

## **Amendments to the Bar Standards Board Handbook – Public and Licensed 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 BSB wishes to provide the information below to support its application.

Any queries about this application should be made to:

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### **1 The proposed alterations**

1.1 We are proposing amendments to the Public and Licensed Access Rules in the BSB Handbook, and the accompanying Licensed Access Recognition Regulations (which while not included in the BSB Handbook, do form part of the BSB's regulatory arrangements). The proposed changes are set out in detail at **Annex A**, and the rationale for the changes is explained in section 3.

1.2 In addition to changes to simplify the rules and ensure consistency with the rest of the Handbook and our outcomes-focused approach, the following key changes are proposed:

#### Public Access Rules

- Removing Rule C120.2 to reflect that the deadline to undertake additional Public Access training has passed;

- Removing the requirement for barristers who are of less than three years' standing to maintain a Public Access log, as there are more effective and proportionate means of seeking and reflecting on client feedback. In addition, this requirement does not reflect the regulatory approach that we are now taking to feedback, both in our Future Bar Training programme and in our response to recommendations made by the Competition and Markets Authority (CMA); and
- Removing the rule that Public Access barristers may only undertake correspondence where it is ancillary to permitted work. This is because there would be no risk posed if a lay client instructed a Public Access barrister simply to undertake correspondence on their behalf.

#### Licensed Access Rules

- Ensuring that barristers notify clients who are members of professional bodies of the same information as other clients using the Licensed Access scheme;
- Permitting barristers to simply refer to the list of Licensed Access clients published on the BSB's website to ensure that the client holds a valid licence. At present, clients are required to send a copy of their licence each time they instruct a barrister;
- Removing references to the Licensed Access Terms of Work, as they are published by the Bar Council in its representative capacity and there is little justification for including reference to them in regulatory rules. It is proposed to simply require that Licensed Access work is undertaken on agreed terms and if barristers and clients wish to use standard terms (which may be the Licensed Access Terms of Work), they may do so; and
- Requiring barristers accepting Licensed Access instructions to retain documents for at least seven years (in line with the Public Access Rules).

#### Licensed Access Recognition Regulations

- Making licences valid for all matters, courts and tribunals to streamline the Licensed Access scheme and free up regulatory resources;
- Retaining the ability to impose limitations and conditions on licences in certain circumstances. For example, on the licences of immigration advisers

regulated by the Office of the Immigration Services Commissioner (OISC), and in exceptional circumstances;

- Putting in place transitional arrangements to allow us to consider whether it is necessary to continue to impose limitations and conditions on existing licences, at the point of renewal;
- Removing the restriction on members of the professional bodies listed in the First Schedule using the scheme to instruct a barrister for representation in the higher courts and the Employment Appeal Tribunal;
- Updating the First and Second Schedules to reflect that some of the bodies listed have changed their names, merged or disbanded; and
- Moving the First and Second Schedules to guidance, so that in the future the BSB will not be required to apply to the LSB to amend them. This will free up resources for both the BSB and the LSB.

## **2 Details of the existing arrangements**

- 2.1 The Public and Licensed Access schemes allow lay clients to instruct barristers directly without first instructing a solicitor or other lawyer. In order for a barrister to accept instructions via Public Access, they must complete training specified by the BSB and be registered as a Public Access practitioner. Over 5,500 barristers in England and Wales are registered as Public Access practitioners. In order for a barrister to accept instructions via Licensed Access, the client must either hold a licence issued by the BSB, or be a member of a professional body specified in the Schedules to the BSB's Licensed Access Recognition Regulations (<https://www.barstandardsboard.org.uk/regulatory-requirements-for-barristers/licensed-access-recognition-regulations/>). It should be noted that the Public and Licensed Access Rules only apply to self-employed barristers, and do not apply to BSB entities as their circumstances will vary considerably. For example, a number of BSB entities are owned and managed by and/or employ solicitors, who are already entitled to accept instructions directly from the public. However, the Public and Licensed Access Rules provide guidance on best practice to BSB entities. The considerations BSB entities need to make when working directly with the public are also outlined at Guidance S7 of the BSB Handbook.
- 2.2 In October 2013, a number of amendments were made to the BSB's Public Access Rules. Most significantly, barristers who were of less than three years' practising

experience were permitted to undertake Public Access work for the first time. This was subject to completing training specified by the BSB, having access to a Public Access 'qualified person' who is readily available to provide guidance, logging Public Access work and seeking feedback from Public Access clients. In October 2013, changes were also made to the Public Access training course which raised the minimum standards that training providers must meet, and included a requirement for participant competency to be assessed against outcomes. Barristers who had taken the existing course needed to complete additional training by November 2015 if they wished to continue to undertake Public Access work.

