



Bar Council response to the Bar Standards Board consultation paper on transparency standards

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Bar Standards Board (BSB) consultation paper entitled 'Response to the Competition and Markets Authority's Recommendations: Policy Consultation on Transparency Standards.'¹

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.

Introduction

4. We have significant concerns with several of the proposals on which the BSB is consulting, particularly as regards workability, proportionality and whether they would, in practice, have the effect of promoting competition or transparency.

5. On the last of those points, we do not consider that they reflect the CMA's intentions, or apply them to the specific position of the Bar. We do not agree that the approach the BSB proposes for enhancing prospective client awareness and driving

¹ [Bar Standards Board \(2017\) 'Response to the Competition and Markets Authority's Recommendations: Policy Consultation on Transparency Standards.'](#)

competition flows from the CMA's report. It is not a meaningful fit with more than a small proportion of the Bar's work – all carried out at the most junior levels – and we have great doubt as to the value of adopting any requirements along the lines proposed.

The focus of the CMA's study

6. The CMA described its study as encompassing "'legal services' in a broad sense",² both those subject to sector-specific regulation and those not so subject (in other words, both reserved and non-reserved legal activities). It focused on what it regarded as legal areas most relevant to consumers and small businesses – conveyancing, wills and probate, immigration, family and employment – and it also conducted more detailed case studies on wills, employment and commercial law services. For all of these kinds of services, and more generally for the demographic of consumers and small businesses, solicitors are the predominant legal service providers.

7. The key concern for the CMA was "whether consumers can access, assess and act on information about legal services so that they can make informed purchasing decisions and thereby drive competition for the supply of legal services."³ Precisely what that means in practice must depend on the type of legal service. The CMA recognised this when it pointed out that:

"[I]n more commoditised areas of law, services are generally less complex, more process-based and therefore more homogeneous (for example, will writing and residential conveyancing). In these areas of law it is inherently easier for providers to be more transparent about their offering and for consumers to compare these offerings."⁴

8. The goal that prospective clients be enabled to make informed purchasing decisions is one that applies universally to all legal services, including those offered by barristers. However, abstract price transparency and comparison as means of achieving this can only be applied to the Bar if barristers' work has the commoditised character described above. In reality, it overwhelmingly does not.

Achieving the CMA's goals in the case of the Bar

9. Barristers are instructed predominantly for advice and advocacy in the context of legal disputes – to give opinions on the merits of actual or potential claims and

² [Competition and Markets Authority Legal Services Market Study, Final Report, p. 6.](#)

³ CMA Report, p. 7.

⁴ CMA Report, p. 43.

defences, to draft statements of case, to advise on strategy and tactics, and to represent clients at hearings. These services are not standardised in nature – they will vary dramatically from case to case in terms of the complexity of issues, and density of material (and thus the time involved and both the value and the cost of the work).

10. The Bar’s services are accordingly qualitatively different from those kinds in relation to which the CMA envisages that abstract price transparency is a warranted means of enhancing consumer awareness and competition. As it said in its commercial law services study:

“In relation to legal document advice, we do not consider there to be any significant barriers to providing price information. The same does not necessarily apply to advice and representation in disputes where the level of complexity and uncertainty can be significant.”⁵

11. The profound lack of standardisation in barristers’ services makes us highly sceptical that they can be described and evaluated meaningfully by generalised service information and abstract price information (as we discuss in our answers below). In the light of this, we suggest that transparency at the Bar can only mean (realistically, usefully or proportionately) transparency to individual clients in their own cases. The nature of barristers’ services makes this both inevitable and appropriate.

12. As the BSB recognises, the majority of barristers’ clients instruct them through solicitors, who play a major role in navigating options on their behalf. As the ones with work to offer, solicitors are in a dominant bargaining position and can choose from numerous chambers and practitioners, driving strong competition at the Bar. In cases of public access work, which the CMA pointed to as more relevant because of the Bar’s directly client-facing role, the work is still bespoke. Not only do the issues in cases vary, but so too do the knowledge, skills and sophistication of public access clients (and thus the degree of guidance and assistance they need, and the efficiency with which barristers can provide their services). Indeed, these can range widely. It is standard practice for a fixed fee to be agreed in advance, on the basis of the client’s discussed individual needs. That process involves a cost to the barrister in terms of time and effort (for which a charge cannot be made, at least if the client does not decide to proceed), as well as to the client, but it is difficult to see how that can realistically be avoided if the fee is to be fair and reasonable for both the client and the barrister. It is still entirely possible for the prospective client to compare providers, equipped with precise information for his or her specific case.

⁵ CMA Report, Annex C, p. C28.

13. The BSB's proposals (on price in particular) are, moreover, not a proportionate means of achieving the CMA's aims, at several levels.

- a. First, the CMA excluded the criminal Bar from its study, on the basis that most such work is publicly funded (in which event, indeed, the fees are largely fixed, or are negotiated with the Legal Aid Agency in individual cases). The BSB has gone beyond the CMA's concerns in proposing to apply transparency requirements to crime (which is the inevitable effect of the current proposal).
- b. Similarly, a large amount of family law work is also publicly funded (either by the Legal Aid Agency or by local authorities; and again, often at fixed or pre-agreed block rates), rendering it equally inapposite.
- c. If these areas were excluded in some way, that would leave the requirements applying to some family work and all civil practice; it is difficult to see how any barrister carrying out any work of that nature could avoid having to comply with the proposals, however rare it might be for that barrister to carry out work for those who would be entitled to complain to the Legal Ombudsman, and irrespective of whether or not that barrister undertook public access work.
- d. Furthermore, as we discuss in detail below, only a small amount of junior work at the Bar is of a standardised, routine character that might be amenable to predictable pricing. We find it difficult to see how mandatory rules applying well beyond these narrow parameters would be proportionate.

Methodology of our response

14. Before compiling this response, we have sought the views of our members by setting up a series of research meetings and teleconferences. We have engaged with a variety of different sets of chambers across England and Wales, and have taken particular care to seek the views of sets of chambers that undertake public access work in particular, since this is the focus of the BSB's proposals. In addition, we have liaised with a number of Specialist Bar Associations, many of which will be putting in their own consultation responses.

15. In summary, there is a significant amount of concern across the Bar in relation to the impact as well as some of the practicalities of the proposals, as we will go on to explain in our response. Where there are differing views, we have sought to capture these within our answers to the questions. Where appropriate, the Bar Council has sought to put forward constructive suggestions and alternative solutions.

Answers to Consultation Questions

QUESTION 1: do you agree that the publication of price recommendations 1, 2 and 3 would have the greatest impact in order to improve consumer understanding, facilitate shopping around and drive competition in service provision?

