

Bar Standards Board
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Sent by email only to communications@BarStandardsBoard.org.uk

10 December 2021

Dear Sir/Madam,

Re: Proposed Strategy for the Next Three Years

The Legal Services Consumer Panel (Panel) welcomes the opportunity to respond to the Bar Standards Board (BSB) consultation paper on its proposed strategy for the next three years.

The Panel has carefully considered the BSB's proposed strategy document and generally believes it offers a positive tone that points the Bar in the right direction for the future. We welcome your efforts to align your three-year strategy with the LSB's sector wide strategy to strive for fairer outcomes, stronger confidence and better services. One clarification we wanted to highlight is that the Panel, and we believe the sector, acknowledges that diversity in the legal profession is not an end in itself. While non-discrimination and fairness should be a basic expectation for all barristers, diversity and inclusion among the legal profession is paramount for other reasons as well. It is vital that the actors in the justice sector reflect the diversity of the society they serve to ensure that all voices and experiences are reflected in the ways justice is manifested. A diverse and inclusive Bar ensures the whole range of potential legal services consumers are well served, their points of view are fully understood and expressed and all those delivering legal services are made aware of lived experiences that may be different from their own. This broader perspective of the fairer outcomes aim is reinforced by a holistic view of the regulatory objectives, all of which serve to protect and promote a functioning and fair justice system for the public, not the profession alone.

We also appreciate that the BSB has placed the regulatory objectives front and centre in this strategy consultation document. Analysing the BSB's identified risks, priorities, and vision in relation to each regulatory objective may be helpful in clarifying the strategy even further. Defining concepts such as the public interest may also help the BSB recognise the range of areas barristers can influence and where further benefits in the pursuit of the regulatory objectives may accrue. The Panel also encourages the BSB to tie in any ongoing work or initiatives to this new strategy to give stakeholders a clear picture of how it would be implemented and the BSB's activities would evolve over the next three years.

The Panel also wishes to emphasize our wholehearted agreement that the BSB should be a completely separate entity from the Bar Council. The Panel feels that this is an extremely important step for the BSB to take to safeguard its ability to fully concentrate on regulating in the interests of consumers and fulfilling all its statutory objectives and should not be delayed any longer.

The BSB's consultation questions and the Panel's responses are set out below.

Question 1: With reference to our regulatory objectives do you agree that these are the main risks and opportunities facing barristers and the market for barristers' services: is there anything you would add or omit?

The Panel has reviewed the risks the BSB has set out and feels that the risks associated with the publicly funded Bar are underplayed even in the context of some recent increases in the justice budget. There are very serious and urgent concerns around consumers on low incomes being able to access a barrister, and whether legal aid is available when it is needed. In addition, the Panel encourages the BSB to also consider these grave access issues outside the publicly funded Bar because there have been shifts in the legal services market in recent years where some legal services that were formerly publicly funded (for example in family law) are now predominantly funded privately.

More widely, there are concerns that a consumer's ability to find a barrister when they need one will further deteriorate due to a continually shrinking supply of barristers given the rising average age of a barrister, attrition rate of newly called barristers and a shrinking number of pupillages available in public law areas. This risk may need to be rephrased to reflect the declining level of competition in some areas of law, detriment posed to consumer access and the public interest when some consumers find it difficult or are unable to engage a barrister with expertise relevant to their legal issue. This is a real issue in specific areas of law, such as criminal law, as well as in certain geographical areas.

In terms of promoting inclusivity and non-discriminatory practices, the Panel would like to see this risk (and any corresponding action) also viewed from a consumer's viewpoint. Our Tracker Survey consistently shows that minority ethnic legal services users have lower satisfaction levels¹ and the entire legal profession should be alive to this fact so that the issue is addressed. More consumer-focused research is needed to fully understand this disparity. We understand the BSB is looking to work with other regulators to collect more consumer-oriented information such as on segmentation and would encourage including references to the type of work it is looking at to address some of these issues within the strategy.

The risk identified as COVID and the courts should also include the great detriment facing consumers and the public at large due to the large backlog of cases waiting for a hearing in court which has increased to unsustainable levels during the ongoing pandemic. Witness evidence online is also not always a fully effective substitute for in person evidence though it may present opportunities in some situations.

The Panel would like to emphasize the risk associated with maintaining ongoing competence in terms of the law and ability to meet consumer expectations along with those set out, outlining concerns around adapting skills and competencies to an online context.

The Panel would also like to point out that innovation does not always mean extensive use of technology; innovative processes or service models may also provide important gains that could benefit consumers and increase access to justice.

