

# BAR STANDARDS BOARD

REGULATING BARRISTERS

## ***2016-2019 at the Bar: Opportunities, risks and the role of the regulator***

**Report of a symposium to launch the Bar Standards Board's  
Strategic Plan and Risk Outlook**

**12 April 2016**

**London**

### **Introduction**

The Bar Standards Board (BSB) regulates barristers, their professional practices and their legal services businesses in the public interest in England and Wales.

In March 2016, we launched our new **three-year Strategic Plan**. This sets out the context in which we regulate and outlines the focus of our regulatory attention for 2016-19.

In April 2016, we followed this up with the publication of our first **Risk Outlook**. This provides a more detailed overview of the legal market and our regulatory priorities.

On 12 April 2016, we held a symposium in London to discuss both documents with a wide range of interested parties. Delegates at the event included representatives of the different parts of the Bar including the Bar Council, organisations representing the interests of legal consumers, other legal regulators and policy decision makers. The Strategic Plan and Risk Outlook were presented to delegates by our Chair, Sir Andrew Burns KCMG, and our Vice Chair, Naomi Ellenbogen QC.

The purpose of the event was to:

- explain our risk-based approach to regulating the Bar; and,
- explore our stakeholders' perspectives on the three main risk priorities that we had identified.

This report is a summary of some of those discussions.

### **Our strategic priorities and our risk-based approach to regulation**

Our new Strategic Plan adopts a **risk-based approach** to regulating the Bar.

This means that we are constantly monitoring the market for barristers' and advocacy services. We identify all of the potential risks that could prevent our [Regulatory Objectives](#) from being met. As we do this, we focus our attention as the regulator on the risks that we think pose the biggest threats to the public interest.

We then take action to try and prevent those risks from occurring in the first place, or to reduce their impact.

You can read more about our risk-based approach in our **Risk Framework** which is available [on our website](#).

During the symposium, we explained the connection between the **three strategic aims** in our Strategic Plan and the **three risk priority themes** which we explore in the Risk Outlook. These are as follows:



You can read more about our strategic aims in our [Strategic Plan](#) and more about the three risk themes in our [Risk Outlook](#).

## About our symposium

At our symposium we focused on delegates' views about the three risk themes. Three breakout discussions took place: one discussion per theme.


We urged delegates to consider the **opportunities** presented by these themes as much as the risks.

What follows is a summary of each discussion.

## Risk theme 1: The opportunity for those we regulate to improve how they meet consumer needs

### About this theme:

What consumers want from the legal services market is changing rapidly. There is evidence that some consumers' needs are not being adequately met. We want to understand this better and improve the capability of the profession we regulate to meet these needs.

 **Theme 1 in brief**

- The needs and rights of consumers and the public go to the heart of our regulatory objectives.
- Individual vulnerability, legal complexity, legal aid reduction and a lack of general understanding of the role of legal services potentially prevent access to justice.
- For those who do obtain legal advice, they can sometimes receive poor service or inadequate advice and may view the advice as poor value for money.
- Obtaining redress when things go wrong can be difficult for consumers. There are many routes to take, depending on what has gone wrong.
- We are keen to develop better our understanding of the interaction between consumers and providers of legal services.
- The profession needs to continue to develop its understanding of the consumers it serves.

### The question that we put to delegates:

What are the implications for the Bar and for the public if consumers' needs are not met and where are the risks greatest?

## Summary of the discussion:

The needs and rights of the consumers of legal services and the public at large are central to our regulatory objectives. Our decision to prioritise this issue for attention and action was welcomed by participants.

In a healthy legal services market, all consumers are able to make informed choices about the services they wish to engage; they can obtain high quality, good value representation; and they can seek redress when things go wrong. Concern was shared across all participants that within our complex, fast-changing and sometimes intimidating legal system, the needs of a significant – indeed, growing – number of consumers are not being met. This has potentially severe and far-reaching implications for the principle of access to justice.