- 2.3 Following the November 2015 deadline, the BSB began a review of the Public and Licensed Access schemes. The objectives of the Public and Licensed Access review included assessing how well the Public and Licensed Access schemes are working in the consumer interest, and considering whether any changes should be made to improve the consumer experience of using these schemes. The review also sought to assess how well the Public Access Rules have been working since the changes in October 2013, and determine what changes may be needed.

### **3 Our rationale for rule changes**

- 3.1 We conducted a wide-ranging review in 2016 to assess what risks, if any were present in relation to the Public and Licensed Access schemes. Extensive research and evidence gathering was undertaken as part of the review and included the following:

- Pye Tait was commissioned jointly by the BSB and the LSB to conduct supply side research into the Public Access scheme by surveying and interviewing Public Access barristers ([https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report\\_26.9.2016.pdf](https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report_26.9.2016.pdf));
- The BSB also commissioned Pye Tait to undertake some additional Public Access research focusing on the client perspective;
- A monitoring exercise of barristers who were of less than three years' standing and undertaking Public Access work was undertaken;
- Interviews were conducted with consumer organisations; and

- Surveys on Licensed Access were conducted with both barristers and clients who have used the scheme.

3.2 The evidence showed that there appeared to be more risks relating to Public Access than Licensed Access, and so a decision was made to consider the two schemes separately. The risks relating to Public Access were then, in line with the BSB's risk-based approach to regulation, cross-referenced with the risks in the BSB's Risk Index ([https://www.barstandardsboard.org.uk/media/1751667/bsb\\_risk\\_index\\_12pp\\_5.4.16\\_for\\_web.pdf](https://www.barstandardsboard.org.uk/media/1751667/bsb_risk_index_12pp_5.4.16_for_web.pdf)). Ultimately this led to the identification of three key issues:

- There are barriers that are making some consumers unable or unwilling to access a Public Access provider;
- Barristers and clerks may not have enough support or may be inadequately prepared to manage Public Access work; and
- Some Public Access barristers may be providing a poor client service.

3.3 Consideration of these key issues led the BSB to adopt the following recommendations:

- Assessing from first principles whether the cab-rank rule, which obliges barristers to accept instructions except in particular circumstances, should apply to Public (and Licensed) Access cases, undertaking a full analysis against the regulatory objectives in the Legal Services Act 2007. This analysis was undertaken as part of the Consultation on Changes to the Public and Licensed Access Rules (**Annex C**), which was launched in June 2017 and closed in September 2017. The consultation proposed that the cab-rank rule should not be extended to Public and Licensed Access cases. While we recognised that there are arguments in theory for extending the cab-rank rule on the grounds of improving access to justice, and protecting and promoting the public interest and the interests of consumers, extending the rule would be more likely to create a barrier to access. All respondents to the consultation who answered the question agreed with the proposal. This included the Legal Services Consumer Panel, noting in particular the potential for clients to attempt to invoke the rule when they are unsuitable for Public Access, or where their cases have little merit;

- Reviewing the BSB's Public Access Guidance for Barristers, Clerks and Lay Clients, and Model Client Care Letters, in light of our evidence-base and the evidence which emerged from the CMA's legal services market study (<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>), published in December 2016. It was also recommended that the BSB explores whether to make provision of the guidance to lay clients mandatory for barristers. This work is being progressed as part of our response to the recommendations made by the CMA in its report. The BSB's Policy Consultation on Transparency Standards ([https://www.barstandardsboard.org.uk/media/1852551/october\\_2017\\_-\\_policy\\_consultation\\_on\\_transparency\\_standards.pdf](https://www.barstandardsboard.org.uk/media/1852551/october_2017_-_policy_consultation_on_transparency_standards.pdf)), which was launched in October 2017, includes a proposal to require barristers to publish the BSB's Guidance for Lay Clients on their websites;
- Reviewing our position on which tasks constitute the conduct of litigation, and publishing standalone Guidance on Conducting Litigation. This was published in September 2017: [https://www.barstandardsboard.org.uk/media/1849621/guidance\\_on\\_conducting\\_litigation.pdf](https://www.barstandardsboard.org.uk/media/1849621/guidance_on_conducting_litigation.pdf);
- Encouraging Public Access clerks and administrators to attend relevant training courses as a matter of good practice; and
- Producing a revised set of required outcomes for the Public Access training. These may not differ substantially from the current outcomes, but may lead to the training placing more emphasis on certain areas (including those which barristers identified for improvement during the research). It was also recommended that the revised outcomes align with the BSB's Professional Statement ([https://www.barstandardsboard.org.uk/media/1787559/bsb\\_professional\\_statement\\_and\\_competences\\_2016.pdf](https://www.barstandardsboard.org.uk/media/1787559/bsb_professional_statement_and_competences_2016.pdf)) and Future Bar Training programme more widely. This work will be completed prior to the expiration of the current Public Access training providers' contracts in 2018.

