

Legal Services Commission's Response to the Bar Standards Board's consultation on the 'Review of the Public Access Rules'

Introduction

1. The Legal Services Commission (LSC) is an executive non-departmental public body sponsored by the Ministry of Justice. With an annual spend of around £2bn, we are responsible for the delivery of civil and criminal legal aid services and the development of the Community Legal Service. We help over two million people in England and Wales every year.
2. The LSC is committed to ensuring that clients have access to quality services that meet their needs, and that providers deliver quality, value for money and client focused services.

General Comments

3. We welcome the opportunity to respond to this consultation and are interested in the development of public access to the bar. The vast majority of clients that we serve under the legal aid scheme are not covered by public access rules¹, as such our comments will be general observations based on our significant involvement in ensuring clients' and the wider public's best interests are served by the legal system. Our response covers areas in which we are interested stakeholders – quality, the public's access to information and legal aid eligibility. In particular we want to emphasise the need for:
 - robust and independent quality assurance schemes to safeguard clients regardless of the route by which they access the legal system.
 - the public to have access to clear information on the legal routes open to them including the public access scheme and the legal aid scheme.
4. Answers to the specific questions should be read in the context of our general views.

Quality

5. We recognise the benefits to the profession afforded by the opening up of working options available to barristers in light of the Legal Services Act 2007, and understand BSB's role in supporting the profession to be in a position to take advantage of those opportunities. The extension of the rule does actively promote competition and in theory supports improved access to appropriate services for consumers, as well as aligning with the Legal Services Act 2007.

¹ The LSC could exceptionally fund a Direct Access barrister on an individual case, outside of the LSC's normal processes, which meets the strict criteria for exceptional funding under section 6(8)(b) of the Access to Justice Act 1999. However the funding available in this area is very limited, only a small number of cases fall within this scheme.

6. We also recognise that expansion in this area will provide greater choice and access for clients. The expansion to further categories has the potential to drive down costs for clients. However it is imperative that whilst costs may be reduced quality should remain at a competent standard. Any expansion must be safeguarded by robust quality assurance and at this stage we do not feel that adequate quality assurance is in place for the bar to support expansion in this area.
7. If there were adequate quality assurance in place, we would see no need for many of the current restrictions that limit the work available to access barristers. Our concerns around quality, focus on the need to ensure that an access barrister has
 - 1) the requisite competence for the case, and
 - 2) the requisite understanding that direct access is right for the individual client and the particular case in each instance.
8. The proxies currently in place do not provide adequate assurance that either of these tests is met.
9. From the client's perspective, they too need to be very clear about the advantages and limitations of accessing a barrister directly. In theory, a broader access scheme should provide benefits for the consumer, however, in our view, the scheme requirements would need to be significantly enhanced (around quality assurance and client care) to provide confidence that any extension (or even maintenance) of the current scheme is in clients' best interest.

Legal Aid Eligibility

10. A further concern regarding the rules is that those who may be entitled to public funding are informed of its availability and of their eligibility for assistance under the CLS/ CDS schemes rather than being 'misdirected' to use this scheme on the basis that it is cheaper than going through a solicitor.
11. The LSC would expect the client to be advised about the availability of public funding whether they use the traditional route of instructing a solicitor or the public access route. It is not clear from the guidance provided in the annex to the paper whether there is a duty to advise the client of this.
12. As barristers are unable to carry out a means assessment, clients should be advised about the existence of CLA (CLS Direct) telephone advice lines and the calculators available to member of the public to check eligibility. With any proposal to move into the area of public law work involving children/family cases for example, it is vital that clients only access the public access scheme if legal aid eligibility has been explored and discounted.
13. The BSB should ensure that there are robust systems to safeguard such clients and ensure that they are re-directed towards legal aid providers where appropriate. The training and guidance for public assess work should cover this.
14. Barristers need to be aware of the Exceptional Funding scheme which operates under section 6(8)(b) of the Access to Justice Act 1999. This is a discretionary power to fund individual cases that would normally be excluded from the scope of civil funding e.g. inquests and tribunal cases, but is typically only available where funding is required on human rights grounds. This scheme falls outside the LSC's normal contract regime so that the LSC could in principle fund a Direct

Access barrister; however the funding available under this scheme is very limited and the tests are difficult to satisfy.

Specific comments

15. Our answers to each question are found below. If you would like to discuss any aspect of the LSC's response in more detail please contact Jennifer Will, Project Manager (Quality Standards), on 0207 7590385.

Specific Comments

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?

LSC Response

16. It is not clear what benefits are provided by the 3-year minimum requirement for public access work given that the work covered by this area does not extend beyond that of a normal barrister, and often more complex matters are excluded in the interests of justice. Rather than different/specialised case ranges the main area of difference is the level of client care required and an understanding of the rules and requirements of public access work.
17. To ensure quality (as with any barrister instruction) you would want to ensure that the person handling the case had the necessary expertise (and was appropriately supervised according to their level of experience). This need not preclude the use of those barristers who are newly qualified (less than 3 years), particularly given that such people could well be very experienced lawyers even if only recently qualified as barristers, provided the cases are suitable to their skill set and knowledge.
18. Earlier public access training should be considered in order to open up the opportunities afforded by public access work to the Young Bar. However, particular caution needs to be applied to ensure that barristers under 3 years call show sufficient competence and expertise in the type of case required.
19. When fully implemented, the Quality Assurance for Advocates (QAA) scheme will help to resolve some of the issues around quality, by identifying an individual's level of competence in different areas of law. Dealing directly with clients does also require additional skills (predominantly around client care) and in our view these should be assessed (ideally formally following competency based training) before any barrister is able to take on access cases. In this scenario, age or years call would cease (as we believe it should) to be a qualifying factor.