**“Most people we see can’t afford the advice they need”**

A range of trends and contributing factors emerged in discussion:

- Amid cuts to legal aid and free legal advice services, organisations such as the Personal Support Unit and Bar Pro Bono Unit are seeing a steep growth in demand. At the same time, supply is increasingly constrained – particularly in areas such as immigration, family law and crime. This is leading to slower turnaround times, including in time-critical cases such as deportations.
- Elsewhere, lack of understanding of what kind of legal support they need or where to find it, coupled with a widespread perception that traditional legal services will be unaffordable, means more consumers are now turning to the unregulated sector or choosing to represent themselves as Litigants in Person (LiPs). In either case, this can result in inadequate representation, with potentially damaging consequences for the individual and the legal system.
- Similarly, many consumers are unaware of their rights in relation to legal services or how to seek redress. This can leave them doubly disadvantaged – unaware that they have received inadequate representation in the first place, and unable to obtain redress. (There was speculation that this may be a factor in explaining the comparatively low level of complaints received by the legal ombudsman about barristers.)
- There was also concern that risks to consumers are likely to increase as the Bar innovates and provides different services.

We heard widespread concern that these issues often hit vulnerable and disadvantaged people hardest. Those same vulnerabilities, including poor education and poverty, can make it even harder for them to engage with the legal system. This is especially so in the youth and family courts, for example, where consumers are often ill-equipped to understand what is happening to them or how to give appropriate instructions.

**“Vulnerable consumers are entirely reliant on a very fragile system. If the system breaks down, the consequences are catastrophic”**

At the same time, some participants were concerned that the risk of unmet demand may become most acute in “the middle ground” among consumers who do not qualify for Legal Aid but are unable to afford adequate representation themselves. Again, with nowhere else to turn, these consumers may find themselves with no choice but to act as LiPs or seek cheaper and potentially less skilled representation through the unregulated market.

Participants were equally clear that poor legal capability is a major potential risk issue across the general public, not just within vulnerable groups.

The discussion moved on to consider how best to respond to this risk.

Participants pointed to some important initiatives already underway to address these issues. There was praise for the BSB's focus on the needs of vulnerable consumers, including through training for the BSB's own staff.

**"The BSB is leading the way in the sector in focusing on vulnerability"**

There was also recognition that the BSB – and the Bar more widely – cannot in isolation resolve issues around unmet need. This is a wider societal problem. Nonetheless, a range of areas for further potential action were suggested:

- There was a strong feeling that barristers need to be better equipped to work with vulnerable consumers and indeed LiPs, who may be coming late, confused and unsatisfied to the legal process.


**"The onus should be on us – not the consumer – to ask the right questions so that we can provide the right representation." Barrister**

- Changes to how legal services are structured and billed – "unbundling" (enabling clients to perform part of the legal process themselves), transparency around fees, growth in direct access and fixed fees, for example, should help consumers understand the different services on offer, make more informed choices about the kind of provider they want to engage and decide whether to undertake aspects of the work themselves. But while there is increasing demand for unbundling, concerns were raised that this is only an adequate solution for those consumers who have sufficient capability to deal with the "unbundled" aspects themselves
- Supply could be boosted if chambers took on more pupil barristers, although it was felt that many chambers would struggle to make this commercially viable.
- BSB could work with others to increase legal capability among the general public, in particular making sure consumers understand their rights in relation to legal services and how to seek redress.

## Risk Theme 2: Improving diversity, and enhancing equality in practice and culture at the Bar

### About this theme:

Those who provide legal services are instrumental in maintaining a fair and democratic society, and using the legal system to hold people to account under the rule of law. The legal system needs to reflect the changing make-up of society, and practice at the Bar needs to be sensitive and responsive to that.