3.4 While they are provided for context, the above recommendations are not relevant to this application as they either relate to maintenance of the status quo, changes to the BSB's regulatory arrangements for which we are not seeking approval at this stage,

or changes which do not require approval from the LSB. However, following the research conducted for the Public and Licensed Access Review, the BSB also adopted recommendations in relation to the Public and Licensed Access Rules and Licensed Access Recognition Regulations. The review identified that the rules were not in line with the more outcomes-focused manner of the rest of the BSB Handbook. The review also showed that while there continues to be regulatory value in Licensed Access as a niche scheme which is distinct from Public Access, there were concerns about unnecessary restrictions and administrative burdens. In particular, the review raised questions about whether the whole system for individual approval of licences continues to be necessary and/or whether it could be made more proportionate.

- 3.5 The proposed changes to the Public and Licensed Access Rules and Licensed Access Recognition Regulations therefore form the basis of this application. For full details of the research and evidence gathering conducted for the Public and Licensed Access Review, and the recommendations which were subsequently adopted by the BSB, please refer to the Public and Licensed Access Review Report (**Annex B**), published in March 2017.

#### **4 Why we wish to make the alterations**

##### Throughout

- 4.1 Various changes have been made to simplify the language used, and update it to reflect that used in the rest of the BSB Handbook.

##### Public Access Rules

- 4.2 The recommendation following the Public and Licensed Access Review was to amend the Public Access Rules to be in line with the more outcomes-focused manner of the rest of the BSB Handbook. We propose to do this as far as reasonably practicable, as the nature of the Public Access work (a lay client instructing a barrister without a solicitor or other professional client) means that the Public Access Rules must retain a level of prescription to ensure public protection.

##### *Public Access registration*

- 4.3 References to Public Access practitioners registering with Bar Council (at Rules C120.1 and C121.1) have been amended to “the *Bar Council* (acting by the *Bar Standards Board*)”. This reflects the fact that this is a regulatory function which is delegated to the BSB, but in practice undertaken by the Bar Council’s Records Office. This forms part of the Bar Council’s Resources Group (which provides shared services to the BSB and the Bar Council’s representative staff) and is not a representative function. The new wording also follows the same convention as the Scope of Practice Rules in the BSB Handbook.

*Additional Public Access training*

- 4.4 Following the changes which were made to Public Access in October 2013, barristers who had taken the existing course needed to complete additional training by November 2015 if they wished to continue to undertake Public Access work. Rule C120.2 has therefore been removed to reflect that the deadline to undertake additional Public Access training has passed.

*Public Access barristers of less than three years’ standing*

- 4.5 The requirement for barristers who are of less than three years’ standing to maintain a Public Access log (Rule C121.2 – .4) has been removed. Monitoring undertaken by the BSB suggests this requirement does not help barristers to manage Public Access work or develop their Public Access practices, and that there are more effective and proportionate means of seeking and reflecting on client feedback. Of those barristers who indicated that they had undertaken Public Access work, most provided a superficial log with little consideration of issues and problems which had arisen. It also appeared that most had produced the Public Access log in response to the BSB’s request rather than maintaining it contemporaneously. In addition, few barristers provided feedback from Public Access clients and those who did only provided positive feedback.
- 4.6 Although barristers who are of less than three years’ standing have only been permitted to undertake Public Access work since October 2013, the Public and Licensed Access Review did not identify any issues specific to these barristers. While it is important that newly qualified Public Access barristers use feedback to develop their practices, the BSB’s Professional Statement (which describes the knowledge, skills and attributes that all barristers should have on ‘day one’ of practice) already



states at paragraph 2.5d) that “barristers should ask for and make effective use of feedback”.<sup>1</sup> In addition, the BSB’s Future Bar Training programme is seeking to ensure that education and training for the Bar reflects the requirements of the Professional Statement. There is therefore now less justification for a prescriptive requirement that barristers who are of less than three years’ standing maintain a Public Access log, given they will be expected to make effective use of feedback on ‘day one’ of practice.

- 4.7 More generally, the CMA also identified issues with the existing means of seeking and reflecting on client feedback in its review of the legal services sector.<sup>2</sup> It would therefore be more beneficial to explore how all barristers (not just Public Access barristers who are of less than three years’ standing) can seek and make use of feedback. This work is being progressed as part of our response to the recommendations made by the CMA in its report. For full details, please refer to the BSB’s action plan ([https://www.barstandardsboard.org.uk/media/1836947/cma\\_-\\_action\\_plan.pdf](https://www.barstandardsboard.org.uk/media/1836947/cma_-_action_plan.pdf)), which was published in June 2017.