16. The importance of competition in legal services provision is beyond doubt. We recognise the role that informed consumer choice plays in driving competition, and that where possible this entails the ability for prospective clients to shop around between different providers and compare them on numerous bases, including price. We are also mindful of the need to ensure that prospective clients are not deterred from using barristers by any misperceptions of the Bar being inaccessibly expensive. However, we would caution against undiscerningly applying to barristers an approach that is in truth more relevant to the commoditised legal services the CMA had in mind.

17. In the CMA's own words, "while many legal services (such as will writing and conveyancing) are fairly standardised and capable of being reduced to a limited number of fixed prices, other services (for example, those involving the resolution of a dispute) will be highly dependent on individual circumstances."⁶ This point underlies the concerns shared across the Bar about both the justifiability and feasibility of requiring the publishing of prices as envisaged by the BSB.

Recommendation 1 - pricing models

18. Transparency about pricing models, i.e. the various bases of charging on which barristers may accept cases, is in principle beneficial to public understanding, and is something which could conceivably make sense to be published on chambers' websites. If prospective clients believe that one form of funding may be most suitable for them, it might theoretically be helpful for them to be able to narrow down potential chambers based on whether that model will be available or not. However, our experience is that chambers will be willing in principle to offer a wide range of pricing models, but the actual availability of a particular mode of charging will depend on the individual case. For example, a barrister might take some work on a conditional fee ("no win no fee") basis, but could only do so if the specific case was suitable. Any decision on a pricing model must take into account numerous factors including the likelihood of success, the amount of work involved, the circumstances of the client and any social benefit.

19. It may therefore be impossible to give information in advance about what specific charging models will actually be available – a discussion will inevitably be

⁶ CMA Report, p. 59.

needed, and at that point, more responsive and individualised information can be given. Pricing models are tools that clerks and barristers will draw on flexibly in order to present the best options to each client. In the end, what is agreed will be a matter of negotiation, but directed to a particular case, not conducted in the abstract.

20. We are hesitant about a mandatory requirement that chambers make clear what is “available”, both for the above reason and because it is not clear what kind of information the BSB would expect all chambers to display. If what is envisaged is a generalised description of what type of arrangement might in principle be negotiated, akin to the “most common pricing models” listed at Annex A of the consultation, we think that this would be better managed centrally on the Legal Choices website. We note that there is already some information about fee structures available but it is not particularly detailed.⁷ If Legal Choices is to be a single repository of useful information for prospective users of legal services, this needs to be developed to include more detailed information about the types of fee structures that all legal service providers might use. If this is done well, there should be no need for this to be duplicated on chambers’ websites. If chambers happen to offer something that is not dealt with on the Legal Choices website, then there would be nothing to stop them making that clear, if they wished to do so.

Recommendations 2 and 3 – prices

21. At present, barristers provide detailed information about prices prior to and at the point of engagement. Most often, this is through instructing solicitors in referral cases (where solicitors play a major role in navigating options at the Bar, in shopping around on behalf of clients, and in negotiating barristers’ fees). Detailed fee quotes are usually sought by and given to solicitors prior to engagement, and solicitors will often seek several estimates from different barristers. As fees are based on a variety of factors, including the kind of work involved, the experience of the barrister, the circumstances of the case and the particular client, estimates are necessarily formulated on request after some form of contact, which may be as simple as a brief phone call with a clerk in which the essential nature of the case is outlined (particularly in more straightforward cases, or for work for the most junior members).

22. We do not believe an evidential case has been made out that the way in which barristers currently provide information on pricing impedes consumer choice or competition. Almost none of the legal services included in the LSB-commissioned prices survey,⁸ on which the CMA based its findings, involve barristers. This fact,

⁷ <http://www.legalchoices.org.uk/legal-choices/money-talks/no-win-no-fee/>

⁸ OMB Research (2016), Prices of Individual Consumer Legal Services Research Report, commissioned by the LSB: <https://research.legalservicesboard.org.uk/wp-content/media/Prices-of-Individual-Consumer-Legal-Services.pdf>. The areas of practice under consideration were conveyancing, divorce, wills, lasting power of attorney and estate administration. Also see CMA Report, p. 60.

coupled with the difficulties (both in referral and public access cases) of giving meaningful price information in advance on inherently case-specific, bespoke services, makes it impossible to say that new requirements to publish prices would have any measurable impact, let alone a very high one. If any proposals are to be made, then they ought to be the subject of careful research before deciding on what proposals are needed, and what those proposals should be. We are also concerned that the burdens the current proposals will impose on chambers, and the risks they actually pose to competition, outweigh any benefit that they might offer consumers.

23. Members across the profession have been emphatic regarding the lack of standardisation or routine in the work that barristers do. Every case is different, and indeed the adaptability of barristers' services is one of the key ingredients in their economy. Moreover, the manner in which legal service users can find themselves drawing on barristers' services varies widely. A client represented by solicitors will only enlist a barrister where the case demands it, and that may be in very discrete, context-specific ways. A consumer who is represented by a solicitor will not be assisted in any meaningful way by the publication of fee information on chambers' websites, any more than a client represented by a specialised insurance broker would be assisted by theoretical risk pricing information being published by insurance companies.

24. While a public access client will make their own choice to consider a barrister, it may be where a relationship with a prior provider has broken down, perhaps because of particular quirks or complications with the case. The aim of bringing forward information routinely included in client care letters and putting them on a site is an understandable one, but while some of that information is standard and will be the same in every letter, that is not true about pricing. On the contrary, price is something on which barristers can frequently give information only after reading the papers and perhaps even meeting the client (often free of charge). The nature of public access is such that clients who use it are often fairly savvy individuals—after all they may have to take some of the steps in their cases. As only 702 barristers have the extension to their practising certificate to conduct litigation, the majority of public access clients will have to be able to conduct the litigation for their own case and the barrister is obliged to consider the suitability of the case to public access for every instruction. By no means do prospective clients always choose to instruct the barrister after a consultation, and there is ample room for them to shop around – it simply requires them to provide other barristers with the same information about their cases.

Hourly rates by seniority

25. Most of our concerns about publishing hourly rates – concerns shared by numerous barristers and chambers directors – are practical, but there is one important point of principle: barristers are selling their skill and judgment in a highly

competitive market, and we would want to avoid fostering a taxi-meter approach to billing in which barristers are driven towards standardised rates in a way which reduces, rather than enhances, competition. The practical concerns are twofold: the first is whether ranges can be formulated with any useful degree of precision, and the second is whether hourly rates by themselves would give prospective clients meaningful information about how much their case is likely to cost overall.

