

**BAR  
STANDARDS  
BOARD**

REGULATING BARRISTERS

## **Public and Licensed Access Review**

### **Consultation on Changes to the Public and Licensed Access Rules**

**June 2017**

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## Executive Summary

The Bar Standards Board (BSB) began a review of the Public and Licensed Access schemes in late 2015.

The Public and Licensed Access schemes allow lay clients to instruct barristers directly without first instructing a solicitor or other lawyer.

The **Public Access scheme** allows registered Public Access barristers to accept instructions directly from any **member of the public**. The **Licensed Access scheme** allows certain “**licensed**” **clients** to instruct any barrister directly.

In order for a barrister to accept instructions via Public Access, they must complete training specified by the BSB and be registered as a Public Access practitioner. Over 5,500 barristers in England and Wales are registered as Public Access practitioners. In order for a barrister to accept instructions via Licensed Access, the client must either hold a licence issued by the BSB, or be a member of a professional body specified in the [Schedules to the BSB's Licensed Access Recognition Regulations](#).

The main benefits of the Public and Licensed Access schemes are that they improve access to justice, and can increase choice and reduce costs for consumers. Consumers are not required to instruct a barrister through a solicitor, and it may be less costly for them not to do so.

The [Public and Licensed Access Review Report](#), published in March 2017, found that the Public and Licensed Access schemes are operating well, and overall are an essential component of how barristers provide their services to the public. However, our review also identified a number of ways in which the Public Access scheme could be further improved in the public interest, and the Licensed Access scheme could be streamlined.

This consultation begins to address the recommendations of the Public and Licensed Access Review Report. For example:

- The report recommended that the BSB should assess from first principles whether the cab-rank rule, which currently only applies to work referred by solicitors or other lawyers, should be extended to Public and Licensed Access cases. A full analysis against the [regulatory objectives](#) in the Legal Services Act 2007 (LSA) has been undertaken. **The consultation proposes that the cab-rank rule should not be extended to Public and Licensed Access cases.** While the BSB recognises that there are arguments in theory for extending the cab-rank rule on the grounds of improving access to justice, and protecting and promoting the public interest and the interests of consumers, extending the rule would be more likely to create a barrier to access. The other proposals in this consultation, and the BSB’s work in response to the Competition and Market Authority’s (CMA’s) [review of the legal services sector](#), are also more likely to be of benefit to consumers than applying the cab-rank rule to Public and Licensed Access cases;
  
- **The consultation proposes amending the Public Access Rules so that they are in line with the more outcomes-focused approach of the rest of the BSB Handbook.** It also proposes a) replacing the requirement for barristers who are of less than three years’ standing to maintain a Public Access log with a more effective and proportionate means of seeking and reflecting on client feedback, and b) requiring that the written notification given to Public Access clients discloses the level of professional indemnity insurance held by the barrister;
  
- **The consultation also proposes amending the Licensed Access Rules and Recognition Regulations so that they are in line with the more outcomes-focused approach of the rest of the BSB Handbook.** In particular, it proposes:

  - a) removing reference to the Licensed Access Terms of Work, which are published by the Bar Council in its representative capacity;
  - b) only imposing limitations and conditions on licences in exceptional circumstances;

- c) if appropriate, permitting 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; and
  - d) moving the First and Second Schedules to guidance, which would allow the BSB to devise application processes for bodies to be added to the Schedules more easily.
- **Finally, the consultation explores whether 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.** This amendment would be made as part of a wider review of the Scope of Practice Rules (rather than under the auspices of the Public and Licensed Access review).

We invite responses to this consultation from anybody wishing to share their views. However, we anticipate that it is going to be of most interest to barristers undertaking Public and Licensed Access work, Public and Licensed Access clients, the professional bodies listed in the First Schedule to the Licensed Access Recognition Regulations, Bar special interest networks and associations and consumer organisations.

The closing date for the consultation is **Tuesday 26 September 2017**.

We want to hear your views on all of the questions posed, and will take all of the responses into account.

Please send your response, or otherwise get in touch, as follows:

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If you have a disability and have a requirement to access this consultation in an alternative format, such as larger print or audio, please let us know. Please also let us know if there is anything else we can do to facilitate feedback other than via written responses.

We look forward to hearing from you.

## Part I: Introduction

1. The Bar Standards Board (BSB) was established in January 2006 as a result of the Bar Council separating its regulatory and representative functions. The BSB is responsible for establishing and implementing a range of regulatory measures to ensure that standards at the Bar are maintained and the interests of consumers are understood, protected and promoted. The BSB regulates around 16,000 practising barristers and around 50,000 unregistered barristers in England and Wales.
2. The Public and Licensed Access schemes allow lay clients to instruct barristers directly without first instructing a solicitor or other lawyer. In order for a barrister to accept instructions via Public Access, they must complete training specified by the BSB and be registered as a Public Access practitioner. Over 5,500 barristers in England and Wales are registered as Public Access practitioners. In order for a barrister to accept instructions via Licensed Access, the client must either hold a licence issued by the BSB, or be a member of a professional body specified in the [Schedules to the BSB's Licensed Access Recognition Regulations](#). The main benefits of the Public and Licensed Access schemes are that they improve access to justice, and can increase choice and reduce costs for consumers. Consumers are not required to instruct a barrister through a solicitor, and it may be less costly for them not to do so.

### **Background to the suggested rule changes: Public and Licensed Access Review Report**

3. The BSB began a review of the Public and Licensed Access schemes in late 2015. The key driver for the review was the fact that the Public and Licensed Access Rules had not been revised prior to the launch of the [BSB Handbook](#) in January 2014, and might not reflect the BSB's current approach of embedding the consumer perspective in all aspects of our work. Our [Strategic Plan for 2016 – 19](#), for example, commits the BSB to building a deeper dialogue with consumers. It was therefore timely to assess how well the Public and Licensed Access schemes were working in the consumer interest, and consider whether any changes should be made to improve the consumer experience of using these schemes.

4. The [Public and Licensed Access Review Report](#), published in March 2017, found that overall the Public and Licensed Access schemes are an essential component of how barristers provide their services to the public. They perform a valuable role in promoting consumer choice by increasing the ways in which legal services can be accessed by the public. The report concluded that both schemes are operating well, and Public Access barristers are providing a valuable service to their clients. The research showed that Public Access has increased markedly over the past three years and is expected to continue to grow, which underlines the need to ensure that the scheme delivers for consumers (for a full description of the research methodology, see the full report).
5. However, the report also identified a number of ways in which the Public Access scheme can be further improved in the public interest. Three key issues were identified in light of the evidence gathered:
  - There are barriers that are making some consumers unable or unwilling to access a Public Access provider;
  - Barristers and clerks may not have enough 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 recommendations in the report were designed to address these issues. It should be noted that the three key issues identified above are only relevant to the review of Public Access, not Licensed Access. The evidence showed that there appeared to be fewer issues with the Licensed Access scheme, and so a decision was made to consider the two schemes separately. Accordingly, separate recommendations have been made for Public and Licensed Access.

### **Recommendations of the Public and Licensed Access Review Report**

7. The recommendations in the report which are relevant to this consultation – which is limited to changes to the Public and Licensed Access Rules – are as follows:

## **Cab-Rank Rule**

8. The BSB should assess from first principles whether the cab-rank rule should apply to Public Access cases, undertaking a full analysis against the [regulatory objectives](#) in the Legal Services Act 2007 (LSA). This should focus in particular on the regulatory objectives of improving access to justice, and protecting and promoting the public interest and the interests of consumers.
9. Consideration will also be given as whether the cab-rank rule should apply to Licensed Access cases.

## **Public Access Rules**

10. The BSB should amend the Public Access Rules to be in line with the more outcomes-focused approach of the rest of the BSB Handbook, and explore whether to replace the requirement for barristers who are of less than three years' standing to maintain a Public Access log with a more effective and proportionate means of seeking and reflecting on client feedback.
11. The report recommended that the Licensed Access scheme should be retained largely in its current form, with only the following changes being made:

## **Licensed Access Rules and Recognition Regulations**

12. The BSB should amend the Licensed Access Rules and Recognition Regulations to be in line with the more outcomes-focused approach of the rest of the BSB Handbook. In order for a barrister to accept instructions via Licensed Access, the client must either hold a licence issued by the BSB, or be a member of a professional body specified in the Schedules to the Licensed Access Recognition Regulations. We will explore, amongst other things, whether the Schedules should be moved to guidance.

### **Limitations and Conditions**

13. Members of the professional bodies listed in the First Schedule to the Licensed Access Recognition Regulations should be permitted to use the scheme to instruct a barrister for representation in the higher courts and the Employment Appeal Tribunal. This would be in keeping with amending the Licensed Access Recognition Regulations to reflect the more outcomes-focused approach of the rest of the BSB Handbook.
14. The BSB should also explore whether the whole system for individual approval of licences continues to be necessary and/or whether it could be made more proportionate.

### **Scope of Practice Rules**

15. The BSB should explore whether 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). However, if this is an amendment which should be made in principle, it may be best made as part of a wider review of the Scope of Practice Rules (rather than under the auspices of the Public and Licensed Access review).

### **Terms of Work**

16. The BSB should remove reference to the Licensed Access Terms of Work from the Licensed Access Rules and Recognition Regulations and, via the protocol for ensuring regulatory independence, request that the Bar Council update the terms.
17. For the other recommendations in the report (which are not directly relevant to this consultation), see Annex F.

## Part II: Current Public and Licensed Access Rules and proposed changes

### Cab-rank rule and the non-discrimination rule

#### Background

18. The cab-rank rule is Rule C29 in the BSB Handbook. The rule states that if a self-employed barrister receives instructions from a professional client such as a solicitor, and the instructions are appropriate taking into account the experience, seniority and/or field of practice of the barrister, they must accept the instructions. This applies irrespective of:
  - The identity of the client;
  - The nature of the case to which the instructions relate;
  - Whether the client is paying privately or is publicly funded; and
  - Any belief or opinion which the barrister may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client.
  
19. The requirement not to discriminate is Rule C28 in the Handbook. The rule requires barristers not to withhold their services, or permit their services to be withheld:
  - On the ground that the nature of the case is objectionable to the barrister or to any section of the public;
  - On the ground that the conduct, opinions or beliefs of the prospective client are unacceptable to the barrister or to any section of the public; or
  - On any ground relating to the source of financial support which may properly be given to the prospective client.
  
20. The requirement not to discriminate applies to all work, including Public and Licensed Access work. The BSB believes this requirement should continue to apply as it provides vital protection to all clients, regardless of how the barrister has been instructed. It is also a matter of general law that barristers have an obligation not to discriminate unlawfully as to those to whom they make their services available on

any of the statutorily prohibited grounds such as gender or race. The rule is also concerned with a barrister's broader obligations not to withhold services on grounds that are inherently inconsistent with their role in upholding access to justice and the rule of law.

21. The cab-rank rule differs in that it only applies to referral work from a professional client. Like the requirement not to discriminate, the cab-rank rule also ensures that all clients with means can obtain representation. However, it also obliges barristers to accept all work for which they are qualified even if refusal would not be caught by the non-discrimination rule. For example, it ensures that barristers cannot be restrained by commercially motivated non-compete clauses. So one client cannot insist that a barrister never works for their competitors in the future.

