

## SCREENING FORM

Date of Screening	August 2009
Assessor Name & Job Title	Toby Frost, Standards and Quality Assistant
Policy/Function to be Assessed	Amendments to the public access scheme.
Aim/Purpose of Policy	<p>The purpose of the amendments is to facilitate use of the public access scheme by both consumers and the bar.</p> <p>The public access scheme permits barristers to be instructed directly by lay clients without the need for an instructing solicitor or other intermediary. In order to offer services under the scheme a barrister must have had three years' practising experience, must have registered with the Bar Council as willing to provide public access work, and must have attended a course run by the College of Law, which seeks to prepare barristers for such work. The BSB intends to work with the College of Law to ensure that the course sufficiently addresses Equality and Diversity issues.</p> <p>Public access is currently limited to: non-publicly funded work in all areas of law other than (almost all) criminal, family and immigration work.</p> <p>Further, barristers undertaking public access work are unable to carry out the functions of the solicitor, which means that in practice many of the activities that would be carried out by the solicitor (filing of documents, communication with the court, writing of letters before action etc) fall to the lay client. Although the barrister can draft documents and letters on the lay client's behalf, they must be sent by the lay client and not from the barrister or the barrister's Chambers. At all stages in the case, barristers are obliged to consider whether it would be beneficial to introduce a solicitor. The public access course trains barristers to identify situations where this will be appropriate. The guidance gives example factors that may push the decision one way or the other: public access is in many ways suited to clients who are able to explain the case and run it without difficulty.</p> <p>When the Bar Council (which originally had oversight of the scheme) introduced public access in 2004, it undertook to review the working of the scheme three years later.</p> <p>In furtherance of this, the Bar Standards Board (which now oversees the scheme) formed a working group, which has consulted twice with the public and profession on this matter. The group sought views on the operation and restrictions on the scheme, and the potential results of widening the ambit of the scheme.</p>

Effort was taken to encourage lay clients of the scheme to contribute their responses. A number of replies were received from lay clients, which were taken into account in the working group's deliberations.

As a result of its findings, the group has proposed changes to the application of the public access scheme. The main changes are:

- a)** The range of work available under the scheme is to be widened to include family, criminal and immigration work. It should be noted that publicly funded work will continue to be unavailable under the public access scheme, which will limit the extent of the new work available to barristers.
- b)** Barristers are to be permitted to engage in correspondence between the parties as per the decision in the case of *Agassi*. This distinguishes case management-type correspondence from the conduct of litigation, although the prohibition on the conduct of litigation will remain.
- c)** The guidance for barristers is to be enlarged to include information on money laundering and the keeping of records.
- d)** The guidance for barristers and clients is to be rephrased to appear less negative in tone. A number of respondents to the consultations felt that the emphasis on the restrictions on the scheme in the existing guidance was potentially off-putting.
- e)** The Public Access Rules at F2 of the Bar Code of Conduct are modified to reflect these changes, along with the addition of a minor enabling amendment at 401(b) of the Code.

It is important to note that it is still not possible to take publicly-funded cases under the public access scheme. This means that it will simply not be possible to take a large proportion of family, criminal and immigration work. In addition to this, the barrister is required to continually assess whether the case would be better served by the inclusion of a solicitor. This is an obligation under the rules. It may well be appropriate to instruct a solicitor where there is a need to instruct other experts, or where the lay client is not able to deal with the paperwork requirements, in order to manage the caseload properly. Where the lay client is unable to deal with the paperwork, it is very likely that a solicitor will be required.

It should be noted that the barrister is under a duty in the Code not to take on work he cannot handle. To do so is a

potential disciplinary offence. The same requirements on the barrister to provide a satisfactory service remain. The Court remains able to raise a complaint to the BSB if required, or to admonish the barrister of its own volition.

Many of the restrictions originally imposed on the public access scheme were intended for public protection. There was concern at the original implementation of the scheme that barristers could be attempting work for which they were not suited, leading to a rise in complaints.

Very few substantive complaints have been received by the Bar Standards Board about work carried out under the public access scheme. In the context of the complaints received, the absence of complaints may be seen as the best indicator of the success of the scheme. When the scheme was originally implemented, the view was expressed that it would lead to a large number of complaints being made against barristers working under the scheme. This has not occurred. Simon Garrod is to contact BMIF to find out whether they have any additional data in this area. BMIF may be able to supply information on the level of claims being made.

It is clearly in the public interest that restrictions should be proportionate and should not be allowed to remain unless justified. The group therefore considers that many of the existing restrictions (which were initially intended to protect the public) are no longer justified, given the success of the scheme and the very low level of complaints about barristers providing public access work received by the BSB.

