



The Bar Council

Bar Council response to Transparency and Reporting Impact discussion paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Ombudsman's "Transparency and Reporting Impact" discussion paper¹.
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. The Bar Council responds only to those questions to which we are able to respond, in our capacity as the representative body for the Bar.
5. As we noted in our response to the Competition and Markets Authority in 2016², the Bar is unique within the legal sector in the way that it operates. The self-

¹ Available here: <https://www.legalombudsman.org.uk/leo-launches-transparency-discussion-paper/>

² Bar Council response to Competition and Markets Authority Market Study into Legal Services (2016). Available here: https://www.barcouncil.org.uk/media/422489/legal_services_market_study.pdf

employed Bar, which constitutes over three quarters of the profession (the remainder being either in employed or dual-capacity practice (this is where a barrister is simultaneously self-employed and employed)), operates first and foremost as a referral profession, being referred work on behalf of a lay client though professional clients.³ Professional clients are usually solicitors but they could also be in-house counsel, foreign or European lawyers or persons authorised by other approved regulators such as legal executives or notaries. Lay clients can also instruct a barrister on a direct access basis, utilising either the licenced access scheme (where the client, usually a professional in another field, holds a licence to enable them to instruct a barrister directly) or the Public Access scheme, where the barrister has additional training and accreditation that permits them to act directly for lay clients.

6. This means that in most cases it is not the lay client that chooses the barrister but the professional client. This limits the utility of information provided by the Legal Ombudsman (LeO) about barristers for consumers of legal services.

Question 1. Would adding extra filtering options for our decision data help consumers to make informed decisions when selecting a service provider? Are there other filters we do not currently offer that we should consider including?

7. It is possible that adding extra filtering options to the decision data could help consumers to make informed decisions when selecting a service provider. In our view the current filter options are inadequate and should first be improved before the data available to those visiting the website page is extended.

8. In our navigation of ‘Ombudsman decisions data’⁴, we concluded that the columns named ‘number of decisions’ and ‘ombudsman remedy required’ are not necessarily helpful for consumers. In particular, it may not be clear to laypersons what the title ‘number of decisions’ means. It is conceivable that it is equated with a finding against the provider, perceived negatively and contributes to a decision not to instruct that provider. This helps neither the consumer nor the provider. We appreciate that the following explanation is provided on the website page, “in cases where there is no ombudsman remedy required this indicates that the ombudsman was satisfied that the customer service provided was adequate and/or that any remedy offered by the service provider was reasonable.” Even with this explanation of what ‘number of decisions’ means, it does not necessarily follow that consumers will readily understand that this does not mean that poor service/performance has been found.

³ As at 01 January 2020 there are: 17,008 practising barristers, 13,448 of these are self-employed, 3,092 are employed and 473 are dual capacity. This aggregated data is derived from data collected by Bar Council and Bar Standards Board

⁴ <https://www.legalombudsman.org.uk/ombudsman-decision-data/>

We are concerned that legal services providers may be prejudiced in cases when one or more decisions have been made by the Ombudsman but no remedy was required.

9. We note from the Ombudsman's 'Better Information' research, that "in the complaints exercise, respondents tended to rank providers with a low number of Ombudsman decisions and Ombudsman remedies required more favourably than those with a high number."⁵ This demonstrates that a decision statistic entered in the column can unfairly disadvantage providers. It is likely that a legal service provider's reputation could be damaged by having a 'number of decisions' entered in the column despite there being no 'ombudsman remedy required' as there is no guarantee that a consumer would be able to meaningfully distinguish between the two.

10. Barristers that practice in certain areas of law⁶ or who are instructed in a certain way, can be more vulnerable to complaints being made against them to the Ombudsman. Consequently, the risk of prejudice is greater for such barristers, even where they are not upheld. This could act as a disincentive to practice in certain areas or law or to accept instructions in a certain way and could impede access to justice.

