



REGULATING BARRISTERS

## **Standards Committee**

### **Review of the Public Access Rules**

#### **Consultation paper**

**March 2008**

# Review of the Public Access Rules

## Consultation paper

### Introduction

1. This consultation paper sets out views on the working and possible reform of the public access scheme, and seeks views from the Bar and other interested parties on the proposed amendments to the scheme. The paper is available to view on the Bar Standards Board website, at [www.barstandardsboard.org.uk](http://www.barstandardsboard.org.uk). The closing date for responses is **3 July 2008**. Responses should be sent to Toby Frost, Bar Standards Board, 289-293 High Holborn, London WC1V 7HZ, or by email to [TFrost@BarStandardsBoard.org.uk](mailto:TFrost@BarStandardsBoard.org.uk). The BSB may wish to cite individual responses in its report of the consultation. If you do not wish your response to be identified in the report or published on the website, you should make this clear in your reply.

### Background

2. In February 2002 the Bar Council accepted recommendations made by a working group chaired by Sir Sydney Kentridge QC in its report "Competition in Professions", which advocated enabling barristers to be instructed directly by the public in certain circumstances, without the intervention of a solicitor or other instructing intermediary. The paper considered a number of restrictions on practice at the Bar in the light of a 2002 report by the Office of Fair Trading, which criticised existing practising limitations on the capacities of the barrister.
3. The report stressed that if the sources of barristers' instruction were widened, the types of work available to barristers should not be. It was felt that permitting barristers to be directly instructed by the lay public would not create significant risks or be especially difficult to regulate, provided that the areas of work barristers could cover were not enlarged.
4. In March 2002, a second working group chaired by Guy Mansfield QC issued a paper on the amendments and rules that were needed to introduce public access. Following the report's recommendations, the Bar Council adopted new rules to allow any member of the public to instruct a barrister directly. These came into effect in July 2004.
5. The principle governing the extent of what a barrister should be permitted to undertake under the public access scheme is still considered to be that it should be limited to that which a barrister can be expected to have the resources to undertake. If work is likely to need the resources of a solicitor then a barrister should not be permitted to undertake it without the involvement of a solicitor.

## **A review of the public access rules**

6. The public access scheme currently allows a barrister to be instructed directly by a lay client without the need for a solicitor. In order to take on public access work a barrister must have more than three years' practising experience, must be properly trained and must have registered with the Bar Council as a public access practitioner. There are no specific requirements or level of knowledge expected of clients for them to be able to instruct a barrister under public access.
7. The public access scheme was deliberately introduced with a good deal of caution. There was uncertainty whether clients would understand the limitations of barristers' work, and it was felt that the new opportunities needed to be approached carefully by barristers.
8. When setting up the scheme, the Bar Council undertook to review the operation of the Public Access rules after three years. Under the present regulatory arrangements, this review falls to the Standards Committee of the Bar Standards Board (BSB) to conduct.
9. The Standards Committee has established a Working Group, which includes experienced public access practitioners, Chambers' managers and lay members to take forward the review.
10. The review of the public access scheme has been carried out in accordance with the values of the BSB. The BSB has identified Access to Justice, Independence, Integrity, Quality and Value for Money, Diversity and Redress as underpinning excellence in the provision of legal services. The BSB considers that it is vital that these qualities continue to inform the provision of services through the public access scheme.

## **Methods of obtaining information**

11. The Working Group decided that in order to assess the success of the public access scheme the views of those with hands-on experience of public access should first be obtained. To that end, questionnaires were sent to all barristers who registered with the Bar Council as intending to undertake public access work, seeking views on the operation of the public access rules. At the same time, these barristers were asked to inform their public access clients of the BSB's review and to encourage them to complete the online questionnaire which had been placed on the BSB website.
12. About 165 responses were received from barristers and consumer groups: only eight responses were received from lay clients and it is a matter of regret that more were not received. Further views were canvassed from sixteen barristers attending a public access training day run by the College of Law.
13. In the light of the information gathered, the Group has highlighted a number of areas in the application and operation of the public access scheme where particular consideration is required. This consultation paper discusses each of these and, through a series of questions, seeks views and comments on whether amendments to the process and rules are required.

## **Topics covered**

14. This consultation paper focuses on the following aspects of the public access scheme:
- Standing and experience of barristers wishing to take public access work
  - Range of work permitted under the public access scheme
  - Use of correspondence by barristers under the terms of the scheme
  - Public access training course
  - Public access guidance materials
  - Advertising under the public access scheme.

## **The alternative business structures review and public access**

15. This consultation paper seeks views on the best way for the public access scheme to progress. The scope of this paper is limited to the consideration of changes within the existing practising arrangements open to barristers. However, any possible reform of the public access scheme needs to be considered in the light of the Legal Services Act 2007, which will open up the working options available to barristers. The Act will permit different structures initially allowing legal disciplinary practices and, subsequently, when the Legal Services Board has been set up, a wider range of Alternative Business Structures. The Legal Services Act is expected to take effect starting in 2009.
16. The BSB has set up a group to examine the possibilities of Alternative Business Structures for the Bar, concentrating in the short term on the possibility of partnerships between barristers and participation in legal disciplinary practices and on whether to remove restrictions on how self-employed barristers may practise. The group has issued a consultation on such issues, which are not within the scope of this more limited consultation.

## **Standing and experience requirements of barristers in public access work**

17. Any barrister wanting to undertake public access work must have at least three years' practising experience after the completion of pupillage. This reflects the requirement on a barrister to spend the first three years of practice working in a Chambers or other organisation which is the principal place of practice of a qualified person able to provide the barrister with guidance.
18. When the public access scheme was set up, it was considered inappropriate to allow barristers to accept instructions directly from lay clients before they had completed this three year period, particularly as no public access training is currently offered on the Bar Vocational Course and it was thought necessary that barristers should first acquire some experience of managing cases and dealing with clients.

