



The Council
of the Inns
of Court

Response to BSB Consultation document:

“Shaping our Next Strategy: Gathering insights and evidence”

Introduction

1. The Council of the Inns of Court (COIC) thank the Bar Standards Board (BSB) for their courtesy in affording them this opportunity to comment on their paper seeking insights and evidence to assist in developing their new strategic framework (“the Paper”).
2. As COIC have observed before, it is in the interests of the Bar to have a credible and robust regulator that delivers the regulatory objectives in a way that is consistent with the better regulation principles. Any failings by the BSB in the proportionate exercise of that role may reflect badly upon the Bar as well as upon the regulator.

Improving BSB’s Performance

3. While the Paper makes comments about performance, and asks questions about how to measure it, we are disappointed at the lack of reference in the Paper to the need to continue to work to remedy known deficiencies within the BSB, and to focus on the BSB’s essential regulatory functions. The Fieldfisher Enforcement Review published last year identified clear areas in which the BSB’s performance fell below the requisite standards. The Paper makes no reference to these or to the steps which the BSB is taking to improve its performance. We still believe that the primary aim of the BSB in its next strategy period must be to continue its work to remedy those deficiencies, to monitor and prove the effectiveness of remedial measures taken, and to establish (or at least re-establish) itself as an effective regulator dedicated to excellence in its essential

tasks. We suggest that this should appear clearly, and as an ongoing priority, in the BSB's next strategy.

4. Since the publication of the Paper the Legal Services Board has reported on its performance assessment of the legal regulators. The BSB's performance has deteriorated further, with ratings of 'insufficient' in the areas of 'well-led' and 'operational delivery' and 'partial' in the area of 'effective approach to regulation'.
5. Those matters lead us to make three overarching observations. First, our firm view is that the imperative for the BSB should still be to focus on getting right its fundamental role as regulator, on which so much public confidence depends. This view is reinforced by the recommendation (no.4) in the Fieldfisher Enforcement Review of the need for the BSB to make clear to the public its core responsibilities in order to ensure a better understanding by the public of the boundaries of its role. The Paper gives the impression that the BSB may not have fully taken on board this recommendation.
6. Second, we consider that a period of consolidation is required for the BSB to ensure it can discharge its basic regulatory functions before considering the propriety of or need for expansion into other areas. We would further suggest that the guiding statement of vision is more explicit in this respect.
7. Third, other areas of potential activity should be subject to a *rigorous* assessment of the need for BSB activity, based on the principles of good regulation, particularly in the light of the significant increase in BSB staff numbers and expenditure in order to ensure that it discharges its *essential* functions effectively. Increasing the BSB's resources by placing a further financial burden on the profession should not be seen as any quick-fix to the BSB's deteriorating performance. There is a limit to the burden that can and should properly be placed on the profession in the light of the ongoing situation that we have described.

Pressures on the Profession

8. The Paper recognises the challenges for everyone of the current economic outlook, but it does so in terms only of the impact on clients and access to justice. These are important considerations, but the impact on the profession also needs to be taken into account.
9. As was the case when the BSB set its current three-year strategy, there continues to be a crisis in the recruitment and retention of barristers at the publicly funded Bar.

Although the direct impact on barristers of the Covid pandemic has now receded, and there have been some improvements in fee rates in some aspects of criminal work, together with a steady flow of work (indeed, excessively so – a point to which we shall return), earnings remain under significant pressure in public-funded work. While recruitment and retention may be stabilising, the supply of barristers to do this work continues to be under pressure. This is the continuing result of years of cuts and failures to keep pace with inflation and is against a backdrop of significant inflation over the last three years. We again ask the BSB to bear in mind that any increase in the burden and cost of regulation would in these circumstances be likely to achieve the opposite of its intended effect by driving more barristers out of this area of work.

10. In other areas of practice, if the economic situation leads to less work for self-employed barristers, then that too will put pressure on individual barristers' incomes and on their personal and family lives.
11. Against the background of those pressures, we are disappointed that the Paper makes no reference to the proper limits on the scope of the BSB's activities under the LSA 2007, particularly in the context of significant year-on-year increases in its annual budgets. These pressures are outside the BSB's control, but the BSB does have control over the financial and regulatory burden that *it* imposes on the profession and it should take account of the stresses upon the Bar – particularly the publicly-funded section of the Bar – when considering the proportionality of its regulatory activities. There ought also to be a recognition of the need to avoid regulatory creep by the BSB, particularly in the light of the statutory requirement that regulation be proportionate and reasonable.

