

The Bar Standards Board’s report on responses to the consultation on changes to the Public and Licensed Access Rules.

Introduction

1. This report summarises the responses received to the Bar Standards Board’s (BSB’s) consultation paper *Consultation on Changes to the Public and Licensed Access Rules*, which was published on 26 June 2017. It also outlines the BSB response to the comments made by respondents.
2. The consultation was scheduled to close on 26 September 2017, although the BSB did grant some extensions to the deadline. 27 responses were received in total.
3. The original consultation report is available at:
https://www.barstandardsboard.org.uk/media/1835713/public_and_licensed_access_consultation_paper_final_cross-references_.pdf

Public and Licensed Access Review

4. The BSB began a review of the Public and Licensed Access (PLA) Schemes in late 2015, primarily because the PLA Rules had not been revised prior to the launch of the BSB Handbook in January 2014 and therefore predated the embedding of a more consumer-focused approach in all aspects of the BSB’s work.
5. The Public and Licensed Access Review Report¹, published in March 2017, found that overall the PLA Schemes promote consumer choice by expanding the ways in which the public can access legal services. However, the report identified some ways in which the PLA Schemes can be further improved in the public interest. In particular, the review found that:
 - there are barriers that make some consumers unable or unwilling to access a public access provider;
 - barristers and clerks may not have sufficient support or may be inadequately prepared to manage public access work; and
 - some public access barristers may be providing a poor client service.
6. The report made a number of recommendations to address these issues. This includes:
 - a first principles assessment of whether the cab-rank rule should apply to public access cases;
 - changes to align the public access and licensed access rules to the more outcomes-focused approach in the rest of the Handbook;
 - an assessment of whether the Scope of Practice Rules should allow any client not able to complain to the Legal Ombudsman (LeO) to instruct a barrister directly, outside of the PLA Schemes; and

¹www.barstandardsboard.org.uk/media/1824703/public_and_licensed_access_review_final_report.pdf

Part 1 – Public

- the removal of reference to the Licensed Access Terms of Work from the Licensed Access Rules and Recognition Regulations.

Consultation on changes to the Public and Licensed Access Rules

7. The BSB determined to consult on these recommendations, with the Board approving a consultation paper on 22 June 2017. The consultation was opened on 26 June 2017 and closed on 26 September. 27 responses were received in total.
8. The paper consisted of 8 questions on proposed changes to the PLA Schemes, as well as the potential implications of these changes. 26 responses were received via email and one response was based on notes taken at a meeting with BSB staff, with the respondent agreeing the text of the response.
9. Responses were received from:
 - The Academy of Experts
 - The Association of Accounting Technicians
 - The Association of Personal Injury Lawyers
 - The Bar Council
 - The Chancery Bar Association
 - The Commercial Bar Association (COMBAR)
 - The Insolvency Practitioners Association
 - The Institute and Faculty of Actuaries
 - The Institute of Barristers' Clerks
 - The Legal Practice Management Association
 - The Legal Services Consumer Panel
 - The Personal Injuries Bar Association
 - The Public Access Bar Association
 - The Royal Town Planning Institute
 - 13 individuals
10. Copies of all responses are available from the BSB on request, where respondents have given their permission for the responses to be made public.

Overall summary of responses

11. There was broad support from the majority of respondents to our proposed changes to the PLA Rules, including the proposal that the cab-rank rule should not be extended to public and licensed access cases. Therefore, we plan to proceed with these changes as set out in the consultation paper.
12. The only areas of significant disagreement relate to our proposal that all barristers must disclose their level of professional indemnity insurance (PII) cover to public access clients and that the Scope of Practice Rules be amended to allow barristers to receive direct instruction from clients who are not eligible to complain to the Legal Services Ombudsman (outside of the PLA Rules). We have reflected on the concerns raised and as a result will not proceed with either proposal at this stage. Instead, we will consider the issue of PII disclosure further as part of our work responding to the recent Competition and Markets Authority (CMA) market study into the supply of legal services². The comments made in response to our proposed change to the Scope of

² <https://www.gov.uk/cma-cases/legal-services-market-study>

Part 1 – Public

Practice Rules will be considered further as part of a wider review of the Scope of Practice Rules, which will take place in 2018.

