LEGAL SERVICES BOARD

Well-led review of the Bar Standards Board: **findings report**

July 2021

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1. Executive summary

1. This report sets out the findings from the Legal Services Board's ("LSB") review of the Bar Standards Board ("BSB") under the "Well-led" standard of the Regulatory Performance Assessment Framework ("the performance framework").[1] Under this standard, we expect all regulators to demonstrate the leadership, capability and capacity, and appropriate corporate governance to manage their organisation effectively; and to have a culture that encourages and uses learning to improve performance and promotes a transparent and consumer-focused environment.

2. Our findings are drawn from the material that we requested from the BSB under section 55 of the Legal Services Act 2007 ("the Act"), including documentation on the BSB's governance arrangements and information on three work programmes. We also interviewed BSB Board and senior management team members and observed a BSB Board and an Executive meeting.

3. In order to minimise the burden of data collection on the BSB, we focused the review on the BSB's decision-making processes over a period of two years, between April 2018 and ending March 2020. Detailed information about the background to the review and the process we followed, including the lines of enquiry, can be found in Annex A.

a) Purpose of the review

4. The purpose of the review was for the LSB, as the oversight regulator of legal services in England and Wales, to gain assurance that the BSB meets the standard of a Well-led regulatory body.

5. The performance framework provides for a more in-depth review when our ongoing monitoring identifies that we do not have sufficient assurance about an area of a regulator's performance or identifies an area as one of concern.[2] In March 2020, the LSB determined that a review was necessary due to ongoing concerns that the BSB did not meet WL5 of the performance framework,[3] which we said centred on the leadership and governance within the BSB in making sound decisions and acting in a way that is compatible with the regulatory objectives. We had already made efforts to secure that assurance by means other than the review, for example by requesting relevant board papers. Those efforts had not been successful for reasons that became clear during the course of the review.

6. We sought assurance that the BSB has decision-making processes that are effective and informed by appropriate evidence; take account of the likely impact of the decisions on the regulatory objectives and in particular the public interest (including the interests of consumers); and have regard to the Better Regulation Principles to be transparent, accountable, proportionate, consistent and targeted.

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[1] https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2017/Regulatory_Performance_Standards_December_2017_(final).pdf.

[2] https://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/2017/08122017_Regulatory_Performance_Process_Document.pdf.

[3] The Board considers its own effectiveness in ensuring the regulator is a Well-led, independent, transparent, and consumer-focused organisation, which acts in a way that is compatible with the regulatory objectives.

b) Review findings

7. Below is a summary of the key findings on governance, the BSB Board and the Executive. These are set out in more detail, along with references to source material, in the main body of the report.

Governance

8. We found that the BSB has in place most of the expected components of a suite of documented governance procedures. However, in the examples of work that we requested information on, which included the BSB's public legal education ("PLE") activities; its involvement with Legal Choices; and work to improve standards of transparency, we found significant shortcomings with how governance operated in practice and the impact of this on its decision making. In particular:
    a. **we found little evidence of meaningful consideration of relevant regulatory objectives when decisions were taken**. It was difficult to be assured by the material of the BSB Board's focus on its statutory duty to protect and promote the interests of consumers, or the duties to improve access to justice and increase public understanding of the citizen's legal rights. As a result, we are concerned that **the BSB allowed the interests of the public and consumers to be outweighed unduly by those of the profession when taking key decisions**.
    b. **The decision-making process for major decisions did not follow the BSB's own procedures**, including instances where the BSB did not identify, assess or mitigate risks to the regulatory objectives in accordance with its risk policies and where there was little or no engagement with the key stakeholders identified by the BSB in its own engagement strategy.
    c. **On several occasions the Board was not provided with sufficient information to support key regulatory decisions**. For example:
        i. when it decided in March 2019 to withdraw funding from Legal Choices,[4] the BSB Board did so in the absence of any specific materials to support its discussion. The decision to withdraw funding was confirmed at a meeting in September 2019, again in the absence of documentation to support the decision and with only an oral overview from the Executive. Further, although the Board had identified the need for an effective alternative plan to satisfy the Competition and Market Authority's ("CMA") concerns in March 2019, we have found no evidence of a comprehensive PLE strategy having been presented to the Board at any point throughout the period covered by the review.
        ii. When the Board decided to narrow significantly the scope of the BSB's proposed transparency standards in 2018,[5] there was no identification of any risks to the regulatory objectives flowing from its decision and little evidence of meaningful analysis of affected stakeholders' views.
9. We also found that **the governance architecture is fragmented and difficult to access, with some gaps and out-of-date components.** For example, the Scheme of Delegations is difficult to understand and the Governance Manual has been archived since October 2019. We note that plans are in place to update the out-of-date policies.

[4] Legal Choices is a website and social media platform that provides independent, objective and factual information about legal services to consumers and the public, which was jointly funded by all legal service regulators up to the point that the BSB exited the partnership.
[5] Transparency standards introduced by the BSB and other regulatory bodies were recommended by the CMA following its 2016 legal services market study to provide consumers with minimum standards of information about the price, service and quality of legal services.

The Board

10. From interviews and Board meeting observation, we found that individual BSB Board members are professional and well-qualified, and the Board has a good working relationship with the Executive.

11. However, we found a number of areas of concern:
    a. as set out above at paragraph
    b. 8.c.(i), we found that when the BSB Board took the decision to withdraw funding from Legal Choices at the March and September 2019 meetings, it did so in the absence of papers. We also found no evidence to suggest the Board was otherwise provided with relevant information to support the decision, such as an assessment of the impact on or potential risks to the regulatory objectives or costed proposals for alternative PLE activities. The BSB's own internal auditors, who were asked to review the governance process the BSB followed in taking the decision, found shortcomings in the information provided to the Board. The auditors made six specific recommendations for future governance and decision-making processes, which the BSB Board accepted (subject to minor amendments) on the advice of the Executive in September 2020. When we interviewed BSB Board members in December 2020, we noted that they did not reflect on or refer to the internal audit report's findings or recommendations. Despite having accepted the internal audit report and the core recommendations, all five Board members that were interviewed said they felt they had the information necessary to take the decision to withdraw funding from Legal Choices. **This leaves us with concerns about the Board's apparent willingness to take key decisions in the absence of supporting material and raises concerns about the confidence that may be placed in such decisions.**
    c. The evidence provided led us to conclude that **the BSB places a disproportionate weight on the impact of its work on the profession and pays insufficient regard to the impact on the public, including consumers**. For example, the decision-making process followed by the BSB Board in taking the decision to rescope the transparency standards appeared to be heavily influenced by the views of the profession but failed to take sufficient account of the views of key stakeholders, including solicitors, consumers and other intermediaries. We note that the decision was taken in the absence of several Board members, including the lay Chair (with the result that a non-lay member was in the chair).
    d. We found no evidence that the Board had engaged with the issues raised in the LSB's formal assessments of its performance. This, coupled with the BSB's lack of cooperation with the review at the outset, gave the impression that **the Board did not take responsibility for the organisation's performance within the statutory framework of regulatory objectives and performance obligations within which it operates.** We note, however, that the Board has recently assumed responsibility and oversight of performance from one of its subcommittees and the Executive will begin undertaking a six-month check of the BSB's compliance with the performance framework.

The Executive

12. We found some areas of concern:
    a. **the Executive did not consistently provide the Board with the information it needed to take effective decisions**. We found this in two particular instances, as set out above in paragraph 8(c). It is particularly concerning that the Executive did not provide a paper and analysis to support the Board's September 2019 decision to withdraw funding from Legal Choices, given that this decision was planned and scheduled. Issues relating to the information provided to the Board were covered by the BSB's internal audit report into the Legal Choices decision. In this context, it is of concern that, in the November 2020 Board meeting that we observed as part of this review, the Executive presented a paper on consumer engagement which, in our view, was lacking key information, including sufficient information on costs and risks to support the Board's decision-making.
    b. **The BSB stakeholder engagement strategy has not been effective in building partnerships with its target organisations relevant to its PLE activities and the transparency standards project**. In both instances, there has been a lack of engagement with consumers and consumer representatives, in particular, despite consumer organisations being identified as key stakeholders by the BSB. The lack of engagement with the public, including consumers, also appeared to be an issue in the modernising regulatory decision-making work programme, which was the other work programme included in the scope of the review. This raises broader concerns on the BSB's ability to form a fully rounded view of the public interest in future regulatory decisions.