 **Theme 2 in brief**

- For society to have continuing faith in the legal system, the system needs to reflect the changing make-up of the people it serves. The Bar is a key source of appointments to the judiciary, making it especially important that it is diverse.
- The Bar has worked hard to encourage diversity, but there is room for improvement.
- Some of the challenges of achieving equality and diversity within the Bar are as a result of challenges within wider society. There are ways in which we and the Bar are trying to mitigate some of these challenges.
- Members of the Bar face many work demands that could affect their general wellbeing. This could encourage anti-social or inappropriate workplace behaviours, potentially affecting not just the Bar, but the public they serve as well.
- As the regulator, we must continue to adapt our own approach. We must lead by example in order to strike a balance between enabling and requiring the Bar to improve diversity and encouraging a positive working culture.
- We want the Bar to work with us to develop strategies that encourage diversity and positive working practices.

### The question that we put to delegates:

What are the implications for the Bar and for the public if we do not achieve a more diverse Bar which more fully reflects society and where are the risks greatest?

## Summary of the discussion:

Participants shared our concern that lack of diversity at the Bar presents a major risk, with implications both for access to justice and to public confidence in the Bar and the legal system. While our focus on this risk theme was welcomed, we heard frustration at the lack of progress in improving diversity and tackling discriminatory practice at the Bar in recent years.

For society to have continuing faith in the legal system, that system needs to reflect the changing make-up of the people it serves. The Bar is also an important source of appointments to the judiciary, making it especially important that it is diverse. Diversity is also key to the Bar in understanding and responding to the needs of an increasingly culturally diverse population; and to attracting and retaining the most able legal practitioners from across all sectors of society.

Participants noted that discrimination is a complex and subtle issue, and identified a number of ongoing concerns:

- Discrimination can start at an early age: faced with a largely white, middle class legal system, those from diverse backgrounds may conclude that a career in law is “not for them” and choose other careers. It can also be felt at law school, where the syllabus and approach may be less accessible to people from diverse backgrounds.
- Even among those who choose to enter the profession, statistics at Bar Professional Training Course (BPTC) and early Bar career stages may present a misleading picture of Bar diversity:
  - BPTC statistics may be distorted by the number of international students who return to practise in their own countries and the number of students with protected characteristics who pass but do not proceed to pupillage and qualification. Participants felt this reflects the fact that although efforts are being made to attract women, black and ethnic minorities (BAME) and other candidates with protected characteristics into the profession, that support quickly falls away beyond the training stage, resulting in high levels of attrition.
  - Diversity statistics at qualification stage may look positive, but data from the Bar Council reveals a very high level of dropout among women, for example, at certain key points of career progression. This may be due to lack of flexibility in management practice toward women with caring responsibilities.

“Even though more women than men make it through initial training, we’ll never reach equality because we lose women from the profession in such large numbers.”

- Elsewhere, it was suggested that a pattern of “segregation” may be found among BAME practitioners, a significant number of whom tend to operate in those areas of law most affected by cuts in Legal Aid and whose incomes, as a result, are disproportionately affected.
- Discrimination seems to affect different groups to different extents. For example, Asian barristers seem to fare better at the Bar than black or African Caribbean barristers. There was also concern that insufficient attention is currently paid to discrimination relating to disability, sexual orientation or age.

- Although some chambers have made impressive progress in improving diversity and addressing discriminatory practice, other parts of the Bar are far less progressive. Unconscious bias remains an issue across the Bar, and may be felt in subtle ways, such as in the way that work is allocated amongst barristers in a chambers.
- There was also concern that discrimination may be happening below the BSB's radar, unreported. The regulator's requirement to appoint an equality and diversity officer in every chambers with the requirement to monitor and look for patterns of discrimination is welcome. But the data is highly complex and challenging to interpret and less overt patterns of discrimination may be missed.

“Getting the data is the easy part. Understanding it is much harder”, Barrister.

- There were also concerns that people from diverse backgrounds may find themselves suppressing their “difference” in order to fit in with the dominant Bar culture. As a result, the Bar may not reap the benefits of the diverse perspective they bring.