### **Analysis**

22. Although Public Access clients are afforded the protection of Rule C28, the BSB has nevertheless assessed from first principles whether the cab-rank rule should also apply to Public and Licensed Access cases, undertaking a full analysis against the regulatory objectives in the LSA. The table at Annex A compares the status quo with applying the cab-rank rule to Public and Licensed Access cases.

### **Conclusion**

23. The BSB recognises that there are arguments in theory for applying the cab-rank rule to Public and Licensed Access cases on the grounds of improving access to justice, and protecting and promoting the public interest and the interests of consumers. However, having undertaken a full analysis against the regulatory objectives in the LSA (at Annex A), our overall assessment is that the status quo should be maintained (i.e. that the cab-rank rule should not be applied to Public and Licensed Access). In summary, our rationale is that:
  - In practice it is unlikely that a Licensed Access client or other member of the public with a properly funded, arguable case would be unable to access representation, either via the Licensed or Public Access scheme or, if

necessary, by instructing a solicitor. However, the BSB should be sensitive to any evidence of such consumer detriment if it emerges;

- Applying the cab-rank rule to Public Access cases could create a barrier to access, in that barristers may become less inclined to undertake Public Access work and not register to do so. This could reduce choice and increase costs for consumers;
- Even if this did not occur, applying the cab-rank rule to Public and Licensed Access cases may still not lead to a meaningful improvement in access, as there would still be an exception for lack of suitability;
- Indeed, applying the cab-rank rule to Public and Licensed Access cases could lead to clients attempting to invoke the rule when they are unsuitable for Public or Licensed Access and/or their cases have little merit, and it may be in no one's interest to proceed;
- There is at least a residual risk that more instructions would be accepted where it would not be in the interests of clients, or in the interests of justice i.e. that more instructions would be accepted inappropriately (although the risk could be mitigated by regulatory supervision and revising the Public Access training – see Annex F); and
- Our view is that the cab-rank rule already operates sufficiently in both the public interest and the interests of consumers.

24. While our conclusion is that the status quo should be maintained (i.e. that the cab-rank rule should not be applied to Public and Licensed Access cases) we also consider more could be done to ensure that barristers undertaking Public and Licensed Access work, and Public and Licensed Access clients, are aware of the protections afforded by Rule C28. Guidance to the rule states this is a requirement that barristers do not 'withhold [their] services on grounds that are inherently inconsistent with [their] role in upholding access to justice and the rule of law'. It is therefore proposed to make the protections which clients are afforded by Rule C28 more prominent in the BSB's [Public Access Guidance for Barristers, Clerks and Lay Clients](#) (see paragraph 87).

25. We also consider that, while our conclusion is the cab-rank rule should not be applied to Public and Licensed Access cases, the proposals in this consultation (for example, streamlining the Licensed Access scheme) will nonetheless improve access to justice, and protect and promote the public interest and the interests of consumers. These regulatory objectives will also be furthered by revising the Public Access training and, in response to the Competition and Market Authority's (CMA's) [review of the legal services sector](#), providing improved information for consumers and promoting greater transparency in costs before barristers are engaged (see Annex F). It is likely that taking these steps will be of more benefit to consumers than applying the cab-rank rule to Public and Licensed Access cases.

### ***Question***

26. **Question 1:** 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.

### ***Proposed changes to the Public Access Rules***

27. The current Public Access Rules are Rules C119 – C131 of the BSB Handbook (Section D2.1). The proposed changes to the Public Access Rules can be found in full at Annex B, and a discussion of the proposed changes to the rules is below.

### ***Discussion of proposed changes to the Public Access Rules***

#### ***Rule C120.2: Additional Public Access training***

28. This rule has been removed to reflect that the deadline to undertake additional Public Access training has passed.

Rule C121.2 – .4: Public Access barristers of less than three years’ standing

29. Monitoring undertaken by the BSB suggests that rather than requiring barristers who are of less than three years’ standing to maintain a Public Access log, it may be that there are more effective and proportionate means of seeking and reflecting on client feedback. More generally, the CMA also identified issues with the existing means of seeking and reflecting on client feedback in its review of the legal services sector.<sup>1</sup>
30. It is therefore appropriate for the BSB to review its regulatory approach in this area. While it is important that newly qualified Public Access barristers use feedback to develop their practices, the BSB’s [Professional Statement](#) (which describes the knowledge, skills and attributes that all barristers should have on ‘day one’ of practice) already states at paragraph 2.5d) that ‘barristers should ask for and make effective use of feedback’.<sup>2</sup> In addition, the BSB’s [Future Bar Training](#) programme will seek to ensure that education and training for the Bar reflects the requirements of the Professional Statement. There is therefore now less justification for a prescriptive requirement that barristers who are of less than three years’ standing maintain a Public Access log, given they will be expected to make effective use of feedback on ‘day one’ of practice.
31. Furthermore, the BSB’s report on High Impact Supervision Returns (October 2015) stated ‘of particular note was the fact that few chambers actively seek feedback from lay clients and a number felt that it would not be possible or appropriate to do so. Rule C121 of the BSB Handbook requires barristers with less than three years’ standing to seek appropriate feedback from their public access clients on the service provided, but few chambers referred to this in their return’. The report did describe how a few chambers seek feedback from lay clients, and it was considered beneficial to explore how chambers could apply these strategies more widely. This led, as the CMA notes in its review of the legal services sector, to a project intended to improve the way in which barristers and chambers gather feedback, and how they make use

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<sup>1</sup> <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>, page 15

<sup>2</sup> [https://www.barstandardsboard.org.uk/media/1787559/bsb\\_professional\\_statement\\_and\\_competences\\_2016.pdf](https://www.barstandardsboard.org.uk/media/1787559/bsb_professional_statement_and_competences_2016.pdf), page 15

of that to improve services to clients. Guidance on how to gather and make use of feedback (with illustrative examples) was drafted; however, it was not intended to be aimed just at Public Access barristers who are of less than three years' standing, but at all barristers regardless of their experience. This was because evidence from supervisory activity indicated that there is benefit for all barristers in seeking feedback from clients.

32. It is therefore proposed to remove the prescriptive requirement of Rule C121.2 – .4, and instead further explore how all barristers (not just Public Access barristers who are of less than three years' standing) can seek and make use of feedback. To this end, the guidance on how to gather and make use of feedback should be revisited in light of the evidence which has emerged from the CMA's report. This guidance on how to engage with feedback directly from clients could also be published alongside the BSB's guidance to providers on how they should engage with public reviews on independent feedback platforms (the CMA has recommended that all legal regulators publish the latter).

*Rule C125: Notifying Public Access clients*

33. Rule C125 states that having accepted Public Access instructions, barristers must notify their Public Access clients in writing, and in clear and readily understandable terms, of a number of particulars. Rule C125.3 states that the notification must include 'unless authorised to *conduct litigation* by the *Bar Standards Board*, the fact that you cannot be expected to perform the functions of a *solicitor* or other authorised litigator and in particular to fulfil limitation obligations, disclosure obligations and other obligations arising out of or related to the *conduct of litigation*'. The term 'other authorised litigator' has been replaced with 'other *person* who is authorised to *conduct litigation*' to reflect the language used in the rest of the BSB Handbook. It is also proposed to simplify the text relating to obligations arising out of or related to the conduct of litigation.
34. In addition, Rule C125.4 states that the notification must include 'the fact that you are self-employed, are not a *member* of a firm and do not take on any arranging role'. The text 'not a *member* of a firm' has been replaced with 'not employed by a

*regulated entity*, and the text 'do not take on any arranging role' has been replaced with '(subject to Rule S26) do not undertake the management, administration or general conduct of a client's affairs'. In both cases, the meaning has not changed but the language used now reflects that in the rest of the BSB Handbook.

35. Furthermore, it is proposed to add Rule C125.10, which states that the notification must include 'the level of professional indemnity insurance held by you'. Self-employed barristers must be members of the Bar Mutual Indemnity Fund (Rule C71 in the BSB Handbook), and barristers must ensure they have adequate insurance (taking into account the nature of their practice) which covers all the legal services they supply to the public (Rule C76.1). The BSB Handbook also states that barristers must not mislead, or cause or permit to be misled, their clients about the extent to which they are covered by insurance against claims for professional negligence (Rule C19.5).
36. While there is no evidence of widespread under-insurance by Public Access barristers, the CMA stated in its review of the legal services sector that consumers should be able to expect legal services providers to disclose the level of professional indemnity insurance they hold.<sup>3</sup> It is therefore proposed to require that the written notification given to Public Access clients discloses the level of professional indemnity insurance held by the barrister. This would assure lay clients (in the absence of professional clients such as solicitors) that Public Access barristers have adequate insurance which covers all the legal services they are supplying.

#### Rule C129: Documents

37. Rule C129 has been changed to state that documents relating to Public Access work should be retained for at least six, rather than seven, years. This reflects 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.<sup>4</sup>

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<sup>3</sup> <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>, pages 227-228

<sup>4</sup> <http://www.legislation.gov.uk/ukpga/1980/58/section/5>, s5

### Rule C130: Correspondence

38. Rule C139 states that Public Access barristers 'may undertake correspondence where it is ancillary to permitted work, and in accordance with the guidance published by the *Bar Standards Board*'. There would be no risk posed if a Public Access barrister undertook correspondence where it was not ancillary to permitted work i.e. if a lay client instructed a Public Access barrister simply to undertake correspondence on their behalf. The reference to the BSB's Public Access Guidance for Barristers is also unnecessary as this is referred to in Rule C119. It is therefore proposed to remove the rule.

### Throughout

39. Various changes have been made to simplify and update the language used. While this has been done where possible, the nature of Public Access work (i.e. a lay client instructing a barrister without a solicitor or other professional client) means that the Public Access Rules must retain a level of prescription to ensure public protection. However, there may be further opportunities to simplify the language used, and so a question has been asked below in respect of this.

### **Question**

40. **Question 2:** do you agree with the proposed changes to the Public Access Rules (at Annex B)? In particular, do you agree with the proposals to:
- a) remove the requirement for barristers who are of less than three years' standing to maintain a Public Access log; and
  - b) require that the written notification given to Public Access clients discloses the level of professional indemnity insurance held by the barrister?

If not, please state why not.

41. **Question 3:** have you identified any further opportunities to simplify or improve the Public Access Rules (at Annex B)? If yes, please explain your answer.

### ***Proposed changes to the Licensed Access Rules***

42. The current Licensed Access Rules are Rules C132 – C141 of the BSB Handbook (Section D2.2). The proposed changes to the Licensed Access Rules can be found in full at Annex C, and a discussion of the proposed changes to the rules is below.

### ***Discussion of proposed changes to the Licensed Access Rules***

#### ***Rule C133: Application of the Licensed Access Rules***

43. Rule C133 states that Rules C136 – C137, which among other things require barristers to be clear with clients about the basis upon which they have accepted Licensed Access instructions, do not apply if the client is a member of a professional body specified in the Schedules to the Licensed Access Recognition Regulations. It is unclear why barristers should not also be required to provide this information to clients who are members of professional bodies. It is therefore proposed to remove the references to Rules C136 – C137 from Rule C133.