Co-operation

13. At the outset of the review, the BSB challenged the statutory and operational legitimacy of the review in ways that went beyond the reasonable and constructive enquiries that might be expected of a regulator that understood the framework of accountability within which it operated. It has been difficult to reconcile the BSB's response with our expectations of co-operation.

14. The BSB accepted the scope of the review in August 2020 and subsequently complied with the Section 55 request for information issued in September 2020. We are grateful for the BSB's efforts to provide information requested, for the time given up by individuals for interview, and for the Board and Executive agreeing to the LSB observing relevant meetings.

2. Findings

15. Below we set out the LSB findings under each of the three lines of enquiry we pursued:

    a) How the governance framework supports decision-making
    b) How the Executive and Board make and implement decisions
    c) How decisions are communicated.

    The wider elements of the lines of enquiry are provided in full at Annex A. We also set out our findings in respect of the BSB Board's oversight and responsibility for performance at 2.d).

a) How the governance framework supports decision-making

16. Our first line of enquiry was designed to seek assurance that there is clarity as to the respective roles of the Board and the Executive and that the BSB is following appropriate protocols and arrangements for decision-making.

17. The BSB provided a range of documents on its governance arrangements, including the Constitution, Governance Manual, Standing Orders, Scheme of Delegations, Governance Principles, Role of the Board and evaluations of board performance.

    Governance documentation

18. Overall, the BSB has in place most of the governance procedures we would expect from a Well-led regulator, but some are out of date. We also found that the documentation is fragmented and accessibility could be improved in some areas.

19. For example, the Scheme of Delegations is a complicated document,[6] from which it is not straightforward to discern how delegation works in practice. The scheme is not clear, for example, whether sub-delegation from the Director General to a list of identified posts is to any, all or a particular combination of individuals, and which of the posts identified holds responsibility for approval. This obscures accountability. We leave the BSB to consider improving clarity in the Scheme of Delegations and whether it could usefully sit alongside an articulation of what is reserved to the Board, which is an approach that many other bodies adopt.

20. The Governance Manual was last updated in October 2019 and the BSB told us it had been archived,[7] although at the time of the review it was available on the BSB website as a result of an IT error (which has since been resolved). The reason the BSB gave was that many of the policies in the Manual are duplicated elsewhere, with a more current version available in other documentation such as the Standing Orders. The BSB also has separate, standalone policies setting out the role of the Board and the Governance Principles to be followed. The benefit of a comprehensive Governance Manual is that it acts as the central resource in which the Board and Executive can find all or most of the relevant information about governance arrangements (and indeed may, if publicly available, support transparency). Currently, with a number of separate documents, it is disjointed and could be confusing for users. We note the BSB has plans to revise the Governance Manual.

[6] https://www.barstandardsboard.org.uk/uploads/assets/ccf68026-9f5f-47c6-a047cd2eb406b97d/BSB-Scheme-of-Delegations-September2020.pdf.
[7] BSB Governance Manual October 2019.

Board performance

21. The BSB Board typically meets six times a year, with five meetings scheduled for 2021. We note that timing of up to two hours is usually set aside for meetings, although this timing is indicative and during the period covered by the review a number of meetings lasted less than two hours. We understand meetings may extend beyond the anticipated finish at other times. Our observation at the November 2020 meeting was that the focus of the Chair was on keeping to time and moving through the agenda with pace. While we appreciate that the Chair has made a conscious effort to drive efficiency, as reported in interviews,[8] this must be balanced with the need to allow appropriate time for meaningful discussion. We consider that the frequency and the time scheduled for the board meetings provide less scope for meaningful debate that is likely to be necessary for some items, particularly on complex or controversial regulatory decisions.

22. Responding to our suggestion that the time allocated to Board meetings ought to be reconsidered, the BSB informed us that it also conducts extraordinary Board meetings. For example, we learned that four such meetings took place during 2020. This is a matter of concern for us. There is no clear public record of any such meetings, when or where they took place, who attended, what was discussed or what decisions were taken. The BSB did not initially volunteer to us that they had taken place, which meant that information relating to decisions taken was not available to the review team.

23. We leave the BSB Chair to consider whether the pattern and duration of board meetings is sufficient. We suggest that this could be tested by reflecting on the *Guidance on Board Effectiveness* questions for boards (paragraph 14): 'is the balance between the focus on immediate issues and long-term success appropriate? Is sufficient time allocated to consider the impact of decisions (measuring and assessing impact)?'[9] This could be a matter for inclusion in the BSB's planned external board evaluation exercise in 2021.[10]

24. In relation to the practice of extraordinary meetings, we recommend that the BSB implements steps as a matter of urgency to ensure that sufficient material is put into the public domain to counter perceptions of secrecy. While we appreciate that extraordinary meetings may sometimes – perhaps often – need to be convened at short notice, it should not be particularly difficult to place a communication on its website that the meeting is taking place, and provide information about the agenda, attendance and decisions taken, even if that has to be done after the meeting has taken place. We also recommend that the BSB reviews extraordinary meetings held over the last three years and places appropriate material in the public domain.

25. We welcome the BSB's plans to undertake an external board evaluation. We also note that it completed internal evaluation surveys in 2020 and 2018,[11, 12] which gathered the Board and Executive's views on the Board's performance. It is good practice for any board to pursue improvement through evaluation of this nature.[13] We note that overall, there was improvement in the Board and Executive's views on the performance of the

[8] Various interview records.
[9] Guide to Board effectiveness 2018 – UK Corporate Governance Code (FRC).
[10] BSB Executive member (amended) interview record.
[11] BSB Board evaluation survey 2020.
[12] BSB Board evaluation survey 2018.
[13] https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF.

BSB Board between 2018 and 2020, which can be attributed to the BSB committing to an action plan. In interviews, Board members and the Director General stated their confidence in the governance of the BSB and noted improvements during their tenure. We have not seen a specific action plan following the 2020 evaluation but understand there will be some work undertaken to prepare for the upcoming external board evaluation; we suggest the findings from this review may be helpful for the evaluation.

b) How the Executive and the Board make and implement decisions

26. Our second line of enquiry was designed to seek assurance that the BSB's decisions are based on appropriate evidence and analysis and that proposals are properly evaluated; include consideration of the impact of the decision on the regulatory objectives, in particular, protecting and promoting the interests of consumers; take account of the Better Regulation Principles; are informed by an assessment of risk; take account of stakeholder views and feedback; and are accompanied by appropriate steps to monitor and evaluate the impact and outcomes.

27. The BSB provided a range of specific documents relevant to its decision to withdraw funding from Legal Choices; PLE activities; work to introduce transparency standards and the modernising regulatory decision-making work programme. We deal with each in turn below. We note that in responding to our interim

28. findings report, the BSB drew our attention to other recent regulatory decisions that it said demonstrated the BSB's commitment to the regulatory objectives and to the consumer interest through a wide range of risk-based interventions. The examples provided were outside the scope of the review, so we have not considered the governance and decision-making processes followed to reach those decisions in this report.

(i) Legal Choices and PLE activities

Background

29. In December 2016, the CMA published the final report from its legal services market study, which found that consumers did not have enough information about price, quality and service to choose the best option for their circumstances.[14] The CMA recommended that the BSB and other regulatory bodies review and further develop the content of the Legal Choices website to present a comprehensive whole of market overview of different types of providers to help consumers navigate the sector. It also recommended that regulatory bodies introduce a new minimum standard for disclosures on price and the service provided and develop and disseminate best practice guidance, including a requirement for providers to publish relevant information about the prices consumers are likely to pay for legal services.

30. This section of the report covers the BSB's response to the CMA's recommendations, starting first with Legal Choices. Legal Choices was established in 2014 as a website and social media platform that offers independent, objective and factual information about legal services to consumers and the public. The BSB provided funding alongside other regulators until 2019, at which time it withdrew funding from the partnership. All

[14] https://www.gov.uk/cma-cases/legal-services-market-study.

other regulatory bodies have so far remained in the partnership and have committed to funding the website for a further three-year period.