Participants also pointed to the importance of diversity at the Bar to help tackle discrimination in the legal system more widely. Many legal service consumers with protected characteristics are already highly vulnerable; they may struggle to engage with the complexities of the legal process. As a result, they can be subject to a “double whammy” of discrimination. In the first instance, lack of sensitivity to cultural issues and vulnerabilities that may impinge on a case can result in inappropriate judgments; the same cultural issues and vulnerabilities leave them unable to seek redress. Barristers who are *cross-culturally* competent – sensitive to the complex needs of people from diverse backgrounds – play a critical role in supporting those people to navigate the legal system and obtain access to justice.

The discussion moved on to consider how best to respond to this risk.

Participants recognised that these issues are part of a wider societal challenge. There will need to be systemic efforts to address them across the whole legal system and beyond. They also welcomed the increase in training in equality and diversity and working with vulnerable clients alongside initiatives such as our cross-cultural competence project ([See report<sup>1</sup>](#)). But they were clear that there is no room for complacency: the regulator must maintain its focus. Suggestions for action included:

- Mandatory training in diversity and discrimination for all barristers, as part of formal training. This would build on positive developments such as mandatory diversity training for those who sit on recruitment panels and the requirement to produce evidence of equality and diversity awareness to progress to silk and the bench. Training in unconscious bias, increasingly common in solicitors' firms, may also be helpful.
- More research into experiences of diversity at the Bar. (For example, we will shortly publish a report from a major research project into women's experience of the Bar.)
- Closer working with diversity groups and others within and outside the profession to understand the complex picture of discrimination and find ways to overcome the deep-rooted and sometimes hidden obstacles to achieving a truly diverse Bar.

---

<sup>1</sup> [Does Cross-Cultural Communication Matter at the Bar?](#)



- Joining others in society to call attention to diversity and discrimination issues and maintain pressure for action.
- More intelligent use of monitoring data to identify instances of discrimination that currently go unreported. This could include in the lower courts, where some felt discrimination may be even more prevalent.
- Closer working with others across the education and training pathway to address hidden discrimination and ensure that the profession is accessible to all.

## Risk Theme 3: Responding to commercial pressures on legal services providers

### About this theme:

We want to safeguard consumers against the potential consequences of commercial pressures in individual practices, or the system as a whole, where those consequences are not in the interests of consumers or of justice more broadly.



### Theme 3 in brief

- Whilst commercial pressures and interests do not themselves constitute a regulatory issue (in fact they may stimulate positive growth and innovation), the potential negative impact these pressures have on the quality and coverage of legal services remains a concern for us.
- Commercial pressures that result in a compromising of ethical principles, lowering of standards and/or unrealistic or hidden pricing in order to win business, may not be in the interests of those who rely on the market for quality advice, nor sustainable for providers.
- A significant proportion of those whom we regulate have historically relied on publicly funded work. Cuts in government spending impact upon the Bar and its clients adversely. Some of the pressures identified have reduced the demand for or affordability of legal services. The amount of work available to the Bar in some areas has reduced.
- Other pressures involve the risk of increased competition from alternative providers and certain clients having unrealistic – and sometimes possibly unethical – expectations of their lawyer.
- In line with our statutory economic growth duty, we need to stay abreast of market developments and identify opportunities to remove unnecessary burdens. We need to support and encourage the development of a diverse and healthy legal services market.
- The Bar needs to understand, plan for and adapt to the changing economic situation. It needs to maintain its focus on its Core Duties and identify opportunities to innovate.

### **The question that we put to delegates:**

What are the implications for the Bar and for the public from commercial and financial pressures and where are the risks greatest?

### **Summary of the discussion:**

All service providers face commercial pressures, which require them to adapt and innovate. This can be a sign of a healthy market.

The scale and pace of change within the legal services section is significant. There is growing competition from alternative and unregulated providers. Cuts in public funding have placed additional financial pressure on barristers who specialise in the types of work where legal aid used to be more prevalent. These sorts of pressures could threaten the viability of providers, which in turn puts their clients at risk. It is natural for the regulator to be concerned about this.