11. It is also tricky to contextualise the statistics on the decisions data website page. A consumer might look at one provider and see that there is only one decision made and one ombudsman remedy required as opposed to a firm which has had twenty decisions made against them and five ombudsman remedies required. The consumer cannot see on the same website page that, for example, a firm which had twenty decisions in the first column is in fact a much larger firm and therefore the fact that they received a higher volume of 'number of decisions' may just be a reflection of their greater number of clients and not necessarily that they offer poorer service than the firm with fewer decisions and remedies.

12. Another concern is that the two categories of information currently displayed could most severely damage self-employed barristers. Barristers' reputation is key to their practice and it is possible that just one number entered in the column 'number of decisions' could harm their practice, particularly where this current wording is retained, and without a clearer and more prominent explanation of what this means. It is often the case in the decisions data that firms are named, without individual solicitors being identified. Barristers, however, are more frequently identified by name rather than by their Chambers name, presumably because whilst being a member of chambers, they are self-employed. In our view, this disproportionality impacts the barrister profession.

⁵ <https://www.legalombudsman.org.uk/wp-content/uploads/2017/11/Better-Information-Research-2018.pdf>, page 11

⁶ Crime, Litigation, Family Law, Employment and Immigration and asylum were the top areas of law for complaints against barristers, source; email from the Legal Ombudsman in April 2019.

13. The way that the providers are currently listed in alphabetical order also seems to be problematic as those at the top of the list that appear automatically will be seen more frequently than those on subsequent pages where active navigation to each page is required. We consider that it may be fairer to not have the providers showing at all, and to just have a search tool with additional categories attached. We note that the Scottish Legal Complaints Commission does use such a search tool rather than showing an alphabetical list.⁷

14. Therefore, we are not persuaded that the current columns for decisions data has struck the right balance between providing information for consumers, particularly before they instruct a legal services provider, and protecting legal services providers from unfair bias. We propose that it might be clearer for the column 'number of decisions' to be replaced with 'number of upheld complaints', which would never show a practitioner whose complaints were not upheld. Overall, we think this could help provide greater clarity for consumers and be fairer to legal service providers.

15. In the event that it was decided that extra information, and therefore extra columns should be added to the current table, we would appreciate a further opportunity to input, ideally via formal consultation. We support the goal of providing transparency to consumers but consider that information needs to be clearly presented and that a balance needs to be struck between ensuring consumers are protected and protecting individual practitioners from unmerited complaints and the reputational damage and cost that can be incurred by them.

Question 2. Would sending annual reviews to service providers (without publishing the information) be helpful in raising standards? If so, what should the selection criteria/methodology be?

16. It is difficult to provide a substantive answer to the first part of this question, without a clear indication of how LeO may approach the second part of this question. It is unclear whether the purpose of any additional 'annual reviews' would be to improve transparency, as suggested by the overall discussion paper, or to raise standards for particular providers, as suggested by the present question. These two purposes are distinct and should be treated as such.

17. The Bar Council would strongly challenge the value of any action by LeO, especially any action which may publicly implicate particular service providers or professions, on the basis of "number of complaints" as opposed to "number of determinations" or "number of upheld complaints", as outlined above. As LeO will

⁷ <https://www.scottishlegalcomplaints.org.uk/resources/decisions-database/search/>

be well aware, consumers may complain for a variety of reasons, and it is the role of LeO (and regulators, in the case of conduct complaints) to consider the merits of each complaint before arriving at a decision. The Bar Council is of the view that complaints which are not upheld should not prejudice the service provider involved, so far as this is possible. As stated above, this causes an unfair disadvantage to service providers against whom no poor service has been found, and again, this is particularly troubling for self-employed barristers who are, by nature of the structure of their business, personally named in the LeO data. It should be noted that as self-employed practitioners, barristers will not have the support of a firm as an employer, to assist them in rehabilitating their reputation and providing a continued guarantee of work.

