

BAR
STANDARDS
BOARD

REGULATING BARRISTERS

**Application for rule changes: Public Access
Rules and Media Comment**

Contents

Public Access

| | |
|--|------|
| 1. Introduction | pg4 |
| 2. Details of existing arrangements and proposed changes | pg5 |
| 3. Nature and effect of the proposed changes | pg7 |
| 4. Why the BSB wishes to make the changes | pg8 |
| 5. Addressing the LSB's concerns | pg10 |
| i. Previous monitoring | pg10 |
| ii. Outcomes | pg11 |
| iii. Risk | pg12 |
| iv. Compliance and enforcement | pg19 |
| v. Training course | pg20 |
| vi. Legal Ombudsman complaints | pg20 |
| vii. Civil Justice Council report | pg20 |
| viii. Post-implementation monitoring | pg21 |
| ix. Profile of public access barristers | pg22 |
| x. BSB complaints data | pg23 |
| xi. Newly qualified barristers and training | pg25 |
| xii. Qualified persons | pg28 |
| xiii. The role of clerks | pg29 |
| xiv. Access to justice | pg29 |
| 6. The regulatory objectives | pg30 |
| 7. The better regulation principles | pg32 |
| 8. Desired outcome | pg33 |
| 9. Other regulators | pg33 |
| 10. Consultation process undertaken | pg33 |
| 11. Date of implementation | pg33 |

| | |
|---------------------------------------|-------------|
| 12. Other explanatory material | pg33 |
|---------------------------------------|-------------|

The following supporting material is attached:

Annex 1 Review of the public access scheme: final report 2009

Annex 2 Extracts from the Civil Justice Council's November 2011 report Access to Justice for Litigants in person (or "self Represented Litigants").

Annex 3 Correspondence from Mr T Mitchell of Fountain Chambers dated 27 April 2012

Annex 4 BSB 2012 survey of public access barristers

Annex 5 Review of public access training

Annex 6 Public access draft guidance for barristers, clerks and lay clients

Annex 7 BSB draft Enforcement Strategy

Annex 8 SRA February 2011 report Qualified Lawyers Transfer Scheme: Map of England and Wales Solicitor Day One Outcomes against a Barrister of England and Wales on completion of pupillage.

Media Comment

| | |
|--|-------------|
| 13. Introduction | pg34 |
| 14. Details of existing arrangements and proposed changes | pg34 |
| 15. Why the BSB wishes to make the changes | pg35 |
| 16. The regulatory objectives | pg35 |
| 17. The better regulation principles | pg36 |
| 18. Desired outcome | pg37 |
| 19. Other regulators | pg37 |
| 20. Consultation process undertaken | pg37 |
| 21. Date of implementation | pg37 |
| 22. Other explanatory material | pg37 |

Amendments to the Bar Code of Conduct – Public Access Rules

For approval by the Legal Services Board

This application is made in accordance with the requirements set out in the Legal Services Board's Rules for Rule Change applications. The Bar Standards Board ("BSB") wishes to provide the information below to support its application.

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1. INTRODUCTION

- 1.1 This application relates to the Public Access Rules (Annex F2 to the Code of Conduct). These changes arise following two consultations issued by the BSB in July and November 2011.
- 1.2 In July 2011 the BSB published a "mini" consultation paper seeking views on the possibility of relaxing rule 3(1) of the Public Access Rules. The proposed relaxation would enable a client to instruct a public access barrister even if they were eligible for public funding, provided they were in a position to make an informed decision. Having considered the responses to this mini-consultation, the Standards Committee and the Board have decided that removing rule 3(1) is desirable.
- 1.3 In addition to reviewing rule 3(1), the BSB has carried out a more general review of the public access rules, the public access guidance and the model client care letters and the current public access training course. Following this review and having carefully deliberated on the issues, the BSB considers that it is also desirable to relax rule 2. This rule currently prohibits barristers with under three years' standing from accepting public access instructions. It is proposed that this prohibition should be relaxed to enable these barristers to undertake public access work provided they

have completed pupillage and been issued with a full practising certificate, have completed the new public access training course and are working with a qualified person (who is themselves eligible to do public access work).

2. DETAILS OF EXISTING ARRANGEMENTS AND PROPOSED CHANGES

2.1 The BSB is applying to make the following specific amendments to the Public Access Rules (Annex F2):

2. *Before accepting any public access instructions from or on behalf of a lay client who has not also instructed a solicitor or other professional client, a barrister must:*

(i) Be properly qualified by having been issued with a full practising certificate, by having undertaken and satisfactorily completed the appropriate training required by the Bar Standards Board from time to time, and by registering with the Bar Council as a Public Access practitioner; ~~and~~

ii) From [date] a barrister must have successfully completed a training programme approved by the Bar Standards Board as valid for these purposes from that date unless:

the barrister was already registered with the Bar Council to undertake public access on that date, in which case he must undertake any additional training required by the Bar Standards Board within 24 months or cease to undertake public access work.

(iii) Take such steps as are reasonably necessary to ascertain whether it would be in the best interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client; and

(iv) Take such steps as are reasonably necessary to ensure that the client is able to make an informed decision about whether to apply for legal aid or whether to proceed with public access.

3. *From [date] a barrister with less than three years' standing (as defined at paragraph 203.2) who has completed the necessary training must:*

(i) have a public access qualified person (a qualified person as defined at paragraph 203.3) readily available to provide guidance to the barrister;

(ii) maintain a log of public cases they have dealt with, including any issues or problems which have arisen (a pro forma for recording this

information is included in the guidance for barristers published by the Bar Standards Board);

(iii) seek appropriate feedback from their public access clients on the service provided;

(iv) make this log available, on request, to the Bar Standards Board for review.

~~3.4. A barrister may not accept direct instructions from or on behalf of a lay client in or in connection with any matter or proceedings in which, in all the circumstances, it would be in the interests of the client or in the interests of justice for the client to instruct a solicitor or professional client.~~

~~(i) In or in connection with any matter or proceedings in which it is likely that the lay client would be eligible for public funding;~~

~~(2) In or in connection with any matter or proceedings in which, in all the circumstances, it would be in the interests of the client or in the interests of justice for the client to instruct a solicitor or professional client.~~

~~6.7. A barrister who accepts public access instructions must forthwith notify his lay client in writing, in clear and readily understandable terms, of:~~

~~(b) the fact that in performing his work the barrister will be subject to the requirements of the Code of Conduct and, in particular, paragraphs 401(b), 603(a), and 608;~~

2.2 The BSB is applying to make the following specific amendments to the Code of Conduct:

203.3 A person shall be a qualified person for the purpose of paragraph 203.1(b) if he:

(a) has been entitled to practise and has practised as a barrister (other than as a pupil who has not completed pupillage in accordance with the Bar Training Regulations) or has been authorised to practise by another approved regulator for a period (which need not have been as a member of the same authorised body) of at least six years in the previous eight years;

(b) for the previous two years

(i) has made such practice his primary occupation, and

(ii) has been entitled to exercise a right of audience before every Court in relation to all proceedings;

(c) is not acting as a qualified person in relation to more than two other people; and

(d) has not been designated by the Bar Council or Bar Standards Board as unsuitable to be a qualified person.

203.4 In relation to public access instructions, a person shall be a qualified person for the purpose of paragraph 203.1(b) if he otherwise complies with 203.3 and is registered as a public access barrister in accordance with Annex F2.

203.5 This paragraph 203 is subject to the transitional provisions at paragraphs 1102 to 1105.

Supply of legal services to the public

204. A practising barrister may supply legal services to the public provided that:

(a) he is practising in a way permitted by rule 205

(b) he complies with the requirements of paragraph 203.1;

(c) he is covered by insurance against claims for professional negligence arising out of the supply of his services in such amount and upon such terms as are currently required by the Bar Council or alternatively (in the case of:

(i) an employed barrister; or

(ii) a barrister practising as a manager or employee of an Authorised Body)

his employer or the body, as the case may be, is covered by such insurance in such amount and upon such terms as are required by the Approved Regulator of the employer or body (or if none, in such amount and on such terms as are currently required by the Bar Council); and

(d) In the case of legal services supplied pursuant to paragraph 401(a)(iii):

(i) ~~he is more than three years' standing~~ he has been issued with a full practising certificate;

(ii) he has complied with such training requirements as may be imposed by the Bar Council or Bar Standards Board; and

(iii) he has notified the Bar Council that he holds himself out as willing to accept instructions from lay clients.

3. NATURE AND EFFECT OF THE PROPOSED CHANGES

3.1 At the time the Public Access Rules were first introduced (in 2004) there was a natural inclination to proceed gradually with their implementation. It heralded the first time in the history of the Bar that barristers could be instructed directly by the public without the involvement of a solicitor, and there was a level of uncertainty as to whether clients would understand the limitations of barristers' work. It was felt that the new scheme should be approached carefully.

