

Robin Geddes (Regulatory Policy Manager), Legal Services Board
By email, robin.geddes@legalservicesboard.org.uk

22 April 2021

Response to the Legal Services Board (LSB) discussion paper

Thank you for the discussion paper on quality indicators in the legal services market. Please find the Bar Standards Board (BSB)'s responses at Annex 1.

The BSB is committed to increasing transparency for consumers to provide them with the information, knowledge and tools they need to make effective choices in relation to legal services providers. This is key to ensuring that the legal services market functions well for consumers and supports our regulatory objectives of protecting and promoting the public interest, improving access to justice, protecting and promoting the interests of consumers and promoting competition in the provision of services.

As a result of the Competition and Markets Authority (CMA)'s review of the legal services market in 2016, we have implemented a number of changes to our regulatory arrangements to increase the availability of information for consumers. This has included setting mandatory transparency rules for all self-employed barristers, chambers and BSB entities, setting additional transparency rules for those undertaking Public Access work and publishing additional best practice on transparency for all (going beyond the mandatory rules). We have also published guidance encouraging barristers to follow good practice when receiving feedback, and a guide for the public on using and leaving feedback about barristers.

We welcome this discussion paper and look forward to engaging further on this topic. Our Business Plan for 2021-22 commits us to collaborating with other legal regulators to understand the possible benefits of quality indicators and pilot new approaches, and to developing a regulatory approach to enabling barristers to better use consumers' feedback about their services and to improve the indicators available to those seeking to engage the Bar.¹ We are also a member of the regulators' quality indicators pilot working group and are planning to conduct a pilot in employment law practice. As an evidence-based regulator, it is important for us to collect information to inform proportionate regulatory interventions. In our research programme for 2021-22, we will gather evidence through a) evaluating the impact of the new transparency rules on consumers and b) independent qualitative research to understand the expectations consumers have of barristers (including what quality indicators consumers find useful).

Please do not hesitate to get in touch with Rupika Madhura (Head of Policy and Research) on RMadhura@barstandardsboard.org.uk should you require any further information.

Yours sincerely,

Ewen Macleod (Director of Strategy and Policy)
Bar Standards Board

¹ Those who engage with barristers are not limited to consumers. As consumers are largely referred to barristers, for the great majority of consumers this must also include solicitors or other intermediaries.

Annex 1 – BSB response to questions in LSB discussion paper

1. We are proposing to think about quality in terms of these dimensions: technical quality, customer service and outcomes. What do you think about these elements and are there others we should consider?

The BSB agrees that quality should be thought of terms in technical quality, customer service and outcomes, although for consumers it is clear that service quality will not necessarily equate to technical quality. The BSB also agrees that a related dimension of choice is what providers include within their service offer (albeit this is different in nature from the quality of legal services). The BSB has addressed this by introducing (i) mandatory service transparency rules for all self-employed barristers, chambers and BSB entities, and (ii) additional service transparency rules for self-employed barristers undertaking Public Access work and BSB entities supplying legal services directly to the public.

We have commissioned independent qualitative research on consumer expectations of barristers with 62 participants across interviews and focus groups and are also undertaking research on the impact of our transparency rules on consumers. If more information comes to light on the different dimensions of quality as a result of this research, then it will be used to inform our work on quality and we will share it with the LSB.

2. We are proposing to encourage use of these types of information: objective data, consumer feedback and general information about providers. What do you think about these types of information and are there others we should consider?

The BSB agrees that the use of objective data, consumer feedback and general information about providers should be encouraged, while recognising that there are likely to be different views on the merits of individual examples within these categories and that consumers are likely to consider various pieces of information together. For example, the number of years a self-employed barrister has been practising would not give a full picture of their experience if they previously practised as a solicitor for many years and then transferred to the Bar. The independent qualitative research we have commissioned on consumer expectations of barristers will include evidence of what quality indicators consumers find useful.

The BSB also notes that participants in the LSB's Public Panel research focused mostly on consumer feedback and were less likely to use objective data. The BSB requires websites of self-employed barristers, chambers and BSB entities to display links to the decision data on the Legal Ombudsman's website, and the Barristers' Register on the BSB's website (which displays disciplinary findings). We believe that regulatory requirements such as these have a role to play in making objective data better known, better understood and more readily available. The research on the impact of our transparency rules will provide us with information on whether these regulatory requirements are being used by consumers and have had the desired effect.