18. It is presumed that where determinations are reached, particular providers are issued with full details of the determination including the reasoning behind the determination and any corresponding recommendations from LeO to the provider. We also note that LeO states on their website that they will share information they consider relevant with the service provider's firm, as well as the approved regulator⁸. We are aware that LeO has existing Memoranda of Understanding with each of the Approved Regulators under the Legal Services Act 2007, which set out relevant information sharing arrangements. It is not clear whether the proposed annual reviews are intended to capture information that is already known to the regulator, or whether any additional information would be shared in this form. If the latter, we would query how appropriate such information sharing is, if it were to extend beyond what is stipulated within existing Memoranda of Understanding. That said, we can see the benefit of the regulators having access to information which helps them to target their limited resources where it is most needed.

19. We note that LeO proposes in their discussion paper to produce a "much more detailed report to be sent directly to providers which could support their own learning process, and an edited version which could be published on [LeO's] website for consumers to read". We would query, therefore, what LeO would anticipate including in the more detailed, full report to the provider, that the provider themselves, their firm (where one exists), or the Approved Regulator will have not already seen in previous communications. For the same reason, it is also not clear in what way such reports could be helpful in raising standards.

20. Depending on the content of the report made available to consumers, our earlier explained concern about potential prejudice to providers may be relevant.

⁸ <https://www.legalombudsman.org.uk/faqs/>

Question 3. Would edited annual review letters be useful to consumers? Are there any risks we should take account of when considering this proposal?

21. Depending on the information published in any such overview report, it may be that an “edited version” is of some assistance in improving transparency. If even an “edited version” of any such annual review is made publicly available to regulators, consumers, policy-makers and journalists, we would urge LeO to carefully consider how they present any such overview, and how this could be interpreted by each of these parties. Any such review is likely to result in a ‘guessing game’, even at a high-level, as to which service providers may be implicated in this overview report. The value of any such review should be carefully weighed up against potential implications for each profession. As we express further below, we consider that transparency could be just as effectively achieved by an improved database of published decisions.

22. As previously noted, the Bar Council is responding to this consultation from the perspective of the Bar. In the case of the Bar, the service provider (barristers) are for the most part self-employed, and tend to work from chambers, which are themselves unregulated but subject to supervision by the regulator. It is not at present clear whether, if the criteria for the set percentage of service providers were based on “firms with the highest complaint volumes”, self-employed barristers would be included or excluded from such reviews.

23. As we note in our answer to question 2, we would strongly challenge the value of taking any action, especially any action which may publicly implicate particular service providers or professions, on the basis of “number of complaints” as opposed to “number of determinations” or “number of upheld complaints”. As LeO will be well aware, consumers may complain for a number of reasons, and it is the role of LeO (and regulators, in the case of conduct complaints) to consider the merits of each complaint, and reach determinations where a complaint is upheld. Complaints which are not upheld should not continue to have implications for the service provider involved.

Question 4. How might publishing full decisions help consumers to assess quality of service?

24. As we note in our response to the CMA in 2016 and in our overview above, barristers are primarily instructed through professional clients. Professional clients of all types have a sophisticated understanding of the legal services market, as this is the market within which they themselves operate. It follows that they will be in a strong position to assess the cost and quality of a barristers’ services, and to make an informed choice – and thus a recommendation to the lay client – about whether the

barrister has the requisite experience and expertise to provide the best possible service for the client at a competitive cost.

