Annex 8

Summaries of consultation on the reform of the public access scheme

Summarised below are the responses to the BSB's second consultation on the public access scheme. 39 responses were received. Views expressed varied greatly: some responses chose to address only some of the questions.

In only a few areas did a great majority of the responses clearly favour one particular course of action. In general, lay clients were more amenable to opening up the system than barristers, both in terms of the range of work done and the ambit of barristers to manage the case. Barristers and professional organisations were more cautious about widening the ambit of the scheme, and in the case of both family and criminal work a number of practitioners were wary about allowing greater range in their own areas of practice.

A couple of responses to the consultation effectively consisted of yes/no answers to the questions. This has been indicated in this summary and also on the spreadsheet of responses. Some of the questions did not easily lend themselves to a yes/no answer: the spreadsheet only indicates general positive or negative response to the issues raised in the question and should be seen only as an indicator of inclination rather than a definitive response. Where no reply was made or the answer did not address the question, I have left the answer blank. Where the answer explicitly stated uncertainty I have noted that.

Experience and training (Qs 1,2 and 11)

Lay clients were more willing than barristers to reduce the amount of experience needed before public access work could be taken on. The majority of responses favoured the retention of the current rule of three years' practice: other suggestions divided about equally between those who thought that more experience was necessary (five years was generally suggested), and those who thought that less time would be suitable. One lay client suggested that barristers should continue to be supervised whilst doing any public access work at all.

The concept of permitting waivers for those with experience of the sort of skills covered in the first three years of practice was raised in a few responses and could be considered where the public access barrister has suitable prior experience. Solicitors, Citizens' Advice Bureau personnel and professionals with a background in dealing with the public were all suggested as suitable for waivers.

Responses generally did not favour the idea of making public access training available on the BVC: there was a feeling that practical experience mattered more than theoretical learning on the course. The response from Gray's Inn raised the point that providing for public access training on the BVC could have very adverse effects on the budget of Inns to continue providing training, as would permitting barristers to appear in immigration tribunals.

Widening of work available under the scheme (Qs 3–7)

Here there was a feeling among lay clients that the scheme should be widened to permit all types of work, although barristers and organisations tended to be more

wary. Responses from lay clients pointed to the reduction of costs for users of the scheme. Two lay clients claimed to have searched (unsuccessfully) for barristers who would take on family work: this issue is closely linked to the issue of how clearly the scheme and its limits are advertised.

A number of barrister responses called for public access to be made available in immigration tribunals (Q3). The main reason given was that it was illogical and unfair to prevent barristers from appearing by virtue of their qualifications where others less well-qualified could be instructed directly. However, a few respondents, most notably the Office of the Immigration Services Commissioner, felt that immigration tribunals required specialised skills and knowledge, as well needing resources and support staff that barristers would not possess, and hence were not suited to public access.

There was discussion over whether minor criminal work should be made available under the scheme (Qs 4-5). It was widely felt among barristers that limiting the scheme to minor criminal offences was overly simplistic, as there was no one point where a clear rule about what would and would not be imprisonable could be applied to the situation with certainty. The risk existed that the barrister would discover that the individual case had the potential for imprisonment to occur, or that such potential would arise during the case. Several responses suggested that the scheme could be made available only in cases where there was no prospect at all of imprisonment, taking into account all the circumstances.

The Family Law Bar Association (FLBA) essentially opposed the use of public access in family cases, and stated that the involvement of a solicitor was as important in cases involving money as those involving children. There was no clear feeling among the respondents that there was a stronger argument for allowing public access in money/property cases than in family matters (Q6). Of those who replied to question 7 ("Should family work be permitted under the public access scheme? If so, in what sort of case is it appropriate?") there was a slight preference for public access being made available in family matters. Several responses proposed the inclusion of collaborative family law. One response from a barrister suggested that public access should be allowed in family cases that did not involve children, but only where litigation had not yet begun. The FLBA suggested collaborative law, the instruction of overseas lawyers and the appearance of guardians in the family court as areas where public access could be appropriate.

Correspondence (Qs 8–10 and 12)

Question 8 was interpreted differently by different respondents, as its wording could be read as applying to the whole Bar or to public access cases alone. It was generally felt that barristers should be able to correspond with the other side (Q8) and that the restrictions on correspondence should be less strict in public access cases where there was no solicitor (Q9). In this area, responses from lay clients and barristers were more open to correspondence than those from other organisations. Barrister responses argued that correspondence occurs already, and that the Bar is unfairly prevented from doing what solicitors and lay people are already able to do, without good reason.

It was generally felt that formal and informal correspondence were hard to distinguish, and that there was no clear dividing line between the two. One barrister pointed out that it was common for barristers to correspond with one another for case management purposes, and that the current rules were confusing and needed to be

clarified. Several barristers stressed the difficulty of clearly distinguishing formal and informal correspondence.

One sole practitioner suggested that correspondence could be permitted provided that a health warning was given and the responses were copied to the lay client as well as the barrister. This response, as well as almost all of the other barrister and client responses, felt that it was unhelpful for barristers not to be able to put their names to letters or send them on Chambers' headed paper.

Guidance and client care (Qs 13-17)

It was generally felt that the guidance covered the appropriate topics, although several responses followed the paper's suggestion that the guidance should be enlarged to give full information on money laundering, Chambers administration and the billing of clients. More difficult was the tone and comprehensibility of the guidance, and the majority of responses that expressed an opinion favoured some degree of rewriting.

A number of responses agreed with the working group's suggestion that the guidance should be reworded. There was a general feeling that it was not easy to read and that it took an unhelpfully negative tone. The BSB Consumer Panel stressed the need for genuine comprehensibility in the guidance rather than just plain English.

The question was raised of whether there should be extra guidance issued for clerks and chambers administration staff. One response suggested that guidance should be given on the keeping of case records in public access work.

Overall, there was a preference that barristers should not be required to send repeat client care letters to corporate clients making frequent use of the scheme (Q17).

Advertising of the scheme (Q18)

With the exception of one respondent who felt that the scheme should not have been created in the first place, almost all the replies expressed a feeling that the scheme should be advertised much more widely (although Middle Temple Hall Committee was divided on this issue). A number of responses stated that the scheme was yet to be seen as a viable alternative to conventional instruction, and several stressed that the majority of lay clients simply did not know that it existed at all.

Responses suggested that the scheme could be advertised more visibly on the Bar Council website, and that information could be made available in courts, Citizens Advice Bureau, Law Centres and other places where potential clients might find themselves needing legal advice.

One response from a barrister pointed out that solicitors were unlikely to assist in advertising a scheme whose success could cause them to lose work. Another barrister suggested that greater advertisement should be avoided, as it could cause solicitors to stop instructing barristers on the grounds that they were competing for work.

List of questions

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?**

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

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?**

Q6 **Is there a stronger argument for 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?**

Q8 **Can formal and informal correspondence be clearly distinguished: if so, how?**

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

Q10 **Should the restrictions on correspondence be relaxed for public access cases, and if so to what extent?**

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?**

Q13 **Do you think that the guidance should be expanded in these areas of money laundering, Chambers administration and billing of clients? Is there anything else that you would like to see included?**

Q14 **Do you think that anything has been missed out or should be removed from the guidance?**

Q15 **Should the guidance to clients be reworded to be in plainer English? If so, is there anything that should be added to or removed from it?**

Q16 **Do the letters cover 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?**

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?**

Individual responses

Access to the Bar Committee

When the public access scheme was originally introduced, it was felt that there was a risk that the Bar would be deluged in complaints. This has not occurred, and so the ABC feels that it is justified in suggesting a slightly lighter-touch regulatory system.

Q1.
The practising requirements are felt to be appropriate. However, exemptions are very important here: a solicitor who transfers to the Bar should not be made to wait. One committee member suggested barristers should be able to do public access work as soon as they start, while another favoured raising the rule to 5 years.

Q2.
It is vital that a practising barrister should get a good idea of public access either in the BVC or shortly afterwards. Even if training is provided in the BVC, that is not sufficient to allow practitioners to start public access work as soon as they complete pupillage.

Q3.
The Committee unanimously believes that public access should be allowed in immigration work.

Q4.
The ABC works from the premise that work should not be disallowed unless there is a good reason for it. It favours the lifting of all blanket bans, but suggests that there will be many cases unsuited for public access: the barrister must decide whether to appoint a solicitor. The need for an intermediary solicitor will not be present in every case. Similarly, some cases require no evidence-gathering: a barrister will be obliged to make suitable arrangements for this. Any necessary liaison with the Court can be dealt with by the client, as is the case in civil cases.

The issue is where the line should be drawn. The Committee had two views: firstly, that there should be no restriction at all. This is based on the difficulty of formulating arbitrary “cut-off” points, and that the barrister will already be under a duty to involve a solicitor where needed and can judge the suitability of a case on a case-by-case basis.

The second argument is that the scheme should be increased in an incremental manner. As methods of instruction grew, extensions to the scope of the work allowed could be granted bit by bit. This had been successful so far, and the success of the scheme did not justify completely opening the floodgates. Also, there were types of work where the scheme would be less suitable, and where a ban could be reasonably maintained. Excluding areas of work removed any risk that public access was used where not suitable, and would help practitioners know what to take and what to leave. This would apply to cases involving children, which would almost always be unsuitable for public access work.

