



## **Bar Council response to the 'Rules Consultation on Transparency Standards' issued by the Bar Standards Board**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Bar Standards Board 'Rules Consultation'<sup>1</sup> on Transparency Standards/Response to the Competition and Market Authority's Recommendations.'
2. The Bar Council represents over 16,000 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

### **Overview**

4. This should be read in conjunction with our earlier response to the first BSB consultation on transparency standards. The BSB is to be commended for altering the scope of its proposals to develop a more proportionate approach in light of the responses it received to the first consultation. It is right that the BSB has moved its focus away from bespoke services most commonly provided by the Bar to types of more frequent, standard services provided in a public access context, in relation to which fixed fees might often be charged in the market already. We had specific concerns, which we are pleased that the BSB has taken onboard, about the proportionately and workability of the requirements for more bespoke services. In

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<sup>1</sup>[Bar Standards Board \(2018\) Rules Consultation on Transparency Standards](#)

particular, we expressed concern that the original proposals went beyond what was proposed by the CMA and would have not improved transparency in practice. This is because the information provided upfront would have to be so heavily caveated so as to be confusing for prospective clients. The focus should be on types of service provided frequently and with a relatively standard content or fee, where those are more likely to be used by vulnerable and less experienced clients. This is the right policy approach as a matter of principle. It also means that any information that is provided up front will likely be more meaningful for prospective clients as well as workable for barristers to implement.

5. We have significant concerns about the quality of the evidence used to justify the proposals set out in this consultation. The pilot study is based on a sample of only 9 businesses, comprising barristers' chambers, entities and sole practitioners, and samples of only 35 clients' views. These samples are too small to be statistically significant and we do not think meaningful conclusions can be drawn from them.

6. Many of the current proposals in this consultation centre on the provision of information upfront on a website to facilitate transparency and enable prospective clients to make informed purchasing decisions. We anticipate that many chambers' websites are managed centrally at staff level. The BSB should give thought to its approach to enforcement given that responsibility for compliance ultimately falls on the individual barrister because chambers are not regulated entities. There is concern amongst the profession that all barristers in a particular set of chambers could be in breach for any incorrect information that is provided centrally on a website managed at the chambers level. We note the BSB's approach to enforcement at page 29 of the consultation and in section 4 of the guidance and agree that spot checks and remedial action is a good approach, but suggest that the BSB consider how best to communicate its approach to the profession.

### *Methodology*

6. As with our previous response, we have sought the views of our members by holding research meetings with chambers' staff and barristers. We have also been in contact with the SBAs to ascertain their views.

**QUESTION 1: do you agree that the proposed rules for all self-employed barristers, chambers and BSB entities provide the appropriate regulatory framework to**

**deliver, in accordance with the BSB's proposals, increased price and service transparency? If not, please state why not.**

Pricing information

Rule 1: Websites must state that professional, licensed access and/or lay clients (as appropriate) may contact the barrister, chambers or BSB entity to obtain a quotation for legal services, and provide contact details. After sufficient information has been provided, quotations must be provided within a reasonable time period, and in clear and readily understandable terms.

7. We agree with the policy rationale/intention behind this rule. It is proportionate and facilitates transparency without burdening chambers with providing heavily caveated information about bespoke services that could have both misled prospective clients and obfuscated the BSB's policy objective.

8. The BSB guidance makes it clear that a quotation ought to be provided after sufficient information has been provided by the client to enable the barrister to quote a meaningful range. It could be helpful if the guidance could tease out the possible difference between a quotation (which can lead to a legally binding agreement on a price) and an estimate, which is an informal indication of the price based on limited information provided by the client. It seems to us that the former is intended, hence the requirement for the client to provide 'sufficient information' in the first instance but it would be helpful to clarify this.

9. In our view, this proposal would be most useful for inexperienced lay clients in public access cases who will be less well versed in how to compare legal service providers. Professional clients will be very aware of how to obtain quotations from barristers and will not need to be prompted to contact chambers.

