



Bar Council response to the Changes to the Public and Licensed Access Rules consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Bar Standards Board consultation paper entitled, “Changes to the Public and Licensed Access Rules”.¹
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

The Bar Council agrees with most of the proposed changes which are simply removing unnecessary regulations and requirements and part of a welcome rationalisation of the public and licenced access rules. However there are a couple of proposals we disagree with, namely the requirement to provide the notification to

¹[https://www.barstandardsboard.org.uk/media/1835713/public_and_licensed_access_consultation_paper_final_cross-references .pdf](https://www.barstandardsboard.org.uk/media/1835713/public_and_licensed_access_consultation_paper_final_cross-references.pdf)

clients of the level of professional indemnity insurance and the proposal to widen the scope of practice to create a fourth mode of instructing a barrister.

Question 1: do you agree with the conclusion that the status quo should be maintained i.e. that the cab-rank rule should not be applied to Public and Licensed Access cases? If not, please state why not.

4. Yes. As the BSB has correctly identified, there is no evidence to suggest lay clients who wish to instruct a Public Access barrister and have the funds to do so are experiencing any difficulty in finding a barrister to act for them.

5. The relationship between a barrister and a Public Access client mirrors that of solicitor and client. It is difficult to see what justification there could be for imposing a 'cab rank rule' on barristers acting on a direct instruction when the same does not apply to solicitors.

6. We agree with the BSB's assessment that introduction of the cab-rank rule may act as a disincentive for barristers to register for Public Access work. Barristers currently enjoy the flexibility and choice that Public Access affords them and many undertake Public Access work in tandem with referral work. Many would not feel able to undertake both if the element of choice were to be removed from the decision as to whether or not they have capacity and inclination to take on a Public Access case.

Question 2: do you agree with the proposed changes to the Public Access Rules (at Annex B)? In particular, do you agree with the proposals to:

a) remove the requirement for barristers who are of less than three years' standing to maintain a Public Access log; and

7. We agree. No risk or disadvantage has been identified from the rule change in 2013 allowing barristers under three years' standing to do Public Access work. This, combined with the various efforts to encourage all barristers to encourage client feedback means we can see no justification for continuation of the rule requiring barristers under three years' standing to maintain a Public Access log.

b) require that the written notification given to Public Access clients discloses the level of professional indemnity insurance held by the barrister? If not, please state why not.

8. We do not agree with this proposed change. Although it is not clear what is meant by the words 'the level of professional indemnity insurance held by you', it is assumed that this rule is intended to oblige Public Access barristers to disclose the

maximum monetary amount which could be paid out under their indemnity insurance cover.

9. Such a requirement does not apply to solicitors, other members of the legal profession or to other professions such as accountants and the medical professionals. Nor does it apply to barristers instructed by professional clients or under Licensed Access. It is not clear why Public Access barristers merit being singled out.

10. A disclosure requirement of this nature might act as a disincentive to barristers qualifying for and being willing to take on instructions via Public Access, particularly by those in areas of work where a significant level of top up insurance is wise (e.g. chancery and commercial). This is because for some, the information may be commercially sensitive, as it frequently is in other sectors or even viewed as inviting claims. For others, this may simply be seen as an unnecessary imposition, adding to other reasons why Public Access work is not seen as attractive. Hence we believe there should be no requirement for disclosure of this information without significant justification.

11. Instructions for the higher value work, where it might be thought the risk of under insurance is greater, is still predominantly done via solicitor instruction. The risk in a Public Access case is, if anything, is usually lower.

12. It appears the reason the BSB is considering introducing such a rule is that it has misinterpreted the Competitions and Markets Authority Legal Services Market Study Final Report ('the CMA report'). The BSB has reproduced a modified version of Table 7.1 from the CMA report in its own action plan² on that report. The BSB version includes the words 'the level of professional indemnity insurance cover' in the 'Redress' column for minimum disclosure requirements.

