



The Bar Council

## **Bar Council response to the Legal Services Board's consultation paper on their Draft Business Plan 2020/21**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Services Board's (LSB) consultation paper on their Draft Business Plan 2020/21<sup>1</sup>.
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

### **Question 1 – Have we identified the most relevant developments in our external operating environment?**

4. Broadly speaking we think the LSB has identified relevant developments in the external operating environment. We have chosen to comment on a few of those that have been identified in detail below.

4.1. In the strategic context on page 6 of the consultation document, the challenging climate of the justice sector in terms of decreased legal aid funding, court

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<sup>1</sup> [LSB Draft Business Plan 2020/21](#)

closures and an increase in litigants in person is referred to. We agree that these are significant factors in the external environment and the Bar Council has consistently highlighted these issues, including in the Bar Council Manifesto where we asserted that a properly funded justice system will lead to a strong and effective justice system.<sup>2</sup> We agree that Brexit and the Commission on Justice in Wales are also significant developments. The former has implications for the international practice of barristers and solicitors and the attractiveness of the UK as a centre for international dispute resolution. As such, the Bar Council's work to secure the best possible outcome for the public and the profession through the coordination of its Brexit Working Committee and the EU Law Committee continues.

4.2. The bedding in of the BSB's 2019 transparency rules are relevant in the context of barristers with many chambers still adapting to the changes and the BSB beginning to conduct spot-checks on their compliance with them.

5. Additional developments in the external operating environment that we would like the LSB to consider include the Fifth Anti-Money Laundering Directive, the review of BSB Handbook and the new education and training arrangements for the Bar. More detail on each of these issues is below:

5.1. The [Money Laundering, Terrorist Financing and Transfer of Funds \(Information on the Payer\) Regulations 2017](#) were updated by the new [Money Laundering and Terrorist Financing \(Amendment\) Regulations 2019](#) on 10 January 2020. These changes were brought in by the [EU's 5<sup>th</sup> Money Laundering Directive](#) (which the UK will continue to comply with post-Brexit). Whilst the changes will affect the whole legal sector, the key changes affecting barristers include an expanded definition of tax advisors, further requirements for carrying out Customer Due Diligence, and a new requirement to report discrepancies on the Companies House register. Consequently, the Bar Council's extensive guidance<sup>3</sup> provided to the barrister profession will again change this year and barristers will need to assess if and how the changes will affect their practice.

5.2. The BSB Handbook is currently being reviewed by the BSB and is likely to be subject to change later this year. Whilst we do not yet know the degree of change the BSB has in mind, the profession, the Bar Council Ethical Enquiries team and Ethics Committee will need to adapt to any new format and substantive changes that are made to the Core Duties, Rules and Guidance. For example, the Bar Council may need to amend many of the 137 ethics and

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<sup>2</sup> [Bar Council Manifesto 2019, page 2](#)

<sup>3</sup> [Guidance](#)

practice documents it makes available to the profession on its Ethics and Practice Hub<sup>4</sup>.

5.3. The BSB's 'Future Bar Training' programme of reform has brought significant changes to the education and training of barristers. These changes include the ability of students to attain the three components of Bar Training through any one of the four approved training pathways.<sup>5</sup> In December 2021 the first new Professional Ethics centralised assessment will take place, where students will sit the BSB examination during pupillage or the work-based learning component rather than during the vocational component of training. There will still be an assessment set by Authorised Education and Training Organisations during the vocational component. Negotiation skills will be a mandatory part of the non-practising period of pupillage from September 2021. In addition, it will no longer be mandatory to complete forensic accounting or practice management courses.<sup>6</sup>

## **Question 2 – What do you see as the key priorities/issues to be addressed by legal services regulation?**

6. We consider that the LSB's core focus should be discharge of its statutory functions in a way that is proportionate and promotes cost-effective regulation by the frontline regulators as well as being compliant with the Legal Services Act 2007.