Pursuit of the Regulatory Objectives by the Profession

12. The Paper makes relatively little reference to the role played by the Bar itself in promoting the regulatory objectives, including the key objectives of protecting and promoting the public interest, supporting the constitutional principle of the rule of law, improving access to justice, encouraging an independent, strong, diverse and effective legal profession and promoting and maintaining barristers' adherence to the professional principles. To recognise this and to take it into account in no way undermines the BSB's regulatory independence from the Bar Council as Approved Regulator.

13. Members of the Bar provide thousands of hours of pro bono work and professional staff and barristers in the Inns, the Bar Council, the Specialist Bar Associations, the Circuits and COIC carry out extensive work in promoting these regulatory objectives. The BSB's strategy should recognise this and the BSB ought to take it into account in considering the need for, and proportionality of, any regulatory activity.
14. Action by the BSB must also be subject more widely to rigorous assessment as to need, proportionality, available alternatives, and the burden of any particular measure against the likelihood that it will achieve the aim pursued. In all of these areas, the BSB should also be looking always to coordinate any activity with activity by the profession and its institutions in a cooperative and mutually supportive way and to allow the profession to take steps where those are more likely to achieve lasting change. It should also bear in mind that lasting, embedded change takes both effort and time, and depends to a large extent on the support and efforts of the profession and its institutions.

Approach to the Paper

General

15. The BSB should approach setting its new strategy against the background of the four points just made: first, the BSB should concentrate on the proper and effective discharge of its core responsibilities and functions as regulator; second, the financial pressures on the profession are such that any proposal to increase the amount of regulation with the concomitant increase in cost to the profession should be subjected to stringent scrutiny; third, this is even more strongly the case in the context of the publicly-funded Bar; and fourth, the profession is carrying on a huge amount of work in furtherance of the statutory objectives, and should be trusted and supported to carry on that endeavour. We make these points particularly in the context of the principles of targeting and proportionality.
16. Before setting a new strategy – including before proposing changes to the BSB's vision, purpose and ambition – the BSB should also analyse what has been achieved as a result of the current strategy and, perhaps more importantly, what was not achieved. That may in itself identify areas which should be carried forward into the next strategy, and which ought to be prioritised ahead of new strands of work.

The BSB's primary regulatory functions

17. There are some regulatory functions – the investigation and prosecution of allegations of professional misconduct against barristers and the licensing of providers offering courses for the vocational stage of qualification for the Bar – for which only the BSB is responsible. The first is an area in which the BSB has been facing significant challenges. The second is one in which we continue to have concerns.
18. Although the BSB has been making progress in that first area, we remain firmly of the view that this needs to continue to be an area of focus until it is clear that this improvement will be sustained. In its omission of any reference to this, the Paper might be read as wrongly suggesting that this is now a ‘job done’. In suggesting (in the preamble to question 2) that the new strategy will “build on progress to date”, the BSB may be understating the importance of this.
19. So far as vocational qualification is concerned, we continue to be greatly concerned at the variation in pass rates between the various Bar Course providers. The BSB’s own data confirms that of the 21 AETO centres delivering a Bar Course over the last four years, just nine achieved the average pass rate of 54.3%, and eight have a pass rate of less than 50%. While the lowest provider achieved a percentage pass rate of 22.4%, the highest – the Inns of Court College of Advocacy – has achieved 89.9% over a period of nearly four years. The Inns would suggest that the introduction of the ICCA Bar Course provides an excellent example that positive change can be effected in this market. It also demonstrates the strong commitment of the profession – independently of the BSB – to trying to achieve change for itself. The Inns’ collective decision to invest in and launch this course has not only been responsible for a significant increase in the average pass rate in the BSB’s central assessments, but has also prompted a 27% decrease in the level of fees charged to students by other London Bar Course providers. The fact that this has achieved such a dramatic disruption of the market reinforces the need for careful scrutiny of poorly performing courses for value-for-money and quality purposes.
20. We understand that the BSB believes its current approach to authorising Bar Course providers improves the diversity of the student population. Even if there is evidence to show that this is happening, we question whether there is evidence to show that this is the case in relation to those students who have a realistic prospect of securing a pupillage and then a tenancy or employed Bar role. Most importantly, it is questionable

