

Risk Outlook

2019

The Bar Standards Board regulates barristers and specialised legal services businesses in England and Wales, in the public interest

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Contents

Introduction	3
Theme 1 - Working cultures and professional environment inhibit an independent, strong, diverse and effective profession	5
Theme 2: Innovation and disruption in the legal services market offer threats and opportunities for the profession and for the public	9
Theme 3: Affordability and lack of legal knowledge threaten access to justice	13

Introduction

As the regulator of barristers and specialist legal businesses in England and Wales, we have a statutory duty to ensure that our regulatory objectives are met. We do this independently of the profession and we do it based on the concept of risk. We call it “risk-based regulation”.

How we use risk-based regulation is explained in the [Risk Based Regulation pages](#) of our website and in detail in our [Risk Framework](#), which should be considered alongside this Risk Outlook, along with our Risk Index which categorises these risks.

The Risk Outlook, often referred to as simply the “Outlook”, contains our assessment of the biggest risks to our regulatory objectives over the next few years. Accordingly, our Outlook focuses on issues relating primarily to the provision of services traditionally provided by the Bar, such as court-based advocacy and litigation, and specialist legal advice. However, because the regulatory objectives are wide-ranging, there are many different risks which could prevent these objectives from being achieved. We need, therefore, to consider the wider legal services market because the people we regulate are just one part of the inter-connected legal system in England and Wales.

The Outlook is where we summarise the evidence and analysis of the risk themes we think could be the biggest threats to the regulatory objectives. This allows us then to focus our attention on the areas where we can make the biggest difference as a regulator, thereby supporting our regulatory focus for the coming years.

We regulate in a fast-moving environment. Things change. New evidence comes to light. New threats to the regulatory objectives emerge and others recede. The Outlook, therefore, is only a snapshot in time, and we will continue to keep the risk index and our regulatory response to those risks under review.

The 2019 Outlook is our second Outlook publication. An archived version of our first Outlook which we published in 2016, is available [on our website](#).

Our objectives are laid down in the Legal Services Act 2007. We share them with the other legal regulators. They are:

- Protecting and promoting the public interest;
- Supporting the constitutional principle of the rule of law;
- Improving access to justice;
- Protecting and promoting the interests of consumers;
- Promoting competition in the provision of services;
- Encouraging an independent, strong, diverse and effective legal profession;
- Public understanding of citizens’ legal rights and duties; and
- Promoting and maintaining adherence to the professional principles.

The professional principles are:

- That authorised persons should act with independence and integrity;
- That authorised persons should maintain proper standards of work;
- That authorised persons should act in the best interests of their clients;
- That persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice; and
- That the affairs of clients should be kept confidential.

What is the Risk Outlook?

The 2019 Outlook identifies the following three priority risk themes:

- working cultures & professional environment inhibit an independent, strong, diverse and effective profession;
- affordability and lack of legal knowledge threaten access to justice; and
- innovation and disruption in the legal services market offer threats and opportunities for the profession and for the public.

The Outlook explores key areas of risk to achieving the regulatory objectives, and for each one looks to set out:

- why we think it matters;
- the evidence;
- our role as the regulator.

The Outlook is not designed to set out in detail what regulatory action (if any) we will be taking to address the risks identified or to provide milestones for relevant initiatives. This information is contained within our Strategic Plan for 2019-22 and our annual business plans.

How has the Risk Outlook been developed?

The 2019 Risk Outlook builds on the evidence and analysis we have undertaken since producing our 2016 Risk Outlook.

We began by considering the full range of risks to our regulatory objectives identified in our Risk Index, developing a process that allows us to consider the evidence for those risks, along with the likelihood of them occurring and the impact they may have. We were then able to bring together some of the recurring themes into proposed priority areas for action. Following preliminary analysis, our leadership team, Board and Committee members further refined this prioritisation and settled on the three themes

described in this Outlook. These were then researched in more detail.

We also sought external views on the three proposed risk themes, our proposed prioritisation and a draft version of the Outlook in a consultation between October and December 2018.

The final Outlook brings these various sources together to describe the most significant risks present in the market.

All other risks in the Index will continue to be the subject of business as usual activity.

What is the purpose of the Risk Outlook?

The purpose of the Risk Outlook is to:

- guide the development and prioritisation of our regulatory activities;
- share our insights and expertise concerning areas of significant risk; and
- support our ongoing engagement with our stakeholders.

We will continue to monitor the areas selected for analysis in this Outlook in line with our risk-based approach to regulation. This will enable us to see how our own activities and other market changes impact the risk landscape. To find out what action we are taking to address the risks we have highlighted, please read our [Strategic Plan for 2019-22](#).

Theme 1 - Working cultures and professional environment inhibit an independent, strong, diverse and effective profession.

The theme in brief and why we think it matters

Our statutory objectives require us to promote a strong, independent, diverse and effective legal profession. It is important, therefore, that the Bar is diverse and that its practices are non-discriminatory and culturally aware. If they are not, then some in society may not be confident in the legal system's ability to provide them with justice.

Although progress is gradually being made, the Bar remains unrepresentative of the population that it serves in relation to several protected characteristics. The strongest evidence is for gender and ethnicity, where the Bar remains unrepresentative overall, and particularly at the more senior levels, despite gradual progress. Examples of potentially discriminatory practices, such as in recruitment and work allocation, have been highlighted in recent research findings, and there is also strong evidence that discrimination and harassment are a problem for many at the Bar, particularly women.

