

BAR  
STANDARDS  
BOARD

REGULATING BARRISTERS

# Public Access Rules

Review and amendments  
to rule 2(i) and rule 3(1)

Consultation Paper

November 2011

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STANDARDS  
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amendments to rule 2(i) and rule 3(1)  
Consultation Paper**

**1 December 2011**

**This consultation will close at 5pm on 9 March 2012**

# Public Access Rules – review of rule 2(i) and rule 3(1)

## Consultation Paper

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## Executive Summary

1. The public access scheme was first established in 2004 and allows a barrister to be instructed directly by a lay client without the need for a solicitor. In July 2011 the Bar Standards Board (“BSB”) published a “mini” consultation paper seeking views on the possibility of relaxing rule 3(1) of the Public Access Rules to enable a client to have the discretion to use a public access barrister even if they are eligible for public funding. Having considered the responses to this mini-consultation, the Standards Committee and the Board have provisionally decided that removing rule 3(1) is desirable and is justified in the public interest. Barristers are not able to contract directly with the Legal Services Commission, however, it is possible that this position may change in the future so removing rule 3(1) will help to future proof the code. It is provisionally proposed that a new requirement should be introduced requiring barristers, before accepting public access instructions, 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. The reasoning behind these provisional decisions is set out in Section 2.
2. In addition to reviewing rule 3(1), the BSB has carried out a more general review of the public access rules, the public access guidance and the model client care letters. The BSB made a commitment to carry out a review of the public access rules when changes to the rules were approved by the LSB in March 2010. This review also forms part of the BSB’s wider work in relation to the move from prescriptive rules to more outcomes focused regulation. Following this review and having carefully deliberated on the issues, the BSB considers that it would be in the public interest to relax rule 2, which currently prohibits barristers with under 3 years’ practising experience from accepting public access instructions. It is proposed that this prohibition should be relaxed to enable barristers who have completed pupillage to undertake public access work. Part 3 of this consultation paper explains the issues around the three year rule, proposes a rule change and seeks views from stakeholders.
3. The amendments to the guidance and the model client care letters are set out in Annexes 4-9 and the proposed rule changes are set out below:

2. Before accepting any public access instructions from or on behalf of a lay client who has not also instructed a solicitor or other professional client, a barrister must :-

(i) Be properly qualified by having been issued with a full practising certificate~~having more than 3 years’ practising experience~~, by having undertaken and satisfactorily completed the appropriate training, and by registering with the Bar Council as a Public Access practitioner; and

(ii) 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 lay client to instruct a solicitor or other professional client.

(iii) 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.

3. A barrister may not accept direct instructions from or on behalf of a lay client:in or in connection with any matter or proceedings in which, in all the circumstances, it would be in the interests of the client or in the interests of justice for the client to instruct a solicitor or professional client.

- (1) ~~In or in connection with any matter or proceedings in which it is likely that the lay client would be eligible for public funding."~~  
(2) ~~in or in connection with any matter or proceedings in which, in all the circumstances, it would be in the interests of the client or in the interests of justice for the client to instruct a solicitor or professional client.~~

6. A barrister who accepts public access instructions must forthwith notify his lay client in writing, and in clear and readily understandable terms, of:

- (b) the fact that in performing his work the barrister will be subject to the requirements of the Code of Conduct and, in particular, paragraphs 401(b), 603(a) ~~and~~ 608;

## Part 1 – Introduction and Background

### Introduction and Current Position

4. The public access scheme was first established in 2004 and allows a barrister to be instructed directly by a lay client without the need for a solicitor. In order to take on public access work a barrister must have more than three years' practising experience, must be properly trained and must have registered with the Bar Council as a public access practitioner.
5. Rule 2 of the Public Access Rules Provides:
  2. *Before accepting any public access instructions from or on behalf of a lay client who has not also instructed a solicitor or other professional client, a barrister must :-*
    - (i) *Be properly qualified by having more than 3 years' practising experience, by having undertaken and satisfactorily completed the appropriate training, and by registering with the Bar Council as a Public Access practitioner; and*
    - (ii) *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 lay client to instruct a solicitor or other professional client.*
6. Rule 3(1) of the Public Access Rules provides:

*“A barrister may not accept direct instructions from or on behalf of a lay client:*

  - (1) *In or in connection with any matter or proceedings in which it is likely that the lay client would be eligible for public funding.”*
7. In July 2011 the Bar Standards Board (“BSB”) published a “mini” consultation paper seeking views on the possibility of relaxing rule 3(1) of the Public Access Rules to enable a client to have the discretion to use a public access barrister even if they are eligible for public funding. A client is eligible for public funding even if he or she indicates an intention not to seek legal aid funding.
8. The BSB received 40 responses from a variety of stakeholders before the consultation closed on 12 August 2011. The responses were analysed and a report was submitted to the Standards Committee of the BSB for consideration. A summary of responses is included in Part 2.
9. Having considered the report the Standards Committee and the Board have provisionally determined that an amendment to rule 3(1) is desirable and justified in the public interest. The reasoning behind this provisional decision is set out in Part 2. The purpose of this consultation is to seek views on the proposals and the associated rule changes.
10. The review of this particular rule forms part of the BSB's wider work in relation to the move from prescriptive rules to more outcomes focused regulation. Whilst the review was prompted in part by representations from barristers, a number of barristers informed us that their clients were unhappy with the current prohibition because it limits client choice and is therefore detrimental to access to justice. In addition, it has been suggested that the current prohibition is detrimental to competition in the legal services market.

11. In addition to the work on rule 3(1), it was suggested that the Standards Committee should also consider a discrete amendment to rule 2(i) of the Public Access Rules. Amongst other things, rule 2(i) currently prohibits barristers with under 3 years' practising experience from accepting public access instructions.
12. Having carefully deliberated on the issues, the Standards Committee and the Board also considers that it would be in the public interest to relax the three year rule. Part 3 of this consultation paper therefore explains the issues around the three year rule, proposes a rule change and seeks views from stakeholders.
13. When the Legal Services Board approved the amendments to the Public Access rules in 2010, the BSB committed to conduct a further review of the public access rules in 18 months time. Since then, the BSB has been actively monitoring and analysing complaints data, complaints and further information about public access work will be collected via the next Chambers Monitoring Programme in the near future.
14. This general review of the public access work has also included a review of the public access guidance documents and the model client care letters.

## Background

15. At the time the Public Access Rules were first introduced (in 2004) there was a natural inclination to proceed gradually with their implementation. It heralded the first time in the history of the Bar that barristers could be instructed directly by the public without the involvement of a solicitor, and there was a level of uncertainty as to whether clients would understand the limitations of barristers' work. Understandably, it was felt that the new scheme should be approached carefully.
16. The three year rule was introduced to offer clients an additional layer of protection at a time when public access was in its infancy. The justification for the rule is understandable in that context. Much has changed since 2004; not least the introduction of the Legal Services Act 2007 and the Legal Services Board ("LSB") as oversight regulator. In addition, the critical importance of the scheme is underlined by the proposed cuts to legal aid. Perhaps not surprisingly, over time, more and more barristers have undertaken public access training and now offer their services direct to the public.
17. To date, 4143 barristers have completed the public access training course. However, it should be noted that not all barristers who complete the course may be actively carrying out public access work. A breakdown of the figure on a yearly basis is shown below:

	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>
Male	279	187	107	235	167	228	853	840
Female	65	44	29	69	60	74	363	543
<b>Total</b>	<b>344</b>	<b>231</b>	<b>136</b>	<b>304</b>	<b>227</b>	<b>302</b>	<b>1216</b>	<b>1383</b>

18. Whilst the number of barristers completing the Public Access Training Course has increased, complaints about barristers carrying out Public Access Work have decreased. The BSB received 33 complaints about public access barristers from 2007 and 2011. However, it is important to note that complaints about inadequate professional service are no longer dealt with the BSB and have been dealt with by the Legal Ombudsman since 6<sup>th</sup> October 2010. The table below illustrates the number of complaints received per year:

<b>Year</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>
<b>Number of Complaints received</b>	8	6	13	4	2

19. The complaints system records the *aspects* of the complaint, i.e. the general nature of the complaint and, once the complaint has continued on to disciplinary conduct, the *aspects* become specific *charges* against the barrister. 32 charges arose from the 33 complaints received. 10 of the charges were for Inadequate Professional Service (“IPS”) matters and 22 were categorized as misconduct. The 22 charges were made in respect of seven barristers. One charge (acting in a manner likely to bring the profession into disrepute) was dismissed. The other 21 charges were proved. The ten IPS charges were committed by seven barristers. Seven charges were proved and three dismissed.

20. As the scheme has grown, so too has experience of and familiarity with the scheme – for both the profession and its regulator. A review of the Public Access Rules was undertaken in 2009 to look at its effectiveness and the possibility of expanding the scheme. A copy of the full report can be viewed on the Bar Standards Board website: <http://www.barstandardsboard.org.uk/standardsandguidance/PublicAccess/>

21. Following the review of the operation of the Public Access Rules in 2009, the BSB proposed revisions to the way in which barristers can work under the Rules and decided to extend the areas of practice where public access is permissible. The overarching conclusion of the review was that the scheme had worked well and should indeed be expanded. Accordingly the existing prohibitions on undertaking family, criminal and immigration work were removed. The three year rule was maintained, together with a prohibition on accepting instructions where the client was likely to be eligible for public funding. The main changes arising from the review that were approved by the LSB on 31<sup>st</sup> March 2010 can be summarised as follows:

- The range of work available under the scheme was widened to include family, criminal and immigration work. Publicly funded work continued to be unavailable under the Public Access scheme, and this limited the extent of the new work available to barristers.
- The rules were amended to permit barristers to engage in correspondence between the parties as per the decision in the case of Agassi. This distinguishes case management-type correspondence from the conduct of litigation, although the prohibition on the conduct of litigation will remain.
- The guidance for barristers was enlarged to include information on money laundering and the keeping of records.
- The Public Access Rules at Annex F2 of the Bar Code of Conduct were modified to reflect these changes, along with the addition of a minor enabling amendment at 401(b) of the Code.



22. When rule 3(1) was introduced in 2010, the BSB considered that there were real regulatory concerns which justified the restriction. In particular, the BSB were concerned about the possibility of clients subsequently complaining that they had not fully understood after a first meeting with their barrister the consequences and ramifications of not seeking legal aid. There was no suggestion made to the BSB at the time that there was likely to be any real demand from the Bar for work prohibited by Rule 3(1) and the prohibition was regarded as proportionate. However, the BSB has recently received a number of letters complaining that Rule 3(1) is unduly restricted and this prompted the mini-consultation mentioned in paragraph 4 above.

## How to Respond

23. A list of those to whom this consultation paper is being sent is attached at **Annex 1**.
24. This list is not meant to be exclusive. Responses are welcomed from anyone who has evidence or views about the questions raised in this paper.
25. It would be helpful if responses could be as full as possible with detailed reasons given for your comments.
26. The BSB will summarise the responses received and will publish responses on its website. **If you do not wish your response to be published, please make that clear when you reply to us.**
27. We would prefer to receive responses by e-mail but hard copy responses are also welcome. Responses should be sent to [paconsultation@barstandardsboard.org.uk](mailto:paconsultation@barstandardsboard.org.uk) by the closing date of **9 March 2012**. Alternatively responses can be posted to:

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

## Part 2 Rule 3(1)

### Introduction

28. On 18<sup>th</sup> July a letter from Christopher Gibson QC, the Chair of the Public Access Working Group, was circulated to all members of the Bar in the Chair's monthly e-mail. The letter was also published in the "News" section of the BSB website and a copy of the letter was sent to the BSB User Group and the Legal Services Board Consumer Panel. A copy of the letter is attached at Annex 2. The letter asked respondents to consider the following questions when responding:

- 1) Your perception of the regulatory risk referred to above and whether it justifies the existing rule;
- 2) The frequency that a situation is likely to arise (identifying also how it would arise) where a potential client is likely to be eligible for public funding but would rationally choose to pay a barrister privately under the public access scheme.
- 3) How relaxing the prohibition might further the regulatory objectives set out above, in particular, measures that the BSB should consider in order to ensure that the interests of consumers are protected and promoted and how the BSB can ensure that consumers who are eligible for public funding, but choose to instruct a barrister privately, are in a position to make an informed choice.
- 4) Whether it is necessary to amend either the rules or the accompanying guidance to enable the client to have the discretion to use a public access barrister even if and once s/he has been made aware of their possible eligibility for public funding and in a way would be in their best interests.

29. The "mini" consultation closed on 12<sup>th</sup> August. 40 responses were received and the BSB wishes to record its gratitude to all those who took time to produce reasoned responses.

30. The breakdown of the responses is as follows.

**Chambers: 8**

**Barristers: 27**

Other:

**Bar Council Committees: 2** (The Access to the Bar Committee and the Young Barristers' Committee):

**Chairman of the Bar: 1**

**Consumers: 1** (Legal Services Board Consumer Panel)

**Bar Associations: 1** (The Criminal Bar Association)

**Total: 40**

### Summary of Responses to the questions asked in the consultation letter

#### Question 1: Your perception of the regulatory risk referred to above and whether it justifies the existing rule;

31. The mini-consultation letter mentioned the risk of clients subsequently complaining that they had not fully understood after a first meeting with their barrister the consequences and ramifications of not seeking legal aid. A number of respondents considered that the key regulatory risks were that the client would not be in an informed position to decide

whether to apply for legal aid or to instruct a barrister directly and that a barrister might accept instructions when it would have been in the clients' best interests to apply for legal aid. However, the majority of respondents thought that the regulatory risk was not sufficient to justify the current prohibition and that it was important to balance regulatory risks against client choice and access to justice.

32. In addition some respondents considered the existing prohibition to be anti-competitive in that it gives solicitors an in-built competitive advantage as they are not similarly restricted. Barristers are free to accept instructions through solicitors from clients who may be eligible for public funding but have decided, for whatever reason, not to make an application. The fact that solicitors are not so tied might restrict client access to a wider source of advice, and could potentially be more costly to a client who could gain the advantage of direct access to counsel without the costs of instructing a solicitor, particularly in criminal matters. One respondent suggested that, in the present climate, the profession and its regulators should endeavour to ensure the Bar is given equal access to lay clients without lowering standards and by ensuring that proper safeguards are in place.

33. A number of responses suggested that in many cases, it is difficult for a barrister to identify or establish if the lay client is entitled to legal aid. Difficulties highlighted in the responses included the following:

- The application process for legal aid (which is based on means and prospects) can sometimes take a long time to process
- Some clients do not wish to disclose that they are on a low income and so may not be open about their means.
- Some clients may appear to be border line, others appear to be entitled but later find out, once calculations and proof has been submitted, that they are not entitled to legal aid after all. Precious preparation time may be lost in that time.
- Some respondents suggested that they find it difficult to endorse legal aid to clients because the standards provided by legal aid lawyers in a number of cases, in their experience, are poor.
- In areas such as immigration, public and family law, clients often need to access representation quickly for example weekend immigration removals and child abduction. Public funding cannot be accessed at these times and funding may have to be deferred. It may still eventually be refused.

34. A few respondents suggested that the regulatory risks identified if this prohibition was relaxed could be mitigated if the following actions were taken:

- The barrister could ensure that the client care letter sets out the full position regarding the likely availability of public funding in the client's particular circumstances, and the consequences and ramifications of deciding to pay a barrister privately and instructing them directly rather than becoming the subject of a public funding order. The client care letter could also provide the client with information about alternative sources of funding e.g. legal expenses insurance attached as an extension to a home, motor or public liability policy.
- The barrister could ensure, at the first meeting, the consequences and ramifications of not applying for legal aid are fully discussed and clearly explained to the client. The barrister could be required to keep a record that this explanation has been provided to the client (a document could be signed by the client). One respondent suggested that time should be given if necessary for the prospective client to take such documents away before making a final decision and signing. The client should

then be asked to return the signed agreement, with a witness as counter-signatory if this were to be thought necessary.