31. The BSB Board took the decision to withdraw funding in March 2019 and it confirmed this decision at its September 2019 Board meeting. Between June 2019 and January 2020, we sought information from the BSB about how it reached this decision, because we wanted to understand the decision-making process it followed. The information provided did not give sufficient assurance in a number of areas: that this was a decision based on proper analysis of evidence and development of alternative proposals to continue to meets its obligations to consumers; that the decision was taken in consideration of the regulatory objectives; and that the decision was informed by an assessment of risk and taking account of stakeholder views, in particular partners impacted by the decision (the other regulatory bodies), the CMA and consumer groups.

32. When the BSB Board took the initial decision in March 2019, there had been no recommendation from the Executive nor any paper to support the discussion about withdrawal. Instead, the future funding of Legal Choices arose in the context of a discussion on the BSB's broader Communications and Public Engagement ("CPE") strategy, which was under review. The BSB Board was provided with a paper on the CPE strategy that set out the total programme budget for the team for the following year (£54k); a proposed budget cut of 30 per cent compared with the prior year (£79k).[15] Members discussed that it was questionable whether the BSB should continue to fund Legal Choices as the cost was 'excessive and provides poor value', although no context was provided for this statement other than a reference to modest webpage views.[16] The BSB told us in interviews and other material that it had been discussing the value of the Legal Choices investment as far back as 2017, but this was not referenced in minutes from the March 2019 meeting.[17] At this meeting, the Board agreed to give notice to stakeholders of its intention to withdraw from the project and to use the resources for other communications activity such as the BSB website.

33. The Board's decision was confirmed at its September 2019 meeting, with the minutes noting what was described as the poor performance of the Legal Choices product and its correspondingly described poor value for money. No evaluation of the performance was provided to support this and no paper was provided by the Executive to otherwise inform the Board's discussion.[18, 19] According to the minutes however, members were provided with oral updates on Executive meetings with the LSB, CMA and discussion with the Legal Choices Governance Board ("LCGB").[20]

34. The Board was told that the LSB and the CMA had requested that the BSB reconsider its decision, and the LCGB had offered to provide better insight into the quality and quantity of traffic to the site. It is unclear if the full Board was provided with a copy of a letter from the LSB Chair, dated 20 June 2019. For reference, this letter requested that the BSB write setting out the rationale for the decision, with our Chair raising issues of fairness for

[15] BSB Annex 1 CPE review and budget 28 March 2019.
[16] BSB Board private minutes 28 March 2019.
[17] Narrative from BSB on Legal Choices documentation.
[18] BSB Board private minutes 26 September 2019.
[19] We note that at the time of the BSB's withdrawal, the partnership had been in year two of developing the content of the website, with marketing planned for the third year, when it was expected traffic to the website would increase (and since has).
[20] BSB Board private minutes 26 September 2019.

the other regulators and the uncertainty about the future of the venture following the BSB's withdrawal of funding.[21]

35. Following confirmation of the BSB's decision, the LSB's Chief Executive wrote to the BSB on 9 October 2019, reiterating our concerns about its decision-making in the lead up to withdrawing funding from Legal Choices, namely that it had taken the decision to withdraw in the absence of a suitable alternative, and requesting that it set out its plans, in detail, for replacing the commitment to funding Legal Choices, including the ongoing financial commitment underpinning these plans. This letter was copied to the CMA.[22]

36. The BSB Board was presented with some high-level options for an alternative PLE strategy at its meeting of 31 October 2019, in preparation for a meeting with the LSB on 28 November 2019. There was a cover paper and slide pack which identified potential audiences and a possible action plan including creating new partnerships. The slides and cover paper noted that for 2019-20 there was £52k budgeted for Legal Choices, which could be re-assigned, but that there was no such provision for 2020-21 and beyond. The cover paper noted that £25k, coupled with existing investment in the BSB website, would 'probably be the minimum needed to deliver a PLE programme which the LSB and CMA would find credible'.[23] The slides did not provide anticipated costs associated with the list of potential actions identified, although there was a high-level summary at the end of the slides of how £25k might be deployed.[24]

37. The minutes captured that some members favoured a broader approach noting the BSB's statutory duties in respect of the regulatory objectives and the need to satisfactorily address the CMA's recommendations, while others favoured a modest approach that was pragmatic and focused on the Bar, its regulation and management of complaints. It was recorded that the Board needed to 'understand the costs of any options before making any definitive statement on budget' and agreed to 'defer further consideration of this topic until a strategy and partnerships are finalised'.[25] It is not evident that such information was provided to the Board to support it to discuss and agree a comprehensive PLE strategy, which is set out as an outstanding concern at paragraph 58. We understand that the Board was provided with the letters referred to at paragraphs 37 and 39, but the Board minutes we have seen do not capture any discussion or decisions made by the Board with regards to PLE strategy after October 2019.[26]

38. The BSB wrote to the LSB on 5 December 2019 advising that it was developing its PLE strategy, which would be published by the end of January 2020.[27] The BSB said that the aim of the strategy, amongst other things, would be to ensure consumers have access to a comprehensive whole of market overview. To achieve this, the BSB said it would pursue a dual strategy of partnerships with those with the most expertise in reaching those with poor legal knowledge and whose websites are already well used, and investing in the BSB website.

[21] Letter LSB Chair to BSB Chair re concern with Legal Choices decision-making – 20 June 2019.
[22] Letter LSB CEO to BSB Director General re concern with Legal Choices decision-making – 9 October 2019
[23] BSB Cover paper PLE 31 October 2019.
[24] BSB PLE strategy slides 31 October 2019.
[25] BSB Board private minutes 31 October 2019.
[26] We were not provided the minutes from the March 2020 meeting.
[27] Letter BSB Director General to LSB CEO re BSB PLE strategy development – 5 December 2019.

39. In November 2019, we carried out the annual performance assessments of regulatory bodies, including the BSB.[28] We assessed the BSB as not meeting the WL5 outcome of the Well-led standard. In response to this assessment, we asked the BSB to:

> *'provide detailed information including costed and specific deliverables which explain how the BSB proposes to fulfil its consumer obligations previously delivered through Legal Choices. We will also expect the BSB to provide records of the Board-level discussions which informed the decision to withdraw from supporting the service.'*

40. The BSB responded on 30 January 2020 setting out its progress on PLE activities, including redesign and development of new content for the public on the BSB website; discussing partnerships with trusted intermediaries including Advocate, Citizens Advice, GOV.UK, Law for Life, The Litigant in Person Support Network and Support through Court. It also planned to work with Law for Life to provide and/or support development of resources for litigants in person.[29] Specifically, we were provided with information about the planned costs and projected reach for the Law for Life resources over two phases of work. No PLE strategy was published on the BSB website in January 2020 as indicated in the BSB's letter from 5 December 2019. It has still not been published at the time of writing.

41. On 27 March 2020, we wrote to the BSB notifying of our intention to carry out a review under the Well-led standard of the performance framework,[30] in line with our published assessment process. We take this action when we do not have sufficient assurance about a regulator's performance.[31] Our letter made clear that while welcoming the BSB's commitment to developing its PLE strategy, we still had concerns about how the decision to withdraw funding from Legal Choices was made. Further, we said we remained unclear how the activities the BSB outlined would address its obligations in protecting and promoting the interests of consumers. We explained the particular concerns about: why it had prioritised some activities;[32] whether it could meet the CMA's recommendation to provide a whole of market overview; and what justification there was for substantial reduction in funding for PLE activities compared with its previous commitment to Legal Choices.

Stakeholder engagement

42. The BSB has been unable to provide any evidence of meaningful engagement with any stakeholders prior to taking the initial decision to withdraw from funding Legal Choices. This is perhaps not surprising, given that the March 2019 decision was not a planned decision based on papers or a recommendation. It is concerning that a decision which would have such a clear impact on stakeholders was not informed by any consultation or engagement in advance, in particular with consumer groups. Instead, the minutes for the March 2019 meeting refer to agreement to 'give notice to stakeholders of our intention to withdraw', rather than to consulting or engaging with stakeholders on the impact of the decision.[33] This appears to be inconsistent with the BSB's own statement on

[28] https://www.legalservicesboard.org.uk/wp-content/uploads/2019/12/191217-November-2019-performance-assessments.pdf.
[29] Letter BSB Director General to LSB CEO re update on PLE strategy development – 30 January 2020.
[30] Letter LSB CEO to BSB Director General advising of intention to carry out Well-led review – 27 March 2020.
[31] https://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/2017/08122017_Regulatory_Performance_Process_Document.pdf.
[32] The BSB identified that litigants in person were an area where there was apparent need for PLE, due to the number of external complaints made to the BSB. It also recognised the Law for Life/Advicenow is a well-known and widely used support service.
[33] BSB Board private minutes 28 March 2019.

engagement, namely that 'our [the BSB] priority is to ensure in each case that those most affected by our decisions have their voices heard in the decision-making process.'[34]

43. The BSB informed stakeholders of its decision in the following months, including the Solicitors Regulation Authority in April 2019; other regulatory bodies, the LSB and the Legal Services Consumer Panel ("LSCP") in June 2019; and the CMA in July 2019.[35] We note the late timing of engagement with the CMA in particular. We also note it does not appear that there was any engagement with consumers or consumer groups other than the LSCP in June 2019.