It is extremely difficult for consumers to feel empowered to navigate the current legal services market² and the BSB should work to decrease this risk and act to provide consumers with accessible information that will improve their ability to procure the services they need effectively and efficiently.

Finally, consumers declining trust in the legal profession is another risk that should be given consideration. Within the current context of the rule of law being undermined by the political

¹ The 2021 Tracker Survey shows that 84% of White British consumers were satisfied with their legal service as opposed to 79% of minority ethnic consumers.

² The 2021 Tracker Survey shows that 22% of consumers felt they did not have much choice in choosing a legal service provider.

environment, it becomes even more challenging for consumers to appreciate the role that barristers play and whether they can offer accessible assistance. The BSB may consider making use of the Bar's talent and communication skills to promote the profession. It may also be worth reconsidering the value of the Legal Choices initiative with this risk in mind.

Question 2: Do you agree with this vision for the BSB and the Bar: is there anything you would add or omit? "We will ensure that the Bar and the BSB deliver diversity and high standards, and promote the public interest."

The Panel wonders whether the vision's wording detracts from its sentiments by starting with smaller areas of focus that consequently puts the public interest as secondary to these narrower points. We agree that diversity, high standards and the public interest are all important things to include in the vision for the next three years. However, a more effective way to convey a vision of the Bar to barristers and stakeholders may be to highlight a Bar that promotes the public interest in the justice system by providing high quality services and being inclusive and diverse to ensure all viewpoints are represented and have access to justice. Such wording may help reflect the overall goal that regulation of the Bar is meant to achieve and help inspire action. It may also be helpful in considering whether there is anything that should be added such as whether there are any other important drivers towards this end of furthering access to justice, such as a consumer-focused approach or innovation.

While consumers are mentioned more than once in the strategy, the points are rather disjointed. The Panel would welcome some articulation of an overall high level consumer-focused approach. Instituting a consumer lens within the vision may help highlight opportunities to achieve the goal of better serving the public. For instance, such a commitment would reinforce activities such as ensuring a diverse and inclusive Bar to serve all legal services users, increasing opportunities for the public's use of direct access to barristers and ensuring that the special needs of vulnerable consumers are understood and met. The work on professional standards may become more urgent when considered through the consumer lens. And the opportunity to participate in the Legal Choices initiative may be viewed as a constructive project that could extend the BSB's reach to a wider audience of potential consumers.

The Panel would also like to point out that a vision must prompt clear goal setting in order to be useful. For example, a vision that embraces a diverse Bar is meaningless without a specific action plan including timelines, evaluations and reviews.

Question 3: Do you agree that these should be the BSB's priorities: is there anything you would add or omit and how would you rank these priorities?

The Panel would like to stress that in addition to the BSB handling complaints and training requirements swiftly and efficiently, stressing the quality of legal services in the professional standards and training requirements is also important. These standards and training requirements could also address general customer service such as the importance of using accessible language when interacting with consumers. The BSB should also actively encourage barristers to be proactive about training, ongoing competence and encouraging consumer feedback so that the BSB is not limiting itself to administering rules. Similarly, the results of information gathered about complaints could be analysed to see which areas of law or situations pose the greatest risk of complaints; this is an opportunity to pass on learning and suggestions on how to avoid complaints.

In relation to access to justice, the Panel would also like to see more included on how consumers choose barristers, including the option of direct access for discrete services such as writing a letter or providing advice. While it is mentioned in the context of exploring how solicitors help consumers choose barristers, it may also be useful to consider how innovation and technology can improve access to justice, especially in underserved geographical areas or certain types of law in the short term. On this point, it may be necessary to go beyond

“enabling the benefits and mitigating the risks of innovation and technology” to actually encouraging their use and aiding in testing new models of delivery.

Realizing that chambers are well-placed to influence standards of practice and diversity within their ranks, the Panel would like to see the BSB becoming more proactive in making chambers more accountable on these measures and highlight their responsibilities in this regard. Again, with regard to diversity and inclusion, it is time to move beyond promotion of these goals and to require concrete action and corresponding evaluation plans in these areas.

Given the many urgent challenges currently facing consumers requiring legal services from barristers, including reduced availability of legal aid, extreme court backlogs, fewer barristers available for certain types of law, difficulties associated with remote hearings and a severe lack of diversity, the Panel refrains from ranking the BSB’s priorities, as we see all the general priorities set out as compelling and pressing. The Panel encourages the BSB to commit to targeted areas for action in all priority areas over the next three years.