Q5.
Imprisonability is not in itself a logical basis for restricting public access work. Suitability does not turn on the severity of penalty. The Committee suggests that access should be unrestricted in all non-imprisonable cases and guilty pleas.

Q6.
Cases involving money and property will probably be more suitable than those about children or public law, but this does not mean that cases about children are inherently unsuitable. Childrens' guardians can be dealt with under the licensed access scheme.

Q7.
The main view in the ABC is that all family work can be dealt with under the scheme, except for cases about children. Cases on ancillary relief could be dealt with under the scheme. The current anomaly involving disputes between unmarried couples and married couples is intellectually untenable.

Q8.
Reform here is inevitable. It is impossible to accept that in this structure barristers would be unable to enter into correspondence when all others can. The current rule is self-defeating and no in the clients' interest. The ABC agrees with the BSB on this issue.

Q9.
A minority considers that public access barristers should be obliged to respond to all correspondence. Others feel that it is up to the barrister as to how active a role he wishes to take. On balance the ABC suggests that barristers should decide on a case-by-case basis. It is for the client to decided how much he wishes to use the barrister's services.

However, light-touch guidance is needed here. It is something for the barrister to decided in each case, in consultation with the client. Public access barristers should have in place systems to reply quickly to correspondence, even if only for sending holding letters, etc.

Q10.
The current rule is unworkable and should be lifted as soon as possible, subject to guidance being produced about correspondence. The ABC is happy to help draft such guidance.

Q11.
Overall the training course should stay as it is. It reflects both practical and legal issues very well. However:

- The money laundering guidance should be widened. This is an area that could affect many barristers, not just those doing public access work. There should be a session in the oral course to summarise the principles and allow barristers to read up on it.

- The course did not give the participants the benefit of the experience of those who had already done public access work. In at least one session a public access barrister should talk to the participants about his experience.

Q12.
The course should explain the rules of correspondence and provide practical assistance as to the best practice and potential risks.

Q13.

The ABC considers that all the guidance should be rewritten. Although it is not to be criticised, the environment has changed, and the guidance should reflect this. The current guidance covers the appropriate subject matter. A training course for clerks and administrators should be considered.

Q14.
No.

Q15.
Yes.

Q16.
The letters cover the appropriate information, but need redrafting. They are very negative, and the limits of the barrister's role are overstated. Any redraft should consider that the letters are part of a contractual relationship and the legal significance of the documents should be understood.

Q17.
The ABC sees no problem with referring back to a previous arrangement instead of sending repeat letters.

Q18.
There should be much greater advertising. Our budget limits what we can do here.

Tor Alloway, barrister

This response largely consists of "yes/no" type responses, which are recorded on the spreadsheet. The response favours widening the scheme somewhat, and makes the following specific points:

- The experience period should be raised to five years;
- Summary-only motoring offences could be dealt with under public access;
- Rights over property are less emotive and easier to define than children cases;
- If ancillary relief is permitted in family, correspondence will need to be permitted too, to permit inquiries about money and property;
- Correspondence should be allowed where facts need to be found out (inquiries re money and property, etc);
- Formal and informal correspondence are difficult to separate;
- The standard letters should deal with limitation, disclosure and litigation obligations;
- There should be no requirement to send repeat letters. Where work is done in quick succession, reference to previous care letters will suffice.

Jamie Anderson, barrister

This response is from a recently-called barrister who has previously worked as a Citizens Advice Bureau adviser, providing advice and representation prior to pupillage.

There is no need for barristers to practice for three years before doing public access work. As a Citizens Advice Bureau volunteer I was able to run my own caseload and

deal perfectly well with lay people. Public access work would largely use these skills, which I already have.

My practice is in employment law, where costs are rarely awarded. Given these funding issues it is rare for a solicitor to attend with me in the tribunal, which keeps costs down. Many employment cases are suitable for public access, where the barrister only needs to draft pleadings, advise on settlement and represent at hearings. Administrative matters can easily be dealt with by the lay client. Of course, the obligation on counsel to take on appropriate work and call in a solicitor where necessary would remain.

As a junior member of the Bar my services would be very cost-effective, yet I cannot take up public access work. I feel that this could be anti-competitive: clients may end up with the options of representing themselves and hence not getting a good standard of advocacy, going to a solicitor which will cost more, or using more senior counsel under the public access scheme, which again may well cost more than my services.

Therefore I support widening the public access rules to allow barristers of less than three years' call to do public access work, or clarifying any grounds which would let them apply for an exemption of the rule and reducing the fee for applications. I feel there is an appetite for public access work among the junior Bar, in certain areas of practice. There is a strong basis for reducing restrictions on competition whilst maintaining the regulation of the BSB.

Anonymous potential public access user, phone call of 9 April 2008

The website is misleading and needs clarification. The scheme should include family work in order to keep costs down: in a family case what is often argued about is a shared pot in the form of the family resources. This is particularly detrimental for women and children.

Solicitors are often expensive and unreliable. The BSB should consider widening the scheme to cover all areas of law.

Anonymous response, received 11 July 2008

This response is largely limited to yes/no answers to the questions, as recorded on the spreadsheet. The following points are also made:

- the criterion for public access in criminal cases should be 6 months' imprisonment;
- public access should be allowed in all cases;
- barristers should be able to correspond as solicitors under their own names, to take advantage of the seriousness of their title;
- the scheme should be advertised as solicitors are.

Daniel Barnett, 1 Temple Gardens

This response is on Chambers' headed paper, but comes from an individual barrister.

About a quarter of my work is public access work in employment tribunals, working for large HR departments who prefer the Bar to solicitors.

The current requirement to draft letters for the client and the inability to receive post in the case slows response times somewhat and makes the Bar look slightly absurd. Clients simply do not understand why our rules prevent barristers writing letters on Chambers headed paper. Relaxing the rules should not reduce the barrister's duty to take proper instruction from clients: good practice requires a barrister to obtain client permission before important letters are sent out, as with solicitors.

It is difficult to distinguish formal and informal correspondence in practice. Referring to the medium of correspondence (letter, email etc) is pointless where a letter can be appended to an email. The following are hard to classify:

- a letter warning that the client intends to apply for an "unless order"
- a letter complaining that Without Prejudice communications have been referred to in a witness statement
- a letter inviting the other side to consent to amending a statement of case.

This makes it impossible to lay down one clear rule. The Bar will continue to look mildly foolish if letters continue to be prevented.

I do not think the scheme should be advertised more fully. This would highlight the competition for clients between barristers and solicitors. Solicitors are currently unaware of the extent of the scheme, and could decide not to refer work to the Bar is perceiving us as competitors. This would limit work for the Bar and undermine the consumer's freedom of choice.

Sets of Chambers and individual barristers are best placed to decide who to target with advertising.

"Bazz", lay client

Barristers need to be aware that lay clients are not Solicitors. Barristers must arrive on time and treat clients with the respect due to a paying client, and not to bill for time on a fictitious basis.

The BSB should advise client to record any meetings or court attendance with council and/or have an independent witness at all times. Barristers should not have to be chased for documents this is not acceptable in industry, and seems arrogant and unprofessional.

Barristers are a service industry and it is way past time for an attitude change. The public do not complain about bad service, as it will be ignored or dismissed by barristers and the Bar Council.

The consultation suggests that competitive work rates should be sought. This is not practicable as there are not enough Barristers who have taken up public access, and the clerks of those that do often claim that public access is not available.

The response indicates dissatisfaction with finding a barrister, only for the barrister to decide not to accept the case. Public access suffers from poor access, limited availability, high cost and shoddy, arrogant service.

Conrad Chamberlain, lay person

It is very difficult to find any information about the scheme, and I had to contact the Bar Council to find out. When I did contact barristers, the clerks were often unhelpful and would not even find out if any barristers were interested in my case. Those barristers I spoke to were largely disinterested. Attitudes need to change for the scheme to work.

It is very difficult to instruct a barrister when dealing with a surly clerk. Clients need to be able to tell quickly if the barrister covers the right areas of law and can work within the client's financial situation and what the barrister can do to help for an agreed fee. Direct access must be literally that.

Barristers need training in how to communicate with the public. The relationship needs to be more relaxed, much like the way that judges work with litigants-in-person. If barristers cannot work in an informal manner, they should not take up public access work.

If the scheme is to work it must be effectively advertised. A4 posters in solicitors' offices/post offices and the like would work: billboards or TV adverts could be effective, if very costly.

I cannot see why barristers should not be able to advise directly on all ranges of work.

Graham Charkham, barrister

The licensed access rules are more restrictive than the public access rules, as they forbid the barrister from undertaking advocacy before the Courts unless an extension is acquired to the standard licence.

A barrister who is able to undertake public access work can initially undertake it for a member of an institution which has a deemed licence, and can then continue to work under the public access rules if it is in the interest of the client and justice to do so, without obtaining an extension to the licence.

Consumer panel of the BSB

The scheme should be widened to include minor criminal work as envisaged by the paper, but not where the client risks imprisonment due to previous convictions. The Magistrates' Association should be consulted on this. The idea of including immigration work is appealing, but the doubts of the Immigration Services Commissioner should be addressed first.

In theory the panel supports wider access in family work, but evidence is required to back this up.

Advice to lay clients should certainly be redrafted and tested with potential users. Plain English tests are not enough here: genuine comprehension is needed, and we need to find out whether the guidance encourages or puts off potential clients. Likewise the client care letters.