#### *Notifying Public Access clients*

- 4.8 Rule C125 states that having accepted Public Access instructions, barristers must notify their Public Access clients in writing, and in clear and readily understandable terms, of a number of particulars. The term “other authorised litigator” at Rule C125.3 has been replaced with “other *person* who is authorised to *conduct litigation*” to reflect the language used in the rest of the BSB Handbook. The text relating to obligations arising out of or related to the conduct of litigation has also been simplified.

#### *Correspondence*

- 4.9 Rule C130 states that Public Access barristers “may undertake correspondence where it is ancillary to permitted work, and in accordance with the guidance published

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[https://www.barstandardsboard.org.uk/media/1787559/bsb\\_professional\\_statement\\_and\\_competences\\_2016.pdf](https://www.barstandardsboard.org.uk/media/1787559/bsb_professional_statement_and_competences_2016.pdf), page 15

<sup>2</sup> <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>, page 15

by the *Bar Standards Board*'. There would be no risk posed if a Public Access barrister undertook correspondence where it was not ancillary to permitted work i.e. if a lay client instructed a Public Access barrister simply to undertake correspondence on their behalf. The reference to the BSB's Public Access Guidance for Barristers is also unnecessary as this is referred to in Rule C119. This rule has therefore been removed.

#### *Proofs of evidence*

- 4.10 Rule C131.4 has been removed. This provision dates from when there was a prohibition on Public Access barristers undertaking criminal work, and sought to clarify that they can obtain proofs of evidence in civil cases. However, it is no longer required as the prohibition on Public Access barristers undertaking criminal work has been lifted. The BSB has also published guidance on investigating and collecting evidence:

[https://www.barstandardsboard.org.uk/media/1666561/11\\_guidance\\_on\\_self-employed\\_practice.pdf](https://www.barstandardsboard.org.uk/media/1666561/11_guidance_on_self-employed_practice.pdf).

#### Licensed Access Rules

- 4.11 The recommendation following the Public and Licensed Access Review was to retain the Licensed Access scheme largely in its current form, but also amend the Licensed Access Rules and Recognition Regulations to be in line with the more outcomes-focused manner of the rest of the BSB Handbook. We propose to do this as far as reasonably practicable.

#### *Application of the rules*

- 4.12 Rule C133 states that Rules C136 – C137, which require barristers to be clear with clients about the basis upon which they have accepted Licensed Access instructions, do not apply if the client is a member of a professional body specified in the Schedules to the Licensed Access Recognition Regulations. On principle, barristers should be required to notify clients who are members of professional bodies of the same information as other clients using the Licensed Access scheme. The references to Rules C136 – C137 have therefore been removed from Rule C133.

#### *Acceptance of instructions*

- 4.13 Rule C134.2 has been amended to permit barristers to ensure that the client holds a valid licence by *either* having the client send them their licence, *or* simply referring to the list of Licensed Access clients published on the BSB’s website (<https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/licensed-access-recognition-regulations/>). At present, clients are required to send a copy of their licence each time they instruct a barrister, which is imposing an unnecessary administrative burden in some cases given the list of Licensed Access clients is easily accessible on the BSB’s website.
- 4.14 The reference to a barrister’s chambers also being able to provide the services required by a particular Licensed Access client has been removed from Rule C135.1. This is because while chambers must be properly administered (Rule C89 in the BSB Handbook), barristers are personally responsible for their own professional work (Rule C20).
- 4.15 The term “other authorised litigator” at Rule C135.2 (and elsewhere in the Licensed Access Rules) has been replaced with “other *person* who is authorised to *conduct litigation*” to reflect the language used in the rest of the BSB Handbook.

#### *Licensed Access Terms of Work*

- 4.16 The Licensed Access Terms of Work are published by the Bar Council in its representative capacity. As Licensed Access clients are deemed to be acting within a specific area of expertise or specialism, there is little regulatory justification in including reference to the terms in the Licensed Access Rules. Instead, we are proposing to simply require that Licensed Access work is undertaken on agreed terms and if barristers and clients wish to use standard terms (including the Licensed Access Terms of Work), they may do so. References to the Licensed Access Terms of Work have therefore been removed from Rules C136 – C137 and C139. Various other changes have also been made to facilitate this.

#### *Documents*

- 4.17 Rule C141 has been changed to state that documents relating to Licensed Access work should be retained for at least seven, rather than six, years. This reflects (i) the equivalent rule for documents relating to Public Access work (Rule C129), and (ii) the

fact that while the Limitation Act 1980 states the limitation period for bringing a simple contract claim is six years, claims can be filed for some months after the deadline.