10. Although we agree that it is good practice to provide a quotation in a timely manner, for the majority of cases (which will usually be subject to 'the Cab-rank rule'), barristers should not be compelled to give quotations for cases that they do not intend to take on. The current wording of the rule does not make it clear that barristers can refuse to give a quotation, either because the instruction is not subject to 'the Cab-rank rule', or because they would be required to refuse an instruction under rC21. We note that barristers are required to explain to the client if they are not 'able' to provide the legal services in question, although this seems to pre-suppose that they should. Public access instructions are not subject to 'the Cab-Rank rule' (and provided the barrister does not discriminate against a prospective client in accordance with rC28) the barrister has discretion as to whether to accept the instructions in these types of cases.

In our view, the current drafting of the rule does not make this clear. If it is intended to, we suggest that the wording is altered to reflect this.

Rule 2: Websites must state the barrister, chambers or BSB entity's most commonly used pricing models for legal services. Where different models are typically used for different legal services, this must be explained.

11. In our response to the first BSB consultation, we expressed concern that whilst chambers are often willing to offer a wide range of different pricing models, the particular mode of charging will depend on the individual case. We remain concerned that there is potential for this rule to create confusion for less experienced users of legal service providers. Specifically, there is a risk that it heightens expectations that a particular fee model is available when it may not be. Ultimately this requirement is no substitute for a discussion with the prospective client about their case and the individualised information that can be given to the client in the course of that discussion.

12. We reiterate our view, expressed in our first consultation, that this information would be better managed centrally on the Legal Choices website. This would remove the need for it to be duplicated on the chambers' website.

Service transparency – mandatory rules for everyone 1) Websites must state the areas of practice in which the barrister, chambers or BSB entity most commonly provides legal services, in a way which enables consumers to sufficiently understand their expertise.

13. The vast majority of barristers, chambers and entities do this already and we think it is useful for prospective clients.

2) Websites must state and provide a description of the barrister, chambers or BSB entity's most commonly provided legal services, in a way which enables consumers to sufficiently understand their expertise.

14. In our research discussions with chambers, it became apparent to us that there is a lack of certainty about how much detail is appropriate to comply with this rule and we suggest that the minimum requirements be made clearer, either within the wording of the rule itself or in the associated guidance.

3) Websites must provide information about the factors which might influence the timescales of a case

15. We do not think this rule is required for referral cases involving a solicitor. At the point the barrister is instructed, the solicitor will have already have discussed the

factors that could affect a particular client's case and will have an ongoing role in managing expectations.

16. We query whether this rule is required in any case where the barrister is not conducting the client's litigation. Rule s25 prohibits a barrister from undertaking the management, administration or general conduct of a client's affairs. If the barrister is not conducting the litigation or undertaking any management role then it is difficult to see how the barrister can have any control over the timescales of a case. This will be the responsibility of the person conducting that litigation, whether that be a solicitor or other professional client or the lay client in a public access case.

17. It is unclear what is meant by 'case.' A barrister could be instructed for a piece of pre-litigation advice and the actual case may go no further than this. We are unclear if the rule is meant to refer only to a particular piece of work on which the barrister has been instructed or across the whole case (in which the barrister may or may not be instructed to undertake additional work.) Cases can vary tremendously. Sometimes an arbitration or an expert determination may be involved, but the procedure for this is unclear at the outset. We have practical concerns about how this rule could be implemented in practice particularly when barristers routinely provide unbundled services and especially where there is considerable uncertainty about the course that a case might take.

18. There is concern amongst the profession about compliance with this rule as it is currently drafted. Although we agree that it may be possible to set out some of the factors that might influence the timescales of a case prior to instruction, we think that this requirement is more appropriate for public access cases. If this rule is intended to apply to all practitioners, it would be much more accurate for the client if it formed part of the rules that deal with the terms or basis for which instructions are accepted (rc21-rC24.) This will allow the information to be more tailored and relevant to the client and their particular case.

19. It is also worth mentioning that, depending on the type of case, some barristers will be led by the client's timescales. This may be the case for certain types of public access instructions. In this situation a barrister may not take on a case if they are unable to meet the client's timeline.