The working group considered the issue of diversity in writing its final report, and concluded that opening the scheme in the areas of immigration, family and crime would provide additional opportunity for barristers without raising the prospect of adverse impact on minority groups. The group considers that the review of the scheme has actually made public access much more open and accessible by bringing in new areas of work. A high proportion of immigration work is carried out by BME barristers, and enabling barristers to do this sort of work under the scheme would greatly increase the capacity of the Bar to compete with non-barrister immigration advisors.

Although the amendments will not make publicly funded work available under the scheme, which will still limit the quantity of work that becomes available in family law, they will help to widen access to family cases for barristers.

Copies of the draft amendments and report were sent to a wide range of organisations. These organisations, which represented minority groups, were asked for their comments. Out of fourteen groups, two replied.

Comments received from the Disability sub-group of the Bar Council considered the draft guidance rather than the

	<p>proposed amendments to the public access rules. They stressed the need to make guidance clear and accessible for the disabled, in particular those with reading difficulties. There was a need for clarity in the materials and for them to be available in a number of forms to make them as accessible as possible.</p> <p>The working group proposes that the changes to the scheme should be reviewed 18 months after its release, in order to consider any issues arising during that time.</p> <p>We believe that the comments in this assessment are a proportionate response to the issues raised. It is difficult to pre-empt every possible circumstance in which the public access rules might be applied: however attempts have been made to cover the areas in which problems might arise. We further stress that the barrister is not obliged to accept instructions in a public access case and must instruct a solicitor where appropriate to do so, as per the public access rules.</p>

**Do you consider the policy to have an adverse impact on equality?**

- Gender equality      Yes       **No**
- Race equality        **Yes**       No
- Disability equality   **Yes**       No

<p>If yes, is there any evidence to support this?</p>	<p><b>Race</b></p> <p>The public access working group considered that the proposed reforms would have no negative effects. It should be noted that the reform of the scheme may have a greater effect on people from BME backgrounds than those who are not. The reform of the scheme will create wider access to justice by widening the scope of public access and reducing the costs of acquiring representation. Making the service cheaper and more accessible will assist access for groups who did not have access previously.</p> <p>The response from ILPA was broadly in favour of the scheme but quoted a range of comments made by its members regarding the scheme, without actually coming down in favour of them.</p> <p>1)</p> <p>Many immigration clients are familiar with legal systems in which there is no split between barristers and solicitors and it is important to bear this in mind when producing publicity</p>
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material aimed at this client group.

2)

Others note that where barristers are instructed by direct access it will not always be easy for the Tribunal to identify whether the barrister or the lay client is responsible e.g. for failure to comply with directions, particularly where the lay client is overseas and not present at the hearing.

3)

On the question of cost, it is vital that barristers participating in the scheme are able to identify clients who qualify for legal aid and that the clients are advised of this, because such clients will need to be represented by a solicitor or by a not-for-profit organisation holding a Legal Services Commission franchise in immigration.

4)

One common disbursement in immigration cases, which is highly relevant to access to justice for vulnerable people, is payment for interpreters' and translators' fees. Failure to use a good interpreter can be very important in a field where inconsistencies and contradictions are picked up and used as reasons to refuse an applicant. Are barristers to handle disbursements for interpreters? If not and the client is to take responsibility for securing an interpreter, what steps are to be taken to ensure that the standards of interpretation is adequate?

5)

If the barrister has provided very detailed advice on the completion of a form and the submission of the supporting evidence but is not the representative on the record, will their contribution anywhere be visible or will the client simply indicate that they are not represented?

6)

Legal aid funding cuts have hurt the junior Bar. If there is to be an increase in solicitors declining to instruct them because of this question of competition there is a real question about how those not already established in the field will be able to specialise in immigration as their main or exclusive area of practice.

The responses to these issues are considered in the next section.

#### **Gender**

No evidence has been provided of there being gender equality considerations. Further comments on gender equality under the public access scheme are below.

## **Disability**

The disability sub-group of the Bar Council was broadly in favour of the proposals but raised issues as to the presentation of the guidance for barristers and the public. The main points raised by the sub-group were:

1)

The Consultation proposes (paragraph 60) 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."

To meet these objectives our view is that the minimum standard is the use of Plain English to the standard of Crystal Mark, and that this accreditation should be obtained from the Campaign for Plain English.

2)

Guidance on Bar Council or Bar Standards Board websites should be presented in formats compatible with 'zoom' magnifier software and 'JAWS' screen reading software. In this form it will be accessible to most disabled people. Additionally, information about the scheme should be circulated through CABs, Law Centres and immigration and refugee advisory services to make it available to potential direct access clients who cannot use a website.

3)

We assume that the Guidance is aimed at all members of the public who have the capacity to instruct a barrister under the Direct Access Scheme.

