

## Review of the public access scheme: final report

### Introduction

This working group was asked to review the functioning of the Public Access Scheme introduced by the Bar in 2004. With the exception of the vexed question of what letters and e-mails a barrister instructed on direct access could properly be instructed to write to the “other side”, we did not consider the question of precisely what function barristers should or should not be permitted to carry out while engaged in direct access work. The recommendations of the group, and the contents of this report, are based on the proposition that barristers cannot conduct litigation and that this restriction, and the detailed rules that are based on it, will apply to the relaxation on the restrictions on public access that we recommend – if our recommendations are implemented. We should add that the research by Professor Flood and Ms Avis Whyte of the University of Westminster<sup>1</sup> appears to show that barristers who do public access work on the whole do not wish to become the functional equivalent of solicitors.

We are conscious that the central recommendation that we make, relating to the removal of the prohibition against public access in certain types of work, may initially be surprising. For the reasons we give below we believe that it is a principled approach; and we also believe that the continuing restrictions on what a barrister may do, and the continuing obligation to advise when it is appropriate for a solicitor to be instructed, mean that there will be few cases taken under the public access scheme in the areas where it was previously prohibited.

We have worked on this issue for a considerable period of time, and considered a volume of material. This report deals with a number of matters, and makes some recommendations, that we believed presented little difficulty. The issue of what (if any) restrictions there should be on types of work that could be undertaken was not straightforward; and the respondents to our consultation had widely differing views. In the end our recommendation is a unanimous approach, which we all support. It was probably not a view that we would have reached unanimously when we started our work, but for the reasons which we set out in this paper we believe that it is a

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<sup>1</sup> *Straight There No Detours*: Direct Access to Barristers, provided for the Access to the Bar day on 27<sup>th</sup> November, 2008.

principled approach, that it is in the public interest, and that it brings to an end unjustifiable restrictions on what barristers are permitted to do that were initially imposed in the belief (which we believe proved to be mistaken) that they were necessary for the protection of the public.

We regard it as a matter of importance in the evaluation of our recommendations, and we wish to emphasise, that the recommendations that we make in respect of the widening of the fields in which public access work should be permitted do not affect the restrictions on the work that a barrister may do – which are unaffected by our recommendations, and not enlarged, as we set out in detail below. We are aware of a consultation paper currently in preparation by the ABS working group which may result in some further relaxations, but we understand that the prohibition on conducting litigation and on general management of a client's affairs will remain..

## **Background**

In February 2002 the Bar Council accepted recommendations made by a working group chaired by Sir Sydney Kentridge QC entitled “Competition in Professions”, which advocated enabling barristers to be instructed directly by the public in certain circumstances, without the intervention of a solicitor or other instructing intermediary. The paper considered a number of restrictions on practice at the Bar in the light of a 2002 report by the Office of Fair Trading, which criticised existing practising limitations on the capacities of the barrister.

The report stressed that if the sources of barristers' instruction were widened, the types of work available to barristers should not be. It was felt that permitting barristers to be directly instructed by the lay public would not create significant risks or be especially difficult to regulate, provided that the areas of work barristers could cover were not enlarged.

In March 2002, a second working group chaired by Guy Mansfield QC issued a paper on the amendments and rules that were needed to introduce public access. Following the report's recommendations, the Bar Council adopted new rules to allow any member of the public to instruct a barrister directly. These came into effect in July 2004.

## **The Current Position**

In order to take on public access work a barrister must have more than three years' practising experience, he or she must be properly trained and must have registered with the Bar Council as a public access practitioner. Although there are rules as set out below on what type of work may be undertaken, there is no restriction on who can be a direct access client.

The public access scheme was deliberately introduced with caution. There was uncertainty whether clients would understand the limitations of barristers' work, and it was felt that the new opportunities needed to be approached carefully by barristers. There was a minority view in the initial working group that Barristers would not have the necessary expertise in dealing directly with clients, and that the development of direct access would lead to unacceptable levels of dissatisfaction amongst clients and that there would be numerous complaints. This view may have affected the extent to which direct access was initially limited.