- The barrister could advise the client that he/she cannot investigate the possibility of public funding and if the client does want to explore this route they would need to approach a solicitor to investigate this possibility.

35. A number of respondents considered that a paragraph included in the existing client care letter and rule 3(2) of the public access rules already provide sufficient protection for clients. Rule 3 (2) states “A barrister may not accept direct instructions from or on behalf of a lay client; (2) In or in connection with any matter or proceedings in which, in all the circumstances, it would be in the best interests of the client or in the interests of justice for the client to instruct a solicitor or other professional client.” In addition, the client care letter states [In the case of a client who is a natural person and whose circumstances suggest that he might be within the financial scope of public funding.] “If you would like to investigate the possibility of your financial means being such as to bring you within the scope of public funding, you should contact a solicitor who undertakes work for the Legal Services Commission. This is because public funding is generally only available for work carried out for a client by a solicitor, who may in turn instruct a barrister.”

**Question 2: The frequency that a situation is likely to arise (identifying also how it would arise) where a potential client is likely to be eligible for public funding but would rationally choose to pay a barrister privately under the public access scheme.**

36. The majority of respondents thought that clients eligible for public funding were increasingly choosing to instruct barristers directly as a result of legal aid cuts. Anecdotal examples of the reasons why clients would wish to instruct a barrister directly despite their eligibility for public funding include:

- Where a client might qualify for legal aid but a friend or a relative has offered to pay the legal fees.
- Where a client has applied for legal aid but has not been happy with the work that the legal aid solicitor has carried out so has chosen to instruct a barrister directly.
- Where a client has little confidence in the provision funded by legal aid. For example a client may have sacked his/her legal aid team and vacated the public funding certificate in order to instruct privately.
- Where a client who is eligible for public funding wishes to instruct direct a barrister more senior than would be available to him/her under the publicly funded scheme, for example a QC. One respondent suggested that many defendants prefer to pay privately as they feel it gives them more choice of counsel. With the latest cuts to legal aid, fewer and fewer barristers will be willing or able to do legal aid work (and they are not obliged to as legal aid fees in crime were undeemed in 2003) so the pool of competent advocates available on legal aid might shrink.
- Where it is cheaper for a client to obtain the services of a single barrister privately rather than pay the fees of both a legal aid solicitor and a barrister. For example, the client receiving public funding might be asked to make contributions (payable in advance of the determination of the case) which would be in excess of what a barrister could and would charge if instructed under the direct access scheme.
- Where the contributions toward public funding make the Public Access scheme more cost effective for the client;
- In some cases clients are advised by solicitors not to apply for public funding as the level of contribution means that it is not cost-effective to do so whilst the case remains in the Magistrates Court. The public would find it confusing that a barrister

can be instructed by the solicitor in such circumstances, yet the client is not entitled to decline public funding and go direct to the barrister.

- Where it is difficult for a client to locate a suitable publically funded solicitor who will accept their case

37. Specific examples provided in the responses included the following:

*“One barrister in London was recently instructed by a solicitor on a publicly funded basis and the client had to contribute £60 per month on her certificate. Because the matter was not listed again for over six months and she did not really need the services of her solicitor in the interim, it was more cost effective for her to instruct counsel to attend the next hearing rather than continue to pay the contribution. The current rule prevented her from doing so.*

*Another barrister who contacted the Ethical Enquiries Helpline indicated that because he could not accept a public access instruction for a Crown Court hearing the client had said she would represent herself due to the level of public funding contribution, which was substantially more than she could afford to pay a public access barrister.”*

*“In divorce cases there are situations where the spouse of a reasonably high earner is eligible for public funding, even where there is a significant equity in property and other joint assets, due to the assets being in dispute. Such spouses frequently instruct solicitors who do not do publicly funded work, as they wish to have equality of arms with the spouse who has the means to pay the best quality solicitors. The costs are greater but they are recouped from the family assets. Solicitors are able to and frequently do instruct counsel to act in such cases”.*

*“With the extension of public access to family cases in April 2010 some divorcing parties, who earn enough to make them ineligible for public funding but not so much that they are not concerned to limit costs, are choosing to conduct the litigation themselves, in whole or in part, and instruct counsel for important hearings. The spouse who is eligible for public funding is not able to do this and therefore is denied the opportunity of limiting the costs of the litigation.”*

38. A number of respondents highlighted difficulties for clients. For example legal aid might be available for some of the preparation of the case but not for representation at the hearing itself, the lay client might not be informed of this at the outset and may find themselves in the situation where at the last minute they have to find an independent lawyer and pay privately.

39. One respondent suggested that in some cases, clients who are entitled to legal aid may not receive confirmation that funding will be provided by the LSC for several weeks. This delay in funding (and the associated delay of preparation work) may cause injustice to the consumer and ultimately harm their case.

**Question 3: How relaxing the prohibition might further the regulatory objectives set out above, in particular, measures that the BSB should consider in order to ensure that the interests of consumers are protected and promoted and how the BSB can ensure that consumers who are eligible for public funding, but choose to instruct a barrister privately, are in a position to make an informed choice.**

## Regulatory Objectives

40. The majority of respondents were of the view that the current rule does not protect and promote the interests of consumers. It was suggested that the current rule prevents a client from making an informed choice to instruct a barrister directly, if that client is eligible for legal aid.
41. A number of respondents voiced concerns that the proposed cuts to legal aid will severely restrict the future provision of legal services and consumer interests in access to justice will be reduced. It was suggested that many clients may be eligible for legal aid, but would prefer not to accept it because the contribution that they are required to make is greater than the amount charged by a public access barrister. Other clients may live in an area where few or no solicitors offer a publicly funded service. Some clients may not wish to apply for legal aid at all and prefer to have a wider choice in the type or quality of advocate they instruct than they would be allowed in the publically funded service.
42. Respondents generally agreed that relaxing the prohibition would further the regulatory objectives, in particular improving access to justice, protecting and promoting the interests of consumers, promoting competition in the provision of legal services and encouraging an independent, strong, diverse and effective legal profession.

## How can the BSB can ensure that the interests of consumers are protected and promoted

43. A number of respondents thought that the current requirements placed on public access barristers (rule 3(2) and the paragraph in the model client care letter) ensured that the public are protected when directly instructing counsel (see para 15 above).
44. Other suggestions for ensuring that the interests of consumers are protected and promoted included the following:
- It is now mandatory to send lay clients details of a Chambers' complaints policy, A BSB authored leaflet regarding funding could be sent to the client at the same time.
  - A strengthened client care letter containing more information
  - Placing barristers under a duty to inform the client of their potential eligibility for legal aid, what this would mean and that they are entitled to instruct a solicitor.
  - The BSB public access guidance should provide a pro forma written terms of instruction document and a 'steps to instruct' document which any public access barrister would be obliged to go through with the potential client and ensure that the potential client signed before any instructions could be acted upon.

## **Question 4: Whether it is necessary to amend either the rules or the accompanying guidance to enable the client to have the discretion to use a public access barrister even if and once s/he has been made aware of their possible eligibility for public funding and in a way would be in their best interests**

45. The majority of respondents thought (for reasons mentioned above) that the current prohibition in rule 3(1) should be removed and replaced with an obligation to ensure that the client is made aware of their options in relation to funding and advised to consult a solicitor if they may be eligible for public funding. Most respondents agreed that the client should be fully informed of options and in a position to make an informed choice. One respondent said *"At a time when there are vast cuts in the public sector the idea that the public should be forced to use the legal aid system at tax payers' expense when they*

*could get it cheaper themselves and at no cost to the tax payer is frankly something that would shock any right-thinking and objective observer.”*

## **Recommendations**

46. The BSB agrees that the key regulatory risks in relaxing the prohibition are that the client might not be in an informed position to decide whether to apply for legal aid or to instruct a barrister directly and that a barrister might accept instructions when it would have been in the clients' best interests to apply for legal aid. However, the BSB considers that the regulatory risks are not sufficient to outweigh the importance of the client's choice of legal representation. Relaxing the prohibition would also provide greater access to justice for clients who find themselves without access to legal aid solicitors, however, any alteration to the rule would need to be accompanied by consumer safeguards. This view is supported by the Legal Services Board Consumer Panel who made the following comments in response to the consultation letter:

*“The Panel strongly supports consumers being able to make informed choices about who will provide their legal services, and how they will access them, including whether to instruct barristers directly. However, the fundamental prerequisite is that consumers have access to, and understand, the relevant information prior to making any decision.”*

47. The current model client care letter mentions public funding and states (in the case of a client who is a natural person and whose circumstances suggest that he might be within the financial scope of public funding): *“If you would like to investigate the possibility of your financial means being such as to bring you within the scope of public funding, you should contact a solicitor who undertakes work for the Legal Services Commission. This is because public funding is generally only available for work carried out for a client by a solicitor, who may in turn instruct a barrister.”*

48. In March 2010 the BSB issued detailed guidance on the types of work that a barrister could accept under the public access scheme. The guidance stated (at para 56):

*“Barristers are unlikely to be able to conduct a means assessment to establish whether a client will qualify for public funding. Nor are barristers at present able to apply to the Legal Services Commission for public funding on behalf of a client. Therefore, when approached by a person whose circumstances are not such as to make it obvious that he will not be eligible for public funding, the barrister should advise the client that he cannot investigate the possibility of public funding and should advise the client to approach a solicitor to investigate this possibility.”*

49. In addition, the Bar Council public access training providers consistently teach that counsel should not give advice on public funding eligibility and that clients should go to a solicitor or Citizens Advice Bureau to properly assess their eligibility. This is in line with the current client care letter and the current Public Access Guidance for Barristers.

50. The current rule requires barristers, who have no experience of assessing eligibility for public funding, to make a judgment as to whether or not the client is likely to be eligible for public funding before accepting instructions. It does not cater for scenarios where the client is aware that they are eligible for public funding but still wish to pay privately. A client is “eligible” for public funding even if he or she indicates an intention not to seek legal aid funding.



51. The BSB considers that relaxing the prohibition in 3(1) would further the following regulatory objectives:

Improving Access to Justice

52. Relaxing the prohibition would improve access to justice by increasing the number and choice of advocates for consumers. For example some consumers may live in areas where few, if any, solicitors offer a publicly funded service. The current prohibition appears to limit the client's free choice of legal representative.

Protecting and promoting the interests of consumers

53. Relaxing the prohibition will protect and promote the interests of consumers by giving them more choice in relation to who can represent them. It is in the public interest to afford all clients the greatest possible choice of legal representation.

Promoting competition in the provision of legal services

54. Relaxing the prohibition will promote competition in the provision of legal services among barristers and also between barristers and solicitors.

Encouraging an independent, strong, diverse and effective legal profession

55. Relaxing the prohibition will help to encourage an independent, strong, diverse and effective legal profession because public access barristers will be able to obtain access to work they would otherwise not get (providing it is in the clients best interests for them to accept instructions) and this might raise the standards of advocacy generally.

56. The BSB has carefully considered the responses to the mini consultation and provisionally concluded that an amendment to the code is preferable to an amendment to the guidance. The current rule is clear and an exception to the rule is not obvious. Adding an exception to the guidance could cause confusion for both barristers and clients. Rule 3(1) expressly states:

*“A barrister may not accept direct instructions from or on behalf of a lay client:*

*(1) In or in connection with any matter or proceedings in which it is likely that the lay client would be eligible for public funding.”*

**Proposed Rule change**

57. The responses to the consultation clearly highlight that removal of the prohibition or an exception to the prohibition would have advantages for both consumers and practitioners. However, any amendment to the rule must ensure that consumers are in a position to make an informed decision about whether to apply for legal aid or proceed with public access. It is essential that all clients clearly understand the implications of choosing public access and the likely costs which they will incur by not accessing public funds. The BSB has taken a provisional view that rule 3(1) should be removed entirely. Barristers are not currently permitted to contract directly with the Legal Services Commission but this position may change in the future. Removing the rule will help to future proof the code if the LSC decides in the future that it will contract directly with the Bar. In addition it is proposed that a new rule is introduced to ensure that consumers are

in a position to make an informed decision about whether to apply for legal aid or proceed with public access. The proposed amendments are as follows:

2. Before accepting any public access instructions from or on behalf of a lay client who has not also instructed a solicitor or other professional client, a barrister must :-

(i) Be properly qualified ~~by having more than 3 years' practising experience~~<sup>1</sup>, by having undertaken and satisfactorily completed the appropriate training, and by registering with the Bar Council as a Public Access practitioner; and

(ii) 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 lay client to instruct a solicitor or other professional client.

(iii) 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.

3. A barrister may not accept direct instructions from or on behalf of a lay client: in or in connection with any matter or proceedings in which, in all the circumstances, it would be in the interests of the client or in the interests of justice for the client to instruct a solicitor or professional client.

~~(1) In or in connection with any matter or proceedings in which it is likely that the lay client would be eligible for public funding."~~

~~(2) in or in connection with any matter or proceedings in which, in all the circumstances, it would be in the interests of the client or in the interests of justice for the client to instruct a solicitor or professional client.~~

***Q1 Our provisional view is that the prohibition in rule 3(1) should be relaxed. However, we would be interested to receive views from anyone who did not have a chance to respond to the previous mini-consultation. Do you agree that rule 3(1) should be deleted?***

***Q2 Do you agree with the proposed amendments to rules 2 and 3?***

### **Proposed amendments to the model client care letters**

58. Before accepting instructions (for example at the initial meeting with the client) barristers should discuss with the client how they will pay. The discussion should cover whether public funding may be available to the client, whether the client has any insurance policies that might cover the fees, and whether the fees may be paid by someone else such as a trade union. If a client is eligible for public funding but has chosen to instruct a barrister directly the BSB recommends that the client care letter should explain the situation in a clear and understandable fashion. The barrister should obtain written consent from the client that they understand that legal aid might be available but the client would prefer to instruct a barrister directly. The guidance and model client care letters have been updated to reflect this, see Annexes 4-6 for amendments to the guidance and Annexes 5-7 for amendments to the model client care letters.

***Q3 Are any further safeguards (in addition to the amendments to the model client care letter and the guidance) required to protect the public?***

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<sup>1</sup> It is proposed that this part of the rule is relaxed, see Section 3 below.

## Part 3 Review of Rule 2 – The three year rule

### Introduction and Background

59. Rule 2 of the Public Access rules currently provides:

*2. Before accepting any public access instructions from or on behalf of a lay client who has not also instructed a solicitor or other professional client, a barrister must :-*

*(i) Be properly qualified by having more than 3 years' practising experience, by having undertaken and satisfactorily completed the appropriate training, and by registering with the Bar Council as a Public Access practitioner; and*

*(ii) 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 lay client to instruct a solicitor or other professional client.*

60. Having carefully deliberated on the issues, the Standards Committee and the Board considers that it would be in the public interest to relax the three year rule.

### Public protection safeguards

61. In proposing to remove the three year rule, the BSB is keen to ensure that there are adequate public protection measures in place to safeguard the public and the wider administration of justice.

62. Having carefully considered the issue, the BSB holds the view that there are already adequate safeguards in other areas of the Code that, combined with appropriate guidance and training, can properly manage any potential risks to the public or the administration of justice.

