



Department for
Business & Trade

SMARTER REGULATION AND THE REGULATORY LANDSCAPE:

CALL FOR EVIDENCE QUESTIONS

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Call for Evidence

This document contains all the questions in the call for evidence on Smarter Regulation and the regulatory landscape. You can access full details of this Call for Evidence on: <https://www.gov.uk/government/calls-for-evidence/smarter-regulation-and-the-regulatory-landscape>

This document is designed to support you in completing the online questions, which is our recommend method of response. Alternatively, you may provide your answers in this document and return it to smarter.regulation@businessandtrade.gov.uk. Full details on ways to respond are available online.

Section One: Questions on the Landscape of Regulation (Required)

There are around 90 regulators in the UK and they spend almost £5bn per year across regulatory activities and running costs, covering most sectors of the economy.¹ The scale and responsibility assigned to regulators makes the performance of these entities in delivering the best outcomes in the sectors/areas that they regulate key to the UK's economic success.

Please note that any questions asked about a 'regulator' is pertaining to the relevant regulatory body to your answer. We are not seeking information about individual persons employed by regulatory bodies.

Question 1: Based on your experience, do you think that UK regulators are supportive of the individual businesses they regulate in a way that appropriately balances considerations of consumers and other businesses within the sector more broadly?

Our experience is that our regulators tend towards somewhat excessive regulatory activity which hampers, rather than helps, growth, considerations of consumers and businesses within the sector.

Question 2: Please name the UK regulator(s) you engage with most frequently:

The Bar Standards Board (BSB) and the Legal Services Board ("LSB").

Question 3: What do you consider to be the most positive and/or negative aspect of how the UK regulators that you engage with operate?

As will be made clear later in this submission, the most negative aspect of our interaction with our regulators relates to how the regulator that oversees the front-line regulators in the legal services sector, the LSB, operates. The LSB operates beyond the scope and remit provided for in the governing Legal Services Act 2007 (LSA07).

We are also conscious that the LSB has had no departmental performance review since 2017. Proper accountability requires regular and independent external performance assessment.

¹ See <https://www.nao.org.uk/wp-content/uploads/2020/03/Overview-Regulation-2019.pdf>

Section Two: Complexity and Ease of Understanding the Regulatory System

The large number of regulators in the UK is driven in part by the scale of our economy and the range of different sectors and activities that require some form of regulation, whether to ensure markets work well or to otherwise protect workers, consumers, and other members of the public. While this structure may have advantages in terms of scope, we also recognise that it creates risks of overlaps or duplications between the mandates of different - potentially increasing complexity for those being regulated and the burden of regulation.

Statutory duties are placed on the regulators through legislation. Regulators often have a set of duties across different primary and secondary legislation which they must fulfil in carrying out their core functions. They also frequently have wider objectives, for instance as set out in statutory guidance.

We are aware that not all questions will be relevant to all respondents. Please address as many questions as are relevant to your experience.

Question 4: Based on your experience or understanding of UK regulators, do you find it clear what the overall purpose and objectives of individual regulators are?

The overall purpose and objectives of the regulators for barristers are clearly set out in the LSA07.

The Act struck a careful balance between self-regulation and external regulation. It provides an element of professional self-regulation by the Approved Regulators, but requires the exercise of regulatory functions to be taken independently from representative functions (s.30).

The Approved Regulator for barristers is the General Council of the Bar. The General Council of the Bar, as required by the Act, delegates its regulatory functions to the functionally independent BSB. The BSB is the front-line regulator for the Bar. The LSA07 also created the LSB. The LSB's principal role is the oversight of the Approved Regulators (s.49). Thus, the legal sector has two tiers of regulation, the frontline regulators and the oversight regulator, the LSB.

The overall purpose and objectives of both the BSB and LSB, as set out in the LSA07 are defined and are clear to us. The evidence of all stakeholders given to the House of Commons Justice Select Committee in November and December 2023, including the General Council of the Bar, the BSB and the LSB, were uniformly of the view that the LSA07 itself did not require review.