In addition to the training and registration requirements set out above there is an absolute prohibition on direct access in the fields of family, crime and immigration. Although there were (and are) strongly held views that each of these areas is unsuitable for direct public access, each has given rise to obvious anomalies which troubled this group and formed part of the basis of our consultation. For example:

- i) The prohibition on family work being conducted by a barrister on direct access meant that a member of the public could not directly instruct a barrister to deal with a dispute between a married couple about shares in a house on the breakdown of the marriage; but if they had not been married the same property dispute could be handled by a barrister on direct access on the breakdown of a relationship.
- ii) In immigration matters non-lawyers can be instructed directly by the public to appear in the immigration tribunal; but barristers cannot be.
- iii) 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.

## **The Consultation**

When setting up the scheme, the Bar Council undertook to review the operation of the public access rules after three years. Under the present regulatory arrangements, this review fell to the Standards Committee of the Bar Standards Board (BSB) to conduct. The consultation has been extensive, and has taken a year to complete.

Initially, questionnaires were sent to all barristers who registered with the Bar Council as intending to undertake public access work, seeking views on the operation of the scheme. At the same time, these barristers were asked to inform their public access clients of the BSB's review and to encourage them to complete the on-line questionnaire which had been placed on the BSB website.

About 165 responses were received from barristers and consumer groups: eight responses were received from lay clients. Further views were canvassed from barristers attending a public access training day run by the College of Law.

Following this exercise the Group believed that it had identified the areas in the application and operation of the public access scheme where particular consideration was required, and the general consultation paper reflected the issues that had been highlighted. The paper set out background and contained narrative about the various issues. The questions posed are at page 19 of this report.

The information and views that were received in response to the consultation were diverse, and showed (as was to be expected) differing emphasis amongst different respondents. The consultation paper focussed on the following aspects of the public access scheme:

- The standing and experience of barristers wishing to take public access work.
- The Public Access Training Course
- The range of work permitted under the public access scheme.

- The use of correspondence by barristers and its limitation under the terms of the scheme.
- Guidance materials provided to public access barristers.
- Advertising under the public access scheme

It was the purpose of the group to seek views on the best way for the public access scheme to move forward, after its first years of operation; but we have not considered the issues of overall reform that the Bar might undergo under the provisions of the Legal Services Act 2007. We realised that it was possible that the scope of work that a barrister might be permitted to carry out might be reconsidered in any such reform together with the Possibilities of Alternative Business Structures for the Bar, and we are aware of a consultation paper that is in the course of preparation by the ABS working group. As set out in the Introduction section of this report, this working group has worked on the basis of the type of work that barristers are currently permitted to carry out.

There was, as set out above, opposition to the setting up of the scheme in the first place on the basis that some barristers would not be able to deal with the public effectively; and that there would be dissatisfaction amongst clients, and that there would be an unacceptable level of complaints and claims. We believe that this has not proved to be the case.

We were told by respondents to the consultation paper of two complaints that had been received by sets of chambers. We considered that neither was significant for the purposes of our evaluation of the scheme.

We obtained the figures for the complaints considered by the Complaints commissioner in respect of public access work up to December 2008. 31 complaints have been disposed of in that period – of which 2 have been upheld. Of these 2 barristers, one has been prohibited from accepting or carrying out any public access instructions indefinitely.

The Legal Services Ombudsman told us that she had not received a single complaint in respect of a public access case.

## **Standing and Experience Requirements of Barristers in Public Access Work**

Any barrister wanting to take on public access work must currently have at least three years' practising experience after the completion of pupillage. This was felt to be an appropriate provision because no public access training is currently offered on the Bar Vocational Course, and it was thought that barristers would need some experience to be able appropriately and safely to take the work on.

The responses to the consultation paper were overwhelmingly in favour of keeping the current requirement. There was some support for reducing the qualifying period, and some for increasing it, but the great majority was for keeping it the same.