The Bar Council should advertise the scheme better, through targeted PR, user groups and through other professions to reach potential clients.

It is regrettable that only 8 client responses were received in response to the first questionnaire: relying on barristers to seek responses from their own clients may not have helped. This would not have encouraged expressions of dissatisfaction and ignored those who would have used public access if they knew it existed.

The BSB should think more imaginatively and constructively about seeking views or actual or potential users. This could be done through dialogue with other professionals, whose advice could lead to a client instructing a barrister. Focus groups with the target audience could help: this could work well with groups not currently covered by public access (family, crime, immigration), as well as hearing from advisory groups in those areas. Other regulators have used the internet to communicate with the public on certain issues, while others take feedback from "experts by experience".

The BSB is right to base regulation on public needs and will probably support following best practice on public involvement in regulation. The NCC recently discussed consumer engagement in regulation. The BSB and Standards Committee could consider how better to ensure consumer engagement in the consultation proves. The Consumer Panel would be happy to assist the BSB with this.

Sarah Cooper, family practitioner

This response is from a barrister who receives enquiries from Spanish family lawyers concerning family litigation in England and Wales, which she cannot accept on a direct access basis. It is argued that this limits the family market, and suggests that the public access rules be relaxed relating to instructions from EU family lawyers, especially in the light of EU directives allowing lawyers to practise in other jurisdictions without requalifying.

Criminal Bar Association (CBA)

Q1.
The current approach is too cautious. All barristers should be able to do public access work on completion of pupillage, provided:

a) the barrister has undertaken Public Access training as part of the BVC or after Call at an approved course provider
b) the barrister has completed pupillage and is a tenant in chambers and
c) the Chambers has achieved BARMARK and has sufficient procedures for the barrister's work to be capable of achieving BARMARK.

Q2.
Public access training should be a mandatory part of the BVC, and PA work should be on the pupillage check list.

Q3.
The CBA does not consider itself to have sufficient experience here. This question would be better answered by the Immigration Law Practitioners' Association. However, we do think public access should be permitted in immigration tribunals.

Q4.
Allowing low-level criminal work would reduce the costs of representation for clients and allow the Bar to better compete with solicitors. Allowing barristers to do this would be in the public interest, provided that the rules of the Code were closely obeyed. This will not lead to an expansion of the functions of barristers: if the barristers believes it is not in the interests of justice or the client to take a public access case, he will ensure a solicitor is instructed as well.

Q5.
The criterion of imprisonment is too arbitrary. There are regulatory cases punishable by imprisonment where the mitigation on a guilty plea could be done under the public access scheme. We agree that the greater the role that contested evidence of fact will play, the less likely it is that it will be suitable for a barrister to accept advocacy instructions on public access.

There must be three factors involved in determining whether criminal work is acceptable for public access:

a) extent to which contested evidence plays a part in the hearing;
b) ability of the lay client to obtain evidence;
c) gravity of alleged criminal conduct.

Therefore the list of acceptable public access criminal work should be enlarged to include:

a) non-imprisonable offences where no contested issues of fact have arisen or are likely to and
b) pleas of guilty where no contested issues of fact have arisen or are likely to.

These will still be subject to the rule that a solicitor must be instructed if it is not in the interests of justice or the client to continue as public access.

Q6.
This is outside the CBA's remit, and would be better addressed by, say, the FLBA.

Q7.
Again, this is a matter better suited for the FLBA.

Q8.
It is suggested in the consultation that barristers do not have the resources or training to deal with this. These considerations no longer apply.

a) barristers are skilled at drafting letters and often do so for their solicitors in criminal cases
b) almost all barristers use computers to store their written work
c) chambers are increasingly computerised and run an administrative operation for close to 52 weeks of the year.

If it is made a requirement of the scheme that public access barristers work from Chambers with BARMARK, it can be expected that Chambers would have appropriate audit systems for all public access correspondence.

Also, any public access training course must include guidance on the conduct of correspondence to ensure barristers do not enter into inappropriate communications with opposite parties.

Q9.
The current restrictions on correspondence should be completely removed, for public access work and otherwise.

Q10.
There is no workable or proper distinction between formal and informal correspondence. Barristers should assume that correspondence is open and may be referred to in court. They will need to avoid situations where they become witnesses in a case: this should for part of the public access training.

Qs 11 & 12.
If our recommendations are accepted, the following should be noted:

a) rule changes on correspondence will need a module of their own;
b) rule changes on evidence gathering will create areas of further training;
c) money laundering advice will need to be expanded to deal with clients seeking advice in this area;
d) the course will need to focus even more sharply on work that is acceptable and that which requires a solicitor.

Barristers will almost certainly require further training on:

a) whether or not to take a case;
b) uncompromised case preparation and presentation;
c) efficient record keeping;
d) value for money;
e) delivering justice to the merits of the case.

The possibility of a longer training course should be considered, especially if more training is required on conducting criminal work and undertaking correspondence.

Qs 13 & 14.

The guidance for barristers is essential, but is a restating of the Code as it applies to public access work. Barristers would be better helped with practical advice, such as:

a) examples of work that can be properly accepted, and why;
b) guidance on advertising;
c) advice on record keeping, both as work done and document storage;
d) guidance on using agents to gather evidence and compile bundles, etc.

The various relevant advice available – Guidance to Clerks, Money Laundering Regulations guidance etc – should be pulled together into one document to give public access barristers everything they need.

Guidance on money laundering, Chambers admin and billing should be expanded.

Q15.
We have no suggestions for improving the guidance for clients.

Q16.

The letters should be redrafted to be more positive and succinct. They have a negative tone and could be reordered and reworded to make them better.

Q17.
Yes, there should be a requirement to send repeat client care letters to corporate clients.

Q18.
The scheme should be advertised more visibly. It should be advertised at least on Bar Council and SBA websites, court buildings and Law Centres.

Rawdon Crozier, barrister

This response takes the form of annotations to the consultation paper.

Direct access is inavisable in most situations: most cases require the use of a solicitor or someone in a similar preparatory role. The time, structures and expense of running a public access case do not suit the Bar, and would change it greatly if the paraphernalia of a solicitor's office needed to be supported. Earlier training should not be provided.

Qs 3 &4.
Immigration is evidence-heavy, and requires the gathering of evidence. A barrister will not be able to do a professional job unless given the support of a solicitor here. If the public interest is served by having a branch of the profession that specialises in advocacy and consultancy, it will not be served by barristers making bad jobs of tribunals. The same goes for minor criminal work.

Q5.
A cut-off criterion is too arbitary. The one instance I would allow is "dock briefs" where the Court would ask a barrister to represent someone in the interests of justice. The Court will act as a filter here.

Qs 6 & 7.
The sheer amount of paperwork for a family case even without money considerations can be dauntingly large. I do not see how barristers will be able to do this without becoming solicitors. Family work should not be allowed.

Qs 8&9.
There should be no direct correspondence. Where would this end – would barristers accept service? The capacity for confusion is very great. A settlement letter could say "Settled by counsel" but should still be sent though the solicitor or lay client. The current co-ordination between legal professionals over skeleton arguments, narrowing issues etc is a different matter and should stay.

Qs 11 & 12.
I am not qualified to answer these. My gut reaction is that a day's course would probably not cover the topic effectively. There should be a period of public access "pupillage" before anyone is allowed to do public access work alone.

Qs 13 & 14.
A health warning for barrister and client should be added.

Qs 15 & 16.

The guidance for clients is off-putting and impenetrable, but I do not see that as a negative. It could be better drafted.

Q17.
Professional or corporate clients should be able to get an exemption here. They are very different to completely lay individuals.

Q18.
Definitely not: there should be no extra advertising!

DK Das, lay person

I have had great difficulty in finding a public access barrister to deal with a judicial review case. It is clear that some solicitors and lay clients do not know enough about the scheme, as well as some chambers' receptionists and clerks.

The lists of barristers on the Bar Council website are unhelpful and inaccurate: no list is given of barristers who give a free initial consultation.

Q1.
At least three years' successful practicing experience is necessary. This should include dealing with caseloads and varied clients.

Q8.
Yes, it should be obligatory.

Q9.
Yes.

Q10.
Yes: see paras 39 and 44 of the consultation.

Q12.
Yes.

Q14.
The consultation paper misses out *Ex Parte* cases, and does not comment on Alternative Dispute Resolution.

Q15.
Yes.

Q16.
I have yet to see a client care letter.

Q18.
Yes: TV commercials or publicly available leaflets would be best.

There are reports about some barristers' shortcomings: my own barrister forgot to send off an important application. I suggest that public access barristers be supervised by senior barristers even after they have completed 3 years of practice.

The present list of barristers should be made more user-friendly. Chambers staff should be trained and Chambers' websites updated where appropriate.

The response makes some further comments about the respondent's individual case, which are not related to the public access scheme on the whole, and hence are not included here.

Timothy Deal, sole practitioner

Q1.
There is no need to change the current 3-year requirement.

Q2.
No.

Q3.
There is no reason to permit lay representatives and yet exclude barristers.

Q4.
Privately-funded road traffic/regulatory cases are suitable for public access. Often minimal work is done by the solicitor anyway, and it cannot be in the public interest to continue this practice, which only raises costs.

