



BAR
STANDARDS
BOARD

REGULATING BARRISTERS

LSB consultation – Approaches to Quality

Response of the Bar Standards Board

Introduction

1. The Bar Standards Board (BSB) welcomes the opportunity to provide comments on the LSB's suggested approach to quality and in particular its focus on risk as a driver for regulatory action. The BSB endorses the emphasis that the LSB places on risk as a means of ensuring that resources and action are targeted to where they are most needed. The extension of such a principle leads to the removal of barriers which could frustrate the delivery of the regulatory objectives or innovation within the legal services market. The BSB supports this but is clear that the identification of risks (and the subsequent regulatory and supervisory strategies) require a sound evidence base to ensure that proportionate regulation is supported by appropriate safeguards. It is the combination of evidence/research and risk which ensures that regulatory policy is practicable and justified.
2. A running theme through the BSB's response is its concern that there has been a failure to recognise risks other than those that relate to the consumer. Whilst the consumer and public interest are key drivers, regulators of legal services providers should not lose sight of the risk posed to access to justice and the proper administration of the legal system. Further, **all** of the regulatory objectives are factors when considering quality risks.
3. Turning now to the questions raised:

Question 1: In your experience, when consumers do not receive quality legal services, what has usually gone wrong? Where problems exist, are these largely to do with technical incompetence, poor client care, the service proving to be less useful than expected by the client – or something else?

4. It is important to note that the provision of quality legal services is not limited to the experience of consumers/clients alone. To restrict consideration to consumers fails to take into account the wider issues of quality in relation to the whole legal system. For example, there has been a marked increase in complaints received in the last year from 'litigants in person'. Such people are not 'consumers' but consideration of quality risks also extends to their experience of the legal system. Furthermore, any risk must also take into account the needs of the court and the proper administration of justice. It would therefore be wrong to limit consideration of quality risks to the experience of consumers, although, of course, their needs are important.
5. In terms of the specific information sought; the data held by the Legal Ombudsman (LeO) is particularly relevant. The BSB maintains that LeO should be regularly providing a breakdown of the information they collect to the regulators to help inform their approach to risk and supervision. To date this has not happened and this in itself creates risks that specific issues or trends in poor quality legal services are not being picked up and addressed.

Question 2: Would it be helpful if the regulators approached issues of quality by looking separately at different segments of the legal services market? Which segments do you perceive as being greatest risk to consumers?

6. This seems like a sound approach. If we accept that the definition of consumer is a much broader one then logically it follows that specific consumer segments require specific solutions or measures. At the same time there may be themes developing that require a more consolidated approach.
7. It seems sensible therefore that the regulators should assess risk by sector and services provided in order to establish what risks are most prevalent in each sector and therefore what should be demonstrated to mitigate these risks. For example, it would seem logical that services provided direct to lay clients are higher risk than those provided on a referral basis where a professional client will provide an additional level of quality assurance.
8. The absence of data from LeO makes it difficult for the BSB to comment on which segment presents the greatest risk.

Question 3: How can regulators ensure that regulatory action to promote quality outcomes does not hinder (and where possible encourages) innovation?

9. The BSB's recent consultation on the new Code and entity regulation sets out our risk approach which seeks to protect consumer interests whilst allowing more flexible business arrangements. This approach encourages innovation whilst at the same time ensures that there are appropriate regulatory safeguards in place.
10. It is also important to bear in mind that consideration of risk in the context of the evolving legal services market should not be limited to the consumer. Access to justice, upholding the rule of law and barristers' duty to the court are important factors that should not be forgotten and which will require different quality indicators to those relating to consumer risk.
11. The BSB's approach to supervision will see a shift in emphasis from strict compliance to focussing on the regulatory outcomes. The BSB believes that a clear regulatory framework supported by guidance provides sufficient flexibility for barristers, Chambers and entities to be creative and innovative and recognises that there are different business models that can be operated which result in the same outcomes. Any prescriptive regulatory requirements must be evidenced based and proven to be necessary in the context of the regulatory objectives.

Question 4: What balance between entry controls, on-going risk assessment and targeted supervision is likely to be most effective in tackling the risks to quality that are identified?

12. The BSB believes that it should be a combination of these. The correct balance will be dictated by identified risk and will therefore evolve over time. The balance will differ dependent upon the risk profile of specific Chambers, individuals or entities.
13. Whilst consumer empowerment can be a way of targeting information asymmetries in the market, for the reasons outlined in our response to earlier questions, the BSB believes that this is too simplistic a risk indicator to reflect the complexities of court based advocacy. The BSB suggests that factors such as access to justice and the

proper administration of justice should also be included in any risk identification process.

Question 5: Quality can also be affected by external incentives and drivers. Some examples include voluntary schemes (for example the Association of Personal Injury lawyers (APIL) Accreditation), consumer education and competition in the market place. How far do you think these external factors can be effective in tackling the risks to quality that exist? Which external factors do you think are most powerful?