We were not aware of any particular difficulty that would indicate that the current qualification period is inadequate, nor did we think that it could be said to be unnecessary. We considered that the original justification for a qualifying period remained, and that the current period was sensible. We considered whether it would be possible to oblige BVC providers to include public access as a module on the BVC course, and whether it might be included as a required part of pupillage.

We considered that the most appropriate course was to keep the requirement unchanged, requiring a barrister to have three years' experience in practice before being able to take public access cases. Barristers who had worked as solicitors before coming to the Bar could in appropriate cases be granted waivers to the rules on standing and experience.

## **The Public Access Training Course**

In order to carry out public access work barristers must attend a one-day training course run by the College of Law. The aim of the course is to teach barristers the strengths and limitations of direct access work, and to introduce them to some of its less familiar concepts. In conventional practice, barristers do not have to deal with lay clients in the same way, usually do not discuss fees with the lay client, and do not have to deal with administrative matters that are usually handled by the professional client, such as the retention of documents and the sending of bills.

The course was widely liked. It was felt to provide a good background to public access work, especially with regard to the issues of what barristers could and could

not do, financial management and when to tell the client that he had to bring a solicitor into the case.

One matter that was raised in response to the consultation, and which we considered, was whether it would be appropriate that the course should seek to provide detailed guidance on the money laundering regulations, (now updated in the form of the 2007 Regulations).

Our view (as set out below) was that the written materials in the Guidance for Barristers section of the public access guidance should be expanded. In particular we thought that they should cover money laundering and the 2007 regulations; and we considered that it was more appropriate for the written materials to deal with this issue than to spend time on it in the training. This area, whilst important, is relevant to the barrister's administration of his affairs, and does not require the development of his or her client care skills. Expanding the training materials would enable more background and guidance to be given in print. The training course was widely approved of, and we did not think that it was right to disturb the balance of its content, or increase it in length, while we considered that the detail of the 2007 regulations could be addressed in the written materials.

We have no doubt that those who present the course elements will continue to review their material, and we would not wish to interfere in any decisions they take. The information we have received indicates that the course is well devised, and we make no recommendation for any specific change in the material that is covered. If the rule against correspondence is relaxed (see below) we would expect the course to include some element about letter writing and systems for keeping files.

### **Range of Work Available Under the Public Access Scheme**

As was originally proposed in the Kentridge Report, the public access scheme does not apply to all types of work. There are three areas – family, crime and immigration – where public access is not permitted except in very restricted circumstances. The prohibition is contained in Rule 3 of the Public Access Rules, and it is explained in Paragraph 61 of the guidance that is currently published by the Bar Standards Board where it is said that the Bar Council considers that it would be contrary to the interests of the lay client and the interests of justice for barristers to undertake public access work in the areas of family, crime and immigration.

In the consultation exercise barristers were specifically asked whether they wished the range of available work to be widened. The responses varied, but of those who expressed a view, the majority suggested widening the range of available work, in particular in criminal and immigration work.

It was particularly felt in the responses that the prohibition against accepting work Immigration Tribunals on a public access basis was an anomaly: if lay representatives could be instructed without the need to be instructed by a solicitor, it seemed unfair and illogical that barristers could not be.

We understand that when the scheme was first established, immigration work was not permitted on the advice of the Immigration Services Commissioner. The commissioner argued that in many cases the immigrant would be vulnerable and that considerable correspondence would exist with the Home Office, often in the immigrant's second language. It was felt that this volume of correspondence would risk pushing barristers too far into the role of solicitors. As things are now, immigration advisers of the Office of the Immigration Services Commissioner can directly instruct barristers without the need to instruct a solicitor.

There was also clear support in the responses to the consultation for the removal of the blanket prohibition in all criminal matters. The specific representations from practitioners showed a clear wish to be allowed to conduct criminal matters in the regulatory field, road traffic matters, and minor non-imprisonable crimes in the Magistrates' Court.

Public access is not available where the client is in receipt of legal aid; if a barrister thinks that legal aid might be available to a direct access client he or she is obliged to advise the client to go to a solicitor and explore the availability of legal aid. We have not felt that direct access could extend to clients with legal aid, and it follows that the scope of criminal matters that could be the subject of direct access instructions is limited by this restriction.