63. In particular, the BSB relies on the following existing provisions of the Code. Rule 603(a) and (h) of the Code states:

*603. A barrister must not accept any instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister will be professionally embarrassed:*

*(a) if he lacks sufficient experience or competence to handle the matter;*

*(h) if the barrister is instructed by or on behalf of a lay client who has not also instructed a solicitor or other professional client, and if the barrister is satisfied that it is in the interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client.*

64. The above rules apply to all barristers. It's certainly true that, from time to time, barristers with over three years' practising experience, who are public access accredited, will come across work which is beyond their experience or competency. Of course, the Code places a strict obligation on these barristers to refuse the instructions. The BSB is aware

of no evidence to suggest that barristers under three years' experience are unable to make a similar judgment.

65. To clarify the rule, the BSB proposes to amend published guidance so that it is clear rule 603(a) applies not only to legal and procedural competency, but also to a barrister's ability to competently manage clients (particularly vulnerable clients).

66. In addition, rule 302 provides:

*302. A barrister has an overriding duty to the Court to act with independence in the interests of justice: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.*

67. A barrister's overriding duty is to the Court and to assist in the proper administration of justice. In the adversarial system the proper administration of justice relies heavily on the professional and competent conduct of advocates. A barrister would therefore be in breach of their duty to the court if they undertook work that they were not competent to handle.

68. In addition, rule 303(a) stipulates:

*303. A barrister:*

*(a) must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including any colleague, professional client or other intermediary or another barrister, the barrister's employer or any Authorised Body of which the barrister may be an owner or manager);*

69. Aside from a barrister's duty to the Court, the next most important duty is to act in the best interests of the client. Barristers must promote and protect the client's best interests without regard to his own interests. All barristers, including those with less than three years' experience, understand and, in the vast majority of cases, abide by this duty. A young barrister wishing to undertake public access work is bound by this duty and will have to carefully consider if it is in the client's best interests before accepting instructions.

70. Finally, rule 4 in the Public Access Rules provides:

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

*(a) inform the client of his view; and*

*(b) withdraw from the case in accordance with the provisions of paragraph 608(a) of the Code unless the client instructs a solicitor or other professional client to act in the case.*

71. The above rule reinforces other rules in the Code and ensures that public access barristers continue to review what is in the best interests of the client.
72. Aside from the existing Code provisions, the BSB is of the view that the training and experience acquired by young barristers (particularly the final 6 months of practising pupillage) properly qualifies them to undertake straightforward public access work. Any barrister wishing to undertake public access work will, as a minimum, have completed the Bar Professional Training Course, been assessed by their chambers to be a high quality candidate (in order to be offered a pupillage), thereafter will have completed at least a twelve month pupillage, and will have completed the Public Access Training Course.
73. Whilst there are a number of different course providers, generally speaking the Public Access Training course is virtually entirely dedicated to client care considerations. In particular, course attendees are required to cover topics that include; managing client expectations (particularly around what barristers are and are not able to do), circumstances where a barrister may have to withdraw, fee negotiations, document retention and management, client care letters, managing the administrative burden clients may put on barristers, money laundering and proceeds of crime.
74. As well as the above the course also covers case studies helping barristers to deal with difficult clients and what to do in ethically challenging situations i.e. where a client wants the barrister to conduct litigation.

***Q4 Do you agree that there are adequate public protection safeguards in the existing Code and training requirements?***

***Q5 What further measures could be taken to protect the public?***

***Q6 Do you agree that the public access guidance for barristers and clerks should be amended to make it clear that rule 603(a) is not restricted to legal and procedural knowledge only, but also includes the ability to competently manage clients (particularly vulnerable clients who may have mental health or language difficulties)? See Annexes 4 and 5.***

### **Supervision**

75. At present a barrister accepting a public access instruction is not subject to supervision. Therefore the responsibility of ensuring that instructions are only accepted in appropriate cases lies with the individual.
76. The BSB has considered the possibility that young barristers wishing to undertake public access instructions could somehow be directly supervised by more experienced members in Chambers or in another place of work. Having considered the issue the BSB is of the view that direct supervision of public access work is impractical and does not add any significant additional protections to those which are already in place.

77. Rule 203.1 of the Code already requires that a barrister of less than three years call must make his principal place of practice a chambers or office where there is a “qualified person” available to offer guidance if required.
78. A “qualified person” is defined by rule 203.3 as someone who has been entitled to practise, and has practised, as a barrister or other authorised person for 6 of the last 8 years. For the two previous years the practice has to have been their primary occupation and they have to have a right of audience before every Court.
79. The BSB considers that this rule already ensures young barristers have qualified professionals to offer help and assistance, should the need arise.
80. In addition to the supervision rules contained in the Code, there is, in the BSB’s view, an important practical control which offers additional public protection safeguards. Although it will be possible for a client to contact a barrister directly, the BSB envisages that the majority of public accesses cases will be referred to a barrister through the clerks’ room. The clerks will act as a filter or an adviser, assisting the client to select an appropriate public access barrister according to the client’s wishes, needs and the complexity of the case. Clerks are not likely to risk the reputation of Chambers by referring a case to an unsuitable barrister.

**Q7 Do you agree that there are adequate supervision requirements already in the Code?**

**Q8 What further supervision requirements could be adopted?**

#### **Complaints data**

81. To better inform the position, the BSB has undertaken an analysis of the complaints data involving public access barristers. Please see the background section above for details of complaints data together with the number of public access barristers registered with the BSB at the relevant time.
82. The data clearly shows that complaints arising out of public access work are very low and, in the BSB’s view, do not give rise to any public or consumer protection issues. The BSB has analysed this data further to determine if there is any relationship between the number of complaints received and length of call. The length of call has been measured for each of the 7 barristers who were charged with a misconduct offence and for those charged with Inadequate Professional Service offences. There does not appear to be any correlation between the length of time since date of call and the propensity to commit a misconduct offence. This is shown in the table below:

*Length of Call for Barristers charged with misconduct*

<b>Barrister</b>	<b>Length of time called*</b>	<b>Offence(s)</b>
1	24 years	<ul style="list-style-type: none"> <li>• Acting outside competence or time available</li> <li>• Failing to inform client they can't complete work w/in</li> <li>• General</li> </ul>
2	30 years	<ul style="list-style-type: none"> <li>• General</li> <li>• Accepting instructions when professional embarrassed</li> <li>• Failing to act courteously/competently or wasting court time</li> </ul>

		<ul style="list-style-type: none"> <li>• Failing to report promptly bankruptcy proceedings</li> <li>• Failing to comply with a sentence of a tribunal</li> </ul>
3	7 years	<ul style="list-style-type: none"> <li>• General</li> </ul>
4	16 years	<ul style="list-style-type: none"> <li>• Failure to comply with other provision of the Code</li> </ul>
5	31 years	<ul style="list-style-type: none"> <li>• Acting uninstructed</li> <li>• Undertaking work inappropriate to self-employed barrister</li> <li>• Acting outside competence or time available</li> </ul>
6	9 years	<ul style="list-style-type: none"> <li>• Undertaking work inappropriate to self-employed barrister</li> <li>• Acting uninstructed</li> <li>• Being dishonest or otherwise discreditable</li> <li>• Acting in a manner likely to bring profession into disrepute</li> <li>• Undertaking work inappropriate to self-employed barrister</li> </ul>
7	32 years	<ul style="list-style-type: none"> <li>• Failure to comply with other provisions of the Code</li> </ul>

\* Please note that although a barrister may be of a substantial length of call at the time the complaint was opened, it does not necessarily mean that the barrister has been actively practising for that length of time.

83. Of the four barristers who were charged with IPS, the length of call ranged from between seven years and 31 years.

84. Importantly there is no evidence whatsoever to suggest younger members of the Bar who are currently able to undertake public access work (i.e. 4-7 years call) are over represented in the data.

***Q9 Do you agree that there is nothing in the complaints data that raises concerns about relaxing the rule?***

#### **Type of work to be undertaken**

85. To better understand the position at a practical level, the BSB recognises that it may be beneficial for stakeholders to have some idea of the type of work the young Bar is proposing to undertake if the three year rule is relaxed.

86. Of course, young barristers cover the whole spectrum of work at the Bar. It is therefore impossible to exhaustively cover every example. Listed below are the main areas of work the BSB considers would be available to public access barristers with less than three years practising experience. It is apparent from the examples that the type of work envisaged would be straightforward and relatively simple cases.

#### **Criminal**

When the BSB reviewed the Public Access Rules in 2009, one of the reasons given for permitting public access in privately paying criminal work was as follows:

*In straightforward criminal matters (the example most commonly given was that of the guilty plea in the Magistrates Court to a minor road traffic offence, or to some other minor statutory offence) where the facts were straightforward*

*and the penalty could only realistically be a modest fine, there is no obvious principled argument why a member of the public should not be permitted to instruct a barrister directly if he or she wished to be represented.*

87. In the criminal sphere, the majority of public access work consists of magistrates' court cases, many of which are guilty pleas or concern minor motoring offences. This work is common amongst pupils and young tenants. Indeed a pupil barrister would be expected to undertake this type of work from the beginning of their practising 6 months and pupils and young tenants often have to appear at court without a professional client being there so they do have experience of one-to-one contact with clients. The reality is that many young barristers with less than three years' experience are in fact more familiar with the workings of the magistrates' courts than their senior colleagues, who do not appear regularly in the lower courts.

**Q10 Do you agree that it would be in the public interest to allow barristers with less than three years experience to act via public access in criminal cases?**

### **Family**

88. Following the 2009 review, the rules were relaxed to permit public access work in privately funded family cases. The BSB felt that it would save time for litigants, be beneficial to the administration of justice, that it would significantly help access to legal representation and that it would help barristers to compete with solicitors. Arguably the Government's plans to reduce legal aid, and remove areas of family law from scope, make the above justifications even more acute.

89. Listed below are three examples where the BSB believes it would be possible for a barrister with less than three years' practising experience to act via public access.

90. Ancillary relief example:

A wife and husband jointly own the former matrimonial home. The property was transferred into joint names during the marriage. The marriage was nine years in length. It produced three children. Initially the wife owned the property alone, it being the product of a previous divorce settlement. During the marriage the husband made contributions to the mortgage. The property has doubled in value during the marriage.

The husband does not want to spend huge legal fees; he just wants to know what is reasonable. They are planning to have a 'round table' where his wife will be legally represented. Her legal fees are being paid for by her brother, who has some money.

The husband wants a short advice as cheaply as possible on what the bracket of reasonable outcomes might be on the following: should he have any money now, if not how would he get his money in future, at what time should he get his money and how much will his share be.

He has limited means and simply wants an opinion rather than representation. He has both Forms E and is capable of writing a short description of what he wants. He telephones a family law chambers who say they do public access work on their website. He is quoted an amount for a practitioner of 5 years' practice who is public access qualified. The rate is too high and he asks if there is someone more junior available.



91. Private Law Children example:

A mother of a six year old girl has separated from the father after years of an emotionally abusive relationship, albeit that there was no physical violence. She takes her daughter when she leaves. Soon after leaving, the father issues an application for contact.

She goes to see a solicitor but is not able to qualify for legal aid as she has a job which pays her £16,000 per annum and she cannot afford to pay a contribution to her legal fees.

Mediation is set up, but is unsuccessful. The matter is referred to court. She attends two hearings as litigant in person, which she finds daunting and confusing. She is rushed into agreeing certain contact times, in the court waiting room, that she knows are not workable but is too scared to tell the judge she is not happy when she goes into court.

When the contact does not take place at the 'agreed times' the father issues an application to enforce and commit the mother to prison. She is terrified and doesn't know what to do. She wants someone to represent her at Court and not to have to deal with the father directly. She calls public access chambers but the fees for attendance by barristers 5 years qualified are unaffordable. The senior clerk suggests that a more junior member would be cheaper but s/he cannot be directly instructed.

92. Public Law Child example:

The maternal aunt and uncle of a child subject to care proceedings agree to care for the child during the proceedings. They initially agree to be short term foster carers but, after a one-off funded (by the Local Authority) consultation with a solicitor they wish to be Special Guardians.

After this decision, there emerges a conflict with the Local Authority which supports the child being adopted. There is a factually disputed incident which means the Local Authority support the child's placement in the short term (i.e. during the proceedings) but not the long term. The aunt and uncle are joined as parties to the proceedings as a result. There is a Final Hearing booked for three days in three weeks' time.

They cannot afford to pay a solicitor and barrister to represent them privately at this hearing and they do not qualify for legal aid. They telephone a public access chambers and are told that the only two barristers with time have been in practice for less than three years and are not able to accept public access instructions.

93. The above offers some insight into cases which may be suitable for young barrister acting via public access. The BSB is aware that some litigants are not necessarily able to afford a 'legal team'; they might simply need guidance on the merits of their claim or assistance at a particular court hearing. As the rules currently stand, such people are only permitted to directly instruct counsel of over three years' practice, which may be cost prohibitive.

**Q11 Do you agree that it is in the public interest for barristers with less than three years experience to accept public access instructions in cases similar to those described above?**

#### **Civil**

94. Civil cases encompass a very wide range of work, including commercial and chancery, and different considerations may apply in each area. Because of the breadth of civil work available, it is impractical to try and provide concrete case examples here.
95. However, the BSB is of the view that, having considered the complexity of the case, there is no reason why barristers with less than three years' experience should be prevented from providing written advice or appearing (particularly at fast track hearings) in straightforward civil disputes.
96. Published BSB guidance is that a barrister should not normally agree to perform any drafting or advocacy role in civil litigation unless they are fully satisfied that the lay client is able, and has the resources and facilities, to perform the activities which a solicitor would normally perform.

**Q12 Do you agree that barristers with less than three years' practising experience should be able to conduct straightforward civil matters (particularly fast track trials and basic advice)?**

#### **The regulatory objectives**

97. The BSB appreciates that any rule amendment needs to be measured against the eight regulatory objectives set out in the LSA 2007. For the reasons outlined below the BSB considers that the regulatory objectives can be best served by relaxing the three year rule.

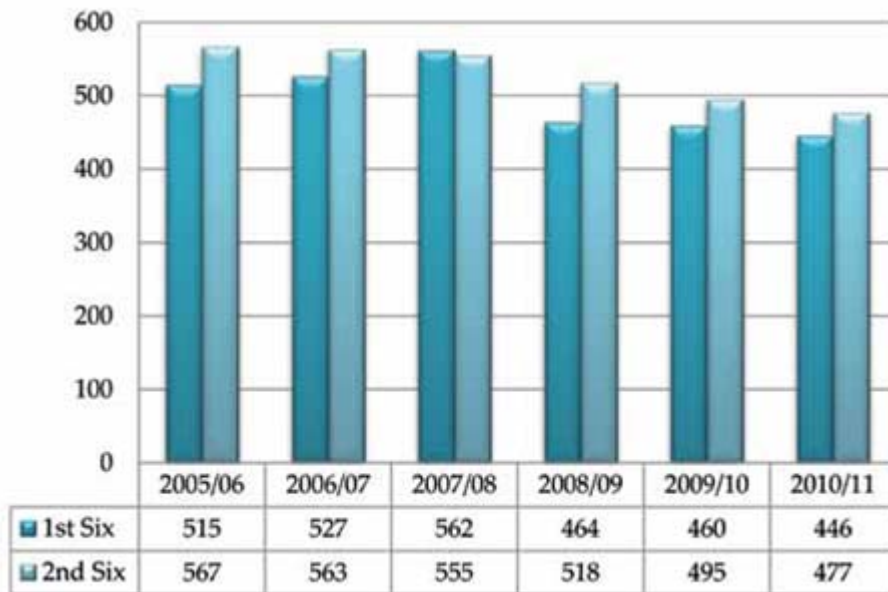
*(1) In this Act a reference to "the regulatory objectives" is a reference to the objectives of—*

- (a) protecting and promoting the public interest;*
- (b) supporting the constitutional principle of the rule of law;*
- (c) improving access to justice;*
- (d) protecting and promoting the interests of consumers;*
- (e) promoting competition in the provision of services within subsection (2);*
- (f) encouraging an independent, strong, diverse and effective legal profession;*
- (g) increasing public understanding of the citizen's legal rights and duties;*
- (h) promoting and maintaining adherence to the professional principles.*

98. **Protecting and promoting the public interest** - In the view of the BSB removing the three year rule furthers this objective by expanding consumer choice, creating greater competition among the public access Bar and increasing the supply of high quality and competitively priced advocacy services.
99. **Supporting the constitutional principle of the rule of law** - This objective in practical terms entails helping to uphold the rule of law which is done most readily by increasing access to justice. The simpler, cheaper and easier it is to access a lawyer, the easier it

is for the ordinary private citizen to assert their rights to ensure that the law applies to them as equally as it does to corporate and wealthy clients.