7. We are very concerned with the 20% increase in budget the Office for Legal Complaints (OLC) proposed in its recent consultation titled, "OLC Corporate Strategy 2020-23 consultation paper"<sup>7</sup> and would ask that because the LSB is responsible for approving its budget, it robustly scrutinises their budget proposals. As the LSB is aware, the budget for the OLC is funded by the authorised persons whose clients have access to Legal Ombudsman services. Consequently, any increase in their budget will be funded by barristers and other legal professionals. Such an increase would require strong justification and more notice. The timing of the proposed increase demonstrates a lack of planning and consideration of the fact that the Bar Council and Practising Certificate Fee levels have already been set for the budget year 2020/21.

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<sup>4</sup> <https://www.barcouncilethics.co.uk/>

<sup>5</sup> <https://www.barstandardsboard.org.uk/training-qualification/bar-qualification-manual/part-1-overview/b2-approved-pathways.html>

<sup>6</sup> <https://www.barstandardsboard.org.uk/training-qualification/bar-qualification-manual/part-2-for-students-pupils--transferring-lawyers/c5-assessment-of-pupils-and-compulsory-courses.html>

<sup>7</sup> <https://www.legalombudsman.org.uk/wp-content/uploads/2019/12/FINAL-STRATEGY-2020-23-Consultation.pdf>

8. This concern over the OLC budget is compounded by the Legal Ombudsman's recent discussion paper titled, "Transparency and Reporting Impact"<sup>8</sup>, in which it explores increasing the information that it makes available to consumers, legal service providers and others. If the Legal Ombudsman realised their full ambition, the budget would increase dramatically. Whilst we support the principle and aims of transparency, we think that the Legal Ombudsman could achieve a similar goal without any increase in its budget by reorganising the presentation of information it already holds on its current website. In our response to the discussion paper, we addressed the difficulties of navigating the Legal Ombudsman's website and the lack of availability of clear and well-presented information for consumers.<sup>9</sup> Again, we urge the LSB to use its position to scrutinise the cost effectiveness of these plans.

9. We would like to highlight that the LSB has recently initiated some projects that impact the Bar Council significantly. For example, the Internal Governance Rules (IGR) project, still ongoing, required responses to three consultations (with a fourth consultation underway, focussing on Regulatory Performance and Proposed Regulatory Independence Monitoring) and significant work by senior office holders at the Bar Council, detracting resources away from other important work. The fact that the LSB proposed rules that the Bar Council viewed as *ultra vires*, made the process more time-consuming and costly than it might otherwise have been.

10. Similarly, the LSB has recently launched a Call for Evidence on the topic of ongoing competence<sup>10</sup> and is beginning to look at section 51 permitted purpose funding. Both are high priority for the Bar Council and like the IGR project, will require significant resources if we are to engage adequately. We are a small organisation with a budget that reflects this and as such, our work on LSB projects inevitably means that other important work we do in relation to fulfilling the regulatory objectives is impacted.

11. We would like to request that the LSB remains conscious of the boundaries of its role as defined by the Legal Services Act 2007 as well as the organisational and opportunity costs of regulatory change and adopts a more proportionate approach in future.

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<sup>8</sup> <https://www.legalombudsman.org.uk/wp-content/uploads/2019/11/Updated-transparency-discussion-paper-November-2019.pdf>

<sup>9</sup> <https://www.barcouncil.org.uk/uploads/assets/0ca7c546-9677-423d-9ad862175f75a851/Bar-Council-response-to-LeO-transparency-discussion-paper-Jan-2020.pdf>

<sup>10</sup> <https://www.legalservicesboard.org.uk/wp-content/uploads/2020/01/LSB-ongoing-competence-call-for-evidence.pdf>

**Question 3 – What are your views on our current approach to market intelligence and how would you like us to develop this function going forward?**

12. We find the LSB’s primary research useful, particularly those that focus on consumer needs and LawTech. We appreciate that its collaboration with other legal sector organisations such as the Law Society helps keep the cost of commissioning such research down and support this approach. We consider that the LSB is well placed to conduct this research on behalf of the legal sector.