whether this (rather than other measures that have been taken) is contributing to a meaningful improvement in the diversity of those obtaining pupillage or practising at the Bar, and whether any degree of improvement is sufficient to justify the cost to the thousands of other students who have been permitted to undertake a course of studies from which they had no reasonable prospect of emerging with anything other than debt.

21. We urge the BSB to include dealing with this as an important limb of its new strategy. We suggest that this should involve the use of the BSB's regulatory toolkit to revise the authorisation regime to ensure first, that *all* providers deliver a high quality of training for students; and second, that the overall number of students admitted by those providers each year more closely corresponds to the number of pupillage and practising roles available in the market. A strategy reflecting those twin aims could more realistically be expected to achieve significantly improved levels of success for those students who have invested in the Bar Course, while fully protecting and promoting the diversity of its student intake.

The BSB's other regulatory functions

22. With regard to all the other statutory regulatory objectives, the Bar's organisations are themselves able to take steps to achieve the goals set out in the LSA, and are doing so.
23. The Bar and its regulator should be acting collaboratively and in a mutually supportive way, co-ordinating work where work is required by both. Indeed, this is essential to avoid duplicated effort and unnecessary cost to the profession. We note the BSB's recognition of this, and we look forward to this being recognised in the strategy, but we have yet to be persuaded that the BSB is getting the balance right.
24. The BSB does not have unlimited resources, despite having continued to demand year-on-year increases in the Practising Certificate Fee to fund its activities. We suggest that before embarking upon new areas of activity, the BSB should first satisfy itself both that the activity meets a regulatory objective and that there is truly a need for intervention (e.g. that the perceived need is either not being met or cannot be better met in other ways).
25. In addition, the pre-ambles to questions 2 and 3 refer to several areas as part of the context within which the BSB and the profession are operating. Some of these are not, in our view, matters for the regulator. In particular:

- There is nothing that the BSB can do to ensure a match between the supply of barristers in different areas of practice and “the need and expectations of clients and the wider public”, other than to avoid making some areas uneconomic for practitioners by ensuring that it keeps the regulatory burden as low as it can. Beyond this, demand and economic viability will be the primary driver of supply.
- In the context of technological development, the Paper refers to a need to “facilitate responsible innovation that is in the public interest”. If there are regulatory obstacles to this, then that might justify reviewing those obstacles, but we find it difficult to see that anything more is a matter for the regulator, rather than for the profession and its representative bodies, particularly (in this context) the Bar Council. We do not see it as necessary, proportionate, or reasonable for the BSB to seek to become involved in facilitating technological developments beyond this, particularly given the resourcing issues we have mentioned.

Duration of the new Strategy

26. It is unclear why the new strategy is intended to be in place for five years. The current BSB strategy runs for three years. We can see potential benefits in a longer strategy period, not least the stability that this might bring and the reduction in the consultation burden, but we suggest that the length of the strategy should be determined once the BSB has identified the context of the new strategy and the priorities to be included. A shorter period of three years may be more appropriate for the next strategy if (as we suggest) there are areas of work to be carried forward and embedded before the BSB could justify focusing on new strands of work.

Responses to the BSB's Questions

27. Our answers to the specific questions should be read in the context of what we have set out above. We urge the BSB to continue to focus primarily on the proper discharge of its disciplinary function and its licensing activity. In other areas, particularly those in which the Bar's institutions are fully and competently engaged, the BSB should apply the regulatory principles rigorously when considering whether there is any demonstrable need for it to spend the profession's scarce resources and whether attention should be focused on new strands of work before completing existing strands.

Q.1 What are your views on our draft statements of vision, purpose and ambition?

