



LEGAL SERVICES
BOARD

The Chief Executive's Office
Legal Services Board
7th Floor
Victoria House
Southampton Row
London WC1B 4AD

T 020 7271 0050
F 020 7271 0051

www.legalservicesboard.org.uk

Vanessa Davies
Director
Bar Standards Board
289-293 High Holborn
London
WC1V 7HZ

27 March 2013

Dear Vanessa

Decision Notice for the Bar Standards Board (BSB) application for approval of revised rules for its Public Access Scheme and removal of the 'Media Comment' rule from the Code of Conduct

Please find enclosed our final decision notice granting the BSB's application for approval of alterations to its regulatory arrangements relating to amendments to the Public Access Rules (Annex F2 of the Code of Conduct), associated amendments to its Practising Requirements (Code of Conduct Part II), and removal of the 'Media Comment' rule from the Code of Conduct (Part VII).

This notice should be considered effective as of today, Wednesday 27 March 2013. A copy of the decision notice will be published on our website on Thursday 28 March 2013.

I am copying this letter to Maura McGowan.

Yours sincerely

A handwritten signature in black ink that reads "Chris Kenny". The signature is written in a cursive style and is followed by a horizontal line.

Chris Kenny
Chief Executive

E chris.kenny@legalservicesboard.org.uk



Legal Services Board – decision notice issued under Part 3 of Schedule 4 to the Legal Services Act 2007

The Bar Standards Board’s rules change application for the approval of revised rules for its Public Access Scheme and removal of the ‘Media Comment’ rule from its Code of Conduct

The Legal Services Board (LSB) has granted an application from the Bar Standards Board (BSB) who sought to make amendments to its Public Access Rules (Annex F2 of the Code of Conduct), make associated amendments to its Practising Requirements (Code of Conduct Part II), and remove the ‘Media Comment’ rule from its Code of Conduct (Part VII).

This decision notice sets out the basis for the LSB granting the application and the decision taken, including a brief description of the changes.

Introduction

1. The LSB is required by Part 3 of Schedule 4 to the Legal Services Act 2007 (the Act) to review and grant or refuse applications by approved regulators to make alterations to their regulatory arrangements. The Bar Council is an approved regulator and the BSB is the regulatory arm to which the Bar Council has delegated its regulatory functions.
2. Paragraph 25 of Schedule 4 to the Act explains that the LSB may only refuse an application setting out a proposed change to the regulatory arrangements if it is satisfied that by granting the application one or more of the criteria specified in sub paragraph 25(3) (and listed in the footnote below¹) will be met. For example, the LSB’s granting of the application to alter the regulatory arrangements must not be prejudicial to the regulatory objectives overall. Accordingly, if the LSB is not satisfied that one or more of the criteria for refusal are met, then it must approve the application in whole, or the parts of it that can be approved.
3. As provided for by paragraphs 20(1) and 23(3) of Schedule 4 to the Act, the LSB has made rules² about how the application to alter the regulatory arrangements must be made including the contents of that application. The rules highlight the applicant’s obligations under section 28 of the Act to have regard to the Better Regulation Principles.

¹ The Board may refuse the application only if it is satisfied that—(a) granting the application would be prejudicial to the regulatory objectives, (b) granting the application would be contrary to any provision made by or by virtue of the Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator, (c) granting the application would be contrary to the public interest, (d) the alteration would enable the approved regulator to authorise persons to carry on activities which are reserved legal activities in relation to which it is not a relevant approved regulator, (e) the alteration would enable the approved regulator to license persons under Part 5 to carry on activities which are reserved legal activities in relation to which it is not a licensing authority, or (f) the alteration has been or is likely to be made otherwise than in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration.

² [Rules for Rule Change Applications – Version 2 \(November 2010\)](#)

The rules also require that the applicant provides information about the nature and effect of each proposed change and of appropriate consultation undertaken. Sub paragraph 25(3)(f) of Schedule 4 to the Act requires that each proposed alteration has been made or is likely to be made in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration. This therefore includes the LSB's rules.