19. In the questionnaire, barristers were asked whether the current requirements relating to experience and standing for public access practitioners were justified. Responses varied, but the great majority of those who expressed an opinion felt that the current requirement of three years' experience was appropriate.
  20. A notable minority suggested that the requirement be raised to five years to ensure that barristers had fuller experience of dealing with caseloads and handling clients: a smaller minority suggested lowering the practising experience required (subject in some cases to supervision by more experienced practitioners), stating that there were some areas of work where the young Bar would especially benefit. It should be noted that the responses to the questionnaire do not indicate whether or not there is a preference or demand for public access work among younger barristers.
  21. In the circumstances it seems reasonable to keep the practising requirement as it is, requiring a barrister to have three years' experience post-call before being permitted to undertake public access cases. This may be thought to strike an appropriate balance between ensuring quality of service whilst keeping barristers' services accessible to lay clients.
  22. Alternatively, provision could be made to extend public access training into pupillage, and/or to oblige BVC providers to include public access as a module on the BVC course. Persons who had worked as solicitors before coming to the Bar, or in other appropriate work that would require equivalent client-care skills, could be granted waivers to the rules on standing and experience.
- Q1 Do you agree that the current requirements regarding practising experience should be retained?**
- Q2 Would your opinion be changed if earlier public access training were available? If so, in what form do you think it would need to be provided?**

### **Range of work available under the public access scheme**

23. As was originally proposed in the Kentridge Report, there are currently a number of areas of work – notably family, crime and immigration – where public access is not permitted.
24. Barristers were specifically asked whether they wished the areas of work in which public access is permitted to be widened. Their responses varied, but of those who expressed a view, the majority suggested widening the range of public access work, in particular in the areas of criminal and immigration work.
25. It was felt that immigration tribunals, especially, were an anomaly: given that lay representatives could appear in such tribunals without the need to be instructed by a solicitor, it seemed wrong to many that barristers could not do the same. The only comment from a lay client on range of work echoed this.
26. When the public access scheme was first established, immigration work was not included on the advice of the Immigration Services Commissioner. The

Commissioner argued that in many cases the immigrant would be vulnerable and that considerable correspondence with the Home Office would often be involved, often in the immigrant's second language. It was felt that dealing with such correspondence would risk pushing barristers too far into the role of solicitors. At present, immigration advisers of the Office of the Immigration Services Commissioner can directly instruct barristers without the need to instruct a solicitor.

27. In the light of the responses, it is proposed that immigration work should be included in the public access scheme. It seems wrong that barristers should be excluded from this field of work which unqualified lay representatives are allowed to undertake.

**Q3 Do you agree that public access should be permitted in immigration tribunals?**

28. One detailed response to the questionnaire suggested that public access should be extended to cases involving non-imprisonable crimes (in particular regulatory/Road Traffic Act cases) in the Magistrates' Courts where the client has not received legal aid.
29. Allowing barristers to undertake low-level criminal work in the Magistrates' Court under the public access scheme could reduce the costs of representation for clients, provide better opportunities to undertake such work for young barristers, and allow barristers to compete with solicitors more effectively for this kind of work.
30. Furthermore, there are numerous criminal offences on the statute book, for example in the environmental, planning, corporate, consumer and trades descriptions fields, where the client may be a business well able to administer the case and which would be well-suited to using direct access to the Bar.
31. However, unless and until barristers are permitted to undertake work currently reserved to solicitors – such as the gathering of evidence – the sort of work that may be undertaken under the public access scheme must be limited to avoid the situation where a barrister is instructed without a professional client and then discovers that he or she is unable to carry out all of the work that the client needs.
32. It is suggested that minor criminal work in the Magistrates' Court be made available under the public access scheme, but only in cases where a custodial sentence is not a possibility, and where the lay client can be expected to produce the necessary evidence. In many situations the latter restriction will in practice limit the barrister's role to mitigation where the lay client has chosen to plead guilty. In all cases the barrister would have the option not to accept the case and would be under a continuing obligation to call in a solicitor if it were in the interests of justice to do so.
33. Views on this proposal in particular would be welcomed.

**Q4 Should public access be permitted in minor criminal cases where imprisonment is not possible? If not, why?**

**Q5 Is a cut-off criterion based on whether an offence is punishable by imprisonment too restrictive or arbitrary? If so, what criterion or cut-off point would be appropriate?**

34. Family work has been entirely excluded from the public access scheme: when the scheme was introduced the family Bar did not express a wish for it. Family work was mentioned by fewer respondents to the questionnaires than immigration or crime. Several barristers were in favour of extending public access to family work, stating that it would save time for litigants, aid accessibility to legal representation and help barristers compete with solicitors. It is anomalous that a barrister may act in a property dispute between cohabitants under public access, but may not do so if the parties are married. The former is regarded as Chancery work and the latter as family work. But the distinction seems artificial.

35. It may be appropriate to allow barristers to accept instructions on a direct basis in at least some family cases, whether to give advice, to draft documents, or to appear in Court. A few responses suggested that it may be appropriate to draw a distinction between family cases that involve money and property, in which public access could be permitted, and cases about children and public law cases, which should remain outside the public access scheme.