20. As barristers' work is inherently piecemeal, we think it would be more appropriate if the scope of this proposal be amended to refer to transparency with regard to the piece of public access work that a barrister is instructed on. As the factors that affect the overall timescales of a case can be very generic or too specific to be published in a website, we suggest that this information is unified and instead incorporated into the Public Access Guidance for Lay Clients document - the link to

which will be on chambers' websites. We reiterate that we do not consider this rule is needed for referral instructions.

**QUESTION 2: do you have any comments on the BSB's Transparency Standards Guidance? (published in draft alongside this consultation). We are particularly interested in how the guidance can (1) better support those regulated by the BSB in complying with the mandatory rules and (2) better encourage them to go beyond the mandatory rules.**

21. The guidance provides useful context to the transparency rules. It is clear and defines key terms that could be open to interpretation in the rules. The checklists are particularly helpful and will assist barristers comply with the provisions set out in the rules. We have made several suggestions for additions or clarifications in our answer to question 1.

22. It is unusual for the BSB to publish guidance on best practice, not least because we see the role of the regulator as setting universal minimum standards. There is the potential for duplication of effort with the Bar Council in its representative capacity as we tend to carry out this type of work. We have already done work in this area, drawing together all of the provisions on client care and demonstrating how barristers can move beyond the minimum requirements to facilitate greater transparency and client support. It would be helpful if we could have a constructive dialogue with the BSB to ensure that duplication is avoided. Depending on what the BSB decides to implement, we will review our guidance to ensure that is relevant and up to date.

**QUESTION 3: do you agree that the proposed rules provide the appropriate regulatory framework to deliver, in accordance with the BSB's proposals, increased redress transparency? If not, please state why not.**

1) Websites must display the following text on the homepage: • For sole practitioners, "regulated by the Bar Standards Board" • For chambers, "barristers regulated by the Bar Standards Board" • For BSB entities, "authorised and regulated by the Bar Standards Board"

23. We have no concerns about this rule and think it could be helpful to highlight the fact that the Bar is a properly regulated profession that confers the associated protections for prospective clients by way of redress, insurance etc.

2) Websites must display information about your complaints procedure, any right to complain to the Legal Ombudsman (LeO), how to complain to the LeO and any time limits for making a complaint

24. As the BSB highlights, barristers' websites already provide information about first tier handling procedures. We do not have any concerns about the proposal to include information about how to complain to the LeO and the time limits for doing so in addition. Currently, this information is provided to clients at the point of instruction, but it could be useful to provide it earlier. This information is arguably helpful to reassure prospective clients that they are entitled to redress from the LeO in the event that things go wrong.

### 3) Websites must link to the decision data on the LeO's website

25. We do not agree that all barristers' websites should link to the LeO decision data and think that any link should be provided by the BSB as regulator, through its own website. We are concerned that this proposal could place barristers at a competitive disadvantage as compared to solicitors who are not required to link to this data on their firms' websites.

### 4.) Websites must link to the Barristers' Register on the BSB website.

26. Again, we are concerned that this proposal creates disparity with what is being proposed by the SRA since we are not aware of any equivalent provision that requires solicitors to link to a register setting out disciplinary findings nor practising certificate status. The proposal to include the text 'regulated by the Bar Standards Board' is sufficient for prospective clients to understand that the barrister is an authorised, regulated provider without a further requirement that compels barristers to link to the Barristers' Register.

**QUESTION 4: do you agree that the proposed additional rules for those undertaking Public Access work provide the necessary regulatory framework to deliver, in accordance with the BSB's proposals, increased price and service transparency? If not, please state why not.**

### Pricing models

27. Please refer to our comments in our answer to question 1. These apply equally to public access instructions.

### Publication of pricing model(s) such as fixed fee or hourly rate

28. So far as indicative fixed fees are concerned, the extent to which fee information can be provided in advance is highly dependent on the type of case and the level of standardisation. We note that the BSB has targeted public access work that is commonly purchased by less experienced consumers or to vulnerable clients. However, the overriding consideration must be a practical one – whether it is

workable for chambers to publicise a fixed fee in a meaningful way and this ultimately depends on whether the service is of such a frequency and nature as to justify this. There is considerable variation in the level of standardisation in the proposed public access services that the BSB has earmarked for price transparency.