Q5.
This should be determined by area of law, not imprisonment. The barrister should decide whether a solicitor is in the client's interest in each case. If a blanket criterion is needed, it should be judged on where the case is heard – Magistrates/Crown Court, etc.

Qs 8&9.
Public access barristers should be allowed to sign letters to the other side to carry greater weight than is currently possible. The "health warning" should be given and all return mail sent to the client, copied in to the barrister if required.

Graham Donald, lay member of the Complaints Committee

There is nothing in the consultation about the take-up of the scheme. The LSO comment, quoted in paragraph 69, indicates that take-up has been low. Should this not be discussed before expanding the scheme to fresh areas of work? If take-up has been low for the existing areas, which were presumably chosen because they were thought the most promising, is there not the risk that it may be lower still for any new areas of work?

Bruce Drummond, barrister

This response is from a barrister doing largely non-contentious public access work in the UK and Canada.

My main concern is on limitation of correspondence. My Chambers largely uses correspondence to write to businesses for notification and negotiation, and we find the rules restrictive. We do not go on record as litigating for a client, which causes confusion when courts do not expect us to attend. There should be separate court notices to deal with this.

The experience requirement should be 5 years PQE unless working for a more experience barrister. Training for dealing with the public should be done earlier and to a greater degree. Barristers also need properly trained staff for this kind of work. Should this be a requirement for doing public access work?

Tribunal work should be permitted: I do not know about criminal work. The argument for allowing public access work in money cases is stronger in family work: TALATA applications would be permissible, although it would be necessary to write correspondence. General family law involves too much ancillary work, especially with children. We are not set up to deal with this.

Barristers should be able to correspond on Chambers notepaper: this can lead to confusion as to whether a party is taking legal advice or not. It is completely unnecessary in non-contentious work. If the proper support staff are there correspondence should be allowed.

Guidance for barristers should be enhanced as suggested in the consultation.

The current client care letters are confusing. A retainer-style agreement should be sent to the client with a simple care letter setting out duties. Where a company has retained the barrister for one matter but then wants to use his services for other matters, a single agreement will suffice.

The bar should generally raise the profile of public access work. Most businesses are unaware it exists.

Anthony Edwards-Stuart QC

This response concentrates on the interpretation of paragraph 401, and argues that it does not prevent the exchange of correspondence between the parties.

The reference in 401 to correspondence refers primarily to inter-solicitor correspondence: when barristers write to one another they are discharging their duty as advocates.

Barristers often communicate in writing in relation to:

* Estimates of length of hearings;
* Timetables for trial;
* Organisation of lists of authorities;
* Agreement of issues for the hearing;
* Producing agreed lists of corrections for draft judgements;
* Agreeing draft orders to put before the Court.

This has been going on for a long time, and it is still commonplace. The BSB should clear up any uncertainty as soon as possible.

Family Law Bar Association (FLBA)

This response opposes any widening of the public access scheme (although it suggests that collaborative law should be available under the scheme). Were public access available, family practitioners would generally have to decline instructions

under the scheme as it would be in the interests of justice that a solicitor was instructed. It would therefore be pointless to extend the scheme.

Almost all family cases involve considerable litigation: there is often evidence gathering, contested fact and a need for correspondence and dialogue between the litigators. Such cases are not suited to barristers without the infrastructure of a solicitors' firm: clients may need out-of-hours support, which may be required in the holiday season, or urgent applications may need to be raised. It is impossible to tell in advance whether support is required as the case progresses. These points were made when the scheme was first introduced, and the situation has not changed.

We understand that the take-up of public access has not been great, and there are almost no family barristers interested in doing it.

If the scheme were to be widened to cover family work, only barristers of 5 years call should be allowed to do it. Junior barristers would not have enough experience of the problems raised by dealing directly with family clients, especially as barristers are not trained to conduct the litigation essential for family cases.

Q.6
There is not a stronger argument for allowing public access in ancillary relief cases opposed to children's cases, as the need for a solicitor to provide litigation is just as important in both cases. Gathering evidence is important in ancillary relief cases, both for the client's benefit and the need to ensure that the other side has disclosed fully: this is complex and lengthy work and may require careful judgement, especially where the assets are modest, to make sure the costs incurred do not outweigh the benefits. Where clients want no stone unturned it can be difficult to dissuade them from wasting resources, or to make the other side provide information voluntarily.

It is untrue to suggest that emotions run higher in children cases than ancillary ones.

Introducing direct instruction would not save time for litigants. The barrister would end up performing the solicitor's litigation role. It is appreciated that there is a discrepancy between property disputes between cohabitees and married couples, but we do not know how many barristers have undertaken such disputes. It is hard to see how in such cases a solicitor would not be needed anyway.

Q.7
The only situations where public access could be appropriate are (a) instruction by Guardians to represent the interests of children (b) Collaborative Law and (c) instruction by overseas lawyers.

Guardians
If direct instruction was in the public interest, guardians could be permitted to instruct via Licensed Access. This view is held by a number of Northern Circuit practitioners.

However, primary legislation would be needed as now a solicitor must be instructed to represent the children. We feel there is a litigation role here that could not be undertaken by the Bar, in particular the instruction of experts, the need to give undertakings to the court and to attend case conferences are particular problems.

It is the statutory duty of the child's solicitor to assess whether the child is competent to instruct directly. This could lead to parting company with the guardian, and can result in the solicitor having to give evidence about his interview with the child. This is not suitable for the Bar.

If there is a major change in the funding of Public Law Children Act proceedings this may have to be looked at again.

Collaborative Law
There is a growing feeling among the FLBA that this is suitable work for public access barristers who have undertaken the Collaborative Law training. The FLBS consulted with its membership, and consider that public access should be extended in this area. It is worth noting that:

a) there is no litigation
b) there is limited correspondence
c) the process takes place largely at face-to-face meetings
d) it involves negotiation, which barristers can do without difficulty
e) if there is an issue about whether full and frank disclosure has occurred, the case will not be suitable for Collaborative Law and will have to go to litigation with new lawyers.

One response felt that Collaborative Law would fall foul of Para 303(a) of the Bar Code, as a barrister could be advising both parties, but we disagree. The lawyer will still represent his client at meetings, and will end the process if that is in the client's best interest. This will require further discussion if permitted.

Instruction by overseas lawyers
This area, which would mostly involve child abduction cases, is not suited to public access. The role of the solicitor is vital, and in Hague Convention cases, a solicitor is provided to each party regardless of funding. In non-Hague Convention cases, the need for a solicitor is even greater.

Points raised in opposition included:

a) the inability of counsel to issue proceedings
b) the regular need for undertakings to be given to the English court here
c) the importance of affidavit evidence, especially where the deponent may not attend for cross-examination
d) language difficulties
e) the importance of the solicitor's duty to the court in a situation where the client may never attend court in this jurisdiction.

Q.8
It is completely unrealistic to prevent a barrister conducting correspondence where representing a litigant in family law cases. In most cases the barrister would draft letters on a daily basis.

It is also unrealistic to restrict correspondence to communication with opposing counsel. Solicitors have full rights of audience in family work. The distinction is arbitrary.

This further highlights the inappropriateness of family law for public access. There should be no change to the current rules on family work, except in Collaborative Law.

Garden Court Chambers

Garden Court supports any measures that broaden access to justice and democratise the availability of legal services.

The experience requirement should be raised to five years. Client liaison and management is vital to public access, but the skills needed for it can only be obtained from experience in practice. Public access requires a barrister to be skilled at taking instructions and explaining the role of the parties in the case. Junior barristers do not have to do the client care/correspondence drafting that solicitors must do for 2 years to obtain their practising certificates. As a result the requirement should be raised to 5 years to reflect this.

It would be pointless to teach barristers about public access on the BVC course. The practical experience is what matters.

We do not want the public access scheme widened to offset the decrease in access to justice that the Legal Aid regime has had and will have in future.

Immigration work should not be included. Those in need of representation may be vulnerable and traumatised, and often do not know English. There is often correspondence with the Home Office, which the solicitor will do, as well as a need for expert medical/psychiatric evidence as well as country reports and research. The can take much correspondence and instruction to acquire. To do justice here, a solicitor and a barrister are required.

We accept the idea of allowing barristers to undertake Magistrates' Court work in regulatory fields where the client is likely to be a business and well equipped to deal with the case. We are happy also for non-imprisonable driving offences to be included in the scheme.

We feel that generally a solicitor will always be in a better position to deal with lay clients owing to practice structure. Solicitors do not go to court all day and will often be available to deal with queries. Barristers, especially the criminal Bar, are limited by the way they work.

Public access should not be allowed in all non-imprisonable criminal work: some of these involve political protest and offences against police officers, which can have serious consequences. Cases may involve complex law and require the gathering of evidence. In the interests of justice it is better to assume that a solicitor will also be involved. It may be possible to exclude public order offences from the scheme.

The scheme should not be enlarged to cover family law. [No reasons given].

Those undertaking public access are unlikely to have resources to carry out protracted correspondence. Also, correspondence exposes counsel to higher degrees of professional liability. Counsel of less than 3 years PQE should not be exposed to this. Although there is no objection in principle to relaxing the restrictions on barristers to engage in correspondence, many may find it is in the interests of justice to bring in a solicitor, thus undermining the scheme.

If rules were relaxed re correspondence, this should be included in the course.