Summary of responses by questions and BSB response

Q1. Do you agree with the conclusion that the status quo should be maintained i.e. that the cab-rank rule should not be applied to Public and Licensed Access cases? If not, please state why not.

13. We received 19 responses to this question, all of which supported the BSB's position.
14. The consultation paper (pages 11-14) outlined the rationale for not extending the cab-rank rule to PLA cases. This includes concerns that to do so would result in a reduction of barristers willing to undertake public access work, and that clients unsuitable for public access or with cases of little merit may invoke the rule with the result that instructions may be accepted where it would not be in the interests of clients.
15. All respondents who answered this question agreed with the proposal that the cab-rank rule should not be extended to PLA cases. The Personal Injuries Bar Association particularly highlighted the potential for instructions to be accepted when not in the interests of the client. The Bar Council agreed that the number of barristers undertaking public access work may decline if the cab-rank rule were enforced, noting that barristers undertaking both public and non-public access work may feel overburdened if they lose the ability to decide whether to take a public access case. The Public Access Bar Association, in supporting the proposal that the cab-rank rule should not be extended, noted that extending the rule may not effect a practical positive benefit for clients, as public access barristers are only regarded as being "instructed" after having sent a client care letter, by which point it is unlikely they intend to refuse instruction in any event. The Legal Services Consumer Panel, also in agreeing with the proposal, noted in particular the potential for clients to attempt to invoke the rule when they are unsuitable for public access, or where their cases have little merit.

BSB Response

16. **There is a clear consensus amongst respondents that the cab-rank rule should not be extended to public access work. Therefore, the BSB intends to continue this approach and maintain the current arrangements.**

Q2. Do you agree with the proposed changes to the Public Access Rules?

17. The consultation paper sets out a number of minor changes to the PA Rules, largely to update and simplify the Rules, and to ensure consistency with other parts of the BSB Handbook. This includes the proposal that documents **relating to public access work should be retained for at least six, rather than seven, years. This would bring this rule in line with the equivalent rule for documents relating to Licensed Access work (Rule C141), and the fact the Limitation Act 1980 states that the limitation period for bringing a simple contract claim is six years.** Three respondents answered this question, of whom two supported the proposed changes

Part 1 – Public

18. COMBAR noted its support for a reduction in duration to 6 years of the period for which documents have to be retained under rC129.³ The Personal Injuries Bar Association (PIBA) noted that if rC130⁴ is to be deleted from the Handbook, then it is essential that guidance elsewhere is updated to clarify to barristers what they can and cannot do if not accredited to conduct litigation, otherwise there is scope for misunderstanding.

BSB Response

19. **The BSB notes the comments received. The Public Access Bar Association have however noted elsewhere in this consultation that although the Limitation Act 1980 states that the limitation period for bringing a simple contract claim is six years, claims can in fact be filed for some months after the deadline (see paragraph 71). As such, we propose to leave the rule relating to the retention of documents relating to public access work at seven years, and instead amend the rule relating to the retention of documents relating to licensed access work (see paragraph 76). Regarding the concerns expressed by the PIBA, the BSB notes that current *Guidance for Public Access Barristers* available on the BSB website addresses the issue of correspondence.**

Q2a. In particular, do you agree with the proposal to... remove the requirement for barristers who are of less than three years' standing to maintain a Public Access log;