#### ***Rule C135: Acceptance of Licensed Access instructions***

44. The reference to a barrister's chambers also being able to provide the services required by a particular Licensed Access client has been removed, as while chambers must be properly administered (Rule C89 in the BSB Handbook) barristers are personally responsible for their own professional work (Rule C20).

#### ***Rules C136 – C137 and C139: Licensed Access Terms of Work***

45. The Licensed Access Terms of Work are published by the Bar Council in its representative capacity. As Licensed Access clients are deemed to be acting within a specific area of expertise or specialism, there is little regulatory justification in including reference to the terms in the Licensed Access Rules. From a regulatory standpoint, it would be better to simply require that Licensed Access is undertaken on agreed terms and then if barristers wish to continue using the Licensed Access Terms of Work, they can do so. It is therefore proposed to remove reference to the

Licensed Access Terms of Work from the Licensed Access Rules. Various other changes have also been made to facilitate this.

### Throughout

46. Various changes have been made to simplify and update the language used. The term 'other authorised litigator' has also been replaced with 'other *person* who is authorised to *conduct litigation*' to reflect the language used in the rest of the BSB Handbook.

### **Question**

47. **Question 4:** do you agree with the proposed changes to the Licensed Access Rules (at Annex C)? In particular, do you agree with the proposal to remove references to the Licensed Access Terms of Work? If not, please state why not.

## ***Proposed changes to the Licensed Access Recognition Regulations***

48. The current Licensed Access Recognition Regulations can be found on the BSB's website: <https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/licensed-access-recognition-regulations/>. The proposed changes to the Licensed Access Recognition Regulations can be found in full at Annex D, and a discussion of the proposed changes to the regulations is below.

## ***Discussion of proposed changes to the Licensed Access Recognition Regulations***

### ***Paragraph 3(e): Limitations and conditions***

49. Paragraph 3(e) states that when issuing licences to clients so they may instruct barristers directly, the BSB may impose limitations and conditions relating to a) the matters the client can instruct a barrister for, and b) the courts and tribunals the client can instruct a barrister to appear in. This is a restriction which is difficult to continue to justify. These lay clients will be deemed to be acting within a specific area of expertise or specialism, and their competence to instruct barristers will be assessed as part of their licence applications. There is also an existing safeguard in the BSB Handbook which states that barristers 'must not accept instructions to act in a particular matter if: [they] are not competent to handle the particular matter or otherwise do not have enough experience to handle the matter' (Rule C21.8).
50. In addition, as limitations and conditions relating to matters and courts and tribunals are often imposed, licence holders are often required to submit (and pay for) applications to amend their licences. Making licences valid for all matters, courts and tribunals would therefore streamline the Licensed Access scheme and free up regulatory resources.
51. The BSB would also retain the ability to impose limitations and conditions on licences in exceptional circumstances, as paragraph 3(e) would still state that licences may be issued 'subject to such limitations or conditions as the Bar Standards Board may think appropriate'. While the BSB would not normally impose

limitations and conditions on licences, an example of where it may still be appropriate is on the licences of immigration advisers regulated by the Office of the Immigration Services Commissioner (OISC). This is because immigration advisers apply to be regulated by OISC at the level which reflects their competence and service.<sup>5</sup>

52. It would be necessary to operate a transitional arrangement whereby as existing licences which have limitations and conditions are renewed, a decision is made as to whether it is absolutely necessary to still impose limitations and conditions.

Paragraphs 4(b) – (c): Content of licences

53. Paragraph 4b) refers to the Licensed Access Terms of Work, which are published by the Bar Council in its representative capacity. As Licensed Access clients are deemed to be acting within a specific area of expertise or specialism, there is little regulatory justification in including reference to the terms in the Licensed Access Recognition Regulations. It is therefore proposed to remove paragraph 4b).
54. Paragraph 4c) states licences ‘*may* if the Bar Standards Board think appropriate provide that a copy of the Licence shall be sent with every set of instructions to any barrister instructed by the authorised licensed access client’. This is in fact a requirement under Rule C134.2 (see above) and so paragraph 4c) has therefore been removed.

Paragraph 6: Matters to be considered by the BSB

55. Paragraph 6a) refers to barristers in independent practice operating ‘as a referral profession of specialist consultants’. This is no longer strictly accurate as following the establishment of the Public Access scheme in 2004, barristers can now undertake work other than on a referral basis i.e. if registered to do so, they can now

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<sup>5</sup> <https://www.gov.uk/government/publications/how-to-become-a-regulated-immigration-adviser/how-to-become-a-regulated-immigration-adviser#applying-for-the-correct-level>

accept instructions directly from the public rather than solely via a solicitor or other professional client. Paragraph 6a) has therefore been removed.

*Paragraph 7: Higher courts and the Employment Appeal Tribunal*

56. Paragraph 7b) states that if a person is a member of one of the professional bodies listed in the First Schedule, while they may use the Licensed Access scheme to instruct a barrister directly, they may not do so for the purpose of representation in various higher courts and the Employment Appeal Tribunal.
57. However, this is a restriction which is difficult to continue to justify for the same reasons as the restrictions currently imposed by paragraph 3(e). Firstly, members of the professional bodies listed in the First Schedule will be lay clients who are deemed to be acting within a specific area of expertise or specialism. Secondly, paragraph 7a) already states that such persons may only instruct barristers directly in matters which fall generally within their professional expertise. If these matters happen to require representation in the higher courts, this should not be an issue as there is an existing safeguard in the BSB Handbook which states that barristers 'must not accept instructions to act in a particular matter if: [they] are not competent to handle the particular matter or otherwise do not have enough experience to handle the matter' (Rule C21.8).
58. It is therefore proposed to remove paragraph 7b). If appropriate, this will 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.

*First and Second Schedules to the Licensed Access Recognition Regulations*

59. The First and Second Schedules to the Licensed Access Recognition Regulations have been updated to reflect that some of the professional bodies listed have changed their names, merged or disbanded.

60. It is also proposed to move the Schedules to guidance, so that in the future the BSB would not be required to apply to the oversight regulator, the Legal Services Board (LSB), to amend them. This would make the process of amending the Schedules more straightforward, freeing up regulatory resources.
61. In addition, it is proposed that the BSB devises rigorous but straightforward application processes for bodies to be added to the Schedules. In the case of the First Schedule, the application process would be for professional bodies such as those for accountants and taxation advisers, insolvency practitioners, etc. In the case of the Second Schedule, the application process would be for ombudsman services. However, in both cases the criteria to be added to the Schedules can be drawn from paragraph 6 of the Licensed Access Recognition Regulations.
62. In the case of applications to be added to the Second Schedule, it is proposed that there would be no application fee. This is because it is in the public interest for ombudsman services to be able to instruct barristers directly via the Licensed Access scheme. However, in the case of applications by professional bodies to be added to the First Schedule, it is proposed that there would be an application fee. This is because the application is more likely to be driven by the interests of their members to be able to make use of the Licensed Access scheme. Individual members of professional bodies which are not listed in the First Schedule (and other licence holders) are also required to pay an application fee in order to instruct barristers directly via the Licensed Access scheme. The application fee for professional bodies to be added to the First Schedule will be determined in line with our fees and charges policy and the principles of cost recovery.

### Throughout

63. Various changes have been made to simplify and update the language used.

**Question**

64. **Question 5:** do you agree with the proposed changes to the Licensed Access Recognition Regulations (at Annex D)? In particular, do you agree with the proposals to:
- a) only impose limitations and conditions on licences in exceptional circumstances?;
  - b) 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?;
  - c) move the First and Second Schedules to guidance?;
  - d) devise application processes for bodies to be added to the First and Second Schedules?; and
  - e) only charge a fee for applications by professional bodies to the added to the First Schedule?

If not, please state why not.

## **Scope of Practice Rules**

65. As Licensed Access clients are deemed to be acting within a specific area of expertise or specialism, the scenarios in which they instruct barristers are deemed to be low-risk. This has led to the suggestion that the BSB could amend its Scope of Practice Rules to allow any client who would not be able to complain to LeO to instruct any barrister directly (i.e. without using the Public or Licensed Access schemes).
66. The justification for this would be that the risk is higher where clients who *would* be able to complain to LeO instruct barristers directly. These are the types of client for whom the Public Access scheme has largely been designed, with the added protection provided by those rules. Those clients who would be able to complain to LeO are as follows:
- Individuals;
  - Businesses or enterprises that are micro-enterprises within the meaning of Article 1 and Article 2(1) and (3) of the Annex to Commission Recommendation 2003/361/EC (broadly businesses or enterprises with fewer than 10 employees and turnover or assets not exceeding €2 million);
  - Charities with an annual income net of tax of less than £1 million;
  - Clubs, associations or organisations, the affairs of which are managed by its members or a committee of its members, with an annual income net of tax of less than £1 million;
  - Trustees of trusts with an asset value of less than £1 million; and
  - Personal representatives or beneficiaries of the estates of persons who, before they died, had not referred the complaint to the Legal Ombudsman.
67. There are risks in the BSB's Risk Index which relate to client service and delivery i.e. the potential for things to go wrong for clients. For example, there is a risk that a barrister may fail to provide a proper standard of client care or quality of work to

clients, and another risk that clients are not given clear information about fees.<sup>6</sup> Where clients who would be able to complain to LeO instruct barristers directly, the impact of things going wrong is higher on those clients. However, clients who would not be able to complain to LeO are less likely to require the protections afforded by the Public and Licensed Access Rules, thus the suggestion that the BSB could amend its Scope of Practice Rules to allow any client who would not be able to complain to LeO to instruct any barrister directly (i.e. without using the Public or Licensed Access schemes).

68. If the Scope of Practice Rules were amended in this way, there would be less reliance on the Public and Licensed Access schemes. This is because clients who would not be able to complain to LeO would be permitted to instruct barristers directly without the requirement for either:
- The barrister to be registered to undertake Public Access work; or
  - The client to hold a licence issued by the BSB; or
  - The client to be a member of a professional body specified in the Schedules to the Licensed Access Recognition Regulations.
69. In these cases, other relevant rules in the BSB Handbook would still apply; for example, barristers would still be required to confirm acceptance of instructions in writing, including the terms and/or basis on which they will be acting (Rule C22). They would also still be required to provide information to clients about their right to make a complaint, and the complaints procedure (Rules C99 – C102). The cab-rank rule (Rule C29) would not apply to these instructions, as no solicitor or other professional client would be instructed in addition to the barrister. In the absence of solicitors or other professional clients also being instructed, record keeping requirements similar to those in the Public and Licensed Access Rules would also likely be imposed. However, in these low-risk scenarios of clients instructing barristers directly, compliance with the Public and Licensed Access Rules as a whole

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<sup>6</sup> [https://www.barstandardsboard.org.uk/media/1751667/bsb\\_risk\\_index\\_12pp\\_5.4.16\\_for\\_web.pdf](https://www.barstandardsboard.org.uk/media/1751667/bsb_risk_index_12pp_5.4.16_for_web.pdf), page 5

would be deemed unnecessary. The Public Access Rules would still remain for those clients who may need additional support in instructing a barrister directly.