25. Any potential client of a barrister can use one or more of the following information sources to assess the quality of a barrister:

25.1. Chambers' websites, which have detailed information on barrister members. Each barrister usually has their own webpage setting out a comprehensive CV detailing qualifications, practice areas, notable cases and quotes from clients. The website may also have articles and blogs written by members which demonstrate their expertise and knowledge;

25.2. Speaking to the clerking team, who will have a detailed knowledge of their barristers' areas of practice;

25.3. Professional Directories, such as *Legal 500* and *Chambers and Partners*;

25.4. The Bar Council and Juriosity search engine, "Bar Directory";

25.5. The BSB Barristers Register⁹ which also provides information on any disciplinary action against a barrister;

25.6. The Specialist Bar Association websites, where a client is looking for a barrister in a particular area of law. A full list of the Specialist Bar Associations can be found on the Bar Council website¹⁰;

25.7. The Bar Council website;

25.8. Articles in the legal press written by barristers which demonstrates their expertise in a particular area;

25.9. Previous experience of working with a barrister or on a case on which the barrister was acting for the other side or a recommendation from a colleague;

25.10. Whether the barrister has been awarded the QC title;

25.11. The barrister's number of years of experience (known as years' call).

26. While public access clients are less likely to have experience of the legal services market, they are nonetheless able to use all of the above-mentioned research methods

⁹ BSB Barristers' Register, available here: <https://www.barstandardsboard.org.uk/for-the-public/search-a-barristers-record/the-barristers-register.html>

¹⁰ Available here: <https://www.barcouncil.org.uk/>

to assess the quality of a barrister, and can also use a Bar Council search engine that lists public access qualified barristers¹¹.

27. For these reasons, the publication of full decisions which relate to barristers is likely to be of limited use to consumers.

Question 5. In what ways could publishing full decisions have benefits for firms and the wider sector?

28. While the Bar Council does not express a view in relation to other legal professions, we would again urge caution from the perspective of barristers. It is also critical that Legal Professional Privilege is not breached unless it is lawful to do so.

Question 6. What reasons should we consider for not publishing full decisions? Please provide evidence with your answer.

29. We have previously considered the issue of striking the appropriate balance between the right to earn a livelihood, and the need to protect the public¹². In particular, the greater the risk to barristers' livelihoods and wellbeing, the greater the level of certainty and justification that should be required when changing policy in this area.

30. It is difficult to comment on whether publication of a greater range of data will assist consumers when choosing a provider, without clear indication of which data may be additionally published. Any move by LeO to publish additional data about service providers and complaints raised against them should be supported by rigorous evidence-based analysis of the benefits, disadvantages and financial costs of doing so.

31. We note that barristers are particularly vulnerable to complaints, for a number of reasons. Firstly, they operate in adversarial circumstances, in which one party to the proceedings will lose. A loss can create a client's sense of grievance against their lawyers. Barristers may thus become subject to complaints because clients are unhappy with the outcome of their case, not because the barrister is guilty of providing poor service to the client. It is often easier for a disaffected client to blame his or her lawyer than acknowledge fault on their own part. In that sense, the legal profession is different from other professions: lawyers are often instructed to defend

¹¹ Bar Council Direct Access Portal, available here: <https://www.directaccessportal.co.uk/>

¹² Bar Council response to Bar Standards Board's 'Review of the Standard of Proof Applied in Professional Misconduct Hearings' consultation paper (2017). Available here: https://www.barcouncil.org.uk/media/579747/bc_standard_of_proof_response.pdf

the conduct or character of their clients. If that defence proves unsuccessful, a client has an incentive to blame others in order to deflect responsibility. This dynamic is less evident in other professions.

32. In a similar vein, barristers increasingly come up against litigants-in-person (LIP) who may blame and on occasion make unfounded allegations against the barrister who acts against them. This will often arise when the barrister has no professional client in attendance at court or during tribunal hearings. In the BSB's recently published enforcement report, covering the period 2018-19 it noted that of all the complaints made by LIP:

“91% of these complaints were closed at the preliminary assessment stage mainly because they did not reveal any breaches of the Handbook and stemmed from the complainants not fully understanding how the court system operates or the role of barristers;”¹³

33. In summary, any policy change resulting in publication of further data than is currently published about service providers should be very carefully considered. It is not presently clear that publication of further data will assist consumers in selecting their service providers, and we would invite LeO to substantiate any such proposal with robust evidence. In particular, the implications for self-employed barristers should be weighed up against any potential benefit to consumers.