20. Fourteen respondents answered this question, ten of whom agreed with the proposal to remove the requirement for a public access log. Three respondents offered a neutral response and one respondent disagreed with the proposal.
21. Amongst those responding, a variety of reasons for agreement were given in support of our proposal. The Legal Practice Management Association felt that public access barristers are effectively supervised in the public access work they do, with the log adding little value to this. The Bar Council noted that no risk or disadvantage has been identified from the rule change in 2013 to allow barristers of under three years' standing to perform public access work. The Bar Council also noted the various other efforts to encourage barristers to obtain client feedback as mitigating the need for a log. The Legal Services Consumer Panel was reassured by the BSB's assertion that new education and training requirements for the Bar will reflect the requirements of the Professional Statement⁵, and that guidance on how to gather and make use of feedback will be revisited.
22. The Personal Injury Barristers Association lodged a neutral response to the proposed change, although highlighted its concern that the removal of the requirement for a log could be replaced by more burdensome regulatory requirements for all public access barristers. The Association expressed the view that:

"If barristers are to compete fairly in the provision of legal services...the delivery of those services must not become over-encumbered with unnecessary regulation."

³ rC129 is our rule requiring public access barristers to maintain, or ensure their client maintains, copies of certain documents for at least seven years.

⁴ rC130 is our rule permitting public access barristers to undertake correspondence when it is ancillary to work they are permitted to perform.

⁵ The Professional Statement for Barristers describes the knowledge, skills and attributes that all barristers should have on "day one" of practice.

Part 1 – Public

23. One individual respondent disagreed with the proposal, arguing that it is important to have additional checks on individuals of under three years' practice undertaking public access work, as:

"...the work is potentially high risk in terms of managing clients, negligence and misunderstandings as to the scope of the instructions".

BSB Response

24. **The BSB notes that responses to this proposal are almost entirely positive, with only one respondent disagreeing with the proposal. While we acknowledge the importance of ensuring that barristers are adequately supervised in performing public access work, we do not agree that maintaining a feedback log is necessarily the most productive way to achieve this end. As noted in the consultation document, the BSB's Professional Statement states that "*barristers should ask for and make effective use of feedback*" and the BSB's Future Bar Training programme will work to ensure that education and training for the Bar reflects this requirement within the Professional Statement. We also plan to revisit guidance on client feedback and ensure that all barristers, not just those undertaking public access work with less than three years' practising experience, are encouraged to make effective use of client feedback. Considering these actions, the BSB will continue to take forward the proposal to remove the requirement to maintain a public access log.**

Q2b. In particular, do you agree with the proposal to.... require that the written notification given to Public Access clients discloses the level of professional indemnity insurance (PII) held by the barrister?

25. 15 respondents answered this question, the majority of whom disagreed with the proposal. This included most professional associations and individual barristers. Two respondents agreed with the proposal and one respondent submitted a neutral response. The main arguments against the proposal were that:
- as Bar Mutual and other insurers provide insurance on a "claims made" basis, the relevant level of coverage is often that of a point several years after the work is completed;
 - disclosure of the level of insurance could encourage unmeritorious claims; and
 - other professions are not required to disclose this level of information.
26. The Legal Practice Management Association, although neutral to the proposal, noted that potential clients could be misled into thinking that the level of coverage a barrister has speaks to their suitability or quality. The Personal Injuries Bar Association, in disagreeing with the proposal, suggested that an alternative measure could be to include a statement in the "Terms for Provision of Legal Services" noting that all barristers are obliged to have minimum of £500,000 PII cover and that any additional cover can be disclosed upon request by the client. The Bar Council, in disagreeing with the proposal, argued that the recommendations of the CMA market study did not include disclosure of the level of PII cover by barristers.

Part 1 – Public

27. The Personal Injuries Bar Association noted that this would have the additional benefit of administratively simplifying the “Terms for Provision of Legal Services”, which would otherwise be bespoke for each barrister.
28. The Chancery Bar Association agreed with the proposal, stating that the information would be ‘*of real value to clients without imposing any onerous or unnecessary obligation on the profession*’.