Paragraph 58 of the consultation highlights some of the main challenges in public access work. These reduce the incentive to undertake such work. Administration systems also would need to deal with billing and information storage: this should be

covered in the guidance and the implications for individuals wanting to undertake the work.

The guidance should be in plainer English, but it will never be able to adequately convey the limitations of counsel's role. These can be explained extensively, but then the litigation may halt once the client realises what those limitations mean.

Given the low number of barristers taking up the scheme, advertising should focus on the bar as well as the public.

The scheme should not be used to bandage the damaged legal aid system. The limitations that counsel face in role and resources in public access may prevent the interests of justice being served in the scheme. We would be interested to know whether the BSB intends to widen the licensed access scheme.

Gray's Inn

The proposals relating to removing unjustified restrictions on the nature of work that can be performed, such as writing letters on behalf of clients, have no impact on Gray's Inn and are for the Bar Council to consider.

Proposals to remove the three-year training rule potentially have serious implications for the Inn's educational budget and place strain on the resources of the Education Department.

The proposals re immigration are illogical, and will put pressure on the Inn to provide extra training. Those sitting on Immigration cases have expressed doubts about the quality of representation: we do not see that reducing the qualification requirements for members of the Bar to appear in such cases will help. Access to justice must be given its true weight instead.

Criminal work should not be expanded: it is hard to tell in advance whether a case will become imprisonable. Breaches of low-level court orders can lead to imprisonment, for instance. Furthermore, the sort of work proposed is currently done by pupils and very junior Bar members, and would risk taking work from them.

Patrick Ground, barrister

The scheme is a very useful extension of services available from the Bar. In my first public access case the client could not have paid for the necessary legal representation without the use of public access.

I have as much public access work as I can cope with. The Bar Council may not be the best body to advertise the scheme, but it could have its own review. The BSB could publicise the scheme as well. All court forms and procedures should recognise the existence of public access barristers.

Piers Harrison, barrister

This response concentrates solely on the possible role of intermediaries in public access work. It suggests that individual Chambers would find it difficult to approach companies and pitch for work, and that this would be far better achieved by

professional marketers. One idea suggested by a company to Mr Harrison was that such marketers could then take a percentage of any work gained for the barrister or Chambers by such marketing. The respondent mentions that this could fall foul of the Bar Code rules regarding the payment of referral fees.

Mr Harrison points out that the business community is largely unaware of public access, and most Chambers do not have the money, time or experience to market themselves in this way.

Simon Hill, barrister and director of "Find a barrister" website

The scheme should be promoted more actively by the Bar Council, since most of the public have not heard of it and are unaware that they have non-charitable alternatives to a solicitor. This lack of knowledge, rather than the scheme itself, has resulted in relatively low take-up of the scheme since its initiation.

It is said that promotion can be seen on two levels: information and advertising. The Bar Council should engage more in the former and be somewhat involved in the latter. Telling people that the scheme exists is information; trying to stimulate specific demand is advertising.

Charitable and similar organisations (eg. Courts) are reluctant to promote companies, but will help the Bar Council. The public are much more trusting of non-commercial organisations too. The Bar Council should therefore consider:

1) Producing a standard leaflet to inform the public about the scheme. This could be placed at Citizens' Advice, charities, libraries etc to be read and taken away;
2) Producing an information leaflet to inform legal advisors about public access, so legal advisors at law centres could describe it to any clients they refer on;
3) Seeking rewording of legal documents (injunctions etc) so any recommendations to seek advice from a solicitor also cover public access barristers;
4) Providing posters on the scheme to county courts;
5) Producing leaflets/information packs for trade associations, including press releases for association newsletters;
6) Producing statistics on use of the scheme and client views towards it. This could be released on the anniversary of the scheme's inception as a press release;
7) Finalising a "public access day".

I find it unlikely that solicitors will help to promote the scheme, as it is not in their interests to do so.

Ian Hughes

This response is from a lay person. It calls for public access to be widened to cover all aspects of work, limited only by the barrister's competence. Barristers should have the option to refuse cases where the client is violent, offensive etc.

James Kemp, clerk

Most of these comments are yes/no answers and are recorded on the spreadsheet. Mr Kemp opposes the widening of the scheme and the provision of earlier training and his answers favour keeping the scheme in its current form.

Legal Services Commission (LSC)

The majority of legal aid clients are not covered by the public access rules, and hence these comments are based on involvement in ensuring that clients' and the public interest are served by the legal system. This response covers areas in which we are interested stakeholders: quality, public access to information and legal aid eligibility. We emphasise the need for:

- robust and independent quality assurance schemes to safeguard clients regardless of the way in which they issue the legal system
- the public to have access to clear information on the legal routes open to the including the public access and legal aid schemes.

Quality

We support the BSB in allowing the profession to take advantage of the opportunities of the Legal Services Act 2007. Expanding in this area will create greater choice and access for clients, but it is vital that quality stays at a high standard. Expansion must be supported by quality assurance, and we do not feel that this is in place to support expansion in this area. Our concerns focus on:

1) the requisite competence for the case
2) the requisite understanding that direct access is right for the individual and particular case in each instance.

The proxies currently in place do not provide that either of these tests is met. Clients need to be clear about the advantages of directly accessing a barrister. Although a broader scheme would benefit the consumer, the requirements need to be enhanced to show that any extension or maintenance of the scheme is in the clients' interest.

Legal aid eligibility

We are concerned that people eligible for public funding may be directed to public access instead on the basis that it is cheaper. The client should be advised of the availability of public funding in all cases. The guidance does not say whether there is a duty to advise on this.

As barristers cannot carry out a means assessment, clients should be advised about the existence of CLA (CLS Direct) telephone advice and the calculators available to the public to check eligibility. If public access is made available in children/family cases, legal aid eligibility must be explored before public access is used.

There should be robust systems to safeguard clients and make sure that they are directed towards legal aid providers where appropriate, and the training and guidance for public access should cover this.

Barristers should be aware of the Exceptional Funding Scheme, operating under S 6(8)(b) of the Access to Justice Act 1999. This gives discretion to fund individual case that would usually be excluded from civil funding, but is usually only available where funding is needed on human rights grounds. The scheme is outside the LSC's

normal contract regime, and in principle a public access barrister could be funded this way: however, the funding available is limited and the tests hard to satisfy.

Qs 1&2
It is not clear what benefits the 3-year requirement provides, as work in this area does not extend beyond that of a normal barrister and more complex matters are often excluded in the interests of justice. Rather than different/specialised case ranges the main area of difference is the level of client work needed and an understanding of the rules of public access work.

To ensure quality the person handling the case needs the necessary experience and is appropriately supervised according to level of experience. This need not preclude newly-qualified barristers provided that the cases suit their skills and knowledge. Earlier training could open up public access to the young Bar: caution must be taken, though, to ensure that barristers under 3 years' call are sufficiently competent and experienced.

The Quality Assurance for Advocates scheme will help resolve some of these issues. Dealing directly with clients requires additional skills (mainly client care) and these should be assessed (ideally with competency based training), before a barrister can take on public access work. In this scenario age and call would no longer be a qualifying factor.

Q3.
What matters most here is quality of service to the client. If the work is not suited for public access on the grounds of the interests of justice, it is better that changes are made to ensure that only appropriate practitioners undertake it rather than opening the work to everyone. The BSB should consider the OISC's concerns here.

The LSC does not support expanding the scheme as it stands, although with proper quality assurance in place, there is no reason why it should not be expanded even, with sufficient training, to cover vulnerable clients.

Funding – disbursements such as interpreters as well as representation – is crucial to ensuring access to justice.

Qs 4 & 5.
Increasing access in contentious cases will increase numbers of lawyers and choice for consumers and procurers. The priority is that the client receives effective representation at the right price. This could produce efficiency savings if a professional client is no longer required.

Not-guilty pleas require organisation, case preparation and case management, and it is doubtful that barristers have the experience or resources to complete these. It would not be in the interests of justice to expect a client to do this: a solicitor would and should be required.

The cut-off criteria would be cases that required little preparation or intervention from a solicitor. A barrister could do guilty pleas alone. The barrister would have to ensure that the client knew the limitations of public access, and would have to make sure that this was in the client's best interest.

There exist a number of initiatives designed to assist litigants in person. These should not be usurped, or to create a situation where it seems unnecessarily antagonistic to instruct a barrister.

Qs 6 & 7.
It is vital that barristers decide whether public access is appropriate in each case before proceeding. There should be greater training where the individual is vulnerable. If family cases are permitted, children and public law cases are particularly sensitive, and it will be necessary for barristers to display suitable levels of client care and witness interaction.

Qs 8,9 & 10.
In the light of the Legal Services Act it is apt that this is revisited. It seems strange that barristers are under no restriction regarding telephone conversations. Any restrictions on proactively progressing the case by email or correspondence should be relaxed. However, appropriate guidance and training should be developed to counter this. It is vital that barrister and client understand their roles.

If a barrister takes on public access work, he should be able to provide an adequate service for all of the representational part of the case, which will occasionally involve correspondence. Suggesting restricting this because it is not part of the barrister's training suggests that this area should be considered for training for all barristers.

Qs 11 & 12.

The course should cover more detail on the items suggested in the consultation. It should also incorporate appropriate sections on client care and equality/diversity, as well as barristers' requirements for referring clients to other services where public access is not appropriate. Changes to the rules on correspondence should be covered in training.