28. We propose to take these in order, but we have two preliminary observations.
29. First, the BSB says that its "starting point is to create new statements of our vision, purpose and ambition as an organisation". It has not, however, explained why it feels this is necessary or what the BSB is seeking to achieve by doing so. Without knowing the BSB's aims and intentions, we are not able to comment on whether or how those aims and intentions might best be achieved or, indeed, as to whether we agree with them. Does the BSB consider that there is something missing from its current vision? If so, what? Unless there is something wrong with the present vision, there is no need to change it. As we explain below, we do not consider that the present vision ought to be altered.
30. Second, there is a notable omission from the introductory text about what the BSB is "there to ensure": there is no reference to the independence, strength and diversity of the profession. Although the text recognises the importance of the role of the profession and of its effectiveness, and the draft vision statement refers to an excellent and ethical profession, there is no reference to the objective of encouraging these aspects of the profession which already exist. In the context of our observations in the introductory section of this response, this is a significant omission.
31. Turning to three elements in order, we have significant reservations about the draft **vision** statement.
32. As we understand it, a vision statement should reflect the future that an organization aspires to create. The draft vision statement might be appropriate for those bodies who

have broader responsibility for the profession – including the Bar Council exercising its representative function, the Inns, the Circuits and the SBAs – but we question whether it is an appropriate vision statement for the regulator of the profession.

33. The performance of regulatory duties to a standard of excellence has an important contribution to make towards such a future, but it cannot create it. The regulator’s role is to assist in creating that vision by performing its regulatory activities to the highest standard. By adopting a more wide-ranging vision a regulator would be implicitly seeking to over-reach its regulatory powers and functions.
34. There is a sharp contrast with the current vision: “We will ensure that the BSB regulates the Bar in the public interest by promoting high standards, equality and access to justice”. The current version accurately and concisely captures the BSB’s role. It is accordingly more appropriate in its content.
35. It is not clear to us why the BSB is seeking to change that vision; even less so in the light of what we have already observed about the challenges that the BSB has been facing in the performance of its core functions. Visions should not be subject to change: rather, they provide the constant around which periodic strategies are developed. Moreover, we do not see a basis for the BSB being confident that its previous vision (or strategy) has been delivered, such as might provide any grounds for revision.
36. If the BSB sees the vision statement as serving a different purpose or as performing a different role, then it would be helpful to explain that.
37. Turning to the draft statements of **purpose** and **ambition**, we do not disagree with the thrust of these. In combination, and at a very high level, they identify what the BSB does and why it does it. However, we are concerned that each of them is both deficient and incomplete, particularly in the following respects:
 - (i) Both the purpose and ambition refer to the ‘public interest’, but without providing any guide to what the BSB mean by this. This term can be both used and abused in a range of ways. It ought not to be used in a strategy without being clear about what it means, and without enunciating that.
 - (ii) It would in any event be helpful to add more explanation of the BSB’s purpose. The draft statement is very high level. The BSB’s own description of its responsibilities on its website might be a good starting point for its purpose and provide a clearer focus, not least in the inclusion of both the objectives that the

BSB must seek to meet as a regulator and the areas within the responsibility of the BSB. This would help to keep the strategy – and the BSB’s purpose – aligned to the BSB’s core responsibilities and to its regulatory function.

- (iii) As to ambition, we question whether the ambition should be limited to – or even focused on – how the BSB is seen, rather than the substance of its role. Being seen as something should be the same as being that something. It may be that the BSB is intending here to recognise the importance of all stakeholders having confidence in its performance; but if so, then that ought at least to be underpinned by the ambition of delivering that performance. Delivery is more important than perception: if perception is based on something other than delivery, then it is false. The BSB’s aim should be that any perceptions are a reflection of its performance.
- (iv) The BSB website clearly details its organisational values. We suggest that these should be part of the framework of any strategic plan, underpin any articulation of the BSB’s strategy and priorities, and be clearly referenced as part of its ambition. It might be that those values should be identified as part of what underpins the BSB’s ambition: not only to be (and be recognised as) an excellent regulator, trusted to advance the public interest, but also to have delivered this in a way that is (and is recognised as being) true to those values.
- (v) The ambition should recognise that excellence in regulation also means delivering it in the manner required by s.28(3) of the Legal Services Act 2007, particularly transparency, accountability, proportionality, consistency and targeted only where action is needed. The BSB’s organisational values reflect only some elements of this.