3.2 The three year rule was introduced to offer clients an additional layer of protection at a time when public access was in its infancy. The justification for the rule is understandable in that context. Much has changed since 2004. Not least the introduction of the Legal Services Act 2007 ("the LSA 2007") and the Legal Services

Board (“LSB”) as oversight regulator. Over time, more and more barristers have undertaken public access training and now offer their services direct to the public.

- 3.3 As public access has developed over time, so too has the experience of the profession, clients and the BSB. A review of the Public Access Rules was undertaken in 2008 to look at its effectiveness and the possibility of expanding the scheme. A copy of the report is attached at Annex 1.
- 3.4 Following the review of the operation of the Public Access Rules in 2009, the BSB proposed revisions to the way in which barristers can work under the Rules and decided to extend the areas of practice where public access is permissible. The conclusion of the review was that the scheme had worked well and should indeed be expanded. Accordingly the then existing prohibitions on undertaking privately paid family, criminal and immigration work were removed. The three year rule was maintained, together with a prohibition on accepting instructions where the client was likely to be eligible for public funding.
- 3.5 Having reviewed the rules again, conducted two further consultations and reviewed the current public access training course, the BSB believes that it is in the public interest, and in the interests of the other regulatory objectives, to relax the rules. Further relaxation is supported by the overarching desire to move to outcomes focused regulation, where overly prescriptive rules can no longer be justified.
- 3.6 However, in order to implement the training review, some additional rules are required to ensure that all barristers wishing to conduct public access cases have either a) undertaken appropriate training and demonstrated that they have the requisite knowledge, understanding and skills or b) have demonstrated that their practice in this area furnishes them with the requisite knowledge, understanding and skills.
- 3.7 Rule changes are essential in order to relax the public access scheme in the above respects. It will not be possible to achieve the desired changes through amended guidance alone.

4 WHY THE BSB WISHES TO MAKE THE CHANGES

- 4.1 We wish to make the rule changes because we feel retaining them cannot be justified as proportionate regulation, and the relaxation of both the legal aid and three year rules would promote the regulatory objectives of the LSA 2007. An important part of the context here is the anticipated increased need for public access to meet the gap that will be left by legal aid cuts. The Civil Justice Council considered these issues in their report in November 2011 on “Access to Justice for Litigants in person (or “self Represented Litigants”).
- 4.2 We attach as **Annex 2** some passages from that report which have particular relevance to the role of public access in ensuring access to justice and which emphasise the need to dismantle any unnecessary regulatory barriers to such access. We believe these proposals are an appropriate regulatory response to what is undoubtedly a very real, and indeed urgent, need.

Legal Aid prohibition

- 4.3 The BSB is concerned that the legal aid cuts, due to come into force in April 2013, will significantly restrict legal services. We believe that the cuts will have a detrimental effect on consumer interests and that access to justice will be reduced. The BSB believes that the current rules unduly restrict barristers from acting where the client may be entitled to legal aid, and there is no evidence to suggest there is a significant risk that rule changes, to a position where the client can proceed with public access instructions provided they are in a position to make an informed decision, will negatively affect any of the regulatory objectives.
- 4.4 The BSB is aware of cases where clients may be eligible for legal aid, but would prefer not to accept it because the contribution that they are required to make is greater than the amount charged by a public access barrister¹. Other clients may live in an area where few or no solicitors offer a publicly funded service. Further, some clients may not wish to apply for legal aid at all and prefer to have a wider choice in the type or quality of advocate they instruct than they would be allowed in the publicly funded service.
- 4.5 The key regulatory risks in relaxing the prohibition are that a client might not be in an informed position to decide whether to apply for legal aid or to instruct a barrister directly, and that a barrister might accept instructions when it would have been in the client's best interests to apply for legal aid.
- 4.6 The BSB considers that the regulatory risks are not sufficient to outweigh the importance of the client's choice of legal representation. This view is supported by the Legal Services Board Consumer Panel who made the following comments in response to the first consultation:
- "The Panel strongly supports consumers being able to make informed choices about who will provide their legal services, and how they will access them, including whether to instruct barristers directly. However, the fundamental prerequisite is that consumers have access to, and understand, the relevant information prior to making any decision."*
- 4.7 Any alteration to the rule would need to be accompanied by consumer safeguards and the BSB believes that the proposed changes to the Code of Conduct and the Public Access Rules provide such safeguards. In addition, the BSB's public access guidance for barristers and lay clients has been amended so that both parties are aware of this point.

Three year rule

- 4.8 The three year rule was initially justified because public access was a novel way of providing legal services and the profession wished to adopt a cautious approach. Much has changed since 2004 and, especially considering the move towards

¹ For specific examples of clients wishing to instruct a barrister even though they are entitled to legal aid funding please see paragraph 37 of the BSB's Public Access consultation dated November 2011. In addition please see at **Annex 3** letter from Mr Tom Mitchell of Fountain Chambers dated 27 April 2012.

outcomes focused regulation, the BSB believes that this restriction can no longer be justified and does not operate to further the regulatory objectives.

- 4.9 The key regulatory risk in relaxing the three year rule is that newly qualified barristers will undertake work that they do not have the required experience or competency to handle. This is a risk that applies to all barristers across all areas of work, not just newly qualified barristers thinking about undertaking public access work. The Code of Conduct has very clear rules in place that mitigate this risk and the BSB is aware of no evidence to suggest that barristers are not complying with these rules².
- 4.10 The newly qualified Bar provides a rich source of expert legal services at an affordable cost, and the BSB does not consider that it is proportionate regulation to prevent these barristers from representing clients in appropriate cases. Put simply, the current rule unnecessarily limits consumer choice and hinders access to justice.

5. ADDRESSING THE LSB'S CONCERNS

- 5.1 In making this application the BSB wishes to address a number of points that have been previously raised by the LSB following the release of the consultation paper³.

PREVIOUS MONITORING

- 5.2 The BSB has continued to monitor complaints data from public access barristers since the relaxation of the rules in March 2010. As indicated in the consultation paper, the number of complaints made against public access barristers is relatively low and our conclusion remains that this is strong evidence to suggest there is minimal regulatory risk posed to the public. Whilst accepting that service related complaints have been dealt with by the Office of the Legal Ombudsman (LeO) since October 2010, the BSB has no evidence to suggest that the relaxation of the rules in March 2010 has led to a significantly increased level of regulatory risk.
- 5.3 Before publishing the most recent consultation paper the BSB wrote to LeO requesting disclosure of any complaints data they held on service related complaints involving public access barristers. Their database does not record whether instructions were received on a public access basis, so there is no way of knowing how many service related complaints involved public access barristers. We have subsequently met with officials from LeO and they have undertaken to review their IT system so that in future it will be possible to record whether a barrister was acting on public access instructions or on a referral basis.
- 5.4 We know from the general complaints figures that in total LeO received 513 notifications against barristers in 2011/2012. Of this only 221 were actively investigated. The remaining cases were either referred back to the chambers for

² See paragraph 61 onwards of the 1 December 2011 consultation for a detailed list of the various public protection safeguards built into the Code of Conduct.

³ For a complete list of the issues please see the letter from Fran Gillon to Vanessa Davies dated 21 December 2011.

resolution or not considered because the complaint was out of time or otherwise not fit for consideration.

- 5.5 The overall percentage of complaints made against barristers is relatively modest, especially when compared to solicitors. In the 2011/2012 reporting year complaints against barristers only made up 3% (221) of the total complaints received. By contrast complaints involving solicitors made up 95.6% (7105) of the total received. The remaining 1.4% of complaints were made against members of other Approved Regulators.
- 5.6 On a straightforward percentage comparison, it is clear that complaints are much less frequent against barristers than they are against solicitors⁴.
- 5.7 The BSB also contacted the Bar Mutual Indemnity Fund (BMIF) in order to obtain relevant data on the number of claims made against public access barristers. For obvious reasons of confidentiality BMIF cannot disclose details of individual cases. They did however confirm that since 2004 they have received approximately 41 notifications emanating from public access instructions (3 of these cases went all the way to a Disciplinary Tribunals).
- 5.8 Since the introduction of the scheme in 2004 only £160,000 is estimated to have been paid out in claims to public access clients⁵.
- 5.9 The overall number of notifications against public access barristers since 2004 is modest and is supported by the low number of complaints received by the BSB. The vast majority of money paid out by the BMIF relates to defence costs at Disciplinary Tribunals. Relatively small sums have been paid out to clients and, taken together with the complaints data, the BSB believes this demonstrates strong evidence to suggest that the regulatory risks posed by public access barristers are being properly mitigated.

OUTCOMES

- 5.10 The Public Access Rules are intended to achieve a number of outcomes. These include ensuring that:
- (a) Barristers who do public access work have the necessary training and skills to provide a good services to clients;

⁴ The comparison was made using the assumption that there are approximately 15,000 practising barrister and approximately 120,000 practising solicitors. On a straightforward percentage comparisons one would expect complaints against barristers to be closer to 8%.