### Licensed Access Recognition Regulations

#### *Limitations and conditions*

- 4.18 Paragraph 3(e) states that when issuing licences to clients, the BSB may impose limitations and conditions relating to (i) the matters the client can instruct a barrister for, and (ii) the courts and tribunals the client can instruct a barrister to appear in. This is a restriction which is difficult to justify. These lay clients will be deemed to be acting within a specific area of expertise or specialism, and their competence to instruct barristers will be assessed as part of their licence applications. There is also an existing safeguard in the BSB Handbook which states that barristers “must not accept instructions to act in a particular matter if: [they] are not competent to handle the particular matter or otherwise do not have enough experience to handle the matter” (Rule C21.8). While it is appropriate to assess clients’ competence to instruct barristers as part of their licence applications, the responsibility to ensure that they are being instructed appropriately should ultimately lie with the barrister.
- 4.19 In addition, as limitations and conditions relating to matters and courts and tribunals are often imposed, licence holders are often required to submit (and pay for) applications to amend their licences. Making licences valid for all matters, courts and tribunals would therefore streamline the Licensed Access scheme and free up regulatory resources.
- 4.20 The BSB would also retain the ability to impose limitations and conditions on licences in exceptional circumstances, as paragraph 3(e) would still state that licences may be issued “subject to such limitations or conditions as the Bar Standards Board may think appropriate”. While the BSB would not normally impose limitations and conditions on licences, it would still be appropriate on, for example, the licences of immigration advisers regulated by OISC. This is because immigration advisers apply to be regulated by OISC at the level which reflects their competence and service.<sup>3</sup>

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<sup>3</sup> <https://www.gov.uk/government/publications/how-to-become-a-regulated-immigration-adviser/how-to-become-a-regulated-immigration-adviser#applying-for-the-correct-level>

- 4.21 The BSB's Authorisation Team would also operate a transitional arrangement, where we would be able to consider whether any limitations and conditions on existing licences are still necessary at the point of renewal. In the vast majority of cases, it is unlikely that this would be considered necessary.

*Content of licences*

- 4.22 Paragraph 4b) refers to the Licensed Access Terms of Work, which are published by the Bar Council in its representative capacity. As Licensed Access clients are deemed to be acting within a specific area of expertise or specialism, there is little regulatory justification in including reference to the terms in the Licensed Access Recognition Regulations. Paragraph 4b) has therefore been removed.
- 4.23 Paragraph 4c) states licences "may if the Bar Standards Board think appropriate provide that a copy of the Licence shall be sent with every set of instructions to any barrister instructed by the authorised licensed access client". The need for barristers to ensure that the client holds a valid licence is dealt with at Rule C134.2 and so paragraph 4c) has therefore been removed.

*Matters to be considered by the BSB*

- 4.24 Paragraph 6a) refers to barristers in independent practice operating "as a referral profession of specialist consultants". This is no longer strictly accurate as following the establishment of the Public Access scheme in 2004, barristers can now undertake work other than on a referral basis i.e. if registered to do so, they can now accept instructions directly from the public rather than solely via a solicitor or other professional client. Paragraph 6a) has therefore been removed.

*Higher courts and the Employment Appeal Tribunal*

- 4.25 Paragraph 7b) states that if a person is a member of one of the professional bodies listed in the First Schedule, while they may use the Licensed Access scheme to instruct a barrister directly, they may not do so for the purpose of representation in various higher courts and the Employment Appeal Tribunal.
- 4.26 However, this is a restriction which is difficult to justify for the same reasons as the restrictions currently imposed by paragraph 3e). Firstly, members of the professional

bodies listed in the First Schedule will be lay clients who are deemed to be acting within a specific area of expertise or specialism. Secondly, paragraph 7a) already states that such persons may only instruct barristers directly in matters which fall generally within their professional expertise. If these matters happen to require representation in the higher courts, this should not be an issue as there are existing safeguards in the BSB Handbook. For example, Rule C21.8 states that barristers “must not accept instructions to act in a particular matter if: [they] are not competent to handle the particular matter or otherwise do not have enough experience to handle the matter”.

- 4.27 The Licensed Access Rules also require barristers to inform clients in writing that (i) unless they are authorised to conduct litigation, they cannot be expected to do so, and (ii) the circumstances may require the client also to instruct a person who is authorised to conduct litigation. If this is not done as soon as reasonably practicable, the rules require the barrister to cease to act and return any instructions. For these reasons, it should not affect the conduct of cases to permit members of the professional bodies listed in the First Schedule to use the scheme to instruct a barrister for representation in the higher courts. Paragraph 7b) has therefore been removed. Our guidance to the profession will also be updated to state that barristers should ensure any unauthorised intermediaries are not conducting litigation on behalf of the client.