13. In relation to the idea of a “standing panel of members of the public”, we would like more information on what is proposed and how much it would cost. We can see that it may be useful to have such a resource but query whether it would duplicate the function of the Legal Services Consumer Panel in any way. If so, we would query its purpose.

**Question 4 – What are your views on our plans to move away from a strategy for the LSB towards a strategy for legal services and their regulation, highlighting gaps and opportunities across the market?**

14. We support the consultative and evidence-based approach being taken and look forward to engaging with the LSB in this process. We also agree that reflection on the last ten years will be helpful to better understand and learn from challenges that have arisen, build on successes and ultimately inform the next strategy.

**Question 5 – Do you have any comments on our proposed business plan and work for 2020/21? Are there any workstreams that you disagree with? Is there any work that you think we should pursue that is not currently included?**

15. As mentioned above, we believe that the LSB’s discharge of its statutory functions should be given priority in its business plan for the coming year.

16. We share the LSB’s desire to see the Legal Ombudsman disseminate learning of use to the Bar, to help it improve client relations, customer services and first tier complaints handling. We understand this ambition is shared by the Ombudsman. We have over the last couple of years held two seminars on best practice in complaints handling with the Ombudsman for the benefit of the profession and plan to deliver another one this year.

17. In relation to the review of the Practising Certificate Fee approval process and s.51 permitted purpose non-regulatory expenditure, we wish to emphasise the importance of this type of funding to the delivery of activities by the Bar Council in

the public interest. Examples are numerous and include its law reform and PLE work as well as its delivery of ethical and practice management advice notes to barristers and chambers.

18. In terms of the LSB's ongoing competence project, we are pleased to see that the first phase of the project is starting by examining what systems are already in place for each of the legal professions.

19. What we said in our response<sup>11</sup> to last year's consultation by the LSB on its business plans remains relevant;

*"The Bar Council is committed to ensuring that barristers meet the high standards expected of them by their clients and the courts. This is currently achieved by a combination of regulation and supportive representative activities and is underpinned by the professionalism and commitment to the administration of justice that defines the majority of those practising at the Bar.*

*In terms of regulation, all barristers must comply with the BSB's Handbook which details the code of conduct as well as the qualification, practise and disciplinary rules. The BSB requires new practitioners to complete the New Practitioners' Programme in their first three years of practice and to comply with the Established Practitioners' Programme thereafter. The latter was recently introduced, replacing the previous continuous professional development system which included mandatory accredited training. The Established Practitioners' Programme by contrast allows barristers to determine their own training needs, with spot checks from the BSB to ensure compliance. The BSB has defined the standards expected for new practitioners in their Professional Statement for Barristers. In addition, chambers are supervised by the BSB according to their risk and impact. This ensures that chambers are run competently and in compliance with the BSB Handbook. The BSB's disciplinary system assesses barristers who are accused of misconduct and disciplines them accordingly with disbarment as the ultimate sanction.*

*Barristers wishing to operate at a certain level or to do certain types of work often have to become accredited to do so. For example, to become a Queen's Counsel a barrister must be independently assessed by the independent Queen's Counsel Selection Panel. Similarly, barristers wishing to join specialist panels such as the Treasury Counsel or the Attorney General's civil panel counsel, must meet a certain standard, as do barristers wishing to prosecute on behalf of the Crown Prosecution Service (they have*

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<sup>11</sup> <https://www.barcouncil.org.uk/uploads/assets/3959870f-c78c-430d-99a8352bf0cb3525/barcouncilresponsetolsbbusinessplan2019-20consultationdraftasd.pdf>

4 levels of panel). Barristers wanting to practice in the youth courts must register with the BSB during the authorisation to practice process before undertaking such work.