Assessment should be mandatory and should cover practical skills and competences required, as well as knowledge and understanding.

Q15.
Guidance should be made more accessible to the public and should help them understand what public access means in terms of conducting a case. The guidance should be more positively slanted. An outline of the scheme should come before the list of things that cannot be done. This will support access to justice if the public are clearly informed what the scheme offers, so they can make an informed choice,

Qs 16&17.
Client care letters are important, and we expect public access clients to receive a good service of confirmation of advice given, action taken, instructions and limitations of the case.

Model letters need to be tailored to individual clients, their needs and their case to ensure good quality of service. Clients should be updated on case progression and/or any changes.

Q18.
More extensive marketing will enhance the benefits of the scheme and ensure that all suitably-trained barristers can compete for business. However, any advertising needs to be supported by proper BSB regulation. The scheme should be able to assert that it is "quality assured" and show what that means, which is important to consumers.

Middle Temple Hall Committee

Q1.
The current rules on experience should be maintained and periodically reviewed: it may be necessary to extend it to 5 years, although at the moment we think 3 is suitable. Some newly-qualified barristers may find it hard to handle difficult and sometimes persuasive clients. It is vital that barristers are able to maintain their independence.

Q2.
A barrister needs to experience practice before taking on this kind of work, and we doubt that any course could provide suitable preparation. Training is no substitute for experience.

Q3.
We are sympathetic to the views of the Immigration Services Commissioner: the Bar should remain a referral profession. It is desirable for barristers to be supported and the distinction between the professions to be retained.

One of the three Hall members who wrote this report stresses that since laymen can appear in Immigration tribunals, barristers should be able to do so too.

Q4.
Barristers should be supported once litigation is occurring. The distinction between the professions should be retained. It would be difficult for barristers to represent clients in minor criminal cases without preparing evidence for their clients. Considerable amendments would be needed to the Code for this to work.

One Hall member believes that the savings to the public and the potential opportunities for the junior Bar would make this a viable proposition. This could be used for corporate clients wanting to deal efficiently with cases of rates liability or VAT enforcement in the Magistrates' Court.

Q5.
If such a rule were imposed, an "imprisonment" rule would be appropriate.

Q6.
This sort of arbitrary rule would cause great difficulty. Cases about children may well involve questions of money and property, hence the extension should not occur.

A minority view states that family litigants may not be able to afford representation by barrister and solicitor in all circumstances. If the extension is granted, barristers should be able to do work in any such case.

Q7.
Public access should not be permitted for family cases.

Q8.
Barrister should be allowed to undertake correspondence, as per the paper.

Q9.
Restrictions on resources, insurance and client money should remain: otherwise correspondence should be permitted.

Q10.

The distinction between formal and informal correspondence is artificial and should be removed.

Qs 11 & 12.
Comprehensive written guidance would be welcome and useful. If rules on correspondence are changed, changes will have to be made to the training course, materials and guidance.

Qs 13 & 14.
Advice and guidance should be included in the proposed areas. Concerns about undertakings given to other parties in discussions should be the subject of guidance and advice. Guidance needs review in the light of the suggested changes.

Q.15
The guidance should be shorter and more positive.

Q16.
Client care letters in standard form may require information in one area of practice that is not relevant to another area. The standard form should be available as a template, to which suitable information could be added.

Q17.Repeated client care letters would merely add to the paperwork. Public access barristers should be able to amend the care letters to deal with anticipated repeat work, and guidance should be given as to when such letters may be used.

Q18.
The majority said “No”: one member wanted the scheme advertised as widely as possible.

Office of the Immigration Services Commissioner (OISC)

Q1.
On balance, the current restrictions on practising requirements should be retained, unless BVC providers can be persuaded to provide training as a module on the BVC course, and extending training into pupillage. If this were done the current experience requirements could be reviewed.

Q3.
Barristers should not be allowed to do immigration work without significant alteration to the rules. Immigration clients often have little or no English or knowledge of the English courts. The OISC is surprised that it is not proposed that public access be extended to employment or mental health tribunals.

It is in the client’s interest that the same representative works through the application and appeal, which would require barristers to be involved from the start of the process, as early as possible. This would require a large number of duties to be done by the barrister including arranging translators, gathering evidence and corresponding with the authorities.

The Kentridge report stated that the areas of work barristers undertake should not be widened. Together with the need for clients to have the same representation throughout the process suggests that it is undesirable for barristers to be involved in pre-hearing immigration work.

Barristers may need to take money in advance for disbursements and/or to ensure payment for services, and will need suitable accounting processes for handling this money, and will need training in handling it.

The work that OISC advisors and barristers do is not equivalent. OISC advisors do a combination of solicitor and barrister work, including processes and procedures. Advisors must satisfy the OISC that they are fit and competent to give immigration services/advice at a certain level. They must:

* Pass competence assessments in immigration law
* Have the necessary tools for managing a client account
* Have procedures for delivery of satisfactory client care, including production of client care letters, adequate insurance cover and approved supervision and complaint arrangements.

Should barristers do immigration (Tribunal) work, we would like to see similar levels of cover and monitoring. Such has not been raised, and we are still concerned about this.

Q7.
The OISC does not have a strong view on family work. However, some immigration work does have a family law element where minors are involved. If public access is extended to cover immigration, it would be impractical to leave out family work as well.

Q8.
There is no good reason why barristers should not undertake correspondence. A barrister would have to be able to undertake correspondence to deal with an immigration case properly. If the BSB extended public access to cover immigration, this would be vital. The training requirements and guidance would need to be altered to cover this.

Q10.
Formal and informal correspondence cannot be clearly distinguished, and it is not in the public interest to do so. Barristers could carry out correspondence if properly trained.

Q11.
We see no reason to change the training course unless changes made to the scheme itself make it necessary.

Q12.
If changes were made to the rule on correspondence, the course would need to reflect this.

Q13.
Guidance should be expanded in these areas. It should be expanded to deal with areas opened up by changes to the scheme such as undertaking correspondence.

Q15.
If public access is made available in immigration, the guidance should be made available in other languages.

James Pirrie, solicitor

I wish to stress the difficulties arising in collaborative family practice, from which the Bar is currently excluded. This results in barristers losing out on work and missing the opportunity to shape policy and progress in this area. Some clients are unable to access out-of-court settlements, raising issues of access to justice.

The response gives a description of collaborative law and explains that this area is growing rapidly. This being family work, barristers cannot undertake it via the public access rules: however, there has been little interest in collaborative law from any of the Bar. This is disappointing, especially considering the interest in all forms of ADR from solicitors and the judiciary.

I cannot give a view as to whether public access should be allowed in all family cases, but the collaborative process certainly should be opened to the Bar under the public access scheme.

Planning and Environment Bar Association (PEBA)

PEBA has around 250 members, 40 or so of whom undertake public access work. Some work has been carried out in planning and environmental fields, including advice to developers, landowners and local residents, representing a parish council and administrative court work. No particular problems have been raised. Takeup is fairly modest and the limitations on scope and experience do not materially affect its usage.

The three-year requirement for experience is an important safeguard for client and barrister. This should also include any time as a solicitor or trainee solicitor. A waiver could be granted if there is other good experience, but these need to be considered case-by-case.

The three-year requirement related to experience rather than a lack of training. As limited public access work occurs now, so junior barristers get little chance to observe its working in pupillage. Barristers need a degree of practical experience here.

Public access should not be allowed in criminal cases. PEBA members carry out regulatory prosecutions in planning, environmental and local government law. These are often complex and evidence is required to be collected. Clients will need direction as to the evidence to be produced and may have to instruct experts. The procedural obligations are significant and communication is best done by lawyers. Mitigation may be lengthy and the issues complex.

Barrister correspondence is a wide issue and can be considered regarding licensed access and instructing a solicitor. This should have been dealt with by a general consultation: if it becomes acceptable in public access is should be available elsewhere.

It is currently acceptable for the client to send a letter attaching relevant guidance from counsel. This seems reasonable and may be more effective than Counsel's own letters.

The assumption of a general role for barristers is not suitable for barristers in general. Hence there is no reason to change the public access course. Correspondence should be the subject of another consultation.

Guidance should explain the roles of clerks and practice managers more clearly, as they have unfamiliar functions. It seems that too much administrative experience is sought from them by clients.

Professional Practice Committee (PPC)

Q1.
The current requirement should be retained. This will keep quality high whilst keeping barristers' services accessible to the public.

Q2.
No, experience is essential. A waiver could be granted to those who have worked as solicitors before coming to the Bar or have undertaken other work requiring equivalent client-care skills.

Q3.
The majority of the PPC feels that it is wrong to prohibit barristers from doing immigration work where other solicitors, legal executives and qualified individuals are able to do so. Although the reasons for originally excluding barristers are noted, they could be dealt with by exercising caution towards vulnerable clients.

a) Almost all of those undertaking work before Immigration Tribunals will do so without a solicitor attending due to funding constraints.
b) If the client qualifies for public funding it will not be available to public access
c) Barristers may only undertake public access work if they have the resources to do so, and the client is able to deal with the correspondence.

The minority view is that there should be no departure from the original view [reasons not given].

