

BSB Consultation on Transparency Standards

Introduction

The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of some 1,300 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

Chancery work is that which was traditionally dealt with by the Chancery Division of the High Court of Justice, but from 2 October 2017 will be dealt with by the Business and Property Courts, which sit in London and in regional centres outside London. The B&PC attracts high profile, complex and, increasingly, international disputes.

Our members offer specialist expertise in advocacy, mediation and advisory work including across the whole spectrum of company, financial and business law. As advocates members are instructed in all courts in England and Wales, as well as abroad.

Our Overall Approach

The approach we have taken to the main proposals in the consultation can be summarised as follows:

- (a) A case is made out for requiring those who market their services direct to the public to publish price and service information. For those providers, there is a clear need for the public to be able ‘shop around’ and to be informed of prices and other information ‘up front’.
- (b) A case is not made out for those who market their services solely to other professions (i.e. are not directly instructed). The purchasers of such services (mostly solicitors) are sophisticated and unlikely to be greatly assisted by having limited and/or high level price and service information set out on a web site.

- (c) The application of the new requirements to those whose customers can complain to the Legal Ombudsman (LeO) will lead to their applying to very nearly all self-employed barristers.
- (d) The BSB should consider restricting the provision of price and service information to specific areas of work, at least to begin with.
- (e) The consultation contains a confusion about how and when information is provided and this needs to be re-considered.

Direct Access

Individuals who seek to use the services of a barrister without the assistance of a solicitor or other professional are often unsophisticated consumers. We can see that such persons would be assisted with being able to compare, by reference to chambers/barristers' web sites the likely prices and methods of calculating price that are used as well as obtaining basic information regarding the level of service they would expect to receive.

It needs to be understood that not all those who are licenced to receive direct access instructions actively market those services (by which we mean holding themselves out on web sites as accepting direct access instructions or advertising that they do so). A number regard it as useful in some cases rather than any significant part of their practice. Those individuals will be deterred from obtaining (or keeping) their licence if the requirements are imposed upon them. Therefore, we propose that any requirements be addressed to those who market direct access services.

Non-Direct Access

The majority of professionals who use the Bar's services are solicitors. There is no evidence that solicitors are unable to be discerning regarding both price and levels of service. Indeed, there is strong evidence that solicitors are very discerning over price and quality of service with the consequence that the independent bar is highly competitive.

In consequence, there is no justification for extending the requirements to the non-direct access bar. We have read the CMA report and it is clear that its focus is consumers. Consumers are, in these instances, protected by the professionals they instruct, i.e. solicitors.

We also question the value to solicitors (and other professionals) of being provided with high level price and service information on web sites. Solicitors are seeking price and service information not in respect of a generic case but in respect of their particular matter. To be given rough indications based on cases of limited (if any) similarity is of low value. If required to provide this information we doubt it will be of much value to its ultimate consumer.

LeO vs Direct Access

The distinction between those whose clients can complain to the LeO and other barristers is based upon a misconception. The misconception is that there are a significant number of barristers whose practice will not involve persons who can complain to the LeO. Even those doing the highest value, most multi-national, work will still have during the course of their practice (and often frequently) individuals as their clients. Take any recent claim involving wealthy Russian businessmen as an obvious example.

In consequence, an (unanticipated) effect of drawing the line as proposed is to mean that very nearly all self-employed barristers will be subject to the Regulation.

A number of other unanticipated consequences may also flow:

- Where those limited number of barristers who are not affected by the LeO choose to not display price/service information will they then be unable to take work from person(s) who can complain to the LeO?
- How will the cab-rank rule apply? Will it become possible, or even mandatory, to not accept work from those person(s) who can complain to the LeO if price/service information is not displayed upon a web site

A better distinction is between those who market their services directly to the public and those who do not. See the discussion above.

Specific Areas

The parallel consultation of the Solicitors' Regulatory Authority proposes restricting the disclosure of price information to a limited number of services, in areas where consumers are likely to be assisted by the provision of such information, see *Looking to the Future: better information, more choice*, para 39.

The BSB should consider a similar approach for three reasons.

First, it would seem to be anomalous for those regulated by the BSB to have to provide price information in respect of services where those regulated by the SRA would not.

Second, the justification for limiting the requirements to those areas where consumers will benefit directly is a valid one. For example, in areas where any claims are likely to be very different in nature, scope and therefore cost it seems to us that generic pricing information is of very limited value to the consumer. In other cases where the advice or representation is more predictable (e.g. personal injury work) information as to the likely cost may be relevant.

Third, if the distinction is not to be between LeO and non-LeO work (and if you do not accept a direct access / no direct access distinction) then there is a strong rationale for limiting the requirements at first to specific areas where the impact may be greatest before considering whether to extend the requirements more generally.