**Q6 Is there a stronger argument for allowing public access in cases about money and property, rather than cases about children or public law cases and, if so, why?**

**Q7 Should family work be permitted under the public access scheme? If so, in what sort of case is it appropriate?**

## **Correspondence between parties**

36. Of all the restrictions on the work barristers can carry out, correspondence with the other side in a case was mentioned most often by practitioners and lay clients alike as causing difficulties.

37. At present, paragraph 401 of the Bar's Code of Conduct prohibits self-employed barristers from conducting litigation and from conducting correspondence with an opposite party (although employed barristers are permitted to do so).

38. Correspondence was held not to be the conduct of litigation by the Court of Appeal in *Andre Agassi v Robinson (HMIT) & (1) Bar Council (2) Law Society (Interveners)* [2005] EWCA Civ 1507. So it appears that even if barristers were permitted by the Code to engage in correspondence, there would be no breach of the restriction on the conduct of litigation.

39. For the purposes of this paper "correspondence" is taken to refer to any written communication between the parties in order to further the case. This can be sub-divided into informal communication, including the use of emails designed to progress the case, and more formal written correspondence between the parties, such as pre-action protocol letters before claim.

40. There are no current restrictions on communication by telephone. Indeed, it has been observed that a rule which prevents professional people communicating in writing has to be viewed in the context of a rule which does not prevent them saying exactly the same thing through the spoken word – either face to face or on the telephone.
41. In the past barristers have been forbidden from corresponding with the other side on the grounds that they are not trained to undertake this sort of work and lack the resources to do so. Under the current Public Access rules, the conduct of written correspondence therefore falls to the lay client because of the prohibition against corresponding in paragraph 401.
42. The responses to the questionnaire indicated a wide range of opinion on this prohibition: its scope is clearly an area of some uncertainty for many barristers, and a number of different practices seem to take place at the moment. The majority of responses saw the current restriction, to varying degrees, as artificial and restrictive.
43. The majority of respondents felt that counsel-to-counsel emails were helpful in dealing with matters such as exchanging skeleton arguments, drafting orders and the like. A strict interpretation of the present rule as prohibiting such communication was generally seen as too restrictive, and limiting to orderly case progression.
44. A minority felt strongly that barristers should be allowed to send Without Prejudice correspondence. Reasons given for this were that lay people should not be expected to send this kind of correspondence, that it would reduce costs and time for the lay client if the barrister was permitted to send it, and that barristers could judge when correspondence should come from them or from the client.
45. In the responses, barrister-to-barrister correspondence tended to be accepted more readily than barrister-to-solicitor correspondence. It is suggested that barrister-to-barrister correspondence would involve less of an assumption of the duties of the solicitor than barrister-to-solicitor correspondence. Indeed, the responses suggest that informal correspondence between barristers is already quite common, especially via email. However, strong views exist on the extremes, and without doubt the situation needs to be clarified.
46. Barristers undertaking public access work are allowed to draft correspondence on behalf of clients but, when sent, this correspondence must come from the client, so it cannot be signed by the barrister or sent on the barrister's Chambers' headed paper. Public access practitioners reported that clients missed the option to send a strongly-worded and powerfully argued "warning letter" signed by a barrister on headed paper, and practitioners felt that it made progressing the case awkward, although it enabled, and actually required, clients to keep a tight hold on the progression of the case.
47. Several clients felt that they were paying for the prestige-value and authority of a barrister, but did not receive it due to a rule that forbids the barrister from signing the barrister's own letters. Furthermore, in the light of the changes in working structures promised by the Legal Services Act 2007, it may be thought that it would be impossible to justify a position where a barrister member of a mixed disciplinary practice is not permitted to write and send



such letters in his or her own name. There is clearly a question here of whether the current restrictions hamper quality and value for money and access to justice.

48. However, this needs to be balanced against the issue of whether it is desirable and in the public interest for barristers to be entitled to assume such a role, and provide such a service. Several responses to the questionnaire saw any relaxation of the rules on correspondence as an assumption of the role of solicitors and a move towards fusion.
49. The BSB has considered the issue of correspondence and other currently prohibited work in its consultation on Alternative Business Structures. It proposes that barristers should be able to undertake such work, provided that
- (a) they have the necessary resources to do so,
  - (b) they have insurance that covers everything that is done; and
  - (c) no clients' money, securities or other property is held.
50. If there are to be changes, it might be of some value for the public access training course to incorporate some guidance on the content and style of business letters. The fear that barristers may not be available to handle return correspondence could be met by amended guidance in the form of a "health warning" that outgoing letters should state that any reply to the barrister's letter should be sent directly to the Public Access client and the barrister merely copied in, unless the barrister has a system in place making it unnecessary.

**Q8 Do you support the BSB's proposal that a barrister should be permitted to undertake correspondence - if so, why and if not, why not?**

**Q9 Should the current restrictions on correspondence be relaxed for public access cases, and if so to what extent?**

**Q10 Can formal and informal correspondence be clearly distinguished: if so, how?**

## **The public access training course**

51. In order to carry out public access work barristers must attend a one-day training course run by the College of Law. The aim of the course is to alert barristers to the strengths and limitations of the scheme and to introduce them to some of its less familiar concepts. In conventional practice, barristers do not have to deal with lay clients in the same way, often do not discuss fees with the lay client (this is generally done by Chambers' clerks) and do not have to deal with administrative matters that would be handled by the instructing solicitor such as the retention of documents and the sending of bills.
52. The questionnaire asked barristers to comment on the quality of the training course. Barristers' responses suggested that the course was generally liked. It was felt to provide a good background to public access work, especially with regard to the issues of what a barrister is and is not permitted to do, financial management and when to call a solicitor into the case.

