

Clare Vicary  
Bar Standards Board  
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8 March 2012

Dear Ms Vicary

### **Public access rules consultation**

The Legal Services Consumer Panel welcomes the opportunity to respond to the Bar Standard Board's (BSB) review of rules 2(i) and 3(1).

Our consultation response focuses on the specific proposed rule changes, but it is important to put the changes in the context of other regulatory developments. A key brake on public access is the prohibition on barristers conducting litigation. The BSB has consulted on lifting this restriction, which the Panel supports. Another wider factor is the BSB's review of its entire code of conduct and the shift towards an outcomes-based approach. The existing code was written for a world where public access was not permitted; it is important to ensure that the new code is drafted in recognition of the changing rights and responsibilities of barristers. The Panel will come back to this point when the BSB consults on its new code.

### **Rule 3(1) – Client discretion to use public access barrister**

As stated in our response to the BSB's mini-consultation on rule 3(1), the Panel 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. This remains our position but it is imperative to ensure consumers can access, and understand, relevant information prior to making any decision.

The summary of consultation responses helpfully sets out some of the reasons why choosing a barrister instead of applying for legal aid may be a rational decision. Of course, it remains the case that clients may be better advised to apply for public funding or use a solicitor who can provide litigation support. Therefore, we welcome the BSB's decision to alter the rule in line with our feedback to the earlier consultation, to require that:

- Barristers demonstrate compliance with the outcome that clients are able to make an informed decision about whether to apply for legal aid or whether to proceed with public access;

- Clear guidance that barristers should obtain the client's written consent confirming their understanding that legal aid might be available but they would prefer to instruct a barrister directly; and
- Barristers should refuse work where it would be in the client's best interests to obtain public funding and/or benefit from the greater case preparation and management support provided by solicitors.

However, such requirements would only have value if properly enforced. The BSB should also continue to keep track of complaints data and monitor compliance in respect of communications between barrister and client. It would be useful if the BSB could clarify that it has the powers to limit, suspend or remove permission from a barrister to carry out public access work. More generally, we hope that the BSB will monitor usage of public access across different types of consumers.

### **Rule 2(i) – Three year rule**

We support the BSB's proposal to remove the requirement for barristers to have at least three years practising experience before being able to offer public access. A barrister's training, including a compulsory public access course, should be sufficient to equip them with the skills needed to deal directly with clients from Day One. We agree that the code of conduct provides appropriate support to this training, in particular the duty to refuse work for which the barrister is not competent. Relaxing the current provisions would offer broad equivalence with the regulatory requirements for solicitors. Our assessment is that the three year rule unnecessarily limits consumer choice and thus needlessly fetters competition.

However, it is important that barristers complete their training before being able to offer public access. For this reason, we also support the proposal not to allow 'second-six' pupils to accept public access instructions.

### **Guidance**

We welcome the amended guidance for lay clients, which provides useful information and issues for consumers to consider. The BSB should actively encourage barristers to send this to prospective clients in order to support consumers in making informed choices.

Finally, we are disappointed that the Panel was not included in the list of consultees in Annex 1. This omission is surprising given the Panel's status as the statutory consumer body in the sector and our response to the earlier consultation on this issue. We trust this was a one-off inadvertent oversight and ask the BSB to update its consultation lists.

Yours sincerely,



Elisabeth Davies  
Chair