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BSB Strategic Plan

Thank you for your letter of 22 February 2016, which I was pleased to be able to discuss with my full Board on 25 February. Whilst your letter was a response to our public request for feedback on our draft Strategic Plan, I thought that a number of the points you made deserved a specific response. Now that your own letter has been made public, we will post this response on our website as well.

I was glad that you found much to welcome in our proposals and that our main strategic aims, and the risks to the regulatory objectives that we have identified, are ones with which you “broadly agree”. More detail will appear in our annual business plans. We have taken on board what you and others have said, in your letter and elsewhere, about the way in which we talk about risks and tried to cast these, at least in the Strategic Plan, using less jargon and emphasising the opportunities for improvement and change - in the public interest - that now face the Bar. If we have not talked about the Bar Council’s role in relation to the regulatory objectives in the LSA2007, this is, quite simply, because the plan is the BSB’s plan. We have nevertheless taken opportunities in the re-draft to note the work which the Bar Council does in relation, for example, to international promotion of the rule of law and outreach to schools.

Your letter highlights the need for all regulatory stakeholders to be absolutely clear about their roles and responsibilities. We fully endorse this. We are ready to pursue an initiative to “jointly and systematically (...) review activity to ensure we are clear about who should do what and that there is no wasteful duplication or indeed gaps that should be filled.” I suggest this starts however only when we have all seen the proposed Ministry of Justice consultation on changes to the regulatory set-up, as this can be expected to provide important context.

Your letter considers a number of areas however where you suggest that the BSB seeks to “stray beyond the core function of regulation.” This is a serious assertion with which we completely disagree. Let me explain why.

As you would no doubt expect, when considering its priorities, the BSB asks two fundamental questions. Firstly, what are our statutory obligations in the relevant area? And secondly is anybody else effectively dealing with the issue that concerns us.

As regards our statutory obligations, these may derive from more than one primary or secondary piece of legislation, but they dictate our minimum level of activity in any given area. So it was surprising to find in your letter an apparent misunderstanding of two key statutory drivers for the BSB.

In relation to the Equality Act 2010 you suggest that “eliminating unlawful discrimination and advancing equality of opportunity and fostering good relations between different groups” is “too broad an interpretation of the BSB’s role.” Yet we take our description of our role directly from the language used in s149 of the EA 2010 which binds all public bodies or bodies exercising public functions, whether or not they are a regulator.

Similarly, we found it hard to understand why you thought our activity in developing Future Bar Training (FBT) would lead us to “(become) too heavily involved with those who are not yet called to the Bar and who therefore are non BSB-regulated” and that this “(falls) outside the scope of the BSB”.

S21 (1) of the LSA 2007 makes it quite clear that qualification regulations are “regulatory arrangements;” s21(2) further defines qualification regulations and this makes it explicitly clear that regulators must be concerned with the education and training of those seeking to become regulated and authorised persons. The LSB has issued statutory guidance in this area which also makes it clear that pre-call training is well within BSB scope. At one point in your letter you appear to acknowledge that the BSB’s regulation involves “the setting and enforcement of standards” and it would be difficult to envisage how we should do that without our involvement in education and training.

We have of course sought throughout the development of FBT to focus very clearly on what the role of the regulator should be, as evidenced in last summer’s full scale consultation: every section of that document asked key questions in relation to the regulators’ role. We took some comfort from the Bar Council’s own response to those 2015 consultations: for example

...Quality assurance of the teaching provided upon (*sic*) the BPTC forms part of the BSB’s regulatory function and we consider that it should continue to do so.

(...)

In the current regularly (*sic*) framework, it is the role of the BSB to perform the quality assurance function and there is no body other than the BSB that can sensibly perform it. (...)

(...) in the context of:

- a. the minimal influence capable of being exerted by individual members of the Bar, chambers and employers upon the quality of course provision; and
- b. a student body who apply to enrol with providers on an individual and self-funded basis;

market forces cannot be relied upon to maintain the standards of providers. The BSB’s quality assurance function is therefore of some considerable importance. This is a factor we invite the BSB to bear in mind when considering whether its regulatory role should be maintained or reduced.

These seemed wise observations at the time, so we are surprised to see now that your position appears to have changed.

Given the statutory definition of qualification regulations and the BSB's responsibilities, especially where the market appears not to function well, we cannot agree that the BSB's consideration of specific compulsory accreditation schemes "goes beyond the BSB's essential core duties." In considering whether to implement any scheme, we are of course bound to be targeted, proportionate and evidence-based and will continue to be so.

The second fundamental question we ask ourselves when considering our priorities is whether, notwithstanding our statutory obligations, there is another competent and effective body already working in an area such that our own intervention is not needed. Having asked ourselves this question, we have concluded that we would not be prepared to leave the promotion and dissemination of good practice eg in equality and diversity to others. Nor would we step back from assisting the profession to understand the business models and modes of practice available to it, or from contributing to public legal education, or to national and international policy debates on the rule of law and access to justice. We will always do these things through our unique regulatory prism and with the public interest and the needs of users of legal services foremost in our minds. You and others will comment from your own angle of view.

We agree that the Bar Council and the BSB should not duplicate work. But the complementary nature of our roles must be recognised and the perspective, expertise and effectiveness which the BSB brings to these areas need to be acknowledged. We think statute requires our contribution and the public expects it.

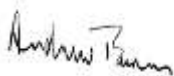
Finally, it may be helpful to clarify some points about our governance reform and the Board's view on separate independent legal regulation. You suggest that the former will "very significantly reduce necessary in-depth understanding of the profession" and that the latter will "excise (...) the voice of the profession from the regulatory structure set up in the LSA07." Neither of these is the case. In our governance reforms, there are still as many barristers on the Board as the Constitution and statutory requirements permit. We have no plans to change this and we continue to attract strong fields of barrister applicants for membership. With our new "task and finish groups" and our impending Advisory Pool of Experts, we will be drawing on a broader, more diverse and expert range of members of the profession than ever before.

There is no suggestion in our Plan that legislative reform will lead the BSB away from its commitment as a regulator to have deep knowledge and understanding of those it regulates. That is an essential feature of competent regulation, whatever the sector. But we will take the opportunity of the MoJ consultation to set out in more detail why we think the arguments for separation are strong and in the public interest, and the evidence we would adduce in support of that position.

The Board will be signing off the final version of the Strategic Plan and the 2016-17 Business Plan at its meeting on 17 March, in public session. I look forward to seeing you there and indeed at our launch event on 12 April.

With warmest regards,

Yours ever,



Sir Andrew Burns KCMG
Chairman, Bar Standards Board