53. In the responses to the questionnaire it was suggested that more information should be given about the money laundering regulations (now updated in the form of the 2007 Regulations), and that more precise information should be given about what exactly barristers may and may not do.
54. It is proposed that, rather than changing the course itself, the written materials in the Guidance for Barristers section of the public access guidance should be expanded to cover money laundering under the 2007 Regulations and the limits of the scheme in more detail (See *Guidance materials provided to public access barristers*, below). These areas, whilst important, do not require personal tuition in the same way as the development of barristers' client care skills. Expanding the training materials would enable more background to be given in print, whilst allowing time on the training course for more practical aspects of public access to be covered in person.
- Q11 Do you agree that the training course should remain as it is? If not, how should it be altered? Do you think that the course should focus on the more practical aspects of the scheme, whilst the written guidance focuses on issues of law and administration?**
- Q12 If changes are made to the rules on correspondence, should the training course be adapted to cover this? Is there anything that would need to be added or removed?**

## **Public access guidance materials**

55. Barristers on the public access training course are provided with a file of written guidance, prepared by the Bar Council. This gives information on the scheme for the use of barristers and further information to be provided to clients, as well as guidance for clerks and suggested client care letters. This guidance is also available at <http://www.barcouncil.org.uk/about/publicaccess/> on the Bar Council website. The guidance for lay clients is attached to this paper at Annex 2.
56. Public access practitioners and clients were asked for their thoughts on the guidance materials that had been provided to them.

## **Guidance materials provided to public access barristers**

57. The purpose of the guidance is to inform barristers and lay clients about the arrangements for public access work and to set out their respective roles where barristers are instructed without a solicitor or other professional client.
58. Because there is no instructing solicitor in a public access case, barristers on the public access scheme must be prepared to deal directly with matters such as billing the client, retaining copies of documents and, where appropriate, taking precautions against money laundering. When dealing with clients face-to-face, it will be necessary to be able to explain the cost and terms of work of the barrister, which is likely to require client care skills that the barrister might not have normally possessed. Work may have to be billed on a time-basis, and guidance would need to be supplied to cover this. Furthermore,

documents that would normally be held by a solicitor have to be kept by the barrister for seven years. This could involve Chambers agreeing to store documents after a barrister has left Chambers or retired.

59. The guidance for barristers has been described by practitioners as deficient in these areas.
60. It is proposed that the written guidance for barristers be reconsidered for clarity, and where necessary rewritten in order to make it clearer and more encouraging, and easier to digest. The areas dealing with money laundering, the storage of documents and the billing of clients should be enlarged and clarified.
- Q13 Do you think that the guidance for barristers should be expanded in the areas of money laundering, Chambers administration and billing of clients? Is there anything else that you would like to see included?**
- Q14 Do you think that anything has been missed out or should be removed from the guidance?**

#### **Guidance for lay clients**

61. The guidance for clients is provided to public access clients when they first instruct a barrister, and sets out the relationship between the barrister and lay client, and what it is that the barrister may do. The guidance therefore needs to be both comprehensive and easy to read. It must inform the clients of the advantages of the scheme, whilst also informing them of the limitations of what the barrister may do. The guidance must balance the need to be easily understood with the need to give full information, as well as being at once positive in tone and clear in its depiction of the limits of the scheme. The current guidance for lay clients is available at: <http://www.barcouncil.org.uk/guidance/publicaccessinformationforlayclients>, and is at Annex 2 to this paper.
62. Comments suggest that the current guidance concentrates too much on what cannot be done under the scheme, rather than its advantages compared to using a solicitor. Several comments said that the guidance began with lists of caveats and was off-putting to clients who would have to read past the various negative aspects to find out the advantages of the scheme. It has also been suggested that the guidance for lay clients is repetitive, and unnecessarily reiterates the limits of what the barrister can do.
63. It is proposed that the guidance be rewritten and in places shortened and clarified, and that it be given a more positive emphasis. The aim would be to present the positive aspects of the scheme earlier in the material and, while making it clear that there are limits to what a barrister may do, to present the advantages of the scheme more clearly. Guidance would continue to be provided by barristers undertaking public access work to the client and be made available on the Bar Council website.
- Q15 Should the guidance for clients be reworded in plainer English? If so, is there anything that should be added to or removed from it?**

## **Client care letters**

64. The suggested form of client care letters sets out the terms on which the barrister will take the case and how the case will be run. Client care letters must be given to the client at the very start of the barrister's work, and must give information on the range of possible work that the barrister may do, availability, fees, documents and complaints procedure. Barristers are not obliged to use the suggested form of letters, although many choose to do so.
65. Comments suggested that the model client care letters were over-long, negative in tone, repetitive and unfriendly. Clearly the letters must set out what the barrister may and may not do, which will inevitably involve a description of the limits of the barrister's role, but this should be done in an approachable and open manner. Several barristers suggested that the letters should concentrate on practical elements of importance to the client: the time that the work would take, the availability of the barrister (and what would happen if the barrister was not available) and above all how much the work would cost and on what basis the client would be billed.
66. It is therefore proposed that the suggested standard client care letters be rewritten to provide a more succinct and positive summary. They should be more focussed on the client's interests, and should seek first of all to answer practical questions of cost, time and availability rather than to provide a summary of the scope and limits of the barrister role. They should continue to provide full, suitable information about the scheme.
67. One response pointed to the requirement to send client care letters to corporate clients stating that it was unnecessary to do so at the start of every case where clients were experienced litigators in their own right.