⁵ In total BMIF has paid out £1.294 million on public access cases. Of this £1.294 million, £749,000 relates to the defence costs in one case before a Disciplinary Tribunal (BMIF covers the defence costs of barristers who appear before Disciplinary Tribunals). Of the remaining £545,000, a further £310,500 relates to the defence costs in the two other Disciplinary Tribunal cases. £160,000 is estimated to have been paid out in claims to public access clients. A further £74,500 is estimated to be paid out in related defence costs.

- (b) The BSB and the public know which barristers provide a public access service;
 - (c) Barristers set up effective systems for dealing with public access clients, including client letters, filing, bill payments and record keeping;
 - (d) There is no confusion as to what types of work a public access barrister can and cannot undertake;
 - (e) Solicitors are brought into a case when it is in the client's interest or in the interests of justice.
- 5.11 The BSB is proposing to remove two of the current rules which restrict public access work as it considers they are disproportionate and impose restrictions which have an adverse effect on access to justice and other regulatory objectives without bringing any real benefits to clients.
- 5.12 A number of prescriptive rules were required when the scheme was first introduced because public access was a new way of working for barristers and it was thought sensible to move cautiously in removing restrictions. The BSB's current view is that it is still desirable to retain some specific rules (i.e. around training requirements and notification, the terms of client letters, fees, records keeping etc) rather than relying exclusively on more general rules.
- 5.13 The alternative approach would be to remove all the rules on public access and rely solely on other general rules and guidance. The BSB considers that this would be a step too far at this stage. As you know, the BSB will be reviewing these rules after the introduction of our new Handbook. The rules do not appear to have given rise to any problems but it may be that some, or all, of the rules could be replaced by amending the guidance in other areas of the Handbook.

RISK

- 5.14 The 2012 survey of public access barristers (**Annex 4**) indicated that the majority of public access instructions come from natural persons, followed in very much smaller numbers by less sophisticated legal persons (as defined in the Oxera report).⁶ The Oxera categories do not further separate out natural persons into those who are vulnerable and those who are not. The BSB's view, as explained below, is that the current rule change proposals mitigate the risks appropriately, even in respect of those natural persons who are vulnerable. That being so, the proposals necessarily also adequately mitigate any risks in respect of sophisticated legal persons, which will if anything be lesser.
- 5.15 Given the survey results, the BSB considers that it would be disproportionate to tailor these particular proposals to different Oxera categories. Nor, for the reasons set out

⁶ See paragraph 6.1 of the survey, where the Oxera definitions are also reproduced.

below, does the BSB consider this necessary. The alternative of licensed access (which is permitted under Annex F1 of the Code) is, by its nature, more likely to be made use of by more sophisticated legal persons (and is tailored to use by more sophisticated users). Barristers will have to consider the ability of the client to manage the steps required of them when deciding whether the case is appropriate for direct access and in doing so can be expected to be able to distinguish between a sophisticated legal person with their own in-house legal department and an individual with no prior experience of litigation.

Specific risks associated with public access work

5.16 The BSB accepts that there are a number of potential risks in allowing barristers to deliver legal services direct to the public. However, the BSB takes the view that all of these risks are appropriately mitigated by the existing regulatory arrangements. The BSB is aware of no evidence to suggest that the public has suffered disproportionate harm as a result of barristers working without referral instructions.

5.17 The risks identified below are applicable to all barristers, irrespective of experience. The BSB is not aware of any risks that are unique to newly qualified barristers that have not already been identified. The BSB does, however, accept that the possibility of the identified risks materialising is amplified with respect to newly qualified barristers, given their relative lack of experience.

5.18 Risks associated with public access work and the proposed changes include:

(a) **A public access barrister fails to understand the regulatory and legal requirements relating to their work in this area.** This may include a lack of knowledge with respect to the Public Access Rules, money laundering regulations, proceeds of crime legislation and consumer protection legislation.

(b) **A public access barrister takes on a case that should properly have a solicitor involved.** Presently this may include cases where the client is not capable of undertaking the litigation component of the case, or where the case is very complex and requires a solicitor.

The new risk, should the rules be relaxed, includes a situation where the client is eligible for legal aid but instructs a public access barrister without making an informed decision as to whether or not to apply for public funding. This may lead to the situation where the client has to pay for legal services that they might have otherwise received for free or for a limited fee;

(c) **A public access barrister accepts public access instructions that initially appear straightforward but that develop into something that is beyond the barrister's competence or requires a solicitor.** This may result in the client having to instruct a solicitor halfway through a case or instruct a more experienced public access barrister;

- (d) **A public access barrister has not got the appropriate softer skills to interact appropriately with the client of their intermediary.** In particular, the barrister may be unable to properly identify and/or manage vulnerable clients (i.e. physical/mental disability, English as a second language, age);
- (e) **A public access barrister has inadequate systems and administrative arrangements in place.** The individual nature of self-employed **practice** arguably makes it more likely that a barrister may miss a deadline or court date (due to illness, double booking, unforeseen absence etc).

Mitigating risk

- 5.19 In the BSB's view there are a number of specific features in our regulatory arrangements that mitigate the identified risks. These include:
- (a) The revised Public Access Training Course (and barristers' training more generally);
 - (b) The Public Access Rules;
 - (c) General Code of Conduct provisions; and
 - (d) Published guidance.
- 5.20 Taken together these provide an adequate level of protection for the public. Each bullet point is examined in more detail below.
- 5.21 Appropriate training must be undertaken by all barristers before being eligible to accept public access cases. The BSB acknowledges concerns that the existing course is insufficient to properly equip barristers with the necessary skills to undertake public access work. Particular concern frequently focuses on the perceived lack of emphasis in relation to identifying and managing vulnerable clients, its relatively short duration and the lack of any formal assessment at the end of the course.
- 5.22 The BSB further acknowledges that there is evidence from the 2012 survey indicating the profession thinks more can be done to improve the course. While 78% of those who responded to the survey found the course to be either very useful (24%) or useful (54%), 10% found the course to be not very useful and a further 2% found the course to be not at all useful. It must, of course, be acknowledged that some respondents may not have found the course useful because they were already familiar with the material.
- 5.23 While 70% of respondents felt that the course had assisted them with identifying and dealing with vulnerable clients, 56% felt that the course should contain more information on this topic. 80% of respondents felt that the course had prepared them to identify when it was in the client's best interests to instruct a solicitor but there were 43% of respondents who thought the course should contain more information on this topic.

- 5.24 In an attempt to gain evidence directly from consumer groups that deal with vulnerable clients the BSB wrote to five organisations that specialise in mental health and refugee cases (MIND, Unlock, Refugee Action, The Refugee Council and Rethink). Unfortunately despite a letter, an offer to meet personally and an email follow up none of the organisations replied to our consultation. The BSB accepts that having consumer input into the proposed changes would be extremely helpful. The difficulty is that we have found it incredibly hard to extract any sort of meaningful reply from consumer interest groups. The BSB's own Equality and Diversity Committee has provided useful comments and generally endorses the need for increased training to help barristers identify and manage vulnerable clients.
- 5.25 Overall, 93% of those surveyed felt competent to undertake public access instructions having completing the course.
- 5.26 The survey further reveals that nearly 65% of all public access barristers have undertaken the training in 2010 and 2011. The rules were relaxed in March 2010 to allow privately paying public access work in crime, family and immigration. Given the two largest areas of practice at the Bar are family and crime (there are approximately 12,300 self-employed barristers of whom approximately 5000 practice in crime and a further 2500 in family) it is perhaps unsurprising that the numbers of barristers doing the course has increased sharply since the rules were relaxed.
- 5.27 To ensure the content and delivery of public access training course remains appropriate, the BSB has recently undertaken a full review. Attached to this application at **Annex 5** are full details of the review together with the recommendations, an action plan for implementing those recommendations and details of the monitoring and review that will be undertaken to ascertain the impact of the changes to public access training.
- 5.28 The new course requirements focus on identifying risks associated with public access work, stipulate the learning outcomes required and state the required knowledge, understanding and skills that candidates will be expected to demonstrate⁷. The BSB believes that the new approach to training:
- (a) is strategic, focussing on outcomes designed to address identified risks associated with the changes to the public access rules;
 - (b) sets out the required knowledge, understanding and skills that must be demonstrated in order to successfully complete the training;
 - (c) avoids detailed prescription about the content and format of training and the structure of associated assessments; and
 - (d) allows individual providers to develop innovative ways of achieving the outcomes, thereby allowing competition between providers and affording choice to those seeking to undertake training.

⁷ For a full breakdown please see Table 1, which is appended to the training review document.