Q4.
Yes, public access should be permitted in minor non-imprisonable criminal matters. Such matters are currently prosecuted by unqualified CPS Designated Case Workers: it would be wrong to prohibit qualified and experienced barristers from undertaking such work on a public access basis. Allowing such work in the Magistrates Court would reduce the cost of representation for clients and allow barristers to compete effectively, creating competition in the professions. Many regulatory offences will involve businesses who can easily handle the running of the case.

The requirement for the lay client to produce the evidence will act as a filter for cases that should be dealt with through the scheme. This will filter out all cases where evidence must be called, since a lay client cannot be expected to take witness statements. This work will be restricted to cases where no evidence is to be called.

We note that the barrister always has the option not to accept the case. The barrister must always ascertain whether it is in the interests of the client or justice to instruct a solicitor or other professional client.

Q5.

The cut-off point is acceptable. The barrister should be able to decline the case if a solicitor's assistance is required and it would be in the best interest of the client to proceed in that way.

Q6.
No: the barrister is always subject to the same professional standards. The artificial prohibition on acting for cohabiting couples under the scheme is likely to become increasingly restrictive as time goes on.

Q7.
Family work should be permitted, although it is hard to imagine cases where a solicitor would not be needed. This could be said about money and property cases, but if the client can take on the solicitor's role public access should be available.

Public access should be able to deal with ancillary relief, child maintenance, injunctions and public/private children cases. Clearly where family work is publicly funded public access would not be possible.

Allowing barristers to undertake injunctions under the scheme would improve access to legal representation. It seems likely that firms will merge soon, reducing access to justice when large firms act for one party. In this climate it is vital that the public has access to the Bar to increase access to justice.

As ever, a barrister should have the option not to take the case. If no evidence is called in a case this area of work may be appropriate for public access: a restriction is needed if evidence is to be called.

Q8.
The majority of the committee says that correspondence should be permitted. There are no restrictions on communication by telephone, and the whole contents of a letter could be transmitted verbally, making this restriction artificial and restrictive.

Clients currently miss out on the prestige and value of letters coming from the barrister.

A minority believes that correspondence should be done only by solicitors, as that is their core function and so far has not been the function of the barrister.

Q9.
The majority considers the answer to be yes, but adds that if the case demands correspondence over and above that which could come from a client it is arguably not suitable for public access and needs a solicitor.

The rules should be relaxed to permit barristers to use their own letterheads and sign correspondence subject to:

1) the letter should also be signed by the lay client before it is sent out;
2) the letter must stipulate that replies must go to the lay client and provide an address.

Barristers cannot deal with urgent communications when away from Chambers: unlike solicitors, any member of Chambers is not able to take the individual barrister's place.

The minority view is that the ambit of correspondence should not be extended.

Q10.
No.

Q11.
The training course is overall adequate. Some barristers have found that public access clients do not understand the barrister's role, making work more difficult. The course should emphasise the need to clearly set out the barrister's role.

Detailed training on accepting work on a fees in advance basis could be useful. Clerks and barristers both would benefit from further training on administration.

Q12.
Yes. Clear guidance on drafting letters would be needed.

Q13.
See the answer to Q11. Once issues are identified and guidance given it is up to individual Chambers to decide how they wish to deal with such matters.

Q14.
No.

Q15.
Yes. Guidance should be rewritten in plain English, with a more positive tone.

Q16.
The letters need to be clearer. More is needed on the obligations of the client undertaking the solicitor's role.

Q17.
No.

Q18.
Yes, to raise awareness of it. Large amounts of money should not be spent on advertising, but the existence of the scheme should be promoted as part of the Bar Council's general PR and communications. Individual Chambers may want to promote public access work done by their members.

Qualifications Committee

The Qualifications Committee feels that much of the consultation falls outside its scope. However it wishes to answer questions 1 and 2 in detail.

Q1.
The Qualifications Committee considers applications for waivers from the standard requirements for undertaking public access work (the current guidelines for waiver applications were attached to the response). The Committee considers that the current requirements are appropriate. No cases have appeared where the Committee wanted the requirements to be more onerous.

Q2.
PA training should not be available at an earlier stage: the BVC and pupillage are busy enough with obligatory requirements, let alone optional public access material.

If training was introduced earlier, we think this would negate the need for current training. The three year rule should remain in any case.

Anis Rahman, barrister

Five years' experience is more desirable than three, but three will suffice.

It is wrong that immigration work is unavailable under the public access scheme while unqualified lay representatives are able to do this work. It is in the public interest that the scheme should be available to the immigrant community: it makes no sense that immigration work was originally excluded without barristers being consulted. This could be seen as a form of discrimination against ethnic minority barristers because these areas of law form the basis of their practice.

There is no reason why public access should not be permitted in minor criminal cases. There is no problem in dealing with non-custodial sentences: only complex cases must be avoided.

Family work should be permitted in all advisory matters, except those that are particularly complex. Money and property cases are more appropriate than those involving children.

It is vital that public access barristers should be allowed to undertake correspondence on their own headed paper. Public access is meaningless without being able to undertake correspondence on behalf of the client. It is in the public interest and should be permitted at once.

There is no clear distinction between formal and informal correspondence. The training course is fine as it is.

The scheme should be wider advertised by the Bar Council, and awareness should be raised. Guidance should be in plain English and should avoid legal jargon.

Lucy Reed, barrister

I have 5 years call and am licensed to do public access work: I mainly practise in family and employment, and have not have very much experience of it. Most potential clients contacting my clerks have been unsuitable for public access or wanted me to do family work, and I have declined more instructions than I have taken.

Public access should be allowed in family cases about money and property, but not where litigation has commenced. Pre-litigation advisory work and collaborative law should be permitted. Pre-hearing work done by barristers in the court building is very similar to the dispute-resolution work of collaborative law, and permitting this would allow barristers to use skills and knowledge they already have. Counsel are as skilled or better at this kind of negotiation, advice and problem-solving law as solicitors.

This would require little correspondence, and the only practical issue would be the ability of the client to promptly gather information without the solicitor's support. Perhaps the client care letters could deal with this, providing sample letters for various situations.

Email correspondence between counsel is common, and also in cases where a solicitor is acting as advocate. The judiciary often expect all advocates and the judge to be copied into correspondence by email: in drafting an order, for instance. The rules are ambiguous here and should permit it. The proposal in paragraph 50 of the consultation deals properly with the risks to counsel being unable to reply to correspondence owing to court commitments. It is not practical to distinguish between formal and informal correspondence.

Re the training course: trainers seemed unsure as to the reasoning behind the restrictions on practice, particularly re the remarks in the guidance about employment tribunals. It's hard to know how to comply with guidance that is vague. Guidance should be clearer and the reasoning behind it made explicit. The guidance is long and dense, and runs the risk of clients missing important points.

The scheme should be advertised more widely. Most of those who encounter public access have been sacked by multiple lawyers and/or cannot find representation elsewhere. Other clients simply don't find the information before they start down the standard route. Public access should attract and help many more clients than it does now.

Robert Spicer, barrister

Qs 1 & 2.
Public access should be available to barristers on completion of pupillage. Training should be given on the BVC.

Qs 3-7.
Public access should be permitted in immigration tribunals and immigration matters. Since immigration could overlap into employment, and probate into family work, limiting work by type can be quite artificial. Criminal work is more easily defined.

Public access should be permitted in minor criminal cases where imprisonment is not possible.

Family work should be permitted without restriction.

Qs 8-10.
Correspondence should be allowed without restriction. Articulate clients are baffled that barristers can draft letters for them but not send them on headed paper, and it can be embarrassing to have to explain this. Arguments about fusion are red herrings: permitting correspondence would enhance the standing of the Bar and improve its competitiveness.

Q11.
The training course should be run by the Bar Council or BSB, and not by the College of Law. Involving the College of Law could be seen as a move towards fusion.

Q13.
The guidance for barristers should be enlarged regarding billing of clients. Public access barristers should be able to draft their own client care letters, subject to including compulsory information.

Q18.
The scheme should be advertised in local and national press, on television and the internet to assist us in competing with solicitors.

TECBAR

Members of TECBAR practise in the fields principally of technology and construction. There has been some experience of public access in those fields. The experience of its members, as reported to TECBAR, is happy.

TECBAR does not propose to comment on issues outside its main field. For example, it does not intend upon the question whether public access should be permitted in cases of immigration and in the family and crime spheres.

Question 1:
The present qualification should be retained. It works well.

Question 2:
No.

Question 3:
No answer.

Question 4:
No answer.

Question 5:
No answer.

Question 6:
No answer.

Question 7:
No answer.

Questions 8-10:
The Rules ought to be amended so as to ensure that correspondence between Counsel or the Advocate on the other side in relation to such things as Forms of Order should be plainly permitted. As to the balance of the issues TECBAR expresses no opinion.

Questions 11-12:
TECBAR has no specific observations to make. Comments about the course are in general favourable. Money laundering is always something upon which more assistance is helpful.

Questions 13-6:
TECBAR has no specific comments on the literature. It considers that it ought to, so far as possible, modernised and simplified. When the scheme was in its infancy great caution and formality was required. A lighter touch can now be adopted.

Questions 17:
No observation.

Question 18:

The scheme should be more visible. There should also be equal priority given to publicising licensed to access.

Rachel Wingert, barrister

This response is from a family practitioner and is largely concerned with the use of collaborative law under the public access scheme.