The working culture within some parts of the Bar and the prevailing professional environment, in which barristers face many demands and must work under considerable pressure, can affect barristers' general wellbeing. Survey evidence relating to wellbeing (although more limited) suggests that the Bar is a high stress occupation, and many find a work-life balance difficult, particularly in certain areas of practice (such as crime and family). This can discourage some people from becoming barristers in the first place or lead to others leaving the profession early. If these issues are not addressed, they could undermine the efforts being made within the profession to make it more diverse.

Evidence

Diversity within the profession

The most recent figures on the diversity of the Bar were published in January 2019.¹ While the diversity of barristers is improving, the statistics indicate that there is some way to go before the Bar is fully representative of the public it serves.

For example, the percentage of Black, Asian and Minority Ethnic (BAME) barristers across the profession is broadly representative of the general population (13 per cent of the Bar compared to 14 per cent of the UK population according to the 2011 census). However, BAME barristers form a smaller percentage of the more senior levels of the Bar, with the percentage of BAME Queen's Counsel standing at 7.8 per cent. This suggests there may be an issue around the progression of BAME practitioners at the Bar.

While women make up 51 per cent of the population, they make up only 37.4 per cent of the practising Bar. This reduces further as we go into the senior levels of the profession, with 15.8 per cent of Queen's Counsel being women.

While the BSB does not hold reliable data on protected characteristics beyond gender, ethnicity and age (due to low levels of disclosure of these data by the profession) what data we have suggests that other groups are also underrepresented at the Bar. Of those who provided information on disability to the BSB, 5.9 per cent of non-QC barristers, 7.7 per cent of pupils, and 2.9 per cent of QCs, had a declared disability. In comparison, 12 per cent of the employed working age population has a declared disability as of July-September 2018.² Similarly,

1 Bar Standards Board (2018) Diversity at the Bar

2 HoC - People with disabilities in employment - Nov 2018 and ONS - UK Labour Market - Dec 2018

although this is not a protected characteristic, of those that provided information on school attended, around 33 per cent of the practising Bar attended an independent school in the UK, compared to approximately 7 per cent of the wider population.³

Mental health and well-being

Surveys of the Bar suggest that being a barrister generally involves working long hours and facing considerable pressure to the extent that many barristers have difficulty balancing their work and home lives. A 2013 survey showed that the average hours worked by full-time practising barristers is 52 hours per week⁴ as compared to 42 hours for all full-time employees in the UK.⁵ A more recent survey suggested the majority (60 per cent) were not happy with their working hours, an increase from 51 per cent when asked the same question in 2013.⁶ Only 45 per cent of barristers surveyed felt able to balance their home and working lives, and only 26 per cent said they were not under too much work pressure (compared to 33 per cent in 2013). Barristers practising in criminal and family law said they were struggling the most with work-life balance – 48 per cent of criminal and 58 per cent of family barristers said they could not balance their home and work lives adequately.⁷

Bullying and Harassment

There is also evidence of barristers experiencing bullying and harassment. The 'Working Lives' survey⁸ indicated that 34 per cent of BAME barristers said they had personally experienced bullying, discrimination or harassment in the last two years, in contrast to 19 per cent of white barristers. This represented a marked increase from when the same question was asked in 2013, when 25 per cent of BAME and 10 per cent of white barristers stated they had

experienced discrimination or harassment. In the same research, 33 per cent of women report personal experiences of harassment compared with 12 per cent for men, and barristers declaring a disability were more than twice as likely to report personal experiences as non-disabled barristers (37 per cent compared with 19 per cent). For both groups, there had been a rise in the proportion who had experienced discrimination and harassment from the 2013 version of the survey. When the question is expanded to cover the course of a barrister's career, rather than merely the last two years, research suggests discrimination and harassment becomes more prevalent. So, for example, in the 2016 Women at the Bar survey⁹, 40.2 per cent of female barristers reported experiencing harassment during their career, with BAME respondents and respondents with caring responsibilities more likely to experience this issue than other barristers.

Research into the experiences of LGBT practitioners at the Bar found that one third had experienced some form of bullying or harassment because of their sexuality. These data arguably suggest that homophobia is more prevalent at the Bar than in the general population, where research suggests one in five (19 per cent) of lesbian, gay and bisexual staff say they have personally experienced bullying or poor treatment at work in the last five years because of their sexual orientation.¹⁰

Discriminatory practices, for example within recruitment and work allocation

Available evidence suggests that certain groups within the profession face disadvantages when compared to their peers. Research undertaken by the BSB suggests that certain groups, in particular BAME students and students from lower socio-economic status backgrounds, face additional

3 Bar Standards Board (2018) Diversity at the Bar

4 Bar Council and Bar Standards Board (2013) Barristers' Working Lives: A second biennial survey of the Bar

5 Eurostat (2014) Labour force survey overview 2013

6 Bar Council (2018) Barristers Working Lives 2017

7 Bar Council (2018) Barristers Working Lives 2017

8 Bar Council (2018) Barristers Working Lives 2017 – Harassment and Bullying Report

9 Bar Standards Board (2016) Women at the Bar

10 Mason, M & Vaughan, S (2017) Sexuality at the Bar

barriers in gaining access to the profession, and are less likely than white students with higher socio-economic status to gain pupillage. This research indicated that BAME graduates of the BPTC are roughly half as likely to obtain pupillage as white graduates with similar prior educational attainment – similarly, graduates with no parent with a degree are around two thirds as likely as graduates with at least one parent with a degree to obtain pupillage.¹¹ Research into the experiences of women in the profession suggests that many feel they are discriminated against, in particular relating to the allocation of work, and on returning from maternity leave.¹²

The evidence available suggests that BAME barristers, in general, are likely to earn less on average than white barristers. Although the degree of difference varies when years’ experience and primary area of practice is taken into account, the general pattern is constant.

