



The Bar Council

Bar Council response to the Legal services Board's (LSB) Quality indicators in the legal services market: Discussion paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal services Board's (LSB) Quality indicators in the legal services market discussion paper ¹.
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Overview

4. As we said in February in our response to the LSB's Strategic plan and 2021-22 Business plan consultation,² although we agree in principle that quality indicators have the potential to serve as a factor in consumers making informed decisions when

¹ Available here: <https://legalservicesboard.org.uk/wp-content/uploads/2021/02/Quality-Indicators-Discussion-Paper.pdf>

² <https://www.barcouncil.org.uk/uploads/assets/b1033e1b-6542-4c13-958790c8a8a64981/Bar-Council-response-to-the-LSB-draft-strategy-and-business-plan-21-22.pdf>

purchasing legal services, we do not conclude that further quality indicators will add much value for consumers in relation to barristers.

5. This is because the self-employed Bar remains overwhelmingly a referral profession. Professional and licensed access clients (which in the case of professional clients will predominantly be solicitors), will generally be sophisticated repeat customers and will have detailed knowledge of the market for barristers' services and the attributes that will best serve a lay client's needs. What matters when instructions are accepted on a referral basis is the views of the professional making the referral as it is they who are making a recommendation about suitable Counsel as opposed to the lay client driving the choice. The solicitor is usually much better placed to express a view than the ultimate client and have a wide range of tools and information sources available to them to assess a barrister's knowledge, skills, experience and reputation.

6. One such source of information is the legal directories such as Chambers and Partners and Legal 500. They collate reviews and views of barristers by solicitors (and from time to time lay clients). These were developed by the market without any regulatory intervention and are independently owned and managed. This means they do not contribute to regulatory costs that fall on regulated legal professionals. They have the advantage of collating views from a range of sources and avoid the risk of a client disgruntled by an adverse outcome having disproportionate impact. They also have the advantage of being free at the point of use for consumers: they are available free of charge online. The directories are not a perfect tool, but they provide a wealth of information which is likely to be useful when choosing whom to instruct.

7. Another signal of quality is a barristers' appointment to Queens Counsel (QC) by application and rigorous assessment by an independent panel, coordinated by the secretariat, the QCA.³ Similarly, appointment to one of the three levels of the Attorney General's Civil Panel denotes that a barrister has met a certain standard in advocacy. This is similar to the Crown Prosecution Service Panels, that barristers can only be a member of having successfully met their entry criteria at the point of initial application and every four years thereafter.⁴ The appointment by the independent Judicial Appointments Commission of a barrister to a part time judge, known as recorder, follows open competition. Again, this is a useful indicator of a barrister's knowledge and skills.

³ <https://qcappointments.org/>

⁴ There are various CPS panels: General Crime 1-4, RASSO 3-4, Specialist Fraud 1-4, confiscation 1-4, Serious Crime 1-4, Extradition, and Terrorism. To get on a panel a barrister must complete an application form, obtain judicial referees, and supply copies of written work. The process is repeated every four years and is rigorous. For any panel members that raise concerns or have complaints made about them, there is a system for a practitioner to observe the barrister in court and make recommendations to the CPS.

8. Other information sources containing what the LSB terms, “objective data” is already in the public domain, for example service complaints data on the Legal Ombudsman (LeO) website⁵ as well as information about disciplinary action on the BSB’s Barristers Register.⁶ However, we question the value of replicating this data on another forum, for example on a single register of all authorised individuals. This is because the BSB’s current transparency rules already require all chambers, self-employed barristers and BSB entities to link to both sources of information from their websites.⁷ In this way, clients and potential clients are already made aware of the information and where to find it.

9. We agree with the assessment by the LSB that in terms of a base level of transparency of quality, “Priority service areas are likely to be those where there is a higher volume of transactions and which are more amenable to solutions”.⁸ These are not the areas in which barristers typically practice. Instead, barristers provide specialist advice and advocacy and every client and every case is different. These are service areas for which it is very challenging to develop reliable quality indicators.

10. We note that the exercise conducted with 69 members of the LSB’s public panel was based on materials about fictitious law firms. This means that its findings are not applicable to the Bar. We would not want for the Bar to be swept up in regulatory reforms underpinned by evidence relating to another profession, based on such a small sample size. Such a piece of research, focussed solely on the provision of relatively standardised services by solicitors’ firms, should not be determinative of a sector-wide strategy.

11. We consider that it is more efficient and appropriate for each of the legal service regulators to address the issue of quality indicators in a way that suits their regulated community’s mode of practice and client base in a risk based and proportionate matter and where there is evidence of harm.

12. In the circumstances, we consider that self-employed barristers acting on a referral basis should be excluded from any regulatory intervention.

⁵ Using the Legal Ombudsman’s decision data <https://www.legalombudsman.org.uk/information-centre/data-centre/ombudsman-decision-data/?page=4>

⁶ [Bar Standards Board’s Barristers Register](https://www.barstandardsboard.org.uk/uploads/assets/dde798b7-4e7b-41ff-ac89958321b094e6/ee6984ab-45bb-4e95-9bee371e431ddd80/Transparency-Standards-Guidance-5-Section-4.pdf)

⁷ <https://www.barstandardsboard.org.uk/uploads/assets/dde798b7-4e7b-41ff-ac89958321b094e6/ee6984ab-45bb-4e95-9bee371e431ddd80/Transparency-Standards-Guidance-5-Section-4.pdf> page 2

⁸ P.14

13. Success rates are not an acceptable metric of good service because the cab rank rule in the BSB Handbook⁹ means that barristers cannot pick winning cases. To introduce such an indicator would be at odds with barristers' ethical obligations and may wrongly incentivise other legal professionals not bound by such a rule to select those pieces of work that they thought they had the greatest chance of success. This could hamper access to justice for clients whose cases have a less certain outcome.