- 5.29 The BSB believes that the training course should be assessed and course providers will need to detail their method of assessment when applying for approval to the BSB.
- 5.30 The BSB will require providers to have appropriate quality assurance arrangements to ensure that the quality of training and assessments is appropriate.
- 5.31 The transitional arrangements that the BSB intends to implement between the current and the new training courses are set out in **Annex 5**. Essentially the proposal is that all newly qualified barristers (those with less than three years' standing) will be obliged to undertake the new training (or the old training with an appropriate top-up) before being able to undertake public access work. Given this group of barristers potentially poses the greatest risk, the BSB considers this to be a proportionate regulatory approach.
- 5.32 Barristers who are over three years' standing and who have not already undertaken public access training when the new arrangements are implemented must complete the new training course before being eligible to accept public access briefs.
- 5.33 Barristers who have already undertaken the training will continue to be able to undertake public access cases, but must undertake an appropriate training course within 24 months of the new course being made available (or may apply to the BSB for a waiver of this obligation on the grounds that they have sufficient experience).
- 5.34 The changes to the public access training course will be monitored to ascertain their effectiveness and impact. A review will be conducted to consider a range of issues including how well prepared trainees are, the impact assessments have had and whether any further changes are required.
- 5.35 The Public Access Rules form an integral part of the regulatory arrangements that mitigate the identified risks in this area. Compliance with these rules is mandatory for any barrister wishing to undertake public access work. Assuming the rule change application is approved, the following rules are particularly relevant to mitigating risk:
- (a) Rule 2 (i) – before accepting instructions a barrister must have a full practising certificate, must have undertaken the public access training and must be registered with the Bar Council.
 - (b) Rule 2 (ii) – before accepting instructions a barrister must take such steps as are reasonably necessary to ascertain whether it would be in the best interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client.
 - (c) Rule 2 (iii) - before accepting instructions a barrister must take such steps as are reasonably necessary to ensure that the client is able to make an informed decision about whether to apply for legal aid or whether to proceed with public access.

- (d) Rule 3 - a barrister may not accept direct instructions from or on behalf of a lay client in or in connection with any matter or proceedings in which, in all the circumstances, it would be in the interests of the client or in the interests of justice for the client to instruct a solicitor or professional client.
- (e) Rule 6 – after accepting a case on public access instructions a barrister must set out in writing, and in clear and readily understandable terms, the terms of work (including the fees that will be charged for the work).

5.36 The above are all important considerations that a barrister must turn his mind to before accepting a public access case. All of these rules are specifically designed to mitigate the risks identified at paragraph 5.18 above.

5.37 There are a number of general Code of Conduct provisions which protect consumers and mitigate the identified risks. These include:

- (a) A barrister must comply with the CPD regulations (rule 202(b)) and conduct at least 12 hours of relevant CPD every calendar year. This requirement ensures that post-authorisation barristers continue to keep their skills and knowledge up-to-date;
- (b) A barrister under three years' standing must have an experienced barrister available to provide guidance, if required (rule 203.1(b)). This rule acknowledges that there may be times where a newly qualified barrister requires the assistance of a more experience colleague. The proposed amendments would make it a requirement that, where the work is public access work, the experienced practitioners also needs to be a public access accredited barrister;
- (c) A barrister must not engage in conduct that is dishonest, discreditable, prejudicial to the administration of justice or likely to diminish public confidence in the profession (rule 301(a)). These are high level requirements that oblige barristers to conduct themselves in a professional and honest way;
- (d) A barrister has an overriding duty to the court (rule 302). This is the overriding duty imposed on all barristers and operates to ensures the proper administration of justice is served;
- (e) A barrister must protect by all lawful and proper means the best interests of the client (rule 303(a)). Aside from the duty to the court this is the most important obligation in the Code. It has wide sweeping implications and exists to ensure barristers conduct themselves in a way that best serves the interests of their client;
- (f) A barrister must not permit his independence to be compromised or do anything that may lead to this inference (rule 307(a)(b)). This rule reminds barristers that in fulfilling the role of an advocate and advisor it is incredibly

important that their independence is not compromised. They must act in their client's best interests without regard to what might be beneficial to them;

- (g) A barrister may only accept public access instruction in accordance with the Public Access Rules (rule 401(a)(iii));
- (h) A barrister must have insurance (rule 402.1 and 402.2). This rule offers a client financial protection should the barrister make a mistake that causes them to suffer loss;
- (i) A barrister must ensure his practice is properly administered and run and proper records are kept (rule 403.5). Amongst other things, this ensures that proper records are kept of the work undertaken and invoices are properly itemised;
- (j) A barrister may not accept a brief if they do not have the required experience or competence to handle the matter (rule 603(a)). This is a very important rule applicable to all barristers, irrespective of their level of experience. The rule obliges barristers to turn down cases where they do not have the necessary skills or experience and is a very important public protection measure;
- (k) A barrister must not withdraw from a case without having given reasons to the client and may not withdraw in such circumstances where the client may be unable to find other legal assistance (rules 610 (a)(d)). This rule protects the client by ensuring a barrister cannot withdraw late in the case and can only withdraw if proper reasons are given.

5.38 The BSB is not aware of any evidence that suggests the various Code provisions are being ignored or do not offer adequate protection against the identified risks.

5.39 The recent survey of public access barristers indicates that the profession routinely refuses work in accordance with the Code - 58% of barristers surveyed reported they had turned down public access instructions. Of those who refused work the greatest percentage (63%) did so because they felt it was in the client's best interest, or in the interests of justice, to instruct a solicitor. Other reasons for turning down work included a lack of sufficient experience (16%), other professional engagements (15%) and risk of conflict (6%). The BSB believes that is clear evidence to support the fact that barristers take their various Code obligations seriously and act in a manner which is consistent with these obligations and supports the client's best interests.

5.40 The BSB has issued comprehensive guidance for barristers, clerks and the members of the public. The guidance is very detailed and, from a barrister's perspective, reinforces the content of the training and the relevant rules within the Code of Conduct. Copies of the current draft guidance documents are attached at **Annex 6**.

Risk of not allowing the changes

- 5.41 Aside from the potential risks associated with allowing the changes, there are also obvious risks to the regulatory objectives were the LSB to decline the application for rule change. In essence this would reverse all of the positive impacts on the regulatory objectives that have been identified at paragraphs 6.1-6.18 below.
- 5.42 Of particular concern is the risk that a decision to decline the application would:
- (a) Unnecessarily restrict consumer choice by limiting the number of qualified practitioners available to the public at an affordable price;
 - (b) Unnecessarily restrict competition between practitioners;
 - (c) Negatively affect access to justice;
 - (d) Unnecessarily prevent newly qualified barristers, and the publically funded bar, from acting in cases that they are competent to handle. Thus making it more likely that practitioners will leave the profession and the strength and diversity of the Bar will be undermined.

COMPLIANCE AND ENFORCEMENT

- 5.43 The BSB's proposed approach to compliance, supervision and enforcement is detailed in Part Two of the consultation on the new Handbook:
- <https://www.barstandardsboard.org.uk/about-bar-standards-board/consultations/open-consultations/>
- 5.44 We do not intend to repeat the proposed approach in great detail here, but it is hopefully clear from the consultation that the new approach will offer the BSB much more flexibility when dealing with compliance, supervision and enforcement issues. We should make clear that the changes have been proposed as part of a general review and are not specifically designed to take into account an increase in public access work. Staff and BSB Committee members will, of course, receive training on the new Handbook after it has been approved and before it becomes operational (a copy of the BSB's draft enforcement strategy is attached at **Annex 7**)
- 5.45 In terms of risk assessment and the current Code, the obvious first point to make is that the BSB has no evidence to suggest that barristers who undertake public access work pose a higher risk to clients than those undertaking work on a referral basis. Of course, the BSB will follow up relevant complaints and take appropriate action where these are shown to be well founded. In the absence of any evidence suggesting public access barrister pose a significant risk, the BSB does not consider that a more interventionist approach is currently justified or would be proportionate.
- 5.46 The BSB's general approach to risk is continuing to be developed and was part of the recent Handbook consultation. Section E of Part 1 to the Handbook consultation

details what we consider to be the correct approach to risk assessment. As part of the proposed risk assessment process you will note that the BSB will take into account a number of factors that relate to possible impact on the regulatory objectives and probability of that impact occurring. Relevant considerations under both headings include, amongst other things, an assessment of the systems that are in place to administer the practice, the experience and training undertaken by the barrister, the regulatory history of the barrister, the relevant services that are offered and whether they are conducted on a referral or public access basis.

- 5.47 A further detailed risk and supervision consultation paper will be released by the BSB in March this year.

TRAINING COURSE

- 5.48 As above, the BSB has recently undertaken a review of the public access course and agreed a number of specific recommendations to improve the training. As part of this review we are committed to monitoring the impact of the proposed changes and considering whether any further changes are necessary. Further details relating to the monitoring and review of the new training course are set out in paragraph 5.56.