4. The chronology for the LSB's handling of this application can be found towards the end of this decision notice.

Proposed alterations

Public Access Scheme

5. The proposed changes are to:
 - a. enable public access barristers to be instructed by a client who would be eligible for public funding, provided the barrister ensures the client is able to make an informed decision about whether or not to apply for legal aid; and
 - b. enable barristers with under three years' standing to undertake public access work, provided they have access to a public access qualified person who is readily available to provide guidance, they log their public access work and they seek feedback from their public access clients.
6. The application also explains changes to the public access training course that raises the minimum standards that training providers must meet, including a requirement for participant competency to be assessed against outcomes. Public access barristers who have taken the existing course will need to do 'top-up' training within 24 months of the changes taking effect if they wish to continue to do public access work.
7. Other changes to existing rules are:
 - That the written notification sent to clients when accepting public access instructions includes specific reference to the requirements of paragraph 603(a) of the Code of Conduct, "a barrister must not accept any instructions [...] if he lacks sufficient experience or competence to handle the matter" (paragraph 7 in the new Annex F2).
 - The addition of a paragraph defining who can be a qualified person in relation to public access instructions as an otherwise 'qualified person' who is also a registered public access barrister (paragraph 203.4 of the revised Part II of the Code).
 - Amending paragraph 204(d)(i) of the Code of Conduct by replacing the requirement to be 'more than three years' standing' with having 'been issued with a full practising certificate'.

Media Comment

8. The proposed changes are to remove the rule prohibiting barristers from expressing personal opinion in any public statement, to the press or otherwise, in relation to any work they are or have been undertaking.

9. Guidance will be available to barristers to assist them in determining in which, if any, circumstances it would be appropriate to express any personal opinion, bearing in mind the obligations around acting in the client's best interests, maintaining independence, upholding trust and confidence in the profession, and preserving client's confidentiality.

Assessment of the application

Public Access Scheme

10. The stated principal purpose of the alterations is to remove unnecessary restrictions in the public access rules. Access to justice may be improved by extending the scope to clients who are eligible for legal aid but choose not to take it and by allowing more barristers to offer this service. The BSB asserts that changes should provide wider choice in the cost, quality and type of advice and representation for clients.

11. During our assessment we discussed the following issues with the BSB.

Removing the legal aid prohibition

12. In its application, the BSB indicated it sees that the key regulatory risks in removing the legal aid prohibition as being that a client may make an ill-informed decision to instruct a barrister directly rather than pursuing legal aid, and that a barrister may accept instructions when it would have been in the client's best interests to apply for legal aid.
13. The LSB sought clarification as to what understanding of the legal aid system barristers are expected to have. The BSB indicated that it expects public access barristers to have a reasonable understanding of legal aid criteria and highlighted that the terms of the new public access training courses include a learning requirement that barristers "know and understand the rules relating to public funding and how to apply these to determine whether it is in the client's best interests to take on a case".
14. The LSB noted that simply expressing an expectation on barristers to ensure a client knows where to find information to make an informed choice may be inadequate for a barrister to be satisfied that their client is able to make an informed decision about public funding. The BSB has modified its guidance for barristers to make it clear that it is important the client does in fact make a well-informed choice about public funding, and that it may be necessary to discuss the matter with the client to ensure that they understand their position, have made an informed decision and that proceeding on a public access basis will be in their best interests.

Removing the "three years' standing" requirement

15. The BSB identified that the key regulatory risk in relaxing the three-year rule is that newly qualified barristers will undertake work that they do not have the required experience or competency to handle. The BSB believes that this is a risk that applies to all barristers

across all areas of work, not just newly qualified barristers undertaking public access work, and that the risk is sufficiently mitigated by the existing Code of Conduct.

16. The LSB sought clarification on the appropriateness of the qualified person arrangement for barristers with less than three years' standing and whether the qualified person is required to have real or active experience of conducting public access work. The BSB outlined that the role of the qualified person is not to be an expert in public access but to be there as a more experienced practitioner generally and to provide a supportive environment for the newly qualified barrister.
17. The BSB confirmed that, for barristers under three years' standing, the log of public access cases they deal with (including any issues or problems that arise) that they will be required to maintain is intended to be a reflective learning tool rather than a compliance mechanism. The BSB will be conducting ongoing sample checks on these logs to ensure they are being used appropriately by the newly qualified barristers they are designed to assist. The log arrangement will be more formally reviewed 18-24 months following the changes.

