THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION TO THE BAR STANDARDS BOARD CONSULTATION ON REVIEW AND AMENDMENTS TO RULE 2(1) AND RULE 3(1) OF THE PUBLIC ACCESS RULES

Executive summary:

1. The Criminal Bar Association ('CBA') represents about 3,600 employed and self employed members of the Bar who prosecute and defend the most serious cases across the whole of England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts; ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained
2. The Criminal Bar Association ["CBA"] strongly supports the amendments to rules 2(1) and 3(1) of the Public Access Rules proposed by the Bar Standards Board.
3. It is our view that rule 2(1), which prevents barristers with less than three years' practising experience from accepting instructions on a public access basis, prevents newly qualified barristers from undertaking criminal work which is suited to their level of experience at a time when the junior criminal bar is under pressure from cuts in publicly funded work.
4. Rule 3(1), which prevents a barrister from accepting public access instructions in a matter in which it is likely that the lay client would be eligible for public funding, operates substantially

to restrict the scope of public access work which is available to criminal practitioners, particularly in more serious cases. Legal aid representation orders are available to all those charged with serious offences in the Crown Court. A client may wish to instruct a barrister privately on a public access basis, either to exercise choice of a particular barrister who may be too senior to be retained under legal aid (a QC for example), or because the defendant's liability to contribute to the representation order makes public funding unattractive. By virtue of rule 3(1) such a defendant cannot instruct a barrister directly.

5. The restrictions in Rule 2(1) and Rule 3(1) operate to the detriment of consumers of legal services by restricting the choice available to those consumers as to who will provide their legal services and how they will access them.
6. The proposed amendments are consistent with the regulatory aims of the Legal Services Act 2007, set out in section 1(1), in protecting and promoting the public interest, promoting access to justice, promoting the interests of consumers of legal services and in encouraging an independent, strong, diverse and effective legal profession.
7. There is little doubt that the demand for public access to barristers practising in crime will inevitably increase as the level of public funding in crime continues to deteriorate.

Q1: Our provisional view is that the prohibition in rule 3(1) should be relaxed. However, we would be interested to receive views from anyone who did not have a chance to respond to the previous mini-consultation. Do you agree that rule 3(1) should be deleted?

8. Yes, we agree that rule 3(1) should be deleted. The mini-consultation identified a potential regulatory risk of clients who are represented by a barrister under public access subsequently complaining that that they had not fully understood the consequences and ramifications of not seeking legal aid.
9. The identified regulatory risk is extremely limited. Prior to the recent clarification by the BSB that the rule was to be applied literally, no complaints were made to the BSB of barristers

being in breach of the rule, despite barristers accepting instructions where the client was eligible for public funding. The BSB has already safeguarded the position. Paragraph 56 of the current Public Access Guidance for Barristers states "when approached by a person whose circumstances are not such as to make it obvious that he will not be eligible for public funding, the barrister should advise the client that he cannot investigate the possibility of public funding, and should advise the client to approach a solicitor to investigate the possibility." This is reflected in paragraph 11 of the model client care letter.

10. If there is any regulatory risk, this is outweighed in our view by the public interest in permitting the client to exercise choice in legal representation. A client who has weighed up whether to apply for legal aid or pay privately, should not be prevented from instructing a barrister privately under public access. Further protection is afforded to the client by rule 3(2) which prevents a barrister from accepting instructions when it would be in the interests of justice or the best interests of the client to instruct a solicitor or other professional client.
11. Equally, against a background of continued and ever harsher cuts in public funding, and an uncertain future in the provision of public funding by the government, criminal practitioners should not be prevented from access in suitable cases to public access clients who are likely to be eligible for public funding. There is a strong feeling amongst a number of criminal practitioners that they have undertaken public access training, only to be deprived of access to the potential market by the strict interpretation by the BSB of rule 3(1), to the detriment of both clients and barristers.

Q 2: Do you agree with the proposed amendments to rules 2 and 3

12. The duty on the barrister 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 is too onerous in our view. It arguably imports a duty on the barrister to provide all the relevant information and carry out a means assessment and/or a comparison between legal aid

eligibility and the cost of representation under public access. This is beyond the area of competence to be expected of a barrister and should not be imposed.

13. We have no observations on the proposed amendment to rule 3.

Q3: Are any further safeguards (in addition to the amendments to the model client care letter and the guidance) required to protect the public?

14. No. The safeguards, including the amendments, properly protect the public. The safeguards are complemented by rule 303(a) of the Code requiring the barrister to act in the client's best interests without regard to his own interests.

Q4: Do you agree that there are adequate public protection safeguards in the existing Code and training requirements?

15. Yes. We strongly support the abolition of the prohibition on barristers of less than three years experience accepting public access instructions.
16. In the context of public access we regard rule 4 of the Public Access rules as being particularly important. The barrister must make an initial assessment as to whether it is appropriate to act under public access. This duty is a continuing one as the case develops. If the barrister forms the view that the case is one where a solicitor should be instructed there is a duty to inform the client and withdraw. Rule 4 builds on Rule 603 of the Code, preventing a barrister from taking a case which is beyond his/her competence or experience. These rules prohibit newly qualified barristers from taking on inappropriately complex cases.
17. Barristers, whatever their call, must receive BSB approved training before accepting public access instructions.