100. ***Improving access to justice*** - Access to justice is central to the public interest. The Legal Aid, Sentencing and Punishment of Offenders Bill is due to come into force in early 2012 and will disqualify large numbers of people from legal aid. Many, if not most, of those who have lost the entitlement to legal aid come from low socio-economic backgrounds, have difficulties with debt, are unemployed or face losing employment, are vulnerable, or have suffered as a result of medical negligence.
101. The purpose of allowing lay clients to instruct barristers directly is to remove unnecessary barriers to the provision of barristers' services and to save costs by cutting out superfluous intermediaries. The BSB recognises that removing the three year rule will not solve this problem, but it is certainly a measure that will assist.
102. Unless marginalised sections of the public are able to access comparatively cheap legal advice it may be that a significant proportion is denied access to justice. The BSB believes that this proposal will increase access to justice by increasing the supply of relatively cheap legal advice and representation.
103. ***Protecting and promoting the interests of consumers*** - As well as having access to an economic and plentiful supply of specialist legal advice, it is in the interests of consumers to have as wide a pool as possible from which to select their representation. This proposal enhances consumer choice and competition on fees.
104. The BSB does not consider that this proposal puts the interests of consumers at risk since barristers will be trained and will be required only to take on those cases which they are qualified to conduct. Provided consumers are properly informed about all of the relevant facts, they should be allowed to make their own choices.
105. ***Promoting competition in the provision of services*** - In the view of the BSB the proposal plainly furthers this objective. It would create greater competition between lawyers and amongst the public access Bar. It would also increase competition on fees.
106. One reason the Public Access Scheme was initially extended to privately paying family, crime and immigration, was to help barristers compete with solicitors. The need to compete is arguably most acute at the lowest end of the young Bar and a relaxation would assist in this regard.
107. ***Encouraging an independent, strong, diverse and effective legal profession*** – The young Bar, and in particular the young publicly funded Bar, is under well publicised strain following successive government cuts. The amount of work available to the young Bar is diminishing and as a result the potential for young talent to drift away from the Bar is enhanced.
108. The below table shows graphically the decline in pupillages over the last five years.



109. The diversity of the Bar is dependent on it being a profession available to people without private incomes. The fear is that only those from privileged backgrounds will be financially able to survive the early years at the Bar. If this fear is realised the result will be a young Bar, and a profession and judiciary, which is less diverse.
110. A less representative Bar will lead to public estrangement from the legal profession and disenchantment with the rule of law and will undermine progress towards every one of the regulatory objectives. The BSB believes that removing the three year rule will assist with the financial burdens faced by those entering the profession and help to lower some of the barriers to entry to the profession.
111. **Increasing public understanding of the citizen's legal rights and duties** - Rights are only meaningful if they can be enforced and that is the function of the courts. If the consumer cannot have access to an affordable junior lawyer in order to argue their case before the courts then this objective will be undermined.
112. **Promoting and maintaining adherence to the professional principles** - No barrister, regardless of their experience, will be permitted to carry out public access work without having undertaken proper training. In addition, all public access barristers will be required to comply with the Public Access Rules and the Code of Conduct as a whole.
113. The BSB is not aware of any evidence to suggest young barristers have difficulty in adhering to their professional principles. They can be trusted to only act where competent and where it is in the client's best interests.

**Q13 Do you agree with the analysis of the regulatory objectives?**

**Q14 Are there any additional points which are likely to enhance or adversely affect the regulatory objectives?**

## Proposed Rule Changes

114. The BSB proposes that the requirement in rule 2(i) that a barrister must have more than three years' practising experience should be removed. Rule 2(i) would therefore read as follows:

*(i) Be properly qualified ~~by having been issued with a full practising certificate, by having more than 3 years' practising experience~~, by having undertaken and satisfactorily completed the appropriate training, and by registering with the Bar Council as a Public Access practitioner; and*

115. Removing the prohibition would thus enable any barrister with a full practising certificate to accept public access instructions, provided they are properly qualified and provided they comply with other duties under the Code. The BSB has considered whether second six pupils should be permitted to accept public access instructions but our provisional view is that this would create regulatory risks. However we would be interested to hear whether consultees take a different view.

**Q15 Do you agree that the three years practising experience requirement should be removed?**

**Q16 Should second six pupils be permitted to accept public access instructions?**

116. The BSB recognises that another important public safeguard will be to ensure that there is, as far as possible, information symmetry between the client and the barrister.

117. Ensuring the client is aware of the particular barrister's experience, and any limitations that he may face in representing the client, is of significant importance. The BSB is anxious to ensure that clients have as much information as possible so they may make an informed decision about whether to instruct the barrister.

118. To assist in achieving information symmetry the BSB relies on the existing rule 6 under the Public Access Rules, which provides:

*6. A barrister who accepts public access instructions must forthwith notify his lay client in writing, and in clear and readily understandable terms, of:*

*(a) the work which the barrister has agreed to perform;*

*(b) the fact that in performing his work the barrister will be subject to the requirements of the Code of Conduct and, in particular, paragraphs 401(b) and 608;*

*(c) the fact that the barrister cannot be expected to perform the functions of a solicitor or other authorised litigator and in particular to fulfill limitation obligations, disclosure obligations and other obligations arising out of or related to the conduct of litigation;*

*(d) the fact that the barrister is a sole practitioner, is not a member of a firm and does not take on any arranging role;*

*(e) in any case where the barrister has been instructed by an intermediary:*

*(i) the fact that the barrister is independent of and has no liability for the intermediary; and*

*(ii) the fact that the intermediary is the agent of the lay client and not the agent of the barrister;*

*(f) the fact that the barrister may be prevented from completing the work by reason of his professional duties or conflicting professional obligations, and what the client can expect of the barrister in such a situation;*

*(g) the fees which the barrister proposes to charge for that work, or the basis on which his fee will be calculated;*

*(h) the barrister's contact arrangements; and*

*(i) the barristers' complaints procedure and that of the General Council of the Bar.*

119. The BSB believes that the requirement to notify all of the above in writing goes some way to ensuring that the client is in a well informed position and understands the practical limitations the barrister faces. To strengthen the above, the BSB proposes to include a reference to rule 603 as an additional requirement under rule 6 and to ensure the letter is written in terms the client can understand:

*6. A barrister who accepts public access instructions must forthwith notify his lay client in writing, and ~~in clear and readily understandable terms~~ in terms the client understands, of:*

*(b) the fact that in performing his work the barrister will be subject to the requirements of the Code of Conduct and, in particular, paragraphs 401(b), 603(a) ~~and~~ 608;*

70. Rule 603(a) provides:

*603. A barrister must not accept any instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister will be professionally embarrassed:*

*(a) if he lacks sufficient experience or competence to handle the matter;*

**Q17 Do you agree that the above will assist in obtaining information symmetry between the barrister and client? Are there any other steps that could be taken to better inform the client's position?**

## **Proposed Amendments to the guidance and model client care letters**

120. In addition to the code amendments, the guidance and the model client care letters have been reviewed and updated to include the revised rules. A summary of all of the amendments to the public access rules is attached at Annex 3 and the proposed amendments to the guidance and the model client care letters are attached at annexes 4-9.

***Q18 Do you agree with the proposed amendments to the guidance and the model client care letters?***

## **Part 4 - Equality and Diversity**

121. The Bar Standards Board is committed to promoting equality and diversity throughout the Bar and within our own organisation. We endeavour to ensure that our processes and procedures are fair, objective, transparent and free from unlawful discrimination. We are also keen to identify ways in which access to and progression within the Bar can be widened such that everyone who has the ability to succeed is able to do so regardless of race, gender, disability, religion or belief, sexual orientation, age or socioeconomic background. An initial equality impact assessment has been conducted, please see Annex 10.

122. In addition to the questions we have asked you to respond to, we would welcome contributions on any areas of the consultation paper which you consider might have implications for equality. For example, are any of the proposals likely to have a greater positive or negative effect on some groups compared to others? We would particularly welcome feedback on whether there are likely to be any negative consequences for any group arising from the proposed changes and how these could be mitigated, or if there are any opportunities to promote greater equality and diversity in the areas mentioned above.

***Q19 Are any of the proposals likely to have a greater positive or negative effect on some groups compared to other? If so, how could this be mitigated?***

***Q20 Are there any negative impacts that have not been identified in the equality impact assessment?***

## Summary of Questions

- Q1 Our provisional view is that the prohibition in rule 3(1) should be relaxed. However, we would be interested to receive views from anyone who did not have a chance to respond to the previous mini-consultation. Do you agree that rule 3(1) should be deleted?
- Q2 Do you agree with the proposed amendments to rules 2 and 3?
- Q3 Are any further safeguards (in addition to the amendments to the model client care letter and the guidance) required to protect the public?
- Q4 Do you agree that there are adequate public protection safeguards in the existing Code and training requirements?
- Q5 What further measures could be taken to protect the public?
- Q6 Do you agree that the public access guidance for barristers and clerks should be amended to make it clear that rule 603(a) is not restricted to legal and procedural knowledge only, but also includes the ability to competently manage clients (particularly vulnerable clients who may have mental health or language difficulties)? See Annexes 4 and 5.
- Q7 Do you agree that there are adequate supervision requirements already in the Code?
- Q8 What further supervision requirements could be adopted?
- Q9 Do you agree that there is nothing in the complaints data that raises concerns about relaxing the rule?
- Q10 Do you agree that it would be in the public interest to allow barristers with less than three years experience to act via public access in criminal cases?
- Q11 Do you agree that it is in the public interest for barristers with less than three years experience to accept public access instructions in cases similar to those described above?
- Q12 Do you agree that barristers with less than three years' practising experience should be able to conduct straightforward civil matters (particularly fast track trials and basic advice)?
- Q13 Do you agree with the analysis of the regulatory objectives?
- Q14 Are there any additional points which are likely to enhance or adversely affect the regulatory objectives?
- Q15 Do you agree that the three years practising experience requirement should be removed?
- Q16 Should second six pupils be permitted to accept public access instructions?
- Q17 Do you agree that the above will assist in obtaining information symmetry between the barrister and client? Are there any other steps that could be taken to better inform the client's position?



Q18 Do you agree with the proposed amendments to the guidance and the model client care letters?

Q19 Are any of the proposals likely to have a greater positive or negative effect on some groups compared to other? If so, how could this be mitigated?

Q20 Are there any negative impacts that have not been identified in the provisional equality impact assessment?

## **Annex 1 – List of Consultees**

### **LIST OF CONSULTTEES**

#### **BAR STANDARDS BOARD COMMITTEES**

BSB User Group  
Complaints Committee  
Education and Training Committee  
Qualifications Committee  
Quality Assurance Committee

#### **BAR ORGANISATIONS**

Bar Council  
Access to the Bar Committee  
Training for the Bar Committee  
Professional Practice Committee  
Remuneration Committee  
Legal Services Committee  
Employed Barristers' Committee  
Young Barristers' Committee  
International Relations Committee  
European Committee  
Equality and Diversity Committee  
Public Access Bar Association

Circuits  
All Specialist Bar Associations  
Heads of Chambers  
Inns of Court

#### **OTHER BODIES**

Legal Ombudsman  
Law Society  
Solicitors Regulation Authority  
Institute of Barristers Clerks  
Legal Practice Management Association  
Institute of Legal Executives  
Council for Licensed Conveyancers  
Chartered Institute of Patent Agents  
Institute of Trade Mark Attorneys  
Institute of Paralegals  
Intellectual Property Regulation Board  
Ministry of Justice  
Attorney General  
Solicitor General  
Crown Prosecution Service  
Legal Services Commission  
Office of Fair Trading  
Which?

Consumer Focus  
National Association of Citizens Advice Bureaux  
Lord Chief Justice  
Master of the Rolls  
President of the Queen's Bench Division  
President of the Family Division  
Chancellor of the High Court

Unlock  
Refugee Action  
MIND  
Refugee Council  
Rethink – mental health Charity

## Annex 2 – Mini – Consultation / Invitation to comment letter

The logo for the Bar Standards Board, featuring the words "BAR STANDARDS BOARD" in white, serif, all-caps font centered within a solid black rectangular box.

REGULATING BARRISTERS

20 July 2011

Dear Colleague,

### **The Public Access Scheme**

1. You will be aware of the situation that has arisen recently to the effect that a number of barristers qualified to accept instructions from members of the public under the public access scheme were under the impression that they were permitted to accept instructions from a client who might be eligible for public funding but decided not to take advantage of it – as long as that client understood that entitlement and decided, nevertheless, to instruct the barrister directly.
2. Rule 3(1) of the Public Access Rules provides:

*“A barrister may not accept direct instructions from or on behalf of a lay client:  
(2) In or in connection with any matter or proceedings in which it is likely that the lay client would be eligible for public funding.”*
3. A client is “eligible” for public funding even if he or she indicates an intention not to seek legal aid funding. The prohibition in this rule is unqualified, and the guidance given by the Bar Council, and the teaching given by course providers now reflects this.
4. It has become apparent that the Bar Council, the Criminal Bar Association and a number of criminal practitioners, who at first understood the interpretation of the rule enabled them to accept instructions as outlined in paragraph 1 above, believe very strongly that this rule should be changed. It is said that in the criminal field in particular there are clients who are entitled to the benefit of public funding but for whom it would be a rational decision not to seek it, but to instruct a barrister privately under the public access scheme.
5. Typically, in the representations so far received it has been argued that there are occasions where the person will be entitled to legal aid but, if it is granted, he may have to make a contribution under the rules that will exceed what he would have had to pay a barrister alone under the public access scheme.
6. The Public Access Rules were amended with effect from 31 March 2010 to permit barristers for the first time to accept instructions from lay clients in criminal and family cases. The change to the public access rules came after the BSB had consulted widely on extending the circumstances in which public access work could be accepted by barristers. In response to that consultation, the Family Bar Association were not in favour of extending public access work to family cases at all, and the Criminal Bar Association did not request that the scheme be widened to include cases where public funding was likely to be available. The BSB’s widening of public access was a liberalising measure

which went further in permitting public access work than most respondents had proposed. Clearly, the environment in which barristers practise has changed in the intervening years, for the publicly funded bar more than most. The areas of practice which the Review Team contemplated in 2009/10 as being affected by the changes to scheme have clearly broadened over that time.