Blended / Specific Price Information

It will be difficult and impracticable for practitioners or chambers to display individual rates. It may also be anti-competitive. That is because:

- Most individuals charge different rates for different kinds and values of work and are prepared to adjust rates in accordance with client demand. That makes it difficult to display such rates on a web-site.
- There is a significant risk of the information being mis-leading. Most of the work that most barristers do is highly bespoke, varying from case to case. There is no single price for a one-day hearing because no one-day hearing is the same in terms of complexity, preparation, value and so on.
- If individuals do all display their individual rates there will be a temptation to match the highest rates. It is not clear that the market pressure will drive rates down.

Blended price and service information, which sets out a range of costs for barristers at different levels and contains illustrative prices and service will be easier and more practicable to provide.

It will also provide the consumer with a more relevant indication of overall price. It is also less likely to prove to be anti-competitive.

How, When and in What Form

The consultation seems to assume that the provision of information means putting it on a website. In reality, all consumers of legal services receive information in different forms and at different times, and the consultation should properly take this into account. So:

- Information about the services that will be provided, likely time scales and so on is generally provided by way of oral / email discussion prior to the receipt of instructions. It is an unusual case where no such information is provided prior to a barrister being instructed.
- Upon instruction, barristers are already required to provide complaints information direct to the client or to ensure that such information will be provided.
- At the conclusion of a case, clients are generally provided with further price information (i.e. a fee note/invoice).

THE 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?

1. We agree that this information will be of most value to typical consumers.

For the reasons given above we doubt that requiring this information be provided to referrers will be of any real value.

We suggest that the recommendations be limited to those marketing their services direct to the public.

We also suggest that the recommendations be limited to specific areas.

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?

2. We agree that this information will be of most value to typical consumers.

For the reasons given above we doubt that requiring this information be provided to referrers will be of any real value.

We suggest that the recommendations be limited to those marketing their services direct to the public.

We also suggest that the recommendations be limited to specific areas.

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?

3. No. We do not believe that consumers shop around based upon what will happen should things go wrong.

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.

4. Yes

This is an area where chambers would expect to receive guidance rather than being subjected to mandatory rules. This would permit flexibility in the application of the rules and would encourage chambers to exceed the requirements where they felt appropriate.

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.

5. Yes. Guidance, rather than mandatory rules, would permit flexibility in the application of the rules and would encourage chambers to exceed the requirements where they felt appropriate.

QUESTION 6: (a) do you think the BSB should require publication of first-tier complaints data? Please explain your answer. (b) Are there any other quality of service indicators which you think we should consider?

6. No. We do not consider that first-tier complaints data provides a reliable guide to quality of service. We agree with the point made in paragraph 53 of the consultation paper that certain types of work may generate more complaints than others. But, in addition to this, it is our experience that, regrettably, complaints are often made either because the client is disappointed to have lost the litigation, or because the client is seeking a reduction in fees, or (in many cases) both. Of course, sometimes such

complaints are justified and they must all be treated fairly and seriously. But the fact of a complaint having been made is often no reflection of the quality of service.

7. Nor would it be fair to require publication of the number of complaints which have been upheld. Some complaints may be relatively minor and there may be all kinds of extenuating circumstances which could not be reflected in the bare statistics. On the basis of anecdotal evidence, few complaints against members of the Association are upheld, with the risk that a requirement for a barrister to publicise the fact that he or she had been the subject of a valid complaint would be likely to create a stigma which could be out of all proportion to the fault. Since many barristers are self-employed, and standards are normally high, a requirement to publish complaints data could seriously, and unfairly, impact on the ability to obtain work, especially where the barrister is relatively junior.

8. In our view, there are no simple statistics or other criteria which objectively indicate quality of service. Much of what members of the Association do turns on matters of judgment and the interrelationship between a large number of complex factors. Consequently, there is no easy way to differentiate a good quality service from a poor one and, in our view, it is unhelpful to consumers and barristers to try to do so.

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

9. We have no strong views about this. We do not see any disadvantage to requiring barristers to display the BSB's logo but are aware of no evidence to suggest that it would make any difference to members of the public deciding whether to instruct a barrister.

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.

10. Yes, but only in the case of barristers marketing their services direct to the public as explained above. Those instructing barristers on a Public Access basis are relatively unlikely to have experience of the process or access to someone who can advise them

about it. They may not be aware that guidance is available if it is not on the website of barristers offering the service.

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.

11. As a result of the variety of work carried out by members of the Association, and the range of clients involved, we do not think it is appropriate to be prescriptive about the provision of information to clients. The critical requirement is that there must be someone available by e-mail or telephone within chambers (normally in the clerks' room) with whom a client can raise any queries or discuss any concerns.

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.