29. We also note the BSB's policy objective to align its approach with that of other regulators to maximise competition within the market and minimise regulatory arbitrage. In this regard, the BSB is encouraged to abandon its proposals in relation to family and personal injury work. As a matter of principle, we do not see that barristers should be subject to higher transparency requirements in areas of law where they compete with other legal service providers. An alternative approach is for the BSB to develop guidance for these legal services as the SRA has done.

30. We are concerned that Employment Tribunal cases are not sufficiently standardised to enable indicative fixed fees to be published in advance. Such cases can be unpredictable especially if allegations of harassment are included. Immigration cases and asylum cases in particular are not commoditised.

31. Winding up petitions are usually standardised enough to enable the publication of a fixed fee that will apply to cases that are not out of the ordinary. Indeed, we believe that this reflects market practice.

#### *Hourly rates*

32. We reiterate the concern that we raised in our earlier consultation response that hourly rates do not provide prospective clients with any meaningful information about the total cost of the work a barrister might be asked to provide, never mind to their 'case' overall (whatever that might refer to). As there can be such a large degree of variation between bands based on seniority and experience, coupled with the fact that there will be both case and client considerations that have a bearing, many sets of chambers expressed concern that the ranges could be so broad as to be meaningless.

33. For the vast majority of barristers, public access work constitutes a minority of their practice. Concerns have been raised with us that the requirement for barristers to publicise prices for work that they do not consider to be standardised would lead to a reduction in the number of practitioners who would be willing to do public access work. This would have a knock on effect on access to justice for prospective clients. The BSB should give this risk further consideration.

#### Whether the fee includes VAT (where applicable)

34. Putting aside the broader concerns that we have set out about the publication of prices on a website, we do not think that there would be any particular issues with a website stating whether the fee includes VAT or not. In practice, the majority of instructions are likely to be subject to VAT unless the client 'belongs' in a country outside of the EU and receives the barrister's services other than wholly in a private capacity.

Likely additional costs, what they cover and either the cost of or, if this can be estimated, the typical range of costs.

35. We are concerned about how broad this requirement might be. It will likely depend on the breadth of the 'case' to which additional costs need to be identified as well as the breadth of the types of work in relation to which this obligation may be imposed. This requirement may be appropriate for solicitors who incur disbursements on behalf of their clients. Barristers do not. It is difficult to see, therefore, what this rule is intended to achieve. Unless there is clear evidence that there is a problem with barristers charging clients for unexpected additional costs (and we are not aware that there is) this seems to be an unnecessary rule. There are already rules which require barristers to inform their clients in writing what fees they are going to charge.

36. It may be possible to publish very generalised information about the likely additional costs. Where court fees are known for the type of case, these could conceivably be published on a website. However, we are concerned that this requirement could impose a substantial maintenance burden on chambers to keep their websites up to date. There could be annual fee rises for example and chambers will be in breach if the information is not reviewed and updated regularly. As information such as court fees will be freely available on other websites, it does not seem necessary to require chambers to duplicate this on their own websites.

Websites must link to the Public Access Guidance for Lay Clients page on the BSB's website.

37. We support this proposal.

If you provide the Public Access services listed in the current version of the BSB's price transparency policy statement (Annex B), your website must also state and provide a description of those legal services. The description must include a concise statement of the key stages and an indicative timescale for the key stages. This must be done in a way which ensures consumers sufficiently understand the service.

38. As we have set out in our answer to question 1, many practitioners already publicise a description of the legal services that they provide. There is concern

amongst the profession about the level of detail required to ensure compliance with this rule.

39. We have already set out a number of concerns about the requirements concerning timescales in our answer to question 1. These also apply here. In particular, we think that there is considerable uncertainty around what is meant by the term 'case.' We suggested that general information about the factors that affect the timescales of a case be unified and publicised in the Public Access Guidance for Lay Clients.