Question 7a. Would it be useful and appropriate to be able to provide contextual information alongside our decision data? Do you foresee any potential difficulties with this, other than those already identified?

34. With the above caveats, providing contextual data could be helpful to help ensure the right balance is struck between giving information that is helpful to consumers whilst also protecting legal services providers.

35. We have noted in our answer to question one that contextualisation could be helpful in relation to the first column on 'number of decisions'. For example, it could be made clearer whether the provider is a sole practitioner or a large corporate firm. This could make a significant difference to how the consumer or interested party, such as a media outlet, analyses the data as they would be able to assess whether a higher number of remedies required by a service provider were proportionate to their size or not. It would also be desirable if the contextualisation of the data was more readily available to those searching on the website. For example, on 'ombudsman remedy

¹³ <https://www.barstandardsboard.org.uk/resources/press-releases/bsb-publishes-annual-enforcement-report.html>

required', there are currently bands of fines listed. It would be useful for these bands to be shown on the same page as the decision data.

36. Currently, on the 'decisions data' website page it states, "To fully understand this data in context you will need to find out how many cases the firm or lawyer deals with each year. This information is not held by the Legal Ombudsman."¹⁴ We consider it will be difficult for consumers to have a full understanding of the decision-making process and the decisions reached by the Legal Ombudsman without further contextual information or signposting to where they might obtain that data.

37. In the research, 'Better Information', we have noted the suggestions of contextualisation by High Street solicitors on the data given by the Legal Ombudsman.¹⁵ These, for example, relate to the size of the law firm and an explanation of remedy to understand the seriousness of the complaint. We agree that these types of examples are sensible suggestions for what information could be available for consumers to provide extra contextualisation to the decisions data. There could also be further contextualisation in order for consumers to understand the difference between data held of larger services providers and sole traders.

38. Lastly, it may be difficult for consumers to understand that when they complain about a self-employed barrister who is a member of Chambers, they are complaining against the barrister and not the Chambers. The list as it stands includes the phrase 'x barrister of y Chambers'. It may be useful to include context about the fact that the complaint against the barrister is a complaint about the barrister and not about the Chambers. Where the complaint does include the Chambers, such as the service provided by the clerks, it may be useful to include that information.

Question 8. Does publishing a greater range of data provide consumers with better information on which to make decisions about choosing a provider?

39. It is difficult to provide a meaningful answer to this question, without indication as to which information or range of data LeO proposes to publish.

Question 9. Would it be useful for LeO to publish a greater range of data for other reasons?

40. We acknowledge that there may be merits to making a greater range of data available, provided that it is presented in a way that is clear and understandable and

¹⁴ <https://www.legalombudsman.org.uk/ombudsman-decision-data/>

¹⁵ <https://www.legalombudsman.org.uk/wp-content/uploads/2017/11/Better-Information-Research-2018.pdf>, at page 34

does not unduly prejudice legal service providers because of presentation issues and a lack of contextual information.

41. Whilst it is stated there is no significant distinction between complaints that are resolved more informally and those that receive an Ombudsman's final decision, that may not be the case for all legal professionals. For example, larger Chambers may have committees dealing with complaints handling that are more alive to the advantages of informal settlements early on in the process. By contrast, other self-employed barristers may be dealing with complaints by themselves and may take a different approach whereby they challenge the complaint and receive a final decision by the Ombudsman. We recognise that the extra data would contribute to the feedback loop and may help demonstrate to legal service providers the advantages of settling early.

42. As with any further detail that is published by LeO, there has to be a balance struck between data published that is useful for the consumer and legal professionals whilst also ensuring the protection of legal professions themselves. Therefore, before being able to comment on whether it would be useful as a whole for LeO to publish a greater range of data, we would want to see a sample or a demonstration of what the data may look like if published. For example, cases resolved by agreed outcome and by case decision could be useful to help a feedback loop between Chambers and clients but at the same time there is the possibility of it having an adverse effect on legal professionals such as barristers. Equally, there may be other ways to achieve this outcome.