However, our risk theme also highlights the possibility that these commercial pressures may increase the likelihood of some barristers and chambers compromising their ethical standards in order to stay afloat.

We have chosen to focus on this theme so that we can monitor and take preventative measures to support providers in maintaining the highest standards of services, however the market develops in future.

While participants recognised the potential risk posed by commercial pressures, our decision to focus attention here provoked considerable contention and debate. Some barristers were very concerned that in emphasising this risk, we imply that providers are *likely* to respond to those pressures by compromising their ethical standards or lowering the standard of services. This could raise doubts among the public about ethics at the Bar, which could erode confidence in it. In this way, by drawing attention to a *potential* risk in the future, we may be creating a new – and very real – risk in the present. A few barristers were concerned it could be interpreted as a judgment on their integrity.

There was also debate about the evidence base for this risk. During the discussion, we made clear that we draw on data from a wide range of sources, including the complaints that we receive about barristers. Although there is no sign of an increase in formal complaints, it is unclear whether this reflects a healthy market, or simply the fact that commercial pressures are often “invisible” and subtle.

Few legal service consumers are well-enough informed to spot where commercial pressures have impacted upon either the ethics or the standards of the service they have received, and seek redress formally. Other complaints may not reach us at all; they may be handled by one of the other regulators.

Having discussed the possible implications of the BSB having identified this as a main theme in the first place, the group moved on to identify a number of potential areas of concern pertaining to the issues within the theme itself. These were:

- There are reports of growing anxiety among young barristers that chambers are increasingly being run as “corporate” organisations, rather than as collectives of self-employed barristers. Coupled with the regulatory focus on chambers and entities rather than individuals, this could erode the principle of individual responsibility at the Bar.
- There are concerns that the high failure rate of the ethics component of the

BPTC reflects the inadequacy of ethics training.

- The high cost of Bar training also leaves many new practitioners saddled with debt, which may add to commercial pressures.
- In an increasingly globalised market different parts of the market are subject to different commercial pressures. These in turn present different risks. Cuts in Legal Aid are disproportionately affecting some areas of law (the impact of the Legal Aid, Sentencing and Punishment of Offenders Act is a particular example) and while this may not threaten ethical standards, it may threaten the viability of practices in those areas. This has implications for access to justice for some of the most vulnerable groups in society.
- Referral fees are felt to present a serious threat to ethical practice. Our ban on such fees is welcome. But as long as other regulators and professional bodies are more tolerant, there will be pressure on barristers who need or want this kind of work to sidestep the ban and pay some kind of referral fee.

The discussion moved on to consider how best to respond to this risk.

We are clear that our decision to focus on commercial pressures reflects our concern that the impact of these risks could be high, even if the likelihood of these risks materialising might be low, or as yet unknown.

Participants were equally clear that work is needed – in conjunction with others – to better understand the nature of these risks, and how to monitor and mitigate them. Suggestions for further action included:

- Undertaking research to gain a more sophisticated understanding of where in the legal system the abuse of powers is most likely to happen – now or in the future. This includes exploring how consumers – as well as providers – may be behaving unethically.
- Working with others, including other regulators, to identify the range of regulatory instruments needed to monitor and mitigate these risks.
- Maintaining robust opposition to referral fees and seeking a more joined up approach with other regulators.
- Working with others to increase public understanding of these issues in such a way that does not erode public confidence in the Bar.

## **Your thoughts?**

We are very keen to hear different perspectives on our strategic aims and on the priorities which we have identified.

In this report, we have summarised what the delegates on 12 April told us. **But, what do you think?** Do you have any different thoughts about our work? Do you have any insight that we have not considered – either above or in our Risk Outlook?

If so, then please do get in touch with us. We would love to hear from you.

You can contact us on **020 7611 1444**.

Or by emailing us at **[contactus@barstandardsboard.org.uk](mailto:contactus@barstandardsboard.org.uk)**

Thank you.