This table summarises barristers of 15 or more years of call, split by their primary area of practice, for each of the four most common primary areas of practice at the practising Bar.

For each area of practice, a higher proportion of BAME barristers is in the lowest two income bands than white barristers, and a lower proportion is in the highest two income bands.¹³

	% in lowest two income bands	% in highest two income bands
Personal Injury		
BAME	14.3%	57.1%
White	9.0%	63.8%
Crime		
BAME	35.6%	12.0%
White	22.9%	20.7%
Family - children		
BAME	29.60%	13.00%
White	18.60%	21.00%
Commercial		
BAME	19.30%	57.80%
White	13.00%	67.50%

11 Bar Standards Board (2017) Differential Attainment at BPTC and Pupillage
 12 Bar Standards Board (2016) Women at the Bar
 13 Footnote: Bar Standards Board data on the practising Bar, December 2018

Mentoring and support

73 per cent of respondents to a Bar Council survey on wellbeing (2015) stated that there was a sense of cooperation in their work environment most or all the time. However, only 16 per cent stated they had been involved in formal or informal mentoring programmes.¹⁴ However, a more recent Bar Council survey (2018) suggested a more positive picture regarding mentoring, with 31 per cent of all respondents involved in mentoring others either currently or in the past, while 47 per cent of the self-employed Bar are either supervising, or have supervised, pupil barristers during their careers.¹⁵ This is important as past research has highlighted the value of mentoring for women¹⁶ and BAME practitioners.¹⁷

Our role as a regulator

In addition to our regulatory objectives, we have statutory duties under the Equality Act 2010. Our core work as a regulator also requires us to enforce the standards of professional conduct expected of all barristers under the BSB Handbook.

As the regulator of the Bar, we have an important role in encouraging the profession to address these issues, to help it improve its working cultures, and to encourage a professional environment. This is a role we share with others and this is an area where important work is being led by the profession, in particular the Bar Council. We therefore seek to collaborate with others where we have shared goals.

The BSB Strategic Plan for 2019-22 sets out the following activity in response to this risk theme:

- Working in partnership with others to implement our equality and diversity action plans;
- Understanding the well-being of the profession and the way in which it influences our approach to regulation; and
- A more nuanced approach to regulation in the light of this understanding and in our supervision of barristers' chambers, including for example piloting new approaches to handling incidents of harassment (including sexual harassment).

14 Bar Council (2015) Wellbeing at the Bar

15 Bar Council (2018) Barrister's Working Lives

16 Bar Standards Board (2018) Women at the Bar - exploring solutions to promote gender equality

17 Bar Standards Board (2018) Heads above the Parapet – How can we improve Race Equality at the Bar

Theme 2: Innovation and disruption in the legal services market offer threats and opportunities for the profession and for the public

The theme in brief and why we think it matters

Innovation can drive change in the provision of services across the legal services market, and some changes could have a significant positive affect for those seeking access to justice.

However, we need to improve our understanding of how innovation is disrupting the market, so that we can understand when and how it might result in threats to the public. We also need to understand the threats to the profession where these could have longer term impacts on the public.

As an example, significant technological reform of court proceedings could lead to greater efficiency in the provision of legal services, and to improvements in access to justice. The Ministry of Justice¹⁸ vision of the future includes courts and tribunals using online, virtual and traditional hearings, with more and more cases or parts of cases being carried out virtually or online, supported by an online form that will guide people through their application and the progress of their case. Such changes in working practices could however, lead to several risks to the delivery of legal services. These risks include additional burdens on the Bar arising from a greater expectation of technical competence, and the need for clients to have access to the technology required to enable them to engage with an online hearing, or to keep up with progress on their case.

Available evidence, although relatively limited, suggests that technologically-driven changes have already started to affect the profession. Further technological developments could bring the potential for significant changes in the way barristers' services are delivered. The legal services market is likely to be facing a period of considerable change and adjustment. Some

parts of the profession may find it difficult to adapt rapidly to a changing legal services market. Should service providers be unable to adjust to changing realities, our regulatory objectives could be put at risk.

Considering these issues, we think there are threats to the public which could directly impact our regulatory objectives such as "improving access to justice" and "protecting and promoting the interests of consumers". There is also a risk that the Bar is unable to take full advantage of the opportunities presented by these technological and other developments. This could lead to the public choosing unregulated or less well-qualified people to service their legal needs.

Evidence

Overall pace and extent of change across many aspects of practice at the Bar

Her Majesty's Courts and Tribunals Service is involved in an extensive period of modernisation and reform, involving large numbers of court closures and an increasing move towards 'digital courts'.