70. It is likely that there would be less reliance on the Licensed Access scheme in particular, as clients who would not be able to complain to LeO would not be required to hold a licence issued by the BSB, or be a member of a professional body specified in the Schedules to the Licensed Access Recognition Regulations. In the light of such a change we would consider whether the Licensed Access scheme continued to be necessary or whether all other clients would be better served by going to a Public Access practitioner.
71. If the Scope of Practice Rules were amended to allow any client who would not be able to complain to LeO to instruct any barrister directly (i.e. without using the Public or Licensed Access schemes), this amendment would be made as part of a wider review of the Scope of Practice Rules (rather than under the auspices of the Public and Licensed Access review). This is an opportunity to simplify the BSB's regulatory arrangements and remove a requirement to use the Public and Licensed Access schemes which may not be adding clear value, unless risks in not requiring compliance with the Public and Licensed Access Rules in these scenarios are identified. We intend to use the consultation to gather evidence as to the feasibility of the proposal, particularly from barristers undertaking Public and Licensed Access work and Public and Licensed Access clients. This evidence base can then be used to inform a wider review of the Scope of Practice Rules.

### ***Questions***

72. **Question 6:** 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 LeO to instruct any barrister directly (i.e. without using the Public or Licensed Access schemes)? Please state why.
73. **Question 7:** in these scenarios of clients instructing barristers directly, have you identified any risks in not requiring compliance with the Public and Licensed Access Rules? If yes, please explain your answer.



### ***Equality impact assessment***

74. An equality impact assessment of the proposals in the consultation has been carried out. This did not identify any adverse impacts in relation to any of the protected groups under the Equality Act 2010. However, the issue of potential equality impacts will be revisited in light of the views expressed in the responses to the consultation.

### ***Question***

75. **Question 8:** 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? If yes, please explain your answer.

## **Part III: About the consultation**

### **How has the consultation been developed?**

76. We are extremely grateful to the Public and Licensed Access Review Task Completion Group for their contribution. The expertise of this small group of practising barristers, chambers staff and consumer experts was invaluable to the development of the consultation.

### **Who should respond to the consultation?**

77. We are particularly interested in hearing from:
- Barristers undertaking Public and Licensed Access work;
  - Other barristers;
  - Public and Licensed Access clients, including licence holders and members of the professional bodies listed in the First Schedule to the Licensed Access Recognition Regulations;
  - The bodies listed in the First and Second Schedule;
  - Other bodies which may apply to be listed in the First and Second Schedule;
  - Members of chambers' business management, including clerks;
  - Members of the judiciary;
  - Bar special interest networks and associations;
  - Consumer organisations; and
  - Students: current law students, BPTC students and anyone interested in a career at the Bar.

## Part IV: How to respond to the consultation

78. The closing date for the consultation is **Tuesday 26 September 2017**. You do not need to wait until the closing date to respond to the consultation.
79. If you have a disability and have a requirement to access this consultation in an alternative format, such as larger print or audio, please let us know.
80. A response does not need to be a comprehensive written document, although it can be if you wish. It can also be short form answers to the specific questions we have posed. It is however far more useful to us (and we are better able to take your views into account) if you are able to address the questions we have posed specifically, rather than, for example, simply stating your general view. We will of course never exclude consideration of a response, whatever its form or content.
81. We want to hear your views on all of the questions posed, and will take all of the responses into account.
82. You do not have to respond to the consultation in writing. If you would like someone from the BSB to meet you or the organisation you represent, to listen to and accurately record your views, then as far as possible we will try to accommodate this request. Please contact us either by email, telephone or post as soon as possible if you would like to do this.
83. **Whatever form your response takes, we will normally want to make it public and attribute it to you or your organisation, and publish a list of respondents. If you do not want to be named as a respondent to the consultation please set this out in your response.**
84. Please send your response, or otherwise get in touch, as follows:

Email: [professionalstandards@barstandardsboard.org.uk](mailto:professionalstandards@barstandardsboard.org.uk)

Tel: 020 7611 1444

Professional Standards Team

The Bar Standards Board  
289-293 High Holborn  
London  
WC1V 7HZ

***List of questions***

85. **Question 1:** 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.

**Question 2:** do you agree with the proposed changes to the Public Access Rules (at Annex B)? In particular, do you agree with the proposals to:

- a) remove the requirement for barristers who are of less than three years' standing to maintain a Public Access log; and
- b) require that the written notification given to Public Access clients discloses the level of professional indemnity insurance held by the barrister?

If not, please state why not.

**Question 3:** have you identified any further opportunities to simplify or improve the Public Access Rules (at Annex B)? If yes, please explain your answer.

**Question 4:** do you agree with the proposed changes to the Licensed Access Rules (at Annex C)? In particular, do you agree with the proposal to remove references to the Licensed Access Terms of Work? If not, please state why not.

**Question 5:** do you agree with the proposed changes to the Licensed Access Recognition Regulations (at Annex D)? In particular, do you agree with the proposals to:

- a) only impose limitations and conditions on licences in exceptional circumstances?;

- b) 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?;
- c) move the First and Second Schedules to guidance?;
- d) devise application processes for bodies to be added to the First and Second Schedules?; and
- e) only charge a fee for applications by professional bodies to be added to the First Schedule?

If not, please state why not.

**Question 6:** 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 LeO to instruct any barrister directly (i.e. without using the Public or Licensed Access schemes)? Please state why.

**Question 7:** in these scenarios of clients instructing barristers directly, have you identified any risks in not requiring compliance with the Public and Licensed Access Rules? If yes, please explain your answer.

**Question 8:** 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? If yes, please explain your answer.

### ***Next steps following the end of the consultation***

- 86. The consultation will close on **Tuesday 26 September 2017**. Once the consultation has closed we will collate and analyse the responses. We will use them to determine the potential for the suggested rule changes and issue a consultation report. If we decide to go ahead with the rule changes, we will finalise the drafting of the new rules and apply to the LSB for approval.
- 87. If the LSB approves the rule changes, we will amend the BSB Handbook and Licensed Access Recognition Regulations, and update the associated documents on

the BSB website: the Public Access Guidance for Barristers, Clerks and Lay Clients, and the Public Access Model Client Care Letters.

## **Annex A: Cab-rank rule analysis**

The following table compares the status quo with applying the cab-rank rule to Public and Licensed Access cases.

<b>Regulatory objective</b>	<b>Status quo</b>	<b>Applying the cab-rank rule to Public and Licensed Access cases</b>
<i>Improving access to justice</i>	<ul style="list-style-type: none"> <li>The BSB has taken the view that the cab-rank rule is an essential safeguard of access to justice.</li> <li>However, it is important not to assume that Public Access clients whose instructions are declined because the barrister does not want to take on the case are unable to secure representation from another Public Access barrister or indeed, a solicitor. The Law Society's response to the 2014 call for evidence on the standard contractual terms and the cab-rank rule noted that 'there are no examples of people with properly arguable, funded cases being unable to access a solicitor'.<sup>7</sup> Expanding on this</li> </ul>	<ul style="list-style-type: none"> <li>This could increase choice and reduce costs for consumers i.e. they would not be required to instruct a barrister through a solicitor, and it may be less costly for them not to do so (although if barristers become less inclined to undertake Public Access work and do not register to do so, this could reduce choice and increase costs for consumers).</li> <li>In 2014, the BSB issued a call for evidence as part of a review of the standard contractual terms and the cab-rank rule. This produced evidence that applying the cab-rank rule to cases where there is a professional client influences barristers to accept instructions.<sup>9</sup> It</li> </ul>

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[http://www.legalservicesboard.org.uk/Projects/statutory\\_decision\\_making/pdf/2015/20150730\\_Annex\\_E.pdf](http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2015/20150730_Annex_E.pdf), paragraph 10

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[http://www.legalservicesboard.org.uk/Projects/statutory\\_decision\\_making/pdf/2015/20150730\\_Annex\\_F.pdf](http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2015/20150730_Annex_F.pdf), paragraph 22

<b>Regulatory objective</b>	<b>Status quo</b>	<b>Applying the cab-rank rule to Public and Licensed Access cases</b>
	<p>statement, it is therefore likely that there are few (or no) examples of clients with properly arguable, funded cases being unable to access either a solicitor or, if the client and case is suitable for Public Access, a Public Access barrister. Receiving advice through the Public Access scheme is also likely to assist clients in establishing whether they have a case in the first instance.</p> <ul style="list-style-type: none"> <li>• Given the expert and specialist nature of Licensed Access clients, it is even less likely that there are examples of Licensed Access clients with properly arguable, funded cases being unable to access representation.</li> <li>• This reflects the findings of the 2014 call for evidence on the standard contractual terms and the</li> </ul>	<p>would follow that applying the cab-rank rule to Public and Licensed Access cases could improve access to justice.</p> <ul style="list-style-type: none"> <li>• As part of the Public and Licensed Access review, the BSB also commissioned, jointly with our oversight regulator the Legal Services Board (LSB), an independent research specialist (Pye Tait) to undertake supply-side research into the Public Access scheme (surveying and interviewing Public Access barristers). The report stated ‘the most prevalent reasons for declining cases [in the past 12 months] are that either the client or the case is not suitable for public access work. Nearly 60% of respondents stated that clients were unsuited to the scheme, and just over 50% that the case was</li> </ul>

Regulatory objective	Status quo	Applying the cab-rank rule to Public and Licensed Access cases
	<p>cab-rank rule. While the BSB has taken the view that the cab-rank rule is an essential safeguard of access to justice, it was noted that market forces are one reason why specific reliance on the cab-rank rule is rare, as ‘there is a good supply of barristers and...they will have a commercial self-interest in accepting work’.<sup>8</sup> However, this is not necessarily the case in all areas of law.</p> <ul style="list-style-type: none"> <li>• It should also be noted that, while it is unlikely a Licensed Access client or other member of the public with a properly funded, arguable case would be unable to access representation, the legal regulators do not operate a mechanism which would</li> </ul>	<p>unsuitable. Nearly 40% of respondents did not want to take on the case’.<sup>10</sup> The fact that nearly 40% of respondents declined Public Access instructions because they did not want to take on the case suggests barristers may be more likely to decline Public (and Licensed) Access cases. Applying the cab-rank rule to these cases could therefore improve access to justice.</p> <ul style="list-style-type: none"> <li>• However, applying the cab-rank rule to Public Access cases could create a barrier to access, in that barristers may become less inclined to undertake Public Access work and not register to do so (unlike Public Access, barristers are not required to register to undertake</li> </ul>

<sup>8</sup>

[http://www.legalservicesboard.org.uk/Projects/statutory\\_decision\\_making/pdf/2015/20150730\\_Annex\\_E.pdf](http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2015/20150730_Annex_E.pdf), paragraph 9

<sup>10</sup> [https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report\\_26.9.2016.pdf](https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report_26.9.2016.pdf), page 31