44. Since withdrawing from Legal Choices, the BSB has described its approach to PLE as being centred on building partnerships with a number of other organisations. The BSB has established partnerships with Law for Life (which was a pre-existing relationship), Support through Court and Refugee Action. However, it appears that there has been limited progress in discussions with Advocate; GOV.UK or Citizens Advice, with whom it said it was seeking to engage in its letter of 30 January 2020.[36]

45. In interviews, the BSB told us that it has found it difficult to build partnerships with other intermediaries such as Citizens Advice, which was attributed to Covid-19 hampering engagement and the impression that it [Citizens Advice] does not generally hear of complaints about problems with barristers. We were also told that the BSB's efforts to bring together the regulatory bodies to agree a joined-up PLE strategy for the sector had not progressed after the meeting convened in July 2020.[37] This is a matter of concern as it compounds the absence of alternative plans to deliver PLE at the time the decision to withdraw from Legal Choices was made.

Evidence, impact and risk assessment

46. Prior to taking the initial decision to withdraw funding from Legal Choices, there is no evidence that a risk assessment was undertaken; in the material provided that is relevant to the Board's decision in March 2019, including board papers and minutes, there is no reference to potential risks to the regulatory objectives.

47. In a risk register provided by the BSB, withdrawal from funding Legal Choices was raised as a strategic and reputational risk in June 2019, with an emphasis on the potential for a negative reaction from the CMA and LSB.[38] We have not seen any documented assessment of the risk of a negative impact on the relevant regulatory objectives leading up to either the March 2019 or September 2019 decisions. Subsequent to this, the brief risk assessment section of the PLE cover paper presented to the BSB Board on 31 October 2019 focused primarily on the reputational risk to the BSB that the LSB and CMA would take action against the BSB. There was no direct reference to any risk or potential impacts on the regulatory objectives, rather, only a passing reference to the BSB risk theme that 'affordability and lack of legal knowledge threaten access to justice'.[39] The slides presented at the meeting also makes no direct reference to risks to the regulatory objectives, although do make some reference to risks around public

[34] BSB Annex 2 CPE strategy 28 March 2019.
[35] Narrative from BSB on Legal Choices documentation.
[36] Letter BSB Director General to LSB CEO re update on PLE strategy development – 30 January 2020.
[37] BSB Executive (amended) interview records.
[38] BSB CMA transparency risk register – April 2020.
[39] BSB cover paper PLE 31 October 2019.

knowledge of legal issues, unresolved legal issues and consumers being unaware of how to compare providers or standards of service.[40]

48. The BSB's Regulatory Risk Assessment Policy provides that the BSB will assess risk 'at key points of [its] regulatory activity'.[41] It also emphasises that the BSB's focus is on impacts in terms of regulatory objectives and the Policy contains significant content about use of and reliance on evidence to inform assessments. The importance of risks to the regulatory objectives is also included in recruitment packs for the BSB Chair and Board members; 'we seek to identify all the potential risks that could prevent the Regulatory Objectives from being met.'[42] It follows that the decision to withdraw funding from Legal Choices should have been based on analysis of the relevant risks, by reference to the regulatory objectives and based on evidence. We did not find evidence that this occurred and therefore conclude that the BSB did not follow its own policies and procedures in this respect.

49. Overall, the BSB does not appear to have considered the extent to which the decision to withdraw funding from Legal Choices, in absence of an appropriate alternative, could have a negative impact on the regulatory objectives. Further, in developing an alternative approach for PLE, there was still no evidence of meaningful appreciation of any risks to the objectives. From the material we have been provided, this remains the case now as there is no risk register for the BSB's PLE approach or the BSB's CPE strategy.[43]

Budget and business planning

50. The BSB told us that the Board's focus on the cost-effectiveness and value for money of Legal Choices in March 2019 was unsurprising in the context of the reductions in the headcount of the CPE team and CPE budget, as well as reductions in the BSB's Policy and Strategy and Governance and Corporate Services divisions.[44] This was said to be necessary to meet the costs of work on reforms to bar training and the modernising regulatory decision-making project.[45] We note that in the 2019-20 Annual Report, the BSB had a £358k budget for Communications & Public Engagement. There was a total budget underspend of £158k (3% of total budget), or more than three times the amount of funding provided by the BSB to Legal Choices.

51. We did not have sight of the BSB's detailed budget so could not draw conclusions about the rationale for different funding priorities. However, we are concerned that in withdrawing funding from Legal Choices, the Board's decision appeared to be based primarily on cost, without supporting information that would have informed it of other relevant considerations such as risks to the regulatory objectives or accounts of affected stakeholders' views.

52. Further, when the Board confirmed its decision in September 2019,[46] it again did so without a supporting paper and had no costed information about an alternative approach(es), despite the Board agreeing an effective alternative plan was necessary

[40] BSB PLE strategy slides 31 October 2019.
[41] BSB Regulatory Risk Assessment Policy.
[42] BSB Board recruitment packs.
[43] Email from BSB Executive with additional information on risks – 16 December 2020.
[44] Narrative from BSB on Legal Choices documentation.
[45] Narrative from BSB on Legal Choices documentation.
[46] BSB Board private minutes 26 September 2019.

when it made its initial decision at the March meeting.[47] When the Board did receive high-level information about options and costs in October 2019, it was recorded in the minutes that, 'the withdrawal from Legal Choices was partly on the grounds of value for money so we [the BSB] ought to spend less than [what was] originally allocated for that project.'[48] Without any evidence or consideration of impact, it is not clear how value for money could have been assessed, which suggests that this was in fact about cost saving. We can only conclude that this was a decision taken in absence of a full understanding of the consequences of funding changes to individual BSB work programmes.

53. The Board said in October 2019 that it needed to understand the costs before making any definitive statement on budget.[49] We understand the Board was provided with costs for some PLE projects by way of the January 2020 letter to the LSB from the Executive referred to in paragraph 39, however this was provided as an annex and did not provide the basis for discussion by the Board. In responding to our interim findings, we were told that the Board subsequently approved a total 2020/21 budget for PLE in the usual budget round, although we note that in the 2020-21 business plan, no funding or activities for PLE were included beyond Q2.[50]

Internal audit report

54. The BSB Board commissioned an internal audit of the decision-making process it followed to withdraw funding from Legal Choices.[51] The auditors said:

> '*in our experience we have undertaken reviews where there have been substantive breakdowns in governance – from our review of papers and engagement this is not reflective of our overall experience with the BSB.'*

55. The report found, however, that at the point the BSB Board took the initial decision, while the auditor's view was that the decision was within the remit of the Board, it was not presented as an option for decision/consideration within the proposed paper and strategy and so there was no definite alternative strategy in place. It went on to say:

> '…*in our view a follow up paper setting out the proposed business case for alternate approaches, risks to the current and proposed Public Legal Education Strategy, stakeholder analysis and financial considerations should have been presented for review at the subsequent Board meetings. This would have allowed the development of the revised approaches (and costings) to have been considered in parallel to the process to withdraw from the funding of the Legal Choices website.'*

56. The report included recommendations for the future in respect of recording historical discussions and decisions and/or wider factors in papers provided to the Board; ensuring that any Board member objections to decisions and agreed actions are appropriately captured; the need for a clear articulation of how any relevant risks have been addressed in Board minutes; and having agreements for performance monitoring when working in partnership with others. One recommendation read:

[47] BSB Board private minutes 28 March 2019.
[48] BSB Board private minutes 31 October 2019.
[49] BSB Board private minutes 31 October 2019.
[50] https://www.barstandardsboard.org.uk/uploads/assets/3a76b28b-997e-48bb-85fdc92ec207c7c1/BSB-Business-Plan-2020-21-FINAL.pdf.
[51] Internal audit report on Legal Choices – September 2020.