LEGAL OMBUDSMAN COMPLAINTS

- 5.49 As above, the BSB wrote to LeO and requested any complaints data before releasing the November 2011 consultation paper. Unfortunately LeO's computer system does not presently record whether or not a complaint against a barrister originated from public access instructions or on a referral basis. It is therefore impossible for us to identify the number of service related complaints involving public access barristers.
- 5.50 We have asked LeO if it would in future be possible for this data to be recorded so a clearer picture can emerge. Whilst it is disappointing that a complete complaints picture is not available, the BSB believes that the data that is available has not been significantly undermined and strongly supports the application for rule change. The additional insurance information provided by BMIF further supports the low level of complaints received by the BSB.

CIVIL JUSTICE COUNCIL REPORT

- 5.51 We refer you to **Annex 2** for relevant passages from this report. These provide clear support for the proposals that are the subject of this application. In short, one of the key messages was not to let an excess of regulatory caution get in the way of broadening access to justice, because more and more people are going to be forced to buy limited amounts of legal help and advice, rather than being able to afford to have a solicitor conduct the whole case for them. Similarly, we would particularly draw your attention to the views of the LSB Consumer Panel, which were broadly supportive and specifically noted that the "three year rule unnecessarily limits consumer choice and thus needlessly fetters competition."

- 5.52 Liberalising the rules in the ways proposed will provide consumers with more choice and ultimately increase access to justice. The BSB is concerned with helping consumers' access expert legal services, even if they cannot afford full representation throughout the life of their case.
- 5.53 Chapter 9 of the report makes it clear that any advice litigants in person may be able to get on the merits of their case, or on procedural steps, is to be welcomed. The public access scheme affords this opportunity to litigants in person and relaxing the rules will help to further increase access to legal services.
- 5.54 The specialist nature of the Bar means it is ideally placed to offer discrete advice on different aspects of a case without the litigant in person feeling they have to hand over the entire case (although this is possible as well) and incur increased costs.
- 5.55 The CJC specifically makes it clear that they favour removing the three year rule (see paragraph 115(3)). The BSB has given this careful consideration and agrees that this is an unnecessary regulatory barrier which should be removed. The same is true of the prohibition on providing direct access services to those eligible for legal aid. This is precisely why we are advocating the two changes mentioned above.

POST-IMPLEMENTATION MONITORING

- 5.56 Please see **Annex 5** for a full description of the post-implementation monitoring regime that has been established by the BSB. The monitoring will focus on gathering information about the impact of the changes made to the public access rules, together with the effectiveness of the new training arrangements put in place. Once the changes have been implemented, the monitoring will involve the following strands of work:
- (a) Chambers and entity monitoring - evidence gathering questions will be included in subsequent rounds of chambers monitoring. It is anticipated that there will be a round of monitoring in summer 2013. The questions will seek to identify, among other things, the extent to which public access work is undertaken within the chamber/entity, the amount of such work undertaken by newly qualified barristers (if any), and the number and nature of any problems that have been identified.
 - (b) Review and analysis of complaints - complaints received in relation to public access work will be monitored to see if any trends or patterns are discernible and, in particular, whether complaints against newly qualified barristers are disproportionate. We are working with colleagues from the Legal Ombudsman to ensure that they collect and record complaints data at this level of granularity so that this can feed into our consideration of complaints data.
 - (c) Tracking the experiences of newly qualified barristers and their clients – the BSB will require barristers with less than three years' standing who undertake public access work to maintain a log of the types of cases they have dealt with and any issues or problems that have arisen. These barristers will be

expected to use this log as a learning tool. They will also be expected to consider the appropriateness of seeking feedback from their clients as an aid to their learning. Within 18-24 months of the implementation of changes the sample of newly qualified barristers will be asked to respond to a series of focussed questions about their experiences of public access work and to share any issues/problems they have logged. In doing this work we will seek to find out the causes of any problems that are identified and the steps that could be taken to address them. We will also consider any feedback received from clients to see whether the same issues have been identified or if there are new issues that need to be considered.

- (d) Review of public access training - within 18-24 months of the changes being implemented a review of the changes to public access training will be conducted. This research will seek the views of trainers and a sample of trainees to explore how well the changes have worked, how well prepared trainees are for public access work, whether assessment has improved training and any changes or innovations that need to be considered.

PROFILE OF PUBLIC ACCESS BARRISTERS

5.57 Numbers of public access barristers (as of December 2012):

- (a) 5429 – The number of barristers who have completed the course. 154 barristers used Barristers Direct, 1296 used the Bar Council, 3811 used the College of Law, 135 received waivers and 33 used Westgate Chambers (who are authorised to provide internal courses only).
- (b) 4595 – The number of barristers who have registered with Bar Council after completing the course.
- (c) 4132 – The number of barristers who have registered and wish to have their details published on the public access register.

5.58 Once a barrister has successfully completed the course the provider sends confirmation to the Bar Council. The Bar Council then writes to the barrister seeking confirmation that a) they wish to register as public access barristers, b) if so, what areas of law they wish to practise in, and c) whether they want to have their details published.

5.59 Barristers may complete the public access course but subsequently decide not to register with the Bar Council. The survey reveals that of sample that responded 20% do not, in fact, undertake any public access cases. If these results were replicated across all 4595 registered this would mean that the number of “active” public access barristers would be approximately 3650. It should also be noted that 51% of those barristers who were surveyed indicated that public access work only makes up between 1-9% of their work. Just over 7% of barristers surveyed said it made up between 60-100% of their work (note the survey has a margin of error between 0.9%-4.5%).

- 5.60 The type of work undertaken by public access barristers varies and is demonstrated in the figure 7 of **Annex 4**. The vast majority of instructions come in what might broadly be described as civil cases (general civil, public law, chancery, commercial, employment etc). Approximately 6% of those surveyed accepted instructions on immigration cases, 20% on criminal cases and 18% on family cases.
- 5.61 In terms of the overall type of service provided by public access barristers, 46% of the work relates to advocacy services, 43% to advice, 10% to drafting legal documents and 1% to acting in an arbitration or mediation.
- 5.62 It is difficult to give a definitive answer as to the type of consumers that use public access barristers, but the survey results do provide some useful evidence. Of those barristers who responded to this question 58.7% said the majority of their public access instructions came from natural persons, 8.5% said the instructions came from less sophisticated legal person, 5.1% from sophisticated legal persons and 1% from Government sources⁸.

BSB COMPLAINTS DATA

- 5.63 As detailed in the consultation paper, between 2007 and 2011 the BSB received 34 complaints from clients against their public access barristers⁹. A total of 32 charges arose from these complaints, 22 of which were for the more serious professional misconduct and 10 of which involved inadequate professional service. The 22 professional misconduct charges were laid against 7 barristers, with all but one of the charges being proved.
- 5.64 The best estimate for the number of barristers who are currently actively undertaking public access work is approximately 3450. Therefore less than 1% of barristers who are active in providing public access services were the subject of associated upheld misconduct charges during the period 2007-2011¹⁰.
- 5.65 The below tables shows a comparison of the complaints received from public access clients against their barristers compared to the total number of complaints received (table 1 is therefore a subset of table 2)

⁸ These categories are drawn from the Oxera report. See paragraph 6.1 of the Survey report for the definitions.

⁹ The December consultation paper actually indicated there were 33 complaints received. A further complaint was received prior to the end of the year so the accurate figure is 34.

¹⁰ This is a best estimate because the number of active public access barristers is likely to have been less than an average of 3450 over the five year period. $7/3450$ gives you 0.2%.