Regulatory objective	Status quo	Applying the cab-rank rule to Public and Licensed Access cases
	<p>systematically capture evidence of such consumer detriment. The BSB should therefore be sensitive to any evidence of such consumer detriment if it emerges; for example, through regulatory supervision.</p> <ul style="list-style-type: none"> <li>• There is anecdotal evidence that if Public and Licensed Access cases are unsuitable, barristers will often refer clients to suitable solicitors (although not for a fee, as this would be in breach of the prohibition on referral fees: see Rule C10 in the BSB Handbook). It is also possible that, to avoid the administrative burden, some barristers may refer Public and Licensed Access cases to solicitors even if they are suitable and the clients are able to</li> </ul>	<p>Licensed Access work, and therefore applying the cab-rank rule to Licensed Access cases would not have the same potential effect). For example, Pye Tait’s report revealed that ‘risk assessment is an important influencing factor when barristers decide whether or not to accept public access instructions. As the vast majority of respondents are self-employed, the risk of the work going wrong in some way can be significant’.<sup>11</sup> Barristers feel more exposed to complaints, and therefore disciplinary action, when undertaking Public Access work.</p> <ul style="list-style-type: none"> <li>• In addition, Pye Tait’s report found that some barristers ‘do not think public access work is suitable for</li> </ul>

<sup>11</sup> [https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report\\_26.9.2016.pdf](https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report_26.9.2016.pdf), page 32

<b>Regulatory objective</b>	<b>Status quo</b>	<b>Applying the cab-rank rule to Public and Licensed Access cases</b>
	<p>conduct any necessary litigation. However, again the legal regulators do not operate a mechanism which would systematically capture evidence of this; for example, feedback from solicitors.</p>	<p>vulnerable clients, and these cases are often declined as part of the clerks' initial screening. In this context barristers consider clients to be 'vulnerable' if they would be unable to conduct litigation, and manage the administrative burden...In a lot of cases, clients approach barristers via the scheme when they have already been turned away by solicitors, as their case is unlikely to succeed or lacks validity in other ways. Therefore barristers will reject the case on grounds of lack of suitability'.<sup>12</sup> However, if the cab-rank rule was applied to Public Access cases, there is a risk that significant numbers of clients would attempt to invoke the rule when their cases have little merit, and it may be in no one's</p>

<sup>12</sup> [https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report\\_26.9.2016.pdf](https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report_26.9.2016.pdf), page 33

Regulatory objective	Status quo	Applying the cab-rank rule to Public and Licensed Access cases
		<p>interest to proceed (although the BSB could mitigate the risk by providing improved information for consumers to help them make more informed choices).</p> <ul style="list-style-type: none"> <li>• There is also a risk that there would not be a meaningful improvement in access. While some additional cases may be accepted, there would still need to be an exception for lack of suitability. 50.8% and 59.3% of respondents to Pye Tait’s survey declined Public Access instructions because the case and the client were not suitable for Public Access work respectively (it is likely that there was some overlap between the two).</li> <li>• Given the expert and specialist nature of Licensed Access clients,</li> </ul>

Regulatory objective	Status quo	Applying the cab-rank rule to Public and Licensed Access cases
		<p>applying the cab-rank rule to Licensed Access cases would be even less likely to lead to a meaningful improvement in access.</p> <ul style="list-style-type: none"> <li>• 30%, 25.9% and 25.6% of respondents to Pye Tait's survey also declined Public Access instructions due to full caseloads, a lack of specialist expertise and disagreements over fees respectively. There would still need to be exceptions for these reasons.</li> <li>• Barristers could also seek to evade the application of the cab-rank rule to Public and Licensed Access cases, although the risk of this could be mitigated by regulatory supervision and if necessary, disciplinary action.</li> <li>• Initial screening for suitability is often undertaken by clerks. If</li> </ul>

Regulatory objective	Status quo	Applying the cab-rank rule to Public and Licensed Access cases
		<p>the cab-rank rule was applied to Public and Licensed Access cases, the BSB would need to revise its Public Access Guidance for Clerks and take other steps to ensure that Public Access clerks and administrators were aware of the wider obligation.</p>
<p><i>Supporting the constitutional principles of the rule of law</i></p>	<ul style="list-style-type: none"> <li>• The BSB has taken the view that the cab-rank rule is an essential safeguard of the rule of law.</li> <li>• Rule C28 in the BSB Handbook and the guidance to the rule (see paragraph 21) are consistent with supporting the constitutional principles of the rule of law.</li> <li>• There are protections in the Public and Licensed Access Rules which are intended to ensure that barristers do not accept</li> </ul>	<ul style="list-style-type: none"> <li>• There would still need to be an exception for cases where it would not be in the interests of justice for barristers to accept instructions. However, there is at least a residual risk that more instructions would be accepted where it would not be in the interests of justice i.e. that more instructions would be accepted inappropriately (although the risk could be mitigated by regulatory supervision and revising the Public Access training – see Annex F).</li> </ul>

Regulatory objective	Status quo	Applying the cab-rank rule to Public and Licensed Access cases
	instructions where this would not be in the interests of justice (Rules C120.4 and C135.2 in the BSB Handbook).	
<p><i>Protecting and promoting the public interest, and protecting and promoting the interests of consumers</i></p>	<ul style="list-style-type: none"> <li>• The BSB has taken the view that the cab-rank rule is clearly in the interests of consumers of barristers' services, and an essential safeguard of the public interest. The two are related as the LSA defines consumers widely – its definition encompasses those who are using, or are contemplating using, legal services, whether this is in a personal capacity or in connection with their business.<sup>13</sup> In theory, this definition of consumer could encompass any member of the public at some point in their lives.</li> <li>• The cab-rank rule already places the public interest</li> </ul>	<ul style="list-style-type: none"> <li>• The BSB recognises that there are arguments for applying the cab-rank rule to Public and Licensed Access cases on the grounds of protecting and promoting the public interest, and the interests of consumers. These are similar to the arguments in relation to improving access to justice. However, in practice it is unlikely that a Licensed Access client or other member of the public with a suitable case would be unable to access representation, either via the Licensed or Public Access scheme or, if necessary, by instructing a solicitor. It is also important to again</li> </ul>

<sup>13</sup> <http://www.legislation.gov.uk/ukpga/2007/29/section/8>, s8(4)

Regulatory objective	Status quo	Applying the cab-rank rule to Public and Licensed Access cases
	<p>higher than professional interests for the reasons described in paragraph 19.</p> <ul style="list-style-type: none"> <li>• The cab-rank rule already places the public interest higher than particular consumer interests, as with the introduction of the BSB Handbook in January 2014 it was extended to apply to instructions for work in England and Wales coming from lawyers in Scotland, Northern Ireland and European Economic Area member states. It was also extended to non-advocacy work, whereas previously it only applied to advocacy work. Different types of consumers with different needs are therefore now all afforded the protections of the cab-rank rule.</li> </ul>	<p>consider that applying the cab-rank rule to Public Access cases could lead to barristers becoming less inclined to undertake Public Access work, and not registering to do so (potentially reducing choice and increasing costs for consumers).</p> <ul style="list-style-type: none"> <li>• Following the 2014 call for evidence on the standard contractual terms and the cab-rank rule, it was noted one reason why specific reliance on the cab-rank rule is rare is that 'solicitors would not consider it to be helpful for their client to force a barrister to accept a case they did not want to undertake'.<sup>14</sup> It is equally unlikely that it would be helpful for a Public or Licensed Access client to force a barrister to accept</li> </ul>

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[http://www.legalservicesboard.org.uk/Projects/statutory\\_decision\\_making/pdf/2015/20150730\\_Annex\\_E.pdf](http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2015/20150730_Annex_E.pdf), paragraph 9

Regulatory objective	Status quo	Applying the cab-rank rule to Public and Licensed Access cases
	<ul style="list-style-type: none"> <li>The cab-rank rule means that it can be professional misconduct for a barrister to refuse to represent a lay client because the barrister, for example, would prefer for commercial reasons to act for a different party. While this protection is not extended to Public and Licensed Access clients, the associated risks are unlikely to materialise in practice. If a Public or Licensed Access client required this protection then, assuming their case is valid, it would be straightforward for them to instruct a solicitor who could invoke the cab-rank rule if necessary (albeit one of the main benefits of Public and Licensed Access is that it increases choice and reduces costs for consumers i.e. they are not required to instruct a barrister through a</li> </ul>	<p>a case they did not want to undertake. While a barrister would of course still be bound by the Core Duty in the BSB Handbook to act in the client’s best interests, assuming that their case is valid it is more likely to be in the consumer’s interest to secure other representation.</p> <ul style="list-style-type: none"> <li>There is a risk that clients would attempt to invoke the rule when they are unsuitable for Public or Licensed Access and/or their cases have little merit, and it may be in no one’s interest to proceed. It would be less likely in the case of expert and specialist Licensed Access clients, but the risk would still not be removed entirely.</li> <li>As Pye Tait’s report stated, ‘it tends to be that</li> </ul>

Regulatory objective	Status quo	Applying the cab-rank rule to Public and Licensed Access cases
	<p>solicitor, and it may be less costly for them not to do so).</p> <ul style="list-style-type: none"> <li>• There are protections in the Public and Licensed Access Rules which are intended to ensure that barristers do not accept instructions where this would not be in the interests of their clients (Rules C120.4 and C135.2 in the BSB Handbook). An example would be if the client is unable to conduct litigation, and the barrister is not authorised to do so.</li> </ul>	<p>individual clients are most likely to be deemed unsuitable. This is partly because businesses may have a better understanding of the legal framework and/or require litigation which is more straightforward and therefore less time-consuming. Businesses also have their own administrative capacity to take on those elements of the case'.<sup>15</sup> Applying the cab-rank rule to Public and Licensed Access cases would not serve to address the gap in suitability, and potentially only lead to clients attempting to invoke the rule inappropriately (although the BSB could mitigate the risk by providing improved information for consumers to help them make more informed choices).</p>

<sup>15</sup> [https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report\\_26.9.2016.pdf](https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report_26.9.2016.pdf), page 33

Regulatory objective	Status quo	Applying the cab-rank rule to Public and Licensed Access cases
		<ul style="list-style-type: none"> <li>• There would still need to be an exception for cases where it would not be in the interests of clients for barristers to accept instructions. However, there is at least a residual risk that more instructions would be accepted where it would not be in the interests of clients i.e. that more instructions would be accepted inappropriately (although the risk could be mitigated by regulatory supervision and revising the Public Access training – see Annex F).</li> </ul>
<p><i>Promoting competition in the provision of services</i></p>	<ul style="list-style-type: none"> <li>• The BSB has taken the view that the existing rule has significant benefits with regard to improving access to justice, supporting the constitutional principles of the rule of law, and protecting and promoting the public interest and the interests of consumers. It</li> </ul>	<ul style="list-style-type: none"> <li>• This would be a regulatory requirement for barristers to accept instructions directly from the public which is not imposed on solicitors or other practising lawyers. In turn, this may distort competition in the market. In response, barristers may become less inclined</li> </ul>