**Q16 Do the letters contain the appropriate information? Do they need to be redrafted and, if so, how?**

**Q17 Should there be a requirement to send repeat client care letters to corporate clients who make frequent use of the public access scheme?**

## **Advertising under the public access scheme**

68. The capacity to deal directly with the public calls for barristers to be able to advertise and market themselves effectively to potential clients. Almost all of the responses from lay clients called for better promotion of the scheme. Clients suggested that the Bar should put more effort into dynamic advertising of public access, and that solicitors should be encouraged to notify clients of its existence. Only one response from a lay client identified the Bar Council as the source for finding out about the scheme.
69. With regard to the public profile of the scheme, the Legal Services Ombudsman stated in response to the practitioners' questionnaire:

*"Over the past 2 years or so I think it is generally agreed that there has been relatively little take up in public access cases. Indeed, I have not reviewed a single complaint concerning such cases. I feel it may be beneficial for the review to consider whether there is a need to generate more public*

*awareness about the availability of public access which may hopefully increase the take up rate.”*

All of the above suggests that the public access scheme does not yet have a high profile among the lay public. Responses from barristers suggested that neither lay clients nor solicitors knew enough about the existence of the scheme or the way it worked. Barristers on the training course were unsure about how they could market their services as public access providers and how far their ability to advertise extended, and noted that the guidance contained no information about this.

70. Public access practitioners are governed by the same rules regarding advertising as the rest of the Bar (See the Bar’s Code of Conduct, paragraph 710.1 and 710.2). Under the Code of Conduct advertising is permitted subject to few restrictions, and it could be commercially useful for Chambers and individual barristers who undertake public access work to advertise directly to the general public, provided they do not breach the provisions of the Code.
71. A number of responses felt that the Bar Council should be more active in advertising the public access scheme. That is not a matter for the BSB, but any opinions on it will be relayed to the Access to the Bar Committee. The BSB is committed to enabling barristers to provide legal services in ways that facilitate access to justice for consumers, and considers that the public access scheme has an important role to play in this regard.

**Q18 Do you agree that the public access scheme should be advertised more visibly by the Bar Council and, if so, what would you suggest?**

## List of questions

- Q1** Do you agree that the current requirements regarding practising experience should be retained?
- Q2** Would your opinion be changed if earlier public access training were available? If so, in what form do you think it would need to be provided?
- Q3** Do you agree that public access should be permitted in immigration tribunals?
- Q4** Should public access be permitted in minor criminal cases where imprisonment is not possible? If not, why?
- Q5** Is a cut-off criterion based on whether an offence is punishable by imprisonment too restrictive or arbitrary? If so, what criterion or cut-off point would be appropriate?
- Q6** Is there a stronger argument for allowing public access in cases about money and property, rather than cases about children or public law cases and if so, why?
- Q7** Should family work be permitted under the public access scheme? If so, in what sort of case is it appropriate?
- Q8** Do you support the BSB's proposition that a barrister should be permitted to undertake correspondence - if so, why and if not, why not?
- Q9** Should the restrictions on correspondence be relaxed for public access cases, and if so to what extent?
- Q10** Can formal and informal correspondence be clearly distinguished: if so, how?
- Q11** Do you agree that the training course should remain as it is? If not, how should it be altered? Do you think that the course should focus on the more practical aspects of the scheme, whilst the written guidance focuses on issues of law and administration?
- Q12** If changes are made to the rules on correspondence, should the training course be adapted to cover this? Is there anything that would need to be added or removed?
- Q13** Do you think that the guidance for barristers should be expanded in these areas of money laundering, Chambers administration and billing of clients? Is there anything else that you would like to see included?
- Q14** Do you think that anything has been missed out or should be removed from the guidance?
- Q15** Should the guidance for clients be reworded in plainer English? If so, is there anything that should be added to or removed from it?

- Q16 Do the letters cover the appropriate information? Do they need to be redrafted, and if so, how ?**
- Q17 Should there be a requirement to send repeat client care letters to corporate clients who make frequent use of the public access scheme?**
- Q18 Do you agree that the public access scheme should be advertised more visibly by the Bar Council and if so, what would you suggest?**

## **Annex 1 – list of consultees**

### **Bar Standards Board Committees/Panels**

Consumer Panel  
Complaints Committee  
Education and Training Committee  
Qualifications Committee  
Quality Assurance Committee  
Diversity Sub-group

### **Bar organisations**

Chairman of the Bar  
All members of the Bar Council  
Access to the Bar Committee  
Alternative Dispute Resolution Committee  
Bar Human Rights Committee  
Employed Barristers' Committee  
Equality and Diversity Committee  
European Committee  
Fees Collection Committee  
Information Technology Committee  
International Relations Committee  
Law Reform Committee  
Legal Services Committee  
Professional Practice Committee  
Public Access Bar Association  
Public Affairs Committee  
Remuneration Committee  
Training for the Bar Committee  
Young Barristers' Committee

All Circuit Leaders  
All Heads of Chambers  
All Chairs of Specialist Bar Associations

Inns of Court

Association of Women Barristers

### **Other bodies**

Advocacy Training Council  
Architects Registration Board  
Association of District Judges  
Association of Muslim Lawyers  
Attorney General  
Bar Council of Northern Ireland  
Bar Mutual Indemnity Fund  
Chancellor of the High Court  
Chartered Association of Certified Accountants  
Chartered Institute of Patent Attorneys  
Chartered Institute of Taxation