All participants in a case, from the judge to the jurors, the Crown Prosecution Service and the defence, legal advisers and court staff, will soon become 'digital by default'

Ministry of Justice¹⁹

Between May 2010 and November 2018, 162 out of 323 Magistrates' courts have closed. 90 out of 240 County courts have closed. 18 out of 83 dedicated tribunal buildings have closed. 17 out of 185 family courts have closed and 8 out of 92

18 Ministry of Justice (2016) Transforming Our Justice System

19 Ministry of Justice (2016) Transforming Our Justice System

Crown courts have closed.²⁰ Parliament has raised concerns that the limited consultation and timescale pressures may lead to unintended impacts on users.²¹

“The pressure to deliver quickly and make savings is limiting HMCTS’s ability to consult meaningfully with stakeholders and risks it driving forward changes before it fully understands the impact on users and the justice system more widely.”

House of Commons Public Accounts Committee²²

Research suggests that greater use of technology within the courts has already created some barriers to the quality of advocacy. For example, the need to retrieve and manage information on digital systems, and the widespread use of electronic devices pose challenges to the ways in which advocates communicate in the courtroom.²³

Allied to this risk, is the need to understand the impact on consumers and the justice system of having to deal with a vast amount of digital evidence and the ethical issues that arise for barristers, for example in relation to disclosure.

Technology and the public

The Legal Services Consumer Panel report on empowering consumers highlights that “whilst the internet is a cost-effective means of delivering information rapidly to a wide audience, legal regulators should be aware of digital inclusion challenges”.²⁴

The final report of the Civil Courts Structure Review²⁵ recognised that a significant number of would-be litigants in an Online Court could face challenges in using computers, in living mainly in rural areas with no access to

broadband or being unable to afford a computer. Considering the mitigation of these risks, the Report states that, “designing all the IT for use on smartphones and tablets rather than just on desktops and laptops is widely regarded as greatly widening the class of court users likely to benefit from it”, however, the report does recognise that “if the Online Court is to be made compulsory then special assistance will need to be available”.

Some research also suggests that the usefulness of the internet can be limited as a source of advice on how to approach legal issues – participants “generally improved their knowledge of rights after internet use, [but] still struggled to translate this knowledge into action.”²⁶ This suggests that increased availability of online information online alone may have a limited impact on helping consumers to negotiate a complex market.

Technological change is also likely to affect the behaviour of consumers and the way in which chambers and barristers operate. These changes could lead to a reduction in face to face contact, which past research found to be the preference for the majority of clients.²⁷ However, where a consumer and provider are unable to meet, technology-based solutions such as the facility to “live chat” (an online exchange of written messages in real time) are found to have higher satisfaction levels than phone and email alternatives.²⁸

20 House of Commons Briefing Paper Number CBP 8372 (27/11/18) Court statistics for England and Wales

21 Public Accounts Committee report, July 2018, summary.

22 Public Accounts Committee report, July 2018, summary.

23 Bar Standards Board (2018) Judicial Perceptions of Criminal Advocacy

24 Legal Services Consumer Panel (2013) Empowering Consumers Report

25 Lord Justice Briggs (2016) Civil Courts Structure Review: Final Report

26 C. Denvir (2014) What is the Net Worth? Young People, Civil Justice and the Internet

27 Peppermint Research (2014) What clients really want from a legal service provider; YouGov (2010) Shopping Around: What consumers want from the new legal services market

28 The eDigital Customer Service Benchmark found 71per cent of customers were satisfied with live chat, as compared to 61per cent for email and 44per cent for phone. See <https://www.maruedr.com/live-chat-tops-customer-service-league-table-thanks-to-high-satisfaction-and-low-customer-effort/>

Technological innovation

Some further examples of technological innovation include Artificial Intelligence (AI), and blockchain (the linking of a growing list of records using cryptography).

In the commercial sector, “live chat” can be supplemented by Chatbots, using AI to supply customer support 24 hours a day. The Government has recently announced that AI research funding will include money for a three-year study to identify and remove barriers to artificial intelligence in legal services.²⁹ The research will look at how AI ‘can be used in legal services and how to unlock its potential for good.’ The Lord Chancellor said that ‘widespread use of Artificial Intelligence is set to transform the £24bn sector, allowing innovative companies to accurately review contracts at high speed and develop ground-breaking tools that could be used to help predict case outcomes.’³⁰

A blockchain is an open, distributed ledger where transactions can be recorded efficiently and in a verifiable and permanent way. A growing list of records (“blocks”) is linked using cryptography, with each record containing an encoded version of the previous record, the relevant transaction data and a timestamp. Since the ledger is distributed, all parties have a copy of the transactions, all of which are digitally signed and encrypted. Blockchain is the technology that underpins digital currencies, but its potential

uses are far broader than finance. It can be applied to any transactions with several steps, where traceability and visibility is required. Smart contracts use blockchain to digitally facilitate, verify, or enforce the negotiation or performance of a contract. Blockchain has the potential to cause considerable disruption to the practice of law – there is already a Global Legal Blockchain Consortium³¹ which seeks to standardise and promote its adoption – and a recent survey of law firms suggested that many legal service providers are already using or planning to use blockchain solutions as part of their business, particularly in relation to some transactional legal services.³²

Data security is a particular source of concern – solicitors have already fallen victim to a range of IT threats and cyber-attacks³³ and the Bar could become equally vulnerable too. A recent report by the SRA³⁴ shows the level of cybercrime is higher than ever. The Information Commissioner’s Office has previously issued a warning to the legal profession relating to “troubling” reports of data breaches.³⁵ This highlights the need for barristers and chambers to maintain data security to protect client data and to avoid potentially high fines.