7. The BSB considered that there were real regulatory concerns which justified the restriction under Rule 3(1). In particular, the BSB were concerned about the possibility of clients subsequently complaining that they had not fully understood after a first meeting with their barrister the consequences and ramifications of not seeking legal aid.<sup>2</sup> There was no suggestion made to the BSB at the time that there was likely to be any real demand from the Bar to be allowed to undertake work prohibited by Rule 3(1).
8. The BSB has decided, in the light of what now appears to be demand for barristers to carry out such work on public access, to carry out an urgent review of Rule 3(1), and it is carrying out a limited consultation exercise in a short period of time.
9. It is hoped that the Working Group considering the matter will be able to consider the responses and report to the BSB by mid September 2011.
10. We would be grateful if you have representations to make on the prohibition contained in Rule 3(1) if you could send them to Clare Vicary [cvicary@barstandardsboard.org.uk](mailto:cvicary@barstandardsboard.org.uk) by no later than close of business on Friday 12<sup>th</sup> August. Alternatively, you can post responses to:

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

11. It is appreciated that this is a short period of time and includes a holiday period. But we believe that the urgency that has been expressed by practitioners means that this is an appropriate way to conduct this consultation and we would hope that you will be able to respond.
12. In considering whether the prohibition in rule 3(1) should be relaxed, the Bar Standards Board is bound to have regard to the regulatory objectives set out in section 1 of the Legal Services Act 2007:
  - protecting and promoting the public interest;
  - supporting the constitutional principle of the rule of law;
  - improving access to justice;
  - protecting and promoting the interests of consumers;
  - promoting competition in the provision of services (by authorised persons<sup>2</sup>);
  - encouraging an independent, strong, diverse and effective legal profession;
  - increasing public understanding of the citizen's legal rights and duties;
  - promoting and maintaining adherence to the professional principles.
13. It has been suggested that the absolute prohibition of the rule is illogical in light of the Regulatory Objectives as it takes discretion away from the client i.e. counsel simply

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<sup>2</sup> The client care letter states [In the case of a client who is a natural person and whose circumstances suggest that he might be within the financial scope of public funding.] "If you would like to investigate the possibility of your financial means being such as to bring you within the scope of public funding, you should contact a solicitor who undertakes work for the Legal Services Commission. This is because public funding is generally only available for work carried out for a client by a solicitor, who may in turn instruct a barrister."

cannot accept instructions if the client is likely to get public funding, even if the client wants to instruct counsel. This seems at odds with issues of client choice and access to justice. However, all of the regulatory objectives must be considered and the BSB must ensure any amendments to the code of conduct offer consumers sufficient protection and put consumers in the position to make informed choices about quality, access and value.

14. We welcome any response in any form, but we would find it helpful if in any response you would address:
- i) Your perception of the regulatory risk referred to above and whether it justifies the existing rule;
  - ii) The frequency that a situation is likely to arise (identifying also how it would arise) where a potential client is likely to be eligible for public funding but would rationally choose to pay a barrister privately under the public access scheme.
  - iii) How relaxing the prohibition might further the regulatory objectives set out above, in particular, measures that the BSB should consider in order to ensure that the interests of consumers are protected and promoted and how the BSB can ensure that consumers who are eligible for public funding, but choose to instruct a barrister privately, are in a position to make an informed choice.
  - iv) Whether it is necessary to amend either the rules or the accompanying guidance to enable the client to have the discretion to use a public access barrister even if and once s/he has been made aware of their possible eligibility for public funding and in a way would be in their best interests
15. The BSB is committed to promoting equality and diversity throughout the Bar and within its own organisation. It endeavours to ensure that its processes and procedures are fair, objective, transparent and free from unlawful discrimination. It is also keen to identify ways in which access to and progression within the Bar can be widened such that everyone who has the ability to succeed is able to do so regardless of race, gender, disability, religion or belief, sexual orientation, age or socio-economic background. In addition to the questions outlined above, the BSB would welcome comments on whether relaxing the prohibition in rule 3(1) might have implications for equality. For example, would relaxing the prohibition have a greater positive or negative effect on some groups compared to others? The BSB would particularly welcome feedback on whether there are likely to be any negative consequences for any group arising from an amendment to rule 3(1) and how these could be mitigated, or if there are opportunities to promote greater equality and diversity.

Please feel free to circulate this letter to colleagues and other interested parties.

Yours Sincerely

**Christopher Gibson QC Chair of the Standards Committee Public Access Working Group**

## Annex 3 – Summary of amendments to the public access rules

2. Before accepting any public access instructions from or on behalf of a lay client who has not also instructed a solicitor or other professional client, a barrister must :-

(i) Be properly qualified by having been issued with a full practising certificate~~having more than 3 years' practising experience~~, by having undertaken and satisfactorily completed the appropriate training, and by registering with the Bar Council as a Public Access practitioner; and

(ii) 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 lay client to instruct a solicitor or other professional client.

(iii) 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.

3. A barrister may not accept direct instructions from or on behalf of a lay client:in or in connection with any matter or proceedings in which, in all the circumstances, it would be in the interests of the client or in the interests of justice for the client to instruct a solicitor or professional client.

~~(1) In or in connection with any matter or proceedings in which it is likely that the lay client would be eligible for public funding."~~

~~(2) in or in connection with any matter or proceedings in which, in all the circumstances, it would be in the interests of the client or in the interests of justice for the client to instruct a solicitor or professional client.~~

6. A barrister who accepts public access instructions must forthwith notify his lay client in writing, and in clear and readily understandable terms, of:

(b) the fact that in performing his work the barrister will be subject to the requirements of the Code of Conduct and, in particular, paragraphs 401(b), 603(a) ~~and~~ 608;

## Annex 4 –Proposed amendments to the Public Access Guidance for Barristers

(The full text of the guidance document can be found at <http://www.barstandardsboard.org.uk/standardsandguidance/PublicAccess/>)

### Types of work suitable for public access

49. Paragraph 603 of the Code of Conduct provides as follows:

*603 A barrister must not accept any instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister will be professionally embarrassed:*

*(a) if he lacks sufficient experience or competence to handle the matter;*

*(g) if the barrister is instructed by or on behalf of a lay client who has not also instructed a solicitor or other professional client, and if the barrister is satisfied that it is in the interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client.*

*(h) if the barrister is instructed by or on behalf of a lay client who has not also instructed a solicitor or other professional client, and if the barrister is satisfied that it is in the interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client.*

50. It has previously been the case that barristers have been prevented from accepting almost all types of family, criminal and immigration work under the public access scheme. Following the BSB's review of the working of the scheme, these areas are now available to public access barristers. The BSB feels that widening the range of available work is in the public interest and does not in itself pose any identifiable risks to the public or profession. However, in every case involving public access by a lay client the barrister is still required, at every stage, to keep in mind whether or not the case is suitable for public access.

51. Rule 2 of the Public Access Rules provides:

*2 Before accepting any public access instructions from or on behalf of a lay client who has not also instructed a solicitor or other professional client, a barrister must 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 lay client to instruct a solicitor or other professional client.*

52. It is not possible to define with precision the exact types of work which will be suitable for public access work. However, the general characteristics of such work can readily be identified. The two most important factors will be:

(1) the nature of the task which the lay client wishes to have performed;



- (2) the ability of the lay client to understand the requirements of his or her case and to arrange for him or herself the performance of the services which would normally be performed by a solicitor. It should be noted that 603(a) is not restricted to legal and procedural knowledge, it also includes the ability to competently manage clients (particularly vulnerable clients who may have mental health or language difficulties). The selection of cases suitable for public access work by a barrister will involve a judgment on the interplay of those two factors.
53. The paradigm case of a suitable piece of work is the giving of an opinion on an area of law within a barrister's special competence. Even here, however, not every instruction to advise will be appropriate for public access: for many lay clients may lack the ability to assemble the information required by the barrister. Often commercial clients will be better placed to assemble such information than private individuals: businesses generally have the ability to collate documents from files and understand the factors likely to be relevant to the impact of the law in their fields of activity. But even commercial clients will not always be able to prepare all the information necessary for an advice, especially if statements from witnesses are necessary.
54. The experience of licensed professional access has shown that a well-informed non-lawyer client can successfully instruct a barrister in such hearings as a planning inquiry or a hearing before tax commissioners. Public access will enable barristers to be instructed for advocacy services before inquiries and tribunals by informed clients outside the professions and bodies who can currently instruct the Bar direct. But the greater the role which contested evidence of fact will play in any such hearing, the less likely it is that it will be suitable for a barrister to accept advocacy instructions on public access, even from a well resourced commercial client.
55. A barrister should not normally agree to perform any drafting or advocacy role in civil litigation unless fully satisfied that the lay client is able and has the resources and facilities to perform for him- or herself, after taking any requisite legal advice from the barrister, the activities which a solicitor would normally perform. For example, it will be the responsibility of the lay client to ensure that all necessary disclosure of documents is made.

56. Rule 2 (iii) of the Public Access Rules provides:

2. Before accepting any public access instructions from or on behalf of a lay client who has not also instructed a solicitor or other professional client, a barrister must :-
- (iii) 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.

576. Barristers are unlikely to be able to conduct a means assessment to establish whether a client will qualify for public funding. Nor are barristers at present able to apply to the Legal Services Commission for public funding on behalf of a client. Therefore, when approached by a person whose circumstances are not such as to make it obvious that he will not be eligible for public funding, the barrister should advise the client that he cannot investigate the possibility of public funding, and should advise the client to approach a solicitor to investigate this possibility. The barrister should also inform the client that they can visit the Direct Gov website for

further information:

<http://www.direct.gov.uk/en/Governmentcitizensandrights/GettingLegalAdvice/index.htm>”

58. It is good practice to discuss at the initial meeting with the client how they will pay and the discussion should cover whether public funding may be available to the client, whether the client has any insurance policies that might cover the fees, and whether the fees may be paid by someone else such as a trade union.

59. It is essential that all clients clearly understand the implications of choosing public access and the likely costs which they will incur by not accessing public funds. If a client is eligible for public funding but has chosen to instruct a barrister directly the client care letter should explain the situation in a clear and understandable fashion. The barrister should obtain written consent from the client that they understand that legal aid might be available but the client would prefer to instruct a barrister directly, for example a paragraph to this effect could be inserted into the model client care letter.

60. Rule 303(a) requires a barrister to protect and promote the lay client's best interests and barristers should not accept instructions where it would be in the client's best interest to obtain public funding.

## Annex 5 – Proposed amendments to the Public Access Guidance for Clerks



REGULATING BARRISTERS

### GUIDANCE FOR CLERKS REGARDING PUBLIC ACCESS RULES

~~The Public Access Working Group, has recently looked into the working and possible reform of the public access scheme. When the scheme was first put into effect in 2004, the Bar Council undertook to review its progress in 2007.~~

~~The Bar Standards Board, which now oversees the review of the scheme, has consulted twice with both clients and barristers of the public access scheme, as well as with interested bodies and the general public. This revised guidance reflects the changes made as a consequence of the review.~~

~~It will be noted that the scope of the scheme has been widened; and in particular that immigration, family and criminal work are now all permitted in certain circumstances, which was not previously the case. This document sets out in summary form the action which should be taken by a clerk or other Chambers administrator upon receiving an enquiry under the scheme other than from a solicitor.~~

~~This does not aim to be more than a general guide. Circumstances in practice will vary. For instance, it is assumed for the purpose of this document that the prospective client will already know the identity of the barrister whom he wishes to instruct, although it is realised that occasionally there may be enquiries in which the prospective client seeks the clerk's advice as to a suitable barrister. It is assumed for the purpose of this document that the prospective client will initially contact the clerks, although in practice on occasions the prospective client will telephone the barrister first.~~

~~This document does not deal with obligations under the Proceeds of Crime Act or Money Laundering Regulations. Barristers do not, and cannot, delegate their responsibilities under the Proceeds of Crime Act or the Money Laundering Regulations to their clerks. It will at all times be the responsibility of barristers to ensure compliance with any obligations which may arise.~~

~~Further guidance on the public access scheme can be obtained from the BSB's website, at <http://www.barstandardsboard.org.uk/>.~~

#### **Introduction**

The purpose of this Guidance is to explain how the licensed access and public access schemes work and to show how lay clients can use it to instruct barristers.

This document does not deal with obligations under the Proceeds of Crime Act or Money Laundering Regulations. Barristers do not, and cannot, delegate their responsibilities under the Proceeds of Crime Act or the Money Laundering Regulations to their clerks. It will at all times be the responsibility of barristers to ensure compliance with any obligations which may arise.

Further guidance on the public access scheme can be obtained from the BSB's website, at <http://www.barstandardsboard.org.uk/>.

### **What is public access?**

Members of the public may now go directly to a barrister without having to involve an instructing solicitor or other intermediary. In the past it was necessary for clients to use a solicitor or other recognised third party through whom the barrister would be instructed.

Although the barrister's role remains essentially the same, members of the public may instruct a barrister directly through the public access scheme.

~~This check list covers the two main types of work in which there is no solicitor:-~~

### **What is Licensed Access?**

In 1990 a number of professions were recognised as entitled to instruct barristers without a solicitor: this was at that time called "Direct Professional Access". Accountants and surveyors are the two professions which have made the greatest use of this arrangement. In ~~2000 the Bar Council extended~~ this arrangement has since been extended to the members of various other groups and to various individual bodies, which in each case were granted a licence ~~by the Bar Council~~ for this purpose: this was then called "BarDIRECT". All these arrangements are now called "Licensed Access".

### **Public Access**

~~Following a report from the Office of Fair Trading in 2002 the Bar Council adopted new rules which would allow any member of the public to instruct a barrister directly, whilst retaining the existing restrictions on barrister functions. In June 2004 the Secretary of State for Constitutional Affairs gave approval to this change which came into effect on 6 July 2004.~~

~~Licensed Access is, in a sense, the fast-track version of these schemes, since the clients may be expected to have a familiarity with the nature of barrister services which members of the public may not have.~~

#### **A. Initial contact and acceptance of instructions**

1. Ascertain whether the client contacting Chambers has a BSB license to instruct the Bar directly and if so what types of work the license covers ~~is entitled to exercise licensed access or not~~. For practical purposes three categories are so entitled:-

- (a) Recognised professions (formerly Direct Professional Access): a list is available
- (b) Members of organisations which have group licences (formerly BarDirect): a list is available

- (c) Individual licences (formerly BarDirect): a list is available

### If licensed access

2. If the client is exercising an individual licence, request that a copy be supplied. If the client presents himself as a member of a recognised profession or of an organisation which has a group licence, and if uncertain of client, check in appropriate professional or trade directory.
3. Place the enquiry before the intended barrister to ascertain whether the barrister considers it proper to accept the case on licensed access.
4. If the intended barrister considers it proper to accept the case on licensed access, write to client notifying that the case is accepted and the terms on which it is accepted. See requirements of Licensed Access Rules and Terms of Work. If it is wished to withhold delivery of paperwork until fee paid, set this out expressly in letter.

### If public access

5. Check whether the intended barrister

~~(a) is over 3 years standing, and~~ (a) Has a full practising certificate

~~(ab)~~ has undertaken public access training and

~~(be)~~ has notified Bar Council that he will accept public access work.

6. Place the enquiry before the intended barrister to ascertain whether the barrister considers it proper to accept the case on public access. This decision will be based on a number of factors. The areas of work permitted under the scheme have now been widened to include work in the areas of crime, family and immigration. Also, under the recent review of the public access scheme, barristers are now permitted to produce correspondence in the case. However, it should be noted that the restriction on the conduct of litigation remains. Barristers should not accept cases where there is an expectation that they would carry out litigation if they did so. It is suggested that in the event of any uncertainty you should contact the Bar Council's ethical enquiries line, on 020 7611 1307.