14. The BSB believes that external factors can be an effective means of tackling risk if they are supported by proper regulatory and supervisory arrangements. For example, for voluntary schemes to be of value in any risk assessment they would have to be accredited or otherwise assured by the regulator and address the correct risks. Market forces and competition can drive out incompetence and drive up quality but whilst it is true that the market is generally adept at identifying the best lawyers, it is not necessarily the case that the less competent will not be instructed. Where the market is not “free”, for example in respect of publicly funded legal services, there may be very particular risks to quality.
15. Encouraging barristers and chambers to take an interest in quality and to address quality risks themselves is likely to be central to the BSB’s new supervision strategy. The fact that a Chambers, for example, has been awarded BarMark will be a relevant factor when establishing its risk profile. It is hoped that the prospect of less intrusive supervision might serve as an incentive for chambers to demonstrate that they are providing a high quality service and are mitigating risks. However, in an increasingly competitive marketplace in which fees are falling in many areas, the ability to gain work through demonstrating and marketing quality are likely to be some of the most potent drivers.

Question 6: Another possible tool for improving quality is giving consumers access to information about the performance of different legal services providers. How far do you think this could help to ensure quality services? How far is this happening already?

16. Regulators should be very careful about becoming involved in comparing services between different providers. However, some kind of profession wide drive to educate consumers about what they can expect from lawyers, how they can choose the best option for them and what they can do if the service they receive falls short of this would seem sensible.

Question 7: What do you believe are the greatest benefits of such transparency? What are the downsides and how can these be minimised?

17. Benefits: It has always proven difficult to access lay consumers of advocacy services and any service which successfully collected lay client feedback, as well as feedback from professional clients, could provide some useful evidence to inform regulatory action and regulatory policy. Successful consumer empowerment will allow more consumers to make informed decisions about the best service for them. It will assist to demystify the legal profession to allow consumers to make informed decisions in a similar manner in which they do for other services that they are more familiar with and use more frequently.

18. Downsides: consumer empowerment should focus on educating consumers about their rights and what they can expect. Any reviewing service must be careful not to tell consumers what is right for them, as this will have the adverse effect. It is therefore important that all information provided in this fashion is put in its proper context. There are obvious risks involved in providing so much power to a reviewing service, which is likely to be subject to commercial pressures and incentives. Independent regulation should not be replaced by commercial companies (such as the existing legal directories) who profit from reviewing services and who could not be regulated. There is a risk that those who do not engage with the service (potentially for good reasons) might unfairly lose work as a result, which is likely to have equality and diversity implications.
19. The nature of the work at the Bar, which often involves in each case one winner and one loser regardless of the quality of the legal professional involved, does not necessarily provide for very easily understood indications of quality particularly in such fields as crime, immigration and housing. This is particularly so in relation to serious criminal offences where some of the best criminal barristers in the country are often pitted against each other. This allows for a high quality criminal trial but the final outcome is in no way a reflection of quality within the "market". Therefore ranking "firms" by outcome is not necessarily a good way to go.
20. Again, the BSB suggests that it would be inappropriate to just limit consideration to the consumer when looking at outcomes. In court it might be a correct outcome for the consumer to have a result that they are not happy with. That will taint consumer feedback on legal services and any profiling system would need to take account of that. Consumer feedback on the softer elements of legal services provision such as managing client expectations and client care will be invaluable but for any profile or ranking system to have credibility and rigour it cannot rely on the views of one interested party alone.

Question 8: The table below (Figure 3) gives some examples of how risks to quality can be mitigated and actions that can be taken by regulators to ensure this happens. Can you suggest any other actions that can be taken?

21. Not at present. Should the BSB identify any other means of mitigating risk during its development of a supervision strategy it will share them with the LSB.

Question 9: Which of the possible actions by regulators do you think likely to have a significant impact upon quality outcomes?

22. Effective risk-based supervision, combined with mechanisms for gathering consumer feedback and input, will allow for the development of a strong evidence base on the quality of service provided in different sectors and the risks to this. This will enable targeted and effective responses to address quality risks. The most effective response will depend upon the risks and circumstances, which is why a range of tools is required. Continued assurance of the quality of those entering the profession and gaining authorisation to practise also has a significant impact on outcomes, we believe.

Question 10: To what extent should the LSB prescribe regulatory action by approved regulators to address quality risks?

23. As with other areas of regulation, the BSB believes such prescriptive action is outside of the remit of an oversight regulator. Risk based supervision is a core regulatory activity for the BSB and we urge the LSB to leave each regulator to develop its own approach to identifying and addressing 'quality risks'. That said, the BSB welcomes the proposal of a 'tool kit' which provides guidance and advice, based on research, into the effectiveness of various quality measures or indentifying trends across the legal services market.
24. The toolkit must remain just that: a selection of tools that the regulators should consider using. The regulators should not be compelled to utilise all or indeed any of these tools. They should also be given space and time to consider and develop additional tools.
25. We are currently engaged in a review in order to enhance our adherence to the new regulatory standards framework. An evidence-based approach to developing and utilising appropriate regulatory tools will be the best way to achieve a sustainable framework. A heavy handed or hasty approach to prescribing the BSB's approach to regulating quality risks will hamper rather than assist the achievement of the objectives.
26. Any queries about this consultation response should be addressed to OHanmer@Barstandardsboard.org.uk.

**Bar Standards Board
30 May 2012**