BSB Response

29. **The BSB notes the concerns expressed by respondents. We note in particular the comments that this is not a change mandated by the CMA in its recent market study of legal services and that potential clients could utilise PII information to make erroneous assumptions about the suitability of a particular service. We also note the comments of the Personal Injuries Bar Association, suggesting a more generic statement on the minimum level of cover that barristers are obliged to maintain. As a result, we will not proceed with this proposal at this stage but will instead explore the issue of PII disclosure as part of our wider work on responding to the recommendations in the CMA market study. We recently published a consultation paper on this⁶.**

Q3. Have you identified any further opportunities to simplify or improve the Public Access Rules?

30. Seven respondents had comments on further opportunities to simplify or improve the PA Rules.
31. The Bar Council suggested that rC131.4⁷ may be of limited value, given that a barrister may take a proof of evidence from a client in any case, whether public access instructed or otherwise. The Public Access Bar Association and the Institute of Barristers’ Clerks also raised this point.
32. The Legal Practice Management Association (LPMA) felt that the definition of “intermediary” could be clarified, as it can be difficult to distinguish between an individual acting as an intermediary and a person who is merely introducing a lay client.
33. The LPMA also considered the requirement under rC134.2⁸ that Licensed Access barristers obtain a copy of their client’s licence every time they receive instructions to be unnecessarily onerous; the Association suggested that it ought to be permitted for barristers to simply check the list of Licensed Access clients that the BSB publishes to ensure that the client is able to instruct.
34. The LPMA further stated that complications are presented by the fact that only named individuals under a licence can instruct, particularly when there are staffing changes. The Association suggested that the process could be adapted to allow individuals of a certain seniority within an organisation to issue instruction under the licence.

⁶ https://www.barstandardsboard.org.uk/media/1852551/october_2017_-_policy_consultation_on_transparency_standards.pdf, page 31

⁷ rC131.4 is our rule permitting public access barristers to take a proof of evidence from their clients in civil cases.

⁸ rC134.2 requires public access barristers to obtain a copy of their client’s licence each time they receive instruction.

Part 1 – Public

35. One individual respondent suggested that the BSB ought to define the “conduct of litigation”.
36. COMBAR raised the suggestion that it is not practical or cost-effective for a barrister to prepare a list of all the documents that have been sent by their client, as required under rC129.⁹ COMBAR expressed that clients themselves should be encouraged to retain documents, particularly originals.

BSB Response

37. **The BSB welcomes all the suggestions put forward.**
38. **Regarding rC131.4, it is correct that there is no longer a rule prohibiting self-employed barristers from investigating or collecting evidence. We believe that rC131.4 was drafted with the intention of clarifying to public access barristers (at a time when they were not able to undertake criminal work) that they were able to obtain a proof of evidence in civil cases. However, public access barristers are no longer prohibited from undertaking criminal work and the BSB will therefore remove this provision. The BSB also clarifies the obligations on self-employed barristers when investigating or collecting evidence in its [Guidance on Self-Employed Practice](#).**
39. **The term “intermediary” is currently defined within Part 6 of our Handbook, although this could be made clearer. The BSB will amend its Guidance for Public Access to refer to this definition when discussing intermediaries**
40. **Regarding the requirement under rC134.2, the intention behind this requirement is to ensure that barristers apprise themselves of whether the client instructing them under the Licensed Access scheme is able to do so. We will therefore amend rC134.2 to a generic requirement that barristers ascertain whether their client is licensed. This will ensure that the barrister checks that their client is licensed to instruct in this manner, but obtaining a copy of the licence is not necessarily the only way to achieve this.**
41. **Concerning the naming of individuals under licences, the BSB acknowledges that some inconveniences may arise under the current system, depending on the client’s own arrangements for issuing instructions. The BSB is currently exploring a number of opportunities to make the system for renewing licences more efficient, and the difficulties faced when named persons change will be considered as part of this exercise.**
42. **In terms of defining the “conduct of litigation”, this is defined statutorily under Schedule 2, Paragraph 4 of the Legal Services Act 2007. However, the BSB has recently published [Guidance on Conducting Litigation](#) which sets out our view on the activities that amount to conducting litigation.**
43. **Finally, the BSB agrees with COMBAR’s observation that it is desirable for clients to retain documents, particularly originals – indeed, the BSB has outlined this point under paragraph 74 of its [Public Access Scheme Guidance for Barristers](#). However, the BSB would distinguish this desirability from the ultimate**