Q5: What further measures could be taken to protect the public?

18. Our view is that the proposed Public Access Rules and the relevant sections of the Code are robust and provide a very high degree of protection to the public.

Q6: Do you agree that the public access guidance for barristers and clerks should be amended to make it clear that rule 603(a) is not restricted to legal and procedural knowledge only, but also includes the ability to competently manage clients (particularly vulnerable clients who may have mental health or language difficulties)?

19. This is an unnecessary addition. Rules 603 to 610 of the Code are extensive in their breadth and cover this position in our view.

Q7: Do you agree that there are adequate supervision requirements already in the Code?

20. Yes, for the reasons identified in the consultation paper at paragraphs 75 to 80.

Q8: What further supervision requirements could be adopted?

21. We do not suggest any.

Q9: Do you agree that there is nothing in the complaints data that raises concern about relaxing the rule?

22. Yes. There are two striking features about the complaints data. Firstly, the number of complaints made is very low. Secondly, there is no correlation between the incidence of complaints and the seniority of the barrister.

Q10: Do you agree that it would be in the public interest to allow barristers with less than three years experience to act via public access in criminal cases?

23. The CBA strongly supports allowing barristers with less than three years' experience to represent clients under public access and believes that it is in the public interest to make this change.
24. Newly qualified criminal practitioners practice extensively in the magistrates' courts from their second six months of pupillage. They quickly become used to conducting cases without

a professional client being present, working directly with the lay client at court with little input from a solicitor.

25. A typical area of work well-suited to public access instructions is Road Traffic. Many junior criminal barristers quickly develop expertise in this area and the junior bar is well qualified to deal with this work on a public access basis.
26. Permitting barristers with less than three years experience to take public access work in straightforward cases is clearly in the public interest. Such barristers can offer a high quality, good value service and would increase the choice available to clients. We emphasise that we envisage newly qualified barristers taking straightforward cases which are consistent with their experience. The client is protected under rule 603 of the Code by the duty of the barrister only to take cases they can competently act in.
27. It is in the public interest to promote a strong, diverse junior criminal bar. The reduction in fees in criminal work and the growth in numbers of solicitor advocates has made it far tougher than previously to pursue a career in criminal work as a newly qualified barrister. The extension of public access scope to include newly qualified barristers would help them to develop in a difficult environment.

Q11: Do you agree that it is in the public interest for barristers with less than three years experience to accept public access instructions in cases similar to those described above?

28. We do not propose to comment on non-crime areas of practice.

Q12: Do you agree that barristers with less than three years practising experience should be able to conduct straightforward civil matters (particularly fast track trials and basic advice)?

29. We do not propose to comment on non-crime areas of practice.

Q13: Do you agree with the analysis of the regulatory objectives?

30. Yes (see our comments under question 10 above). It is of concern to the profession that the increasingly tough financial conditions for young barristers who practice in crime will result in a loss of diversity in the constitution of the young Bar, setting back the progress made in the last two decades. The removal of the three year rule would be consistent with the statutory regulatory objective under the LSA 2007 to encourage an independent, strong, diverse and effective legal profession. The removal of the restriction would offer an opportunity to newly qualified barristers to compete more effectively.

Q14: Are there any additional points which are likely to enhance or adversely affect the regulatory objectives?

31. We have no suggestions.

Q15: Do you agree that the three years practising experience requirement should be removed?

32. Yes, for the reasons already given.

Q16: Should second six pupils be permitted to accept public access instructions?

33. No. Our view is that a full practising certificate and approved public access training should be the pre-condition for taking public access work.

Q17: Do you agree that the above will assist in obtaining information symmetry between the barrister and client? Are there any steps that could be taken to better inform the client's position?

34. We agree that it is important to obtain information symmetry between the barrister and client. It is our view, however, that the current rule 6 achieves this aim. In our view the duty should be to disclose the information in readily understandable terms. A requirement on the barrister to ensure the client understands would be very difficult to adjudicate in the event of a complaint.

Q18: Do you agree with the proposed amendments to the guidance and the model client care letters?

35. As set out under question 2, we are uneasy about a duty on the barrister 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 as this could imply a duty to provide a worked comparison. The same criticism applies therefore to rule 56.

Qs19 and 20: Are any of the proposals likely to have a greater positive or negative effect on some groups compared to others? If so, how could this be monitored?

Are there any negative impacts that have not been identified in the equality impact assessment?

36. We have no comment on the impact assessment in annexe 10 save to observe that in our view the existing regulatory requirements provide adequate protection to the identified vulnerable groups of consumers of legal services.
37. We take the view that, given the higher than average numbers of women and BME barristers practising in areas of work with a significant level of public funding, such as family law and crime, there will be a negative impact on the diversity of the Bar in the event that these proposed amendments are not made.

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5/3/12