Question 4: Do you agree that these are the key areas where the BSB needs to develop as an organisation?

The Panel would like to see more consumer-based research, especially on how barristers can meet the needs of diverse users. A diverse profession will help, but there is also the matter of ensuring that all barristers understand and can meet the needs of a broad range of consumers. Research will contribute towards developing a picture of how these needs vary between different types of users, but training and encouraging a consumer-focused culture among barristers is also an important part of achieving this goal. These capabilities will be important in driving the BSB’s strategy in the next three years and may help the organisation set an ambitious agenda for the profession.

The Panel strongly supports the BSB’s proposal to form a separate legal entity from the Bar Council. Though the BSB does maintain administrative independence, it is important for the BSB to be entirely separate in order to ensure that the desires of the profession do not interfere with the BSB’s ability to fulfil its obligation to regulate in the interest of the public at large. An entirely separate organisation will not only reinforce independent decision-making but would also allow the BSB to develop an organisational culture more focused on the regulatory objectives. It will also bolster the BSB’s standing to be able to hold chambers and barristers accountable in implementing these regulatory priorities.

Question 5: Are there any particular areas on which we might collaborate with you, or with others, to further the priorities set out above?

The Panel welcomes the BSB’s openness to collaboration and we understand there are plans to work with the SRA on consumer research as well as the unbundling pilot. We are also aware that there was collaboration with the SRA and CILEx on advocacy best practice in the Coroners Court. The Panel would like to see further collaboration on advocacy standards in research, training and action plans. There is little data on advocacy standards in many areas of law but many anecdotal situations where consumers have not been well served. Additional consumer-focused research would help address this issue and because advocacy standards should be improved across the legal professions, it is a good area for collaboration.

Additional consumer-focused research is something that all regulators could benefit from and consequently presents another good opportunity for collaboration and learning from other regulators in the legal services sector. This type of research is especially important in order to understand how the sector can better serve vulnerable users as well as ethnically diverse

users who have consistently lower satisfaction levels than White British consumers.³ While we understand there has been some discussion with other regulators, the Panel would strongly encourage the BSB to commit to engaging with other regulators on these issues and others on a regular basis in order to grow understanding of consumer needs in various arenas. If the sector can bring their research and learning together, it can achieve a comprehensive understanding of the legal services market.

Another area that could benefit from a sector-wide approach is technology. Some regulators have done more work on this than others but there are tools that could be used across the regulated professions and certainly consumers would benefit from a common approach. Again, learning from the experiences of other regulators could also help move technological innovation more quickly and ensure it is implemented in a user-friendly way. A cross-sector technology strategy as well as a digital strategy would drive coherence and ensure momentum is not lost as more legal services than ever before moved online during the pandemic. This will improve the sharing of best practices, risk awareness and potentially create additional opportunities for more cost effective and far-reaching solutions.

The Consumer Panel is currently working on a consumer-focused regulation project and would welcome working with the BSB in this area. The Panel is also open to providing input during policy development work even before the consultation phase as we have found this type of early engagement often results in more nuanced policies.

Question 6: Have you identified any risks or opportunities in relation to promoting equality, diversity and inclusion for the profession or the public?

Again, the Panel would like to stress the importance of considering diversity and inclusion and impact assessments on consumers as well as on the profession. As stated above, viewing the BSB's strategy and priorities through the lens of the regulatory objectives can be a good reminder of why this is important as the justice system will not function properly if all potential consumers are not able to participate equally. We appreciate the BSB explicitly considering opportunities to promote equality, diversity and inclusion as opposed to looking at the risks alone, as much more is needed in order to ensure that all consumers are served to their satisfaction. We encourage the BSB to review our 2021 Tracker Survey data⁴ and to pursue research on different groups of consumers and how they can be better served. There is a real risk that the BSB's focus on diversity will not produce results without a concrete plan of action with regular evaluations to drive continuous improvement.

Should you have any questions pertaining to the Panel's response, please do not hesitate to contact us for clarification. Queries on this response should be directed to Heidi Evelyn, Legal Services Consumer Panel Associate, in the first instance.

Yours sincerely,



Sarah Chambers
Chair
Legal Services Consumer Panel

³ LSCP, *Briefing Note: Experiences of Black, Asian and Minority Ethnic Groups in Using Legal Services* (2021) <https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2021/01/2021-01-13_BAME-user-experiences_FINAL.pdf> at pp. 14 to 15.

⁴ Our latest data tables and reports can be accessed on our website here: <<https://www.legalservicesconsumerpanel.org.uk/what-we-do/research-and-reports>>.