12. As stated in the introduction we accept that a case is made out for requiring those who market their services direct to the public to publish price and service information.
13. We do, though, consider that even within those barristers who undertake, and market themselves as undertaking, public access work it would be preferable to restrict the initial requirements to specific areas of work. Where legal products or services are highly standardised, it may be possible to provide clear and meaningful pricing information. The Solicitors Regulation Authority ("SRA") consultation suggested that disclosure of pricing information be restricted to a limited number of standardised products and services. It would be anomalous for the disclosure obligations on solicitors providing services direct to the public to be different from those in respect of barristers offering equivalent services to the public.
14. It is also important to note that barristers who engage with clients directly are often in competition with solicitors. If solicitors have a markedly lighter regulatory burden than public access barristers, it would hamper fair competition and at the same time make it

impossible for consumers to make any useful ‘like-for-like’ comparisons on pricing. These unintended consequences would hinder, rather than enhance, true competition and openness around pricing information.

15. We also emphasise that if the requirements are applied to all public access barristers, there is a genuine risk that some practitioners will be deterred from offering such work.

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?

16. We consider that the minimum disclosure requirements should not apply to barristers undertaking referral work of any kind.

17. As set out above, the distinction between clients entitled to complain to the LeO and those who are not is based upon a mis-conception. The mis-conception is that there are a significant number of barristers whose practice will not involve persons who can complain to the LeO.

18. The distinction between high-risk and non high-risk areas is not explained in the consultation. The consultation does not explain what higher risks the clients are exposed to, nor how the provision of pricing or service information would reduce the perceived risk.

19. We do not consider that either of the criteria identified by the BSB is appropriate to addressing the regulatory objectives which are the subject of this consultation.

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?

20. We agree that requirements to publish price information should not apply to publicly funded work.

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

21. We suggest that the rules be initially targeted at specific areas of work carried out via Public Access. This would be consistent with the proposed regulation of solicitors, would target those areas where the requirements are likely to be effective and would avoid creating requirements which have no or limited benefit for the consumer.

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?

22. We have no comments on the time by which the requirements should apply.

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.

23. For the reasons given in our introduction we strongly agree that option two (the provision of blended information) is to be preferred to option one (the provision of individual rates and charges).

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?

24. We do not have any experience of entities and offer no comment to this.

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

25. As we state in the introduction, the whole consultation seems to proceed on the assumption that all information is provided via a website, whereas in reality information

is provided throughout the course of the instruction of a barrister (before, during and after) in many different and divergent forms. We strongly suggest that these differing means by which information can be and is provided are taken into account in the consultation.

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?

26. We do not consider that the provision of core information would assist consumers in shopping around. Almost all barristers now provide detailed information regarding their practice area and experience on their website. The provision of more limited and basic information on another site is unlikely to assist the consumer in comparing barristers. We suggest that it is unlikely to be used at all.

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

27. No.

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

28. No.

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

29. Anecdotally, there is limited price discrimination in Chancery practice. Clients may be offered a discount because:

- they provide a large volume of work;
 - they are long-standing clients;
 - the work is desirable to the particular barrister; or
 - the client is the government or there is some social benefit.
30. Professional clients understand that fees are negotiable; public-access clients may not. Almost all work is bespoke in Chancery practice, so there is little risk of a ‘focal price’ emerging across the market for particular kinds of work. The ‘standard’ pieces of work will generally be undertaken by very junior barristers. Examples are winding-up hearings and possession hearings. In those cases, there is an understanding at least among solicitors as to the expected level of fees, irrespective of which barrister does the work and how long it takes.

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

31. Value is very hard to assess, even after the work has been provided. For example, it is usually impossible to know if a more experienced barrister could have obtained a different result at a hearing; and short advice from a QC can be worth more to a client than many hours of work from a junior barrister.
32. If the lay client looks for a barrister through solicitors then the solicitors can advise on how to get the best value from a barrister. If the lay client comes directly to the barrister, then the barrister’s clerks / practice managers would have to provide some guidance. It may, however, be difficult for them to do so because (1) they may be used to dealing with solicitors (2) they will have limited time to give explanations to lay clients and (3) they would have an incentive to recommend particular barristers who need the work.
33. Otherwise, it will be difficult to give lay clients an idea of value for money beyond what is already done. The Direct Access Portal gives the number of years’ call for the barristers it lists. Barristers also have their own websites setting out their experience.

This difficulty in indicating value is a problem common to most (or perhaps all) service industries.

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

34. Clerks / practice managers are used to managing clients' expectations to avoid fee disputes, and then dealing with any disputes that might arise.
35. Nonetheless, it may help to give public-access barristers more guidance as to how they should explain their fees in their engagement letters. The basic information will be the work to be done and the way in which fees will be calculated. But it would help to set out some contingencies, such as what happens if the work takes longer than expected.
36. There is probably little more that can be done to assist with resolving fee disputes once they have arisen.

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

37. The proposed system of risk-based spot-checks and corrective action would be appropriate.

Questions 25 to 27

38. We have no comments on these questions.