The statutory limits as well as the clearly defined purposes of the LSB are not always respected by the LSB itself. Over time, particularly since the implementation of the regulatory objectives, the LSB has moved some way beyond its core function and duties, with many of its plans and initiatives straying beyond its remit in what looks to us as attempts to impose regulatory burdens beyond its intended role.

Question 5: Within these overall objectives (as considered in the preceding question), do you find it clear what the specific statutory duties (i.e required by legislation) of individual UK regulators are?

The statutory duties of legal sector regulators are defined and set out in the LSA07. The problem lies in the interpretation and implementation of those duties by the oversight regulator, the LSB, which pushes at or beyond the provisions of the Act, and certainly beyond the legislative intentions.

Question 6: Do you think that the statutory duties (i.e required by legislation) imposed on UK regulators:

1. Cover the right issues?
2. Are clearly stated in relevant statute, including where supplemented by relevant guidance?; and
3. Are sufficiently consistent across regulators, where this is relevant?

Yes. We believe that the statutory duties for the legal services regulators cover the right issues, are clearly stated and are sufficiently consistent across legal services regulators. They are fit for purpose.

Parliament established the Legal Services Board and set out its responsibilities when it passed the Legal Services Act 2007. Under the Act, the role of the LSB is (and is only) to fulfil its statutory functions. In discharging its functions it must so far as is reasonably practicable act in way which is compatible with the regulatory objectives (s.3).

The principal role of the LSB is the oversight of the Approved Regulators: see section 49(3).

There is a current tendency for the regulators to push at, or beyond, the boundaries of what was legislatively intended.

Question 7: As set out above, UK regulators have a remit that is set through legislation and guidance. Which of the below do you consider best applies?

1. Regulators always act within the scope of their remit;
2. Regulators go beyond their remit in a way that may negatively impact the outcomes that they are required to deliver; or
3. Regulators go beyond their remit in a way that supports the outcomes they are required to deliver

As set out above in our response to question 6, the LSB's statutory duties are clearly set out in the LSA07.

We consider that some of the LSB's actions go beyond its remit in a way that can negatively impact the outcomes that it is required to deliver.

The Bar Council has been concerned for some time that the LSB has on occasion made regulatory interventions, including over-use of its power to issue statutory policy statements, for example on issues such as ongoing competency or first-tier complaints procedures when (contrary to the Better Regulation Principles) there was little or no evidence of any problem, the LSB did not trouble to investigate or evidence what the legal professions and their various representative bodies were already doing in relation to the relevant topic, identifying and evidencing where each profession was failing. Matters would better have been left to the front-line regulators (like the Bar Standards Board) who have a much closer understanding of the risks inherent in the profession that they regulate.

The Bar Council has particular concerns about the rigour of the LSB's approach to the gathering and analysis of the material it relies on as "evidence" to support its interventions. Reports of generalised public perceptions obtained by public panels guided to views that meet the LSB's hypothesis are not a substitute for proper examination of what is actually done in each profession and, importantly, whether and what efforts are being made by the professions themselves, their professional bodies and the first-tier regulators. This should all be considered before the LSB begins work.

Finally, the LSB will often take on work that is inappropriate and clearly outside its statutory remit. For example, the LSB has spent the money it raises from the regulated sector on developing a strategy for the whole of the legal services sector. However, it has no role as a sector or market regulator. These matters are for Government and Parliament, not the LSB.

Question 8: Do you often have to engage multiple UK regulators on the same issue or area?

1. Yes
2. No

Please provide further information for your response if applicable. Examples are welcomed.

Optional

Question 9: Do you consider that UK regulators collaborate effectively with each other and their international counterparts?

Please provide your answer here if applicable. Please break down your response by national and international. Examples are welcomed.



Question 10: Where you engage with multiple UK regulators, do you find it clear which regulator is responsible for a specific issue or area, and how regulator mandates interact?

Please provide further detail here if applicable. Examples are welcomed.

Question 11: Do you consider there to be underregulated areas of the economy, or gaps in regulatory responsibility between UK regulators?

Please provide further detail here if applicable. Examples are welcomed.

Question 12: Do you consider that guidance issued by UK regulatory bodies makes the regulatory system clearer and easier to understand?

Please provide further detail here if applicable. Examples are welcomed.