The argument is that allowing barristers to conduct on direct access the routine and low level criminal work in the Magistrates' Court, including road traffic cases and regulatory work, could reduce the costs of representation for clients, provide better

access to less serious criminal work for young barristers, and allow barristers to compete with solicitors more effectively for this kind of work.

The responses to the consultation concentrated on cases at the lower end of the spectrum of criminal work in the Magistrate's Court. It was thought that many such cases might involve guilty pleas, with the advocacy limited to mitigation, and no need to carry out any investigation or gathering of evidence.

There was much consideration of how the matters that could be conducted on Direct Access should be defined. One suggestion was that the offence charged should not be imprisonable. No clear consensus as to where the line should be drawn emerged.

Family work has been entirely excluded from the public access scheme from the beginning: when the scheme was introduced we understand that the Family Bar did not express a wish for it. Family work was mentioned by fewer respondents to the consultation process than immigration or crime, but there was still a view put across that family work should be included in the scheme on the basis that it would save time for litigants, that it would significantly help access to legal representation, and that it would help barristers compete with solicitors.

It is also clearly anomalous that a barrister may accept a property dispute between cohabitants under public access, but if the parties are married he may not do so. The former is regarded as Chancery work and the latter as family work. But the distinction is artificial and it is hard to find any justification for such a distinction.

We were surprised to find that the Family Bar Association still opposed the extending of the scheme to family work. They made the unanswerable point that a great many family law cases would be inappropriate for direct access: cases involving children, and cases involving investigation of evidence and taking of statements would not be suitable. But it did not seem to us that any principle emerged that should make the entire field off-limits for direct access if it would otherwise be in the public interest to permit direct access in some cases that are currently forbidden because they qualify as family law cases.

This is the part of our report that caused us the greatest difficulty. We were all quite sure that it was in the public interest to extend the scope of the direct access scheme to include work that has previously been forbidden. But we were concerned to find a

formula that might define what could and could not be done that would produce sensible boundaries that could be recognised and understood, and which would stand up to reasonable scrutiny. We wanted to avoid, if possible the sort of anomaly that permitted working on a property dispute where the parties cohabited, but prohibited it if they were married.

Broadly speaking the alternatives are as follows:

We could recommend the relaxation of the three prohibited fields in certain clearly defined areas. This would entail the definition of what sort of offences could be within the direct access scheme in the criminal area; and the definition of situations in which family law cases could be undertaken, and similarly in the area of immigration.

The alternative approach is simply to remove the prohibitions and rely on the overriding requirements that any case involving legal aid has to go to a solicitor, and cases that can be accepted by a barrister on direct access has to be suitable for direct access, and the barrister still cannot conduct litigation, cannot interview witnesses, cannot make disclosure, cannot go on the court record, cannot pay court fees, and cannot issue process.

In the end we were unanimous in our belief that it was in the public interest to remove the prohibition on immigration, criminal and family work, and that it should be done without limitation – other than by reference to the existing and continuing limitation on the work that the barrister is allowed to do. We were not aware of cases showing that barristers were taking direct access cases which were inappropriate and failing to appreciate when a case involved too much investigation or otherwise needed a solicitor. On the contrary, there is evidence that direct access barristers provide a useful function, and frequently are able to provide representation for litigants who would otherwise be unrepresented.

It was our belief that an approach seeking to define precisely the cases that could and could not be undertaken on direct access would necessarily be arbitrary, and would produce indefensible anomalies. But we considered that a general relaxation of the prohibitions (with the safeguards provided by the rules that will continue in place) was a principled approach that is in the public interest, with no identified dangers or disadvantages that would make it undesirable.

## **Correspondence Between Parties**

Paragraph 401 of the Code of Conduct of the Bar contains a prohibition against barristers engaging in correspondence. This applies in public access cases and is causing difficulty. The rule is not liked either by the bar doing the work, or the clients. In particular the clients find it hard to understand.