Complaints received from clients against their public access barrister

| Year | Registered Public Access Barristers | Complaints Received | | Misconduct Charges Raised | |
|--------------|-------------------------------------|---------------------|------------|---------------------------|------------|
| | | Complaints | Barristers | Charges | Barristers |
| 2007 | 571 | 8 | 7 | 10 | 3 |
| 2008 | 803 | 6 | 6 | 4 | 2 |
| 2009 | 1091 | 13 | 12 | 6 | 1 |
| 2010 | 1910 | 4 | 4 | 2 | 1 |
| 2011 | 3966 | 3 | 3 | 0 | 0 |
| Total | - | 34 | 32 | 22 | 7 |

All external complaints received

| Year | Practising Barristers | Complaints Received | | Misconduct Charges Raised | |
|--------------|-----------------------|---------------------|-------------|---------------------------|------------|
| | | Complaints | Barristers | Charges | Barristers |
| 2007 | 15030 | 593 | 549 | 71 | 26 |
| 2008 | 15182 | 514 | 482 | 76 | 26 |
| 2009 | 15270 | 551 | 513 | 91 | 32 |
| 2010 | 15387 | 501 | 473 | 56 | 22 |
| 2011 | 15581 | 303 | 283 | 30 | 13 |
| Total | - | 2462 | 2300 | 324 | 119 |

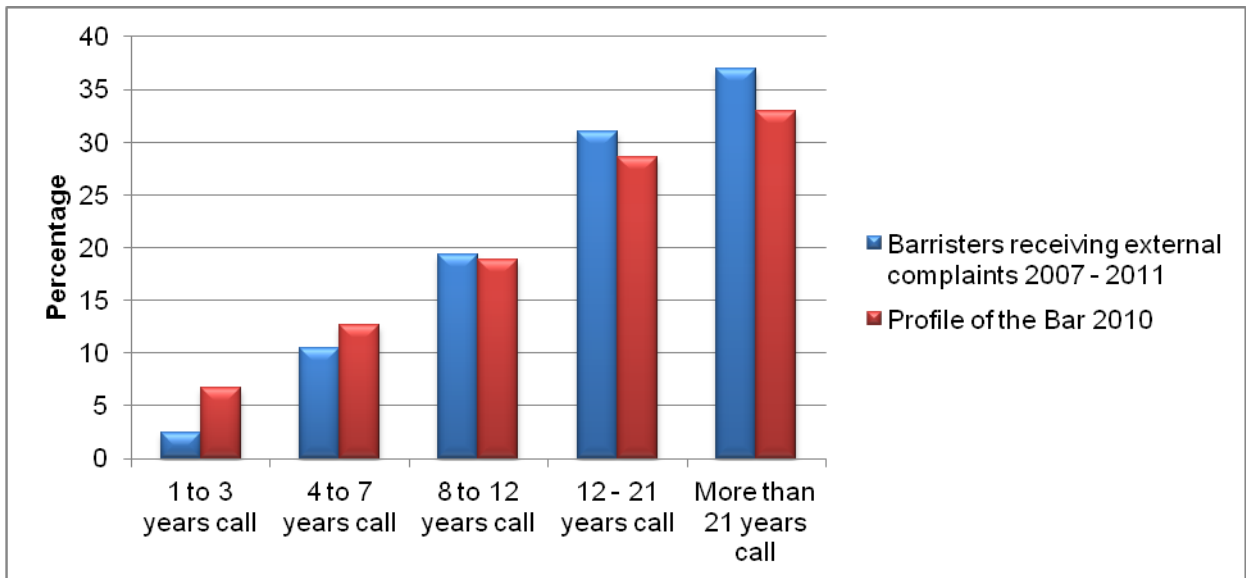
5.66 The above demonstrates that 302 charges, out of a total of 324 charges, were laid against barristers in circumstances where the complainant was not complaining about their public access barrister. In percentage terms this means that more than 93% of all charges laid were not associated with a client complaining about their public access barrister. Therefore, clients complaining about their public access barrister make up fewer than 7% of the total number of charges prosecuted by the BSB between 2007-2011.

5.67 Although direct statistical comparisons can be difficult, the complaints data does not, in the BSB's opinion, establish that public access work is a source of regulatory risk that is insufficiently mitigated. On the contrary, 22 charges against 7 barristers in five years is evidence to suggest that the regulatory framework around the public access scheme is working well.

5.68 Specifically in relation to newly qualified barristers, the BSB has also looked at the complaints data by reference to years' call. The profile of barristers receiving external

complaints was generally in proportion to the profile of the Bar by year of call. However, those who were one to three years call, and four to seven years call, accounted for a smaller proportion of barristers receiving complaints than their proportion at the Bar. There were more barristers receiving complaints in the eight to 12 years call, 12 to 21 years call and more than 21 years call.

Total external complaints received against profile of the Bar



5.69 The above graph demonstrates that, in fact, newly qualified barristers receive fewer complaints compared to their more experienced colleagues.

NEWLY QUALIFIED BARRISTERS AND TRAINING

5.70 The main justification for moving forward from our 2010 decision to maintain the three year rule is that we are adopting a more outcomes focused approach to regulation. The BSB believes that a prescriptive rule that maintains the three year prohibition is not necessary when there are other outcomes focused sections of the Code (notably the obligations to act in the client’s best interests and to only take on work you are competent to manage) that provide adequate safeguards.

5.71 The BSB continues to be of the opinion that the BPTC and pupillage training programmes completed by newly qualified barristers are robust and properly qualifies them to undertake straightforward public access cases (examples of some types of straightforward cases were given in the consultation paper). We emphasise that the public access training course must be completed before any barrister is permitted to accept public access briefs. However, we will continue to work with BPTC providers with the aim of assimilating the new public access training and assessments requirements within their provision.

- 5.72 Budget cuts mean that it is becoming increasingly common for barristers to attend court without a professional client. The reality is that newly qualified barristers are involved with many such cases. More senior barristers working on complex cases will almost always have a professional client involved. It is the newly qualified barristers attending straightforward criminal, family and civil matters that routinely do so without a professional client and with direct contact with the lay client.

BPTC Handbook

- 5.73 The BPTC handbook sets out the course specification requirements and guidance for the one year BPTC course (previously the BVC). It details the core subjects all students are obliged to undertake and the additional options which are available. Aside from advocacy there are other core requirements such as civil litigation, criminal litigation, conference skills, resolution of disputes outside of court, and professional ethics. The BSB believes that all of these core subjects teach young barrister valuable skills that are applicable to public access work.
- 5.74 A complete copy of the handbook can be found at this link:
http://www.barstandardsboard.org.uk/media/28049/bptc_final_pdf.pdf
- 5.75 BPTC course providers teach a range of components through role-play. The providers have access to mock courts complete with retiring rooms and public galleries. They are also fortunate to have volunteers in the form of judges and barristers who give their time to enable students to experience what acting in the real courtroom is like. Students take turns at being defence and prosecution advocates as well as clients (often vulnerable). A case may go on for several days, allowing time for client interviews and research. The role-play briefs given to the students are often quite detailed and allow practise of various skills.
- 5.76 In addition to the above a number of providers either operate their own Legal Advice Centres and/or encourage students to attend local Legal Advice Centres. Students deal mainly with vulnerable clients in need of legal help. Many students are regularly scheduled to work in the Legal Advice Centres and are assigned their own cases so that they see the same clients each week (under supervision). This enables them to hone their interview skills as well as their research skills and they learn in a live situation how to identify and manage whatever client vulnerabilities they encounter.

Pupillage handbook

- 5.77 The Handbook is a comprehensive guide to the life of a pupil and sets out, amongst other things, the core and specialist knowledge required, the assessment process, the skills that pupils are expected to achieve and the standard their work will be tested against.
- 5.78 A complete copy of the handbook can be found at this link:
http://www.barstandardsboard.org.uk/media/261792/pupillage_handbook20august202011c.pdf

- 5.79 The BSB requires all pupils to achieve specified standards and competencies relating to a set of core skills. Chapter 10 (pages 44-47) identifies these core skills as:
- (a) Conduct and etiquette – aims to ensure pupils have a thorough understanding of the Code of Conduct and their professional obligations.
 - (b) Advocacy – aims to ensure pupils develop and practise skills necessary to be an effective advocate in oral or written advocacy.
 - (c) Conferences and Negotiations – aims to develop skills in the area of conference and negotiation, so a pupil can competently conduct a conference or negotiation on behalf of a client.
 - (d) Drafting paperwork and legal research – aims to enable pupils to develop the necessary drafting and writing skills, and to develop legal research skills to ensure pupils can correctly apply all sources of information.
- 5.80 The standard of performance which a pupil's work must achieve is the standard at which the work professionally addresses all the points raised and is capable of rendering a real and valuable service to the client.
- 5.81 In addition to the above core skills, which must be covered by every pupil, considerable time will also be spent on specialist areas depending on a pupil's intended areas of practice. These include employment law, family law, criminal law, immigration law, personal injury etc. Pupils are required to keep a pupillage diary which they can then use as evidence to demonstrate competency in the above skill areas.
- 5.82 Before a pupillage is signed off by the BSB and a practising certificate is issued, the pupil supervisor (or Head of Chambers) must complete and endorse the pupil's checklist. This is independent verification from an experienced barrister that the pupil has met all of the competencies required of them. The most recent pupillage checklist can be found at this link

<http://www.barstandardsboard.org.uk/qualifying-as-a-barrister/forms-and-guidelines/pupillage-forms/>

Comparative analysis with junior solicitors

- 5.83 In February 2011 the SRA published a report detailing a comparative analysis of the BPTC and the LPC (attached at **Annex 8**). The report maps the learning outcomes of barristers on completion of the BPTC and pupillage against a solicitor's day one outcomes (day one is the first day after a solicitor's training contract has finished). The report acknowledges that, whilst there are many similarities between the two courses and the respective day one outcomes, it is not always easy to find a direct fit.
- 5.84 A number of learning outcomes were addressed but of particular relevance to public access work is section D - Legal, professional and client relationship knowledge and

skills. This section compared various specific areas of the respective training courses, including:

- (a) the ability to communicate effectively with clients, colleagues and other professional (D5);
- (b) the ability to advocate on behalf of clients (D6);
- (c) the ability to recognise clients' financial, commercial and personal priorities and constraints (D8);
- (d) the ability to exercise effective client relationship management skills (D9); and
- (e) the ability to act appropriately if a client is dissatisfied with advice or services provided.

