

The public access scheme

Guidance for lay clients

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, at page 2.

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) or 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 on page 4 below.

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 at page 6 of 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 service 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.

- 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.
- 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.

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 records the terms of the agreement between you and the barrister. It is a very important document and you 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 could be eligible for public funding, a barrister has to advise you to approach a solicitor.

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. 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 has to advise you to approach a solicitor with a franchise from the legal Services Commission to investigate this possibility.

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

In the first instance, you should try the complaints system maintained by the barrister or his or her Chambers. Should this not help, the Bar Standards Board operates a complaints system. If you are not satisfied with the way in which the Bar Council has considered your complaint, you may take the matter up with the Legal Services Ombudsman.

A barrister is required to deal with all complaints courteously, promptly and in a manner that addresses the issues raised by the complaint. He or she is also required to have a written complaints procedure that should be made available to you if you ask for it. Whatever the nature of your complaint, therefore, you should take the matter up with the barrister in the first instance, or his or her Senior Clerk or Head of Chambers. The nature and speed of any response will depend upon the precise circumstances. For example, if your complaint is that the barrister has been negligent, he or she is required to inform his or her insurers and those insurers may need to be consulted about the response.

If this is not possible, or you are unhappy with the manner in which the barrister has dealt with your complaint, you should contact the BSB, the regulator for barristers. We investigate complaints against barristers and take action against those who break the rules of the code of conduct. We do this in the interests of the public and to maintain the good name and standards of the profession. There is no charge for making a complaint to us.

The address and phone number is:

Complaints and Investigations Department,

Bar Standards Board

289-293 High Holborn

London
WC1V 7HZ

Main Switchboard: 020 7611 1444

Fax: 020 7611 1342

If you are not satisfied with the way in which the Bar Standards Board considered your complaint, you may contact the Legal Services Ombudsman to investigate how we handled it. The Ombudsman is not a lawyer. If the Ombudsman thinks that the complaint was not investigated properly, she can recommend that the complaint be reconsidered or that the BSB and/or the barrister pays compensation.

The Ombudsman's address is:

The Legal Services Ombudsman

3rd Floor

Sunlight House

Quay Street

Manchester
M3 3JZ.

E-mail. enquiries.lso@oslo.gsi.gov.uk

Website: www.olso.org

Lo-call number: 0845 6010794 (charged at local rates and available nationally)

March 2010