Section Three: Regulator Agility, Responsiveness and Skills

Regulators need to be responsive to change and wider systemic factors. As new issues and novel technologies emerge, regulators must be adaptive, coherent and coordinated to ensure that issues do not fall through the cracks and that responses are timely. Regulator agility means quick and effective implementation of current rules, as well as adapting rules when circumstances change and it is appropriate to do so.

We are aware that not all questions will be relevant to all respondents. Please address as many questions as are relevant to your experience.

Question 13: Do you find UK regulators to be agile and responsive to new and emerging issues?

Please provide further detail here if this question applies to you. Examples are welcomed.

Question 14: What factors do you think work for and against UK regulators' ability to respond sufficiently rapidly?

Please provide further detail here if applicable, covering both factors working for or against agility where possible. Examples are welcomed.

Question 15: Do you consider the processes that UK regulators have in place allow them to make decisions in an appropriate time frame?

Please provide further detail here if applicable. Examples are welcomed. You might wish to consider whether the decision-making time frame effectively balances the trade-off between the benefits of reaching a quick decision versus those of reaching the right decision.

Question 16: In the sector(s) that you operate in, do you think there are specific improvements that UK regulators and / or the Government could make to facilitate a more agile implementation of rules and regulations?

If the LSB limited its work and focused on its proper remit, as it did for the first ten years of its existence, the BSB would be better placed to focus on core business of setting and policing minimum standards and processing professional misconduct complaints, training and approvals.



Question 17: Do you think UK regulators have the appropriate mix of skills to deliver their objectives?

Please provide further detail here if this question applies to you. Examples are welcomed.

Question 18: Do you think UK regulators are appropriately resourced to discharge their duties?

Please provide further detail here if this question applies to you. Examples are welcomed.

Question 19: Do you think existing processes enable UK regulators to test new regulatory reform proposals?

Please provide your answer here if this question applies to you. You might wish to consider whether the decision-making time frame effectively balances the trade-off between the benefits of reaching a quick decision versus those of reaching the right decision. Examples are welcomed.

Section Four: Proportionality in Implementing Regulation

The methods regulators employ to meet their objectives can increase or decrease the burden on those they regulate. A proportionate approach to managing risk is key to balancing important protections with an environment that fosters innovation and accelerates economic growth and technological development.

We are aware that not all questions will be relevant to all respondents. Please address as many questions as are relevant to your experience.

Question 20: Do you consider UK regulators to be proportionate in the measures they take, e.g. in applying regulations or responding to emerging issues?

As we have stated, the LSB in our view often acts outside of its intended statutory remit, which is not proportionate nor properly targeted to where regulatory action is required. The proper role of the LSB is as the oversight regulator of the nine Approved Regulators identified in the Legal Services Act 2007. For instance, it recently decided (for the first time) to promulgate a “strategy for sector”, despite (a) not being a direct or market regulator at all (b) having no role or responsibility for large parts of the legal services sector.

Question 21: In making decisions that involve risk, which of the below do you consider most accurate?

1. UK regulators are too risk averse in their decision making
2. UK regulators achieve the right balance of risk in their decision making
3. UK regulators allow for too much risk in their decision making

Please provide further detail here if this question applies to you. Examples are welcomed, including being specific on the type of risk you are referencing.

The LSB addresses problems without assessing the true nature and extent of the risk presented based on media assumptions, rather than evidence. Rather than identifying and evidencing to what extent (if any) UK regulators achieve the right or too little amount of risk in their decision making, the LSB, as the oversight regulator, needs to demonstrate that there is in fact a risk which is within its remit that requires addressing and which it is qualified to make a decision on.

For example, there are many topical legal issues which are contentious and difficult – such as the use of Strategic Lawsuit Against Public Participation (SLAPPs) and the use of Non-Disclosure Agreements (NDAs). They are contentious topics but in respect of which there is little, if any, evidence-base that concerns the regulation of barristers as opposed to being matters of public policy and substantive law for Government and for Parliament. Such contentious political issues are not matters in which it is appropriate for the oversight regulator to step into.