Chartered Insurance Institute  
Council of HM Circuit Judges  
Council of the Inns of Court  
Council for Licensed Conveyancers  
Citizens' Advice  
Crown Prosecution Service  
Department for Business, Enterprise and Regulatory Reform  
Faculty of Advocates  
Faculty of Actuaries  
Federation of Small Businesses  
Institute of Barristers' Clerks  
Institute of Chartered Accountants of England and Wales  
Institute of Chartered Secretaries and Administrators  
Institute of Legal Executives  
Institute of Paralegals  
Institute of Trade Mark Attorneys  
Justices Clerks Society  
Law Centres Federation  
The Law Society  
Legal Action Group  
Legal Complaints Service  
Legal Practice Management Association  
Legal Services Consultative Panel  
Legal Services Commission  
Legal Services Ombudsman  
Lord Chief Justice  
Master of the Rolls  
Ministry of Justice  
National Consumer Council  
Office of Fair Trading  
Office of the Immigration Services Commissioner  
President of the Family Division  
President of the Queen's Bench Division  
Revenue and Customs Prosecutions Office  
Royal Institute of British Architects  
Society of Asian Lawyers  
Society of Black Lawyers  
Solicitor General  
Solicitors Regulation Authority  
Which?



**PUBLIC ACCESS TO  
BARRISTERS  
GUIDANCE FOR LAY  
CLIENTS**

June 2004

### **What is Public Access**

1. Until recently, it was not possible for members of the public to go to a barrister directly; they needed to use a solicitor, or some other recognised form of access. This has now changed. Although the barrister's role remains the same, members of the public may now instruct a barrister direct (Public Access). The aim of this Guide is to help you understand the nature of a barrister's role and how you may be able to use Public Access.

### **The difference between the services offered by a barrister and a solicitor**

2. The services offered by barristers are different from those offered by solicitors for two main reasons.
  - a) First the different service offered:
    - BARRISTERS are trained as specialist advisers and advocates. This means that they become involved where expert legal advice is needed, where documents need to be drafted for their clients to use, or for advocacy (presenting a case in court or before some other tribunal or organisation).
    - SOLICITORS also give advice to and draft documents for their clients to use or may instruct a barrister to provide this service. Some solicitors also provide advocacy services to their clients. Other solicitors instruct a barrister to provide advocacy services to their clients. In addition, solicitors generally take responsibility for the handling of a client's affairs, handle clients' money and take responsibility for the general management of a client's legal case (the conduct of litigation).
  - b) Second, by law, barristers are not allowed to provide a wide range of services that solicitors offer.
3. Here are some examples of work which a barrister is allowed to do:
  - a) A barrister may give you legal advice.
  - b) A barrister may draft documents for you, such as a will.

- c) A barrister may advise you on the formal steps which need to be taken in proceedings before a court or other organisation and draft formal documents for use in those proceedings.
  - d) A barrister may draft a letter for you to send to another person (although a barrister may not sign or send the letter on your behalf or write the letter on his or her notepaper).
  - e) If a witness statement from you is required in proceedings, a barrister may prepare that statement from what you tell him or her. A barrister may also help to prepare witness statements from another person based on the information which that person has provided.
  - f) Where a case requires an expert witness (for example, a surveyor), a barrister may advise you on the choice of a suitable expert and may draft a letter of instruction which you can then send to the expert on your own notepaper.
4. The following are examples of work that a barrister is *not* allowed to do:
- a) A barrister is not allowed to issue proceedings on your behalf or to issue other applications or to take other formal steps in court or other proceedings.
  - b) A barrister may not use his or her notepaper to send letters on your behalf nor may he or she sign or send letters on your behalf.
  - c) A barrister is not allowed to investigate or collect evidence for use in proceedings. This means that, for example, a barrister is not allowed to contact possible witnesses to investigate what evidence they may be able to give.
  - d) Similarly, a barrister is not allowed to instruct an expert witness on your behalf.
  - e) A barrister is not allowed to take responsibility for the handling of clients' affairs, or to take responsibility for the general management of a client's case, or to handle clients' money.

5. It is not possible for a barrister to waive the restrictions on the work which he or she is able to undertake. This is because these restrictions are imposed by law, or by the Bar Code of Conduct, which the barrister must comply with.

**Are there any other restrictions on Public Access?**

6. Subject to limited exceptions, before a barrister is permitted to accept Public Access work he or she must have
  - a) practised for a total of three years following the completion of training
  - b) attended a “public access” training course approved by the Bar Council and
  - c) given certain notices which are required to be given by the Bar Code of Conduct.
7. Public Access is permitted in most areas of work. Those where it is not permitted, however, are as follows:
  - a) Criminal work, except in the following areas:
    - i) Advisory work, except where proceedings have already started
    - ii) Appeals from the Justices to the Crown Court against sentence only and where no issue as to the calling of evidence of fact has arisen or is likely to arise
    - iii) Appeals from the Justices to the High Court by way of case stated
    - iv) Appeals from the Crown Court to the Court of Appeal, Criminal Division, where no issue as to the calling of fresh evidence has arisen or is likely to arise
    - v) Appeals to the House of Lords or Privy Council
    - vi) Appeals to the European Court of Justice and the European Court of Human Rights
  - b) Family work, except in the following areas:

- i) Advisory work or drafting, other than in connection with proceedings which have been commenced
  - ii) Hearings before the Child Support Commissioner and the Child Support Appeal Tribunal
  - iii) Appeals from the Justices to the High Court by way of case stated
  - iv) Appeals to the Court of Appeal, where no issue as to the calling of fresh evidence has arisen or is likely to arise
  - v) Appeals to the House of Lords or Privy Council
  - vi) Appeals to the European Court of Justice and the European Court of Human Rights
- c) Immigration work.
8. These restrictions are imposed by the Bar Code of Conduct and it is not possible for a barrister to waive them.