3. Which groups of consumers and/or types of provider should action in this area focus on?

The BSB agrees that regulatory interventions should be targeted at legal services providers delivering services to individual consumers and small businesses, reflecting the focus of the CMA's review and the fact that these consumers are more likely to benefit from regulatory interventions in relation to quality indicators. It may also be beneficial (as the discussion paper suggests) to implement short-term measures (for example, participation in pilots) sooner and make initial progress, paving the way for longer-term measures which may take more time to implement (for example, mandatory requirements if such regulatory interventions are justified on the basis of evidence). Such pilots will generate a useful evidence base. The conveyancing pilot being conducted by the SRA, CILEx Regulation and the Council for Licensed Conveyancers is not directly relevant to the Bar, but we are interested in learning any lessons that might emerge from it. We are planning to conduct a pilot in employment law practice and depending on how this progresses, we will consider extending the pilot to other areas such as family and immigration law.

4. Should there be a base level of transparency on quality across the market and enhanced transparency in priority service areas? What should a base level of transparency on quality consist of?

The BSB agrees that there should be a base level of transparency on quality across the market and enhanced transparency in priority service areas. As the discussion paper recognises, this mirrors the CMA's preferred approach to transparency of information more generally. This is also reflected in the BSB's transparency rules, which consist of (i) mandatory price, service and redress transparency rules for all self-employed barristers, chambers and BSB entities, and (ii) additional transparency rules for self-employed barristers undertaking Public Access work and BSB entities supplying legal services directly to the public. The additional transparency rules are targeted at the delivery of less bespoke, more commoditised services to individual consumers and small businesses. It makes sense for enhanced transparency on quality to be similarly focused on service areas where they will be most useful and can bring the greatest benefits to consumers.

The BSB agrees that there would appear to be a strong case for some objective data (for example, disciplinary records/sanctions, Legal Ombudsman decisions, and error rates recorded by public bodies where relevant) to be published on a market-wide basis, noting that without contextualisation it may not make much sense to consumers in some cases. The BSB already requires websites of self-employed barristers, chambers and BSB entities to display links to the decision data on the Legal Ombudsman's website, and the Barristers' Register on the BSB's website (which displays disciplinary findings). Similarly, there may be a good case for general information about providers – for example, length of practising experience, areas of expertise and geographic focus – to be published on a market-wide basis. However, care would need to be taken to ensure that length of practising experience, for example, does not become a barrier to entry to the market or have an adverse impact in terms of equality and diversity. It is not necessarily the case that less experienced practitioners (who are also more diverse relative to the whole Bar) provide a lower quality of service. Simple data such as date of qualification would also not take account of career breaks.

The research we will be publishing on consumer expectations of barristers and the impact of the transparency rules will inform our view of the necessary base level of transparency on quality.

5. How useful could consumer feedback, objective data and general information about providers be in informing consumer choice? What are the benefits and drawbacks of these types of information?

Consumer feedback

While the use of consumer feedback about providers should be encouraged, the discussion paper recognises some of the potential drawbacks of this type of information (along with DCTs), and so the BSB would encourage consumers to make choices informed by the full range of information: consumer feedback along with objective data and general information about providers where relevant, in addition to information on price, service and redress.

The BSB also recognises the concerns in parts of the sector that consumer feedback can be too subjective, with consumers likely to be swayed in leaving positive or negative feedback by the outcome of their case. Compared to other sectors, it may be more difficult for a client to assess the quality of the service they have received. The relatively small number of barristers providing services directly to the public (compared to, for example, solicitors) may mean that a lack of critical mass hinders the development of quality indicators which rely on volume of consumer feedback to provide meaningful results.² In addition, where solicitors or others are acting as intermediaries, it may be difficult in practice for clients to distinguish between the services provided by barristers and those provided by instructing solicitors. We will explore these issues in the pilot.

