

Research Specification: Direct Access

September 2015

Purpose

1. The Legal Services Board (LSB) and the Bar Standards Board (BSB) wish to develop a better understanding of the operation of the Direct Access arrangements, including information on the regulated community and their clients, impact on the regulatory objectives and barristers' businesses, and perceptions of the regulatory framework.

About our organisations

2. The LSB has been set up to reform and modernise the legal services market in the interests of consumers by enhancing quality, ensuring value for money and improving access to justice across England and Wales. The LSB seeks to achieve this through pursuing its regulatory objectives¹ and providing regulatory oversight for the eleven approved regulators². All approved regulators share these regulatory objectives.
3. The BSB regulates barristers called to the Bar in England and Wales in the public interest. It is responsible for: setting the education and training requirements for becoming a barrister; setting continuing training requirements to ensure that barristers' skills are maintained throughout their careers; setting standards of conduct for barristers; monitoring the service provided by barristers to assure quality; and handling complaints against barristers and taking disciplinary or other action where appropriate.

Background

1. '**Direct Access**' is a catch-all label used to describe two different sets of regulatory arrangements, each of which permits barristers to accept directly instructions from the public and other categories of clients without the involvement of an instructing solicitor.
2. Historically it was not possible for the public to engage a barrister without first instructing a solicitor or other third party. The **Public Access** Rules, introduced in 2004, for the first time allowed certain barristers to accept work directly from the public. Some restrictions designed to protect clients were introduced in recognition of the significant change that this shift in practice represented. These restrictions included: prohibiting public access instructions in family, criminal and immigration work; prohibiting barristers with less than 3 years' practising experience from accepting public access instructions; and limitations on types of legal activity, for example engaging in correspondence between the parties. In addition, clients eligible for legal aid were not able to instruct barristers directly.

¹ http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_2#pt1

² The approved regulators are: The Law Society, General Council of the Bar, Council for Licensed Conveyancers, The Chartered Institute of Legal Executives, The Chartered Institute of Patent Attorneys, The Institute of Trade Mark Attorneys, Association of Law Costs Draftsmen, Master of the Faculties, Association of Certified and Chartered Accountants, Institute of Chartered Accountants of Scotland, Institute of Chartered Accountants in England and Wales.

3. Over time all these restrictions were gradually lifted, but a series of measures were put in place to provide consumer protection. Barristers who wish to accept instructions directly from lay clients must be registered with the Bar Council as a Public Access practitioner. To be eligible they must further have a full practising certificate and have satisfactorily completed training on public access. Barristers should still not accept instructions when, in all the circumstances, 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. Barristers must also 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 Section D2 of the BSB's Handbook contains the current rules on public access work.⁴
4. The stated intended benefits of lifting the restrictions mentioned in paragraph 2 above included: widening consumer choice; greater competition among barristers and between barristers and solicitors; and increasing the supply of high quality and competitively priced legal services. The key advantage for clients is the opportunity to access the specialist expertise and skill of a barrister without the additional cost and time incurred by the previous requirement to use the services of a solicitor in order to access the barrister. In addition, relaxing the rules was also designed to help encourage an independent, strong, diverse and effective legal profession on the basis that public access barristers would be able to obtain access to work they would otherwise not get (providing it is in the client's best interests for them to accept instructions directly). This sits within a wider context of diminishing work available to parts of the Bar and greater competition as a result of the Legal Services Act and other reforms.
5. Separately the '**Licensed Access**' scheme enables suitable organisations and individuals (ranging from the business community to the voluntary sector), under certain conditions to instruct a barrister directly. To provide a flavour, examples of these clients include housing associations, trade unions, police forces and fire services, dispute resolution services, law schools and a wide range of other bodies. As long as the type of work offered is appropriate for the scheme, any barrister in independent practice can accept instructions directly from those clients (including their members and employees) licensed under the scheme.⁵ Further details of the regulatory framework can be found in the BSB Handbook and the Licensed Access Recognition Regulations.⁶

Aims and objectives of the research

6. The main aim of this research is to develop a detailed picture of the current provision of legal services through public access and licensed access barristers and to learn the perceptions of barristers about the operation of the current regulatory arrangements. Further, we are interested in hearing perspectives about the impact of these schemes on clients, barristers and the regulatory objectives more broadly.
7. We are interested in the operation of both the public access and licensed access schemes, although we may need to prioritise depending on the cost of proposals. There may only be a small overlap in barristers serving both types of client. **Tenders should be structured to enable us to make such a cost analysis.**

³ Barristers must obtain separate authorisation if they wish to conduct litigation on behalf of clients.