Q3 Do you agree that public access should be permitted in immigration tribunals?

LSC Response

20. When considering expansion into other areas of law what must be ensured is the quality of service to the client. If this area of work is not suitable for public access work on the grounds of interests of justice it seems that changes should be made to ensure only appropriate practitioners undertake this work rather than opening the work to everyone. The Bar Standards Board (BSB) should listen carefully to the concerns of the OISC.
21. The LSC would not support any current expansion of the scheme. However, with acceptable quality assurance in place, there is no reason why expansion should not cover all of the areas proposed, including for vulnerable clients (providing it was covered in training and properly assessed).

22. Also as above, the issue of funding (not just representation but also disbursements such as interpreters) is critical to ensuring access to justice.

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?

LSC Response

23. Allowing greater access in contentious issues will increase the number of competing lawyers and provide greater choice in the market place for consumers and procurers. Clearly, the priority will be that the client receives effective representation at the right price whether from a barrister or a solicitor. In some cases this could also produce efficiency savings if the requirement to instruct a solicitor and barristers is no longer a necessity.

24. Cases of seriousness that risk a client's imprisonment (other than guilty pleas) would require skills of organisation, case preparation and case management. It is questionable whether a barrister would have the experience, skill or resource to complete these tasks. It would not be in the interests of justice to expect a client to undertake this role so inevitably a solicitor would and should be required.

25. Cut off criterion would need to be focused around cases that require little preparation or intervention by a solicitor; guilty pleas could be solely represented by barristers with little input required from a solicitor.

26. Again with any area of public access work the barrister must ensure the client is aware of the limitations (in terms of preparation) of a direct access barrister, and in properly assessing whether it was in the client's best interests to be represented by them (or indeed at all, see below).

27. BSB should be mindful of a number of initiatives in the courts that have been developed to improve access for lay clients/litigants in person. Care must be taken not to usurp those, or indeed to jeopardise the client's position by instructing a barrister where the court does not view this as necessary and may in fact view it as antagonistic or unduly adversarial.

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?

LSC Response

28. We believe that it is key that barristers ensure direct access is in the client's best interests in each case, regardless of case type before proceeding with the matter. There should be greater training and assessment (and guidance and restrictions) where a client is vulnerable. It could be that this relates to the individual making the instruction, rather than about their case. Although this scenario is less likely it may make cases regarding money or property just as complex or sensitive.

29. If family cases were to be permitted under the public access rules (it should be in the context of comments above). Children and public law cases are particularly sensitive with often extremely vulnerable clients, so assurances that levels of client care and interaction with clients and witnesses are of the highest quality is paramount.

Q8	Do you support the BSB's proposal that a barrister should be permitted to undertake correspondence - if so, why and if not, why not?
Q9	Should the current 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?

LSC Response

30. It seems appropriate, in light of Alternative Business Structures (ABS) and Legal Disciplinary Practices (LDP's) that the issue of correspondence is revisited. It does seem inconsistent that Barristers are under no restriction with regard to communication by telephone. Any restrictions on proactively progressing the clients case whether, by email or correspondence should be relaxed.
31. In principle we agree that rules should be relaxed, in the clients interest but appropriate guidance and training should be developed to cover this. It is paramount that both the Public Access client and Barrister are clear as to their roles.
32. Whilst the Bar may want to take care to retain barristers' identity as something very different from solicitors, if a barrister takes on direct access work, they must be able to provide an adequate service for all of the representational part of the case (which will inevitably cover correspondence from time-to-time). To suggest that it is restricted because it is not covered in a barrister's training, suggests this important element should be considered for particular inclusion in training for all access barristers.

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?

LSC Response

33. The course should cover more detail on the areas outlined. i.e. money laundering regulations. In addition the course should incorporate appropriate sections regarding client care and equalities and diversity requirements, as well as barristers' responsibilities for referring clients to other services where public access is not appropriate or for those who are eligible for legal aid.
34. If changes are made to the rules on correspondence this should also be covered within training.

35. We believe that assessment should be mandatory and should cover the practical skills and competences required, as well as of the knowledge and understanding required (as set out in rules and 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?

LSC Response

36. The guidance would benefit from being reworded to make it more accessible to members of the public so that they are clear what the public access scheme means for them in practice in terms of the conduct of a case.

37. We also suggest that it may be helpful if the guidance were more positively slanted on what the public access scheme offers rather than a list of exclusions, which can be dealt with following a clear outline of the options provided by the scheme.

38. We feel this will support the cause of access to justice as if the public are clearly informed what the scheme offers they can make an informed choice and possibly use the scheme when no viable alternative offers itself to them.

Q16 Do the letters contain 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?

LSC Response

39. As with requirements for solicitors (Code of Conduct) and in particular Legal Aid providers (Specialist Quality Mark (SQM) requirements), client care letters are an important element in the conduct of cases. We would expect public access clients to receive the same service regarding confirmation of advice given, action taken, instructions and any limitations for their case. This is what we believe consumers expect and is a key component of a quality service.

40. The use of model letters is acceptable, however these must be tailored to individual clients, their needs and their case, to ensure good quality of service. We would also expect clients to receive necessary updates in writing with regard to the case progression and/or any changes. Tailoring responses to clients need not be onerous, can involve using standard information in a way that is meaningful to the client and their case.

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?

LSC Response

41. More extensive marketing will enhance the potential benefits of the scheme and ensure that all suitably qualified barristers have the opportunity to compete for business. There may be both financial and access benefits, as securing work is not reliant on recommendation from a solicitor.

42. However we believe any advertising should be supported by proper BSB regulation. The scheme should be able to assert that it is “quality assured” and define what that mean – we believe that this is what consumers seek.