<b>Regulatory objective</b>	<b>Status quo</b>	<b>Applying the cab-rank rule to Public and Licensed Access cases</b>
	<p>is therefore a justifiable restriction on a barrister's freedom of contract as it only applies if a barrister is instructed by a professional client, who can both ensure that the case is suitable and conduct any necessary litigation.</p> <ul style="list-style-type: none"> <li>• It is possible that not applying the cab-rank rule to Public and Licensed Access cases has a negative impact on competition in the legal services market. This is because barristers are free to only accept instructions directly from the public when those clients can conduct any necessary litigation, whereas solicitors accept instructions directly from the public and are less able to avoid incurring litigation costs. However, solicitors' practices are</li> </ul>	<p>to undertake Public Access work and not register to do so (but still be required to accept Licensed Access instructions).</p> <ul style="list-style-type: none"> <li>• A solution would be for there to be an equivalent regulatory requirement on solicitors to accept instructions directly from the public, but this is unlikely for the same reasons why, overall, applying the cab-rank rule to Public and Licensed Access cases would not be consistent with many of the regulatory objectives.</li> <li>• The cost of additional regulation may also lead to barristers becoming less inclined to undertake Public Access work and not registering to do so. This should be considered in light of Pye Tait's finding that 'Public Access work</li> </ul>

Regulatory objective	Status quo	Applying the cab-rank rule to Public and Licensed Access cases
	<p>more likely to achieve economies of scale when conducting litigation, and litigation costs are likely passed on to their clients in any event. The fundamental point is also that there is no regulatory requirement for solicitors to accept instructions directly from the public.</p>	<p>currently accounts for a relatively small proportion of barristers' overall caseload'.<sup>16</sup> It may therefore be better for the BSB to promote competition by focusing on expanding other opportunities for clients to access barristers (for example, streamlining the Licensed Access scheme), and providing improved information for consumers to help them make more informed choices.</p>
<p><i>Encouraging an independent, strong, diverse and effective legal profession</i></p>	<ul style="list-style-type: none"> <li>As there is no (potentially onerous) duty to accept Public and Licensed Access instructions, there is no disproportionate impact on any sections of the Bar.</li> </ul>	<ul style="list-style-type: none"> <li>A potentially onerous duty to accept Public and Licensed Access instructions could have a disproportionate impact on some sections of the Bar. For example, a requirement to accept instructions directly from lay clients, which may include the need to provide additional support</li> </ul>

<sup>16</sup> [https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report\\_26.9.2016.pdf](https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report_26.9.2016.pdf), page 8

Regulatory objective	Status quo	Applying the cab-rank rule to Public and Licensed Access cases
		<p>to clients in the absence of a professional client and may result in nugatory work if a greater number of clients seek representation for cases without merit, could cause particular challenges for barristers with disabilities or parental and caring responsibilities, who may have less time and flexibility to accommodate this additional workload.</p> <ul style="list-style-type: none"> <li>• The cost of additional regulation could reduce supply, as barristers may become less inclined to undertake Public Access work and not register to do so. Most respondents to Pye Tait’s report were ‘opposed to any additional regulations within the existing framework’.<sup>17</sup></li> </ul>

<sup>17</sup> [https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report\\_26.9.2016.pdf](https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report_26.9.2016.pdf), page 49

Regulatory objective	Status quo	Applying the cab-rank rule to Public and Licensed Access cases
		<ul style="list-style-type: none"> <li>• Pye Tait’s report stated that a ‘risk relates to getting paid for public access work; a number of barristers who participated in in-depth interviews said they have spent time and effort chasing up fees which would not have been the case if instructed by a professional client’.<sup>18</sup> If the cab-rank rule was extended to Public (and Licensed) Access cases, barristers may need to be able to require payment of fees in advance.</li> </ul>
<i>Increasing public understanding of the citizen’s legal rights and duties</i>	<ul style="list-style-type: none"> <li>• Clients are not able to attempt to invoke the rule when they are unsuitable for Public or Licensed Access and/or their cases have little merit, and it may be in no one’s interest to proceed.</li> </ul>	<ul style="list-style-type: none"> <li>• In the absence of a solicitor, clients may be more likely to take steps to improve their understanding of their legal rights and duties.</li> <li>• However, there is a risk that clients would attempt to invoke the rule when they are unsuitable for</li> </ul>

<sup>18</sup> [https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report\\_26.9.2016.pdf](https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report_26.9.2016.pdf), page 32

Regulatory objective	Status quo	Applying the cab-rank rule to Public and Licensed Access cases
		<p>Public or Licensed Access and/or their cases have little merit, and it may be in no one's interest to proceed. It would be less likely in the case of expert and specialist Licensed Access clients, but the risk would still not be removed entirely (although the BSB could mitigate the risk by providing improved information for consumers to help them make more informed choices).</p>
<p><i>Promoting and maintaining adherence to the professional principles<sup>19</sup></i></p>	<ul style="list-style-type: none"> <li>The cab-rank rule means that it can be professional misconduct for a barrister to refuse to represent a lay client because the barrister, for example, would prefer for commercial reasons to act for a different party. While this protection is not extended to Public and Licensed Access clients, the associated risks are unlikely to materialise in</li> </ul>	<ul style="list-style-type: none"> <li>There would still need to be an exception for cases where it would not be in the interests of clients for barristers to accept instructions. However, there is at least a residual risk that more instructions would be accepted where it would not be in the interests of clients i.e. that more instructions would be accepted inappropriately (although the risk could be</li> </ul>

<sup>19</sup> <http://www.legislation.gov.uk/ukpga/2007/29/section/1>, s1(3)

<b>Regulatory objective</b>	<b>Status quo</b>	<b>Applying the cab-rank rule to Public and Licensed Access cases</b>
	<p>practice. If a Public or Licensed Access client required this protection then, assuming their case is valid, it would be straightforward for them to instruct a solicitor who could invoke the cab-rank rule if necessary (albeit one of the main benefits of Public and Licensed Access is that it increases choice and reduces costs for consumers i.e. they are not required to instruct a barrister through a solicitor, and it may be less costly for them not to do so).</p>	<p>mitigated by regulatory supervision and revising the Public Access training – see Annex F).</p>

## Annex B: Proposed changes to the Public Access Rules

The current Public Access Rules are Rules C119 – C131 of the BSB Handbook (Section D2.1). The proposed changes to the Public Access Rules are in bold below.

### D2.1 PUBLIC ACCESS RULES

rC119 These rules apply to *barristers* instructed by or on behalf of a *lay client* (other than a *licensed access client*) who has not also instructed a *solicitor* or other *professional client* (public access clients). Guidance on public access rules is available on the *Bar Standards Board* website:

<https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/code-guidance/>.

rC120 Before accepting any *public access instructions* from or on behalf of a *public access client*, you must:

- .1 be properly qualified by having been issued with a full *practising certificate*, by having satisfactorily completed the appropriate public access training, and by registering with the ***Bar Council Bar Standards Board*** as a public access practitioner;
- .2 **~~if you were already registered with the *Bar Council* to undertake public access work on October 4 2013 then they must undertake any additional training required by the *Bar Standards Board* within 24 months of that date or cease to undertake public access work; removed from [date];~~**
- .3 take such steps as are reasonably necessary to ascertain whether it would be in the best interests of the *client* or in the interests of justice for *the* public access client to instruct a *solicitor* or other *professional client*, and

- .4 take such steps as are reasonably necessary to ensure that the *client* is able to make an informed decision about whether to apply for legal aid or whether to proceed with public access.

rC121 As a *barrister* with less than three *years' standing* who has completed the necessary training, you must:

- .1 Have a *barrister* who is a qualified person within Rule S22 and has registered with the *Bar Council* as a public access practitioner readily available to provide guidance to you;
- .2 ~~Maintain a log of public access cases you have dealt with, including any issues or problems which have arisen;~~ removed from [date];
- .3 ~~Seek appropriate feedback from you public access clients on the service provided;~~ removed from [date];
- .4 ~~Make this log available, on request, to the Bar Standards Board for review.~~ removed from [date].

rC122 You may not accept **direct** *instructions* from or on behalf of a public access *client* ~~in or in connection with any matter of proceedings in which~~ if, in all the circumstances, it would be in the best interests of the public access *client* or in the interests of justice for the public access *client* to instruct a *solicitor* or other *professional client*.

rC123 In any case where you are not prohibited from accepting *instructions*, you must at all times consider the developing circumstances of the case, and whether at any stage it is in the best interests of the public access *client* or in the interests of justice for the public access *client* to instruct a *solicitor* or other *professional client*. If, after accepting **direct** *instructions* from a public access *client* you form the view that circumstances are such that it would be in the best interests of the public access *client*, or in the interests of justice for the public access *client* to instruct a *solicitor* or other *professional client* you must:

- .1 inform the public access *client* of your view; and
- .2 withdraw from the case in accordance with the provisions of Rules rC25 and rC26 and associated guidance unless the *client* instructs a *solicitor* or other *professional client* to act in the case.

rC124 You must have regard to guidance published from time to time by the *Bar Standards Board* in considering whether to accept and in carrying out any *public access instructions*.

rC125 Having accepted *public access instructions*, you must forthwith notify your public access *client* in writing, and in clear and readily understandable terms, of:

- .1 the work which you have agreed to perform;
- .2 the fact that in performing your work you will be subject to the requirements of Parts 2 and 3 of this *Handbook* and, in particular, Rules rC25 and rC26;
- .3 unless authorised to *conduct litigation* by the *Bar Standards Board*, the fact that you cannot be expected to perform the functions of a *solicitor* or ~~other authorised litigator~~ **other person who is authorised to *conduct litigation*** and in particular to fulfil **limitation obligations, disclosure obligations and other** obligations arising out of or related to the *conduct of litigation*;
- .4 the fact that you are self-employed, ~~are not a member of a firm and do not take on any arranging role~~; are not employed by a ***regulated entity*** and (subject to Rule S26) do not undertake the management, administration or general conduct of a *client's* affairs;
- .5 in any case where you have been instructed by an *intermediary*.

- .a the fact that you are independent of and have no liability for the *intermediary*; and
- .b the fact that the *intermediary* is the agent of the lay *client* and not your agent;
- .6 the fact that you may be prevented from completing the work by reason of your professional duties or conflicting professional obligations, and what the *client* can expect of you in such a situation;
- .7 the fees which you propose to charge for that work, or the basis on which your fee will be calculated;
- .8 your contact arrangements; **and**
- .9 the information about your complaints procedure required by D1.1 of this Part 2; **and**
- .10 the level of professional indemnity insurance held by you.**

rC126 Save in exceptional circumstances, you will have complied with Rule rC125 above if you have written promptly to the public access *client* in the terms of the model letter provided on the *Bar Standards Board* website.

rC127 In any case where you have been instructed by an *intermediary*, you must give the notice required by Rule ~~C123~~ **C125** above both:

- .1 directly to the public access *client*; and
- .2 to the *intermediary*.

rC128 Having accepted *public access instructions*, you must keep a case record which sets out:

- .1 the date of receipt of the *instructions*, the name of the lay *client*, the name of the case, and any requirements of the *client* as to time limits;

- .2 the date on which the *instructions* were accepted;
- .3 the dates of subsequent *instructions*, of the despatch of advices and other written work, of conferences and of telephone conversations;  
**and**
- .4 when agreed, the fee.

rC129 Having accepted *public access instructions*, you must either yourself retain or take reasonable steps to ensure that the lay *client* will retain for at least **seven six** years after the date of the last item of work done:

- .1 copies of all *instructions* (including supplemental *instructions*);
- .2 copies of all advices given and documents drafted or approved;
- .3 the originals, copies or a list of all documents enclosed with any *instructions*; **and**
- .4 notes of all conferences and of all advice given on the telephone.

rC130 ~~Having accepted *public access instructions*, you may undertake correspondence where it is ancillary to permitted work, and in accordance with the guidance published by the *Bar Standards Board*.~~  
**removed from [date].**

rC131 Save where otherwise agreed:

- .1 you shall be entitled to copy all documents received from your lay *client*, and to retain such copies permanently;
- .2 you shall return all documents received from your lay *client* on demand, whether or not you have been paid for any work done for the lay *client*;
- .3 you shall not be required to deliver to your lay *client* any documents drafted by yourself in advance of receiving payment from the lay *client* for all work done for that *client*; **and**

.4 having accepted *public access instructions* in any civil matter, you may take a proof of evidence from your *client* in that matter.