**Is a barrister obliged to accept Public Access work?**

9. Barristers are entitled to choose not to undertake Public Access work at all. However, if a barrister is willing in principle to undertake such work, then he or she may not refuse to accept instructions
- a) On the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, sexual orientation, marital status, disability or political persuasion; and
  - b) In the case of advocacy work, on the grounds
    - i) That the nature of the case is objectionable to him or her or to any section of the public
    - ii) That your conduct, opinions or beliefs are unacceptable to him or her or to any section of the public

iii) On any ground relating to the source of any financial support which may properly be given to you for the proceedings in question.

10. Before accepting Public Access work, and in addition to considering whether the work in question is work which they are allowed to do, the barrister will have to consider whether it is in your interests and in the interests of justice for them to accept the work. There will be legitimate reasons why the barrister may (and, on occasion, must) decide that it is inappropriate for him or her to accept your instructions. This is dealt with further in paragraphs 11 to 13 below.
11. The Bar Code of Conduct requires a barrister to refuse to accept instructions if he or she considers that it is in your interests or in the interests of justice for you to instruct a solicitor or other professional person. The barrister's duty in this respect is a continuing duty, so that if he or she considers, at any stage of your case, that you ought to instruct a solicitor or other professional person, the barrister must refuse to continue to act for you on a Public Access basis.
12. In considering whether your case is suitable for Public Access, the barrister is likely to take into account
  - a) The nature of the work which you wish him or her to undertake
  - b) Your ability to understand the requirements of your case and to arrange the performance of the services which would normally be carried out by a solicitor (including those referred to above).
13. Each case will depend on its particular facts. It is impossible, therefore, to provide a list of cases which will or will not be suitable for Public Access. Here is some guidance.
  - a) The giving of an opinion on an area of law within the barrister's special expertise may well be suitable for public access. However, the more complex the factual background to the case, the more likely it is that the barrister will have to consider your particular circumstances, to determine whether or not you are capable of assembling the information required by the barrister to enable him or her to give a fully informed opinion.

b) In relation to the provision of advocacy services :-

- i) Generally, the more complex the case, the more likely it is that the barrister will decide that your interests or the interests of justice require the involvement of a solicitor and that he or she should therefore decline to accept instructions on a Public Access basis.
- ii) For less complex cases the greater the role which contested evidence of fact will or is likely to play in the case the less likely it is to be suitable for Public Access.
- iii) On the other hand, cases which are unlikely to involve factual disputes may well be suitable.

**What if I qualify or may qualify for public funding ?**

14. It is unlikely that a barrister will be able to carry out the means assessment required to establish whether you would qualify for public funding. Further, at present barristers are not able to apply to the Legal Services Commission for public funding on your behalf. If it appears that you may qualify for public funding, therefore, a barrister is likely to advise you to approach a solicitor with a franchise from the legal Services Commission to investigate this possibility.

**How do I find a barrister**

15. It is important to instruct a barrister who specialises in the appropriate area of law for your case.
16. If you do not know who to instruct, there are a number of ways of finding the right barrister. There are legal directories – for example, the Bar Directory (access to which may be obtained via the Bar Council’s website) Chambers & Partners Guide to the Legal Profession, Havers Companion to the Bar, or the Legal 500. In addition, many sets of Chambers publish their own web sites which contain information about the set of Chambers as a whole and individual barrister members.



17. Alternatively, if you know of a set of barristers' chambers which undertake your sort of case, you can telephone them and ask the Senior Clerk or Practice Manager to make a recommendation.

### **How do I instruct a barrister ?**

18. Once you know who you want to instruct, then contact the Chambers from which the barrister practises and speak to the Senior Clerk or Practice Manager. You will have to explain to them that you wish to instruct the barrister directly and the nature of the work which you wish the barrister to undertake for you. It may be that they will ask you to send your written instructions (setting out the factual background to your case and what it is that you want the barrister to do). Alternatively, the barrister may decide that it would be appropriate in the first instance briefly to discuss the matter with you on the telephone or at a preliminary meeting to decide on the best way forward.

### **Proof of your identity**

19. In certain circumstances, the barrister will be required by law to carry out certain identification procedures. These must be followed as soon as reasonably practicable after you have first made contact with the barrister and it is likely that this will take place after you make the initial contact described in paragraph [18] above. Whether these procedures apply and, if so, how they should be followed, need to be considered by the barrister when you make the initial contact.

20. Where the procedure applies, the barrister will require satisfactory evidence of your identity – that is, proof of your name, date of birth and current address. The type of evidence required will depend on the circumstances. For example:

- a) If you are an individual, you may be required to produce in person your current passport or other national identity card or a new form of driving licence (with a photograph) together with a recent utility bill, bank or building society statement.
- b) If you are acting on behalf of a company, you will be required to produce a certified copy of Certificate of Incorporation, the latest accounts filed at Companies House and evidence that you are authorised to act on behalf of the company.

21. To carry out the procedures properly, the barrister may well have to have a meeting with you. You will be told what to bring to that meeting. The barrister is required to take copies of the documents which you bring and to retain those copies for 5 years.

### **What happens next ?**

22. Some cases obviously will be suitable for Public Access. In such a case, and provided that (a) the barrister is willing to undertake the work, (b) agreement can be reached about the charge which will be made for that work and (c) where appropriate, you have provided satisfactory proof of your identity, your instructions will be accepted and a client care letter will be sent to you. The role and importance of the client care letter is described below.

23. In other cases, the barrister may suggest that you have a preliminary meeting before deciding whether or not to proceed with the instructions.

24. It is also open to a barrister to accept your instructions for the limited purposes of reading the papers and advising whether or not he or she is able to perform the substantive professional work which you wish him or her to undertake. If instructions are accepted for these limited purposes, it is important that you are both clear as to whether a charge is to be made for this work. If preliminary work is to be carried out and a charge made for that work, you will be sent a client care letter.