38. Finally, we suggest that there should be some recognition of the need for the BSB to be an excellent regulator of *barristers*, within the context in which the vast majority of barristers (employed and self-employed) actually operate. The BSB must ensure that it possesses, or takes steps to acquire, the specialist knowledge and expertise that is needed for this purpose.

Q.2 Can you offer insights and evidence related to the current environment in which the BSB and the barrister profession operate that will help inform our strategic thinking?

39. We propose first to comment on some of the areas covered in the BSB’s pre-amble to this question (and question 3).

“The reported prevalence of bullying, discrimination and harassment, the failure of the profession adequately to deal with these issues to date and the need to be more inclusive generally.”

40. We agree that this is an area that requires continued focus by both the BSB and the profession, but we would urge caution in how this is reflected in a future strategy. The BSB should await the Harman Review and then give careful consideration – together with the profession – to the issues it identifies and to how best to respond. Much work is already in hand across the profession on this, including within the Inns. We anticipate that a cooperative approach between the BSB and the profession is likely to be the most appropriate and effective way to address the issues identified. Any further regulatory action other than at the level of enforcement should be taken only if it complies with the better regulation principles, including avoiding any unnecessary overlap with other work being done. There would also need to be a rigorous consideration of any new initiatives, and a proper evaluation framework for them.

“A profession where everyone has equal opportunities and success is not limited by background”

41. We would hope that the BSB’s strategy will recognise the significant work and achievements already made in dismantling barriers to entry and early progression within the profession (including much work by the Inns, including their extensive outreach work). Addressing differential success and progression within the profession is and will be more challenging, not least because of the need to secure and maintain improvement over a sustained period. Close engagement with the profession will be essential.

“A competent and ethical profession”

42. The Inns look forward to the opportunity to respond to any discussion document that seeks stakeholders’ views on current ethical issues. For present purposes, we propose

to comment only at a relatively high level, by reference to the need to include this as a strand of new work in the BSB's future strategy.

43. Although the Paper refers to working with the profession to maintain high ethical standards – an ongoing aim that we would endorse – the Paper appears to proceed on the premise that this aim is not being achieved, and to such an extent that the BSB needs to set a strategic objective of further regulatory action (beyond enforcement action where necessary). We do not agree with that premise. The day-to-day experience of those in the profession is the opposite.
44. Most obviously, high ethical standards are demonstrated publicly every day in courts across England and Wales, where decisions made by barristers are subject to the regular scrutiny of judges, colleagues, the press and the public. A similar situation prevails in both contentious and non-contentious settings outside the courtroom: barristers' decisions are subject to the regular scrutiny of opponents, colleagues (both in chambers/departments and in robing rooms), instructing solicitors and clients (including employers and more senior managers). For most barristers, the circumstances in which they operate are very different from the generally more private and disconnected circumstances in which other lawyers may operate.
45. The BSB should not allow its strategic priorities to be set by a small number of incidents of failure to exercise high ethical standards – however significant their effects and the attendant publicity – rather than a genuine assessment of real need. Similarly, it should not allow strategic priorities to be set by reference to issues identified in other spheres and branches of the profession, or in other professions, particularly in areas in which barristers do not typically operate (whether employed or self-employed), such as in large scale transactional legal work.
46. We remain unconvinced that in the case of the profession of barristers there is a need either for regulatory clarification of “expectations” or for any changes to regulatory arrangements. Barristers are well-aware of the hierarchy between their Core Duties, and their compliance with this is subject to regular scrutiny in the ways we have just identified. The primacy of a barrister's duties to the court in the administration of justice, to act with honesty and integrity, and to maintain independence is at the core of practice and culture at the Bar, whether barristers are employed or self-employed. When barristers do fall short, enforcement action may be required – and where this is needed, the profession itself will demand it – but that does not mean that regulatory expectations

and arrangements are wanting, or that there is a widespread problem.