#### *First and Second Schedules*

- 4.28 The First and Second Schedules to the Licensed Access Recognition Regulations have been updated to reflect that some of the professional bodies listed have changed their names, merged or disbanded.
- 4.29 The Schedules have also been moved to guidance, so that in the future the BSB would not be required to apply to the LSB to amend them. This would make the process of amending the Schedules more straightforward, freeing up resources for both the BSB and the LSB.
- 4.30 To facilitate this, it is proposed that the BSB devises rigorous but straightforward application processes for bodies to be added to the Schedules. In the case of the First Schedule, the application process would be for professional bodies such as those for accountants and taxation advisers, insolvency practitioners, etc. In the case

of the Second Schedule, the application process would be for ombudsman services. However, in both cases the criteria to be added to the Schedules can be drawn from paragraph 6 of the Licensed Access Recognition Regulations. The key criteria would be the extent to which the organisation or its members are likely to instruct barristers, able to do so appropriately, subject to appropriate professional rules and insured against claims for negligence.

- 4.31 In the case of applications to be added to the Second Schedule, it is proposed that there would be no application fee. This is because it is in the public interest for ombudsman services to be able to instruct barristers directly via the Licensed Access scheme. However, in the case of applications by professional bodies to be added to the First Schedule, it is proposed that there would be an application fee. This is because the application is more likely to be driven by the interests of their members to be able to make use of the Licensed Access scheme. Individual members of professional bodies which are not listed in the First Schedule (and other licence holders) are also required to pay an application fee in order to instruct barristers directly via the Licensed Access scheme. The application fee for professional bodies to be added to the First Schedule will be determined in line with our fees and charges policy and the principles of cost recovery.

## **5 The regulatory objectives**

### Public Access Rules

- 5.1 Removing the requirement for barristers who are of less than three years' standing to maintain a Public Access log, and instead exploring how *all* barristers (not just Public Access barristers who are of less than three years' standing) can seek and make use of feedback will protect and promote the public interest, and the interests of consumers. This is because all users of barristers' services will benefit from the BSB encouraging their barrister to seek and make use of feedback to improve the services they are providing. This work is being progressed as part of our response to the recommendations made by the CMA in its report, and so should also help to promote competition in the provision of barristers' services. In addition, it could improve access to justice as by removing an administrative burden, Public Access barristers who are of less than three years' standing will have more time to dedicate to service provision.

- 5.2 Rule C125 states that having accepted Public Access instructions, barristers must notify their Public Access clients in writing, and in clear and readily understandable terms, of a number of particulars. Updating these particulars to reflect the language used in the rest of the BSB Handbook, and simplifying the text, will also protect and promote the public interest and the interests of consumers. The protections available to Public Access clients will be described more consistently and more easily understandable to them.
- 5.3 It is not anticipated that the changes to the Public Access Rules will have an adverse impact on the constitutional principles of the rule of law, public understanding of the citizen's legal rights and duties, adherence to the professional principles or an independent, strong, diverse and effective legal profession.

#### Licensed Access Rules

- 5.4 Requiring barristers to notify clients who are members of professional bodies of the same information as other clients using the Licensed Access scheme will protect and promote the public interest, and the interests of consumers. This is because the amended rule will require all Licensed Access clients to be notified in writing of the protections available to them. It will also promote and maintain adherence to the professional principle that authorised persons should act in the best interests of their clients.
- 5.5 At present, clients are required to send a copy of their licence each time they instruct a barrister, which is imposing an unnecessary administrative burden in some cases given the list of Licensed Access clients is easily accessible on the BSB's website. Permitting barristers to ensure that the client holds a valid licence by *either* having the client send them their licence, *or* simply referring to the list of Licensed Access clients, will also protect and promote the public interest and the interests of consumers. The same applies to changing Rule C141 to state that documents relating to Licensed Access work should be retained for at least seven (rather than six) years, as this will ensure documents are retained for a suitable length of time. One of the objectives of the Public and Licensed Access review was to consider whether any changes should be made to improve the consumer experience of using these schemes, and the above changes will help to meet this objective. Removing unnecessary restrictions and administrative burdens for clients and barristers could also improve access to justice.



- 5.6 It is not anticipated that the changes to the Licensed Access Rules will have an adverse impact on competition in the provision of services, the constitutional principles of the rule of law, public understanding of the citizen's legal rights and duties or an independent, strong, diverse and effective legal profession.