⁹ rC129 is our rule requiring public access barristers to maintain, or ensure their client maintains, copies of certain documents for at least seven years.

Part 1 – Public

responsibility that public access barristers have to ensure that records are kept, either by themselves or by their clients. It is not in the interests of either the client or the barrister to allow the responsibility of maintaining records to become a matter of uncertainty – this is a matter that all public access barristers should discuss with their clients, as per our guidance. In light of this, the BSB does not agree that the administrative effort of listing documents sent by the client, in instances where the client themselves have not maintained such a list, is sufficient justification to remove this rule.

Q4. Do you agree with the proposed changes to the Licensed Access Rules? In particular, do you agree with the proposal to remove references to the Licensed Access Terms of Work? If not, please state why not.

44. 14 respondents answered this question, eleven of whom expressed agreement with the proposal.
45. COMBAR, in supporting the proposal, queried the necessity of removing reference to the Licensed Access Terms of Work, suggesting that references to “standard terms” in rC136-137¹⁰ would become defunct. They also noted that while there may be good reason for the BSB to remove reference to the Terms of Work due to their being published by the Bar Council in its representative capacity, it would be prudent to retain mention of them under rC136-137 if they are commonly used in practice.

BSB Response

46. **The BSB acknowledges the use of the Terms of Work. However, as these are drafted by the Bar Council as a representative body, it would not be appropriate to continue to cite them within our regulations unless a strong public interest argument for doing so were apparent. Barristers are able to agree their own terms with their clients and the Terms of Work will still be available for use irrespective of their being cited in the PLA Rules. In addition, references to “standard terms” will not be defunct but refer to any standard terms used by the barrister and agreed with the client. Such standard terms could include the Licensed Access Terms of Work, which will continue to be published by the Bar Council in its representative capacity. We will therefore continue as proposed to remove the references to the Licensed Access Terms of Work from the Handbook.**

Q5. Do you agree with the proposed changes to the Licensed Access Recognition Regulations?

47. The consultation paper sets out a range of proposed changes to the Licensed Access Recognition Regulations, including proposals to simplify and update the language throughout. 10 respondents answered this question, eight of whom agreed with the proposed changes and two of whom were neutral towards them. The Bar Council raised the additional point, although agreeing with the proposals, that it should be clarified whether individual members of professional bodies must comply with rC134.2¹¹ when instructing barristers.

¹⁰ rC136 outlines steps a licensed access barrister must take if they have been instructed on terms other than the Licensed Access Terms of Work and rC137 outlines steps a licensed access barrister must take upon being instructed.

¹¹ rC134.2 requires public access barristers to obtain a copy of their client’s licence each time they receive instruction.

BSB Response

48. **The BSB notes that the majority of general responses are positive and will proceed with the proposed changes to the Licensed Access Recognition Regulations. In terms of the requirement under rC134.2, rC133 clarifies that this does not apply where the client is a member of one of the organisations listed in the First and Second Schedule to the Regulations. As noted under paragraph 40, the BSB will also consider taking a less prescriptive approach where clients are currently required to provide barristers with copies of licences.**

Q5a. In particular, do you agree with the proposal to... only impose limitations and conditions on licences in exceptional circumstances?

49. Four respondents answered this question, all of whom agreed with the proposed change. One individual respondent noted that there is always a possibility that they may need to instruct counsel on an unforeseen issue, not permitted by the terms of their licence.