47. The profession's commitment to high ethical standards is reinforced through its professional structures. No single element of that structure stands alone. The Inns, Circuits, Specialist Bar Associations and others provide ethical training, building on the resources available within chambers and other organisations for seeking ethical guidance from colleagues and leaders. The Bar Council continues to provide leadership, guidance and training on a wide range of ethical issues, reinforcing such guidance as the BSB is willing to give in individual situations. The Bar Council's ethical enquiries service and ethics hub are models of their type, and their frequency of use demonstrates the profession's daily commitment to high ethical standards.
48. This is only one of the many respects in which the unique professional structures of the Bar differentiate it from other professions and enable the profession as a whole to contribute (both individually and through institutional structures) to promote the regulatory objectives.
49. None of what we have said means that we are in any way complacent. The Inns recognise a need to continue to play their part in providing training opportunities, particularly but not only to those who are starting out in the profession, and in maintaining and fostering a culture of high ethical standards; but it is through the activities of the profession and its institutions themselves that this culture will be most effectively maintained and fostered, not by action by the BSB as regulator beyond that in which it is already engaged. This applies just as much to any lessons to be learned from particular examples of situations in which barristers have fallen short. Lessons are instructive for any profession, but that is a very different question from whether learning them requires further regulatory action.
50. If and to the extent that there is reliable evidence showing a genuine need to reinforce aspects of ethical training at later stages in barristers' careers, we would expect the BSB's existing, balanced approach to Continuing Professional Development to be the most effective route to achieving this. In this connection, the Inns already provide a large amount of ethical training for those starting out in the profession, giving them considerable experience and expertise in this area: indeed, this is a key aspect of their long-term role. The Inns funded the development of a suite of materials to assist pupils to prepare for the BSB ethics assessment, which is now delivered at minimal cost to the pupils themselves. The related training is supported by volunteer barristers, which

ensures that it is focused on ethical issues as they arise in practice. This has the additional benefit of being delivered in a context which reinforces the culture and combined commitment of the Inns and the profession to the highest ethical standards. If and to the extent that there is a need to refresh barristers' understanding of their Core Duties, and the application of those duties in practical situations, later in their careers, the Inns and the Circuits (together, as appropriate, with the Bar Council) are well-placed – indeed, best-placed – to meet such a need. Any particular challenges in some areas/types of practice could readily be catered for as part of this.

“An effective, competitive market for barristers’ services where consumers are empowered to engage effectively with barristers”

51. Much of the document reads as if the majority of clients of barristers are members of the public instructing them on public access. This is far from the case. This is rarely the case for employed barristers, and the majority of the work of the self-employed Bar – in some areas, almost all – is on a referral basis. It is not the role of the BSB to try to change this; and the BSB has no control over those through whom clients instruct the Bar (whether that is solicitors or other professionals or a barrister's employer). Similarly, the BSB has no control (and little influence) over the “complex market” that it identifies and can only play a limited role in promoting competition and ‘consumer-focus’ in that complex market. All of this needs to be recognised by both the BSB and, where relevant, the LSB; and the BSB should take it fully into account when identifying its priorities, so as to ensure that it is not devoting disproportionate resources to measures which do not reflect the reality of practice as a barrister or the limited scope of the BSB's role.
52. In a similar vein, far fewer clients (whether ‘consumer’ or not) will have experience of working with barristers than with other legal professionals. While the BSB should not ignore reliable survey information which is truly relevant to its role as regulator, it must bear in mind the limitations of that information, and the societal factors over which neither the BSB nor the Bar can have much influence.
53. In this connection, we are particularly concerned at the BSB's suggestions that it has a significant role to play in many of the elements of the LSB's ‘Reshaping Legal Services’ strategy, even leaving aside the questions as to the extent to which that strategy is truly within the remit of the LSB. The BSB's focus should be on the role that *it* can properly play, as the regulator of *barristers*, in pursuing the regulatory objectives

engaged by the LSB's strategy. It should approach this without preconceived ideas as to what, if anything, this may require of the BSB.