## Annex C: Proposed changes to the Licensed Access Rules

The current Licensed Access Rules are Rules C132 – C141 of the BSB Handbook (Section D2.2). The proposed changes to the Licensed Access Rules are in bold below.

### D2.2 LICENSED ACCESS RULES

rC132 Subject to these rules and to compliance with the Code of Conduct (and to the *Scope of Practice, Authorisation and Licensing Rules*) a *barrister* in self-employed *practice* may accept *instructions* from a *licensed access client* in circumstances authorised in relation to that *client* by the Licensed Access Recognition Regulations (<https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/licensed-access-recognition-regulations/>) whether that *client* is acting for themselves or another.

rC133 These rules apply to every matter in which a *barrister* in self-employed *practice* is instructed by a *licensed access client* save that Rules rC134.2, ~~rC136, rC137~~ and rC139 do not apply to any matter in which a *licensed access client* is deemed to be a *licensed access client* by reason only of paragraph 7 or paragraph 8 of the Licensed Access Recognition Regulations (<https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/licensed-access-recognition-regulations/>).

rC134 You are only entitled to accept *instructions* from a *licensed access client* if at the time of giving *instructions* the *licensed access client*:

- .1 is identified; and
- .2 sends you a copy of the Licence issued by the *Bar Standards Board*.

rC135 A *barrister* must not accept any *instructions* from a *licensed access client*:

- .1 unless you **and your chambers** are able to provide the services required of you by that *licensed access client*;

- .2 if you consider it in the interests of the lay *client* or the interests of justice that a *solicitor* or ~~other authorised litigator~~ **other person who is authorised to conduct litigation** or some other appropriate *intermediary* (as the case may be) be instructed either together with you or in your place.

rC136 ~~Having accepted instructions from a licensed access client otherwise than on the terms of the Licensed Access Terms of Work, you:~~

- .1 ~~must first agree in writing the terms upon which you have agreed to do the work and the basis upon which you are to be paid;~~
- .2 ~~must keep a copy of the agreement in writing with the licensed access client setting out the terms upon which you have agreed to do the work and the basis upon which you are to be paid. If you agree standard terms with a licensed access client, you must keep a copy of the agreement in writing with the licensed access client setting out the terms upon which you have agreed and the basis upon which you are to be paid.~~

rC137 Having accepted *instructions* from a *licensed access client*, you must promptly send the *licensed access client*:

- .1 a statement in writing that the *instructions* have been accepted (as the case may be) ~~(1)~~ on the standard terms previously agreed in writing with that *licensed access client* ~~or (2) on the terms of the Licensed Access Terms of Work (and thereafter if requested a copy of the Licensed Access Terms of Work)~~; or
- .2 if you have accepted *instructions* otherwise than on such standard terms ~~or on the terms of the Licensed Access Terms of Work~~, a copy of the agreement in writing with the *licensed access client* setting out the terms upon which you have agreed to do the work and the basis upon which you are to be paid; **and**

- .3 unless you have accepted *instructions* on ~~the terms of the Licensed Access Terms of Work~~ or on standard terms which incorporate the following particulars must at the same time advise the *licensed access client* in writing of:
- .a the effect of rC21 as it relevantly applies in the circumstances;
  - .b unless authorised by the *Bar Standards Board* to *conduct litigation*, the fact that you cannot be expected to perform the functions of a *solicitor* or ~~other authorised litigator~~ **other person who is authorised to conduct litigation** and in particular to fulfil ~~limitation obligations disclosure obligations and other~~ obligations arising out of or related to the *conduct of litigation*; and
  - .c the fact that circumstances may require the *client* to retain a *solicitor* or ~~other authorised litigator~~ **other person who is authorised to conduct litigation** at short notice and possibly during the case.

rC138 If at any stage you, being instructed by a *licensed access client*, consider it in the interests of the lay *client* or the interests of justice that a *solicitor* or ~~other authorised litigator~~ **other person who is authorised to conduct litigation** or some other appropriate *intermediary* (as the case may be) be instructed either together with you or in your place:

- .1 you must forthwith advise the *licensed access client* in writing to instruct a *solicitor* or ~~other authorised litigator~~ **other person who is authorised to conduct litigation** or other appropriate *intermediary* (as the case may be); and
- .2 unless a *solicitor* or ~~other authorised litigator~~ **other person who is authorised to conduct litigation** or other appropriate *intermediary* (as the case may be) is instructed as soon as reasonably practicable thereafter you must cease to act and must return any *instructions*.

rC139 If at any stage you, being instructed by a *licensed access client*, consider that there are substantial grounds for believing that the *licensed access client* has in some significant respect failed to comply ~~either~~ with the terms of the Licence granted by the *Bar Standards Board* ~~or (where applicable)~~ **with the terms of the Licensed Access Terms of Work** you must forthwith report the facts to the *Bar Standards Board*.

rC140 Having accepted *instructions* from a *licensed access client*, you must keep a case record ~~(whether on card or computer)~~ which sets out:

- .1 the date of receipt of the *instructions*, the name of the *licensed access client*, the name of the case, and any requirements of the *licensed access client* as to time limits;
- .2 the date on which the *instructions* were accepted;
- .3 the dates of subsequent *instructions*, of the despatch of advices and other written work, of conferences and of telephone conversations;  
**and**
- .4 when agreed, the fee.

rC141 Having accepted *instructions* from a *licensed access client*, you must either yourself retain or take reasonable steps to ensure that the *licensed access client* will retain for six years after the date of the last item of work done:

- .1 copies of *instructions* (including supplemental *instructions*);
- .2 copies of all advices given and documents drafted or approved;
- .3 a list of all documents enclosed with any *instructions*; **and**
- .4 notes of all conferences and of all advice given on the telephone.

## Annex D: Proposed changes to the Licensed Access Recognition Regulations

The current Licensed Access Recognition Regulations can be found on the BSB's website: <https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/licensed-access-recognition-regulations/>. The proposed changes to the Licensed Access Recognition Regulations are in bold below.

### **THE LICENSED ACCESS RECOGNITION REGULATIONS**

1. Authorised licensed access clients are those persons and organisations and/or their members and/or their or their members' employees (as the case may be) who have from time to time been approved as such by the Bar Standards Board.
2. Any person or organisation wishing to be approved as an authorised licensed access client shall apply in writing to the Bar Standards Board by completing an application form in such form and supplying such other information as the Bar Standards Board may from time to time or in any particular case require.
3. In approving any person or organisation as an authorised licensed access client the Bar Standards Board may grant such approval in each case as the Bar Standards Board may think appropriate:
  - (a)
    - (i) on a provisional basis or
    - (ii) on a full basis;
  - (b)
    - (i) for a fixed period or
    - (ii) for a fixed period subject to extension or
    - (iii) indefinitely;
  - (c)
    - (i) to the person or organisation and/or

- (ii) to some or all of the members of the organisation and/or
- (iii) to some or all of the employees of the person or organisation or its members;

(d) in relation to matters concerning

- (i) the person or organisation and/or its members (as the case may be) and/or
- (ii) his or its or its members' employees and/or
- (iii) his or its or its members' clients or customers; **and**

(e) subject to such limitations or conditions as the Bar Standards Board may think appropriate. ~~relating to~~

~~(i) the matters in relation to which the authorised licensed access client may instruct a barrister and/or~~

~~(ii) the courts or tribunals before which a barrister so instructed may exercise a right of audience and/or~~

~~(iii) such other matters (including the means by which the authorised licensed access client shall instruct a barrister) as seem relevant in the circumstances.~~

4. The Bar Standards Board shall issue to every person or organisation approved as an authorised licensed access client a Licence in such form as the Bar Standards Board may from time to time or in the particular case think appropriate. Such Licence (which may be a provisional Licence or a full Licence):

(a) shall specify (i) the name of the person or organisation who has been approved as an authorised licensed access client (ii) the period (if any) for which the Licence has been granted or (as the case may be) that the Licence has been granted indefinitely and (iii) the limitations or conditions (if any) subject to which the Licence has been granted; **and**

~~(b) may if the Bar Standards Board think appropriate provide that unless otherwise first agreed in writing with an individual barrister or chambers all instructions accepted by any barrister from the authorised licensed access client will be deemed to be given and accepted on the terms of the Licensed~~

~~Access Terms of Work as approved from time to time by the Bar Standards Board;~~

~~(c) may if the Bar Standards Board think appropriate provide that a copy of the Licence shall be sent with every set of instructions to any barrister instructed by the authorised licensed access client;~~

~~(d) (b) shall remain at all times the property of the General Council of The Bar Bar Standards Board to whom (or to whose duly appointed officer) it shall be surrendered on demand.~~

5. The Bar Standards Board may from time to time:

(a) approve additional persons or organisations as authorised licensed access clients;

(b) withdraw approval (either wholly or in part) from any person or organisation as an authorised licensed access client;

(c) increase reduce or otherwise alter the period for which a person or organisation is approved as an authorised licensed access client;

(d) alter or revoke the limitations or conditions (if any) attached to any approval of a person or organisation as an authorised licensed access client or impose new or additional limitations or conditions;

(e) cancel and demand the surrender of any Licence issued under paragraph 4 of these regulations.

6. In exercising their functions under paragraphs 1, 2, 3, 4 and 5 of these regulations the Bar Standards Board shall comply with the statutory objectives referred to in ~~section 17(1) of the Courts and Legal Services Act 1990 and section 1(2) of the Access to Justice Act 1999~~ **section 1 of the Legal Services Act 2007**, may consult with such persons organisations or bodies as they think appropriate and shall to such extent as they may think appropriate in the particular case have regard to the following matters:

~~(a) the fact that barristers in independent practice operate as a referral profession of specialist consultants;~~

~~(b)~~ (a) the extent to which the person or organisation or its members (as the case may be) are likely to have a significant requirement to retain the services of a barrister for their own benefit or for the benefit of their employers, employees, members, clients or customers (as the case may be);

~~(c)~~ (b) the extent to which whether as a result of professional or other relevant training or by reason of practice and experience the person or organisation or its employees or members (as the case may be) are or may reasonably be expected to be:

(i) providers of skilled and specialist services

(ii) competent in some identifiable area of expertise or experience

(iii) familiar with any relevant area of law

(iv) possessed of the necessary skills to obtain and prepare information and to organise papers and information sufficiently to enable the barrister to fulfill **his** **their** duties in a non-contentious matter to the client and in a contentious matter both to the client and to the court

(v) possessed of the necessary skills to take charge and have the general conduct of the matters in respect of which they wish to retain the services of a barrister;

(d) the extent to which the affairs and conduct of the person or organisation or its members (as the case may be) are subject to some appropriate professional disciplinary regulatory or other organisational rules;

(e) the extent to which the person or organisation or its members (as the case may be):

(i) are insured against claims for negligence in relation to their handling of matters in respect of which they wish to retain the services of a barrister

(ii) have made and continue to comply with satisfactory arrangements for holding in separate accounts and maintaining as trust monies any monies received from third parties

(iii) have made and continue to comply with satisfactory arrangements for ensuring that barristers' fees are promptly paid; **and**

(f) such other facts and matters (if any) as seem to them to be relevant in the circumstances.