The BSB also agrees that a contentious issue is likely to be whether consumer feedback mechanisms should be introduced, if at all, across the whole market (base level) or only in priority areas of law (enhanced level), and that there are considerations around proportionality (we would repeat our earlier observation that the biggest impact at the Bar would be in higher volume Public Access work, but that need not be the only place where feedback can play a part). One option would be for regulators to prescribe a common scale or format for feedback, which could be used on providers' or DCTs' websites. Although it should be noted that consumer feedback mechanisms are already built into search engine platforms (Google being the most widely known) and so, in effect, where providers operate websites consumer feedback mechanisms have already been introduced across the whole market, regardless of their take up by consumers, their utility to consumers or the extent to which providers engage with them. There may therefore be a number of steps which can be taken to boost consumer and provider engagement with consumer feedback mechanisms for both Public Access and referral work. All barristers are already required to inform all clients of their right to complain, for example, and so they could also use the opportunity to prompt all clients to leave a review at the end of the matter. For referral work, solicitors could also (i) prompt the client to leave a review for both them and the barrister or (i) pass on a request from the barrister for the client to leave a review. Finally, as the Bar remains a referral profession for the most part,

² The Public Access income declarations made at Authorisation to Practise 2020/21 showed that 82% of the Bar do no Public Access work. For more than half of the other 18%, Public Access work accounts for less than 10% of their income and for less than 1% does it make up all of their income.

we will consider seeking better to understand the quality indicators used by solicitors and other intermediaries.

Objective data

In relation to objective data (for example, disciplinary records/sanctions, Legal Ombudsman decisions, and error rates recorded by public bodies where relevant and attributable to the action of the provider), the BSB agrees with the discussion paper's assessment of the benefits of this information. The BSB also agrees with the CMA that objective data benefits from being contextualised, so it is fair to providers and meaningful to consumers (for example, the number of complaints upheld by the Legal Ombudsman could be measured relative to the size of the provider or the number of cases handled by that provider, broken down by service area). While progress on contextualisation has been hampered by a lack of agreement on what information to use and practical barriers to accessing this information, the BSB would suggest that the size of the provider would be the simplest information to use; for example, all self-employed barristers are sole traders, and the number of solicitors in a law firm is publicly available data (in contrast, it may be difficult to collect data on the number of cases handled by providers in a standardised way, and this may be an undue regulatory burden on the profession). If the decision data on the Legal Ombudsman's website, for example, indicated the size of the provider, this would help consumers to measure the number of complaints upheld relative to size (complaints upheld by the Legal Ombudsman are different to complaints submitted and are a more reliable indicator of quality issues).

General information about providers

The BSB agrees that there may be a good case for general information about providers – for example, length of practising experience, areas of expertise and geographic focus – to be published on a market-wide basis. However, we would repeat that care would need to be taken to ensure that this information does not become a barrier to entry to the market or have an adverse impact in terms of equality and diversity. In practice, much information about providers is also already published on a market-wide basis due to regulators' mandatory service transparency rules.

6. What role, if any, should success rates and complaints data have in informing consumer choice? Is there other quantitative data that would be helpful to inform consumer choice?

The BSB agrees that for these types of information, there are issues around reliability, contextualisation and the risk of perverse incentives. It remains the BSB's view that the publication of first-tier complaints data may not be the most useful quality indicator for users of barristers' services. For complaints data to be a reliable indicator of quality, there would need to be consistent reporting as well as some standardisation of what constitutes a complaint. This standardisation would be difficult to achieve in a fragmented market such as the legal services market, where a broad range of providers supply often bespoke services (as opposed to sectors such as financial services and energy, where fewer providers supply substantially similar commoditised services). Instead, the BSB has required chambers' websites to link to the Barristers' Register page on our website (which shows whether a barrister has any disciplinary findings), and to the decision data on the Legal Ombudsman's

website (which shows providers that received an ombudsman's decision in the previous year). The rationale for this was that it would address the need for standardisation of what constitutes a complaint, give assurance to both consumers and barristers that there is substance to published information and be the most effective way of helping consumers to make informed decisions. It also seeks to act as an additional deterrent against poor practice. However, there may be a role for regulators to play in setting standards as to how first-tier complaints data should be compiled and reported, testing whether consumers would find this data useful and facilitating market access to this data so that it can be contextualised and displayed on DCTs. The BSB would welcome discussions on this.