Client vulnerability

18. In assessing the proposals, we also considered an important risk to be that a barrister does not understand or adequately handle a potentially vulnerable client's needs and underestimates the client's ability to manage their own case. In considering and addressing vulnerability barristers need to look more broadly than the indicators of 'protected characteristics' in the Equality Act 2010 to other triggers and the risks they may invoke.
19. The BSB noted that the revised public access course has specific outcomes relating to client vulnerability. It also highlighted that the typical case load of the 'young bar' involves a significant amount of client interaction and that therefore working directly with clients is not a new aspect for a newly qualified barrister.
20. Given the importance of this the LSB asked why the BSB had not included specific guidance on meeting the needs of vulnerable clients in its guidance for public access barristers. The BSB accepted that this could be improved and has added wording to its draft guidance that uses a broader interpretation of vulnerability.

Obligation to accept instructions

21. The principle that legal services should not be withheld by a barrister because of the nature of the case, the personal beliefs of the client or the source of funding is a fundamental one, and a principle that the LSB supports. Where they are dealing with a 'professional client', the "cab-rank rule" positively obliges a self-employed barrister to accept instructions (subject to a range of exemptions). The LSB considers that not having an equivalent provision for public access cases undermines the 'access to justice' arguments on which both the cab-rank rule and this application are based.

22. Given how fundamental this principle is, the LSB questioned why there is no equivalent obligation on barristers dealing with public access clients. In discussions the BSB responded by citing the general duty not to discriminate (though the LSB notes that the BSB do not deem this to be sufficient when dealing with a professional client), the fact that there is no similar requirement on solicitors with whom barristers may be increasingly competing for work, that barristers should be able to refuse work that is 'not reasonable' for them to accept and the need to allow barristers to develop a successful practice as they see fit. While these arguments may not be without some merit, they appear to be at odds with what is presented in other contexts as a fundamental principle.
23. Further, the LSB considers that some of the reasons given by the BSB for the cab-rank principle not applying to public access work are inconsistent with the regulatory objectives in the Act. Specifically, having different applications of the obligation to accept instructions is likely to impinge on access to justice if this means a member of the public seeks legal advice or representation but is unable to find a barrister willing to provide it. The interests of consumers are not being protected and promoted if barristers are in a position where they can make a choice to prioritise their own interests over their (potential) client's interests. Inconsistent obligations on barristers to accept instructions are also likely to prejudice the promotion and maintenance of adherence to the professional principles of independence and of observing the best interests of the client and the duty to the court if the barrister is choosing 'business interest' over client interest or the interests of justice.
24. Nevertheless, the LSB recognises that a substantial motivation for this rules change application is to facilitate an increase in the number of barristers able to do public access work for a lower fee and therefore increase access to advice and representation. While the LSB considers that the omission of a provision analogous to the cab-rank rule is likely to lessen the benefits of the change, it does not believe that it removes them entirely. Taking account of this and the fact that the terms of the cab-rank rule as currently formulated do not form part of this rules change application, the LSB does not believe therefore that this weakness gives it grounds to refuse the application.
25. The BSB will nevertheless need to explain in its forthcoming application to the LSB how cab-rank type provisions are included in its proposed new Code of Conduct so that they are consistent with the regulatory objectives and provide universality for clients and for barristers. The BSB has indicated that it is giving early consideration to this issue and will seek to engage further with both the LSB and other regulators in so doing.

Media Comment

26. The BSB acknowledged in its application that there is a risk that barristers could make comments in the media that will undermine confidence in the conduct and outcome of an individual case. It believes that this will be mitigated by the new guidance and the general Code of Conduct obligations of not engaging in conduct that is dishonest or otherwise discreditable, prejudicial to the administration of justice or likely to diminish public confidence will still apply and be relevant when deciding whether to make comments to the media.

27. The LSB agrees with the BSB's assertion that this rules change should allow barristers to exercise their professional judgement in a more outcomes-focused way and that it is consistent with the regulatory objectives for barristers to be able comment in public where they believe that this is justified, appropriate and in their client's best interests.