> *'Where the Board decision arises indirectly from discussion and results in a change in a strategic approach, as was the case with the Legal Choices funding, there should be a subsequent paper (albeit this may only be required in summary form) capturing the key decision, risks, stakeholder assessments and any mitigating factors presented at the subsequent Board meeting for ratification.'*

These recommendations were accepted by the BSB Board at is 24 September 2020 meeting on the advice of the Executive, subject to minor adjustments related to the recommendation on capturing Board member dissent.[52, 53] The recommendations appear to be broadly sensible and we note the Governance Risk and Audit ("GRA") committee has been asked to monitor the implementation of the recommendations.[54]

Outstanding concerns

57. When we interviewed BSB Board members in December 2020, we noted that they did not reflect on or refer to the internal audit report's findings or recommendations. Despite having accepted the internal audit report and the core recommendations, all five Board members we interviewed said they felt that they had the information necessary to take the decision to withdraw funding from Legal Choices.[55] Based on the evidence we have seen and our analysis set out at paragraphs 28-55, this leaves us with concerns about the Board's apparent willingness to take key decisions in the absence of supporting material and raises concerns about the confidence that may be placed in such decisions.

58. It also raised concerns about the extent to which the BSB is embedding the recommendations in future practice and taking opportunities for learning. At the Board meeting we observed in November 2020, there was a paper on consumer engagement that asked the Board to decide 'whether the BSB should re-establish a Consumer Panel or whether alternative forms of engagement with consumers might be more effective'.[56] The paper provided a detailed explanation of the proposal and demonstrated a definition of a consumer in its broadest sense (in contrast to the narrow interpretation applied in the development of transparency standards), but was missing important options analysis, meaningful costings and value for money considerations. The Board challenged it and asked the Executive for additional information, although it subsequently agreed in principle to endorse the establishment of a BSB Consumer Panel, subject to further consideration.[57] While it was good practice from the Board to seek further information, it is unclear why, in the absence of this information, the Board felt able to, decide to re-establish a Consumer Panel, an approach which had been unsuccessful in the past, without confirmed costs or risk and impact analysis.[58] We are also concerned that the Executive did not appear to reflect on the findings from the recent audit report in preparing a paper which included detailed costings and options analysis if it was asking the Board to take a decision. We are pleased that the GRA has agreed that the BSB Board should undertake a self-evaluation of its compliance with the internal audit recommendations in mid-2021.

[52] BSB Board paper recommending acceptance of Crowe recommendations 24 July 2020.
[53] BSB Board private minutes 24 September 2020.
[54] BSB Board private minutes 24 September 2020.
[55] BSB Board member interview records (amended versions, where relevant).
[56] BSB Board paper on consumer engagement panel 26 November 2020.
[57] BSB Board public minutes 26 November 2020.
[58] The paper suggested that, 'If a Consumer Panel of say a dozen members were to meet for half a day perhaps four times a year at APEX rates with some allowance for expenses this might cost in the region of £10,000 pa. We would not expect much by way of additional resources needed from IT or HR and we would aim to service the Panel from existing staff resources.'

59. The BSB has provided no evidence that it has a coherent strategy in place to deliver its PLE programme, which means it is unlikely to meet the CMA's recommendation to provide its contribution to present a comprehensive whole of market overview for consumers. While the BSB Board was provided the letters from the Executive referred to in paragraphs 37 and 39, it appears that the Board has not been given the detailed information necessary to decide what constitutes agree a suitable alternative to funding Legal Choices, despite taking the decision to withdraw from the project almost two years ago. There is no evidence that the Board, at the time of the decision nor at any point subsequently, has been provided with a complete assessment of the different options and their compatibility with the regulatory objectives; costs; risks and impacts on different stakeholders, particularly consumers who require access to transparent information about legal services.

(ii) Transparency standards

60. The CMA recommended in its 2016 market study that regulatory bodies introduce a new minimum standard for disclosures on price and the service provided, and develop and disseminate best practice guidance, including a requirement for providers to publish relevant information about the prices consumers are likely to pay for legal services.

61. For the purposes of the review, we were provided with information including relevant board papers and minutes, Programme Board minutes, risk registers and a communications plan. We also accessed publicly available information. This information enabled the LSB to consider the decision-making process that the BSB followed in determining the scope of the transparency standards that came into effect on 1 July 2019.

62. As we did above at section 2.b)(i), we focused on the decision-making processes and governance practices of the BSB Executive and Board and not the outcome of the decision. This analysis is distinct from the consideration and approval of the application for changes to the BSB rules on transparency given by the LSB on 12 June 2019.[59] The LSB's statutory approval of the change to the BSB regulatory arrangements necessarily focused on the application and information provided to support the proposed change and we were satisfied that the grounds to refuse the application set out in Schedule 4 of the Act were not engaged.

The scope of the rules

63. During 2017, the BSB developed plans to require some barristers to disclose information about their services to consumers, including information about pricing and charging models, hourly fees, indicative fixed fees, indicative timescales and a description of services. The BSB proposed that it would introduce mandatory requirements for barristers and entities undertaking public access work and apply minimum disclosure requirements to referred work where a consumer was entitled to complain to the Legal Ombudsman ("LeO"). The BSB also suggested that there were some other specific areas of work where minimum disclosure requirements could apply, including high-risk practice areas such as immigration, crime and family.[60]

[59] https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2019/20190614_BSB_Transparency_Decision_Notice.pdf.
[60] https://www.barstandardsboard.org.uk/uploads/assets/fdb657e3-a24c-45ac-aa05a4706f524534/cmaconsultationva988967.pdf.

64. This was a wide-reaching and ambitious policy proposal that went beyond what some of the other regulators in the sector were aiming to do in their regulated communities. The BSB said in its 2017 Action Plan that it had taken a view that it should not necessarily confine itself to looking only at public access work in recognition of the CMA's comments that 'the solicitor's role as an intermediary may be strengthened if there are general improvements in the level of transparency in the sector.'[61] In the consultation paper, which the BSB said was informed by discussions with consumer organisations, Bar representative groups and individual barristers, the BSB said it wanted to have the greatest impact in terms of consumer benefit. The BSB said that by adopting the CMA recommendations it would be promoting the regulatory objectives of protecting and promoting the consumer interest, improving access to justice and promoting competition in the provision of services.[62]

65. The BSB's public consultation received 25 responses, 23 of which were from the profession and one each from the LSCP and LeO. LSCP and LeO both broadly supported the proposals,[63] with the LSCP saying in its response that [the proposals] had the potential to advance transparency in the sector in the interests of consumers.[64] There was considerable opposition from the profession, however. For example, in a paper provided to the BSB Board at its 22 February 2018 meeting, the Executive reported that,

> *'Many responses from the profession argued that the nature of the disclosure envisaged by the CMA's recommendations is not appropriate to the majority of barristers' services. There were also concerns about potential unintended consequences such as barristers publishing aspirational, rather than realistic, rates.'*
>
> *'Responses from the profession disagreed that barristers should be required to provide first tier complaints data on their chambers' website (i.e. data on complaints which have been made to them directly in the first instance (before they may have been made to the LeO)).'*
>
> '*There was a general view among the profession that as barristers undertaking referral work are instructed by solicitors, there is no need for significant further consumer protection.'*[65]

66. The BSB substantially revised the scope of the transparency standards following the consultation, limiting the new mandatory requirements to the more standardised services provided by public access barristers direct to the public and whose clients were most likely to shop around.[66] This significantly narrowed the definition of consumers and application of the rules compared to what it proposed in its consultation.