BSB Response

50. **The BSB notes the positive response to these proposals and will continue as planned.**

Q5b. In particular, do you agree with the proposal to... if appropriate, permit members of the professional bodies listed in the First Schedule to use the scheme to instruct a barrister for representation in the higher courts and the Employment Appeal Tribunal?

51. Three respondents answered this question, all of whom agreed with the proposal.

BSB Response

52. **The BSB notes this positive response and will continue as proposed.**

Q5c. In particular, do you agree with the proposal to... move the First and Second Schedules to guidance?

53. Four respondents answered this question, two of whom agreed and two who disagreed. The Association of Accounting Technicians stated that moving the First and Second Schedules to guidance:

“...could streamline the process whereby the BSB would be required to apply to...the Legal Services Board to amend them from time to time.”

54. The Insolvency Practitioners Association said it would oppose the move if it were to attract any fees for those already listed in the Schedules. The Association of Personal Injury Lawyers expressed concern that barristers would no longer be able to use the Schedules as a reference to check whether clients are licensed if they are moved to guidance:

“...the schedules provide a simple way for barristers to ensure that their instructions are from those with licensed access.”

BSB Response

55. **The BSB notes the concerns of the Insolvency Practitioners Association and confirms that no fees will be incurred by organisations already listed under the Schedules as a consequence of this move. We also note the concerns of the Association of Personal Injury Lawyers. However, as they can now, barristers will equally be able to use the Schedules as a reference when they are part of guidance. In light of this, the BSB will continue with the proposal to move the First and Second Schedules to guidance.**

Q5d. In particular, do you agree with the proposal to... devise application processes for bodies to be added to the First and Second Schedules?

56. Four respondents answered this question, three of whom agreed and one of whom was neutral to the changes. Some of those who agreed had additional comments. The Chancery Bar Association submitted its view that any application process would need to “*ensure that proper professional standards are maintained across the membership of [applicant bodies]*”. They also expressed concerns that individual members of some professional bodies may not maintain a high level of professional standards “*irrespective of the existing rules regulating them*”. The Insolvency Practitioners Association submitted that bodies recognised by the Secretary of State for the purposes of authorising insolvency (“Recognised Professional Bodies”) should be automatically admitted to the First Schedule, as they have already demonstrated their suitability to their oversight regulator.

BSB Response

57. **The BSB notes the general agreement that an application process should be devised for those bodies wishing to be added to the First and Second Schedules. Regarding the Chancery Bar Association’s comments, all appropriate steps will be taken to ensure that the bodies admitted to the Schedules are suitable to instruct via Licensed Access. The authorisation criteria will be drawn from the existing criteria (in paragraph 6 of the Licensed Access Recognition Regulations) which the BSB already uses to determine Licensed Access applications from individuals and organisations. Concerning the Insolvency Practitioners Association’s comments, the BSB would not consider it appropriate to exempt professional bodies from the application process on the sole basis that they have been recognised by their oversight regulator. Recognition by an oversight body is not concomitant with an assessment of a body’s suitability to instruct barristers via Licensed Access, although the oversight regulator itself could apply for recognition on behalf of its regulated community under the scheme. The BSB will therefore continue as proposed to devise an application process for admittance to the Schedules.**

Q5e. In particular, do you agree with the proposal to... only charge a fee for applications by professional bodies to be added to the First Schedule?

58. Four respondents answered this question, two of whom agreed with the proposals and two of whom were neutral to the proposals. All agreed in principle with the proposal that applications by professional bodies to be added to the First Schedule should incur a fee. Two had additional comments. The Insolvency Practitioners Association felt that Recognised Professional Bodies should be automatically admitted to the Schedule, and therefore no fee should be charged. The Association of Accounting Technicians

Part 1 – Public

submitted that fees for applications should be on a cost recovery basis only, so that the fee is not prohibitive and therefore does not hinder access to justice. This was proposed in the consultation and is in line with our fees and charges policy.