26. As regards formulating ranges of hourly rates, we are concerned that the breadth of practice areas in which many chambers undertake work (and indeed work varies widely within practice areas), the huge variation that can exist within bands that are based on year of call, and the many case/client-specific factors that can affect price (which the BSB identifies at para 32 of its consultation), will make the bands that chambers publish so wide that they do not actually give prospective clients any useful indication of likely fees, or enable them to compare different barristers. We have heard differing views on whether averages are a reliable means of arriving at indicative hourly rates. Many feel they are not; however, one set of chambers (practising a wide range of civil and family work) which already publishes hourly rates for public access considered that they do enable an accurate gauge of price (caveating that a discussion is still needed in each case to tell the client how many hours will be required). It is difficult to see how the BSB could prescribe a minimum standard that would work in a meaningful way for sets that have such differing approaches to practice.

27. Although seniority of the barrister is commonly an ingredient in the process of negotiating an hourly rate for a particular instruction, it is rarely the only factor. It is important to remember that barristers are all self-employed and in competition with one another. A set of chambers is not like a law firm, setting (headline) rates for its junior associates, senior associates and partners. A barrister who is in particular demand relative to her seniority (e.g. because she is only 3 years' call, but before becoming a barrister, practised medicine for 20 years and has very specialised expertise in medical negligence work) should be entitled to charge a higher hourly rate without coming under pressure because that rate is outside the published "range" for those of 1-5 years' call: her higher rate is simply the market rate for her particular services. Similarly, a more senior barrister who is hungry for work ought to be entitled to offer a lower hourly rate than his peers in chambers, rather than forced to give the impression that his rate will fall into a particular range.

28. Linked to this is the fact that the vast bulk of instructions are referred by solicitors, who are in most cases already very well informed about what is available and have the upper hand in any negotiations, especially with more junior barristers, or others who are (for whatever reason, including because returning to work after a career break) less in demand in the short term. The immediate effect of publishing rates would be to provide solicitors with a further negotiating weapon; for any range which was published, they would expect to be charged at the bottom end or below.

In order to combat this, chambers might be tempted to ensure that the rates published were aspirational, rather than representative. The net effect might be equivalent to requiring hotels to publish their supposed “room rates” in the reception area: anyone save the most naïve would be aware that that published rate did not represent the price actually payable. It is easy to see how a well-intentioned requirement to publish hourly rates (in any form) might end up *decreasing* transparency. Chambers would publish notional or “headline” ranges of hourly rates, with all market participants *except the inexperienced consumer of legal services* aware that these rates would be subject to discounts, depending on the particular case or the particular barrister instructed.

Indicative fixed fees

29. The fact remains, in any event, that hourly rates are only one piece of the puzzle. For a consumer to know what their bill is likely to be, they need an idea of the *total* fee. The vast majority of public access work in particular involves a fixed fee agreed in advance. It is logical, therefore, that the BSB is consulting on indicative fixed fees; however these are fraught with similar difficulties.

30. While public access work involves fixed fees, these are very much dependent on the individual case. The extent to which indicative fees can nonetheless be provided in advance depends on how standardised barristers’ work is. Only a few kinds of work are sufficiently standardised to lend themselves to reliable ballpark fee estimates, and these are mostly very junior-level work. Examples include: Inheritance Act advices; financial dispute resolution hearings in divorce cases; public law children work; health and safety prosecutions; mediations; first hearings in residential possession cases; civil claims that are already cost-controlled (e.g. junior-level road traffic cases)—but only where a barrister is willing to work for the fixed recoverable amounts; and ‘ordinary’ winding-up petitions. These are hardly a significant proportion of the work barristers do, and even the fees for these items of work can vary dramatically.

31. For example, not all one-day hearings are created equal. They can differ widely depending on the issues involved and the density of evidence. Indicative fees could give clients unrealistic expectations and set them up for disappointment (and wasted time) when barristers evaluate their specific case and give a markedly higher estimate. In other cases, it might discourage them from using the services of barristers for cases which would in fact attract a lower fee. It is difficult to see what benefit this offers over giving a client a first-time quotation that is genuinely realistic after speaking to them about their case. Alternatively, if barristers might be held to the necessarily broad estimates they publish online, it could discourage practitioners from doing certain kinds of work, for example public access cases.

32. We recognise that publishing ranges of fees could have the effect of enabling barristers with a protected characteristic to see whether there are any unjustified pay disparities between themselves and colleagues. However, the ranges are likely to be too vague to identify disparities, never mind evince what the reasons for them might be. Moreover, this does not override the broader concerns we have expressed.

Competitive concerns

33. Competition at the Bar is born out of negotiation and flexibility. Clerks negotiate with solicitors, often tendering for agreements and sometimes offering below-market rates. Work is won by being able to answer a solicitor's phone call and say, for example, that a barrister is able to take on a case at a lower fee because his or her diary has unexpectedly cleared.

34. The BSB's consultation recognises the role that solicitors play as intermediaries and cites the CMA's point that this role might be enhanced by greater price transparency. However, it does not say how, and we are unable to see how it would be the case. If it is by driving barristers down to the lowest prices stated in indicative ranges, this could have the consequence of a race to the bottom that prioritises the cheapest service at the expense of quality. Chambers are concerned that they will lose any hand in negotiations with solicitors.

35. It is also dangerous to treat chambers in the same way as corporate firms where every practitioner's interests are aligned. Members of chambers compete with each other individually.

36. Fundamentally, there is a risk that the Bar will lose its individually-tailored character and that barristers will all offer the same blunt, ill-fitting packages. This is entirely the opposite of competition. It is, furthermore, telling that solicitors have quite vocally opposed equivalent measures for their side of the profession. Research conducted by the Law Society has shown that consumers will become preoccupied with price and essentially ignore other relevant factors that affect quality (please see our response to question 21 below).

37. We acknowledge the importance of the considerations underlying the BSB's thought process here, and it is not our intention to obfuscate or be defensive for the sake of it. However, we feel that transparency for the Bar can only sensibly mean transparency to each individual client in each piece of work. We are at present sceptical that there is any justification for departing from this, and concerned that it will not be workable in a way that meaningfully benefits consumers and competition while also empowering the profession.

QUESTION 2: do you agree that the publication of service recommendations 7 and 10 would have the greatest impact in order to improve consumer understanding, facilitate shopping around and drive competition in service provision?

38. We shall take each recommendation in turn. Recommendation 7 calls for the publication of ‘a description of the services that the legal service provider provides’ on barristers’ websites.