#### Licensed Access Recognition Regulations

- 5.7 Making licences valid for all matters, courts and tribunals will streamline the Licensed Access scheme, as licence holders will not be required to submit (and pay for) applications to amend their licences. This will protect and promote the interests of consumers, and also improve access to justice. In addition, it will promote and maintain adherence to the professional principle that authorised persons should maintain proper standards of work. This is because streamlining the Licensed Access scheme will emphasise that ultimately, it is the responsibility of the barrister to ensure they are competent to handle the particular matter (and not the responsibility of the instructing client).
- 5.8 The BSB will also retain the ability to impose limitations and conditions on licences in certain circumstances; for example, on the licences of immigration advisers regulated by OISC (as immigration advisers apply to be regulated by OISC at the level which reflects their competence and service, and so the licence would also need to reflect this). Retaining this ability will protect and promote the public interest, and the interests of consumers. This is evidenced by the BSB's Immigration Thematic Review Report ([https://www.barstandardsboard.org.uk/media/1760828/immigration\\_thematic\\_review\\_report\\_may\\_2016.pdf](https://www.barstandardsboard.org.uk/media/1760828/immigration_thematic_review_report_may_2016.pdf)), published in May 2016. The report summarises the risks in the immigration advice and services market. This includes the fact that the service provided by barristers is, in many cases, the last link in the supply chain which may have an effect on their ability to provide a competent service. For example, there seemed to be a unanimous and strong opinion from barristers that they repeatedly experience poor standards of service from other legal professionals. The quality of work/files is often poor and papers are often missing, and solicitors and OISC advisors tend to send papers to barristers very late in the day before the hearing. Imposing conditions on the licences of OISC advisors based on their own level of competence (as determined by their regulator) should help to prevent these problems from occurring.

- 5.9 Permitting members of the professional bodies listed in the First Schedule to use the Licensed Access scheme to instruct a barrister for representation in the higher courts will promote competition in the provision of barristers' services, and encourage an independent, strong, diverse and effective legal profession. By removing this unnecessary restriction, barristers acting on a Licensed Access basis, as well as on a referral and Public Access basis, will now be able to represent clients in the higher courts. For this reason, it will also protect and promote the interests of consumers and improve access to justice. The same applies to moving the First and Second Schedules to the Licensed Access Recognition Regulations to guidance, as for the first time this will allow professional bodies to apply to the BSB to be added to the Schedules. In the case of applications to be added to the Second Schedule, it is proposed that there will be no application fee. This will protect and promote the public interest, as ombudsman services will be able to apply at no cost to instruct barristers directly via the Licensed Access scheme. If their applications are successful, this will mean that they can access specialist legal advice and representation from barristers without the potentially unnecessary expense of also instructing a solicitor. This will help them to fulfil their public interest role of resolving complaints between consumers and service providers.
- 5.10 It is not anticipated that the changes to the Licensed Access Recognition Regulations will have an adverse impact on the constitutional principles of the rule of law or public understanding of the citizen's legal rights and duties.

## **6 The better regulation principles**

### Proportionality

- 6.1 Removing the requirement for barristers who are of less than three years' standing to maintain a Public Access log reflects that there are more effective and proportionate means of seeking and reflecting on client feedback.
- 6.2 At present, clients are required to send a copy of their licence each time they instruct a barrister, which is imposing an unnecessary administrative burden in some cases given the list of Licensed Access clients is easily accessible on the BSB's website. Permitting barristers to ensure that the client holds a valid licence by *either* having

the client send them their licence, or simply referring to the list of Licensed Access clients, is a more proportionate approach.

- 6.3 The whole system for individual approval of licences has also been reviewed and made more proportionate. Finally, moving the Schedules to the Licensed Access Recognition Regulations to guidance (so that in the future the BSB would not be required to apply to the LSB to amend them) is a more proportionate use of regulatory resources.

#### Accountability and Transparency

- 6.4 The Consultation on Changes to the Public and Licensed Access Rules (**Annex C**) was launched in June 2017 and closed in September 2017. Following discussion by the BSB Board in public session, a Summary of Consultation Responses (**Annex D**) was published on the BSB's website in October 2017.
- 6.5 The responses we received to the consultation helped to inform our current proposals, which in some respects have been amended from our original proposals in the consultation. For example, the consultation included a proposal to require that the written notification given to Public Access clients discloses the level of professional indemnity insurance (PII) held by the barrister. However, respondents to the consultation highlighted (among other objections) that potential clients could utilise PII information to make erroneous assumptions about the suitability and quality of barristers' services. As a result, we are not proceeding with this proposal but are instead exploring the issue of PII disclosure as part of our wider work on responding to the CMA's recommendations. The BSB's Policy Consultation on Transparency Standards includes a proposal that barristers confirm (in accordance with the BSB Handbook) that they have insurance cover for all the legal services they supply.<sup>4</sup>

#### Consistency

- 6.6 The proposed changes are intended to bring the Public and Licensed Access schemes in line with the BSB's risk-based, outcomes-focused approach to regulation. We are also proposing to make various changes to the Public and Licensed Access

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<sup>4</sup> [https://www.barstandardsboard.org.uk/media/1852551/october\\_2017\\_-\\_policy\\_consultation\\_on\\_transparency\\_standards.pdf](https://www.barstandardsboard.org.uk/media/1852551/october_2017_-_policy_consultation_on_transparency_standards.pdf), pages 30-31

Rules and Licensed Access Recognition Regulations to ensure that the language used is consistent with that in the rest of the BSB Handbook.

### Targeting

6.7 The Public and Licensed Access Review led the BSB to adopt a number of recommendations in relation to the schemes (please refer to **paragraphs 3.3 – 3.5**). However, not all of them have resulted in proposed rule changes, as we are targeting rule changes to ensure consistency and remove unnecessary administrative and regulatory burdens.