67. When the BSB Board made this decision, there was no evidence of discussion in the material we have seen of the significance or potential impact of the changes, for

[61] https://www.barstandardsboard.org.uk/uploads/assets/749c3da4-e027-43ab-b422035b29c0e3bb/CMA-Action-Plan-FINAL.pdf.
[62] https://www.barstandardsboard.org.uk/uploads/assets/fdb657e3-a24c-45ac-aa05a4706f524534/cmaconsultationva988967.pdf.
[63] https://www.legalombudsman.org.uk/media/ogxf15ms/leo-response-to-regulator-transparency-consultations.pdf.
[64] https://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/Consultation_BSB_CMA_-_final_vs.2_.pdf.
[65] https://www.barstandardsboard.org.uk/uploads/assets/862e8024-db22-4ac4-aab259f6048ac460/bsbpart1agenda180222.pdf
[66] https://www.barstandardsboard.org.uk/uploads/assets/fdb657e3-a24c-45ac-aa05a4706f524534/cmaconsultationva988967.pdf.

example, no reference to risks to the regulatory objectives in adopting a different approach to what had been previously agreed as the proposal upon which to consult.[67] At the 22 February 2018 BSB Board meeting, members queried if the CMA could impose compliance with its recommendations, to which the Executive replied that it could but was unlikely to if the BSB could demonstrate reasonable progress towards greater levels of transparency. Members also commented on the single response from a consumer body and queried if others were contacted, to which the Executive responded consumer groups had been contacted but engagement had proved difficult as they did not consider barrister services as a priority area. The minutes do not suggest that the Board was not satisfied with these responses from the Executive.

68. We note that five members including the lay Chair were absent for this discussion, which was chaired by the Vice-Chair who was a non-lay member. It is not clear if there had been any comments provided in absentia, which the BSB governance procedures provide for,[68] but it was a significant decision to have taken with a reduced, albeit quorate, number of members.[69] As a key consumer focused initiative, it is also unfortunate that the decision was taken with a non-lay Chair.

Stakeholder engagement

69. As set out at paragraph 64, the LSCP and LeO provided the only responses to the consultation that were not from the profession and both generally supported the proposals. The LSCP stated publicly that it was 'very disappointed' with the BSB's position after it announced it was revising the scope of the transparency standards.[70] In a later response to the BSB's consultation on the draft rules, the LSCP said the BSB's approach was 'not sufficiently aligned to the needs of consumers' and that the BSB had 'found a very complicated way to restrict the transparency requirements to a few providers.'[71]

70. We found no evidence that the BSB engaged with any other consumer groups prior to or after taking the decision to revise the scope of its proposals. It did conduct consumer research in 2018, but this was after the scope had been revised and the research focused on testing approaches to disclosure within the parameters of the revised scope.[72]

71. We found no evidence of any engagement with solicitors, despite the BSB noting in its 2017 Action Plan that the CMA had highlighted the role of solicitors as intermediaries. We acknowledge the referral nature of the majority of the Bar, but there are users of barrister services and their clients, where this is the case, who may be equally entitled to information on price, fees and costs. The BSB appeared to be persuaded by the view of the profession that solicitors and other intermediaries would not benefit from increased transparency (see paragraph 64), yet there is no evidence of this theory having been tested through engagement with solicitors or other intermediaries. It is concerning that

[67] https://www.barstandardsboard.org.uk/uploads/assets/e7240224-9cb1-4439-a4b8e035091b69f3/04annexapart1minutes180222.pdf.
[68] BSB Governance Manual October 2019.
[69] BSB Board public minutes 22 February 2018.
[70] BSB CMA Programme Board minutes 19 April 2018.
[71] https://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2019/20190110_BSBs_Consultation_On_Rules_For_Transparency_Standards.pdf.
[72] https://www.barstandardsboard.org.uk/uploads/assets/2f51d889-9f4b-4a69-b5d1425d048cdaa1/summaryofresponsestothebsbspolicyconsultationontransparencystandardsupdated.pdf.

views of the referral Bar on what solicitors, as their professional clients, want appears to have been accepted without any successful engagement with these clients to understand their views and therefore to provide evidence to support the reasonableness of the BSB assumption.

72. The BSB's approach to stakeholder engagement on this project raises concerns that the BSB is not achieving the right balance between the interests of the public and consumers that the BSB serves, and those of the profession. This is in line with the concerns we have about the decisions relating to Legal Choices and the delivery of PLE activities as set out at paragraphs 41-44. The BSB's duties of protecting and promoting the public interest and interests of consumers are clearly set out in the Act. The Act places considerable emphasis on consumer interests; in the regulatory objectives, the establishment of the LSCP and the redress provided by the Office for Legal Complaints. The BSB's focus should be within that context, however, the thrust of the BSB decision to revise the scope of its transparency standards suggests that the interests of the profession were the predominant factor in its decision-making. It did not do enough to put the views of the profession in appropriate perspective through meaningful and effective engagement with consumers or intermediaries and professional clients. Further, it is concerning that the Board agreed to rescope its proposals in the clear absence of effective input from consumers and clients.

Evidence, impact and risk assessment

73. The influence of the profession was recognised as a risk when the BSB recorded in the transparency standards project risk register that, 'we [the BSB] are perceived to have been "captured" by the profession.' This was recorded as a strategic and reputational risk in January 2018, which was said to be mitigated through careful stakeholder management, although it is not clear what specific activities this would entail or how the success of the mitigation would be measured.[73]

74. We found no evidence that the BSB identified, assessed and took steps to address any potential risks to the regulatory objectives from revising the scope of the transparency standards.[74] The paper that was provided to support the Board's decision referenced the general risk that many consumers lack sufficient information to make confident, informed decisions about the value and affordability of legal services, but it did not identify any specific risks from the revised proposals compared with the proposals the Board had previously approved and were consulted on.[75]

75. It is difficult to reconcile this approach to risk assessment with the fact that the revised approach was a significant change from what the Board had previously proposed and greatly limited the extent of information that would be made available to consumers. It appears that the BSB was more focused on reputational risk, rather than risks to the regulatory objectives, when taking the decision to rescope the transparency standards. We observed a similar focus on reputational risk above others when the BSB took the decision to withdraw funding from Legal Choices, as set out at paragraph 46.

[73] BSB CMA risk register – July 2018.
[74] BSB CMA risk register – July 2018.
[75] https://www.barstandardsboard.org.uk/uploads/assets/862e8024-db22-4ac4-aab259f6048ac460/bsbpart1agenda180222.pdf.

Outstanding concerns

76. The identification of the perception of regulatory capture as a risk provides some reassurance that the BSB is aware of the extent to which its decisions could be viewed to be more sympathetic to views from the profession. However, it compounds the findings set out in section 2.b)(i) on the lack of focus on consumer interests in taking decisions about Legal Choices and PLE. In this context, it is relevant that the transparency decision was taken with a barrister acting as Chair (in the absence of the lay Chair), albeit with a lay majority. We also note a perception of barrister member dominance on the Board, which emerged in our analysis of material provided for the review.[76] This perception of undue influence from the profession was not shared in interviews with BSB Board and Executive members, who stressed that all Board members contribute to decision-making at the BSB.

(iii) Modernising regulatory decision-making

77. In its 2016-2019 Strategic Plan, the BSB committed to,

> *'centralising work to assess incoming information and reports about activity in the profession and market as a whole'* and *'aligning regulatory decision-making to the Regulatory Objectives more consistently and clearly through improvements to the governance of independent decision-making.'*

78. The modernising regulatory decision-making work programme was designed to give effect to this objective and included the establishment of a Centralised Assessment Team and an Independent Decision-Making Body to replace the Professional Conduct Committee and Authorisation Review Panel.

79. For the purposes of our review, we requested information from the BSB, including relevant Board papers and minutes, Programme Board minutes, risk registers. This was so that we could understand the decision-making processes the BSB followed in this work programme.

Key observations

80. Overall, the BSB appeared to follow its governance procedures in the modernising regulatory decision-making project. For example, the paper that was provided to the BSB Board to approve the consultation paper for the project at its 22 February 2018 meeting referenced relevant budgetary, risk and stakeholder considerations. There was also a clear identification of how the changes proposed would promote the regulatory objectives to protect and promote the public interest and promote and maintain adherence to the professional principles.[77] The consultation paper outlined how the proposed changes would improve independent governance and what the potential benefits of this would be, including for the public.[78] Relevant Board minutes provided are detailed and appear to capture what was discussed and agreed clearly, including referring to previous decisions made by the Board where relevant.[79]

[76] Source withheld due to confidentiality.
[77] BSB transparency Board paper 22 February 2018.
[78] https://www.barstandardsboard.org.uk/uploads/assets/0974ca73-8e38-4cb1-9c3b6439cd51dea5/modernisingregulatorydecisionmaking-consultationpaper.pdf.
[79] BSB Board minutes from the period (19 July 2018; 25 October 2018), for example.

