



Bar Council response to the Legal Services Board's draft Business Plan 2014/15

1. The Bar Council welcomes the opportunity to consider the Draft Business Plan 2014/15 proposed by the Legal Services Board (LSB).
2. This response is made by the Bar Council as the Approved Regulator of the Bar of England and Wales, on behalf of approximately 15,585 barristers (c.12,680 self-employed, c.2,708 employed, c.188 dual capacity as at 2012). We understand that the Bar Standards Board (BSB), the independent regulator of the Bar, will be making its own response to your consultation.
3. It is right that the LSB Chairman should refer in his introduction to the draft Business Plan to the difficult economic conditions which the providers as well as the consumers of legal services face. As the Government proceeds with its *Transforming Legal Aid* agenda, driven by the need substantially to reduce public expenditure on legal aid, many publicly-funded practitioners at the Bar are facing an uncertain future in which the viability of practice looks increasingly bleak.
4. We note that this draft Business Plan stands out from its predecessors in stressing the extent to which the LSB understands the need for light touch regulation (and here we note in particular the Chairman's Introduction ("the LSB will be continuing its attack on burdensome, disproportionate and growth-restricting regulation"); paragraph 11: "Underpinning our approach is a belief that regulators must understand the negative impact of regulation for consumers (in terms of loss of competition and innovation that drives value for money for consumers) as much as they focus on using regulation to tackle the risks to consumers from using legal services."); and paragraph 41 ("rule making should not be the default response in most cases"). We would not like to think that the LSB is paying lip service to such concepts in the light of the Government's stated aim to reduce unnecessarily burdensome regulation. We note, however, that these statements are at odds with the LSB's behaviour over the past year, of which examples abound, and we will look with care at the extent to which the LSB follows through words with actions designed to minimise the amount of regulatory oversight interference.
5. The regulation of legal services which adds unnecessarily to the costs and burdens of practice, and which is disproportionate and growth-restricting, serves neither the public, the consumer, nor the profession's interest. The Bar Council therefore welcomed the Government's decision last June to undertake a review of the legal services regulatory

framework. Our response to the call for evidence by the Ministry of Justice (MoJ) was underpinned by the Bar's commitment to high quality regulation which safeguards the independence of the legal profession from government, provides appropriate protection for consumers and enables the Bar to make its contribution to a thriving, competitive legal services sector in the domestic market and overseas. We remain firmly committed to these objectives and await the Government's response to the review with interest.

6. The Bar Council's observations on the LSB's draft Business Plan need to be considered in the context of our response to the MoJ's call for evidence. We have argued for a re-balancing of the regulation of legal services in particular to address concerns about the way in which the LSB has exercised its functions.

7. In our view it cannot be stated too often that the LSB's "principal role is the oversight of professional regulators" (section 49(3) of the Legal Services Act 2007). The Attorney General recently recognised (in his speech on 22 January 2014, at the launch of the new BSB Handbook) the danger that regulators of professions are drawn into over-regulation and micro-management of their regulated communities. An oversight regulator must guard against these dangers as much as, if not more so than, frontline regulators. In seeking to discharge their shared responsibilities (under sections 3(2) and 28(2) of the Legal Services Act) and fulfil their complementary roles, legal services regulators must have regard to the principles under which their respective regulatory activities should operate. They must be transparent, accountable, proportionate, consistent and targeted and otherwise in accordance with best regulatory practice.

8. It is with reference to these principles that we have considered the LSB's plans for 2014/15. Our observations on specific issues of interest to the Bar are summarised below.

2014/15 work programme

9. We note that much of the work proposed in the final year of the LSB's current three-year strategic plan continues work that is already underway and that, pending the outcome of the MoJ's review, the LSB's plans (with their focus on regulatory performance) must proceed on an assumed basis about the future role and responsibility of the Board.

10. Paragraph 6 states that the LSB will "continue [its] work to liberalise the legal workforce". We do not understand what work of liberalisation has thus far been carried out by the LSB, and we are therefore in some difficulty in commenting on this proposal.

Regulatory performance and oversight

11. We were encouraged to learn (at paragraph 19) that the LSB will review the application of its regulatory standards against best regulatory practice, including the new regulators' compliance code and the requirement to promote growth, and where relevant other approaches to regulatory assessment in other sectors. However, we have found the description of the work envisaged in the "Thematic reviews", and why this work is said to matter (at paragraphs 20-23 and in Section B, dealing with strategy development and research), to be less than clear. Much of the narrative to be found here is expressed in generic

language and gives little insight into the nature of the work in question (“more in-depth exploration would be beneficial” – but the subject matter of the exploration is not stated), the need for such work, what it is designed to achieve, how it is intended to be undertaken or indeed how the LSB’s performance will be evaluated.

Regulatory reform

12. We note (at paragraph 32) the LSB’s plans to publish an initial assessment of regulatory costs, including the costs “imposed on the market by practising fees spent by approved regulators on permitted purposes”. We are unclear about the driver for this activity and what it is designed to establish, and we would be grateful for elaboration in the final version of the Business Plan. The related passage (in Section C, on the Board’s statutory decision making), which refers (at paragraph 67) to the contribution of the LSB’s work on PCF approval to a better understanding of the costs of regulation and “other statutory burdens on business often conflated with it”, does not provide much assistance.

