

## **Speech: Legal Practice Management Association Annual Conference 2022**

12 May 2022

### **Regulatory Update: Mark Neale Remarks**

I am delighted to be with you. Believe it or not, thanks to the pandemic, this is the first occasion since joining BSB two years ago I have had the chance to talk to a live audience at any length. So this is a good place and time to break my duck.

It's a good time because the LPMA conference comes hard on the heels of the BSB publishing our strategy for the next three years. So there is plenty to talk about.

It's a good place because, as I will discuss, Chambers are important partners in delivering that strategy and our broader regulatory objectives. So the LPMA is a key player and an important stakeholder. I want your support!

My plan, therefore, is to do roughly three things:

- first, I want to say something about the role of BSB as the regulator and how that role informs our strategy;
- second, I want to talk about the role chambers play now, and I hope will play to an even greater extent in future, in support of regulation and, in particular, in fostering standards, equality and access in the profession; and
- third, I want to end by describing how you can expect the BSB itself to evolve over the next three years.

### **Role of regulation and the Regulator**

The recent consultation on our future strategy revealed different views about what a professional regulator should do.

There is a strong body of opinion – particularly held within the profession itself – which says that the Bar Standards Board is there to manage access to the Bar and to maintain discipline and, by and large, should stick to those tasks and do them well.

Well, these are indeed important operational responsibilities of BSB. And I go along wholeheartedly with the sentiment that we should do them well.

In many respects, what's more, we do discharge them well.

We have just, for example, successfully delivered the first examinations of ethics in pupillage. Needless to say, you won't have heard much about those examinations because they ran so smoothly. They ran smoothly in part because we learned lessons from the online examinations we had to improvise at short notice in August 2020 in response to the health emergency.

The standards of our decision-making in disciplinary matters are also high. That's according to our Independent Reviewer, not me. In dealing with reports on barristers and on investigations, we shall never trade off quality against speed.

But speed is important too and this is where we have struggled in the recent past. A rise in both the volumes and complexity of the cases with which we deal has meant that we have taken too long to turn round reports on barristers, to complete investigations and to deal with applications for waivers from our rules.

### ***Efficiency***

To be clear, we must do better. It's equally unacceptable to those making reports and to the barristers who are the subject of those reports to prolong the agony. And it is, I recognise, agonising if you're the subject of a complaint.

That is why the first of our strategic goals for the next three years is *Efficiency*.

It is also why we have already overhauled our approach to the way we triage the reports we receive and why we shall be undertaking a full-scale review of regulatory operations and of our approach to authorisation decisions in the year ahead. And it is why we have reinforced the teams which deal with our core regulatory operations – not a universally popular decision, but a necessary one.

We are already seeing the fruits of this focus on efficiency. Prior to the cyber attack we suffered at Easter, we were on course to hit our service levels for turning round reports and authorisation requests. We have further to go – and a tougher challenge - in accelerating investigations

So, yes, we agree that regulatory operations matter. Achieving greater efficiency – with no loss of effectiveness – is our top priority.

### ***Regulating in the public interest***

But efficiency in handling core operations is not, and cannot be, our exclusive focus. We regulate in the public interest and the public interest goes wider.

What constitutes the public interest is spelled out in the objectives set for the legal services regulators in the Legal Services Act 2007.

I am not going to read out each and every objective, but, broadly speaking, the public interest has two dimensions.

One dimension is concerned, quite rightly, with the interests of consumers. In the interest of consumers, we are charged with promoting competition and access to justice. And we have a responsibility to promote an understanding of a citizen's right and duties – *public legal education* in the jargon.

In our strategy, we summarise the aim of these duties to consumers like this:

“barristers provide a range of good value legal services which are well understood by the public, who can access those services either through their solicitors or directly”.

The second dimension focuses on the rule of law and barristers' duties to the Court which transcend the professional obligation to any individual client. It requires the BSB to interest ourselves in the strength and independence of the profession itself and in its ethical well-being.

Uniting the duty to consumers and the duty to the rule of law is a duty to promote equality – equality within the profession itself, because the profession cannot serve consumers unless it reflects wider society, and equality in serving diverse consumers, because the rule of law must provide equal access.

### ***Regulation: standards, equality, access***

Spelling out these duties does not, of itself, tell you what regulation can, or should aim to, achieve.

Regulation cannot wave a magic wand and, by force of rules, will the realisation of the public interest. But the regulator can raise the profile of issues, including, as we do, by publishing research and analysis about the profession. We can set clear expectations and work with partners in the profession more widely to realise those expectations. And, yes, we can - where it will make a difference - use the black letter of regulation to enforce good practice and changes of approach.

We intend to do all these things over the next three years, with a particular focus on three strategic objectives.

First, we shall work with the profession to sustain the professional *standards* which underpin both service to consumers and the rule of law. We already exercise a firm grip over standards of entry to the profession, but we want to ensure that barristers maintain those standards throughout their careers.

And we want to ensure that regulation identifies promptly where professional approaches need to adapt to changing consumer expectations and circumstances. A good example of the latter are the competences which we have just published, in partnership with the SRA and CILEx Regulation, on practice in the Coronial courts.

Second, we shall be unrelenting in our determination to promote *equality* – equality within the profession, equality within the Bar Standards Board, equality of outcome and access for consumers of legal services. You in the LPMA have a key role here as the custodians of many of the practices within chambers which determine who is recruited, who is taken on as tenants, who is allocated work and who is able to further their careers.

And, third, we shall work to promote access for consumers now and in future. This is about both the supply of barristers and the demand for barristers' services.