5.85 The conclusion of the report identifies some areas where there was more than just minor differences between the training undertaken by solicitors and barristers. However, importantly none of the areas listed in section D, which concentrates on client relationship skills, were identified as producing significant differences in day one learning outcomes as between newly qualified solicitors and barristers.

5.86 The BSB believes that this is strong independent evidence that supports our proposition that newly qualified barristers have the appropriate training and experience to conduct straightforward public access cases.

5.87 In using this material to support the case for rule change, the BSB acknowledges that, given the structure of solicitors' firms compared to chambers, newly qualified solicitors will have greater day-to-day supervision as compared to newly qualified barristers. It must however be acknowledged that all barristers under three years' standing must ensure they have an experienced barrister available to them should they require assistance or advice. Further, the chambers model fosters a strong collegiate environment with experienced practitioners regularly making themselves available to more junior colleagues. Still further, all newly qualified barristers also have access to the Head of Chambers, their Inn of Court, the circuits, specialist bar associations and the Bar Council's ethical helpline.

QUALIFIED PERSONS

5.88 The BSB proposal is that the requirement for supervision should remain in force. The BSB agrees that if a barrister of less than three years' standing wants to undertake public access work, the "qualified person" must also be public access accredited in order to be in a position to provide proper guidance to barristers under three years' standing.

THE ROLE OF CLERKS

- 5.89 In paragraph 80 of the November 2011 public access rules consultation we stated that the majority of public access cases will be referred to a barrister through a clerks' room and that this would offer an additional public protection safeguard. In making this statement the BSB was not suggesting that the allocation of work by clerks was sufficient justification, in itself, to outweigh the need for regulation. The obvious desire for clerks to protect chambers' reputation, and thus safeguard future instructions, is an additional public protection measure that needs to be read in light of the much more significant regulatory obligations elsewhere in the Code (i.e. must act in the client's best interest, must only do work your are competent to handle).
- 5.90 The BSB continues to believe that clerks will provide an added level of practical consumer protection. The BSB has published guidance for clerks which is available on our website that details their obligations when dealing with a public access client. We stress however that this point was never intended to be a standalone justification for relaxing the three year rule. The much more significant client protection measures are detailed at paragraphs 61-74 of the consultation paper.

ACCESS TO JUSTICE

- 5.91 Whilst it is true that some clients will not be able to carry out tasks in the absence of a solicitor, that is not true across the board. Where a client is not capable of completing the tasks that fall to them the Code places a very clear obligation on the barrister to refuse the instructions and advise that a solicitor should be appointed.
- 5.92 However, many people of limited funds or who are otherwise vulnerable will be entirely capable of handling the litigation component of the cases. It would be disproportionate regulation to maintain the current restrictions on barristers merely because some clients will have difficulty in conducting the solicitor's job. The rules make provision for this scenario and in these circumstances a barrister must refuse to act and send the client to a solicitor.
- 5.93 It would, however, be equally wrong to take an excessively cautious approach to when a solicitor's help is required and to impose that when it would amount to gold plating. It is dangerous to assess these proposals on the basis that the alternative available to all of these individuals will be that a solicitor will take conduct of the litigation on their behalf. We, again, refer you to the extracts from the Civil Justice report attached at **Annex 2**. It is essential to bear in mind that the alternative to allowing expanded direct access may be that an individual goes without any expert legal advice at all. A newly qualified barrister is undoubtedly expert in the law and procedure, relative to such a lay client, and can provide much needed assistance at very low rates.

6 THE REGULATORY OBJECTIVES

Protecting and promoting the public interest

- 6.1 Relaxing the rules will protect and promote the public interest by giving consumers more choice, creating greater competition among the public access Bar and increasing the supply of high quality and competitively priced legal services. It is in the public interest to afford all clients the greatest possible choice of legal representation.

Supporting the constitutional principles of the rule of law

- 6.2 In practical terms this objective entails helping to uphold the rule of law which is done most readily by increasing access to justice. The simpler, cheaper and easier it is to access a lawyer, the easier it is for the ordinary private citizen to assert their rights to ensure that the law applies to them as equally as it does to corporate and wealthy clients.

Improving access to justice

- 6.3 The current rules unnecessarily limit clients' free choice of legal representation. Relaxing the rules would improve access to justice by increasing the number and choice of advocates for consumers.
- 6.4 From April 2013 the new restrictions on the scope of legal aid will disqualify large numbers of people from public funding. The BSB recognises that relaxing the public access rules will not solve this problem, but it is certainly a measure that will assist.

Protecting and promoting the interests of consumers

- 6.5 As well as having access to an economic and plentiful supply of specialist legal services, it is in the interests of consumers to have as wide a pool as possible from which to select their representation. These proposals enhance consumer choice and competition on fees.
- 6.6 The BSB acknowledges that there are risks in allowing barristers to provide legal services direct to consumers. However, the BSB considers that all of the identified risks are properly mitigated by a variety of Code obligations and appropriate training requirements. Provided consumers are properly informed about all of the relevant facts, they should be allowed to make their own choices.

Promoting competition in the provision of services

- 6.7 Relaxing the prohibitions will plainly promote competition in the provision of legal services among barristers and also between barristers and solicitors. It would also increase competition on fees.
- 6.8 One reason the public access rules were initially extended to privately paying family, crime and immigration, was to help barristers compete with solicitors. The need to

compete is arguably most acute at the lowest end of the young Bar and a relaxation would assist in this regard.

- 6.9 The Bar, and particularly the young publicly funded Bar, is under great strain. There has been a reduction in fees combined with a sharp increase in solicitors retaining more and more briefs in-house. The current rules prohibit barristers from competing on an even footing and risk driving away talented people from all backgrounds joining the profession.

Encouraging an independent, strong, diverse and effective legal profession

- 6.10 Relaxing the rules will help to encourage an independent, strong, diverse and effective legal profession because public access barristers will be able to obtain access to work they would otherwise not get (providing it is in the clients best interests for them to accept instructions).
- 6.11 The Bar, and in particular the young publicly funded Bar, is under well publicised strain following successive government cuts. The amount of work available to the Bar is diminishing and as a result the potential for young talent to drift away from the Bar is enhanced.
- 6.12 The diversity of the Bar is dependent on it being a profession available to people without private incomes. The fear is that only those from privileged backgrounds will be financially able to survive the early years at the Bar. If this fear is realised the result will be a young Bar, and a profession and judiciary, which is less diverse.
- 6.13 The BSB believes that relaxing the rules will assist with the financial burdens faced by those entering the profession and help to lower some of the barriers to entry to the profession.

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

- 6.14 Affordable legal advice is critical to enabling individuals to understand and enforce their rights, as the Civil Justice Council Report emphasised. Allowing greater access to barristers, either directly or through an intermediary service, will help to increase the public understanding of legal rights and duties. The public will have more choice and direct access to expert legal services.
- 6.15 Rights are only meaningful if they can be enforced and that is the function of the courts. If the consumer cannot have access to an affordable lawyer, either in order to argue their case before the courts, or to provide advice that enables them to better represent themselves, then this objective will be undermined.

Promoting and maintaining adherence to the professional principles

- 6.16 The Bar has a strong tradition of adhering to stringent professional principles. There is no evidence to suggest the proposed changes will impact on this long standing tradition.

- 6.17 No barrister, regardless of their experience, will be permitted to carry out public access work without having undertaken proper training. In addition, all public access barristers will be required to comply with the public access rules and the Code as a whole.
- 6.18 The BSB is not aware of any evidence to suggest barristers have difficulty in adhering to their professional principles. To the contrary, the recent survey of the profession reveals that barristers routinely refuse instructions where they are not experienced enough or where it would be in the client's best interests to instruct a solicitor.

7. THE BETTER REGULATION PRINCIPLES

Transparency

- 7.1 Two consultation papers were issued on the proposed rules in July and December 2011. A summary of responses has been published.
- 7.2 In March 2012 the BSB issued a survey to all public access barristers seeking views on a number of various issues. The survey was widely publicised and we received 414 responses.
- 7.3 A communications strategy has been developed to ensure there is publicity around the proposed rule changes. The strategy includes articles in the legal press, communication through the specialist bar associations, circuits and targeted mail and email shots.

Accountability

- 7.4 As the regulator for the Bar, the BSB is accountable for any changes that are made. The BSB believes that the new arrangements will us help to meet our various regulatory objectives.