13. The CMA report does not refer to 'the level of' PII cover either in this table or anywhere else in the report, save for two places. One is in paragraph 7.160 where it suggests that the Legal Choices website might inform consumers whether unauthorised providers hold PII cover and the level of that cover. The other is in a footnote to paragraph 7.113 which suggests that in some cases there might be a requirement to ensure the level of cover is appropriate. Barristers are already subject to this requirement by virtue of rC76.1 and rC19.5 of the Bar Standards Board (BSB) Handbook³. In addition, barristers are required to disclose to their clients details of their insurance cover, including contact details and information about territorial coverage by virtue of the Provisions of Service Regulations 2009.⁴

² [CMA Legal Services Market Study: BSB Response](#), June 2017: 1

³ [Bar Standards Board Handbook](#)

⁴ [Bar Council guidance: Provision of Service Regulations](#)

14. Read properly, the CMA report does not suggest that providers should be subject to any greater obligations than the above, which they are currently subject to. In addition, the CMA recognises that,

“It will be for individual regulators to assess their own current regulatory requirements and the relevance of our recommendations to the services that their regulated professionals offer”⁵,

15. They also suggest it would be useful to first test with consumers the value of different disclosures before implementing any change⁶. We would ask the BSB to consider including such a test in their autumn transparency pilot programme, to properly assess whether such a change is beneficial, if it is not already doing so.

16. If this proposal is intended to reassure the client, then it seems to forget that practising barristers are implicitly regulated by virtue of holding the title of “barrister” and are required to have adequate insurance because they are subject to the BSB Handbook. The majority of clients understand this and are attracted to the Bar precisely because of the thorough regulation that use of the title “barrister” confers. As the BSB admits, “there is no evidence of widespread under-insurance by Public Access barristers”⁷ and we question the assumption that there is a problem that needs addressing by this proposed additional regulatory requirement.

17. Information on redress mechanisms is commonly included in client care letters and it is therefore likely that information on PII cover would also be included in this medium. There have been moves by various legal bodies in recent years to simplify client care letters and use language that is readily understood by clients. Inclusion of the level of professional indemnity insurance in the client care letter is contrary to the recommendations in a recent research report jointly commissioned by the BSB with other legal regulators, that legal professionals ought to keep such letters concise and to use plain English⁸.

18. If this proposal is consumer driven, then it is also very unlikely that consumers would have any need or wish to know the amount of any top up insurance above the minimum cover required under Bar Mutual terms. At the most, therefore, the requirement should be limited to confirming that the barrister maintains at least the minimum cover required by Bar Mutual, and the amount of that cover at the time of accepting instructions.

⁵ CMA Legal Services Market Study [Final Report](#) 2016: 228

⁶ Ibid

⁷ Bar Standards Board consultation paper, “Changes to the Public and Licensed Access Rules” 2017: 17

⁸ [Research into Client Care Letters](#) QUALITATIVE RESEARCH REPORT, Optimisa Research, Commissioned by a number of legal regulators including the BSB, 2016: 5

19. However such disclosure brings with it a difficult risk; because barristers renew their BMIF cover every year, their level of cover will vary each year. Therefore if the BSB were to proceed with requiring barristers to disclose their level of insurance there is a risk that whilst the information will be accurate at the time when it is given to the client, it may simply be out of date by the time that anyone seeks to rely on it. Should this be the case, the requirement is at best a waste of time and at worst, misleading to the client.

20. In summary, we think the current regulations go far enough and that it is unnecessary and potentially counterproductive for a barrister's level of professional indemnity insurance to be disclosed to clients.

Additional comment on rule rC129-Ddocuments

21. It is agreed that the record keeping rules in the Public Access Rules and the Licensed Access Rules should not be inconsistent. However, given that it is possible for a claim to be issued six years after the event but not served for another four months, it seems sensible to keep the seven year rule here and change the Licensed Access Rules. We would also recommend that at rC121.1 "the Bar Council" should be changed to "the BSB", because of inconsistency with rC120.1.

Question 3: have you identified any further opportunities to simplify or improve the Public Access Rules (at Annex B)? If yes, please explain your answer.

22. It is difficult to see the practical value of rC131.4 is, given that a barrister however instructed may take a proof of evidence from a client in any case. This rule appears to be a hang-over from the old version of the Public Access Rules which were drafted before the changes to the old Code of Conduct in 2010 which allowed barristers to investigate and collect evidence.

Question 4: do you agree with the proposed changes to the Licensed Access Rules (at Annex C)? In particular, do you agree with the proposal to remove references to the Licensed Access Terms of Work? If not, please state why not.