The LSB's recent consultation on NDAs² suggests it assumes an inappropriately wide role for legal regulators in using regulatory levers to restrict or restrain lawful conduct and appears to confuse the regulation of lawyers' conduct with the regulation of lawyers' client's conduct. The LSB has no role in the regulation of the conduct of lawyers' clients – that is for Parliament and/or the Courts. Lawyers' duties to their clients are to advise them on the law and assist them in behaving lawfully in their own best interests, whilst the lawyers themselves must of course behave with integrity, honesty and independence and otherwise in accordance with their codes of conduct.

Question 22: Do you consider that individual UK regulators have the appropriate level of discretion when taking decisions that involve risk?

Please provide further detail here if this question applies to you. Examples are welcomed, including being specific on the type of risk you are referencing.

Question 23: If you are a business or consumer, how does the approach that UK regulators take to risk impact your own decision-making?

Please provide further detail here if this question applies to you. Examples are welcomed.

Question 24: UK regulators often need to balance delivery across a range of different legislative duties or regulatory requirements, some of which may involve trade-offs. Do you consider that they balance these trade-offs effectively and transparently?

Please provide further detail here if this question applies to you. Examples are welcomed.

No. There the LSB places too great a focus on the regulatory objectives, which it increasingly appears to consider it is its role and that of the front-line regulators to achieve, when properly the role of the front-line regulators is to carry out the regulatory functions and in doing so to comply with the regulatory objectives so far as may be practicable and in line with the better regulation

² <https://legalservicesboard.org.uk/news/legal-services-board-launches-call-for-evidence-on-the-misuse-of-ndas-and-the-role-of-lawyers>

principles including that all regulatory action should be proportionate and only targeted where needed.

Question 25: If you are a UK regulator, are there specific areas where you consider it would be beneficial to seek further steer or guidance from the Government?

Please provide further detail here if applicable. Examples are welcomed - you may wish to consider the extent to which existing steers support you to balance trade offs in decision making.

Question 26: In general, do you consider the approach that UK regulators take to requests for information to be proportionate to any burden they may impose on you?

1. Yes
2. No
3. N/A

In recent years we have noted an increase in requests for information, open consultations and new areas of work that the LSB is delving into, often beyond its remit. This activity has sparked the front-line regulators into thematic and sometimes draconian activity. For example, the BSB were, in effect, pushed by the LSB into an investigation into sanctions compliance in Commercial Chambers. Prior to the investigation there was no evidence that Chambers were flouting sanctions rules. Following its heavy-handed investigation by the BSB (in relation to which the Bar Council received a number of complaints from chambers) the BSB reported no examples of sanctions breaches amongst barristers.

There is an increasing tendency of the LSB to stray beyond its statutory remit and into policy areas for which it has no mandate. Front-line regulators (and representative bodies) are forced to divert precious resources to responding to these consultations on areas of policy outside the LSB's remit. It may be that the LSB is employing too many people whose interest is in regulatory policy and too few who have appropriately granular knowledge of legal practice within each profession.

Question 27: Do you ever receive duplicative requests for information from the same or multiple UK regulators? (i.e., requests asking for essentially the same information)?

1. Yes
2. No
3. N/A

Please provide further detail here if this question applies to you. Examples are welcomed.

Yes.

Section Five: Process and Governance

Regulators have a variety of governance structures (for example decision making boards or external advisory committees) which underpin their decision making. Responsibility is also assigned throughout the regulatory system between Government departments and regulators. The balance of this relationship is vital for the successful delivery of regulatory outcomes. Regulators are in place to deliver certain outcomes, as set out in their duties and guidance. As in any organisation, internal processes need to be put in place to operate effectively and consistently. It is however crucial that those processes drive rather than limit outcomes.

We are aware that not all questions will be relevant to all respondents, please address as many questions as are relevant to your experience.

Question 28: Do you consider that UK regulators have in place the right governance structures to deliver the best outcomes? If not, how can they be improved?

The Bar Council is concerned that the governance structures currently in place do not allow for sufficient scrutiny of the performance of the LSB.