25. The sorts of factors which a barrister will have to consider when deciding whether or not to accept your instructions have been described in paragraphs [11] to [13] above. Much depends on the circumstances of your case. Here are some possibilities:

- a) The barrister might decide that your case is suitable for Public Access and that there is no need for the involvement of a solicitor. In such a case, you should still be aware that, if circumstances change, the barrister may have to advise you that a solicitor will need to be instructed.
- b) Your case is such that (whether because of its complexity, or because of the stage which it has reached) it is not suitable for Public Access and that a

solicitor is required. In such a case, you should be told by the barrister why your case is not suitable but that he or she would be prepared to act for you if instructed by a solicitor. In such a case, and if you wish, you can ask the barrister to recommend a suitable solicitor to you.

- c) Although your case may become unsuitable for Public Access in the future, it is suitable for Public Access for the time being. In such a case, the barrister will inform you
  - i) of the work which is suitable for Public Access
  - ii) the likely point at which your case will become unsuitable for Public Access and
  - iii) that he or she will have to withdraw at that stage if a solicitor is not instructed by you.

26. If the barrister decides to accept your instructions, you will be sent a client care letter.

### **The client care letter**

27. When a barrister agrees to carry out work for you for which you will be charged, he or she must send you a client care letter. The client care letter is a very important document. It contains a description of the work to be undertaken, the basis on which you will be charged for that work, and the other terms of the agreement between you and the barrister. If you are unclear about any of the contents of that letter, you must raise your concerns with the barrister immediately.

### **How will I be charged ?**

28. There are no formal scales of fees for barrister's work. Generally, barristers charge according to their level of experience and the complexity and length of time involved in any particular matter. The amount to be charged for any particular piece of work, and when the fee becomes payable, is a matter for negotiation between you, the barrister and his or her clerk. Barristers are all independent self-employed practitioners, competing with each other. If you consider the fee proposed by one barrister to be too high, try another barrister.

**Can a barrister stop acting for me after he or she has accepted my instructions**

29. The Bar Code of Conduct requires a barrister to cease to act in a case in certain circumstances. This applies to all cases.

30. In Public Access cases, a barrister is also required to cease to act where he or she has formed the view that it is in your interests or the interests of justice that you instruct a solicitor or other professional person. In such cases:

- a) Your barrister is under a continuing duty to consider whether your case remains a suitable case for Public Access. If he or she forms the view that it is not, you will be advised of this fact. If you then instruct a solicitor or other professional person able to provide instructions to the barrister, he or she may continue to act for you. If you do not, your barrister must cease to act for you.
- b) If you are a party to proceedings in which a hearing is imminent, and you are likely to have difficulty in finding a solicitor in time for the hearing, your barrister should provide you with such assistance as is proper to protect your position. Although your barrister may not continue to work for you on a Public Access basis, he or she may be able to assist you by, for example:
  - i) Drafting letters for you to send, asking for an adjournment of the hearing
  - ii) Writing a letter to the court in support of that application, explaining that he or she has had to withdraw and, if appropriate, the reasons for it
  - iii) Assist you to find solicitors.

**Can I instruct a barrister direct when I have already instructed solicitors**

31. You may instruct a barrister direct even though you have already instructed solicitors. If you do so, the barrister will still have to consider whether he or she should accept your instructions. However, the fact that you have retained solicitors is not of itself a reason for refusing to accept your instructions; nor may the barrister contact your solicitors without your permission. However, there may be cases (for example, where your case involves existing litigation) where a barrister will refuse to accept your instructions unless you give him or her permission to contact and liaise with your solicitors.

*Confidentiality and compulsory disclosure of information*

32. Your barrister will be under a strict professional duty to keep your affairs confidential. Legal professional privilege protects your communications with your barrister from disclosure. The only exception is that statutory and other legal requirements may cause a barrister to disclose information which he or she has received from you to governmental or other regulatory authorities and to do so without first obtaining your consent to such disclosure or telling you that he or she has made it.

**Complaints**

33. In the first instance, you could also use the barrister's chambers' own complaints procedure which might help sort out your complaint.

34. If this is not possible, you should contact us. We regulate barristers' behaviour. We investigate complaints against barristers and take action against those who break the rules of the code of conduct. We do this in the interests of the public and to maintain the good name and standards of the profession. There is no charge for making a complaint to us. We have prepared a standard form on which you should make your complaint, as well as guidance notes to help you fill it in.

The address and phone number is:

**Complaints Department**  
**The General Council of the Bar**  
**Northumberland House**  
**High Holborn**  
**London WC1V 7JZ.**  
**Phone: 0207 440 4000**  
**Fax: 0207 440 4001**  
**E-mail: [complaints@barcouncil.org.uk](mailto:complaints@barcouncil.org.uk)**  
**Website: [www.barcouncil.org.uk](http://www.barcouncil.org.uk)**

35. If you are not satisfied with the way in which we considered your complaint, you may contact the Legal Services Ombudsman to investigate how we handled it. The Ombudsman is not a lawyer. If the Ombudsman thinks that the complaint was not investigated properly, she can recommend that the complaint be reconsidered or that we pay compensation, or that the individual barrister or both of us have to pay.

The Ombudsman's address is:

**The Legal Services Ombudsman**

**3<sup>rd</sup> Floor**

**Sunlight House**

**Quay Street**

**Manchester**

**M3 3JZ.**

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**Lo-call number: 0845 6010794 (charged at local rates and available nationally)**