39. We are unclear what the Bar Standards Board has in mind with respect to this recommendation. The consultation paper does not include any level of specificity about the type of service information that barristers ought to provide. We have inferred that this does not include information about fees as this is dealt with elsewhere in the consultation paper. From our own analysis and review of barristers’ websites, the Bar already provides a great deal of information about the services that they offer. This is often broken down into information about the practice areas that the barrister specialises in and notable cases that they have been involved in, and includes information about their seniority and experience. Frequently, there are links to other websites that include information about providers and their services such as the Legal 500.

40. We are unclear, given that the BSB is consulting on whether there should be minimum standards for service information, whether the BSB is currently of the view that there is a lack of transparency in this area. We do not believe that there is. Our analysis has led us to conclude that there is already a high level of transparency with respect to service. Consequently, we are not convinced that there is a need for regulation in this area. Having said that, we would not necessarily oppose the introduction of certain minimum standards in principle. We agree with the BSB and the CMA that consumers need to be able to understand the services on offer and how they relate to their individual circumstances, but it is not clear to us what this is really intended to mean in relation to the Bar, particularly given the very wide range of circumstances in which members of the Bar might be engaged, and the very wide range of work that they may be engaged to carry out. We would need further information about the scope of the proposals before we could be clear on the extent to which we could agree with this proposal. We would welcome greater clarity about what this would look like in practice and the BSB’s approach. Currently, we are left wondering what minimum requirements on this might look like.

41. Turning to recommendation 10, the consultation paper recommends the provision of ‘indicative timescales’ on barristers’ websites. Whilst we can understand the policy intention behind this proposal, we struggle to see how this can be realised in a meaningful way in practice.

42. A question at the outset is exactly *what* the timescales would refer to. Timescales about the length of litigation are not realistically a matter for barristers, the vast majority of whom are not authorised to conduct litigation. Those are more within the province of solicitors, but in any event it is very difficult to predict the likely length of any litigation, which can be influenced by a far greater number of external factors than other types of non-contentious work. We note that the SRA's parallel consultation on its response to the CMA recommendations recognises the difficulty of giving information about timescales in litigious cases, suggesting that it "might not be practical."⁹ We can only presume that the BSB's intention is to refer to the timeframe within which a particular piece of work might be done; but that is either unnecessary or unrealistic. If the work for which a barrister is engaged is to appear at a hearing, then the date for the hearing will already be fixed (although hearings can become part-heard or adjourned, for reasons entirely outside a barrister's control), and what might be required for preparation (and when) will depend on the particular circumstances. For advisory or other work, the primary timescale of relevance is how long it will take a barrister to produce that work; but this is not something that can be predicted in the abstract, for several reasons.

43. First, it is worth re-emphasising that barristers often undertake bespoke, complex work. Timescales can be difficult to predict especially because of the diversity in terms of the type and nature of their caseload. The timescales will depend on the complexity and nature of the case as well as the extent of the paperwork that the barrister has to review. It is difficult to see how general timescales can be published in a meaningful way on a website before the client comes to the barrister for an estimate for their particular case. Only after that initial conversation is it practicable for the barrister to provide a proper estimate of the time that the client's case will take.

44. Second, the vast majority of barristers are self-employed and agree to undertake work personally. This is unlike other sections of the legal sector where there may be multiple lawyers and paralegals undertaking work on the same case, or available to do so, which enables them to have greater control over timescales. For barristers, timescales are influenced by other diary commitments and are contingent upon the rest of their caseload, which varies from time to time.

45. Barristers are also individuals, and it is inevitable that a particular case will not take every barrister the same amount of time. This will be influenced by a number of factors, including experience and their degree of expertise in the particular areas of law relevant to the case.

⁹ [The Solicitors Regulation Authority \(2017\) 'Looking to the future, better information, more choice', para 63.](#)

46. The timescale for a particular case can also be affected by requirements for additional information or documents, by new issues that arise on more detailed consideration of papers, and by delays in obtaining documents from third parties.

47. We are also concerned that this particular proposal could have a detrimental impact on those with childcare and other caring responsibilities, and we urge the BSB to give this point serious consideration.

48. Further, it is possible that barristers with a protected characteristic such as a disability under the Equality Act 2010 may require longer to complete a piece of work than others. The BSB should give this requirement further thought to see if there are any unintended consequences that might affect those with such characteristics.

49. If the BSB decides to proceed with imposing new requirements in this area, a more practicable alternative might be for chambers to provide information about the factors that might influence the timescales on a case such as complexity etc. This could be provided on a website in a standardised format and may be able to manage the client's expectations so that they can be alive to the realities of the sometimes unpredictable nature of litigious work. We have serious doubts as to the value or benefits of providing this information, but it could probably be done in principle.

QUESTION 3: do you agree that the publication of redress recommendations 11 and 12 would have the greatest impact in order to improve consumer understanding, facilitate shopping around and drive competition in service provision?

50. We agree that publication of these pieces of information is worthwhile and could have a beneficial effect on consumer understanding. If consumers can see at the outset that they are looking at a regulated provider, it could provide them with a degree of confidence. Similarly, while users do not search for legal services anticipating that they will need to complain, knowing that there are processes for redress (both internal and external via the Legal Ombudsman) should offer some reassurance.

51. However, we would emphasise that any rules should state what information is required on chambers' website but not make any prescriptions on how that information must be presented. This is in keeping with the approach taken in existing rules on redress information (rC99.1, rC103 and rC125). Chambers should be accorded discretion on, for example, the phrasing they use, and on which page of their website they display regulatory information or details about complaints.

QUESTION 4: do you agree that the BSB should introduce guidance (rather than mandatory rules) for the CMA recommendations that have been categorised as having high and medium impact for consumers? Please explain your answer.

52. In order for regulation to be proportionate, mandatory rules should only be considered where there is a clearly demonstrated problem and universal compliance by the Bar is necessary in order to make the solution effective. Where the BSB does not consider a proposal to offer a very high impact, guidance is certainly more appropriate than mandatory rules.

53. We consider that some of the high/medium impact information is more than a prospective client would need to know at the stage of comparing providers (creating a risk of “information overload”), and it is likely to be far more useful for barristers or clerks to provide that information directly to a client in a manner suitable to each particular case and client, and to tailor it appropriately. Additionally, devising and publishing information such as scenarios, cost ranges for each stage, and likely disbursements will have a significant burden on chambers – a cost which could be passed on to clients. Instead, the types of information the BSB considers would have a high or medium impact are better regarded as good practice which chambers might choose to adopt to distinguish their sites from those of competitors.

QUESTION 5: do you agree with the BSB’s analysis of why the high and medium impact recommendations should not be adopted as mandatory rules? Please explain your answer.