7. It should be noted that barristers are unlikely to be able to conduct a means assessment to establish whether a client will qualify for public funding. Nor are barristers at present able to apply to the Legal Services Commission for public funding on behalf of a client. Therefore, if a barrister is approached by a person whose circumstances are not such as to make it obvious that he will not be eligible for public funding, the barrister should advise the client that he cannot investigate the possibility of public funding and advise the client to approach a solicitor to investigate this possibility. The barrister should also inform the client that they can visit the Direct Gov website for further information: <http://www.direct.gov.uk/en/Governmentcitizensandrights/GettingLegalAdvice/index.htm>

8. It is good practice for the barrister to discuss at the initial meeting with the client how they will pay and the discussion should cover whether public funding may be available to the client, whether the client has any insurance policies that might cover the fees, and whether

the fees may be paid by someone else such as a trade union.<sup>59</sup> It is essential that all clients clearly understand the implications of choosing public access and the likely costs which they will incur by not accessing public funds. If a client is eligible for public funding but has chosen to instruct a barrister directly the client care letter should explain the situation in a clear and understandable fashion. The barrister should obtain written consent from the client that they understand that legal aid might be available but the client would prefer to instruct a barrister directly, for example a paragraph to this effect could be inserted into the model client care letter.

97. If the barrister not willing to accept the case, notify the prospective client. Remind the barrister to keep a record of the reasons for declining the work.

108. If the barrister is uncertain whether it would be proper to accept, and wishes to have a no-fee meeting with the prospective client before deciding, arrange the meeting. Write to the client to ensure that the limited purpose of the meeting is understood.

119. If the barrister is uncertain whether it would be proper to accept and wishes to be paid for having a meeting with the client and/or for reading documents before deciding, ensure that the barrister writes a client care letter to the client in respect of such preliminary work.

120. If and when the barrister decides to accept instructions, ensure that the barrister sends a client care letter. The clerk should assist the barrister to select an appropriate fee option, and to insert suitable figures. File a copy of the letter.

131. Open a case record on the Chambers computer.

142. Ensure the client countersigns and returns a copy of the client care letter. File the countersigned letter.

153. If the client is acting as an intermediary for the ultimate lay client, ensure that the barrister not only sends an appropriate client care letter to the intermediary, but also an appropriate letter to the lay client.

**B. After case accepted (both licensed access and public access)**

164. Notify the client when paperwork is done. If the fee has been agreed to be time based, notify the client what the fee has come to. Record such notification on the Chambers computer.

175. If an agreement has been made with the client that the paperwork will not be delivered until the fee is paid, ensure that fee has been received before paperwork is delivered. If the paperwork is delivered by e-mail, consider whether it should also be delivered in hard copy form.

**C. After work done (both licensed access and public access)**

186. Maintain the case record on the Chambers computer of all relevant actions and payments, as with a solicitor access case.

197. Keep in an ordered filing system copies of letters to and from the barrister regarding acceptance of instructions and fees.

2018. Remind the barrister to archive necessary papers for 7 years. This will include:

- (a) all drafts and advices prepared by the barrister,
- (b) the barrister's notes of all meetings and telephone calls,
- (c) either a list of all papers before the barrister, or copies of them,
- (d) identification documents if the barrister has considered work to be "relevant business" within the Money Laundering Regulations.

**Bar Standards Board**

**March 2010**

## **Annex 6 –Proposed amendments to the Public Access Guidance for Lay Clients**



REGULATING BARRISTERS

### **THE PUBLIC ACCESS SCHEME GUIDANCE FOR LAY CLIENT**

#### **Introduction**

The purpose of this Guide is to explain how the public access scheme works and to show how lay clients can use it to instruct barristers.

#### **What is public access?**

Members of the public may now go directly to a barrister without having to involve an instructing solicitor or other intermediary. In the past it was necessary for clients to use a solicitor or other recognised third party through whom the barrister would be instructed.

Although the barrister's role remains essentially the same, members of the public may instruct a barrister directly through the public access scheme.

#### **What are the advantages of the public access scheme?**

The main advantage of the public access scheme is that it could potentially save you money whilst giving you access to the Bar, since you would be paying for a barrister only instead of a barrister and solicitor. However, although the barrister would be able to deal with most aspects of the case, you could have to assist in some limited areas, generally with filing documents with the court. This is explained in more detail below.

#### **Is my case suitable for public access?**

Public access is available in all types of work that barristers can do, except for work funded out of legal aid. It is most suitable for reasonably straightforward cases. It is likely to be inappropriate in cases involving children. If you are not sure whether your case would be suitable for public access, you should contact an appropriate barrister (see below) of his or her clerk and seek an initial view. If the barrister considers that your case would benefit from the involvement of a solicitor, he or she will tell you so. A barrister may choose whether or not to take a public access case. The factors which he or she will take into account are discussed below.



You must be able to deal with certain administrative tasks in order to help your case along, without the help of another legal professional. For example you must be able to gather together the papers and the evidence in support of your case that the barrister will need in order to do the work that you ask him or her to do. You may also need to file documents at court and correspond with the court and other parties. If you are not sure if you will be able to assist with the various administrative tasks for whatever reason, it is worth considering if it would be better to have a solicitor assist you with your case.

As a public access client, you will be a "litigant in person" and will be treated by the court and/or the other side for most purposes as though you were acting without any legal assistance. If your case goes to court you will be the person whose name appears in the court's records, and all documents from the other parties and the court will be sent directly to you, though you can ask or arrange sometimes for the court/tribunal and the other parties to copy documents to a third party other than the barrister.

### **How do I make use of the public access scheme?**

To use the scheme, you would have to instruct a barrister yourself. Further details of how to do this are given in this guidance.

### **The public access scheme**

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

Barristers specialise in providing expert legal advice, advocacy and the drafting of documents.

The services offered by barristers are different from those offered by solicitors for two main reasons.

#### **1) First the different services offered:**

Barristers are trained as specialist advisers and advocates. This means that they become involved where expert legal advice is needed, where documents need to be drafted for their clients to use, or for advocacy (presenting a case in court or before some other tribunal or organisation).

Solicitors also give advice to and draft documents for their clients to use or may instruct a barrister to provide this service. Some solicitors also provide advocacy services to their clients, although many prefer to instruct a barrister to do this.

2) By law, barristers are not able to provide some of the services that solicitors offer. On the other hand, some solicitors do not themselves provide advocacy services. At present only a solicitor may conduct litigation and take the formal steps that are necessary to progress and action. Your barrister will advise you if he or she considers that anything you want done is something that only a solicitor can provide.

#### **Some examples of work which a barrister is allowed to do:**

a) A barrister may appear on your behalf at Court.

b) A barrister may give you legal advice, for example barristers can advise you on your legal status or rights.

c) A barrister may draft documents for you, such as a will.

d) A barrister may advise you on the formal steps which need to be taken in proceedings before a court or other organisation and draft formal documents for use in those proceedings.

e) A barrister may draft and send letters for you on his Chambers' headed paper, before your case goes to court. A barrister can assist you with drafting letters if your case goes to court but the letters will need to be sent out in your name.

f) If a witness statement from you is required in proceedings, a barrister may prepare that statement from what you tell him or her. A barrister may also help to prepare witness statements from another person based on the information which that person has provided.

g) Where a case requires an expert witness (for example, a surveyor), a barrister may advise you on the choice of a suitable expert and may draft a letter of instruction which you can then send to the expert as a letter from you on your own notepaper.

h) Barristers can negotiate on your behalf and can attend employment, police or investigative hearings where appropriate.

#### **What a barrister cannot do on your behalf:**

The following are examples of work that a barrister is not allowed to do:

a) A barrister cannot issue proceedings on your behalf or to issue other applications or to take other formal steps in court or other proceedings. You would have to send the documents to the court, although the barrister could help prepare them for you.

b) A barrister is not allowed to instruct an expert witness on your behalf.

c) A barrister is not allowed to take responsibility for the handling of clients' affairs, or to handle clients' money.

#### **Is my case suitable for public access?**

In considering whether your case is suitable for Public access, the barrister is likely to take into account

a) The nature of the work which you wish him or her to undertake

b) Your ability to deal with any aspects of the case which would normally be carried out by a solicitor that cannot be covered by a public access barrister.

Much depends on the circumstances of your case. Here are some possibilities:

a) The barrister might decide that your case is suitable for public access and that there is no need for the involvement of a solicitor. If circumstances change, the barrister may have to advise you that a solicitor will need to be instructed.

b) Although your case may become unsuitable for public access in the future, it is suitable for public access for the time being. In such a case, the barrister will inform you

i) of the work which is suitable for public access

ii) the likely point at which your case will become unsuitable for public access and

iii) that he or she will have to withdraw at that stage if you do not instruct a solicitor.

c) Your case is such that (whether because of its complexity, or because of the stage which it has reached) it is not suitable for public access and that a solicitor is required. In this situation, you should be told by the barrister why your case is not suitable and that he or she would be prepared to act for you if instructed by a solicitor. In such circumstances you can ask the barrister to recommend a suitable solicitor to you.

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

### **Is a barrister obliged to accept public access work?**

A barrister may choose whether or not to accept public access work. This choice is restricted in that it is impermissible to refuse to take on a case for specific reasons, relating to discrimination, which are set out below.

When deciding whether to accept instructions in a case, a barrister must consider whether that case is suitable for public access. If he or she decides that it is not suitable, he or she must decline the instructions. Throughout the case, the barrister remains under a continuing duty to consider whether a case remains suitable for public access, and he or she must refuse to continue to act on a public access basis if it is no longer suitable.

A barrister may not refuse to accept instructions:

a) On the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, sexual orientation, marital status, disability or political persuasion; and

b) In the case of advocacy work, on the grounds:

i) That the nature of the case is objectionable to him or her or to any section of the public; or

ii) That your conduct, opinions or beliefs are unacceptable to him or her or to any section of the public.

### **Does a barrister need special training to take public access work?**

Barristers must satisfy a number of conditions before they can accept public access work. Subject to limited exceptions, before a barrister is permitted to accept public access work he or she must have:

a) practised for a total of three years following the completion of training

b) attended a "public access" training course approved by the Bar Standards Board and

c) given certain notices which are required to be given by the Bar Code of Conduct.

## **Instructing a public access barrister**

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

It is important to instruct a barrister who specialises in the appropriate area of law for your case. If you do not know whom to instruct, there are a number of ways of finding the right barrister.

The Bar Council has a directory of public access barristers on its website, at:

<http://www.barcouncil.org.uk/about/find-a-barrister/public-access-directory/>

There are also legal directories – for example, the Bar Directory (which may be found via the Bar Council’s website), Chambers & Partners Guide to the Legal Profession, or the Legal 500. In addition, many sets of Chambers publish their own web sites which contain information about the set of Chambers as a whole, and the individual barrister members.

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

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

Try to clarify in your own mind the nature of your problem and what it is that you want the barrister to do.

Telephone the Senior Clerk or Practice Manager of the set of Chambers in which the barrister practises and tell him or her that you wish to instruct the barrister directly. He or she will tell you what to do next.

Alternatively, if the barrister practises as a sole practitioner, you should contact the barrister’s place of work. You will have to explain that you wish to instruct the barrister directly and the nature of the work which you wish the barrister to undertake for you. You may be asked to send written instructions, setting out the factual background to your case and what it is that you want the barrister to do. Alternatively, the barrister may decide that it would be appropriate in the first instance to discuss the matter with you on the telephone or at a preliminary meeting to decide on the best way forward.

### **Proof of your identity**

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

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

a) If you are acting as an individual, you may be required to produce in person your current passport or other national identity card or a new form of driving licence (with a photograph) together with a recent utility bill, bank or building society statement.

b) If you are acting on behalf of a company, you will need to produce a certified copy of the Certificate of Incorporation, the latest accounts filed at Companies House and evidence that you are authorised to act on behalf of the company.

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

### **What happens next?**

The barrister will have to decide whether your case is suitable for public access. He or she may charge you for this Preliminary work.

If your case is suitable for public access, you and the barrister will have to agree the terms on which he or she is to carry out the work. Those terms will be set out in a client care letter which will be sent to you.

If your case is not suitable for public access, the barrister will tell you so. If you wish, he or she may recommend a suitable solicitor for you to instruct.

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

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

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

### **The client care letter**

The client care letter sets out terms that will form a contract between you and the barrister. ~~records the terms of the agreement between you and the barrister.~~ It is an ~~very~~ important document and you ~~should~~must read it carefully.

It contains a description of the work to be undertaken, the basis on which you will be charged for that work, and the other terms of the agreement between you and the barrister. If you are unclear about, or disagree with any of the contents of that letter, you must raise your concerns with the barrister immediately.

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

A barrister usually charges according to their level of experience, the complexity of the case and the length of time involved in dealing with it. It is important that the cost to you, and the stage at which the fee is payable is agreed at the outset, and that the terms of the agreement are clear to both you and the barrister.

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

It is very important that you and the barrister agree from the outset the basis upon which you are to be charged for work and the time at which the fee will become payable.

Where the fee relates to a hearing, the barrister is normally entitled to the fee, whether or not the hearing goes ahead. If that is to be the case, the barrister will tell you. You may, if you wish, try to agree a different basis for payment of the fee in such a case.

In other cases (whether for a conference or for paperwork), it may be possible to fix a fee in advance for the work. However, that will not be possible in every case. Where it is not possible, you should ask for an estimate. You may be able to agree with the barrister that there should be a "ceiling" on the fee charged for a particular piece of work.

If you agree a fee in advance of the work being done, then the barrister may require that fee to be paid before carrying out the work. Where a fee is not fixed in advance and the work involves the production of paperwork (for example, the drafting of a contract), the barrister may nevertheless require you to pay for the work after he or she has completed it and before releasing it to you. If that is to be the case, the barrister should tell you at the outset.

Although conditional fee agreements (agreements under which a fee becomes payable only in the event of success in a case) are possible, it is unlikely that barristers will be willing or able to undertake public access work on a conditional fee basis, save in very rare cases.

The barrister is required to keep sufficient records to justify the fees that he or she is charging. You are entitled to ask for details to justify the fee that you are being charged.

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

If you ~~are~~could be eligible for public funding, a barrister ~~should~~has to advise you to approach a solicitor. This is because barristers cannot do legal aid work unless they have been instructed by a solicitor.

If you are not sure if you qualify for public funding and you would like to talk to someone in more detail about getting legal aid, you should contact a solicitor who does legal aid work. You can find out more information on the DirectGov website: <http://www.direct.gov.uk/en/Governmentcitizensandrights/GettingLegalAdvice/index.htm>

It is unlikely that a barrister will be able to carry out the means assessment required to establish whether you would qualify for public funding ~~and. Further, at present,~~ barristers are not able to apply to the Legal Services Commission for public funding on your behalf. If it

appears that you may qualify for public funding, therefore, a barrister ~~should~~<sup>has to</sup> advise you to approach a solicitor with a franchise from the Legal Services Commission to investigate this possibility.

If you do not qualify for public funding, you might like to consider whether you have any insurance policies that might cover your legal fees, or if the fees may be paid by someone else, for example a trade union.

If you do not wish to investigate whether you qualify for public funding, or if you qualify for public funding but would prefer to instruct a barrister directly, the barrister should ensure that you understand the implications of choosing to instruct him or her privately and the likely costs which you will incur by not accessing public funds. It is likely that the barrister will ask you to confirm in writing that you fully understand the implications of your decision, for example the model client care letter might contain a paragraph to this effect.

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

In public access cases, the barrister must stop acting for you if he or she considers that the case is no longer suitable for public access. The barrister may be able to assist if, as a consequence of no longer continuing to act for you, you will or may experience difficulties in relation to an imminent hearing.

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

a) Your barrister is under a continuing duty to consider whether your case remains a suitable case for public access. If he or she forms the view that it is not, you will be advised of this fact. If you then instruct a solicitor or other professional person able to provide instructions to the barrister, he or she may continue to act for you. If you do not, your barrister must cease to act for you.

b) If you are a party to proceedings in which a hearing is imminent, and you are likely to have difficulty in finding a solicitor in time for the hearing, your barrister should provide you with such assistance as is proper to protect your position. Although your barrister may not continue to work for you on a public access basis, he or she may be able to assist you by, for example:

i) Drafting letters for you to send, asking for an adjournment of the hearing

ii) Writing a letter to the court in support of that application, explaining that he or she has had to withdraw and, if appropriate, the reasons for it

iii) Assisting you to find solicitors.