BSB Response

59. **The BSB notes that respondents agreed in principle that applications to be added to the First Schedule should incur a fee. Regarding the comments of the Insolvency Practitioners Association, the BSB’s response above under paragraph 57 is relevant. In terms of the Association of Accounting Technicians’ submission, the BSB would emphasise that fees will be charged only to cover the administrative cost of processing the application. This was proposed in the consultation and is in line with our fees and charges policy. In light of this, the BSB will continue as proposed and ensure that fees are levied only for applications by professional bodies to be added to the First Schedule.**

Q6. Do you agree or disagree that, in principle, the Scope of Practice Rules should be amended to allow any client who would not be able to complain to the Legal Ombudsman (LeO) to instruct any barrister directly (i.e. without using the Public or Licensed Access schemes)?

60. 18 respondents answered this question, ten of whom disagreed with the proposed change. The key arguments put forward against changes to the Scope of Practice Rules include:

- the concern that some organisations would struggle to give instructions to a non-public access trained barrister just as much as a member of the public would;
- that, unlike under the PLA schemes, it could be unclear who (either the client or the barrister) would be responsible for establishing the suitability of the case for direct access; and
- the change would be unfair on those who have undertaken the required public access training.

COMBAR encapsulated much of the concerns of respondents in its assertion that *“the fact that a client may not be able to complain to the LeO does not mean that the client is a sophisticated user of legal services”*.

61. Eight respondents did agree with the proposal to expand direct access in this way. The Personal Injury Bar Association noted that a number of sophisticated, well-funded and experienced organisations exist within the personal injury field, who could safely instruct in this manner. The LPMA expressed that bodies who are unable to complain to LeO should be *“of sufficient size and resource to prepare cases and assess whether to engage a solicitor or go to counsel directly”*. The Chancery Bar Association expressed that larger and more sophisticated clients *“have the commercial power to deal with any shortcoming in service delivery without the need for extra protection”*.

BSB Response

62. **The BSB notes that most respondents disagreed with this proposal. While the reasoning behind these proposals is that clients unable to complain to LeO are less likely to need the protections afforded by the PLA Rules, it is clear that**

Part 1 – Public

most respondents do not feel that this is the case. Evident from the responses is that much of the opposition to this proposal stems from whether the ability or otherwise to complain to LeO is an appropriate metric by which to measure the capacity of an organisation to instruct directly. As a result of these concerns, we will not proceed with any change to the Scope of Practice Rules on these grounds at this stage. However, the BSB will consider this issue further as part of the wider review of the Scope of Practice Rules scheduled to start in 2018.

Q7. In these scenarios of clients instructing barristers directly, have you identified any risks in not requiring compliance with the Public and Licensed Access Rules?

63. Fifteen respondents answered this question, with ten of these highlighting potential risks with the proposal under Question 6. These included the following concerns:
- that clients instructing in this manner may not understand the role they must take on, particularly regarding conducting litigation;
 - that clients may not benefit from the range of safeguards the PLA schemes have, including the client care letter and the obligation that barristers must inform their client if they do not conduct litigation;
 - that clients may lack the knowledge to ensure the barrister is supplied with all the relevant documentation;
 - that practitioners may need to conduct an assessment to establish whether their client actually meets the criteria to instruct in this manner; that
 - practitioners may need to establish whether the individual instructing them has sufficient authority within the organisation to do so; and
 - that barristers accepting instructions would not necessarily have benefited from public access training, which provides various benefits in terms of client care.

BSB Response

64. **The BSB notes the additional risks highlighted by respondents. Many of these, particularly those concerning client care, are inherent to a set of regulatory arrangements that seek to lessen regulation where the client is more expert. However, it is clear that there is no consensus that a client can be said to be more expert simply because they are unable to complain to LeO. The BSB will consider these risks alongside others as part of the 2018 Scope of Practice Review.**

Q8. Do you consider that any of the proposals in the consultation could create any adverse impacts for any of those with protected characteristics under the Equality Act 2010?