Mediation is compared to collaborative law: in a collaborative law case each parting instructs a lawyer with the aim of reaching a negotiated agreement. If negotiations break down and a client wishes to issue a court application, the lawyers who have been acting are barred from continuing to act, as per the participation agreement made at the start of the negotiations. At present, a barrister must be instructed by a solicitor here: this unbalances the foundations of collaborative law. If one party has two lawyers, and the other only a solicitor, this alters the dynamics of the negotiation.

The ADR committee and Resolution (formerly the Solicitors Family Law Association) have expressed no objection to direct instruction in this area. To allow this, Rule 401 of the Code of Conduct should be altered to say:

"A self-employed barrister whether or not he is acting for a fee:…

(b) must not in the course of his practice:…

(ii) conduct litigation or inter-partes work… **save that a barrister may conduct negotiations as a Collaborative Lawyer in accordance with the terms of the Guidance issued by the Bar Council.**"

Annexe F2 of the Public Access Rules, para 3 should be amended as follows:

"A barrister may not accept direct instructions from or on behalf of a lay client:…

(2) in, or in connection with:

(a) any family business of family proceedings… **save that a barrister may advise a client on the issuing of a divorce petition, and the obtaining of a consent order, where these arise in the course of representing a client in negotiations under Collaborative Law.**"

Range of work

Re Q7, the BSB should allow public access for collaborative law cases, as per the FLBA submission. There is no need to distinguish between cases involving money and those involving children, as collaborative law is equally suited to either or both.

I agree with the FLBA that there are concerns re permitting public access in property disputes involving unmarried couples (para 34 of consultation). This should be changed so as not to distinguish between them. Both forms of dispute are suitable for collaborative law, but not for public access in a litigation framework.

Para 3(2) of annexe F2 of the public access rules is confusing. I would suggest it is changed to read as follows:

3. A barrister may not accept direction instructions from or on behalf of a client:

(2) in, or in connection with:

(a) any dispute arising from the breakdown of a marriage or cohabitation, in relation to property disputes, or concerning the arrangements for residence or contact with a child, *save that:-*

(i) *a barrister may advise a client on the issuing of a divorce petition, and the obtaining of a consent order, where these arise in the course of representing a client in negotiations under Collaborative Law,*

(ii) a barrister may give a client initial advice on such a dispute, provided that such instructions shall cease, prior to any court proceedings being issued, and,

(iii) a barrister may not act in any cases concerning the adoption of a child, or in connection with care proceedings, or special guardianship.

Standing and experience requirements of public access barristers

Resolution's ADR Collaborative Practice Membership Rules require a barrister to have had 3 years experience in a specialist family law practice or a practice dealing with over 50% family law work to be able to become a collaborative lawyer. This seems appropriate for public access collaborative law work.

Correspondence

The present rules on correspondence are anomalous. What message does it give about our professional integrity that we cannot send letters in our own names, when we can draft them? I cannot imagine how to explain this to a client.

This and Rule 401 of the Code need amending. I suggest correspondence is limited to issues arising in collaborative cases. The Code could state:

"Correspondence and Other Communication with Other Collaborative Lawyers

Barristers may communicate with the other party's Collaborative Lawyer by telephone, letter or E mail, for the following purposes:-

i. to confirm the arrangements for forthcoming Four Way Meeting,

ii. to exchange documents by way of disclosure, and Minutes of Four Way Meetings, and,

iii. to settle, or comment on, the terms of any proposed Court Order to incorporate any agreement reached at a Four Way Meeting."

I often exchange emails with opposing counsel to discuss terms of consent orders. This is necessary as court staff are not expected to type up orders in the Family Division or the Principal Registry. I do not see this as a breach of Rule 401, as this cannot be seen as "conducting litigation or inter-partes work". However correspondence with an opposing party should remain forbidden, except for collaborative cases. Allowing this would undermine counsel's capacity to concentrate on the trial and would present problems when counsel was staying away from Chambers.

Qs 8&9.
I oppose any change in Rule 401(b)(ii) except for collaborative cases.

Guidance materials

There should be new guidance for counsel accepting collaborative cases. [Suggested guidance was annexed to this response and is available for consideration by the working group]. I feel that the guidance material as well as Annexe F2 of the Code is trying to cover too many different sorts of cases in one document. It would be easier to have a document relating only to family cases, and in particular to collaborative law.

Instructing experts

There is no problem with Rules 307(f) and 401(b)(ii) of the Code of Conduct, and para 3e) of the Guide for Lay Clients. In collaborative law additional professional input is to be encouraged, as appropriate: eg a jointly-instructed accountant or financial adviser. Clients who are not emotionally ready to negotiate can be encouraged to seek help from a psychologist trained in collaborative law. A psychologist could be instructed to assist with concerns about the welfare of children. All third party instructions can be handled directly by clients, with a lawyer-drafted letter of instruction. This would avoid the need for counsel to handle paying such experts.

Additional comments

I would be happy to assist the BSB in explaining any aspect of collaborative law or in amending any of the materials. Resolution has a number of documents that could be of use to the BSB.

Young Barristers' Committee (YBC)

The current rules on experience should be maintained, if not strengthened. Barristers under 3 years' Call lack the experience for this work. There may indeed be merit in raising the requirement to 5 years. There should be waivers for former solicitors and people with experience of dealing with the public.

Experience is vital here, and earlier training in public access work would not change our views. Therefore there should be no public access training on the BVC.

Q.3
Public access should not be available in immigration cases. There is greater risk that litigation will not be carried out properly if left to the lay client, and to impose this responsibility on barristers is onerous. Other challenges include translation, the client living abroad, corresponding with the Home Office, payment of court fees and so on.

However the YBC is aware of different opinions here and recognises the use of being able to accept instructions directly, provided this does not compromise the independence of the bar or create significant risks to its members.

Q.4
It is not appropriate for there to be public access in any criminal cases. Firstly, solicitors are often needed at police stations, which barristers may not do. Secondly, in criminal cases evidence needs to be gathered independently from the lay client,

which is a task barristers could not easily undertake. If left to the lay client there is a danger that cases will not be properly prepared.

The Written Standards for the Conduct of Professional Work state at paragraph 6.3 that it is inappropriate for a barrister to interview any potential witness. To allow public access in criminal cases would require a fundamental change of the rules, which would benefit barristers very little.

Thirdly, it is unfair to expect the lay client to correspond with the prosecuting authority. A solicitor is needed for smooth progression to trial.

Q.5
The need to gather evidence remains in cases not punishable by imprisonment. There is no connection between seriousness of case and difficulties in public access. Any case can involve the taking of witness statements and/or the loss of the client's reputation or job.

If public access were permitted here, the correct criteria would be not the seriousness of the case but the workload it involved. Such criteria would be difficult to determine at the start of a case. To limit the scheme to guilty pleas would rely on clients knowing how they intended to plead before they had spoken to a legal professional, which is unfair.

Q.6
There is no stronger argument for allowing public access in ancillary relief than children cases. The need for a solicitor to litigate is just as strong.

Q.7
We oppose the use of public access in family cases except in Collaborative Law and instruction of Guardians. However, some members felt that since solicitors perform poorly here, barristers could undertake these tasks in financial cases only.

Family clients require much support, that a self-employed barrister is badly placed to give. Even where this is not needed, it may be required later in the case.

There could be a change in the rules to allow barristers to represent children directly in Public Law cases. Guardians are not members of the public but professional clients, which would be an exception to the YBC's concerns about extending public access.

The Guardian does not have complex administrative duties. A barrister could become specialised in this area. This could bring in new work. It would be necessary to consider how counsel would hold funds to pay the Guardian's share of any expert instructed during proceedings.

The YBC is unanimous that Collaborative Law is suited for PA. The following must be noted:

a) there is no litigation;
b) there is limited correspondence;
c) the process takes place in face to face meetings;
d) there is negotiation, at which barristers are skilled;
e) if there is an issue as to whether there has been full and frank disclosure, the case will be unsuited for collaborative law and will have to go to litigation with new lawyers.

Q.8&9
Barristers should be able to write on their own notepaper. At present lay clients miss out on a considerable advantage here.

Some of the YBC felt that barristers writing in their own name might be felt to be acting as the client's agent, and this could result in the client being bound by notices served on counsel, which the barrister might not be in a good position to administer (being in court, etc). Solicitors can rely on colleagues and locums: barristers cannot.

There is a risk that if allowed to deal with correspondence there may be slippage into litigation and management of clients' affairs. Barristers are not trained to do this, and the current rules help keep down counsel's overheads and make legal advice and advocacy cheaper.

Some members of the YBC feel this could be managed. The barrister could be required to get express approval from the client for any letter sent, and all letters sent by the barrister could state that correspondence should go to the lay client instead of the barrister. Letters could include a disclaimer of any general relationship of agency.

Q.10
In public access there will be times when the barrister needs to correspond in his own name in relation to trial timetables, skeleton arguments and so on. If this becomes contentious it should only be continued on a formal basis.

Q.12
The training course would need to advise on managing the risks of correspondence.

Q.13
Guidance should be given on money-laundering, document storage and billing.

Q.15
Guidance should be reworded for accessibility and to make sure the service is competitive.

Q.16
Client care letters should be clear, succinct and in accessible terms.

Q.17
Repeat client care letters are not particularly burdensome.

Q.18
The scheme should not be advertised more widely. Most barristers prefer referral work, and it would discriminate against them to push forward the interests of public access barristers.