54. Turning to what we can add regarding the current environment, there should be greater recognition than in one sentence of the demands and pressures on barristers in those areas of work which are subject to public funding of fees, beyond the financial pressures. Particularly in crime and family work, the backlog of cases and the burden on the courts to do more with less is having a significant effect on the wellbeing of barristers.
55. Where the BSB seeks to impose regulatory requirements through barristers' involvement in their organisations, including chambers, this should also recognise the nature and structure of the profession, including the self-employed nature of practice in chambers, and the very wide range of sizes and structures within chambers. Failure to pay proper attention to these matters risks imposing substantial and/or unjustified regulatory burdens on the profession without a likelihood of achieving the desired aims (either at all or to a degree which is proportionate to the burden), however legitimate and important those aims may be. This seems to us already to have happened, and the Paper indicates to us that there is a risk of this becoming yet more onerous. This is an area in which it may be more appropriate for the BSB to focus on collaboration with the Bar Council and other stakeholders.
56. Finally on Question 2, the introductory text to the Paper very significantly understates the BSB's regulatory responsibilities by referring only to practising barristers. The BSB is responsible for the regulation of around 67,000 barristers worldwide, and the law is a global business. There is no reference in the strategy to the large and seemingly growing number of *unregistered* barristers, and the challenges this is seen by many to represent to the sustainable regulation of the profession in future. This continues to place a significant burden on the BSB, at a cost only to the practising profession. We suggest that this should not be ignored in the BSB's new strategy. If the BSB decides not to address this, it should make this clear and explain why not.

Q.3 What do you think of these early emerging priorities for regulating in the public interest? Is there anything that has been missed?

57. The pre-amble to this question starts by asking what the BSB needs to consider and prioritise. We are not convinced that the BSB's suggestions in this section are truly the key priorities for the BSB.
58. We have already commented on each of the three areas to which the BSB refers. Other than as we have already indicated, we doubt the extent to which these should be prioritised in the next strategy.
59. The BSB is right *in this context* to identify technology as an early emerging matter to be considered. We assume that the BSB includes the role of AI under this heading. The extent to which this will call for particular regulatory responses is unclear.
60. As regards omissions:
 - (i) We have also already commented on the importance of the BSB continuing to focus on its core roles as regulator, particularly its roles in efficient and transparent enforcement and in relation to legal education providers. Neither is mentioned in this section. Both should be key priorities on which the BSB focuses in its next strategy period.
 - (ii) The BSB should also focus on ensuring that it regulates in a manner demonstrating effective collaboration, listening to and transparency with stakeholders (including with students), and prompt publication of responses to consultation in line with its commitments to do so.
 - (iii) The BSB should commit to seeking to achieve simplification of the content of the Handbook (particularly as regards the rules outside the Code of Conduct), whilst leaving barristers with an appropriate level of guidance on ethical matters. This is one of Fieldfisher's recommendations and it should be put into effect without delay as a primary task for the new strategy. The level of guidance should reflect the context in which barristers operate, including the frequency with which particular types of issue arise (at a more granular level than that of the Core Duties) and the need to address issues with limited time for reflection (particular, but not only, in the setting of a real or virtual courtroom) and without other legal team members on hand to assist. The BSB should also take the

opportunity to improve its structure and the accessibility and ease of use of the online version. The Handbook is particularly complex as regards entities and other matters of regulatory structure, and we question whether either the desire to create regulatory freedom or the market results have proved to be sufficient to justify the complexity and cost of this aspect of the Handbook and of the BSB's activity.

61. There also needs to be a recognition that the BSB's priorities need to be realistic in scope, achievable with the resources that are available and proportionate, taking into account existing stresses upon the profession.
62. Finally, the continuing importance of the Cab Rank Rule should be a focus, given its importance in enabling barristers to maintain their independence and integrity in the face of (1) an increasingly hostile tone towards lawyers and legal institutions in public and political debate, (2) a determined desire in some quarters to dismiss or ignore the important role of independent lawyers in the administration of justice, and (3) the degree of hostility generally in public and political debate towards those whom barristers may be obliged to advise or represent (and whom it is important that they can advise and represent, in compliance with their ethical obligations).

Q.4 Do you have any feedback on our approach to regulation in general or of the barrister profession in Wales?