81. We note that the BSB received no responses from consumers or consumer groups during consultation and it is not clear if there was any other engagement with consumers throughout the work programme. This is consistent with the LSB findings in respect of limited engagement during the transparency work programme as set out in sections 2.b)(i) and (ii). While this type of project may naturally be of more interest to barristers, in terms of encouraging consultation responses from other stakeholders, as a Well-led regulator, the BSB should seek a broad range of perspectives to inform its decision-making.

c) How decisions are communicated

82. Our third line of enquiry was designed to seek assurance that appropriate consideration is given to when, how and to whom key regulatory decisions need to be communicated. This includes consideration of the BSB's engagement with key stakeholders. Given that communication and engagement is central to all of the BSB's work, we have considered it in the analysis of the other lines of enquiry. This section confirms findings covered elsewhere in the report.

83. The BSB provided information about its communication and consultation with stakeholders during the period covered by the review, such as its regulatory update to barristers and consumer newsletter. It also provided its CPE strategy, which aims to support the BSB's delivery of its statutory objectives and strategic plan.[80]

Communications and public engagement

84. The CPE strategy sets out that some of the regulatory objectives (e.g. adherence to professional principles) primarily result in engagement with the profession, whereas others (e.g. protecting and promoting consumer interests and improving access to justice) rely on the BSB's messages reaching beyond the legal profession, including to consumers.[81]

85. We found limited evidence that the BSB meaningfully engages with consumers or groups that represent their, or indeed broader public, interests. As set out in paragraphs 41-44, 68-71 and 80, the BSB did not take proper account of consumers and other relevant stakeholders' views in taking the decision to withdraw funding from Legal Choices, developing its PLE approach and determining the scope of its transparency standards, as well as in the modernising regulatory decision-making work programme.

86. According to the BSB's 2019-20 stakeholder map, it seeks to engage with consumer organisations such as Advice UK; Advice Service Alliance; Citizens Advice; LSCP; Which?; Law Centres Network; Law for Life; Legal Action Group; and the Personal Support Unit. Of these, the BSB has only worked with Law for Life on PLE and engaged with the LSCP on the transparency work. This suggests that the BSB has not been effective in building partnerships with consumer organisations, which it said is central to its PLE approach, or in increasing its engagement with a more diverse range of perspectives, including consumers, which was a key aim of the revised CPE strategy.[82] We note that the BSB said Covid-19 has had some impact on its ability to engage with stakeholders, for example, Citizens Advice.

[80] BSB Board paper CPE 28 March 2019.
[81] BSB Board paper CPE 28 March 2019.
[82] BSB Board paper CPE 28 March 2019.

87. Engagement with consumers and their representatives, including solicitors or other intermediaries where appropriate, should be seen as an opportunity to gather information about the impact of work programmes, which is an important part of the process to inform regulatory decisions. We refer to previous comments that we made to the BSB about engagement with consumers in the November 2019 performance assessment:

> *'We acknowledge that the predominantly referral nature of barrister services means that services are delivered to consumers primarily through other providers, however, we consider that providing good quality information to the public will create the opportunity to expand public access work. Moreover, we also see barristers as being part of an important value chain delivering services to an end user, whether that is an individual, a business or other organisation. We consider it important for regulators and those whom they regulate to see that value chain primarily from the point of view of that end user and not that of the profession being regulated.'* [83]

88. We note the BSB's plans to establish a consumer panel, which the BSB Board agreed to in principle at the meeting that we observed in November 2020. While it is positive that the BSB is seeking to expand its access to consumers, it is important it addresses the points raised by the BSB Board about avoiding duplicating work of the LSCP and broadening the membership so as not to replicate the BSB's former panel, which was disestablished.[84]

d) The BSB Board's oversight and responsibility for performance

89. At the outset of the review, the BSB challenged the statutory and operational legitimacy of the review in ways that went beyond the reasonable and constructive enquiries that might be expected of a regulator that understood the framework of accountability within which it operated. It has been difficult to reconcile the BSB's response with our expectations of co-operation.

90. We requested information about the BSB's handling of LSB regulatory performance assessments as part of the review because it was not clear what the governance of performance related matters at the BSB was.

The Board's oversight of performance

91. In November 2020, the BSB Board assumed oversight and responsibility for performance, which had previously been delegated to the Planning, Resources and Performance ("PRP") sub-committee. The PRP was simultaneously refocused as the Strategic Planning and Resources Committee. This means that during the period covered by the review, the BSB Board carried out limited oversight for performance matters.

92. The delegation had been an unusual arrangement. A board typically has oversight and responsibility for performance so that it can be proactive in identifying and addressing any issues or opportunities for performance improvement. The delegation also appears to have created confusion about which of the committees had responsibility and

[83] https://www.legalservicesboard.org.uk/wp-content/uploads/2019/12/191217-November-2019-performance-assessments.pdf.
[84] Board public minutes 26 November 2020.

oversight, as some performance matters were seen to be legitimate interests for both committees.[85]

Regulatory performance assessments

93. The LSB's performance framework has five standards, with the Well-led standard placing specific expectations on the board of a regulatory body as well as on the executive. As such, some degree of consideration at board level is anticipated in order that a board is able to provide assurance to the LSB as oversight regulator that it is an effective regulator. We carry out annual assessments and where we consider a standard is not met then a course of action is agreed with the regulatory body to remedy the shortcoming and meet the standard required.

94. During the period covered by the review, it appears that the GRA had primary responsibility for overseeing agreed actions from the performance assessments, although it was not clear when and how it would do this and at which point the PRP or BSB Board would be sighted for consideration of the actions, if at all. [86] We note, for example, that information about the November 2019 performance assessment was noted in the Director General's January 2020 strategic update at the 31 January 2020 BSB Board meeting.[87, 88] The minutes do not record any discussion of the issues raised.[89]

95. We understand that it is standard practice for the BSB Board to be updated on performance assessments via the strategic update, which the BSB said is in part due to the short timeframe we provide for consideration of LSB assessments.[90] The timing we provide is for fact-checking but should not preclude regulatory boards from engaging with the performance assessments once they have been finalised.

96. While the BSB Board was sighted on the 2019 performance assessment, it is unclear whether the BSB Board was sufficiently engaged on the performance issues we raised in the LSB letter of 9 October 2019 that indicated the link to performance related to the Legal Choices withdrawal decision. This includes the concerns relevant to the Well-led standard of the performance framework that were set out in the November 2019 assessment, which are central to this review.

97. We welcome that the Board has now assumed oversight and responsibility for performance and that the Executive plans to conduct six-monthly reviews of the BSB's compliance with the performance framework in the future.[91]

3. Conclusion

98. The Executive Summary outlines the findings from the review which are:

Governance

[85] BSB Board and Executive member (amended) interview records.
[86] BSB GRA minutes 24 July 2018.
[87] https://www.legalservicesboard.org.uk/wp-content/uploads/2019/12/191217-November-2019-performance-assessments.pdf.
[88] BSB Director General Strategic Update 30 January 2020.
[89] BSB Board private minutes 30 January 2020.
[90] Email from BSB Executive on BSB performance remit – 25 January 2021.
[91] Email from BSB Executive on BSB performance remit – 25 January 2021.

1) We found little evidence of meaningful consideration of relevant regulatory objectives when decisions were taken.
2) The BSB allowed the interests of the public and consumers to be outweighed unduly by those of the profession when taking key decisions.
3) The decision-making process for major decisions did not follow the BSB's own procedures.
4) On several occasions the Board was not provided with sufficient information to support key regulatory decisions.
5) The governance architecture is fragmented and difficult to access, with some gaps and out-of-date components.

The Board

6) We have concerns about the Board's apparent willingness to take key decisions in the absence of supporting material and concerns about the confidence that may be placed in such decisions.
7) The BSB places a disproportionate weight on the impact of its work on the profession and pays insufficient regard to the impact on the public, including consumers.
8) The Board did not take responsibility for the organisation's performance within the statutory framework of regulatory objectives and performance obligations within which it operates.

The Executive

9) The Executive did not consistently provide the Board with the information it needed to take effective decisions.
10) The BSB stakeholder engagement strategy has not been effective in building partnerships with its target organisations relevant to its PLE activities and the transparency standards project.