We support the statutory framework which has been in place for the last 16 years and support the role of the LSB as oversight regulator of the Approved Regulators, as envisaged by the Legal Services Act 2007. We are however concerned that there has been a lack of sufficient scrutiny and oversight of the LSB. Although the performance of the Approved Regulators is, rightly, regularly assessed by the LSB, there has been insufficient review of the LSB's own performance. Under the existing structure the LSB accounts only to itself. There has not been a departmental review of the LSB since 2017 and we support the holding of in-depth departmental performance review of the way in which the LSB discharges its duties to ensure that it is not overreaching on the decisions it makes or the new work it takes on.

The Bar Council also has concerns that the LSB's Internal Governance Rules are driving too great a separation between the Approved Regulators and those to whom they delegate their regulatory functions. In the case of the Bar, this is the Bar Standards Board. It is the Approved Regulators who are ultimately responsible for delivering high quality regulation and standards, and too remote a relationship between the Approved Regulators and those to whom day-to-day regulation is entrusted compromises the ability of the professions to maintain standards in the public interest. For instance, at the moment the Bar Council is unhappy about steps being taken by the BSB to make it easier to pass the Bar exams, certain operational decisions that are made (away from the exercise of decision-making on regulatory matters, which is properly a matter only for the BSB), all budgetary matters (the BSB has increased its budget by 64% in just six years), and there are currently acute tensions between CILEX and CILEX Regulation. The Approved Regulators must be permitted to maintain an appropriate degree of influence over budget and policy decisions in relation to structures and performance (though not, of course, individual disciplinary decision-making).

Question 29: Do you consider that UK regulators use digital systems in their interactions with you in an efficient fashion? (e.g. data transfer or other digitised methods)?

Please provide further detail here if this question applies to you. Examples are welcomed.

Question 30: Do UK regulators sufficiently communicate the processes they follow to make decisions?

1. Yes
2. No
3. N/A

Please provide further detail here if this question applies to you. Examples are welcomed.

There is mixed picture.

The Bar Council has been concerned for some time that the LSB has, on occasion, made regulatory interventions, including over-use of its power to issue statutory policy statements when (contrary to the Better Regulation Principles) there was little or no evidence of any problem. The LSB does not sufficiently communicate its decision-making processes, does not hold any part of its meetings in public or with stakeholder observers, and does not sufficiently inform the professions why it considers itself best placed to take on areas of policy which would have been better left to the front-line regulators who have a much closer understanding of the risks inherent in the professions they regulate.

Question 31: Are you provided sufficient opportunity to input into decision making by UK regulators processes (e.g., via consultations, workshops etc)? If not, how would you suggest improving the process?

Please provide further detail here if this question applies to you. Examples are welcomed.

Question 32: Do you consider the processes that UK regulators follow deliver reasonable outcomes?

Please provide further detail here if this question applies to you. Examples are welcomed.

Question 33: Do you think UK regulators treat those that they regulate consistently?

Please provide further detail here if applicable. Examples are welcomed, including any detail on how this impacts your planning and decision making. Examples are welcomed.



Question 34: As a business, do you think the process to challenge a UK regulator you interact with is sufficiently clear, robust and fair?

Please provide further detail here if this question applies to you. Examples are welcomed.

Question 35: What steps, if any, do you think could be taken to further improve the effectiveness and clarity of the reviews and appeals processes?

Please provide further detail here if this question applies to you. Examples are welcomed.

Section Six: Regulator Performance

How regulators seek to meet their objectives, implement and enforce regulation is just as important as regulatory structures. Regulation is only effective if it achieves its desired outcome and tackles the problems that it is trying to solve.

We are aware that not all questions will be relevant to all respondents, please address as many questions as are relevant to your experience.

Question 36: In your experience, have UK regulators that you interact with delivered on their stated objectives in that interaction?

As we have stated, we are concerned that the LSB is going beyond its remit. It appears that the LSB puts in place new priorities to meet and tasks, such as developing a strategy for the sector, which is inappropriate considering the statutory limitations on it as an oversight regulator.

Question 37: Do you think UK regulator performance reporting is proportionate, objective and transparent?

In the legal sector, the front-line regulators are subject to oversight by the LSB and this should provide sufficient scrutiny and accountability without the intervention of government. However, there is an issue (as outlined throughout our response) as to the accountability of the LSB itself.