6.8 The purpose of making the whole system for individual approval of licences more proportionate is to free up our regulatory resources, and allow us to target them where they are most needed. For example, we still intend to impose limitations and conditions on the licences of immigration advisers regulated by OISC. This is because immigration advisers apply to be regulated by OISC at the level which reflects their competence and service. The BSB's Strategic Plan 2016-19 also commits us to prioritising those practice areas, including immigration, which are likely to have a high impact on vulnerable consumers.<sup>5</sup>

## **7 Desired outcomes**

7.1 The key desired outcome, in line with the objectives of the Public and Licensed Access review, is to improve the consumer experience of using these schemes. The proposed changes seek to do this by:

- Removing unnecessary restrictions;
- Simplifying and updating the language used in the rules;
- Ensuring that barristers notify all Licensed Access clients of the same information;
- Permitting barristers to simply refer to the list of Licensed Access clients published on the BSB's website to ensure that the client holds a valid licence;
- Making the whole system for individual approval of licences more proportionate; and

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<sup>5</sup> [https://www.barstandardsboard.org.uk/media/1746768/bsb\\_strategic\\_plan\\_2016-19.pdf](https://www.barstandardsboard.org.uk/media/1746768/bsb_strategic_plan_2016-19.pdf), page 18

- Devising application processes for professional bodies and ombudsman services to be added to the Schedules.

## **8 Date of implementation and operational readiness**

- 8.1 It is proposed that the changes to the Public and Licensed Access Rules and the Licensed Access Recognition Regulations will take effect from 1 February 2018. This will be communicated to the profession and other stakeholders via a press release, the BSB's monthly Regulatory Update e-mail, Counsel magazine and the BSB's Twitter, Facebook and LinkedIn accounts.
- 8.2 A project team including members of the Professional Standards and Authorisations Teams has been established to ensure that by this date, the existing application forms and guidelines have been updated and the requisite new application forms and guidelines have been published.
- 8.3 Updated versions of the BSB's Public Access Guidance for Barristers and Lay Clients, and Model Client Care Letters, will also be published alongside the updated rules on 1 February 2018.

## **9 Consultation processes undertaken**

- 9.1 The Consultation on Changes to the Public and Licensed Access Rules (**Annex C**) was launched in June 2017 and closed in September 2017. Following discussion by the BSB Board in public session, a Summary of Consultation Responses (**Annex D**) was published on the BSB's website in October 2017. The consultation was promoted via a press release, the BSB's monthly Regulatory Update e-mail, Counsel magazine and the BSB's Twitter, Facebook and LinkedIn accounts. We also engaged extensively with stakeholders including the Legal Practice Management Association, Legal Services Consumer Panel and the bodies listed in the Schedules to the Licensed Access Recognition Regulations.
- 9.2 The main issue identified by the consultation responses was the proposal to require that the written notification given to Public Access clients discloses the level of professional indemnity insurance (PII) held by the barrister, which we are not proceeding with (please refer to **paragraph 6.5**). For further information on the

challenges presented by the consultation responses and the BSB's response to them, please refer to **Annex D**.

## **10 Other explanatory material**

### Equality impact assessment (EIA)

- 10.1 An EIA was conducted on the recommendations of the Public and Licensed Access review, and no adverse impact was anticipated on the basis of protected characteristics. This assessment is attached at **Annex E**.
- 10.2 A question was also asked in the consultation on whether respondents anticipate any adverse impact on the basis of protected characteristics as a result of our proposals. No adverse impacts were raised by respondents regarding the proposals that we intend to take forward.

## **11 Monitoring and evaluation**

- 11.1 The changes to the Public and Licensed Access Rules and the Licensed Access Recognition Regulations will be subject to our programme of evidence-based policy review, as set out in the evaluation stage of our policy development framework. A plan to evaluate the impact of changes to the Public and Licensed Access has been agreed with the Research Team, and will be implemented from 2019 (once all of the recommendations of the Public and Licensed Access Review have been implemented). The evaluation will use the research and evidence gathering undertaken as part of the Public and Licensed Access Review (please refer to **paragraph 3.1**) as a baseline. In the meantime, we will seek to make further refinements to the Public and Licensed Access schemes if risks to our regulatory objectives are identified through, for example, our authorisation and supervision processes.

### **Annexes**

Annex A – Proposed Changes to the Public and Licensed Access Rules and Licensed Access Recognition Regulations.

Annex B – Public and Licensed Access Review Report (March 2017).

Annex C – Consultation on Changes to the Public and Licensed Access Rules (June 2017).

Annex D – Summary of Consultation Responses (October 2017).

Annex E – Public and Licensed Access Review EIA (November 2016).