Our supervision of chambers has found that “dedicated IT resources and specialist information risk management expertise are rarely found within chambers themselves”.³⁶ This is partly a result of the “structure of the Bar, with the relatively small size of many chambers”.³⁷

29 <https://www.gov.uk/government/news/new-era-of-tech-driven-legal-and-financial-services-to-boost-productivity-and-improve-customer-experience>

30 Ibid

31 <https://www.techradar.com/news/7-ways-blockchain-will-change-the-legal-industry-forever>

32 PriceWaterhouseCoopers (2017) Time for change - PwC Law Firms’ Survey

33 Solicitors Regulation Authority (2014) Spiders in the Web – the risks of online crime to legal business

34 Solicitors Regulation Authority Risk Outlook 2018/19

35 Information Commissioner’s Office (2014) Information Commissioner ‘sounds the alarm’ on data breaches within the legal profession

36 Bar Standards Board (2015) Report on High Impact Supervision Returns

37 Bar Standards Board (2015) Report on High Impact Supervision Returns

Research by the BSB suggests that while there are some examples of “new and innovative” business models in the market, the prevailing business model for barristers is a traditional set of chambers. It also suggests that most barristers do not necessarily feel the need for a new approach to the delivery of legal services. The research indicated that over the next five years, only 5 per cent of barristers’ organisations planned to change fee structures, 7 per cent their governance structure, and 8 per cent the way they receive instructions.³⁸ This suggests that a lack of flexibility in how barristers’ services are delivered may make it more difficult for the Bar to adapt to a changing market and respond to changing consumer needs.

One such driver of change in the market could be Brexit, which could give rise to both threats and opportunities for barristers. It will be important that we understand the implications of Brexit, and that we then ensure the profession is sufficiently well informed so that it can consider the implications for clients.

Our role as a regulator

We will continue to work closely with the profession to ensure we understand the risks and opportunities arising from the changes we have identified. The BSB needs to gain insight into these areas and will seek to build good relationships with subject matter experts. Where necessary, we will act quickly to mitigate the risks, but will also work to enable the profession to adapt and hence take advantage of the opportunities described here. We can do this by keeping our rules flexible to facilitate innovation.

The [BSB Strategic Plan for 2019-22](#) sets out the following activity in response to this risk theme.

- Research and evidence gathering (undertaken where possible, collaboratively with other regulators or interested groups) on the changing shape of the legal services market and the delivery of services by barristers; and then refining our regulatory approach to meet the risks and opportunities identified;
- Assessing the consequences of Brexit for the regulation of barristers in England and Wales; and
- Assessing whether our regulatory arrangements, based on evidence gathered, stand in the way of innovation and, if so, what our regulatory approach should be.

Theme 3: Affordability and lack of legal knowledge threaten access to justice

The theme in brief and why we think it matters

The regulatory objectives set out our responsibility, alongside the other legal regulators, to improve access to justice, to protect the interests of consumers and to encourage strong and effective legal services providers. The right of the public to obtain an appropriate remedy through the justice system if they have not been treated fairly is fundamental to maintaining a democratic society.

Having said this, obtaining access to justice is difficult for many consumers, particularly those who are more vulnerable. There are several reasons for this: a complex and fragmented market, a lack of legal knowledge and experience among the general population, and affordability issues.

Affordability, and perceptions of affordability, pose several risks to access to justice, but this can also be hindered by a general lack of legal understanding among the public; while inexperienced, often vulnerable, consumers often find it difficult to know who to turn to for advice and/or representation.

There is also substantive evidence that changes to Legal Aid eligibility implemented by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), have compounded these issues for many, and once again particularly for the more vulnerable. This has led to a significant increase in litigants in person within certain areas of law, resulting in additional burdens being placed on the court system and available evidence suggests this may result in worse outcomes for the individuals affected.

The Bar Standards Board has no locus in advising Government as to the levels or availability of Legal Aid, but our statutory objectives include improving access to justice, protecting and promoting the interests of consumers, and encouraging an independent, strong, diverse and effective legal profession. We will therefore continue to monitor the impact that cuts in Legal Aid may be having upon these regulatory objectives. We will consider what regulatory action may be necessary, working with other bodies who share our regulatory objectives, as together we can uphold those objectives more effectively than on our own.

Evidence

Affordability / pricing and price transparency of legal services

There is evidence that many legal issues and disputes remain unresolved because those involved are unable to obtain legal advice or representation due to cost, or a lack of knowledge and confidence in how to obtain it.³⁹ This is particularly true amongst “socially excluded” groups, even though they are more likely to experience situations requiring a legal solution.⁴⁰

The implementation of LASPO has seen cuts in the amount of Legal Aid available, and associated changes to the way in which it is allocated. The government’s review of LASPO⁴¹ shows significant drops in expenditure on legal aid, with falls of 41% for legal help (defined as initial advice and assistance that does not involve legal representation), 35% for civil representation, and 16% for criminal legal aid.