54. We do agree with the BSB’s analysis, for the reasons given in our answer to question 4. We can in principle see some limited value in scenarios as a means of giving perspective to hourly rates, but we find it difficult to see that any benefit is likely to be meaningful. We agree with the BSB’s points about diversified chambers having real difficulty producing this information, and complex practices potentially putting out information that would not improve consumer understanding. These points strongly militate against a mandatory rule of general application.

QUESTION 6: (a) do you think the BSB should require publication of first-tier complaints data? Please explain your answer.

55. No. We disagree with this proposal and do not consider the publication of this information by chambers to be a useful indicator of quality. In coming to this view, we discussed this proposal with a variety of barristers and SBAs, all of whom were unanimously against it for the reasons that we will set out below.

56. The BSB suggests that barristers could publish the previous 3 years’ worth of data allowing consumers to see any trends over time. It is unclear from the

consultation paper whether the requirement would be to publish data on complaints about individual barristers, or the total complaints made to chambers as a whole. It is, moreover, unclear whether the BSB is suggesting that barristers publish figures showing the number of complaints made in particular practice areas or whether they ought to publish more detailed information about the outcome of complaints dealt with at the first-tier. We asked the BSB what their intention is and we understand that it is considering a requirement that would compel chambers to publish both the number of complaints as well as information about the outcome.

57. We believe that it would be difficult to publish information about the outcome of complaints in a manner that would be useful to prospective clients. For the data to be meaningful, there would need to be included a description of the complaint and information about whether it was upheld. This would be problematic for reasons of client confidentiality. It would be difficult to publish descriptions of complaints that would allow clients to 'see any trends over time' without revealing any details about the client or the nature of the case. Further, revealing this information could conflict with a barrister's ongoing duty of confidentiality to clients at rC15.5,¹⁰ which persists even after a barrister ceases to act for the client. The duty of confidentiality also hampers a barrister's ability to respond to a complaint, which we think would be necessary in the interests of fairness. This is one of the reasons why we expressed concerns about comparison websites in the legal services market in our submissions¹¹ to the CMA. Without information about the nature of the complaint, it will not necessarily be possible for the client to ascertain whether the issue complained about was minor or a more serious; either that, or prospective clients will take a too simplistic and potentially highly unfair view of the significance of the complaints data. Pure statistics about the number of complaints received or upheld would not reveal this information either.

58. Publishing meaningful statistical information is problematic for several other reasons. Many sets of chambers that we spoke to said that they receive very few complaints and that publishing figures would not provide any useful information to clients because there were so few as to be statistically insignificant.

59. In addition, the BSB seems to acknowledge in its consultation paper that figures may be skewed because certain areas of work that will inevitably attract more complaints than others. For example, in its 2016-17 annual enforcement report it stated that 14% of complaints against barristers were from family law litigants, which is small in its own right, but is significant when compared to the 19% made up by litigants in all areas of civil practice.¹² The BSB also mentions the fact that Public Access

¹⁰ [Bar Standards Board \(2017\) Handbook, p134 – Rule rC15.5.](#)

¹¹ [Bar Council \(2017\) Response to the Competition and Markets Authority Interim Report, para 29.](#)

¹² [BSB Enforcement Annual Report 2016-17, p. 13.](#)

work receives a greater number of complaints than referral work. This risks creating a distorted picture that does not shed any light on quality either of the set of chambers or the individual barrister.

60. Even if it were possible to publish meaningful complaints data, which we do not think is practicable because of the concerns set out above, it is not desirable for the following reasons:

61. First, complaints are not always justified. Nearly all barristers receive spurious or unjustified complaints at some point during the course of their careers. Clients can be influenced by the outcome of the case and as highlighted above, this may be more pronounced in emotive areas of law such as family where there is a great deal at stake for the client. The client can feel aggrieved if the outcome of the case was not what they wanted even if the case did not have much strength in law. Complaints of this type can reveal more about the nature of the client and case rather than the quality of the barrister. Many clients who instruct barristers on a public access basis come to the Bar after their relationship with a previous provider has broken down; barristers may stop taking on public access clients who they fear may be difficult to work with or likely to complain spuriously. Individual barristers may also be the subject of repeated complaints by an individual whose is doing so vexatiously.

62. Second, we have heard concerns about the effectiveness of providing complaints data in other sectors such as in financial services. We would urge the BSB to give this careful consideration to capture any lessons learned.

63. Third, complaints that genuinely reveal deficiencies in a barrister's *service* (as opposed to quality) are treated by chambers as impetuses to address the barrister's shortcomings. Publishing the data and shaming the barrister is inherently punitive and detracts from more constructive steps that chambers might look to take. If, alternatively, aggregated trends of complaints are published for chambers as a whole rather than for individual barristers, the reputations of all member barristers will be unfairly tarnished – a set of chambers is not a collective unit or firm in any substantive sense.

QUESTION 7: do you think it would beneficial for barristers to display the BSB's logo on their website? Please explain your answer.

64. We can see some benefit to displaying the logo, as a clear and memorable visual cue that consumers will learn to look for from site to site as a mark of assurance.

65. The BSB may wish to consider whether a regulatory status text requirement (redress recommendation 11) may be more practical. As with the SRA's equivalent rule, it should give chambers the freedom to choose where on their site they mention

their regulatory status. In the case of a logo, it should be borne in mind that not every chambers' website is equivalent, and there could be issues about site layouts not easily accommodating the image (especially on homepages), or giving it disproportionate prominence, particularly when one factors in mobile optimisation (or the lack thereof). These issues might matter less if the BSB leaves it to chambers to decide where to place the image.

QUESTION 8: do you think Public Access barristers should be required to publish the BSB's Guidance for Lay Clients on their websites? Please explain your answer.

66. We have no objection to such a requirement, and consider it to be a sensible and worthwhile one. Public access practitioners roundly regard the Guidance as having genuine value, and many chambers already link to the Guidance on their websites' public access pages as a matter of course.

67. The one clarification we would seek to make is that there be no prescriptions as to form, and that such a requirement may be met by displaying a weblink to a BSB-hosted copy of the Guidance, rather than chambers being expected to publish the text of the Guidance in the body of their sites or host the file locally.

QUESTION 9: in terms of the provision of information, are there any other examples of what you consider to be good practice that you could draw to our attention? We would be particularly interested to hear about examples of what you consider to be good practice in terms of providing information to consumers with additional needs.

68. While some of the ideas suggested in para 56 of the consultation may be worthwhile, we are concerned that if information requirements pile up, the burden on chambers could be very substantial. Chambers are not corporate entities but collectives of individuals, and they do not necessarily have significant budgets for business development or marketing – a factor which translates to savings for clients. Although it is helpful that the BSB as regulator can offer that function of identifying good practices, we would want to ensure that they remain just that – good practices and not regulatory requirements.