To meet these objectives our view is that the minimum standard is the use of Plain English to the standard of Crystal Mark, and that this accreditation should be obtained from the Campaign for Plain English.

4)

For persons with a learning difficulty it will be helpful to use the format known as "Easy Read". Guidance is available from Mencap, but in brief the format combines simple text and visual representations. As the document will be for those who have capacity to instruct Counsel it is important that they are able to access this information independently, and it is inappropriate to leave it in an inaccessible format (such as ordinary text) in the expectation that someone will explain the contents to the prospective client.

5)

There is a limited need for Braille, but it may be wise to hold a couple of copies in this format with arrangements to produce more at short notice. Most visually impaired people are likely to use formats such as Large Print (larger than 20pt font), audio or electronic text. The RNIB publishes

guidance on relative quantities. Audio formats include tape, audio CD and MP3, the last of which could be available from the Bar Council website. The preferred electronic format is Word (rather than PDF) which can be made available on the Bar Council website. For BSL users it is possible to produce a DVD with the document in BSL, and to include the document (or a summary) as BSL clips available on the Bar Council website.

## POLICY ANALYSIS

What are the (potential) barriers to equality arising from this policy?

What evidence supports the existence of such barriers?

### **Race**

The Immigration Law Practitioners' Association (ILPA) did not provide one clear view but instead quoted a number of varying views of members. Comments from ILPA suggested that there was a potential range of effects. It would be necessary to monitor the scheme, given the vulnerable nature of some of those receiving immigration law advice. Public access in immigration could help foster diversity at the Bar, and that this could provide savings for the consumer, especially where a solicitor would previously have been instructed to do little more than forward documents in the case.

The view was expressed by a solicitor member of ILPA that public access in immigration work could lead to solicitors ceasing to instruct barristers with whom they were in competition. Another view was that permitting immigration work would allow barristers to compete with solicitors and diversify their practice, arguably encouraging diversity at the Bar.

1)

It is reasonable to expect the solicitor in a standard case and the barrister in a public access case to explain their roles clearly. The client care letter sets out what the barrister can do, and this includes the role and limitations on the barrister in public access work. It is a breach of the public access rules and a potential disciplinary offence for the barrister to continue to act alone where it would be more appropriate for a solicitor to be instructed. In a situation where the lay client is unable to carry out the normal role of a lay client in a public access case (through, say, being unable to speak or read English) the case would very probably be best served by the inclusion of a solicitor and/or translator. The working group proposes adding comments on the instruction of interpreters to the guidance for barristers.

2)

We do not consider that this is any more of a problem with barristers acting under the public access scheme than with solicitor-advocates or barristers instructed by solicitors (or indeed immigration advisors). In a situation where the legal representative has not acted properly the client has the option to complain to the regulator, the barrister's Chambers or the barrister him/herself. Although we agree that barristers must act to a proper standard, we note the existing requirements of the Code and the availability of the complaints procedure. It is further noted that the barrister, although able and obliged to help the Court, cannot make decisions for it. Where the Tribunal is uncertain as to who is



responsible for an act/omission it is able to make inquiries. We do not see any difference here between the current position and that under the public access scheme.

3)

The public access scheme does not permit legal aid work to be taken under 3.1 of the revised public access rules at Annex F2 of the Bar Code. A barrister attempting to do so would be in breach of the Code and potentially open to disciplinary proceedings. As a result we do not feel that this will be a problem. It should also be noted that in general a barrister should not make the decision as to whether a client is eligible for legal aid unless that barrister is an expert in this field. There remains a continuing duty on the barrister to assess whether the case is best served by his continuing representation or whether it would be better served by the inclusion of a solicitor or other expert.

4)

We feel that there are two potential solutions to this issue. Firstly, in the event of a trial the court service is likely to provide an interpreter, as arranged at a directions hearing. Secondly, where the barrister is dealing with a client in, for example, a conference, the barrister is able to hire an interpreter and include the interpreter's fee in the fee to the client.

The group feels that it may well be in the public interest for cases that are not suitable for public access to be recognised as such as early as possible, to save expense and difficulty for the client as well as the barrister and the court.

We propose that the guidance is amended to state that if the barrister recommends that an interpreter is used, and the lay client refuses to allow an interpreter to be instructed, the barrister should withdraw from the case, as it will clearly no longer be in the interests of the case and the lay client for the barrister to proceed without an interpreter.

The interpreter in a case will by definition speak the same language as the lay client seeking to make use of the interpreter's services. In the first instance, the barrister will research a pool of interpreters in the lay client's language. Then the lay client will pick one of the interpreters and instruct him/her.

Where the lay client is ultimately unable for whatever reason to effectively communicate information to the barrister, it is most unlikely that the case will be suitable for public access.