### **Can I instruct a barrister directly when I have already instructed solicitors?**

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

litigation) where a barrister will refuse to accept your instructions unless you give him or her permission to contact and liaise with your solicitors and you also give your solicitors the necessary permission to provide information to the barrister.

### **Confidentiality and compulsory disclosure of information**

Your barrister will be under a strict professional duty to keep your affairs confidential. Legal professional privilege protects your communications with your barrister from disclosure. The only exception is that any lawyer may be required by law to disclose information to governmental or other regulatory authorities, and to do so without first obtaining your consent to such disclosure or telling you that he or she has made it.

### **Complaints**

~~I hope you will be happy with the professional services I provide. However, if you are not satisfied with the services the barrister has provided, you should first refer the matter either to the barrister or to his or her my Chambers, in line with my Chambers' complaints procedure. If you would like a copy of the Chambers complaints procedure, please ask either the barrister or the Chambers.~~

If you are not happy with ~~the barristers' my~~ reply or ~~with the my~~ Chambers' reply then you can contact the Legal Ombudsman (as long as you complain to the Legal Ombudsman within 12 months of discovering that there was a problem). The contact details are as follows:

Legal Ombudsman  
PO Box 15870,  
Birmingham  
B30 9EB

Email: [enquiries@legalombudsman.org.uk](mailto:enquiries@legalombudsman.org.uk)

Phone: 0300 555 0333

Frequently Asked Questions concerning the new Legal Ombudsman can be found on the Bar Standards Board website:

<http://www.barstandardsboard.org.uk/complaintsofprofessionalmisconduct/howtocomplainaboutabarrister/>

**Bar Standards Board  
March 2010**



## Annex 7 – Proposed amendments to the Model client care letter to the Client

### Model client care letter (no intermediary): to the client

Thank you for your [letter of ...[insert date]] [phone call on ... [insert date]].

I would be pleased to accept instructions from you on the terms set out in this letter. It is important that you understand what these terms are. These terms will form a contract between us. If you agree with the ~~se terms proposed arrangement~~, please sign the enclosed copy of this letter and return it to me ~~to record your agreement~~.

#### My terms:~~The basis on which I carry out professional work~~

1. I am the only person you are instructing and I personally will do all the work needed under this arrangement. I am a sole practitioner although I practise with other barristers from a set of Chambers (barristers' offices).

1.2. I have carefully considered the instructions and can confirm that I have sufficient experience and competence to undertake the work.

2.3. If for any reason I cannot carry out all the work you are instructing me to do, or if I want to suggest that another barrister (instead of me, or as well as me) carries out the work for you, my clerk or I may propose this. However, another barrister will not carry out work for you unless and until you have agreed to ~~this an arrangement and have instructed the other barrister~~. ~~If you feel that you would be happier with the services provided by an organisation (rather than an individual), you need to instruct a firm of solicitors.~~

3.4. If the instructions include or are likely to ~~include~~ include a brief for a specified day, add:] There may be times when my professional commitments clash. If I identify a possible clash of commitments and I am unable to work on your case (meaning that I will not be able to work on your case), I will, ~~with the help of my clerks,~~ do my best try my best to ~~do the following~~.

- (1) Warn you as soon as possible and ask you how you would prefer to continue. As a result, it would be helpful if you would give me a phone number where I ~~will~~ would always be able to contact you if you haven't already.
- (2) Suggest the name of another barrister within my Chambers (of a suitable level of seniority and expertise), who is willing to accept your case under the same terms as this agreement. You would then need to decide whether you want to instruct that barrister.
- (3) Help you find a barrister from other Chambers if there is not a suitable barrister within my Chambers, or if you do not want my Chambers to continue working on your case.
- (4) Discuss with you the costs of using another barrister.

#### The work I will carry out

4.5. The work you are instructing me to carry out is

~~5.6.~~ If subsequent work is needed on this matter, and I am available to do the extra work there will need to be another letter of agreement between us.

~~6.~~ Because I carry out all my work personally and cannot predict what other professional responsibilities I may have in the future, I cannot at this stage undertake that I shall be able to accept instructions for all subsequent work that your case may need.

### The range of work I can carry out

7. ~~I should explain to you the range of the work that barristers carry out, as well as the type of work they do not.~~ Barristers advise on the law, draft documents for clients to use, and appear on behalf of their client before courts or other organisations. Barristers do not handle client money or undertake the administrative management of a case proceeding through a court.

8. Here are some examples.

(1) I can draft letters on your behalf ~~and send them to another person.~~

(2) I can appear on your behalf to argue your case at Court.

(3) If a witness statement is needed from you, I can draft it from what you tell me. I may also be able to help finalise a witness statement from another person based on the information that person has provided.

(4) I can advise you on the need for expert evidence and on the choice of a suitable expert. However I may not instruct an expert on your behalf.

(5) I can draft formal court documents for you. However, I cannot serve court documents on other parties or file them at court on your behalf. You will need to take responsibility for serving formal court documents on other parties and filing them at court.

(6) I cannot go on the court record or provide my address to the court as the 'address for service' of documents (that is, the address which you are required to provide to the court for receipt by you of formal court documents sent by the court or other parties). You will be listed on the court record as a litigant in person. You will need to provide your own address as the 'address for service' of documents sent to you by the court and other parties.

9. As you are instructing me without a solicitor, you must be sure that:

(1) you are able to do whatever is necessary for those matters that I cannot deal with; or

(2) you have made an arrangement with another person of suitable competence and experience to provide these services for you.

### Circumstances when I may not be able to act for you

10. As a barrister, in all my professional work I must follow the Bar Code of Conduct. That code of conduct requires me to consider whether ~~As a result, if I consider that a~~

solicitor needs to be instructed in your own interests. If there comes a point at which I consider you need a solicitor or for some other professional reason, I will no longer be able to act for you without the involvement other than on the instructions of a solicitor. If I foresee that situation arising, I will give you as much notice as possible.

### Legal Aid

11. It is possible that you may be eligible for public funding or "legal aid" as it is usually referred to.
11. ~~[In the case of a client who is a natural person and whose circumstances suggest that he might be within the financial scope of public funding.] However, as a barrister I cannot do legal aid work unless I have been instructed by a solicitor. If you want to talk to someone in more detail about getting legal aid, you should contact a solicitor who does legal aid work. You can find out more information on the DirectGov website:  
<http://www.direct.gov.uk/en/Governmentcitizensandrights/GettingLegalAdvice/index.htm> If you would like to investigate the possibility of your financial means being such as to bring you within the scope of public funding, you should contact a solicitor who undertakes work for the Legal Services Commission. This is because public funding is generally only available for work carried out for a client by a solicitor, who may in turn instruct a barrister.~~
7. If you wish to be assessed for Legal Ad you can call the Community Legal Advice: 0845 345 4345 or use its online legal aid calculator:
8. <http://legalaidcalculator.justice.gov.uk/calculators/eligCalc;jsessionid=469F7212B0D9FBDD627227DF995FE1CB?execution=e1s1>
9. If you do not qualify for public funding, you might like to consider whether you have any insurance policies that might cover your legal fees, or if the fees may be paid by someone else, for example a trade union.
10. I can advise and represent you if:
- you decide that you do not wish to seek public funding
  - Make an application that is rejected
  - You consider that the level of contribution you will be required to make is too much and therefore do not take up an offer of public funding.
11. In signing these terms, you confirm that you have been informed that you may be eligible for public funding and where you can find further information. You are choosing to instruct me without the benefit of any public funding that may be available to you.

### **My availability**

12. As I carry out all my professional work personally, there may be times when I am not available to you. ~~f~~For example, if I am in court for a day or for several days in a row, ~~I~~ you are not able to contact me directly, please leave a message with my clerk. may be unavailable to other clients during that time.

### **Fees**

13. [Option 1: My fee for the advisory and drafting work described in paragraph ... will be a fixed fee of £... plus VAT. You and I agree that I will not send to you the work ~~you have instructed me to draft~~ until you have paid the fee.]

[Option 2: My fee for accepting the instruction to appear as an advocate on the occasion described in paragraph ... will be £... plus VAT. You and I agree that I will not go to the hearing unless you have paid the fee in advance. If for any reason the case takes longer than one day, I will charge an extra fee of £ ... per day plus VAT.

[Option 3: At the moment, I do not know how much work will be involved in your instructions. As a result, I cannot quote you a fixed fee at this stage. So I will charge you on a time basis at £... an hour plus VAT. I will not carry out work that will cost you more than £... plus VAT without your permission. When I have finished the paperwork you have instructed me to draft, my clerk will tell you how much the fee is. You and I agree that I will not send you the work until you have paid the fee.]

14. Under ~~these terms~~this contract, you are responsible for paying my fees.

15. If you owe me any fees and do not pay them for more than three months after I give you a fee note, interest will be payable at 2% above Barclays Bank base rate from 28 days of the date of the fee note.

## Documents

16. You and I agree that:

- (1) I am entitled to keep copies of any documents you give me for my own professional records; and
- (2) I will return all your original documents to you when I have carried out the work you have instructed me to do.

I would prefer that you give me copies of documents rather than originals. However, if this is not possible, I may make a reasonable charge to you for producing photocopies.

## General obligations

17. The information which you give me will be received in professional confidence. The only exception is that statutory and other legal requirements may mean that I have to cause me to disclose your information ~~which I have received from you~~ to governmental or other regulatory authorities ~~and to do so~~ without ~~first obtaining your consent to such disclosure and~~ without telling ~~you you that I have made the disclosure that I have made it.~~
18. This contract ~~we are making between us~~ will be governed by English law, and any dispute will be subject to the jurisdiction of the English courts.

## Complaints

19. I hope you will be happy with the professional services I provide. However, if you are not satisfied, you should first refer the matter either to me or to my Chambers in line with my Chambers' complaints procedure. If you would like a copy of the complaints

procedure, please ask me or my Chambers.

20. If you are not happy with my ~~reply~~ or my Chambers' reply then you can contact the Legal Ombudsman (as long as you make your complaint ~~complain to the Legal Ombudsman~~ within 12 months of discovering that there was a problem). The contact details are as follows:

Legal Ombudsman

PO Box 15870,

Birmingham

B30 9EB

Email: [enquiries@legalombudsman.org.uk](mailto:enquiries@legalombudsman.org.uk)

Phone: 0300 555 0333

Frequently Asked Questions concerning the new Legal Ombudsman can be found on the Bar Standards Board website:

<http://www.barstandardsboard.org.uk/complaintsofprofessionalmisconduct/howtoexplainaboutabarrister/>

## Annex 8 – Proposed amendments to the Model client care letter: to the client in an intermediary case

I have been approached by [X] on your behalf and I would be pleased to accept instructions from [X] on the terms set out in this letter. These terms will form a contract between myself and [X]. ~~am writing to tell you the terms on which I would be pleased to accept instructions from [X].~~ I am also enclosing a copy of my letter to X, in which I explain in more detail the services I am able to offer.

### ***The arrangement***

1. My contract under this arrangement will be with X. X is acting as your agent, not as my agent.
2. However, in carrying out the work under these instructions, I owe a professional duty to you. Also, the benefits that this contract gives to you may be enforced by you under the Contracts (Rights of Third Parties) Act 1999.
3. I will be receiving my instructions from and through X, so you should make sure that X is aware of any matters you want to have drawn to my attention.

### ***The range of barrister work***

4. I will personally do all the work needed under this arrangement. If subsequent work is needed on this matter, and I am available to do the extra work there will need to be another letter of agreement between X and me. ~~I cannot predict what other professional responsibilities I may have in the future so I cannot at this stage undertake that I shall be able to accept instructions for all subsequent work that your case may need.~~
5. X will provide administrative services in connection with this case. I will not correspond with any other person, instruct experts or find witnesses for you.
6. As a barrister, I must follow the Bar Code of Conduct. That code of conduct requires me to consider whether a solicitor needs to be instructed in your own interests. If there comes a point at which I consider you need a solicitor I will no longer be able to act for you without the involvement of a solicitor. If I consider that a solicitor needs to be instructed in your interests or for any other professional reason, I will no longer be able to act for you unless and until a solicitor is instructed.

### ***The work I will carry out***

7. \_\_\_\_\_ The work I am instructed to carry out is drafting ['an opinion concerning ...'].
8. I have carefully considered the instructions and can confirm that I have sufficient experience and competence to undertake this work.

7.9. \_\_\_\_\_

8. ~~If subsequent work is needed on this matter, there will have to be another letter of agreement between X and me.~~

### ***Fees***

10. X will be responsible to me for paying my fees. The enclosed letter gives details of the fees and interest I may charge.

### Legal Aid

11. It is possible that you may be eligible for public funding or “legal aid” as it is usually referred to. However, as a barrister I cannot do legal aid work unless I have been instructed by a solicitor. If you want to talk to someone in more detail about getting legal aid, you should contact a solicitor who does legal aid work. You can find out more information on the DirectGov website:  
<http://www.direct.gov.uk/en/Governmentcitizensandrights/GettingLegalAdvice/index.htm>

11. If you wish to be assessed for Legal Ad you can call the Community Legal Advice: 0845 345 4345 or use its online legal aid calculator:

12. <http://legalaidcalculator.justice.gov.uk/calculators/eligCalc.jsessionid=469F7212B0D9FBDD627227DF995FE1CB?execution=e1s1>

13. If you do not qualify for public funding, you might like to consider whether you have any insurance policies that might cover your legal fees, or if the fees may be paid by someone else, for example a trade union.

~~9.14.~~

~~10.~~ I shall not be advising you whether you are likely to be eligible for public funding through the Legal Services Commission. If you would like to investigate the possibility of your financial means being such as to bring you within the scope of legal aid, you should contact a solicitor who undertakes work for the Legal Services Commission before X continues to instruct me.

### **Compulsory disclosure of information**

~~11.15.~~ The information which you give me will be received in professional confidence. The information which you give me will be received in professional confidence. The only exception is that statutory and other legal requirements may mean that I have to disclose your information or information I have received from X to governmental or other regulatory authorities without you or X’s consent and without telling you or X that I have made the disclosure. ~~The only exception is that statutory and other legal requirements may cause me to disclose information which I have received from you or X to governmental or other regulatory authorities and to do so without first obtaining your consent or the consent of X to such disclosure or telling you or X that I have made it.~~

### **Complaints**

~~12.16.~~ The enclosed letter also gives details of the complaints procedures and the address of the Legal ~~Services~~ Ombudsman

## Annex 9 – Proposed amendments to the Model client care letter to an intermediary

Thank you for your [letter of ...~~[insert date]]~~ [phone call on ... ~~[insert date]]].~~

I would be pleased to accept instructions from you on the terms set out in this letter. It is important that you understand what these terms are. These terms will form a contract between us. If you agree with the ~~se terms proposed arrangement~~, please sign the enclosed copy of this letter and return it to me ~~to record your agreement~~.

### The arrangement

1. My contract under this arrangement will be with you. I will receive my instructions from and through you, but the client I am instructed for is Y. You are acting as agent for Y – you are not acting as my agent.
2. In carrying out the work under these instructions, I owe a professional duty to Y. Furthermore, the benefits that this contract gives to Y may be enforced by Y under the Contracts (Rights of Third Parties) Act 1999

### The basis on which I carry out professional work

3. I am the only person you are instructing and I personally will do all the work needed under this arrangement. I am a sole practitioner although I practise with other barristers from a set of chambers (barristers' offices).