63. We have nothing to add at this stage to what we have said above and say below about the BSB's general approach to regulation. We welcome and would endorse the stated commitment to make maximum use of awareness-raising and supportive supervision to achieve objectives that are shared with the profession.
64. As for regulation of the profession in Wales, we note the conclusion of the Commission on Justice in Wales that the present system where legal practitioners can practise in England and Wales and the legal professions are jointly regulated should be continued. The BSB must in any event operate within the present system.
65. Regulation should, though, take into account the particular geographical and social context of practice in Wales. Many of the challenges for the Welsh Bar are similar to those elsewhere: barristers' workloads are heavy – particularly in the case of those undertaking publicly funded work – and working conditions are made worse by the poor

state of repair of the courts. On the other hand, the Welsh Bar is small in size and has limited resources compared to the Bar in some other parts of the country, and both the size and distribution of the profession in Wales brings different and additional challenges: for example, the provision of advocacy training and fulfilment of other BSB requirements depends upon the good will of a smaller number of practitioners in different areas within Wales, who are already facing significant challenges in their daily practices.

66. This underlines the need for the regulatory burden imposed on barristers to be kept to a minimum, as the capacity of barristers (particularly those already charged with responsibilities for Chambers management) to undertake substantial additional work is limited. It also emphasises the need to keep the costs of regulation tightly controlled (whether in terms of the direct costs of funding the BSB's activities or in terms of the indirect costs of compliance).

Q.5 Do you have view on how we might more effectively monitor and report on performance?

67. The BSB's focus has been measuring the performance of the Bar, rather than measuring its own performance. In the Annual Report 2023-2024, which seeks to show how each strategic aim was implemented, there is very little to show how the BSB sought to measure whether it had, in fact, been successful in implementing those aims. The focus has almost entirely been on the Bar's performance, without any significant attempt to measure whether and the extent to which the BSB's activities have had an effect on that performance, or whether that effect was what the BSB aimed to achieve. There is no transparency about costs of initiatives, or benefits (save for some reporting in relation to the enforcement function). The absence of monitoring and reporting on cost and benefits means that (i) independent scrutiny of the regulator's effectiveness is difficult and (ii) when new initiatives are announced it is at times difficult to understand how the BSB has analysed the likely benefits and cost in order to reach that decision, and what success or failure would look like.
68. It should now be a priority for the BSB to measure the extent to which it is an effective regulator in all of its activity, not just the existing measures relating to processes. That would involve: measuring the effect of regulatory activity on barristers; measuring the extent to which BSB activities influence outcomes; measuring the extent to which that influence on outcomes meets the BSB's regulatory objectives and is aligned with the five

principles of good regulation; evaluating the cost of that influence on outcomes; and a cost/benefit evaluation.

69. This should be done soon, and publicly. It is noted that the BSB propose to ‘commit to a process to develop and refine the methods to better evaluate the impact of our regulatory interventions’ which is welcome. However, the linked timeframe is vague: ‘Over time, we aim to enhance how we measure and report our performance’.
70. One simple step for the BSB to improve transparency and understanding in its performance would be for it to share a detailed breakdown of its operating budget, setting out what funds it allocates to what activities, and confirming to what extent its expenditure is achieving or advancing its strategic aims.
71. In the strategy document, the BSB should commit to a short timeframe in which to identify how it will evaluate its own performance in this respect. It is expected that external support will assist the BSB to create an evaluation framework. If this cannot be completed within the next 12 months, it should be done early in the next strategy period (particularly if this is to cover five years) so that the BSB is able to use that evaluation framework to evaluate its performance for the remainder of the strategy period.
72. In relation to each strategic aim adopted in the new strategy there should be an explicit commitment to monitor and measure the extent to which that strategic aim has been implemented, and to report on the evaluation.
73. Finally, we note that the BSB identifies relevant data as including ‘trust in both the barrister profession and in regulation itself’. We make two comments about this. First, we invite BSB to be cautious about linking any decrease in trust in the profession with a decrease in performance. A decrease in trust may reflect unjustified attacks on the integrity of the Bar by politicians and others. Second, as regards trust in regulation, we would hope to see the BSB recognise the importance of having the confidence of the profession it regulates; expect this to be reflected by performance of BSB’s core tasks and its focus on its core regulatory role.

Q.6 Is there anything else you would like to add?

74. COIC would welcome the opportunity to engage with the BSB to discuss any of the points raised in this response, and any related matters.

The Council of the Inns of Court

April 2025