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

Pre-action protocol letters of claim in PA cases are often written by barristers. The author may even name himself in his draft. But he cannot use his Chambers’ writing paper or send the letter directly by post, fax or e-mail. He is compelled, in effect, to be a ghost writer for the client. There was clear evidence in the responses to our consultation, that clients are frustrated that despite their payment for such services, they cannot enjoy the prestige and impact of a letter sent directly by their barrister, and on his note-paper.

E-Mail is an efficient, effective and self-recording method of delivery of communication. But barristers are not permitted to send e-mails to opponent barristers or to opponent solicitors. Such a restriction is in our view anachronistic and ripe for change. There is evidence that across the Bar, and both within and without public access work, this restriction is being honoured more in the breach than the observance.

We believe that the Consultation of clients and consumer groups supports the case for change. The BSB has stated: *“Good client care is a crucial feature of any profession providing services. The Bar should aspire to the highest standards of service and it needs to take notice of its consumers.”*

In its response to the consultation the National Consumer Council stated that they regarded restrictions which lead to double-manning as not in the interests of consumers. There is a widespread complaint that the current rule compels a consumer who wants a letter to be sent on his behalf by a lawyer to instruct a

barrister to draft a complex letter, but then also to use a solicitor merely to reproduce the barrister's work on professional notepaper. The public access barrister can draft the letter, but he cannot send it.

Relaxation of the current restriction will lead to a wider choice for the client, and in some cases to greater efficiency, and less expense.

The Public Access Bar Association supports the case for change. The experience of its members, who specialise in public access work, is that the rules on corresponding are now unworkable and actually inimical to the interests of public access clients. We were told of one recent case in which an experienced Public access barrister settled what could have been a multi-million pound dispute between his client and an NHS Trust within 48 hours of being instructed two days before the Christmas holiday. He believed that without the use of e-mail, and without corresponding directly with the parties who were in breach of contract, the dispute could never have been settled so rapidly. And this was in the context that it was urgent, and that the object of the dispute was to establish a service contract as from 1<sup>st</sup> January. He believed that his actions saved his clients the cost of a solicitor, as well as the cost of prolonged litigation between the parties, and that it would not have been possible without direct correspondence.

We also find compelling the argument of the Access to the Bar Committee of the Bar Council that:

*“a rule limiting freedom of expression in the conduct of settlement negotiations to the use of speech and which prevents the use of the written word, is predicated on an artificial distinction between sound waves and symbols - yet both are forms of human expression. The BSB and the Bar Council are public bodies. The legality of their actions is governed by the Human Rights Act 1998. The restriction on corresponding appears to be a breach of s. 6 of the HRA, as it is impossible to find any justification for it in Art 10 of the ECHR. Art 8 of the ECHR<sup>2</sup> may also be engaged.”*

The Access to the Bar Committee further believes that:

*“ The current restriction is anti-competitive. It places solicitors at an unfair commercial advantage against PA barristers. And it is an advantage without justification on public policy grounds.”*

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<sup>2</sup> Referring expressly to “...correspondence”

We consider that the rule against a barrister entering into correspondence is anti-competitive and unnecessary. It can be seen that in public access cases it can make a case that is otherwise suited to public access extremely unwieldy, and in some cases where speed is necessary it might make it impossible.

We would envisage a change in the rule to permit correspondence to be undertaken by barristers in public access work where it is ancillary to already recognised and permitted barrister functions in such work, such as:-

- Advocacy (for example e-mails attaching Skeleton Arguments and/or copy authorities);
- Drafting (for example letters of claim, which are technical documents now routinely drafted by Counsel in PA cases);
- Negotiation and ADR (for example without prejudice or open letters making offers to settle, e-mails exchanging travelling draft Consent Orders as attachments, or letters or e-mails suggesting arrangements for the setting up of a Mediation).
- Discharging a duty (or courtesy) to the Court (for example a letter or e-mail to a Judge explaining an absence from Court, or providing dates to avoid, or a draft Order for approval, or copy authorities).