65. Ten respondents answered this question, only one of whom noted any potential adverse impacts resulting from the proposed changes. COMBAR stated that individuals may seek to reduce the level of their PII cover when taking extended maternity leave; thus, disclosure could have a disproportionate impact on individuals on the basis of maternity.

BSB Response

66. **The BSB notes COMBAR’s comments regarding PII cover in the context that clients could misconstrue the level of cover as a commentary on the quality or suitability of the barrister. Our proposed response to the CMA recommendations is that barristers could simply confirm (in accordance with the BSB Handbook) that they have insurance cover for all the legal services they supply. If this proposal is implemented, there will be no risk of clients misconstruing the level of cover as a commentary on the quality or suitability of the barrister.**

Additional comments

67. A number of respondents lodged additional comments that did not fit within the framework of the consultation questions. These will be addressed in this section.
68. Two individual respondents suggested that there are insufficient measures within the PLA Schemes to protect consumers.
69. The Institute and Faculty of Actuaries noted that references to the Institute and Faculty as separate bodies in the Regulations should be updated, as they merged in 2010.
70. The Royal Town Planning Institute felt that its members who are involved in planning litigation should be as aware of possible of the risks and benefits of not engaging an intermediary when instructing a barrister. The Institute suggested that guidance for consumers on the risks and benefits for those using Licensed Access could be produced.
71. The Public Access Bar Association also suggested a number of miscellaneous changes, including:
- that references in rC120.1¹² and rC121.1¹³ to ‘the Bar Council’ be changed to ‘the Bar Council (acting by the Bar Standards Board)’, as this is the same convention followed in the Scope of Practice Rules; and
 - that rC129¹⁴ and rC141¹⁵ should both require records to be retained for seven years, as while the Limitation Act 1980 states that the limitation period for bringing a simple contract claim is six years, claims can in fact be filed for some months after the deadline.

BSB Response

72. **The BSB welcomes the additional comments and observations provided.**
73. **Concerning the level of protection offered under the PLA schemes, the Handbook contains a range of measures intended to safeguard clients under**

¹² rC120.1 outlines one of the prerequisites for a barrister to be eligible to undertake public access work

¹³ rC121.1 outlines the requirement that a barrister of under three years’ practice have a qualified person who is registered to provide public access work ready to provide guidance to them

¹⁴ ¹⁴ rC129 is our rule requiring public access barristers to maintain, or ensure their client maintains, copies of certain documents for at least seven years.

¹⁵ rC141 is our rule requiring barristers to maintain, or ensure their client maintains, copies of certain documents for six years where instructed by a licensed access client.

Part 1 – Public

rC122, rC125, rC127-rC131 and rC134-rC141.¹⁶ The BSB has not identified sufficient evidence to suggest that there is a need to move beyond the level of protection already offered, although we will update our Public Access Guidance for Barristers and Lay Clients to include relevant reference to the Consumer Contracts Regulations 2013.

74. The BSB has already ensured that the references to the Institute and Faculty of Actuaries will be updated in the Regulations (see Annex D to the consultation).
75. In terms of the suggestion of the Royal Town Planning Institute, the authorisation process and rules already provide a significant level of protection for consumers seeking to utilise the Licensed Access route. Additionally, the Bar Council already produces [guidance](#) for clients seeking to utilise Licensed Access.
76. The BSB will adopt the miscellaneous changes suggested by the Public Access Bar Association, including requiring records to be retained for seven years.

BSB
October 2017

¹⁶ These rules include requirements (amongst others) that public access barristers send clients a client care letter, that they ensure that they or the client retain copies of certain documentation and that they return documents to clients on demand.