99. The review was carried out under the performance framework. The BSB's last assessment in November 2020 showed that it had failed to meet the standard required in WL5 (The Board considers its own effectiveness in ensuring the regulator is a well-led, independent, transparent, and consumer-focused organisation, which acts in a way that is compatible with the regulatory objectives). Following this review and based on the findings set out above, we have formed the assessment that the BSB additionally does not meet the required standard in the following outcomes of the Well-led standard:
    - WL1 (The Board/Council holds the executive to account for the regulator's performance to ensure that it operates effectively and efficiently and in a way which is compatible with the regulatory objectives).
    - WL3 (The regulator is transparent about its own: decision-making; regulatory approach; the risks it and its regulated community faces and how these are being mitigated; performance; regulated community and related markets; financial costs).
    - WL6 (The regulator communicates with a diverse range of stakeholders, for example its regulated community, the approved regulator, its representative body(ies), students, consumers, government, etc. to: account for its plans, progress and performance; ensure appropriate and accurate information is effectively taken into account in its work).

100. This is set out in the revised July 2021 performance assessment available on our website.

Next steps

101. In July 2021, the BSB Board accepted the findings in relation to the decisions reviewed in this report and restated its commitment to the regulatory objectives. It also accepted that it must do more to convince the LSB and other stakeholders that its leadership and governance substantiate this commitment and conform to the Well-led standard. Accordingly, the BSB Board committed to an Action Plan, which is available on our website.

102. We welcome the BSB's response to the findings. Accordingly, in our performance assessment of the BSB (see paragraph 99) we have recorded the actions that we see as relevant to each of the outcomes that we have assessed as 'not met', along with some additional expectations on some outcomes. We will monitor the BSB's progress in delivering against its action plan and seek evidence that it is meeting all of the outcomes that we expect of a well-led regulator under our regulatory performance framework.

4. Annex A

a) Background

1. In November 2019, we carried out our annual performance assessment of the BSB under the performance framework. As the statutory oversight regulator for legal services, we routinely assess the performance of regulatory bodies, including the BSB, as part of our ongoing monitoring of regulators' performance against standards of regulation under the Act. At that time, we assessed that the BSB did not meet outcome WL5 of the performance framework,

> *'the Board considers its own effectiveness in ensuring the regulator is a Well-led, independent, transparent, and consumer-focused organisation, which acts in a way that is compatible with the regulatory objectives.'*

2. In the assessment, we said:

> *'The LSB considers the provision to consumers of good quality information about legal services is a key element of improving access to justice, one of the regulatory objectives contained in the Legal Services Act 2007. In our view, the BSB's decision to withdraw funding from Legal Choices without a clear commitment to investing in alternatives is a diminution of the BSB's commitment to this objective and therefore its performance in respect of this outcome…In their letter dated 5 December (in reply to our letter of 9 October), the BSB informed us that it is currently devising a new public legal education strategy. We await detailed information on the ways the BSB proposes to address its obligations currently delivered through Legal Choices.'*

3. Information provided by the BSB in December 2019 and January 2020 did not provide sufficient assurance that the BSB met WL5. We determined it was necessary to carry out a review of the BSB's performance under the wider Well-led standard and advised the BSB of our intention to carry out the review.[92] The performance framework provides for a more in-depth review when our ongoing monitoring identifies that we do not have sufficient assurance about an area of a regulator's performance or identify an area as one of concern.

b) Process

4. We note that formal commencement of the review began in September 2020. We had initially planned to begin the review in July, but agreed to change the timing to allow the BSB time to respond to the impact of Covid-19 on the profession. We also note that the BSB made other requests, including that we not carry out the review and instead rely on the BSB's external review of its governance arrangements planned for 2021. We did not consider that this was appropriate and that we needed to seek our own assurance.

5. We also determined that it was not necessary to commission an independent governance expert to conduct or have input into the review, as requested by the BSB. This was because we have the remit to conduct our own reviews and appropriate internal governance expertise to do so.

[92] Letter LSB CEO to BSB Director General advising of intention to carry out Well-led review – 27 March 2020.

6. We followed the steps set out below to carry out the review.

Step 1: Pre-review discussion

This was an opportunity to discuss and agree the scope of the review with the BSB. We proposed that the review would focus on the BSB's decision-making processes covering a period of two years between April 2018 and March 2020, to which the BSB agreed. We also discussed the key lines of enquiry, which are set out at c) of this Annex.

Step 2: Terms of engagement letter

We finalised the scope and timeline for the review.

Step 3: Review initiation meeting

This was an opportunity to discuss and agree the information to be requested under Section 55 of the Act.

Steps 4 and 5: Request and provision of information

The BSB provided the following information as requested:

- general corporate documents, including terms of reference for the BSB Board and Committees, Scheme of Delegations and risk management policies
- Director General reports (strategic and operational)
- documents relating to specific decisions, including to withdraw from Legal Choices, the transparency project, modernising regulatory decision-making and LSB regulatory performance monitoring and assessment
- opportunities to interview the BSB senior management team and members of the BSB Board.

Step 6: Fact-finding and analysis

We analysed the information provided by the BSB, including following up for additional information where required.

We interviewed the following BSB Executive and Board members:

- Mark Neale, Director General
- Wilf White, Director of Communications and Public Engagement
- Ewan MacLeod, Director of Strategy and Policy
- Rebecca Forbes, Head of Governance and Corporate Services
- Baroness Tessa Blackstone, Chair
- The Honourable Mrs Justice Ellenbogen, former Vice Chair
- Steven Haines, Board member
- Andrew Mitchell QC, Vice Chair
- Kathryn Stone OBE, Board member.

We also interviewed Malcolm Cree, the Chief Executive of the Bar Council.

Step 7: Interim report

The review team, with support from inhouse governance colleagues, prepared an interim report setting out our findings and recommendations. Our Senior Leadership Team, including our General Counsel, reviewed the report. It was also shared with a

panel of LSB Board members, which provided constructive challenge. The full LSB Board discussed the interim findings report. It was then provided to the BSB for review and comment.

Step 8: Final report and publication

Following consideration of the comments received from the BSB, we will publish the final report.

c) Lines of enquiry

7. The aim of the review was for the LSB to gain assurance that the BSB meets the standard of a Well-led regulatory body with decision-making processes that are effective and informed by appropriate evidence; take account of the likely impact of the decisions on the regulatory objectives and in particular consumers; and have regard to the Better Regulation Principles to be transparent, accountable, proportionate, consistent and targeted.

8. We devised the following lines of enquiry in consultation with the BSB:

Line of enquiry 1: How the governance framework supports decision-making

Under this line of enquiry, the LSB would seek assurance that:

- there is clarity as to the role of its Board and the relationship between the Board and Executive
- it is following appropriate protocols and arrangements for decision-making.

The LSB proposes that it may seek the following sources of information to assess this:

- terms of reference for the Board and any of its sub-committees
- Board member induction material and practice
- the decision-making delegation agreements (or equivalent) between the Board and Executive
- the decision-making protocols (or equivalent) governing decisions the Executive takes, including the mechanisms to seek Board agreement where relevant.

Line of enquiry 2: How the Executive and the Board make and implement decisions

Under this line of enquiry, the LSB would seek assurance that decisions the Executive and the Board make:

- are based on appropriate evidence and analysis and that proposals are properly evaluated
- include consideration of the impact of the decision on the regulatory objectives, in particular, protecting and promoting the interests of consumers
- take account of the Better Regulation Principles
- are informed by an assessment of risk
- take account of stakeholder views and feedback
- are accompanied by appropriate steps to monitor and evaluate the impact and outcomes.

The LSB proposes that it may seek the following sources of information to assess this:

- a sample of agendas, papers and minutes from Executive meetings

- a sample of agendas, papers and minutes from Board meetings
- conflict of interest policy and board member register of interests
- LSB attendance at Executive and Board meetings as an observer
- interviews with selected Board and Executive members
- risk management policies and procedures.

Line of enquiry 3: How decisions are communicated

Under this line of enquiry, the LSB would seek assurance that:

- Appropriate consideration is given to when, how and to whom key regulatory decisions need to be communicated

The LSB proposes that it may seek the following sources of information to assess this:

- annual reports and business plans
- communications strategy
- policies and procedures on publication of Board material
- consultation policy
- Press releases and other communications around a sample of key regulatory decisions.