14. Lay client satisfaction is a very doubtful metric of substantive quality because when assessing outcomes, clients find it very difficult to disentangle the relative impact of the quality of their case and the quality of the way in which that case was represented. A client's perception of this is often different from a judge's. Part of being a good advocate and complying with ethical obligations and duties to the court is resisting pressure to put forward irrelevant information and unarguable points before the court, even though the client may urge the barrister to do this. We outlined this concern and others in our response to the LSB's Strategic plan and 2021-22 Business plan.¹⁰ The admittedly exceptional case referred to in the LSB discussion paper involving consumer feedback on the Trustpilot website illustrates the risks to both legal service provider and client of unmoderated feedback.

15. We do not support the idea of regulators commissioning a customer feedback platform on the basis of principle and cost. As mentioned, we are not convinced that customer feedback is useful, particularly that which relates to the quality of legal advice. Creation of such a platform is not an appropriate role for the regulators and the cost for such an enterprise will be borne by the profession via their practising certificate fee, and probably passed onto the end client via increased fees. Furthermore, there are already many customer feedback platforms operating in the market, as identified by the LSB.¹¹ These will develop further if there is a market for them.

16. There are serious potential problems with customer feedback platforms because they need to have a method for dealing with unjustifiably negative, and perhaps even malicious, "feedback" being left by disgruntled clients. Roughly speaking half of barristers' clients who go to Court end up being disappointed – because in any case one side wins and the other loses. Even if only a small proportion of those who "lose" were to post unjustifiably negative feedback, the operator of the website would have a significant task to moderate comments and adjudicate in cases of dispute. If the website were in any sense to have the imprimatur of a regulator,

⁹ See rS29 in the [BSB Handbook](#)

¹⁰ <https://www.barcouncil.org.uk/uploads/assets/b1033e1b-6542-4c13-958790c8a8a64981/Bar-Council-response-to-the-LSB-draft-strategy-and-business-plan-21-22.pdf> - see pages 23-26

¹¹ <https://legalservicesboard.org.uk/wp-content/uploads/2021/02/Quality-Indicators-Discussion-Paper.pdf> Page 20

unjustifiable adverse comments would be especially damaging and particularly unfair, and would put a high premium on swift remedies being available. The website operator would expose itself to the risk of claims if defamatory material were posted.

17. Barristers who hold the additional Public Access qualification and are registered with the BSB as such¹² can be instructed on a public access basis directly by a lay client who is conducting their own litigation. Although potential Public Access clients that engage a barrister's services directly are likely to have less experience of the legal services market than a professional or licensed access client, there already exist a number of regulatory protections for them. There are many information sources that help clients assess the quality of a barrister's service and enable them to choose a suitable barrister. These include those outlined in paragraph 7, the BSB barristers register, LeO website, their website profile, the Direct Access Portal¹³ and other intermediary websites.

18. In terms of regulatory protections in Public Access cases, a barrister must consider whether it would be in the client's best interests to instruct a solicitor rather than coming directly to the barrister (rC122 & 123, the BSB Handbook¹⁴) and should only act on a public access basis if the client understands what is expected of them in terms of managing the litigation (oC32, BSB Handbook). The net effect of these provisions is that it is only clients who are relatively sophisticated and knowledgeable who will be able to instruct a barrister on a public access basis. Instructions are on a piecework basis; a fee is agreed in advance for providing a particular piece of work. The Bar Council is unaware of any evidence to suggest that these clients have any difficulty in locating or engaging a public access barrister; nor to suggest that public access clients have had cause to complain because they have been misled about or misunderstood the nature or scope of the service being provided. Indeed, it is a further requirement of the Code of Conduct (rC125) that a public access barrister provides their client with a client care letter, setting out in clear and readily understandable terms what work they are going to do and what fee they are going to charge for it.

19. We look forward to engaging with the BSB if and when they undertake work in relation to quality indicators.

¹² On 1 March 2021, 6,590 (38.4%) of practising barristers were Public Access registered. This aggregated data is derived from data collected by Bar Council and Bar Standards Board. However, BMIF data shows that less than half this number declared income earned through this type of instruction in 2020, at 2,961. The fee income derived from Public Access work by these 2,961 barristers in 2020 accounts for 12.6% of their overall income. In the same year Public Access work accounted for 2.2% of total earnings of self-employed barristers.

¹³ <https://www.directaccessportal.co.uk/>

¹⁴ <https://www.barstandardsboard.org.uk/uploads/assets/de77ead9-9400-4c9d-bef91353ca9e5345/a9fd5bc5-edb7-4b52-be7f4cbcd4560996/second-edition-test31072019104713.pdf>

Bar Council

22 April 2021

For further information please contact:

Sarah Richardson, Head of Policy, Regulatory Affairs, Law Reform and Ethics

The General Council of the Bar of England and Wales

289-293 High Holborn, London WC1V 7HZ

Email: SRichardson@BarCouncil.org.uk