In relation to success rates, again there are issues with attributing the quality of the legal service to the outcome of the case. The public interest and the administration of justice require that court cases are decided on their merits rather than on the quality of advocacy, for example. Even for less bespoke, more commoditised services typically provided to individual consumers and small businesses, it may be difficult to quantify what success looks like and achieve a common understanding among consumers, providers, DCTs and regulators. The BSB, for example, requires Public Access barristers providing advice and representation at the Employment Tribunal to comply with price transparency rules which go beyond the minimum standard, but only in relation to actions for ordinary unfair dismissal and/or wrongful dismissal. This is on the basis that these services are less bespoke and so more conducive to price transparency, but even here it is difficult to quantify what success looks like – does it constitute success if a barrister negotiates a settlement so that the claim does not need to be heard in the Employment Tribunal? What size of settlement would constitute success, given the circumstances of the individual case? What if a barrister does not successfully represent a client at the Employment Tribunal, but the client's case was weak – is it correct that this should be categorised as not having been a success? What if a barrister successfully represents a client at the Employment Tribunal, but the compensation awarded to the client is less than in similar cases – should this still be categorised as having been a success? This illustrative example demonstrates some of the difficulties in quantifying what success looks like, even in relatively straightforward advocacy cases. However, there may be other types of legal service where 'success' is more appropriate.

7. Which of these different channels – law firms' websites, DCTs, a single digital register – do you think could be most effective in providing access to information on quality? Are there other channels we should consider?

Websites

The BSB would caution against the publication of first-tier complaints data for the reasons discussed in our response to the question above (but as explained there may be a role for regulators here). We believe that existing remedies are better placed to provide access to (objective) information on quality: requiring chambers' websites to link to the Barristers' Register page on our website, and to the decision data on the Legal Ombudsman's website. With regard to the other option of requiring legal services providers to operate customer feedback mechanisms (whether on their websites or DCTs), the BSB's view is that it will be beneficial to first undertake some piloting work before considering longer-term measures such as mandatory requirements (whether across the whole market or not) if these regulatory interventions are justified on the basis of evidence. (Our views on consumer feedback mechanisms are discussed in more detail in our response to the question below). In relation to legal services providers' websites more generally, the BSB

agrees that the ability of providers' websites to provide access to information on quality could be hampered by difficulty in designing and implementing a standardised approach and ensuring compliance, and agrees with the LSB's Public Panel that consumers are sceptical about the value of information on providers' websites. But note our suggestion above about regulators developing a standard form or scale for gathering consumer feedback, which could lead to more useful information on providers' websites. Providers' websites can also give consumers some indication of quality. In terms of cybersecurity, for example, a public accreditation or kitemark, a valid SSL encryption certificate and privacy, data protection and cookies policies can help to give assurance to consumers. In contrast, poorly maintained websites may give consumers a negative impression both in terms of cybersecurity and quality more generally.

DCTs

While the BSB notes that consumers may also be sceptical about the value of quality information on DCTs, some participants of the LSB's Public Panel were alive to potential pitfalls of DCTs, and described techniques they used to maximise their utility – these should be shared with consumers more widely. In addition, the BSB agrees that DCTs could act as key mechanisms for further driving online growth, particularly as their use has increased during the Covid-19 health emergency. However, the BSB also agrees with the participant of the LSB's Public Panel that price comparison sites and DCTs are “only one step in the selection procedure” and would encourage consumers to make choices informed by the full range of information (consumer feedback on DCTs along with objective data and general information about providers where relevant, in addition to information on price, service and redress). Our views on DCTs are also discussed in more detail in our response to the question below.

A single digital register

The BSB notes (i) the CMA's recommendation that the LSB co-ordinate the development of a single digital register combining relevant regulatory and customer focused information, and (ii) that in practical terms, two linked registers may be needed (one for individual practitioners and another for entities). The raw material on the BSB's Barristers' Register and Entities register is already available on our website for use by DCTs and others. The BSB agrees that potential benefits include uniting various relevant information in a single system, so simplifying access for consumers and offering a whole of market view. A single digital register could be achieved by the Legal Choices “Help Me Trust My Lawyer” product, which will bring together existing registers and in which we are participating and part funding. This could be particularly useful for consumers where different parts of the legal services market are providing similar services. However, care would need to be taken to provide contextual information for consumers and ensure that any single digital register does not oversimplify the market for consumers or suggest that any legal services provider could meet any legal need. The BSB also agrees that, in principle, a single digital register could be effective in providing access to information on quality. Our views on what range of quality information it would be appropriate to hold on a single digital register are discussed in response to question 10.