7. Notwithstanding paragraphs 2, 3 and 4 of these regulations any member of any of the bodies referred to in the First Schedule to these regulations shall be deemed to be an authorised licensed access client (including in relation to matters concerning that member's clients or customers) but

~~(a)~~ only in a matter of a kind which falls generally within the professional expertise of the members of the relevant body; ~~and~~.

~~(b) not for the purpose of briefing counsel to appear in or exercise any right of audience before the Judicial Committee of the House of Lords the Privy Council the Supreme Court the Crown Court a County Court or the Employment Appeals Tribunal.~~

8. Notwithstanding paragraphs 2, 3 and 4 of these regulations any of the following shall be deemed to be an authorised licensed access client:

(a) an arbitrator, (including for these purposes an adjudicator under the Housing Grants Construction and Regeneration Act 1996) **(as amended)**, but only when instructing ~~counsel~~ **a barrister** for the purpose of advising on any point of law, practice or procedure arising in or connected with an arbitration in which ~~he has~~ **they have** been or may be appointed; **and**

(b) any person who has been appointed to one of the offices of Ombudsman referred to in the Second Schedule to these regulations, but only when instructing

~~counsel~~ a barrister for the purpose of advising on any point of law, practice or procedure arising in the course of the performance of ~~his~~ their duties.

9. Nothing in paragraphs 7 and 8 of these regulations shall prevent:

(a) any person to whom paragraph 7 or paragraph 8 applies making an application in accordance with paragraph 2 of these regulations (in which event paragraphs 3, 4, 5 and 6 of these regulations shall apply to such application and to any Licence issued pursuant to such application);

(b) the Bar Standards Board exercising in relation to any person to whom paragraph 7 or paragraph 8 applies the powers conferred by paragraphs 5(b), 5(c) and 5(d) of these regulations (in which event paragraph 6 of these regulations shall apply).

## **THE FIRST SCHEDULE**

### **Part I - Accountants and taxation advisers**

1. The Association of Authorised Public Accountants
2. Association of Taxation Technicians
3. The Association of Chartered Certified Accountants
4. The Chartered Institute of Management Accountants
5. Institute of Chartered Accountants in England and Wales
6. ~~The Institute of Chartered Accountants in Ireland~~ Chartered Accountants Ireland
7. Institute of Chartered Accountants ~~in~~ of Scotland
8. The Chartered Institute of Taxation
9. The Institute of Financial Accountants
10. ~~The Institute of Indirect Taxation~~

### **Part II - Insolvency practitioners**

1. Insolvency Practitioners Association

### **Part III - Architects surveyors and town planners**

~~2. The Architects Registration Council of the UK~~ **1. Architects Registration Board**

~~3. The Architects and Surveyors Institute~~

~~4. 2. Association of Consultant Architects~~

~~5. 3. The Royal Institute of British Architects~~

~~6. 4. The Royal Institution of Chartered Surveyors~~

~~7. 5. The Royal Town Planning Institute~~

**Part IV - Engineers**

1. The Institution of Chemical Engineers

2. The **Chartered** Institution of Civil Engineering Surveyors

3. The Institution of Civil Engineers

4. The Institution of Engineering and Technology

5. Institution of Mechanical Engineers

6. The Institution of Structural Engineers

**Part V - Valuers**

~~1. The Incorporated Society of Valuers & Auctioneers~~

**Part VI - Actuaries**

~~2. 1. The Institute and Faculty of Actuaries~~

~~3. Institute of Actuaries~~

**Part VII - Chartered secretaries and administrators**

1. The Institute of Chartered Secretaries and Administrators: **The Governance Institute**

**Part VIII - Insurers**

~~2. 1. The Association of Average Adjusters~~

~~3. 2. The Chartered Institute of Loss Adjusters~~

~~4. 3. The Chartered Insurance Institute~~

## THE SECOND SCHEDULE

1. ~~Parliamentary Commissioner for Administration~~ The Parliamentary and Health Service Ombudsman
2. ~~Commissioner for Local Administration (England)~~ The Commission for Local Administration
3. ~~Commissioner for Local Administration (Wales)~~ Public Services Ombudsman for Wales
4. ~~Health Service Commissioner~~
5. ~~Banking Ombudsman~~ 4. The Financial Ombudsman Service
6. ~~Building Society Ombudsman~~
7. ~~Insurance Ombudsman Bureau~~
8. ~~The Personal Investment Authority Ombudsman Bureau Ltd~~
9. 5. The Legal ~~Services~~ Ombudsman

## Annex E: About the BSB

### About the BSB and what we do

1. The Bar Standards Board is the regulator of barristers in England and Wales. We are also responsible for setting the education and training requirements for those who wish to practise as barristers in England and Wales.
2. We are responsible for the [BSB Handbook](#), which sets out how barristers must work once they are qualified. We monitor how well barristers are meeting our practising requirements.
3. If they breach the BSB Handbook, we can take disciplinary action against them. Through our activity, we protect the public interest and consumers, and help uphold the rule of law and the proper administration of justice. You can find out more about us on our [website](#).

### Strategic context and our approach as a regulator

1. Along with other legal services regulators, such as the Solicitors Regulation Authority<sup>20</sup> (SRA) and CILEx Regulation<sup>21</sup>, our regulatory objectives are:
  - protecting and promoting the public interest;
  - supporting the constitutional principle of the rule of law;
  - improving access to justice;
  - protecting and promoting the interests of consumers;
  - promoting competition in the provision of legal services;
  - encouraging an independent, strong, diverse and effective legal profession;
  - increasing public understanding of citizens' legal rights and duties; and
  - promoting and maintaining adherence to the professional principles.

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<sup>20</sup> The body responsible for regulating solicitors.

<sup>21</sup> The body responsible for regulating legal executives.

2. Last year, we published our [Strategic Plan for 2016-2019](#). This Plan, and the accompanying annual business plans which support it, set out our strategic aims for ensuring we are best placed to respond to our regulatory objectives. These are:

- regulating in the public interest;
- supporting barristers and those we regulate to face the future; and
- ensuring a strong and sustainable regulator.

3. We are a risk and evidence-based regulator. This means that our approach must focus on identifying potential risks which could prevent us from meeting our regulatory objectives. We use evidence to prioritise the risks that we focus upon, and then review our effectiveness in achieving the desired outcomes to inform future adjustments to our regulatory approach.

## Annex F: Other recommendations of the Public and Licensed Access Review Report

1. The other recommendations in the [Public and Licensed Access Review Report](#) are not directly relevant to this consultation, which is limited to changes to the Public and Licensed Access Rules. However, respondents to the consultation may be interested in the other recommendations in the report to understand the wider context of the Public and Licensed Access review.
2. We will seek to address many of the other recommendations as part of our response to the CMA's [review of the legal services sector](#). Its report identified issues relating to (for example) transparency of fees and the existing means of seeking and reflecting on client feedback. The BSB will be working with the other frontline legal regulators to publish a detailed collective response to the CMA's recommendations. We will also be publishing an action plan of how we will be taking its recommendations forward individually.
3. The Public and Licensed Access Review Report also assessed how well the Public Access training regime prepares barristers for Public Access work and what, if anything, should be added or removed from the training course so that all Public Access barristers are well prepared to undertake Public Access work. The report made a recommendation in respect of this.
4. The other recommendations in the report are as follows:

### *Guidance for Barristers, Clerks and Lay Clients*

5. The BSB should review its [Public Access Guidance for Barristers and Clerks](#), amend as necessary and then test the guidance to ensure it is fit for purpose. It should then be published and promoted through a variety of channels.
6. The BSB should also revisit the updated [Public Access Guidance for Lay Clients](#) in light of its now larger evidence-base and the evidence which has emerged from the CMA's report, amend as necessary and then test the guidance to ensure it remains

fit for purpose. In addition, the BSB should explore whether to make provision of the guidance to lay clients mandatory for barristers. This could usefully ensure that all clients have the same basic level of understanding about Public Access, reduce the amount of information which needs to be included in client care letters and reduce the need for frequent communication between barristers and clients.

7. N.B. If the LSB approves the rule changes which are the subject of this consultation, we will update the Public Access Guidance for Barristers, Clerks and Lay Clients to the extent necessary. The Public Access Guidance will then be revisited in light of the evidence which has emerged from the CMA's report, and amended again as necessary.

#### Guidance on Conducting Litigation

8. The BSB should review its position on which tasks constitute conducting litigation, draft standalone Guidance on Conducting Litigation and then test the guidance to ensure it is fit for purpose. It should then be tested and promoted through a variety of channels.

#### Model Client Care Letters

9. The BSB should review its [Public Access Model Client Care Letters](#) in light of its evidence-base, amend as necessary and then test the letters to ensure they are fit for purpose. Making provision of the guidance to lay clients mandatory for barristers could also reduce the amount of information which needs to be included in client care letters and therefore, reduce the length of the Public Access Model Client Care Letters.
10. In reviewing its Public Access Model Client Care Letters, the BSB should also draw on the best practice it has identified in terms of providing clarity and transparency on fees, and managing clients' expectations. This should help clients to understand how the fees they are charged are calculated, what is required of them and what sort of contact with barristers they can expect. In light of the evidence which has emerged from the CMA's report, as part of our response to its recommendations we will also

be considering rules that would promote greater transparency in costs before clients have engaged a barrister.

11. N.B. If the LSB approves the rule changes which are the subject of this consultation, we will update the Public Access Model Client Care Letters to the extent necessary. The Public Access Model Client Care Letters will then be revisited in light of the evidence which has emerged from the CMA's report, and amended again as necessary.

#### *Training for Clerks and Administrators*

12. The BSB should encourage Public Access clerks and administrators to attend relevant training courses as a matter of good practice. We should also explore how best to promote the training which is available (in a way which is consistent with our regulatory role).

#### *Public Access Training*

13. The BSB should undertake further assessment of how well the current Public Access training providers are meeting the required outcomes, and how well the providers are delivering training in the areas which barristers have identified for improvement. These assessments should be used to produce a revised set of required outcomes, which may not differ substantially from the current outcomes, but may lead to the training placing more emphasis on certain areas (including those which barristers have identified for improvement). It is also recommended that the revised outcomes align a) with the BSB's [Professional Statement](#), which describes the knowledge, skills and attributes that all barristers should have on 'day one' of practice, and b) with the BSB's [Future Bar Training](#) programme more widely. This seeks to make education and training for the Bar more consistent, innovative and flexible, while also removing unnecessary barriers.