Although each case should be judged individually, we feel that where an interpreter is required the case is significantly less likely to be appropriate for the public access scheme.

As ever, the barrister is required to continually assess whether it would be more appropriate for a solicitor to be instructed. Failure to consider this would constitute a breach of the public access rules, and hence would be good grounds for complaint.

It is proposed that the guidance is amended to specifically consider the instruction of interpreters in public access cases.

5)

The situation this raises is analogous to that of a solicitor going on the record. It could be possible for a lay client to acquire the assistance of a solicitor for some elements of a case without that solicitor going on record as acting. ILPA suggests that if the barrister was not on record as acting, the lay client could be suspected of having acted fraudulently. It seems peculiar that the Court would come to this conclusion without properly making inquiries of the barrister and lay client. We note both the duty on the barrister to assist the Court under the Code of Conduct and the fact that any decision of this sort must ultimately be made by the Court.

6)

It is very difficult to answer this comment, as it is based on an assumption of structural change at the Bar that is hard to confirm or disprove. The Code requires barristers only to take on work they are competent to do (701(b)(i)). If they are found not to be carrying out work in a competent manner, the complaints procedure can be invoked. The option to complain is always available to the lay client. Barristers are obliged under the public access rules to make the client aware of this option, and it is worth noting that if the barrister is unable or unwilling to resolve the complaint it may be referred to the BSB for resolution. The BSB is also able to raise complaints of its own motion.

### **Gender**

The BSB considers that there are no negative policy implications with regard to gender.

The working group consulted twice as widely as possible, canvassing the views of both barristers and users of the scheme. Furthermore letters were sent to a range of organisations with particular interest in the fields of Equality and Diversity. No response from any of these consultation exercises indicated any difficulties that might affect one gender more than another. As a result we consider that, despite several attempts to ascertain the opinions of people involved in public access work, the absence of comments in this area suggests that there was no gender-related issue

worth commenting upon. As a result we do not see there being an issue here.

### **Disability**

At present, the BSB displays its documents in website form. Provision is made on the website to display information in larger fonts and in high-contrast text, thus improving its accessibility for the visually impaired. It is possible for documents to be provided in Word and PDF formats, making them suitable for use with software for reading aloud.

Documents are available in Braille on request: owing to high cost they are not automatically converted to Braille. It is felt that this is proportionate considering the cost and low number of requests for different document formats.

The BSB notes that where a lay client is educationally disadvantaged, they will generally have an assistant from the Citizens' Advice Bureau to help them with the case. We think it is very unlikely that it would be appropriate for a barrister to take on a public access case with a lay client who is unable to communicate fully with the barrister. In this situation it would be necessary to involve a solicitor, and hence it seems unnecessary to provide the guidance materials in a simplified form. There is also concern that since the guidance is by necessity fairly technical (although, we feel, clearly explained) it would be difficult to significantly simplify it without losing a good deal of its meaning.

We feel that it is very unlikely for public access to be appropriate where the lay client is disadvantaged to an extent where he or she is unable to carry out the tasks required of the lay client. For example, where the lay client cannot file documents with the Court (which the barrister cannot do under the public access rules) it will not be appropriate for the client to instruct without an intermediary.

However, it should be noted that the BSB has initiated a thorough review of its policy on the provision of documents on its website. This will include the availability of documents and information in alternative formats for disabled people. The comments made by the Disability Sub-Group will be taken into account in the accessibility audit.

It should be remembered that in all public access cases the barrister is under a continuing duty to assess whether the case would be better served by the inclusion of a solicitor or other individual. The breach of this duty would constitute a breach of the Code.

## Action Planning

<b>Recommendations and actions required to reduce/remove barrier</b>	<b>Person Responsible</b>	<b>Progress</b>
Comments of the disability sub-group to be considered as part of the accessibility audit re the provision of information.	Kofi Kramo/ Toby Frost	February 2010
Guidance to be amended to include advice on the instruction of interpreters after consultation with the Chair of the working group.	Toby Frost	Complete
BMIF to be approached regarding frequency and size of claims made re public access work.	Simon Garrod	Complete (no evidence of any public access difficulties)
Guidance to include comments above re ability of lay client to carry out solicitor's role.	Toby Frost/working group	Complete
Working group to consider amending guidance to include factors that may make it inappropriate for public access to occur without the assistance of professional client.	Toby Frost/working group	Complete
Working group to consider amending guidance to require barrister to leave case where lay client refuses to involve an interpreter, as per above.	Toby Frost/working group	Complete
Working group to consider amending guidance to stress requirement for barristers to identify potential legal aid clients	Toby Frost/working group	Complete
Progress of the scheme to be reviewed 18 months after the changes are introduced.	Working group	Complete