43. We appreciate the argument that there is currently a large amount of data that is unavailable to consumers, such as informal resolutions that are reached between legal services providers and their clients, and you would like to make that available for consumers. Without seeing some examples of the data that you wish to make available, however, we are concerned about the potential unintended consequences of this approach. In principle, greater transparency is to be welcomed but we would be concerned about the extent of information available on informal resolutions that are reached. For example, we would like to know if that would be analysed and contextualised or just presented as raw data and most importantly, whether this would be useful to the consumer.

Question 10. Would allocation of resource to changing the Legal Services Act 2007 be appropriate? Who would it be most appropriate for us to work with on this project?

44. In our opinion, it is not appropriate for us to comment on whether the Legal Ombudsman should allocate resources to changing the Legal Services Act 2007. Any amendments to legislation would take time, resources and would presumably be

dependent on raising additional funds from the regulated legal community, including barristers. There has to be a demonstrable need and justification for any increase in regulatory fees paid by barristers to the Ombudsman.

Question 11. Would you support greater investment of budget and resources into improving our data collection and analysis for the purpose of transparency?

45. We are reluctant to endorse greater investment of budget and resources without seeing detailed costs provisions. Therefore, we would need to view detailed cost proposals before giving a full response to this question.

46. Given that any costs would fall to legal professionals, additional expenditure would need to be thoroughly justified. Funding for the Legal Ombudsman is one of several regulatory costs borne by barristers and should not be viewed in isolation. There is also a risk that increases in the Legal Ombudsman's costs would be passed onto consumers by practitioners raising their fees. Additionally, the perception or actuality of any increased costs as a practising barrister does have an impact on recruitment and retention, particularly for those working part time or in poorly remunerated areas.

47. Any decision to put resources into improving data collection and analysis prompts consideration of the cost implications, which has a bearing on the practicality and value of any proposed change. We consider that some consideration by LeO on the prioritisation of criteria would be useful. Would there, for example, be a prioritisation into changing the scope of the Legal Services Act 2007, or into greater investment of the current budget and resources that the Legal Ombudsman has into improving data collection and analysis? It would be useful to see analysis of these considerations alongside detailed costs proposals.

Question 12. Have we considered all the potential advantages and disadvantages of these four proposals? Please provide evidence to support your answer where possible.

48. We have nothing further to add on the advantages and disadvantages of the proposals regarding decisions data.

Question 13. Are there other ways we could improve our transparency?

49. In our view, it is in the public interest that the Legal Ombudsman demonstrates its role to consumers, legal professionals and the general public. To this end, we have

been pleased to work with LeO to deliver seminars on complaints handling, which have assisted barristers, clerks and chambers management professionals in this area.

50. We believe that LeO plays a valuable role in translating lessons from cases into best practice guidance that can help improve service standards across the profession. We share your belief that this forms a valuable part of the feedback loop between barristers and their clients that will raise standards, and ultimately attract fewer complaints. We worked with LeO in 2017 and 2019 to provide support to the profession on its first-tier complaints handling processes and have plans to continue this work this year.

51. Finally, as a point of practicality, we have noted that the website is split into two parts which includes information for public/consumers and then separately information for the legal sector such as legal service providers and regulators. We appreciate that you have included large amounts of information such as in the form of factsheets, publication documents and decision data. However, large swathes of information could also have the effect of making navigation difficult for consumers. We suggest that consumers, particularly those consumers who are either vulnerable or new to the legal service market, might find it hard to navigate the website and find the key information on 1) how to make the complaint, 2) what is the process once a complaint is received (e.g. a simple flowchart showing even the link between investigators and Ombudsman) and 3) remedies that can be obtained. We appreciate that this information is available but propose that it could be better presented and more easily located. To improve transparency, we recommend that simple factsheets are prominently located on the website.

Bar Council

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