The Bar Standards Board is open with its performance metrics, allowing barristers and the Bar Council to understand their performance with regards to disciplinary processes and authorisation applications. Such information is helpfully included in their Board papers and in various annual reports.

Question 38: Do you think UK regulators report on the right set of criteria and metrics to monitor their performance and ensure accountability?

Please provide further detail here if applicable. Examples are welcomed. If you think that there are better criteria and metrics that regulators do not report on, please provide details.

As above, in our view the Bar Standards Board is open with its performance metrics which is always helpful and ensures transparency and accountability.

While the Legal Services Board is transparent in some areas, such as consulting on strategy and budget and its annual reports, we cannot have overall assurance while there has been no departmental review of the LSB since 2017.



Section Seven: Concluding Questions (Required)

Question 39: If you could suggest a single reform to improve how UK regulators operate, what would it be?

There should be better and more regular scrutiny of Arm's Length Bodies (ALBs) and certainly the LSB.

As stated above, there has not been a review of the LSB, an ALB, since 2017. We think such a review should take place and a commitment should be made to review the LSB at regular intervals thereafter. It otherwise is solely accountable to itself. This is clearly unsatisfactory.

Strong regulation of professional legal services providers is vital in the public interest. That is why the performance of the Approved Regulators (the Bar Council) and the front-line regulators (the BSB) is, rightly, regularly assessed by the LSB. It is an anomaly that the oversight regulator itself should not be subject to regular review.

It is important to keep the activities of regulators within proper bounds because if regulators begin to overreach their proper role it leads to unnecessary burdens on the regulated professions resulting in reduced productivity (because engaged on unnecessary compliance activity) and increased costs - ultimately passed on to consumers. There is also a risk that matters that are properly for Government and Parliament are, inappropriately and undemocratically, decided by regulators instead. That cannot be right.

Question 40: Are there any examples of international approaches to regulation that you think set best practice that UK regulators could learn from?

International comparisons are of doubtful utility for legal sector regulation because of the differences in the ways legal professions are organised, and the different degrees to which there are constitutional guarantees of independence of the legal profession.

However, it is noteworthy that, at present, the Bars of Scotland and Northern Ireland are fully self-regulating with no additional regulatory failures being experienced.

Question 41: What is the best designed regulation you face, and why?

Please provide further detail here. Examples are welcomed.



Question 42: Are there any further points you would raise about regulation, including the functioning of the regulatory system or any recommendations you have on the stock of regulations from the Government which should be removed or reformed and modernised?

Please provide further detail here. Examples are welcomed.

Section Eight: Closing Questions (Required)

Question 43: In what capacity do you interact with UK regulators or regulated businesses? (Please select the most appropriate option that represents you, and respond according to your primary responsibilities)

- Regulated entity (i.e. business)
- Consumer
- Regulator
- Academic or think tank
- Other

If you selected other, please specify here:

As a representative body.

Question 44: If you are a business, how many employees do you have?

- Not Applicable – not a business
- 1 – 9 employees
- 10 – 49 employees
- 50 – 99 employees
- 100 – 499 employees
- 500+ employees

100-499 employees

Question 45: Please name the Sector(s) that you operate in - you may wish to reference [Standard Industrial Classifications](#)

Barristers at law.

Question 46: If you are a regulated business, how much as a percentage of turnover does demonstrating compliance with regulation cost your business?

- Not Applicable
- Less than 1% of turnover
- 1 to 5% of turnover
- More than 5% and up to 10% of turnover
- Over 10% of turnover



Compliance costs may for example include costs of staff responsible for engaging with regulators, responding to requests for information and demonstrating compliance to the regulator. It is these costs we are concerned with, rather than the costs of delivering the policy intent of the regulation.

Question 47: What is your name, or the name of your organisation?

The Bar Council of England and Wales.

Question 48: What is your e-mail address (optional response)?

PhilipRobertson@BarCouncil.org.uk

Question 49: We usually publish a summary of all responses, but sometimes we are asked to publish the individual responses too. Would you be happy for your response to be published in full?

- Yes
- Yes, but without identifying information
- No, I want my response to be treated as confidential

Yes

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