39 Legal Services Board (2016) Online Survey of Individuals Handling of Legal Issues in England and Wales; Legal Services Board (2014) How People Resolve ‘Legal’ Problems; Legal Services Research Centre (2010) Knowledge, capability and experience of rights problem

40 MoJ (2016) Findings from the Legal Problem and Resolution Survey, 2014–15; Legal Services Commission (2011) Civil Justice in England and Wales; Buck et al. (2005) Social Exclusion and Civil Law: Experience of Civil Justice Problems among Vulnerable Groups

41 Ministry of Justice (2019) Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

Research suggests this has resulted in larger numbers of consumers unable to afford legal advice or representation in court.⁴² The Ministry of Justice has found that the majority of litigants in person in private family law cases were in that position “because they were ineligible for or had been unable to obtain Legal Aid , but could not afford legal representation”.⁴³ Another example is in employment tribunal cases – the introduction of charges for making an employment tribunal claim following LASPO (reversed in 2017) was followed by a 76 per cent drop in cases taken to employment tribunal in the following year.⁴⁴

One survey found that 63 per cent of the public do not believe professional legal advice is an affordable option for ordinary people.⁴⁵ Other research by the Legal Services Board suggests that “perceived high costs is [one of the] main barriers to accessing legal services for small businesses”.⁴⁶

Furthermore, price transparency is uncommon within the legal sector. Research from the LSB found that only 17 per cent of legal services providers published prices online,⁴⁷ and BSB research suggests that barristers are less likely to provide pricing information than other providers, with only 6 per cent of chambers providing numerical data about fee levels or price structure.⁴⁸ A study from the Competition and Markets Authority concluded that consumers find it hard to make informed choices due to the lack of transparency about price, service and quality, and that this lack of transparency weakens competition between providers and means that some consumers do not obtain legal advice when they would benefit from it.⁴⁹

Ability of legal service providers to meet demand

The government’s review of LASPO found⁵⁰ that since its implementation, there are fewer legal aid providers, with the number of criminal legal aid providers having fallen by 14% and the number of legally aided civil work providers having fallen by 32% overall.

There has also been an absolute fall in the number of providers in some areas of law or regions in the country. Since LASPO was implemented, the number of immigration providers has fallen by 15%, while providers of housing law services have declined by 39%. In some areas, the effects are more pronounced. The Eastern region, for example, has seen a 50% fall in the number of immigration providers. All of this suggests that the changes in legal funding may have affected the ability of the sector to meet consumer demand: for example, there is evidence to suggest that in immigration work there is higher demand than supply.⁵¹

Research by Amnesty international⁵² has also argued that cuts had contributed to ‘advice deserts’ in certain areas of the country, where there is extremely limited provision of (particularly free) legal advice. This has also been highlighted in other research which details the closure of Citizens Advice Bureaux and Law Centres in response to decreases in available funding.⁵³

42 Amnesty International (2016) Cuts that Hurt - The impact of legal aid cuts in England on access to justice

43 Ministry of Justice (2014) Litigants in person in private family law cases

44 Equality and Human Rights Commission (2015) Equality, Human Rights & Access to Civil Law Justice

45 Hodge, Jones & Allen (2015) UK Perceptions of the Legal and Justice System

46 Legal Services Board (2016) Cost of Services, Available at: <https://research.legalservicesboard.org.uk/analysis/demand/cost-of-services/>

47 Legal Services Board (2016) Prices of Individual Consumer Legal Services

48 Bar Standards Board (2017) Web Sweep – Transparency of Online Price Information

49 Competition and Markets Authority (2016) Legal Services Market Study

50 Ministry of Justice (2019) Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

51 Bar Standards Board (2016) Immigration Thematic Review

52 Amnesty International (2016) Cuts that Hurt - The impact of legal aid cuts in England on access to justice

53 JUSTICE (2018) Innovations in Personally Delivered Advice – surveying the landscape

The organisation that used to give me advice on my case, as well as confidence that things would be OK, has gone. I've lost that support. I'm totally on my own and that terrifies me."

Family law litigant⁵⁴

LASPO could also be affecting the quality of advocacy, with some in the profession being unable or unwilling to deliver the services required to a competent level. Research published in June 2018, which looked at judicial perceptions of the quality of criminal advocacy⁵⁵ found that more than half of the judges interviewed expressed concern that declining levels of remuneration in criminal advocacy, and associated low levels of morale within the profession, have a negative impact on the quality of advocacy. Specific concerns were that such issues can mean that the most able advocates leave criminal practice in favour of more lucrative work in the civil arena, and those remaining in criminal practice are more likely to take on cases above their level of competence or be able to devote less time to cases that they do take on.

Navigating a complex marketplace and choices of provider

Consumers can feel intimidated by legal professionals and the process of purchasing legal services.⁵⁶ This can also contribute to them not making a complaint when they are dissatisfied with the service they have received.⁵⁷ Research from the Legal Services Consumer Panel (LCSP) suggests that 44 per cent of consumers who were dissatisfied with a lawyer did not take any action in response.⁵⁸

The more formal it [a complaint] gets with them, the less you're likely to ever get anywhere, because they'll win at that. They'll always win at that. It's what they do day in and day out."

Dissatisfied legal service consumer⁵⁹

Research from the LSB suggests that while unregulated providers make up a relatively small proportion of the market (around 5 per cent of cases for which clients paid for legal services) they pose risks for consumers including making misleading advertising claims. This is significant as consumers might not always make an informed choice to use an unregulated provider and will not, therefore, realise the lack of consumer protection they have.⁶⁰ The research also found that nearly half of consumers using unregulated providers are not aware of their regulatory status, with many assuming they are regulated.

"I'd be shocked if they weren't regulated - you'd just assume that they would be."