By contrast, we consider that the service by a barrister of a pleading or witness statement under cover of a letter or an e-mail should not be permitted. That would be the conduct of litigation and not merely ancillary to a barrister function. It would be the assumption of a solicitor function and therefore prohibited. We do not advocate the relaxation of that prohibition.

We have considered whether relaxation of the no correspondence rule should be part of a relaxation of the no conduct of litigation rule. However, we believe that the rules about correspondence can be relaxed without enabling barristers to conduct litigation. In the case of *Andre Agassi v Robinson (HMIT) & (1) Bar Council (2) Law Society (Interveners)* [2005] EWCA Civ 1507, the Court of Appeal held that correspondence is not part of the conduct of litigation, and it seems to us that it is sensible to vary this rule about correspondence without relaxing the rule against conducting litigation.

Direct correspondence will, of course, produce return correspondence. If this restriction is relaxed, as we suggest, new guidance will have to be produced to provide advice about how to handle correspondence. Barristers whose practices may not permit them to deal promptly with such replies will have to take proper steps which might be a standard clause in their own letters out asking the recipient to reply directly to the client.

We would expect the public access training course to offer some guidance about formal letter-writing, both as to tone and content.

We have considered how these changes might affect the conduct of solicitor-instructed work. We do not think that it is rational to make one rule for public access cases and a different one for other cases - and we do not suggest this. However, when a barrister is instructed by a professional client, there will be less need for the barrister to engage in correspondence – although this is by no means to be regarded in modern practice as unusual.

We consider that the rule against correspondence should be changed. While we consider that this properly forms a part of the reforms we are suggesting, it is also the case that it is a change that is necessary within the current framework. It should probably be changed as soon as is practical.

### **Public Access Guidance Materials**

Barristers on the public access training course are provided with a file of written guidance, prepared by the General Council of the Bar. This gives information on the scheme for the use of barristers and further information to be provided to clients, as well as amendments to the Code of Conduct, guidance for clerks and suggested client care letters. This guidance is also available on the Bar Council website, at <http://www.barcouncil.org.uk/about/publicaccess/>. The respondents to the consultation were asked for their views on the guidance materials.

#### *Guidance for Barristers*

The purpose of the guidance is to prepare barristers and lay clients for public access work and to set out their roles in the case. The guidance covers the working of the scheme, and provides background as to what the barrister and client must do.

Because there is no instructing solicitor in a public access case, barristers on the public access scheme must be prepared to deal directly with issues of billing the client, retaining copies of documents and, where appropriate, taking precautions against money laundering. When dealing with clients face-to-face, it will be necessary to be able to explain the cost and working terms of the barrister, which is likely to require client care skills that the barrister might not have normally possessed. Work may have to be billed on a time-basis, and guidance would need to be supplied to cover this. Furthermore, documents that would normally be held by a solicitor have to be kept by the barrister for seven years. This could involve Chambers agreeing to store documents after a barrister has left Chambers or retired.

The guidance for barristers has been described by practitioners as missing certain areas of information. It appears that further information and training is required for barristers undertaking public access work to deal with billing, chambers administration and money laundering issues. Consequentially the existing guidance may need to be revised.

It is proposed that the written guidance for barristers be reconsidered for clarity, and where necessary rewritten in order to make it clearer and more encouraging, and easier to digest. The areas dealing with money laundering, the storage of documents and the billing of clients should be enlarged and clarified.

#### *Guidance for Lay Clients*

The guidance for clients is provided to public access clients when they first instruct a public access barrister, and sets out the relationship between the barrister and lay client, and what it is that the barrister may do. It therefore needs to be both comprehensive and easy to read. It must inform the clients of the advantages of the scheme, whilst informing them of the limitations of what the barrister may do. The guidance must balance the need to be easily understood with the need to give full information, as well as being at once positive in tone and clear in its depiction of the limits of the scheme. The current guidance for lay clients is available at: <http://www.barcouncil.org.uk/guidance/publicaccessinformationforlayclients>.