QUESTION 10: do you agree that the BSB's suggested minimum disclosure requirements should apply to all barristers undertaking Public Access work? Please explain your answer.

69. This answer focuses on price, as our views on service and redress information holds true both for referral and public access work.

70. We understand the logic of applying the requirements to public access work, given its directly consumer-facing nature. However, to apply it simply to all public access barristers as a category is far too blunt an approach. The fact of work being done by public access rather than referral does not obviate the significant difficulties, discussed above, of providing meaningful, precise information for bespoke services. A more narrowly tailored approach is required. The Solicitors Regulation Authority’s consultation limited price-publishing proposals to a small number of specific services that are all highly commoditised in nature:¹³

For consumers	For small businesses
<ul style="list-style-type: none"> • Residential conveyancing (limited to sale, purchase and remortgage) • Family – undefended divorce and financial disputes arising out of divorce • Drafting of a will • Probate/Estate administration • Drafting a lasting Power of Attorney • Motoring offences • Employment tribunal • Personal injury claimant 	<ul style="list-style-type: none"> • Employment tribunal • Debt recovery • Licensing applications in relation to business premises

71. We would encourage the BSB, at most, to consider a similar approach and to look to identify whether there are specific kinds of services provided by barristers which fit this mould. Our answer to question 1 pointed out some potential examples, such as Inheritance Act advices or junior-level road traffic cases (where fixed recoverable costs may apply in any event). This would go some way to ensuring the proportionality of any regulatory action, particularly as the only potential information deficiency for which the BSB has cited evidence is the perception among the family law clients it surveyed that barristers are more expensive than solicitors (which in any event needs unpacking – as the BSB itself points out, barristers’ services may be qualitatively different). But we remain concerned that the limited areas in which this is realistic mean that regulatory action is unjustified and disproportionate.

72. In the limited areas in which public access barristers’ services compete directly and meaningfully with those of solicitors, that competition will not be strengthened by barristers having to disclose prices for all their work but solicitors only having to do so for the few services listed above, as there will be no potential for price comparison in respect of all the myriad services outside of this narrow list.

73. We should also emphasise that if the requirements are applied to all public access barristers, there is a genuine risk that practitioners will be deterred from offering to undertake such work. Numerous practitioners whom we spoke to held this

¹³ [SRA Consultation “Looking to the future: better information, more choice”, p. 18.](#)

fear, for many of whom public access work is only a relatively small proportion of their caseload, and some have said they would be moved to cancel their public access registration if it were to trigger additional requirements along the lines proposed.

QUESTION 11: do you think that the BSB's suggested minimum disclosure requirements should apply to barristers undertaking referral work, either:
(a) when dealing with clients that are entitled to complain to the LeO?;
(b) by reference to high-risk practice areas?; or
(c) a combination of (a) and (b) above?

74. For the reason stated above, this answer focuses on price.

75. As we noted above, while the CMA opined that applying new transparency standards to referral cases could strengthen solicitors' role as intermediary, and the BSB has endorsed this view, it is not at all apparent how it will have that effect. At present, solicitors actively shop around for barristers, and members of the Bar often win instructions (including block or panel agreements) with solicitors and insurers through processes of competitive tendering. Publishing rates as proposed could destroy much of the flexible negotiation that takes place. We struggle in any event to see benefits to consumer understanding or competition arising from barristers having to publish necessarily broad and imprecise price ranges (particularly when solicitors will not have to for the overwhelming majority of their work).

76. The CMA was focused on directly client-facing services – public access work, in the case of the Bar – and only went as far as offering a speculative remark about enhancing the existing role of solicitors (and not pointing to any evidenced deficiency in how referral cases currently work). We cannot agree that any case has been made out for applying disclosure requirements to referral cases.

77. Taking each of the BSB's proposed categories of applicable referral cases in turn, defining the class as all clients eligible to complain to the Legal Ombudsman is far too broad a category. It would be likely to capture almost every member of the Bar (particularly given the 'cab rank' rule) and cover almost all of their practice areas. In the BSB's December 11th webinar, it appeared to recognise that this option would not be a meaningful filter at all, so we will not labour this point.

78. As to areas of practice characterised by the BSB as "high risk", these appear to be predicated on heightened vulnerability of consumers. However, these are not the kinds of services the CMA focused on in its 2016 legal market study, as we outlined at the beginning of this response. The CMA specifically excluded crime from its study. It is, moreover, arguable that in these areas where clients' personal stakes are often frightfully high, consumers will be looking for guarantors of quality and not

economy.¹⁴ These two points are borne out by the fact that the SRA has limited its price proposals to “some of the key legal issues that consumers face”, opining that “some of the most vulnerable consumers seeking immigration or housing advice will not pay for these services.”¹⁵

79. We do not believe that either category identified by the BSB is well-targeted, proportionate or effective, or that they make a good case for applying disclosure requirements to barristers doing referral work.

QUESTION 12: regarding work funded by the Legal Aid Agency, do you agree that the BSB’s suggested minimum disclosure requirements:

(a) should not apply in relation to price?; but

(b) should apply in relation to service and redress?

80. We agree that requirements to publish price information are especially inappropriate for legal aid work. As to service and redress information, our responses to question 2 and 3 apply as much to legal aid work as to privately paid work.

QUESTION 13: are there any other options (other than those discussed above) to ensure any new rules are targeted, proportionate and effective?

81. We have raised concerns about the proportionality and effectiveness of some of the requirements being proposed by the BSB in our earlier answers. We have also suggested that some of the proposals (such as the proposals for providers to publish their first tier complaints data) go beyond what is recommended in the CMA Legal Market Study and are neither driven by the results of that study nor proportionate.

82. To ensure that the proposals are better targeted, we recommend that the BSB should align its approach with the recommendations of the CMA. So far as the publication of pricing information is concerned, in their final report, the CMA identified a number of principles that are needed to ensure that effectiveness of upfront information provided to the consumer. These are as follows:

“Accuracy: As far as possible, the information provided should be complete and should allow the consumer to understand the price that is relevant to their circumstances. This may require the presentation of a number of price permutations for variations of the same service. Price information should

¹⁴ The reality is that recommendations from family and friends do play a valuable role in such situations.

¹⁵ [SRA Consultation Impact Assessment, p13.](#)

ultimately provide consumers with (i) an understanding of the total price of their legal service and (ii) what services are included in that price.