13. In relation to “What we will do” about regulatory costs, the LSB comment (at paragraph 33):

“We [the LSB] will also identify a select number of issues either across regulator or for specific regulator, and conduct an in-depth review of them. This work also links to our work on regulatory performance in that we will be considering what implications the issues have for regulators’ performance and what it indicates for their overall capacity and competence, both in the current market and for the future. *Once the scope of these reviews is agreed* [emphasis supplied; it is not clear with whom the agreement will be made] we will engage a wide range of stakeholders and produce a published report on each issue, which will consider the most appropriate way for bringing about change where we conclude this is necessary”.

14. We have quoted this passage at some length because it is not at all clear what it is describing (what are the issues?) nor is it clear to what problem(s) the LSB’s work will be directed. The proposal appears to envisage undertaking work to establish whether a review actually needs to be made. Yet it provides no clarity at the outset about the purpose of such activity, no doubt in the hope that this will become apparent in due course. How is it envisaged that the LSB’s performance will be assessed in undertaking work of this nature and in this way?

15. We have read the LSB’s plans about liberalising the legal workforce (paragraphs 35-39) with some interest in the light of the (in our view, unsurprising) conclusions of the Legal Education and Training Review as they related to the Bar. But we have not gained much enlightenment about whether (and, if so, how) the LSB’s plans to issue statutory “guidance” to legal regulators in setting educational standards will be targeted to particular needs which have been identified at the Bar. No evidence is adduced in the draft Business Plan to support this work or the need for it. In trying to evaluate the relevance and importance of this proposed activity we derived little assistance from the statement of the LSB’s belief (at paragraph 36) that “reform to education and training can both increase the flexibility of the

legal profession to consumer needs and maintain the high standards of legal services". Nor did the Board's belief (expressed at paragraph 38) that "consumers of legal services will benefit from a more flexible labour market in legal services" increase our understanding.

16. We recall that Parliament specified the role of the LSB in relation to maintaining and developing standards in education and training in a restricted way, as being of assistance (section 4 of the Legal Services Act). As we noted in our recent response to the Board's consultation on its proposals to issue statutory guidance in this area of much recent regulatory activity, we question whether the Board will be encroaching on (or duplicating) the work of frontline regulators who in this, as in other areas, are more likely to understand the needs and expectations of their consumers and professional members' than the oversight regulator will be.

Research

17. We have read the LSB's plans for the forthcoming year and note (at paragraph 54) the proposal to postpone the full market evaluation in 2015/16. We would be interested to understand better the role of the Research Strategy Group, in particular its composition and the arrangements for reporting and the accountability of this group. We hope these can be explained fully in the final version of the Business Plan. We have an on-going concern about the risk of duplication of research work which the frontline regulators (or others, such as the MoJ) are undertaking or planning to do, for example in relation to the effects of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. It is not sufficiently clear why any of the six initial research proposals identified in paragraph 60 have been proposed or indeed at this stage in their development their relevance to those who use the services of barristers or who practise at the Bar.

Delivering the LSB's Plan

18. We have read with particular interest the proposed budget for the LSB's 2014/15 activity (at paragraph 80). It is said (at paragraph 3) that this equates to a little over £26 per year for each lawyer. By itself such a statistic is of limited value. Although the annual cost to the Bar of regulation by the LSB is relatively small (and the same is true if the costs of the Office for Legal Complaints is taken into account as well), the knock-on costs to the Bar of regulation by the BSB have been rising, as a direct consequence of the LSB's activity and plans. As we indicated in our response to the MoJ's call for evidence on the regulation of legal services, the directly attributable costs of the BSB to the Bar have risen from £2.9m in 2008 to £4.3m in 2013. These increases have a knock-on effect on the costs of providing the necessary Bar Council infrastructure costs to support the regulator of the Bar, which have also been steadily rising. Over this period, the Bar Council's Central Services costs (to cover such items as IT, research, HR and project support) have risen from £3.1m in 2008 to £5.2 in 2013 (see *Bar Council Financial Statements 2012/13* (2013)). The LSB's plans have a direct effect on the costs of the BSB and the Bar Council's operations.

19. With reference to the LSB's operational budget for 2014/15, we have noted that, notwithstanding a relatively modest proposed reduction of the LSB's budget of £150,000, seven of the 10 identified LSB budget lines showed planned increases in expenditure,

compared with the previous year, significantly so in the case of the Consumer Panel and “Governance and support services”. No explanation is provided for these increases, which should be remedied in the final version of the Business Plan.

20. We note that no attempt has been made to provide a breakdown of the costs of the LSB’s activity under the headings “regulator performance and oversight”, “strategy development and research” and “statutory decision-making”. This omission makes it more difficult for readers of the draft Business Plan to evaluate the claimed benefits of the various activities which are described there other than at face of value. We hope that this deficiency could be remedied in the final version of the Business Plan. This would undoubtedly help the LSB’s stakeholders to form more informed assessments about the value for money it represents through its various activities. It would contribute to better understanding about what the Board actually does and why this work matters.

Conclusion

21. The Bar Council is grateful to have had this opportunity to comment in advance on the LSB’s Business Plan for the forthcoming year of its operations. We hope that our observations will enable some amendments to be made to the plan. We are content for this response to be published in its entirety on the LSB website and we shall publish it on the Bar Council website.

22. It remains for us to wish David Edmonds well for the future as he steps down as Chairman of the LSB and we look forward to working with his successor.

Bar Council
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