The responses to the consultation appear to suggest that the guidance concentrates too much on what cannot be done under the scheme, rather than its advantages compared to using a solicitor. This is perhaps not surprising on the basis of the doubts and concerns surrounding the original scheme. Several respondents said that

the guidance began with lists of caveats and was off-putting to clients who would have to read past the various negative aspects to find out the advantages of the scheme. It has also been suggested that the guidance for lay clients is repetitive, and unnecessarily reiterates the limits of what the barrister can do.

It is proposed that the guidance be rewritten and in places shortened and clarified, and that a more positive emphasis be put on the wording. The aim would be to present the positive aspects of the scheme earlier in the material and, while making it clear that there are limits to what a barrister can do, to present the advantages of the scheme in a little more detail. Guidance would continue to be provided by public access barristers to the client and be made available on the BSB website.

### *Client Care Letters*

The suggested form of client care letters sets out the terms on which the barrister will take the case and how the case will be run. They are given to the client at the very start of the barrister's work, and give information on the range of possible work that the barrister can do, availability, fees, documents and complaints procedure. Barristers are not obliged to use the suggested form of letters, although many choose to do so.

Comments suggested that the client care letters were overlong, negative in tone, repetitive and unfriendly. Clearly the letters must set out what the barrister can and cannot do, which will inevitably involve a description of the limits of the barrister's role, but this should be done in a more approachable and open manner. Several barristers suggested that the letters should concentrate on practical elements of importance to the client: the time that the work would take, the availability of the barrister (and what would happen if the barrister was not available) and above all how much the work would cost and on what basis the client would be billed.

We suggest that the suggested standard client care letters should be rewritten to provide a more succinct and positive summary. They should be more focussed on the client's interests, and should seek first of all to answer practical questions of cost, time and availability rather than to provide a summary of the abilities and limits of the barrister. They should continue to provide full, suitable information about the scheme. We believe that the experiences of practitioners who have been doing the work since 2004 will provide some useful material for the improvement of the standard draft letters.

## **Advertising of the Public Access Scheme**

If barristers are to deal direct with the public, they have to be able to advertise their services, and market themselves effectively, directly to those potential clients. Almost all of the responses from lay clients in our consultation called for better promotion of the scheme. It was suggested that the Bar should put more effort into dynamic advertising of public access, and that solicitors should be encouraged to notify clients of its existence. Only one response from a lay client identified the Bar Council as the source for finding out about the scheme.

The response of the Legal Services Ombudsman to our consultation stated:

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

We believe that there is in fact now a growing awareness of the scheme, but we think that it is inescapable that the public access scheme does not yet have a high enough profile among the public who might be potential clients. Responses from barristers suggested that neither lay clients nor solicitors knew enough about the existence of the scheme or the way it worked. Barristers on the training course were unsure about how they could market their services as public access providers, and how far their ability to advertise extended, and noted that the guidance contained no information on this.

Public access practitioners are governed by the same rules regarding advertising as the rest of the Bar (See the Bar Code of Conduct, Paragraph 710.1 and 710.2). Chambers and individual barristers are able to advertise themselves under the Code of Conduct, and under the public access scheme it could be commercially useful for them to advertise directly to the general public, provided that they do not breach the provisions of the Code or bring the Bar into disrepute.

We consider that the guidance should include a reference to the ability to advertise under the provisions of the code. We also believe that consideration should be given by the Bar Council to providing greater publicity for the scheme, but we did not think that the question of how that might be done was a matter for this sub-group.

## **Equality and Diversity under the public access scheme**

The working group believes that any reforms to the scheme need to reflect the requirement on the regulator to act in the public interest. Assessing the public interest in relation to the scheme entails consideration of factors of both protection and opportunity to both the public and the Bar. While the public access scheme permits wider and cheaper access to barristers' services, it clearly would not be in the public interest for this increased availability to reduce the quality of the services available. As a result, the working group feels that there are areas where the mere reduction of cost will not be in the interest of the lay client or justice as a whole. It should be noted, though, that the legal aid system does not allow public access work to be publicly funded. As a result, the working group believes that a large amount of work which may involve the disadvantaged will simply not be available under the scheme: the great majority of criminal, family and immigration work will remain unavailable. It is beyond the group's remit to comment on whether or not public funding should be extended to all types of work.