Comparability: Price information should be communicated by different providers in a way that is comparable; for instance, a standardised format could be used.”¹⁶

83. We have set out the difficulty of providing accurate fee information on a website, in advance, for bespoke, complex work. This dramatically diminishes the effectiveness of this proposal and it ought not to be proceeded with.

QUESTION 14: do you have any comments on when the BSB’s suggested minimum disclosure requirements should apply to Public Access barristers and those undertaking referral work for clients entitled to complain to the LeO?

84. We believe the redress information requirements could apply universally to all members of the Bar. We do not believe a case has been made for requiring barristers to publish price information. Nonetheless, any requirements to publish price information, and to some extent service information as well, should not apply beyond barristers whose work falls within the CMA’s paradigm of commoditised services – and they should only apply to that work, so that these barristers are not disadvantaged by the fact that they offer such services alongside the ones they offer in common with their peers.

85. This is a category which the BSB will, if it is minded to pursue this, have to define and consult on. It may be that this category proves to be unworkable just as the ones already suggested. At present we cannot see a case for applying the price requirements to referral work.

QUESTION 15: do you agree that option two would be more feasible in terms of providing minimum price and service information? Please explain your answer.

86. We do agree that option two is more feasible than option one. Publishing chambers-wide averages or guideline ranges of rates would avoid information overload and allow practice managers and clerks to set ranges in ways that better preserve their ability to negotiate. The BSB flags up the possibility of price collusion; this could also be seen as barristers seeking to avoid solicitors holding them to the lowest end of their ranges.

87. Our concerns about the practicality and utility of price ranges apply to both options, however. The notion of “most common cases” is overly optimistic in practice – most chambers do a staggeringly broad range of work, and very little of it will be as

¹⁶ CMA Report, p. 58.

neatly packageable as the mediation used as an example. Although certain types of very junior work might be identified in different practice areas, we are not convinced that this would be of any real benefit. In referral work, solicitors will know the 'going rate', or can easily find it out. On the other hand, that 'going rate' will be for a typical case prepared by a professional client, and so will in part reflect the work required for typical instructions of that sort; with a much wider range of public access clients and circumstances, that 'going rate' will simply not be applicable.

QUESTION 16: are there any other issues in relation to entities providing the suggested minimum disclosure requirements (other than those highlighted above) that the BSB should consider?

88. There are currently 82 BSB-authorized entities. A substantial number of these are limited companies through which single barristers practise, based in chambers. In this respect, they are not relevantly different from their self-employed colleagues in chambers. If any requirement were placed on entities to publish their prices, it would thus result in those individual barristers having to do so, disadvantaging them vis-à-vis other members of chambers. We cannot see any justification for this differential treatment. Accordingly, any distinct requirements applying to entities should only apply to those not associated with a set of chambers, or should accord entity-barristers discretion as to how they comply with the requirements.

QUESTION 17: are there any other issues in relation to accessibility of information (other than those highlighted above) that the BSB should consider?

89. We believe that the suggestions listed in the BSB's consultation document for how to present information accessibly are logical ones. We are, however, concerned that making them into requirements would be overly prescriptive. Either a rule would include the term "prominently" which is a value judgment and which would result in uncertainty, or the Handbook would have numerous provisions going into excessive depth about website layouts. If publishing the information under discussion were to become a requirement, it would be much more in keeping with the BSB Handbook's approach of outcome-focused regulation if chambers are accorded latitude as to how they present it.

QUESTION 18: do you think it would be useful to provide core information on either the BSB's website or through other third party sites?

90. The BSB's consultation defines core information as the recommendations it proposes for disclosure requirements. As we stated above in our answer to question 1, we believe Legal Choices might be a better location than chambers' websites for displaying information on typical pricing models at the Bar. Drawing on Annex A of the consultation, Legal Choices could describe the kinds of pricing models that

barristers might typically offer (caveating that prospective clients will need to approach individual chambers to see which might be available in their particular cases).

QUESTION 19: are there any other issues in relation to consistency of information (other than those highlighted above) that the BSB should consider?

91. We can understand the need for consistency of information so far as comparability is concerned. Our view is that it would be possible to present information on core redress such as regulatory status, registration details, the complaints process and access to LeO in a standardised way. The consultation paper discusses the challenge of standardising price and service information and we agree that this is more difficult, if not impossible.

QUESTION 20: are there any other issues in relation to the need for flexibility (other than those highlighted above) that the BSB should consider?

92. The BSB has pointed to relevant factors under the auspices of flexibility. However, we believe the consultation document is too quick to conclude that it is “unlikely that the new transparency requirements will compromise the need for flexibility in service delivery, or risk barristers undervaluing work which they are then obliged to undertake at a set price.” It is true that the prices to be published are meant to be indicative, but it is important to look more closely at bargaining dynamics and the possibility that clerks will be hamstrung in negotiations, particularly as barristers and clerks are forecasting *exactly* the two problems which the BSB mentions.

QUESTION 21: are there any other issues in relation to price discrimination (other than those highlighted above) that the BSB should consider?

93. The Law Society has commissioned research¹⁷ to understand better consumer behaviour and how information can be best presented to clients. One of the conclusions of the report is that price is a significant factor for prospective clients and it tends to be ranked as the most important factor for the most vulnerable clients. The research emphasises that there are substantial risks to prospective clients if they are presented with incomplete information. The report concludes:

“Providing relevant but missing (or difficult to access) information will only help consumers if presented in the right way, and may harm consumers if it leads them to overlook or discount other relevant service information such as protections, qualifications, and regulation which are important to consumers. This is particularly the case when consumers have little knowledge that

¹⁷ London School of Economics and YouGov (2017) *Consumer Behaviour Research*

protections can vary and that not all providers are regulated. A number of large scale quantitative behavioural experiments have illustrated that how prices are presented can have significant impact on consumer decision-making, including generating harm. This is because consumers anchor to the price, and may stop searching when in fact they should continue to search, and consumers overlook important information leading them to make poorer choices.”¹⁸

94. The BSB should have regard to the scientific research concerning consumer behaviour when thinking about if and how to frame any regulatory requirements concerning price. We would not wish for any transparency requirements concerning price to lead prospective clients away from the other significant advantages that come with instructing a barrister such as quality and expertise, regulatory status, professional indemnity insurance and Legal Professional Privilege. The BSB should ensure that these factors are given equal weight in any new transparency requirements.

QUESTION 22: are there any other issues in relation to perceptions of value (other than those highlighted above) that the BSB should consider?

95. The BSB is right that value will mean different things to different clients, and that price is only one factor. Many clients will perceive barristers to have presented good value if they have won their cases. Equally, clients may also greatly value being told promptly that their case has no prospects, thus sparing them unnecessary expenses and time.