Looking to the medium term, we are concerned that the profession is ageing and the implications of that for access to justice. How can we boost the numbers of people qualifying as barristers?

Here and now, we want to improve consumers' understanding of the services barristers can provide and access to useful information about the price and quality of those services. We also want consumers to have choice, so we shall be looking hard over the next three years at the referral process by solicitors.

So *standards, equality, access*: the Bar Standards Board priorities for delivering the public interest.

### **The role of chambers**

That brings me to your role – to the role of chambers – because, as I have said, regulation is a necessary but not sufficient condition for progress.

In fact, the Bar Standards Board, as the regulator, is in many respects at a disadvantage as a facilitator or inspirer of change. We regulate individual barristers, but we are small relative to the size of the profession: roughly 100 regulators plays over 17,000 barristers. Despite the excellence of our supervision team, we cannot realistically be hands on. Nor should we be. We can only respond to risk.

And our powers are, I would say, nuclear powers to be deployed only when there is evidence of serious breaches of professional

standards or of our rules. So, to give you an example, some barristers will, from time to time, have an off-day in court or provide problematic advice. That should not normally be a cause for regulatory intervention, but it is, perhaps, an opportunity for chambers.

It is an opportunity for chambers because, like the employers of employed barristers, chambers are much better placed to provide support, counsel and, occasionally, warning.

Now, I know, of course, that chambers are not employers. They exist to serve self-employed barristers. But chambers do have an interest in the collective reputation of their members and chambers do provide the structure within which barristers work.

So I would like to ensure that all chambers promote high *standards* by acting as the conduits for informal feedback to barristers on their performance from a range of stakeholders: judges, solicitors, fellow barristers, clerks and clients. This feedback, which the BSB is keen to promote, should inform barristers' reflection on their continuing professional development.

I would also like to see all chambers adopting the practices of the best in ensuring equality and inclusion. Too many chambers persevere with time-honoured, but uninclusive, approaches to recruitment, to development and to the distribution of work. Implementing the findings of the Bar Council's November 2021 *Race at the Bar* report would be a good point of departure. If you're not already doing so, start now.

And please, too, ensure that your chambers has clear policies to counter bullying and harassment and processes in place to support anyone who believes they have been subject to bullying and harassment.

I would like to see all chambers facilitate access for consumers by, at minimum, adhering scrupulously to the spirit and letter of our transparency rules, but by going beyond the minimum to make it easy for consumers to understand the services available and by

working with solicitors to ensure that clients have a choice of well-qualified counsel.

And, finally, I would like to see senior barristers, alongside chief executives, championing standards, equality and access within chambers to demonstrate that these things matter and to deliver effective reform.

Now, you may say that these are fine as aspirations and ask how the Bar Standards Board is going to turn them into reality.

The answer is: with your help.

Over the course of the next year, the Bar Standards Board will work with its partners – the LPMA foremost among them – to clarify our expectations of chambers when it comes to oversight of *standards*, *equality* and *access*. We shall also spell out what governance we shall expect to see in chambers in furtherance of these priorities.

I emphasise the word *expectations*. We are not setting out now to regulate chambers themselves. But we do want chambers and the profession to be allies in advancing our regulatory objectives. To achieve that, we all have to be clear what good practice looks like. And there is plenty of good practice on which to draw and to build on.

There is nothing new about this. BSB's *Anti-Racist statement* of November 2020 is a good example of the regulator spelling out our clear expectations. We now intend to do this more systematically.

Alongside setting expectations, we shall also review relevant rules – our *Equality Rules* are a prime example – so that the duties of barristers and our expectations of chambers are consistent and self-reinforcing.

So please watch this space; we shall be seeking your views.

### **Evolution of the Bar Standards Board: *Independence***

Finally, let me say something about the Bar Standards Board itself.

I hope it's clear from what I've said already that we do not think that more regulation is the answer to every problem and that we are ready and willing to work with the profession and with other stakeholders to advance the public interest. We know perfectly well that you in the LPMA and our counterparts in the Bar Council care just as much about *equality* as we do, for example.

So we're not going to pick fights with the profession to gratify external interests or to demonstrate our virility.

But, equally, we're not going to shy away from tough or unpopular decisions if the public interest demands them. I think the steps we have already taken to enhance the capacity and capability of the Bar Standards Board itself demonstrate that.

The Bar Standards Board must not only be independent in its decision-making, but it must also have the culture, capability and credibility to be confident in the exercise of its regulatory functions.

That is why we are also looking at the merits of incorporating the Bar Standards Board, a path already trodden by the SRA and by CILEx Regulation.

Incorporation is perfectly compatible with the statutory framework of the Legal Services Act 2007. The Bar Standards Board would continue to be owned by the General Council of the Bar. But as a corporate body in our own right, with a separate legal identity, we would be able to streamline our governance. We would be able to clarify accountabilities, including publishing our own accounts. We would secure greater operational freedom, particularly over the employment of our people. And we would have the greater credibility which comes with visible independence.

So the Bar Standards Board is also changing – and changing for the better.

## **Conclusion**

I hope I have fulfilled my remit this morning to provide you with a regulatory update. I also hope I have underlined the importance we attach to working with the LPMA in fulfilling our regulatory



objectives. We shall be giving priority to improving the efficiency of our regulatory operations. But we also have broader duties to promote the public interest. Regulation alone will not deliver high standards, equality and wider access. To protect the rule of law and to improve access to justice for consumers, we need to work together.

Over to you for questions...