However, under the proposed changes to the public access rules, these areas will become available for public access so long as public funding is not involved. This in turn raises the issue of when it is inappropriate for the lay client to instruct directly where unable to do so: this will be of particular note where interpreters are required, especially in immigration work.

## **Consultation with representative groups**

The working group canvassed the views of a range of organisations linked to diversity as part of the consultation exercise, and carried out a full Equality Impact Assessment.

Responses were received from the disability sub-group of the Bar Council and the Immigration Law Practitioners' Association (ILPA). The comments of both organisations were taken into account by the working group when it came to its conclusions.

Overall, the public access working group felt that the review of the scheme had the potential to have a particularly strong effect on vulnerable members of society. A

higher proportion of people from black and minority ethnic (BME) backgrounds may not have the funds to instruct barristers through solicitors, and so the reduction in cost that public access offers could provide greater access to the Bar to this group than before. Clearly this is a positive effect, but it is one that should be monitored carefully to ensure that good service is provided.

It should also be noted that the public access rules place barristers under a continuing duty to assess whether a case may be better suited by the inclusion of a solicitor. This may become apparent later in the case and hence it is possible that the barrister may have to propose that a solicitor be included once proceedings are underway, perhaps as a result of some new factor arising in the case. The group believes that it is especially important for the issue of whether a solicitor needs to be instructed as early as possible where a client is vulnerable, even where this may entail additional expense for the client, to ensure that the best possible legal representation is available.

### **Interpreters and communication difficulties**

It seems highly unlikely that a client who cannot, for whatever reason, communicate easily with the barrister would be able to those case management functions that would usually be dealt with by the solicitor, and hence such a case would usually not be suitable for public access. Indeed, the need for an interpreter to be instructed in the case would greatly increase the likelihood that the case would not be suited to the public access scheme. Clearly however each case would have to be considered individually.

Where a barrister recommends that an interpreter be instructed, and the lay client refuses to allow this to happen, the barrister should withdraw from the case.

The working group felt that although it might have the effect of excluding some people from the scheme, it would be best for the decision to involve a solicitor to be made as early as possible to ensure that the case began on an appropriate footing. It would clearly not be in the public interest for a client who could not run the case to be able to make use of the scheme.

## **Conclusion**

All sources of information suggest that the public access scheme is working very well. The lack of recorded complaints, together with the comments from practitioners and lay clients, suggests that the scheme has not given rise to either inappropriate conduct or poor-quality work by barristers. Indeed, most negative criticism was directed against the limitations of the scheme, which were often regarded as illogical and unfairly limiting to the Bar.

It is proposed that the following changes are made to the scheme:

- The range of work available under the scheme is widened to include family, criminal and immigration work;
- Barristers be permitted to engage in correspondence between the parties, although the prohibition on the conduct of litigation should remain;
- The guidance for barristers is enlarged to include information on money laundering and the keeping of records
- The guidance for barristers and clients is rephrased to appear less negative in tone;
- The Public Access Rules at F2 of the Bar Code of Conduct are modified to reflect these changes.
- The scheme be reviewed in eighteen months' time, running from the introduction of the reforms in the review.

Drafts of the amended guidance and rules are attached to this report.

It is further suggested that the Bar Council be approached with regard to widening public awareness of the scheme. This is not an area where the BSB itself can act directly, but recommendations can be made.

**BSB Public Access Working Group**

**June 2009**

## Questions asked in the consultation paper

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

- Q15** Should the guidance for clients be reworded in plainer English? If so, is there anything that should be added to or removed from it?
- Q16** Do the letters cover the appropriate information? Do they need to be redrafted, and if so, how ?
- Q17** Should there be a requirement to send repeat client care letters to corporate clients who make frequent use of the public access scheme?
- Q18** Do you agree that the public access scheme should be advertised more visibly by the Bar Council and if so, what would you suggest?