Legal service consumer⁶¹

Availability of flexible / unbundled service offerings

Unbundling can also be a way to reduce the cost of legal advice. This involves separating "a package of legal services into parts or tasks".⁶² The consumer and provider then agree which parts the provider will do, with the consumer doing the rest. The 2017 Tracker Survey⁶³ found that one in five of all legal transactions involve some element of unbundling, and research for the LCSP and LSB⁶⁴ suggests that the primary reason for consumers adopting an unbundled approach is lower costs.

54 Amnesty International (2016) Cuts that Hurt - The impact of legal aid cuts in England on access to justice

55 Institute for Criminal Policy Research (2018) Judicial Perceptions of the Quality of Criminal Advocacy https://www.barstandardsboard.org.uk/media/1939251/judicial_perceptions_of_criminal_advocacy_final_report_june_2018.pdf

56 Solicitors Regulation Authority (2010) Research on Consumers' Attitudes towards the Purchase of Legal Services

57 Legal Ombudsman (2012) Consumer experiences of complaint handling in the legal services market

58 Legal Services Consumer Panel (2014) Consumer Impact Report

59 Legal Ombudsman (2012) Consumer experiences of complaint handling in the legal services market

60 Legal Services Board (2016) Unregulated Legal Service Providers – Understanding Supply Side Characteristics

61 Solicitors Regulation Authority (2010) Research on Consumers' Attitudes towards the Purchase of Legal Services

62 Legal Services Consumer Panel (2015) Qualitative research exploring experiences and perceptions of unbundled legal services

63 Legal Services Consumer Panel (2017) Tracker Survey

64 Legal Services Board (2015) Qualitative research exploring experiences and perceptions of unbundled legal services

However, in the research, providers and judges highlighted issues with the unbundling approach. While some legal help was seen as better than none, both judges and providers highlighted that problems could arise when clients were incapable of effectively carrying out the elements of the case they were doing themselves, when they supplied inaccurate information to providers, and when they were unclear as to the limits of what the provider had agreed to do for them. These risks could adversely affect the outcomes of the case, with associated detrimental impacts on the individuals involved.

Links between diversity and access to Justice

Some legal consumers will be facing particular vulnerabilities, which could relate to a wide range of situations or individual characteristics. Such individuals can face additional barriers to accessing legal services or to obtaining an appropriate service.

In addition, individuals with vulnerabilities can be more likely to encounter the justice system. Research by the Legal Services Commission found individuals with one or more “vulnerabilities” report higher numbers of civil justice problems on average than those without any “vulnerabilities”.⁶⁵ In particular, those involved in the criminal justice system are considerably more likely than the general population to have mental health issues - research has estimated that 39 per cent of people detained in police custody have one or more mental health issues, and that around 60 per cent of prisoners have personality disorders, compared to 5 per cent of the general population.⁶⁶

Past research has suggested that vulnerable users of the justice system, such as consumers with mental health issues⁶⁷, learning disabilities⁶⁸, hearing impairment⁶⁹, or young defendants or witnesses⁷⁰ have support needs that are often poorly addressed by legal service providers.

*“I didn’t like it, it shocked me. The judge asked me if I understood and I said yes even though I didn’t. I couldn’t hear anything, my legs turned to jelly, and my mum collapse
Defendant with learning disability⁷¹”*

Unmet need, and its disproportionate impact on certain groups, can also cause some sections of the public to feel that the legal system does not operate in their best interests. This can undermine public trust in the legal profession, which the LSCP Tracker Survey (2017) found is lower than for some other professions.⁷²

Much of the public feel that the legal sector is not fair or transparent, and that their rights will not be protected if they make use of legal services.⁷³ Some research has argued that existing levels of trust in the legal profession are already damaging both to providers of legal services and to the wider public.⁷⁴

The ability of some groups to access the justice system effectively is likely to have been disproportionately impacted by changes to funding, according to research from Amnesty International⁷⁵ which highlighted the impact of Legal Aid cuts on disadvantaged and marginalised groups, primarily in the areas of family, immigration and welfare benefits law.

65 Legal Services Commission (2010) Report of the 2006-2009 English and Welsh Civil and Social Justice Survey

66 National Institute for Health and Care Excellence (2017) Mental health of adults in contact with the criminal justice system

67 JUSTICE (2017) Mental health and fair trial

68 Legal Services Consumer Panel (2013) What happens when people with learning disabilities need advice about the law?

69 Kyle et al. (2012) Legal Choices – Silent Process

70 Institute for Criminal Policy Research for the BSB (2015) Youth Proceedings Advocacy Review

71 J. Jakobsen & J. Talbot (2009) Vulnerable Defendants in the Criminal Courts

72 Legal Services Consumer Panel (2017) Tracker Survey

73 Hodge, Jones & Allen (2015) UK Perceptions of the Legal and Justice System

74 Respublica (2015) In Professions We Trust

75 Amnesty International (2016) Cuts that Hurt - The impact of legal aid cuts in England on access to justice

'Legal capability' amongst the general population

Law for Life, a legal education and information charity, has defined legal capability as “the abilities that a person needs to deal effectively with law-related issues”.⁷⁶ This covers the knowledge, skills and attitudes needed by a consumer to identify and subsequently resolve a legal problem they are facing – so going beyond knowledge of the law, to include capabilities such as communication skills, confidence and determination. It is difficult for inexperienced, often vulnerable, consumers to know who to turn to for advice and/or representation. This can worsen any legal problems they face⁷⁷ and affect their willingness to engage with legal services in the first place.⁷⁸

A lack of knowledge of their rights and a lack of understanding of legal services is more common among disadvantaged or vulnerable groups and around certain legal issues.⁷⁹ This can lead to further disadvantage when people from these groups require legal services.

