



Bar Council response to the Legal Services Board consultation Strategy 2018-21 and Business Plan 2018/19

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Services Board consultation paper entitled “Draft: Strategy 2018-21 and Business Plan 2018/19: A consultation on our proposed three-year strategy and business plan for 2018/19”.¹

2. The Bar Council represents over 16,000 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.

Introduction

4. We are grateful to the LSB for having offered us several opportunities to provide input into its strategy from an early stage, and for engaging with us on our specific concerns. We recognise that the LSB has taken on board some of the suggestions we made during the informal consultation process, and that it has amended its draft plans in some respects.

¹ Legal Services Board (2017) Draft: Strategy 2018-21 and Business Plan 2018/19.

Q1 – Are there any additional significant market trends or drivers for change that you are aware of that we should also take into account?

5. We believe that the trends and drivers for change identified in the LSB strategy are relevant and more or less comprehensive. However, we consider that the effect of legal aid cuts is something that should be considered head-on. We recognise that aspects of this have been captured by LSB research (on unmet legal need, the fact that for some people no price will be affordable, and the inability of the market to fill the gap), and are reflected in some of the trends and drivers. Nevertheless, the LSB espoused the view (at the January 29th stakeholder roundtable) that as an independent body it could not opine on legal aid cuts – that they were a matter for government.

6. It is right that policies on legal aid are not made by the LSB; however it should not shy away from criticising them, or from carrying out research into their implications. If the LSB is truly independent of government, we suggest that it *should* form its own views about the impact of reductions in legal aid funding on those providing legal services. By saying that legal aid cuts are a policy matter for the MoJ and not wanting to encroach on that or contradict it, the LSB risks being seen as acting as though it is another department of government. One of the regulatory objectives is improving access to justice – something which the Supreme Court recently reaffirmed is a constitutional right² – and while the LSB must respect the limits of its competence, it should not censor itself.

Q2 – Do you have any comments on our proposed strategic objectives?

Promoting the public interest through ensuring independent, effective and proportionate regulation

7. In principle, this objective is an important and proper one for the LSB, but we can only make practical sense of it by reference to the more specific ‘Indicators of Success’ under the objective. We agree that the indicators of success are appropriate and represent relevant outcomes under the larger objective.

² R (Unison) v Lord Chancellor [2017] UKSC 51

8. As for the planned actions, we would support the activity of identifying and addressing poor performance by regulators through a proportionate application of regulatory standards. Moreover, it makes sense in principle for regulators to be able to adapt their approaches to future challenges; however, preparing for those challenges requires some idea of what they might be, and we would welcome clarity from the LSB on what kinds of challenges it envisages.

9. We would also support the monitoring of compliance with the IGRs, so long as this is done proportionately and in accordance with the Act. This must not be influenced by the LSB's stated intention of advocating for legislative reform. We look forward to further engagement with the LSB on this topic, in the context of its consultation on the IGRs.

10. We also agree that ensuring regulation remains proportionate is an important function of the LSB, and equally we welcome its intention to seek efficiencies in its own work. We believe, however, that this aim could be more ambitious, and could also include ensuring that the LSB only undertakes activity which has a clear focus and which is anticipated to have a sufficient benefit to justify the cost of the activity. We would be happy to work with the LSB to help to achieve this.

11. In this regard, we continue to be troubled by the LSB's intention to advocate for reform in line with its 2016 vision for legislative reform. The nature of the proposed reform for which the LSB wishes to advocate is not identified, but in any event we are not aware of any proper justification for the LSB expending resources in lobbying or advocating for "reform" of the Act, or for this being an appropriate strategic activity over the next three years. The Ministry of Justice was clear that regulatory independence should be approached within the existing legal framework. The Board has specific statutory functions and we have strong doubts about whether this is a proportionate or justifiable use of its resources.

12. We also consider that this conflicts with another of the LSB's indicators of success: that the "international standing of legal system of England and Wales is maintained". The regulatory structure under the Act is already regarded in some quarters internationally as threatening the independence of the legal profession in England and Wales. With the upheaval and uncertainty caused by Brexit, it is not

appropriate for the LSB to be pushing for regulatory change that would create either further reputational risks or further uncertainty. When this point was made at the 29th January stakeholder meeting, the LSB's response was that Brexit would change some aspects of the profession at an international level but it would not lead to some changes domestically which the LSB thought desirable. Respectfully, we think the LSB misunderstood the question. The point is not about Brexit changing too little. It is that seeking major reforms of the structure of legal services at a time where the profession is already facing changes caused by Brexit is potentially damaging to all parties, and to the international reputation of England and Wales as a centre of legal excellence and a jurisdiction of choice. It also detracts from regulatory objective 6 (encouraging an independent, strong, diverse and effective legal profession). Far from bolstering the strength of the profession, it weakens it and detracts from its ability to respond to more pressing challenges.

13. Moreover, if (as para 12 of the consultation states) the LSB recognises that legislative reform is not a realistic prospect in the next three years, then we do not see the purpose of (or justification for) including it in the strategy at all.