LSB decision

28. The LSB is satisfied that, having considered the application against the criteria in paragraph 25(3) of Schedule 4 to the Act, there is no reason to refuse this application; accordingly, the LSB grants this application.

29. Appendix A of this decision notice contains the revised *Public Access Rules* (Annex F2 of the Code of Conduct) and the revised paragraphs 203.1 to 204 of the *Practising Requirements* (Part II of the Code of Conduct).

30. The rules on *Conduct of Work by Practising Barristers* (Part VII of the Code of Conduct) are modified in that the Media Comment rule 709 is removed and consequentially rule 710 is renumbered to become rule 709.

31. All of the changes are approved by the LSB from this date. The BSB will determine the dates from which they will be implemented, which may be on a phased basis.

32. In relation to the public access changes, the BSB has indicated that it intends to undertake a review 18-24 months after the changes have been fully implemented. In preparation for and in determining the terms of reference for that review the LSB encourages the BSB to consider how effectively the risks identified in the application have been mitigated. This might include targeted monitoring of those practitioners for whom public access is only an occasional feature of their work, whether and how clients are making informed decisions about legal aid, the effectiveness of the revised public access course in preparing barristers for dealing with public access clients (and vulnerable clients in particular) and the impacts of the changes on access to justice.

33. The LSB also encourages the BSB to press forward more quickly with any changes to ensure consistency of approach to cab-rank style protections for all barristers' clients, rather than making that change dependent on wider evaluation of the entire public access regime.

Chronology

- The LSB confirmed receipt of the application from the BSB on 8 February 2012.
- The LSB extended the initial decision period to 8 May 2013 on 5 March 2013.
- This decision notice will be issued to the BSB on 27 March 2013.
- This decision notice will be published on the LSB's website on 28 March 2013.

Chris Kenny, Chief Executive
Acting under delegated authority granted by the Board of the Legal Services Board
27 March 2013

Code of Conduct

Annexe F2 - Public Access Rules

1. These rules apply to barristers instructed by or on behalf of lay clients (other than licensed access clients) pursuant to paragraph 401(a)(iii) of the Code of Conduct.
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, by having undertaken and satisfactorily completed the appropriate training required by the Bar Standards Board from time to time, and by registering with the Bar Council as a Public Access practitioner; and
 - ii) From [date] a barrister must have successfully completed a training programme approved by the Bar Standards Board as valid for these purposes from that date, unless:

the barrister was already registered with the Bar Council to undertake public access on that date, in which case he must undertake any additional training required by the Bar Standards Board within 24 months or cease to undertake public access work.
 - (iii) 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; and
 - (iv) Take such steps as are reasonably necessary to ensure that the client is able to make an informed decision about whether to apply for legal aid or whether to proceed with public access.
3. From [date] a barrister with less than three years' standing (as defined at paragraph 203.2) who has completed the necessary training must:
 - (i) Have a public access qualified person (a qualified person as defined at paragraph 203.3) readily available to provide guidance to the barrister;
 - (ii) Maintain a log of public cases they have dealt with, including any issues or problems which have arisen (a pro forma for recording this information is included in the guidance for barristers published by the Bar Standards Board);
 - (iii) Seek appropriate feedback from their public access clients on the service provided;
 - (iv) Make this log available, on request, to the Bar Standards Board for review.
4. 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.
5. 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.

6. A barrister must have regard to guidance published from time to time by the Bar Council in considering whether to accept and in carrying out any public access instructions.

7. 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), 603(a), 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 fulfil 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.

8. Save in exceptional circumstances, a barrister will have complied with rule 6 above if he has written promptly to the lay client in the terms of the model letter provided on the Bar Council's website.

9. In any case where a barrister has been instructed by an intermediary, he must give the notice required by rule 6 above both:

- (a) directly to the lay client; and

(b) to the intermediary.

10. A barrister who accepts public access instructions must keep a case record which sets out:

- (a) the date of receipt of the instructions, the name of the lay client, the name of the case, and any requirements of the client as to time limits;
- (b) the date on which the instructions were accepted;
- (c) the dates of subsequent instructions, of the despatch of advices and other written work, of conferences and of telephone conversations;
- (d) when agreed, the fee.