8. Do you have evidence on current usage of DCTs not mentioned in the paper? How could we best encourage engagement by consumers and law firms with DCTs? What are your views on the specific potential solutions, such as requiring law firms to signpost to DCTs, embed ratings, or prompt consumers to leave a review?

Not all parts of the sector appear to be using legal services DCTs to the same extent – few barristers seem to be featured on legal services DCTs at present. We believe this may be because of (i) DCTs perhaps being less useful for the more bespoke services most often provided by the Bar, and (ii) the relatively small number of barristers providing services directly to the public (compared to, for example, solicitors) meaning that there may be a lack of critical mass hindering the development of relevant DCTs. However, we will be discussing this with the DCTs engaged in the employment law quality indicators pilot to understand the issues better, including whether there is a role for the BSB in seeking to improve barrister engagement with DCTs.

Our independent qualitative consumer research will establish consumers' views on DCTs for barristers, their utility, whether they would be minded to post reviews on DCTs and whether they were asked to post a review by their barrister.

The BSB also notes with interest the potential options the CMA set out to encourage engagement by consumers and legal services providers with DCTs:

- Requirements on legal services providers to signpost consumers to DCTs;
- Requirements on legal services providers to embed a rating from a DCT on their website; and
- Requirements on legal services providers to prompt consumers to leave a review following the provision of legal services.

As the legal services regulators have no formal jurisdiction over independent DCTs, if the regulators were to require providers to engage with DCTs then appropriate steps would need to be taken; for example, providers could be advised or required to use DCTs which have signed up to a voluntary code of conduct. The code of conduct for DCTs published by the Legal Services Consumer Panel could be helpful here and a shortened version of it is being used as part of the regulators' pilots. The code could be issued either by individual regulators or jointly on behalf of all the regulators. Participation by legal services providers in pilots, where they could be asked to trial the potential options above, should provide the BSB and other regulators with a useful evidence base to help determine whether mandatory requirements would be beneficial. We are hopeful that participation in the employment law quality indicators pilot in particular will provide a helpful basis for our work on quality.

9. What, if any, steps should regulatory bodies take to help consumers and legal services providers engage with DCTs safely?

As part of the employment law quality indicators pilot, we will explore how we can help consumers and legal services providers engage with DCTs safely. We are looking to engage with other regulators such as Ofgem to understand what they have done in this area and to see if we can learn any lessons from them; for example, in operating an accreditation scheme for DCTs which requires DCTs to sign up to a code of conduct. To help consumers and legal services providers engage with DCTs safely, the regulators can also issue relevant guidance for consumers and providers.

In 2018, the BSB published guidance encouraging barristers to follow good practice when receiving feedback, and a guide for the public on using and leaving feedback about barristers.

In addition, the BSB notes the CMA's view that legal professional privilege or client confidentiality does not necessarily prevent providers from responding to reviews. In any event, where legal professional privilege or client confidentiality may prevent providers from responding to reviews in full, there would not appear to be a barrier to providers stating that this is the case on review platforms and, where appropriate, inviting clients to engage with them directly. This would help to demonstrate to those using review platforms that, notwithstanding concerns about legal professional privilege or client confidentiality, providers take issues raised on review platforms seriously.

The BSB is also encouraged that Trustpilot data suggests only 0.2% of reviews for legal services companies in the UK are flagged and reported, compared to an overall rate of 4.6% across its UK service. However, the BSB notes that the legal services regulators have no formal jurisdiction over DCTs. This risk could be mitigated by advising consumers and providers to only use DCTs which have signed up to a voluntary code of conduct. The BSB also notes that some regulators in other sectors (such as Ofgem) operate accreditation schemes for DCTs which require DCTs to sign up to a code of conduct.