⁴ <https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/the-handbook-publication/>

⁵ The register can be consulted at <https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/licensed-access-recognition-regulations>

⁶ Ibid.

8. In particular, the research should:

- Provide statistically robust data on the community of barristers undertaking public access and licensed access work
- Build a picture of the types of client using these services and the areas of law and types of legal activity where these services are either heavily or lightly used
- Identify how consumers access these services
- Identify the impacts of recent reforms to public access, on:
 - the regulatory objectives, in particular those relating to improving access to justice; protecting and promoting the interests of consumers; promoting competition; and encouraging an independent, strong, diverse and effective legal profession⁷
 - barristers' businesses, for example whether they have enabled barristers to compete more effectively (both with other barristers and other types of provider) or diversify their practices
- Gather barristers' perceptions on the operation of the regulatory framework including the following issues:
 - Whether the BSB's Public Access Guidance helps barristers to understand their obligations when conducting public access work
 - Whether the BSB's public access training is seen as effective, and whether barristers identify a need for further public access training
 - How barristers provide public access clients with clear information about their case, and whether the BSB's model client care letters are used (or seen as useful) by barristers
 - Possible areas for improvements to the regulatory arrangements
- Seek barristers' views on how public access and licensed access might evolve over the next period

9. We do not propose to survey clients of Direct Access Barristers within this research. Understanding the client perspective is important, but we wish first to build a better picture of the supply side of the market. We are also aware that the relatively small number of clients using Direct Access Barristers would make it challenging to access a sample. The LSB is including a question on its large-scale individual legal needs survey⁸ as an initial way of establishing incidence levels among the population.

10. The research will be a key evidence source for the LSB's **market evaluation** exercise due for publication next year. The evaluation assesses the impacts of the regulatory reforms, and other drivers for change in the market, from five different perspectives.⁹ Broadening of Direct Access ranks as one of the most significant regulatory changes over the last five years. Yet the evidence base is limited to the number of barristers who had taken direct access instructions in 2013, the proportion of earnings from this type of service, and intentions to undertake this training in the future. The type of consumers using this service, how barristers get this type of work, the nature of the services provided and perceptions of regulation etc, currently remain unknown and this therefore limits an objective assessment of the market impacts of this regulatory change.

11. The BSB is currently conducting a review of its regulatory arrangements in this area. The objectives of the review are to:

⁷ See Section 1 of the Legal Services Act 2007 for the full list of regulatory objectives.

⁸ Jointly commissioned by the LSB, Law Society and Legal Education Foundation; due to publish in early 2016.

⁹ This will update the Baseline Report published in 2012 [insert link]

- Assess how effectively the risks associated with public and licensed access (including the lifting of the prohibitions around Public Access work in October 2013) are being mitigated;
- Assess whether public access barristers in particular are equipped to meet the needs of clients;
- Assess whether the required outcomes of the new public access training regime have been realised; and
- Assess what scope is there for the Public and Licensed Access Rules to be consolidated and / or drafted in a more outcomes-focused manner.

Issues and scope

12. The LSB and BSB are ideally seeking a combination of statistically robust data on the make-up of the barrister community undertaking public access and licensed access work and their perceptions of current arrangements, plus richer qualitative insight that will offer us a deeper understanding of these perceptions. **Therefore, tenders should include proposals on an appropriate sample frame and methodological approach.**
13. The BSB holds directories of barristers authorised to conduct this type of work from which to draw a sample, but the main challenge for the research is likely to be achieving a sufficient sample size to produce robust data. While the BSB's involvement alongside the LSB should help to encourage participation among barristers and we will publicise the research to the regulated community, this cannot be guaranteed.
14. There are currently around 6,575 barristers registered for public access work out of around 12,500 self-employed barristers. The most recent survey data found that 23% of self-employed barristers had received fees from public access work in the previous twelve months. Civil and family practice were the areas of law where public access was most common.¹⁰ Note that not all registered barristers will actively be carrying out such work. Barristers who are registered for public access work may be instructed by members of the public directly without a solicitor also being instructed. All self-employed barristers are also able to undertake licensed access work, but again not all such barristers will actively be carrying out such work. Barristers are also not registered for licensed access work – barristers undertaking licensed access work are instructed by individuals or organisations who hold licences issued by the BSB. These licences allow them to instruct barristers directly without a solicitor also being instructed. Members of some professional associations are also 'deemed' to be licensed access clients, which means that they are able to instruct barristers directly without in fact holding a licence.
15. **Tenders should set out proposals to ensure the sample target is achieved.**