40. There is concern across the profession that it would be very difficult to publicise indicative timescales in advance not least because barristers typically provide unbundled legal services where timescales and key stages are less relevant, unlike in cases involving solicitors who may be instructed for all aspects of a case.

41. There are also a number of unpredictable factors that make timescales difficult to predict in advance. These can include the complexity of the case, the expertise and experience of the particular barrister, as well as other case commitments. Ultimately, it is only once the barrister has had an initial discussion with the client and becomes aware of the details of the case that they can provide a proper estimate of the amount of time that it will take. We are concerned that this requirement could be both onerous and impractical to implement in practice. It may be possible to publicise very broad ranges for more commoditised work.

42. It is potentially useful to set out the limitations of any service that is offered especially as barristers are rarely authorised to conduct litigation. This necessarily means that the client assumes more personal responsibility for aspects of their case. Reminding clients of what the barrister can and cannot provide upfront could usefully assist the barrister manage clients' expectations and avoid confusion as to roles and responsibilities.

**QUESTION 5: do you have any comments on the BSB's price transparency policy statement? (this can be found at Annex B of the BSB's Transparency Standards Guidance, published in draft alongside this consultation). We are particularly interested in your views on:**

**(1) The criteria we have used to determine which Public Access services should be subject to price transparency requirements; and**

**(2) The Public Access services we have initially determined should be subject to price transparency requirements, and the specific circumstances in which they apply. For each Public Access service, the specific circumstances in which price transparency requirements apply can be found at Annexes C – K of the BSB's Transparency Standards Guidance.**

43. So far as the criteria are concerned, we think that is right that the BSB is focusing on services that are commonly purchased by less experienced, less expert and vulnerable clients. These are the types of client who would most greatly benefit from the price transparency requirements and this approach aligns with the intentions of the CMA in its legal market study.

44. We note that the SRA has not proceeded with transparency requirements in family and personal injury cases and we suggest that the BSB aligns its approach and issues guidance on these areas instead, so as to prevent the Bar from being at a competitive disadvantage.

45. In our earlier answers, we have also identified potential difficulties with public access employment and immigration work.

46. Cases concerning child arrangements arising out of a divorce are not standardised and can vary dramatically depending on the circumstances of the particular case. Whilst some cases may be minor disputes about the handover arrangements for a child, others could be considerably more complex especially if for example, there is an application for the child to relocate overseas or there are allegations of domestic abuse.

47. Financial disputes arising out of divorce also range depending on how straightforward the division of the assets is likely to be in practice. These types of cases can be complex if there are offshore trusts or third-party interveners for example.

48. Inheritance Act work can also vary depending on the number of beneficiaries, the number of parties to the dispute and the complexity of the assets concerned.

**QUESTION 6: do you have any comments on the examples of required transparency for Public Access services? (these can be found at Annexes C – K of the BSB’s Transparency Standards Guidance, published in draft alongside this consultation). We are particularly interested in how the examples can better support those undertaking Public Access work in complying with the additional rules.**

49. We think the examples usefully bring to life the possible ways that barristers can comply with the transparency rules.

**QUESTION 7: do you agree with the analysis in the EIA, and our view that although, in respect of different Public Access services, Public Access barristers who are BME, male/female, disabled and under 35 may be more likely to be required to comply with additional transparency requirements, this is justified**

**given the expected benefit to Public Access clients, access to justice and competition? Please explain your answer.**

50. Yes. The issue of fees is one of the most potent deterrents to those who need representation seeking to obtain it. Of such groups of potential clients those with protected characteristics or who are vulnerable can be assumed to represent a significant proportion.

51. The proposals contained in the consultation document seem on their face to be relatively straightforward and not unduly onerous.

52. Much of the work required will be done by chambers' administration in any event and the availability of support in the form of guidance for those individuals who also have to take personal steps to comply is noted.

53. Therefore when balancing the value in the proposals compared to what appears to be an obligation which is not particularly onerous, and whilst acknowledging that certain groups including BAME, women and those under 35 may be more exposed to such an obligation, it seems that notwithstanding this the proposals are justified. The reference to a review of impact one year in is also noted.

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