14. By way of contrast, we believe the first proposed action under 'agent for change', namely working collaboratively with other bodies to act on shared learning, is an entirely proper and well-founded one.

Making it easier for all consumers to access the services they need and get redress

15. We agree with this objective. We also agree with the steps the LSB proposes under 'acting as an agent for change'. It is right that its action should be driven by evidence and research. Unmet legal need could be attributable to many factors, not just transparency issues, and the LSB is right to look into the causes (and into the choices being made) before deciding on what action needs to be taken.

16. While we believe it is right for regulators to take into account the recommendations of the CMA, we are not sure how the LSB will judge what "appropriate changes" are, particularly given the diverse contexts of each type of legal service provider. In this regard we would expect the LSB to defer to the judgement of the independent regulators, based on consultations with their specific regulated

communities and stakeholders, in accordance with the respective roles of the LSB and the approved regulators under the Act.

17. It is right that the LSB is looking to hold the Office for Legal Complaints to account for the performance of the Legal Ombudsman.

Increasing innovation, growth and the diversity of services and providers

18. While regulators and the LSB can ensure that there are no disproportionate or unnecessary regulatory barriers preventing innovation, innovation is ultimately driven by the market, and more specifically by the providers and the end clients within the market, and not by regulators. This is borne out by the fact that (as the LSB acknowledged in discussions with us) the “indicators of success” are variables that could change for reasons entirely unconnected with any steps taken by the LSB. While the actions the LSB proposes to take under this heading are sound, their impact will be difficult to measure using these indicators of success. When many of the LSB’s actions involve *identifying* whether there are barriers to competition or any measures to stimulate it, to say that increased growth or competition by itself vindicates this work is a big logical leap. Success will be indicated if these things happen in ways that are specifically attributable to certain barriers being lifted (if any exist) or certain innovations being fostered.

19. We welcome the LSB’s having substituted “delivery models” for the less clear “business models”. However, we remain unclear as to what sort of “growth” in the legal sector the LSB is looking for, or what the LSB means by the “legal sector *as a whole*” (emphasis supplied).

Q3 – Do you have any comments on our proposed equality objectives?

20. We think that these objectives make sense. We would simply urge the LSB to ensure that there is no overlap between its role and that of the approved regulators, particularly in work carried out under Objectives 2 and 3. To the extent that the LSB does simply “encourage and support the regulators ... to continue to promote equality and diversity”, the risk of duplication should be minimised.

Q4 – Do you have any comments on our proposed approach to market intelligence within our strategy?

21. We think it makes sense. The LSB is well-placed to do synoptic studies of the market as a whole and produce useful research. The emphasis on finding opportunities to work in partnership with other organisations (including regulators), and on maximising the value of existing research, should help ensure that this work is carried out in the most efficient way.

Q5 – Do you have any other comments about the presentation or content of our strategy?

22. The presentation of the strategy and information provided about the regulatory context is helpful, but it lacks transparency in some respects. We have already indicated some areas in which we think this could be improved. It should not leave those at whom it is aimed asking themselves, “What does the LSB really mean?” or, “What does the LSB really intend?” Improved transparency would accord with good regulatory practice; but beyond that, if the LSB’s aims and intentions are not as some might fear (including in the ways we have already mentioned), then greater transparency would be helpful to the LSB and to those reading its strategic plan, in terms of both encouraging better and more co-operative relationships, and making it easier for the LSB to pursue its aims.

Q6 – Do you have any comments on our proposed business plan and work for 2018/19? Are there any workstreams that you disagree with? Is there any work that you think we should pursue that is not currently included?

23. We believe the work streams identified are ones that merit inclusion, and we look forward to engaging with the LSB on many of them. The LSB has the potential to conduct useful research on the regulatory implications of technology, and we would remind it not to forget the perspective of the Bar when doing so.

24. We would also ask for more clarity from the LSB about what actions it proposes to take under the auspices of Planning for EU Exit. The other work streams are all concrete and state specific actions the LSB will undertake. This, by contrast, states an objective (“making sure that the LSB and regulators play our parts in preparing for EU exit”). While we welcome its inclusion (which appears to have been in response to informal feedback), it ought perhaps to be included in the Strategy, with each business plan then including any specific steps that the LSB proposes to take to achieve it. We would be very happy to liaise with the LSB about what some of those steps might be, and we see that it may be a little early in the withdrawal negotiations for specific steps to be included in the 2018/19 business plan at this stage.

Q7 – Please identify any elements of our strategy or business plan that you think present an opportunity for more detailed dialogue and/or joint working between your organisation and the LSB.

25. We are keen to have an opportunity to feed into the commissioning of the third Individual Legal Needs survey by raising with the LSB our thoughts and the perspective of the Bar.

26. As stated above, we would also welcome the opportunities:

- 1) to discuss with the LSB the ways in which we think both it and the regulators can best support the strength and independence of the profession in the lead-up to, and immediate aftermath of, EU exit; and
- 2) to engage further with the LSB in relation to the IGRs.

Bar Council
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