¹⁰ [Barristers' Working Lives: A second biennial survey of the Bar, 2013.](#)

Tender Evaluation Criteria

16. The research will be project managed by the LSB and all projects commissioned by the LSB are subject to our [standard terms of contract](#) and must comply with equality legislation and anti-collusion arrangements. Tenders will be evaluated on best value for money and will be assessed on:
- a) Overall cost. Please include appropriate breakdowns.
 - b) Proposed team composition, expertise and management and the organisation's diversity policy. Bidders should explain how they will report the research findings in a way that demonstrates a good understanding of barristers' services
 - c) The extent to which tenders are clearly written and meet the specified objectives, present a sound methodology, ensure robust research is repeatable, identifying any potential problems, and proposing suitable solutions.
 - d) Address outputs and ensure these are in line with requirements and the required timing of the project.
 - e) Demonstration of understanding of the project.

Deliverables – Outputs and Project Plan

Outputs

17. The output for this research should be a report with executive summary and associated survey data sets that meets the aims and objectives outlined in paragraph 8 above.
18. As a public body the LSB's policy is to publish research reports and associated datasets in full. The report should be clearly presented in accessible language so that it can be understood by our stakeholders and the general public.
19. The successful bidder should be prepared to write and deliver a presentation at a research launch or other event.
20. The LSB and BSB will retain joint ownership of the report and underlying data which will be delivered in a publishable format.

Project plan

21. Tenders should include a project plan and time schedule for the work that identifies the main task and key milestones that will be used to monitor progress. The plan should be accompanied by a resource profile, giving a breakdown of the resources in person days allocated to each task. We would also expect the tenders to include a clear analysis of the potential risks and how they propose to mitigate them during the project.

Duration

22. The intention is for a draft report to be ready by the end of February 2016 and final report and associated data sets by the end of March 2016, but please advise us if this timetable is unrealistic.

Contact details

23. We encourage any team considering bidding for this work to contact:

Steve Brooker, Head of Research and Development, Legal Services Board
Email: steve.brooker@legalservicesboard.org.uk Tel: 020 7271 0074

Ewen Macleod, Director of Regulatory Policy, Bar Standards Board
Email: EMacleod@BarStandardsBoard.org.uk Tel: 020 7611 1459

24. However, please do not send completed tenders to these individuals.

Tender closing date

25. The deadline for receiving tenders will be **Wednesday 28th October 2015**.

26. Completed tenders should be sent to chidinma.alufuo@legalservicesboard.org.uk, or by post to:

Chidi Alufuo
Legal Services Board
One Kemble Street
London
WC2B 4AN

27. Please complete and return the non-collusive tendering certificate located overleaf along with your proposal.

Legal Services Board

Contract for the provision of research services to the Legal Services Board

Non-collusive tendering certificate

We certify that this is a bona fide tender, and that we have not fixed or adjusted the amount of the tender by or under or in accordance with any agreement or arrangement with any other person. We also certify that we have not done and we undertake that we will not do at any time before the hour and date specified for the return of this tender any of the following acts:-

- a) communicate to a person other than the person calling for those tenders the amount or approximate amount of the proposed tender, except where the disclosure, in confidence, of the approximate amount of the tender was necessary to obtain insurance premium quotations required for the preparation of the tender;
- b) enter into any agreement or arrangement with any other person that he shall refrain from tendering or as to the amount of any tender to be submitted;
- c) offer or pay or give or agree to pay or give any sum of money or valuable consideration directly or indirectly to any person for doing or having done or causing or having caused to be done in relation to any other tender or proposed tender for the said work any act or thing of the sort described above.

In this certificate, the word "person" includes any persons and any body unincorporate; and "any agreement or arrangement" includes any such transaction, formal or informal, and whether legally binding or not.

Dated this day of 2015

Signature _____

In the capacity of (eg director,
secretary etc)

(capitals) _____

Duly authorised to sign
tenders for and on behalf of

Postal address _____

Telephone no _____

Fax no _____

E-mail address: _____