Notwithstanding that Trustpilot data suggests only 0.2% of reviews for legal services companies in the UK are flagged and reported, the consumer organisation Which? is campaigning on the issue of fake reviews and has recently published articles to highlight that fake reviews can be used to manipulate the market, causing consumer detriment (including in the legal services sector).³ In addition, the Federation of Small Businesses has voiced concerns about the negative impact of fake reviews on their members (their 2019 survey shows this has affected 20% of their members⁴) and the CMA launched an investigation into misleading online reviews in May 2020.⁵ This underlines the importance of ensuring that legal services sector DCTs operate to high standards and so, as part of the employment law quality indicators pilot, we will be engaging with the relevant DCTs to understand what steps they take to combat fraudulent activity. We will need to have a clear understanding of the risks in this area and what action we can expect DCTs to take.

10. What range of quality information, if any, would it be appropriate to hold on a single digital register?

A single digital register could be achieved by the Legal Choices "Help Me Trust My Lawyer" product. In the first instance, a single digital register might only include basic information about practitioners and entities, and objective data generated by the regulatory bodies and the Legal Ombudsman. This could also include error rates recorded by public bodies where relevant. In addition, there may be a good case for general information about providers – for example, length of practising experience,

³ <https://www.which.co.uk/news/2021/02/how-a-thriving-fake-review-industry-is-gaming-amazon-marketplace/>

<https://www.which.co.uk/news/2021/03/fake-google-reviews-boosting-uk-businesses/>

⁴ <https://www.fsb.org.uk/resources-page/fake-reviews-hampering-small-firms-using-online-platforms.html>

⁵ <https://www.gov.uk/cma-cases/online-reviews>

<https://www.gov.uk/government/news/cma-intervention-leads-to-further-facebook-action-on-fake-reviews>

areas of expertise and geographic focus – to be published on a single digital register. Careful consideration would be needed as to whether a register should be limited to objective, factual data, or also include more subjective data from sources not within the regulatory bodies' control (for example, consumer feedback). We have stated above that it will be beneficial to first undertake pilots to gather evidence to inform any longer-term, mandatory measures. One option would be for a single digital register to link to (and not itself hold) consumer feedback, and perhaps only link to DCTs which have signed up to a voluntary code of conduct. This option would make a clear distinction between objective and subjective data and give consumers and providers assurance that the DCTs linked to from a single digital register are fit for purpose. Linking to DCTs from a single digital register would also be a good opportunity to inform and educate consumers about the potential pitfalls of DCTs, and describe techniques which consumers can use to maximise their utility.

11. What are your views on the relative merits of a market-led approach compared with standardised regulator-led approach?

The BSB agrees with the advantages of the first route (market-led) identified in the discussion paper, including that DCTs might ultimately produce models that serve consumers better than a single model designed by regulators, and the market-led route may also deliver benefits more quickly and cheaply than regulators establishing a bespoke platform for the sector. The market-led route may adapt more quickly should consumer expectations of quality or DCTs themselves change in the future. The first route could sit alongside a single digital register – one option would be for a single digital register to link to DCTs.

The BSB also notes the advantages of the second route (standardised regulator-led approach) identified in the discussion paper, including that consumers could access a standardised set of quality information across the sector. However, we would suggest that the market-led route might be explored first. For example, DCTs specialising in conveyancing (one of the most appropriate legal services for comparing providers) have already been established in the market and so there would need to be a clear benefit to replacing that with a regulator-led approach. As the discussion paper recognises, many sectors use different scales for measuring quality and performance, without the need for a single consistent metric, and it is not clear that this is causing consumer detriment in those sectors. Standardisation may be difficult to achieve in the legal services market, where a broad range of providers supply often bespoke services. A regulator-led platform could be overtaken by commercial DCTs, and there is no guarantee that consumers would use the regulators' service at sufficient scale to justify the investment.

Like the LSB, we are hopeful that the regulators' pilots will provide helpful insights on whether both consumers and legal services providers can be encouraged to engage with DCTs in sufficient numbers to enable this market to thrive, or whether further regulatory requirements and/or action by the regulators may be needed. It would therefore be helpful if the LSB could issue its statement of policy on consumer engagement, which will set expectations of the legal services regulators in relation to market transparency, once the regulators' pilots are complete and the regulators have a clearer evidence base.

12. Do you have any further comments on our analysis and approach to determining suitable quality indicators?

No.