Proportionality

- 7.5 The BSB carefully considered all of the options for achieving policy objectives before developing and proposing the rule changes. The BSB considers that there is no evidence to suggest relaxing the rules would negatively affect the regulatory objectives and that it would be disproportionate regulation to retain the prohibitions.

Consistency

- 7.6 Removing unnecessary restrictions from the Code is consistent with the BSB's new approach to outcomes focused regulation (please see our recent consultation on the new BSB Handbook and entity regulation).

Targeting

- 7.7 The proposed changes will be monitored and reviewed. Complaints and BMIF data will continued to be monitored to see if there are any unacceptable risks emerging.

8. DESIRED OUTCOME

- 8.1 The BSB is always seeking ways in which to improve and provide for better regulatory practice. The desired outcome is for the BSB to allow barristers to provide legal services direct to the public in a way that best promotes the regulatory objectives.

9. OTHER REGULATORS

- 9.1 All of the other approved regulators were invited to provide comments on the consultation paper. The responses that we received from other regulators have been carefully considered and taken into account.

10. CONSULTATION PROCESSES UNDERTAKEN

- 10.1 The BSB has released two consultations as part of the rule change application dated July 2011 and November 2011.

11. DATE OF IMPLEMENTATION

- 11.1 The BSB would like to have the new rules in place from March 2013.

12. OTHER EXPLANATORY MATERIAL

- 12.1 The Board considered the recommendations of the Standards Committee in relation to the public access rule changes at its meeting in July 2012. Minutes of that Board meeting can be found at this link:

http://www.barstandardsboard.org.uk/media/1428307/05_bsb_minutes_part_1_120719_v4.pdf

- 12.2 The Board considered the recommendations of the Standards Committee in relation to the review of public access training at its meeting in January 2013. Minutes of that Board meeting will be made available once they have been published on our website.

Amendments to the Bar Code of Conduct – Media Comment

For approval by the Legal Services Board

This application is made in accordance with the requirements set out in the Legal Services Board's Rules for Rule Change applications. The Bar Standards Board ("BSB") wishes to provide the information below to support its application.

Any queries about this application should be made to:

Ewen Macleod
Head of Professional Practice

Bar Standards Board
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London
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13. INTRODUCTION

- 13.1 This application relates to Media Comment (paragraph 709.1 of the Code of Conduct). These changes arise following two consultations issued by the BSB in March 2009 and January 2011.
- 13.2 In March 2009, the BSB published a consultation paper seeking views on draft conduct rules which had been developed as part of the review of the Code of Conduct. The consultation paper did not propose to remove the rule prohibiting barristers from expressing personal opinions to the press or other media (other than in an educational or academic context). However, it flagged up that there had been suggestions this rule was unnecessary and noted that there was no longer such a restriction on solicitors. Respondents were invited to comment on whether this rule should be amended or removed altogether. As the majority of respondents were in favour of removal of the rule the BSB decided to consult further on a specific proposal to remove the rule and replace it with guidance. The Review of the Code of Conduct consultation published in January 2011 included this specific proposal.
- 13.3 The proposal consulted on was to remove the media comment rule and to replace it with guidance to barristers about how to exercise their professional judgement when making comments in the media. The consultation noted that this position was analogous to that taken by the Solicitors Regulation Authority. Following this consultation, and having carefully deliberated on the issues raised by respondents, the BSB agreed that the rule is unnecessarily prohibitive and should be replaced with guidance on this matter.

14. DETAILS OF EXISTING ARRANGEMENTS AND PROPOSED CHANGES

- 14.1 The BSB is applying to remove the following rule relating to Media Comment.

Media comment

709.1 A barrister must not in relation to any anticipated or current proceedings or mediation in which he is briefed or expects to appear or has appeared as

an advocate express a personal opinion to the press or other media or in any other public statement upon the facts or issues arising in the proceedings.

- 14.2 In place of this rule the BSB will be publishing guidance which is in the process of being developed. The aim of the guidance will be to assist barristers in identifying the factors and risks they should take into account when considering whether to speak to the press and/or commenting in other social media such as social networks. A copy of the draft guidance can be provided if required.

15. WHY THE BSB WISHES TO MAKE THE CHANGES

- 15.1 We wish to remove this rule for the following reasons:

- a) the wording of the rule means that it serves a very limited purpose. The current rule does not prohibit all statements to the press, but only those which contain statements of opinion;
- b) continuation of the ban would not serve the regulatory objectives; and
- c) we the SRA has repealed an equivalent ban for solicitors with no apparent detriment to clients or the regulatory objectives and, with barristers increasingly working with solicitors in entities, it would be anomalous to adopt a different rule for barristers.

16. THE REGULATORY OBJECTIVES

Protecting and promoting the public interest

- 16.1 Removing this blanket prohibition and replacing it with guidance will protect and promote the public interest by allowing barristers to make a professional judgement about whether or not to make comments in the media. It is in the public interest to allow barristers to make a comment where, in their professional opinion, this is justified and appropriate.

Supporting the constitutional principles of the rule of law

- 16.2 This rule change should have a neutral impact on the constitutional principles of the rule of law.
- 16.3 There is a risk that barristers could make comments in the media that will undermine confidence in the conduct and outcome of an individual case. We believe that this will be mitigated by the new guidance and the general Code obligations of not engaging in conduct that is dishonest or otherwise discreditable, prejudicial to the administration of justice or likely to diminish public confidence will still apply and be relevant when deciding whether to make comments to the media.

Improving access to justice

- 16.4 The removal of this prohibition should have a neutral impact on this regulatory objective.

Protecting and promoting the interests of consumers

- 16.5 The proposed rule change should promote the interests of consumers by allowing barristers to comment in the media where they believe that this is justified, appropriate and in the best interests of their clients.

Promoting competition in the provision of services

- 16.6 The removal of this prohibition should have a neutral impact on this regulatory objective.

Encouraging an independent, strong, diverse and effective legal profession

- 16.7 Removing this blanket ban will help to encourage an independent, strong, diverse and effective legal profession because it will give barristers an opportunity to voice valid opinions in the media. To the extent that views are expressed skilfully and with forethought, this could serve to enhance the profession's standing in the eyes of clients and other stakeholders, and bolster its confidence and independence.
- 16.8 The removal of an unnecessary restrictive rule will ultimately allow barristers to exercise their professional judgement in a more outcomes focussed way and thereby enhance their independence and strengthen the profession.

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

- 16.9 The removal of this prohibition should have a positive impact on this regulatory objective by allowing barristers to better communicate aspects of the law to the public.

Promoting and maintaining adherence to the professional principles

- 16.10 The Bar has a strong tradition of adhering to stringent professional principles. There is no evidence to suggest the proposed changes will impact on this long standing tradition.
- 16.11 The proposed change will place the onus on barristers to make a professional judgement about whether or not to make a comment in the media. This will require them to apply the professional principles to the decision making process which we believe can only promote adherence to those same principles.

17. THE BETTER REGULATION PRINCIPLES

Transparency

- 17.1 The proposed rule change was included in two consultation papers issued in March 2009 and January 2011.
- 17.2 A communications strategy is in the process of being developed to ensure there is publicity around the removal of the rule and publication of the guidance.

Accountability

- 17.3 As the regulator for the Bar, the BSB is accountable for any changes that are made. The BSB believes that the new arrangements will us help to meet our various regulatory objectives.

Proportionality

- 17.4 The BSB carefully considered all of the options for achieving policy objectives before developing and proposing the rule changes. The BSB considers that there is no

evidence to suggest that removing this rule would negatively affect the regulatory objectives and that it would be disproportionate regulation to retain the prohibition.

Consistency

- 17.5 Removing unnecessary restrictions from the Code is consistent with the BSB's new approach to outcomes focused regulation.

Targeting

- 17.6 The proposed changes will be kept under review. Complaints data will be reviewed to see if there are any unacceptable risks emerging and consideration given to any further steps required to address any risks identified.

18. DESIRED OUTCOME

- 18.1 The BSB is always seeking ways in which to improve and provide better regulatory practice. The removal of this rule and replacement by guidance will allow barristers to make a professional judgement on whether or not to comment in the media, having first considered relevant risks and factors.

19. OTHER REGULATORS

- 19.1 All of the other approved regulators were invited to provide comments on the consultation papers. The responses that we received from other regulators have been carefully considered and taken into account.

20. CONSULTATION PROCESSES UNDERTAKEN

- 20.1 This matter has been included in two BSB consultations relating to the review of the Code of Conduct which took place in March 2009 and January 2011.

21. DATE OF IMPLEMENTATION

- 21.1 The BSB would like to remove the media comment rule and replace it with guidance from March 2013.

22. OTHER EXPLANATORY MATERIAL

- 22.1 The Board considered the recommendations of the Standards Committee in relation to the removal of this rule at its meeting on 15 December July 2011. Minutes of that Board meeting can be found at this link:

https://www.barstandardsboard.org.uk/media/1363140/111215_bsb_part_1_minutes.pdf