4. I have carefully considered the instructions and can confirm that I have sufficient experience and competence to undertake the work.

~~3.5.~~ If for any reason I cannot carry out all the work you are instructing me to do, or if I want to suggest that another barrister (instead of me, or as well as me) carries out the work for you, my clerk or I may propose this. However, another barrister will not carry out work for you unless and until you have agreed to this an arrangement, and have instructed the other barrister. ~~If you or Y feel that you would be happier with the services provided by an organisation (rather than an individual), you or Y need to instruct a firm of solicitors.~~

4.6. **[If the instructions are a brief for a specified day, add:]** There may be times when my professional commitments clash. If I identify a possible clash of commitments and I am unable to work on this case, (meaning that I will not be able to work on your case), I will, ~~with the help of my clerks, do my try my~~ best to do the following:-

- (1) Warn you as soon as possible and ask you how you would prefer to continue. As a result, it would be helpful if you would give me a phone number where I would always be able to contact you.
- (2) Suggest the name of another barrister within my chambers (of a suitable level of seniority and expertise), who is willing to accept your case under the same terms as this agreement. You would then need to decide whether you want to instruct that barrister.



- (3) Help you find a barrister from other chambers if there is not a suitable barrister within my chambers, or if you do not want my chambers to continue working on your case.
- (4) Discuss with you the costs of using another barrister.

### The work I will carry out

~~5.7.~~ The work you are instructing me to carry out is drafting ['an opinion concerning....']

~~6.8.~~ If subsequent work is needed on this matter and I am available to do the extra work, there will be another letter of agreement between us.

~~7.~~ Because I carry out all my work personally and cannot predict what other professional responsibilities I may have in the future, I cannot at this stage undertake that I shall be able to accept instructions for all subsequent work that your case may need.

### The range of barrister work

~~8.9.~~ I should explain to you the range of the work that barristers carry out, as well as the type of work they do not. Barristers advise on the law, draft documents for clients to use, and appear on behalf of their client before courts or other organisations. Barristers do not handle client money or undertake the administrative management of a case proceeding through a court.

~~9.10.~~ Here are some examples.

- (1) A barrister may draft a letter for you to send to another person.
- (2) If a witness statement is needed from Y, I may draft it from what Y tells me. And a barrister may also help to finalise a witness statement from another person based on the information that person has provided.
- (3) A barrister may advise on the need for expert evidence and on the choice of a suitable expert. But a barrister may not instruct an expert on behalf of a client.
- (4) A barrister can draft formal court documents. However, barristers cannot serve court documents on other parties or file them at court. You will need to take responsibility for serving formal court documents on other parties and filing them at court.
- (5) A barrister cannot go on the court record or provide their address to the court as the 'address for service' of documents (that is, the address which you are required to provide to the court for receipt by you of formal court documents sent by the court or other parties).

~~(3)~~(6)

~~10.11.~~ As you are instructing me without a solicitor, you must be sure that:

- (1) you are able to do whatever is necessary for those matters that I cannot deal with; or
- (2) you have made an arrangement with another person of suitable competence and experience to provide these services.

### Circumstances when I may not be able to act for you

~~12. As a barrister in all my professional work I must follow the Bar Code of Conduct. That code of conduct requires me to consider whether As a result if I consider that a solicitor needs to be instructed in your own interests. If there comes a point at which I consider you need a solicitor or for some other professional reason, I will no longer be able to act for you without the involvement of a solicitor other than on the instructions of a solicitor. If I foresee that situation arising, I will give you as much notice as possible.~~

### Legal Aid

~~11. It is possible that your client may be eligible for public funding or "legal aid" as it is usually referred to. However, as a barrister I cannot do legal aid work unless I have been instructed by a solicitor. If your client wants to talk to someone in more detail about getting legal aid, you or your client should contact a solicitor who does legal aid work. You can find out more information on the DirectGov website: <http://www.direct.gov.uk/en/Governmentcitizensandrights/GettingLegalAdvice/index.htm>~~

~~12. If your client wishes to be assessed for Legal Ad they can call the Community Legal Advice: 0845 345 4345 or use its online legal aid calculator:~~

~~13. <http://legalaidcalculator.justice.gov.uk/calculators/eligCalc.jsessionid=469F7212B0D9FBDD627227DF995FE1CB?execution=e1s1>~~

~~14. If your client does not qualify for public funding, they might like to consider whether they have any insurance policies that might cover my legal fees, or if the fees may be paid by someone else, for example a trade union.~~

~~15. In signing these terms, you confirm that your client has been informed that they may be eligible for public funding and where they can find further information.~~

~~11. —~~

~~13. **[In the case of a client who is a natural person and whose circumstances suggest that he might be within the financial scope of public funding.]** If you would like to investigate the possibility of Y's financial means being such as to bring Y within the scope of public funding, you should contact a solicitor who undertakes work for the Legal Services Commission. This is because public funding is generally only available for work carried out for a client by a solicitor, who may in turn instruct a barrister.~~

### **My availability**

14. As I carry out all my professional work personally, there will be times when I am not available to you. For example, if I am in court for a day or for several days in a row, If you are not able to contact me directly please leave a message with my clerk. I may be totally unavailable to all other clients during that time.

### **Fees**

15. **[Option 1:** My fee for the advisory and drafting work described in paragraph ... will be a fixed fee of £... plus VAT. You and I agree that I will not send to you the work ~~you have instructed me to draft~~ until you have paid the fee.]

**[Option 2:** My fee for accepting the instruction to appear as an advocate on the occasion described in paragraph ... will be £... plus VAT. You and I agree that I will not go to the hearing unless you have paid the fee in advance. If for any reason the case takes longer than one day, I will charge an extra fee of £ ... per day plus VAT.

**[Option 3:** At the moment, I do not know how much work will be involved in these instructions. As a result, I cannot quote you a fixed fee at this stage. So I will charge you on a time basis at £... an hour plus VAT. I will not carry out work that will cost you more than £... plus VAT without your permission. When I have finished the paperwork you have instructed me to draft, my clerk will tell you how much the fee is. You and I agree that I will not send you the work until you have paid the fee.]

16. Under ~~these terms this contract~~, you (not Y) are responsible for paying my fees.
17. If you owe me any fees and do not pay them for more than three months after I give you a fee note, interest will be payable at 2% above Barclays Bank base rate from 28 days of the date of the fee note.

## Documents

18. You and I agree that:
- I am entitled to keep copies of any documents you give me for my own professional records; and
  - I will return all your original documents to you when I have carried out the work you have instructed me to do.

I would prefer that you give me copies of documents rather than originals. However, if this is not possible, I may make a reasonable charge to you for producing photocopies.

## General obligations

19. The information which you give me will be received in professional confidence. The only exception is that statutory and other legal requirements may ~~mean that I have to cause me to~~ disclose information which I have received from you or Y to governmental or other regulatory authorities ~~and to do so~~ without ~~first obtaining the consent of you~~ or Y's consent and without telling you or Y that I have made the disclosure. ~~to such disclosure or telling you that I have made it.~~
20. This contract ~~we are making between us~~ will be governed by English law, and any dispute will be subject to the jurisdiction of the English courts.

## Complaints

21. I hope you will be happy with the professional services I provide. However, if you are not satisfied, you should first refer the matter to my chambers in line with my chambers' complaints procedure. If you would like a copy of the complaints procedure, please ask me or my Chambers.

22. If you are not happy with my reply or my chambers reply then you can contact the Legal Ombudsman (as long as you ~~make your complaint~~ ~~complain to the Legal Ombudsman~~ within 12 months of discovering that there was a problem). The contact details are as follows:

Legal Ombudsman

PO Box 15870,

Birmingham

B30 9EB

Email: [enquiries@legalombudsman.org.uk](mailto:enquiries@legalombudsman.org.uk)

Phone: 0300 555 0333

Frequently Asked Questions concerning the New Legal Ombudsman can be found on the Bar Standards Board website:

<http://www.barstandardsboard.org.uk/complaintsofprofessionalmisconduct/howtocomplainaboutabarrister/>

## Annex 10 Provisional Equality and Diversity Impact Assessment SCREENING FORM

Date of Screening	20 October 2011
Assessor Name & Job Title	Andy Hill and Clare Vicary, Senior Policy Officers
Policy/Function to be Assessed	Amendments to the Public Access Rules
Aim/Purpose of Policy	<p>Since 2004 the BSB has allowed properly trained and qualified barristers to provide legal services direct to the public. Initially the scope of the public access rules was quite narrow and barristers were prohibited from undertaking any legal aid work or work in family, immigration or criminal cases. However, after a review in 2009, the BSB expanded the scope to include privately funded family, immigration and criminal work. The prohibition on acting in legal aided cases was continued.</p> <p>Since 2004 the number of barristers accepting public access work has steadily increased. Currently there are approximately 4000 barristers who have completed the public access training courses.</p> <p>The Public Access Rules are found at Annex F2 of the Code and set out the requirements a barrister must adhere to when undertaking public access work. Of particular relevance to this consultation are rules 2(i) and 3(1).</p> <p>Amongst other things, rule 2(i) currently prevents barristers with less than three years' practising experience from accepting public access instructions. Rule 3(1) prevents a barrister from accepting public access instructions where the lay client is likely to be eligible for public funding.</p> <p>In June 2011 the BSB published a mini consultation seeking views on a proposed relaxation to rule 3(1). Subsequent to that consultation closing the Standards Committee of the BSB also considered amending rule 2(i).</p> <p>Having carefully considered the position, the BSB now</p>

	<p>provisionally considers that the regulatory objectives of the LSA 2007 would be best served by relaxing both of these existing rules.</p> <p>Aside from promoting the eight regulatory objectives, the BSB's aim in amending the rules is to remove any unnecessary regulatory barriers to the provision of legal services. The BSB considers that the proposed relaxation does not place the public at risk because other sections of the Code provide strong public protection. In particular rule 603(a) – must not accept instructions where you are not qualified to act - and 303(a) – must promote and protect, by all proper means, the best interests of the client.</p>
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**Do you consider the policy might have an adverse impact on equality?**

Gender                      Yes        **No**

Race                        **Yes**     No

Disability                **Yes**     No

Sexual orientation    Yes        **No**

Religion/belief        Yes        **No**

Age                         **Yes**     No

Gender reassignment Yes        **No**

Pregnancy/maternity **Yes**     No

**Potential Impact**

Please note that this is an initial equality impact screening. The BSB will use evidence obtained during the consultation period to consider further the equality impact of these changes.

**Gender, sexual orientation, religion/belief, gender reassignment.**

There is no evidence to suggest that the amendments to the rules will have an adverse impact on any of the above protected categories. The concerns outlined below, in essence, relate to client care and communication issues. These concerns do not touch on any of the above categories.

All of the concerns outlined below are general points that already apply to the public access scheme as it currently exists. However, potentially relaxing the rules even further means these issues may need to be addressed afresh.

### **Disability**

The BSB is aware that relaxing the public access rules may potentially have negative impacts on some disabled clients. This is particularly true for clients with mental health impairments who might not be in a position to fully understand the various restrictions that barristers operate under, and the tasks (such as serving court papers) that they might personally be asked to complete during the course of the case.

Clients with these sorts of health issues may give assurances to the barrister that they understand what is expected of them, and there is a risk that barristers, notwithstanding the public access training, may rely on such assurances to the disadvantage of the client. Because there is no solicitor or other suitably trained intermediary involved in the case, the disabled client's case could be disadvantaged.

### **Race**

The BSB is aware that relaxing the public access rules may potentially have negative impacts on clients with limited English language skills.

The concern is that barristers may not have the expertise, experience or resources to properly communicate with a lay client where language barriers exist. If this is the case, then the client may not be able to make an informed decision about whether to instruct a barrister directly, and may not fully understand their own obligations.

Solicitors have more experience dealing with language barriers and may be better qualified to manage these clients.

### **Age**

The BSB is aware that relaxing the public access rules may potentially have a negative impact on clients from specific age groups. However, the BSB also considers that there will be positive impacts on barristers with less than three years practising experience, who are more likely to be younger barristers.

In terms of negative impacts, young people may be negatively impacted because they are inherently more vulnerable and may not fully understand the public access scheme. In these circumstances they could inappropriately instruct a barrister directly without appreciating the limitations a barrister operates under or their personal obligations in the case.

In terms of a positive impact, the relaxation removes existing rules and the BSB believes that this will allow young barristers with less than three years' practising experience to compete more effectively in the legal services market. This will in turn promote a diverse profession by allowing young barristers to survive in their early years of practice without the need for outside

financial assistance.

### **Pregnancy and Maternity**

The policy poses potential disadvantages for pregnant women and those with very young children, particularly single parents, who may not be in a position to undertake many of the tasks public access cases require (such as serving of court papers, photocopying etc).

## **POLICY ANALYSIS**

Because the amendments remove existing barriers to the provision of legal services, the BSB believes that more barristers will be encouraged to provide their services direct to the public. The proposals will remove prohibitions which are not justified in light of the regulatory risks that they pose.

Whilst the BSB is aware that the relaxation may have a negative impact on some protected groups, it believes that any negative effects can be properly managed and mitigated. The consultation process will involve discussions with equality groups and the BSB equality and diversity committee, during which evidence on potential negative impact will be gathered. Such evidence will be analysed in the final full equality impact analysis document.

### **3 year rule (rule 2(i))**

The existing rule prevents barrister with less than three years' practising experience from accepting public access instructions. The restriction has historically been justified on public protection grounds because it was felt the young bar might not have the necessary experience or competence to properly manage public access clients.

Having reconsidered the issue, the BSB believes there are adequate public protection measures in other sections of the Code (i.e. rules 603(a), 303(a) and Annex F2) and the prohibition can no longer be justified, particularly with reference to the eight regulatory objectives set out in the LSA 2007.

The administration of justice, access to justice and the public interest will all benefit from a relaxation of the rule because it will enhance the pool of skilled advocates who are available to act at relatively inexpensive rates. Having a wide pool of advocates is especially important when one considers the impending legal aid cuts due to come into force in February 2012.

The Bar, and the young publically funded Bar in particular, face a number of challenges from solicitors and other legal service providers. It is right that, with other proper public protection measures in place, the BSB should remove any unnecessary regulatory obstacles to ensure that the young Bar can compete on an even footing with other providers.

It is in the wider interests of the profession, and ultimately the judiciary, that the Bar remains open to all and is as diverse as the community it serves. The BSB is keen to avoid a situation where the young Bar is only open to those people who are fortunate enough to have outside financial assistance. Removing unnecessary barriers will ensure young barristers have the tools to properly compete, and will help to avoid negative impacts on the diversity of the Bar.

### **Public funding rule (rule 3(1))**



The following paragraph was included in the initial consultation paper in July 2011:

*The BSB is committed to promoting equality and diversity throughout the Bar and within its own organisation. It endeavours to ensure that its processes and procedures are fair, objective, transparent and free from unlawful discrimination. It is also keen to identify ways in which access to and progression within the Bar can be widened such that everyone who has the ability to succeed is able to do so regardless of race, gender, disability, religion or belief, sexual orientation, age or socio-economic background.*

*In addition to the questions outlined above, the BSB would welcome comments on whether relaxing the prohibition in rule 3(1) might have implications for equality. For example, would relaxing the prohibition have a greater positive or negative effect on some groups compared to others? The BSB would particularly welcome feedback on whether there are likely to be any negative consequences for any group arising from an amendment to rule 3(1) and how these could be mitigated, or if there are opportunities to promote greater equality and diversity.*

Although the BSB received approximately 40 responses, none of the replies highlighted concerns over equality and diversity.

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