The Bar Council runs training courses on a number of practice related matters such as Public Access work, litigation, mediation, Anti-Money Laundering and Terrorist Financing training and quality and diversity. It also delivers an ethical enquiries service (fielding both telephone and written queries) to assist barristers in their compliance with the BSB's Handbook. The Bar Council is involved in the delivery of the Advocacy and Vulnerable course for all criminal barristers, aimed at improving standards of cross examination of children and vulnerable witnesses. The Family Bar is actively seeking to roll out this training amongst barristers practicing family law. The Bar Council sought to mirror the CPS's panel scheme for criminal defence barristers undertaking legal aid funded work, to certify their competence to do the work. However, the Ministry of Justice has not yet responded to this proposal, hence it has not to date progressed further. These measures help ensure high standards are maintained amongst barristers and demonstrate the Bar Council's commitment to maintaining high standards. The fact that the Advocacy and Vulnerable course has been rolled out nationwide by barrister trainers working on a voluntary basis demonstrates the Bar's commitment to peer to peer development and upholding the high professional standards and reputation of the whole profession.

Care must be taken in the area of quality assurance as the now defunct Quality Assurance for Advocates (QASA) scheme illustrates. QASA failed because it was top down, bureaucratic, narrow in scope and made judges the gatekeepers of an advocate's accreditation, setting up ethical difficulties for barristers who may have felt constrained in their role before the court if the presiding judge were assessing their performance. Recent reported allegations of judicial bullying by a small number of judges make this concern all the more pertinent.

*It is clear that any quality assurance measures must be very carefully designed by those who understand what is being measured but only after it has been objectively demonstrated that there is a need for additional assurance. "*

20. With regards the LSB's plans for Public Legal Education (PLE), we support the plan to conduct an assessment of work in this area by regulators and Approved Regulators. We suggested such an approach in our response<sup>12</sup> to the LSB's consultation on its Business Plan last year;

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<sup>12</sup> Ibid

*“We fully support the rationale that public legal education (PLE) helps citizens better understand when a legal issue arises and to seek legal assistance where required as well as helping them understand their rights and duties. We share the LSB’s aim of increasing the public’s legal capability and run a number of programmes to achieve this aim. However, the LSB is correct in recognising that a lot of organisations do a lot of work on PLE and we therefore agree with them that they must first understand the context and assess whether there are any gaps or deficiencies before planning any action. There is a risk, in this crowded market, of duplication, that would naturally be inappropriate use of the profession’s funds. To avoid this occurring, we would be very happy to explain to the LSB the work that we do in this area.*

*We also believe that the Bar Council and other representative bodies are uniquely placed to deliver PLE given their established links to third sector organisations that work in this area and ready access to legal professionals, who in the case of barristers, mainly deliver the training on a pro bono basis and speak with authority on the subject.”*

21. We support the LSB’s aims to maximise the utility of its recently published survey of individual consumers as well as its plans to prepare for a further survey focussed on small businesses.

22. We are pleased to see that the LSB has considered the impact of Brexit on legal sector regulation.

**Question 6 – Do you have any comments on our proposed budget for 2020/21?**

23. We support the year on year decrease that the LSB’ has achieved in its budget in recent years and encourage it to keep costs down. As ever, we would like to remind the LSB that its budget is funded by the profession and therefore there is a need to keep any increases in its budget to a minimum and for them to be justified. Any increase in fees for the profession can have an impact on recruitment and retention at the Bar and may be eventually be passed onto the consumer in the form of higher fees.

**Question 7 – Please identify any elements of our business plan that you think present an opportunity for more detailed dialogue and/or joint working between your organisation and the LSB.**

24. The most obvious areas for collaboration are PLE and research. We are already collaborating on this year’s Justice Week and would welcome a discussion about further areas where a joined-up approach may be beneficial.

25. **Question 8 – Please provide comments regarding equality issues which, in your view/experience, may arise from our proposed business plan for 2020/21.**

26. We are not aware of any equality issues arising from the plans.

**Bar Council**

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