Alongside the complexity of the legal system, Law for Life found that “only 59 per cent of people were able to demonstrate some understanding of their rights” and “only 25 per cent of people claim to know their legal position completely when they experience a legal problem”. They also found that the “majority of people feel confident that they can achieve a fair resolution to a problem” until they realise they have encountered a legal problem. At this point, “levels of confidence [reduce] significantly”.⁸⁰

Other research showed that when faced with legal problems, 31 per cent of respondents felt they did not understand their rights at all, and just 11 per cent were able to correctly identify problems as being legal in nature.⁸¹

Furthermore, the elaborate, ritualised nature of trials, involving technical terms, jargon and ‘legalese’, can make trials almost incomprehensible to victims, witnesses and defendants.⁸²

Rise in self-representation and the impact on the courts system and the interests of justice

The available evidence suggests that since LASPO there has been a significant increase in the numbers of litigants in person⁸³, particularly in family cases. In the past, they may have been in the courts by choice but now they were there because they could not get Legal Aid.⁸⁴

Interestingly, the BSB has also seen a 64 per cent increase in the number of complaints from litigants in person (from 47 in 2016/17 to 77 in 2017/18.)⁸⁵ Many of these have been in relation to civil and family law. As reported in our Enforcement Report 2017-18, this increase could reflect cuts in Legal Aid as these areas are the most severely affected by the cuts and the areas that give rise to the greatest numbers of complaints from litigants in person. However, this can only be a speculative assumption, as we do not have the detailed information to make a firm deduction.

Research from Amnesty International has highlighted the impact of Legal Aid cuts on disadvantaged and marginalised groups, primarily in the areas of family, immigration and welfare benefits law.⁸⁶

76 <http://lawforlife.org.uk/wp-content/uploads/2013/05/legal-capability-planet-2009-147-1-147.pdf>

77 Denvir et al. (2013) When legal rights are not a reality: do individuals know their rights and how can we tell

78 Legal Services Board (2012) Understanding consumer needs from legal information sources

79 Legal Services Research Centre (2010) Knowledge, capability and experience of rights problems

80 Law for Life (2015) Legal Needs, Legal Capability and the Role of Public Legal Education

81 Legal Services Commission (2013) Summary Findings of Wave 2 of the English and Welsh Civil and Social Justice Panel Survey

82 Institute for Criminal Policy Research (2015) Structured Mayhem – Personal Experiences of the Crown Court

83 House of Commons Library (2016) Litigants in person: the rise of the self-represented litigant in civil and family cases

84 House of Commons Library (2016) Litigants in person: the rise of the self-represented litigant in civil and family cases

85 BSB Annual Enforcement Report_2017-18

86 Citizens Advice (2016) Standing alone: going to the family court without a lawyer

The research found that litigants in person often lack the skills to represent themselves and present their cases effectively. This is particularly so among vulnerable groups such as children and young people in family cases. Research from Citizens Advice found that the proportion of family cases in which neither party had representation increased from a quarter to a half since the implementation of LASPO. Its report highlighted the stress, responsibility and loneliness faced by those acting as a litigant in person, and that they were likely to receive worse outcomes than those with representation.⁸⁷ The research also highlighted that the court system was ill-suited to dealing with litigants in person, compounding the problems they faced.

The impact of litigants in person is not restricted to the family courts – other research found that as Legal Aid was not available for employment tribunals, only 33 per cent of claimants were represented at hearings, as opposed to 67 per cent per cent of employers.⁸⁸

Research from the Ministry of Justice suggests that not having a lawyer in Civil or Criminal proceedings is associated with more court hearings being needed for a case, or cases taking considerably longer to resolve. This is a situation that could end up costing the court system more.⁸⁹

*Having unrepresented defendants drives a coach and horses through Better Case Management*⁹⁰
Crown Court Judge⁹¹

Our role as a regulator

Whilst there is nothing we can do directly as a regulator to change the availability of Legal Aid, there is much we can do to fulfil our objective to improve access to justice for everyone in our society. This includes some of the work we have done over the past few years to introduce new rules to improve transparency standards at the Bar, and the work we do with the other legal regulators to run the Legal Choices website, to improve public legal education and to increase public understanding of citizens' legal rights and duties.

The BSB [Strategic Plan for 2019-22](#) sets out the following activity in response to this risk theme.

- Delivering risk-based, targeted and effective regulation, including improving the way in which we communicate with the public;
- contributing to public legal education to enable the public to have better access to information about the legal sector, barristers and the services that they provide
- assuring the standards of practice of barristers (generally and against the backdrop of changing consumer needs);
- understanding the role of unregistered barristers and barrister intermediaries in meeting consumer needs (and therefore the role that the BSB should play in regulating them);
- evaluating the impact of our regulatory response to the CMA report.

87 Citizens Advice (2016) Standing alone: going to the family court without a lawyer

88 Equality and Human Rights Commission (2015) Equality, Human Rights & Access to Civil Law Justice

89 Ministry of Justice (2016) Unrepresented Defendants - Perceived effects on the Crown Court and indicative volumes in magistrate's courts

90 'Better Case Management' is a set of guidelines introduced in 2016 to improve court efficiency

91 Ministry of Justice (2016) Unrepresented Defendants - Perceived effects on the Crown Court and indicative volumes in magistrate's courts

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