23. Agreed.

Question 5: do you agree with the proposed changes to the Licensed Access Recognition Regulations (at Annex D)? In particular, do you agree with the proposals to:

- a) only impose limitations and conditions on licences in exceptional circumstances?;
- b) if appropriate, permit members of the professional bodies listed in the First Schedule to use the scheme to instruct a barrister for representation in the higher courts and the Employment Appeal Tribunal?;
- c) move the First and Second Schedules to guidance?;
- d) devise application processes for bodies to be added to the First and Second Schedules?; and
- e) only charge a fee for applications by professional bodies to be added to the First Schedule?

If not, please state why not.

24. Agreed. We should like to use this opportunity to seek clarification on whether clients that are individual members of professional bodies detailed in schedule 1 will be required to show their licenced access certificate to the barrister instructed as currently required in the BSB Handbook (rC134.2). We think it would be more realistic to require proof of membership of their professional body to be shown to the barrister, given it will likely be difficult for them to obtain the certificate from the organisation that holds it. In any case, clarity on this matter would be helpful.

Question 6: do you agree or disagree that, in principle, the Scope of Practice Rules should be amended to allow any client who would not be able to complain to LeO to instruct any barrister directly (i.e. without using the Public or Licensed Access schemes)? Please state why.

25. Whilst we welcome the removal of unnecessary regulations and the opening up of new markets for the Bar, it is not immediately clear what the purpose of this proposed scheme is, whether there is evidence of demand and whether it will afford sufficient protection to clients. There is insufficient detail about its purpose and operation. Hence at this stage the Bar Council does not agree with the proposal and would offer the following observations:

26. Large companies and organisations are unlikely to take advantage of this amendment because they will continue to deal with legal problems as they typically tend to now, either by using an in-house legal department or instructing solicitors. Those who may use the scheme are SMEs (small and medium sized enterprises). A SME with just over ten employees is unlikely to be any more sophisticated in the way it approaches a legal problem than one with nine or fewer. This poses a potential risk

in terms of a difference between their expectations of service compared to the service they receive and their means of redress if things go wrong.

27. Under the Licensed Access scheme the obligation falls on the licence holder to satisfy the BSB it is a fit and proper person to be able to instruct a barrister. Under the Public Access scheme the obligation falls on the barrister to ensure the case is suitable for Public Access and he or she has the appropriate training to deal directly with a lay client. This 'third way' seems to fall between both schemes and currently lacks similar safeguards for ensuring the work is suitable for instruction without a professional client and without the protections afforded by Public and Licensed Access work. We explain our reasoning further in the answer to the next question.

Question 7: in these scenarios of clients instructing barristers directly, have you identified any risks in not requiring compliance with the Public and Licensed Access Rules? If yes, please explain your answer.

28. The Public Access scheme imposes a number of requirements on a barrister which provide important safeguards both for the barrister and the lay client. Importantly they require the barrister to inform the client in the client care letter 'in clear and readily understandable terms' (at rC125 of the BSB Handbook) what work the barrister is going to do and what fee is going to be charged. This is vital in ensuring that the client understands the basis of instructions.

29. There are other safeguards as well. A barrister cannot take on the case if it would be in the client's interests or the interests of justice for a solicitor to be instructed instead (rC122 of the BSB Handbook). This obligation lasts for the duration of the case. The barrister must unless authorised to conduct litigation, warn their client that they do not conduct the litigation (rC125.3); that they might get a clash of professional duties which requires them to return instructions (rS125.6); that they do not work as part of a firm (rC125.2); and that they are bound by the Code of Conduct. The client care letter in a Public Access case must also comply with other statutory obligations, such as under the data protection legislation and the Provision of Service Regulations 2009.

30. Clients are usually afforded some protection in Licensed Access cases by virtue of their membership of a profession and familiarity with its legal and regulatory framework and because they may be accustomed to instructing legal professionals. We are concerned that the clients of this new scheme may not have the necessary expertise to instruct the Bar directly and may lack understanding of the limitations on the scope of the barristers work and consequent roles they themselves may have to take on, absent for example, a solicitor or barrister authorised to conduct litigation.

31. It is difficult to see how this scheme would ensure the client protections afforded by the Public Access rules and to a lesser extent, the Licensed Access rules, without imposing similar requirements, in which case it would be redundant.

Question 8: do you consider that any of the proposals in the consultation could create any adverse impacts for any of those with protected characteristics under the Equality Act 2010? If yes, please explain your answer.

32. No.

Bar Council⁹
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⁹ Prepared for the Bar Council by the Direct Access Panel of the Legal Services Committee