96. We note the finding in the BSB’s Family Law Clients Research Report of a perception among respondents that barristers charge more than solicitors (although it does not explain to what extent this relates to the same work or the same level of expertise, e.g. in advocacy). As discussed above, this is the only evidence to which the consultation refers about client awareness in the case of the Bar. Any regulatory response should be commensurate to the evidence. If the BSB focuses its action on this concrete issue rather than broader notions of transparency that do not have the same evidential foundation, its regulation will be more targeted, proportionate and effective.

QUESTION 23: are there any other issues in relation to fee disputes (other than those highlighted above) that the BSB should consider?

97. It is worth pointing out that the majority of the work that comes to the Bar is by referral instruction. This is important because the fee arrangement will be between

¹⁸ Page 77, *Ibid.*

the solicitor and the barrister and not between the barrister and lay client. Under the Standard Contractual Terms¹⁹ the solicitor is responsible for paying the fees irrespective of whether they have the funds from the lay client. If the client has a concern about the level of the fee (the barrister's fee is only one aspect of the total fee), this is raised with the solicitor.

98. If the solicitor is unhappy with the fee the Bar Council offers a Joint Tribunal arrangement²⁰ with the Law Society which resolves disputes over the level of the fee.

QUESTION 24: do you have any comments on the BSB's proposed strategy for compliance with the new transparency requirements?

99. We support the BSB's intention, stated in its action plan, to develop supporting guidance and a communications strategy to assist compliance with any requirements it adopts. Chambers are likely to need assistance on understanding what the requirements mean in practice.

100. We also agree with the BSB's intention to prioritise supervisory action over enforcement. The reality is that barristers and chambers will struggle with the proposed requirements, for reasons we have discussed above. Many failures to comply are likely to stem from a lack of understanding about how to produce or present the relevant information, and will be best addressed with the BSB clarifying exactly what the barrister or set of chambers is expected to do.

101. One issue of concern or uncertainty for us is about how risk will be evaluated in this area, for the purposes of targeted spot-checks. Focusing on "high risk" areas or vulnerable clients is likely to unfairly burden practitioners in these areas (many of whom may be working in lower-earning chambers because of the nature of the work) and neglect to secure compliance by large swaths of the Bar which do similarly individual-centric or consumer-type work (areas where, for example, price may actually matter more). Histories of regulatory non-compliance seem to be logical methods for defining targets. However, the nature of these requirements is such that many chambers may struggle with them. It may be that random spot-checks are more appropriate. Instances of non-compliance are likely to raise questions whose answers will assist others with understanding and implementing the requirements. Put another way, the goal of supervision in this area might be a form of shared learning.

¹⁹ Available here:

http://www.barcouncil.org.uk/media/278543/12_7_27_approved_contractual_terms_updated_bsb_handbook.pdf

²⁰ <http://www.barcouncil.org.uk/supporting-the-bar/fees-collection/joint-tribunal-service/>

102. There is also a concern relating to regulatory consistency. Given that, as the BSB recognises, one size will not fit all when it comes to disclosure requirements, the BSB will be evaluating varying approaches by different chambers. It is crucial to maintain some level of consistency in how the BSB judges different means of achieving the same goal.

QUESTION 25: do you agree with the analysis in the EIA, and our view that although barristers who are BME, male and over 35 will be somewhat more likely to be required to comply with new transparency requirements in respect of Public Access work, this is justified given the expected benefit to Public Access clients, access to justice and competition? Please explain your answer.

QUESTION 26: do you consider that the requirements will have any adverse impact on the basis of other protected characteristics under the Equality Act 2010? If yes, please explain your answer.

103. These two questions are taken together. We first provide our comments on the analysis in the EIA with respect to each protected category, giving our views on any adverse impacts not identified by the BSB. We then explain why we do not agree that any disparate impacts will be justified.

104. Taking the impact analysis for each characteristic in turn:

- Race: we have no basis to question the BSB's conclusion that BME barristers will be more likely required to comply with disclosure requirements. However, we do not accept that the only negative impact is an administrative burden. The BSB has to factor in the impact that publishing prices could have on income (for instances by barristers being forced down to the low-end of published fee ranges). If BME barristers are more likely to do public access work – and, as it has been suggested to us, some of the junior-level work we have listed above for which there may be a 'going rate' in referral work – there is a possibility that the effect of complying with transparency requirements could exacerbate pay differentials between BME and white barristers.
- Gender – we have no basis to question with the BSB's finding that male barristers will be more likely to be required to comply in respect of public access as a whole. However, it has been suggested to us that female barristers are more likely than male colleagues to do the type of junior-level work we have listed above, partly as a result of flexible working arrangements. Again, the impact is not just the administrative burden but also the effect on income. The BSB must consider whether female barristers could be disproportionately impacted in that regard.

- Disability – as we stated in our answer to question 2, the BSB should consider whether requiring the publishing of timescales could negatively impact barristers with disabilities.
- Age – the BSB is proposing to require chambers to publish hourly rates by seniority. Seniority is typically defined by number of years call, which can be a function of age (although barristers of a certain years’ call may not actually have practised for all of that time, and some will have started their career at the bar later or earlier than others). The BSB should consider whether such a requirement could discriminate against younger barristers who, although less senior, would otherwise attract especially high fees.
- Pregnancy / maternity – the BSB should consider the effect of price publication on barristers returning to practice *after* parental leave. Some such barristers will lower their rates when they first return. Publishing individual rates could create baseless assumptions about *why* such barristers’ rates are lower, while publishing chambers-wide rates may result in such barristers being passed up for work (otherwise risking undercutting their fellow members). We have also pointed (in our response to question 2) about the potential impact that publishing timescales could have on barristers with childcare responsibilities.

105. The BSB has concluded that any disparate impacts are justified by the “expected benefit to Public Access clients, access to justice and competition in the provision of legal services”. We cannot agree with this. For reasons we have discussed above, the putative benefit is speculative and has not been substantiated (for instance, by showing any evidence that current practices *specifically at the Bar* are resulting in unmet legal need, lack of consumer understanding, or uncompetitive behaviour).

QUESTION 27: do you have any comments on the action plan for improvement in the EIA?

106. We broadly agree with this approach. However, we think there is room to widen the scope of the action plan for improvement. Currently, BME barristers over the age of 35 have been identified as a group that may require additional support in addition to disabled barristers. We have also raised concerns earlier in this response about the possibility of those with childcare and caring responsibilities being adversely affected by the proposals. There may be other groups who could be adversely affected and the BSB should keep this under review.

Bar Council
9 January 2018

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