

Application for approval by the Legal Services Board

Amendments to the regulatory arrangements in respect of the application of the Public Access scheme

Introduction

1. Public access was introduced on 2004 and 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.
2. Public access is currently not allowed in almost all areas of family, crime and immigration work. Whilst undertaking public access work, barristers are unable to carry out the functions of the solicitor, which means that in practice any of the activities that would be carried out by the solicitor (filing of documents, communication with the court, writing of letters before action etc) are carried out by the lay client. Although 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.
3. 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. 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 (copies of which are provided as well as a summary of the responses received). The group sought views on the operation and restrictions on the scheme, and the potential results of widening the ambit of the scheme. The draft guidance and amendments attached to this note represent the result of that process, and take into account the views of the profession and of representative groups at the Bar. A copy of the final report of the Group, as approved by the Board, is also attached. This report provides the background to the review of the public access scheme and outlines the changes proposed and the reasons for them.

4. The Bar Standards Board approved the proposed changes to the public access scheme and the resultant changes to the Code of Conduct at its meeting of 17 July 2009. It considers that these amendments support the regulatory objectives in the Legal Services Act and are consistent with the Better Regulation principles. They are intended to facilitate access to justice for consumers and encourage competition whilst seeking to maintain high standards of work at the Bar.
5. The rules were submitted to the Ministry of Justice in August 2009. The Ministry advised in December of that year that they would not be able to deal with these changes in advance of the transfer of the rule approval powers to the LSB. The rules are now submitted to the LSB for approval.
6. There are three forms of amendments we propose to make to our materials: amendments to the Code, amendments to the annexes to the Code and amendments to the Guidance. These amendments are set out in detail below.
7. Any queries about the application should be made to:
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Nature and effect of the proposed alterations

8. The main changes are:
 - 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.
 - 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.

- The guidance for barristers is to be enlarged to include information on money laundering and the keeping of records.
- 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.
- The Public Access Rules at Annex 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.

The regulatory objectives

9. We believe the proposed amendments support the eight regulatory objectives at Part 1 of the Legal Services Act 2007 as follows:

Protecting and promoting the public interest

10. The proposed changes are complemented by enhanced guidance and a revised training scheme to ensure that public interest is protected as public access moves in to new areas of practice. Wider, properly regulated, access to justice is in the public interest. Moreover, it promotes competition and as a consequence drives down consumer costs.

Supporting the constitutional principle of the rule of law

11. The proposed amendments do not have any adverse affect on this objective. Any concerns expressed about the ability of barristers to discharge their duties effectively under an extended public access scheme have been carefully considered and will be addressed through enhanced training and guidance.

Improving access to justice

12. The amendments improve access to justice by widening the range of work in which the Public Access scheme can operate. This will make it easier for consumers to acquire the services of a barrister at a lower cost than using the services of both solicitor and barrister, thus improving access to legal advice.

Protecting and promoting the interests of consumers

13. It is clearly in the consumer interest that consumers are able to obtain lower-cost advice and representation, which remains of high quality. The amendments seek to make public access easier to obtain, whilst retaining the requirements on barristers that ensure that a high-quality service is provided.

Promoting competition in the provision of services

14. The widening of access in the scheme makes the Bar more effective at competing for work, especially lower-end advisory work. This will enable public access barristers to compete directly with solicitors firms.

Encouraging a strong, diverse and effective legal profession

15. The amendments propose to widen accessibility to the scheme, thus providing additional opportunities to practitioners from all backgrounds. We feel that the widening of the scheme will enable barristers to deliver a more effective service.

Increasing public understanding of the citizen's legal rights and duties

16. An important feature of the revision of the scheme is the rewriting of guidance for barristers and lay clients. This seeks to clarify the possibilities and limitations of the scheme, thus furthering public understanding of the consumer's legal rights and duties. Also, wider access to the services of barristers will enable more consumers to acquire legal advice and thus be better informed of their duties and rights.

Promoting and maintaining adherence to the professional principles

17. The amendments and guidance clearly state that public access barristers should not carry out work which they are unsuited to do. The conduct of litigation is still prohibited, and the barrister remains under a duty to continually assess whether a solicitor should be involved in a case. Consequently barristers are required to adhere to the principles that bind them in the Bar Code.

The better regulation principles

18. We consider that these amendments are proportionate, given that they seek only to extend the Public Access scheme as considered appropriate on the basis of the consultation responses. Two public consultations have, we feel, enabled the BSB to satisfy the requirement upon it to be accountable. The public, the profession and all stakeholders have been able to scrutinise and comment on the proposals and recommendations for extending the public access scheme, all of which have been made available on the BSB website. All responses received were taken into account and considered carefully. Where substantive concern was raised but was not followed the final report explains why.

19. The guidance on public access has been extensively rewritten in order to simplify it and make it more user-friendly. We have been careful to include the public in the review and consultation process and have taken especial care to canvass the views of lay clients who have made use of the Public Access scheme. The new regulations seek only to address the limitations of the Public Access scheme, and do not aim to change the position of barristers as a whole or to allow barristers to act beyond their capacities as they presently stand.

Equality impact

20. The BSB has undertaken a comprehensive equality impact assessment of the proposed changes to the Public Access scheme. A copy is attached for information.

Desired outcome

21. The desired outcome of the amendments to the Public Access Rules is that there is greater access to justice through the extension of the Public Access scheme to

previously prohibited areas. This will be complemented by enhanced guidance and training to ensure that there are adequate safeguards in place to protect the public interest.

Other regulators

22. The BSB does not believe that the proposed changes to the Public Access scheme affect areas regulated by other approved regulators. All of the approved regulators were contacted as part of the consultation process and none raised concerns of a substantive nature.

Date of implementation

23. We would like to implement the changes to the Public Access scheme as soon as possible.

Consultation processes

24. The working group consulted twice on this issue with the profession, public and other interested groups representing consumers, minority legal groups and other regulators. In particular, the group sought to canvass the experiences of lay clients who had used the Public Access scheme in the past. In consulting, the group sought views on the operation and restrictions on the scheme, and the potential results of widening the ambit of the scheme. The draft guidance and amendments attached to this note represent the result of that process, and take into account the views of the profession and of representative groups at the Bar.

25. The list of organisation from whom views were sought is attached to the final report.

26. The BSB believes that these amendments support the regulatory objectives of the Legal Services Act. They represent a commitment to opening up access to justice whilst continuing to provide adequate consumer protection. The changes carry the support of the large majority of the Bar and are in line with the improvements suggested by those members of the public who have used barristers in public access cases.

27. The LSB is asked to approve the changes to the BSB's regulatory arrangements.

28. Should the LSB require further information or wish to discuss this application they should contact Oliver Hanmer.

Bar Standards Board

4 March 2010

Enclosures:

- 1. Final report of the review of the Public Access rules**
- 2. Code of Conduct changes**
- 3. Revised guidance for the Bar on the application of the Public Access rules**
- 4. Revised guidance for lay clients on the application of the Public Access rules**
- 5. Equality Impact Assessment of the proposed changes**
- 6. Questionnaire sent to all public access practitioners and to users of the Public Access scheme and a summary of the responses received**
- 7. Consultation paper on proposed revision to the Public Access rules**
- 8. Summary of consultation responses**