11. A barrister who accepts public access instructions must either himself retain or take reasonable steps to ensure that the lay client will retain for at least seven years after the date of the last item of work done:

- (a) copies of all instructions (including supplemental instructions);
- (b) copies of all advices given and documents drafted or approved;
- (c) the originals, copies or a list of all documents enclosed with any instructions;
- (d) notes of all conferences and of all advice given on the telephone.

12. A barrister who has accepted public access instructions may undertake correspondence where it is ancillary to permitted work, and in accordance with the guidance published by the Bar Council.

13. Save where otherwise agreed:

- (a) A barrister shall be entitled to copy all documents received from his lay client, and to retain such copies permanently.
- (b) A barrister shall return all documents received from his lay client on demand, whether or not the barrister has been paid for any work done for the lay client.
- (c) A barrister shall not be required to deliver to his lay client any documents drafted by the barrister in advance of receiving payment from the lay client for all work done for that client.

A barrister who has accepted public access instructions in any civil matter may take a proof of evidence from his client in that matter.

Code of Conduct

Part II - Practising requirements

[...]

Rights of audience

203.1 A barrister may exercise any right of audience which he has by reason of being a barrister provided that:

- (a) he is entitled to practise as a barrister in accordance with paragraph 202; and
- (b) if he is of less than three years' standing his principal place of practice (or, if he is practising in a dual capacity, each of his principal places of practice) is either
 - (i) a chambers or annexe of chambers which is also the principal place of practice of a qualified person who is readily available to provide guidance to the barrister; or
 - (ii) an office of an organisation of which an employee, partner, manager or director is a qualified person who is readily available to provide guidance to the barrister.

203.2 For the purpose of paragraphs 203.1(b) and 204(c)(i) a barrister shall be treated as being of a particular number of years' standing if he:

- (a) has been entitled to practise and has practised as a barrister (other than as a pupil who has not completed pupillage in accordance with the Bar Training Regulations) or has been authorised to practise by another approved regulator;
- (b) has made such practice his primary occupation; and
- (c) has been entitled to exercise a right of audience before every Court in relation to all proceedings for a period (which need not be continuous and need not have been as a member of the same authorised body) of at least that number of years.

203.3 A person shall be a qualified person for the purpose of paragraph 203.1(b) if he:

- (a) has been entitled to practise and has practised as a barrister (other than as a pupil who has not completed pupillage in accordance with the Bar Training Regulations) or has been authorised to practise by another approved regulator for a period (which need not have been as a member of the same authorised body) of at least six years in the previous eight years;
- (b) for the previous two years
 - (i) has made such practice his primary occupation, and
 - (ii) has been entitled to exercise a right of audience before every Court in relation to all proceedings;
- (c) is not acting as a qualified person in relation to more than two other people; and

(d) has not been designated by the Bar Council or Bar Standards Board as unsuitable to be a qualified person.

203.4 In relation to public access instructions, a person shall be a qualified person for the purpose of paragraph 203.1(b) if he otherwise complies with 203.3 and is registered as a public access barrister in accordance with Annex F2.

203.5 This paragraph 203 is subject to the transitional provisions at paragraphs 1102 to 1105.

Supply of legal services to the public

204. A practising barrister may supply legal services to the public provided that:

- (a) he is practising in a way permitted by rule 205
- (b) he complies with the requirements of paragraph 203.1;
- (c) he is covered by insurance against claims for professional negligence arising out of the supply of his services in such amount and upon such terms as are currently required by the Bar Council or alternatively (in the case of:
 - (i) an employed barrister; or
 - (ii) a barrister practising as a manager or employee of an Authorised Body)

his employer or the body, as the case may be, is covered by such insurance in such amount and upon such terms as are required by the Approved Regulator of the employer or body (or if none, in such amount and on such terms as are currently required by the Bar Council); and

- (d) In the case of legal services supplied pursuant to paragraph 401(a)(iii):
 - (i) he has been issued with a full practising certificate;
 - (ii) he has complied with such training requirements as may be imposed by the Bar Council or Bar Standards Board; and
 - (iii) he has notified the Bar Council that he holds himself out as willing to accept instructions from lay clients.

[...]