STRAIGHT THERE
NO DETOURS:
Direct Access to Barristers

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A. BACKGROUND

1 The Pressure for Change

The debates over the role and practices of the legal profession have been particularly active from the 1980s to the present day. During this period the Bar has gradually opened up access to its members. The diagrammatic chronology of the Bar's access changes looks like this:

The Clementi report led to the Legal Services Act 2007 (LSA), which has created a new regulatory structure for the legal profession and introduced new concepts, namely Legal Disciplinary Partnerships (LDPs), Multidisciplinary Practices (MDPs) and Alternative Business Structures (ABS).

The LSA opens up an array of possibilities that place ‘direct access’, and especially Public Access, at the centre of the agenda for the future of the Bar. In the next section we explore the views of some who are considering the possibilities for change and the potential impacts under the Act.

2 POTENTIAL POST CLEMENTI AND THE LSA 2007

2.1 Synopsis: Academic, Trade Press, Legal Consulting Views

Little has been written about the possible consequences of Clementi and the LSA. That which has can be interpreted as potentially apocalyptic. Some writers forecast up to a thousand solicitors’ firms could disappear as a result of either being forced out of business by new providers or being taken over by them. If this many solicitors' firms are vulnerable, it does not take much imagination to speculate about the possible effect on the Bar.

One of the Bar’s possible salvations is development of its ‘direct access’ capacity. If the Bar were to alter radically following the LSA changes, an expansion of the access schemes would enable it to capture a larger and more varied client base thus maintaining its position as a core legal service provider.
2.2 Synopsis: Research Interviews

We canvassed views on ‘direct access’ through interviews with barristers undertaking ‘direct access’ work, chambers’ Chief Executive Officers (CEOs) and chambers’ Practice Managers; we summarise their views here:

- ‘Direct access’ offers considerable potential for market expansion.
- The extent to which the Bar needs to consider changing its structure is an open question. Especially as there are advantages to being a referral profession with the present self-employed structure enabling wide diffusion of expertise.
- ‘Direct access’ offers opportunities to create new relationships with traditional providers, namely, solicitors, by barristers providing referrals.
- More dramatically, ‘direct access’ creates the possibility for chambers to forge new alliances with cognate professional groups like accounting firms.

The Traditional Relationship

\[ \text{CLIENT} \rightarrow \text{SOLICITOR} \rightarrow \text{BARRISTER} \]

The New Relationships

\[ \text{CLIENT} \rightarrow \text{BARRISTER} \rightarrow \text{SOLICITOR/OTHER INTERMEDIARY} \]

Strategically over the long term the Bar will have to take radical decisions about its working practices and structures; ‘direct access’ could be key to this.

2.3 Synopsis: Barristers’ Clerks’ Interviews

A number of clerks were cautious about what barristers and chambers should or could do in response to the LSA. Other clerks welcomed the opportunities to explore new relationships and create new ways of working. And a few chambers have started to think creatively about how to exploit the advantages of the LSA without destroying the benefits of being a barrister.

3 Conclusion

The advantages of ‘direct access’ potentially outweigh the perceived disadvantages. Those working in the field have begun to envision a future that can be modelled on new forms of working that do not necessarily compromise the culture of the Bar. Their view is more synergistic than destructive.
B METHODOLOGY

This research was conducted through the combination of three methods:

1. Documentary—entailing a detailed literature review.
2. Interviews—carried out with ‘experts’ having extensive knowledge of ‘direct access’ work plus a small number of ‘direct access’ clients.
3. Surveys—conducted electronically via the web and sent to Licensed Access users, to barristers undertaking ‘direct access’ work and to potential users of barristers’ services.

C. OVERVIEW: USING BARRISTERS’ SERVICES DIRECTLY

1. Introduction

Two key points of distinction between Licensed Access (LA) and Public Access (PA) should be noted. Whereas barristers instructed via PA can argue cases for clients in the courts, LA does not automatically grant the same rights. The second point refers to the mode of instruction in that PA clients can instruct barristers directly for their own cases. Under LA clients from professions other than solicitors usually instruct barristers on behalf of their clients (see further sections D and E).

1. Amounts of ‘Direct Access’ Work

The amounts of work done under the schemes are small in proportion to work undertaken via traditional routes but precise figures are difficult to obtain.

1.1 Bar Council figures for Public Access

The Bar Council website has 971 PA barristers who are registered and putting themselves forward for this work. About three hundred more have undertaken the training but elect not to appear on the Bar Council website.

1.2 Research Survey

Our survey of barristers registered for PA work, asked if they actually undertook ‘direct access’ work. Of 145 respondents, a little over 92% undertook PA work and 60% undertook LA work. These figures demonstrate that significant numbers of barristers are engaged in this work.

1.3 Bar Council Survey

The Bar Council survey of PA barristers (Sept 2008) supports the finding that significant work is being done under the PA rules. Indeed, a small proportion of the Bar’s group derive 75% or more of their fees from this type of work.

2. Views of Barristers Undertaking ‘Direct Access’ Work

Chambers’ directors and clerks reported seeing advantages and opportunities in increasing PA and LA work. A chief executive of one chambers said:
Our take as a chambers...is that this is a growing area of work. We’re enthusiastic about it and we see it as one of the innovations that the Bar is coping with at the moment. We are encouraging all of those who might benefit to be trained and we’ve reached a very high proportion of our barristers who have been trained.

Reinforcing these views our research found that a significant number of barristers would like to undertake more PA and LA work. The responses showed that nearly 69% of ‘direct access’ barristers surveyed would like to do more PA work, with over 72% wanting to do more LA work.

3 Concerns about ‘Direct Access’ Work

There is some worry from a number of barristers and clerks that taking on more ‘direct access’ work might lead to tensions with and a reduction in work from their solicitors. One Senior Clerk pointed out “you have to be very careful about biting the hand that feeds” and a Practice Manager added:

But the problem of a referral profession having access to clients means that the first time we pinch a client direct off one of our best firms of solicitors he’s just not going to send us any more. So we’re always competing with one hand tied behind our back.

4 Views from Users of ‘Direct Access’

Some corporate clients are more knowledgeable about selecting different types of lawyers and the ways, including ‘direct access’, in which this can be done. This was especially noticeable among those who use the Bar more than once. Still, the solicitor route to a barrister was the preferred method. Yet when asked about the relative difficulty of contacting barristers, the answer was overwhelmingly direct: 100% of respondents agreed that instructing their most frequently used barrister was the same as instructing their most frequently used solicitor.

Ease of instructing though, is not the same as understanding how chambers operate. Half of users we consulted were confused about the organisational structure of chambers but over three quarters of respondents were aware that barristers are concerned with more than litigation. Furthermore, 69% found barristers approachable with a further 23% being neutral on this question.

5 Conclusion

5.1 The exact amount of ‘direct access’ work being done is unclear but overall figures demonstrate significant numbers of barristers are engaged in this type of work.

5.2 Chambers see advantages and opportunities in increasing PA and LA work and barristers engaged in ‘direct access’ would like to do more.

5.3 There was concern that the traditional relationship between solicitors and barristers would be countermanded by the growth of ‘direct access’

5.4 Corporate clients and those who use the Bar regularly were more knowledgeable about ‘direct access’ than non-professional clients.

5.5 ‘Direct access’ users found instructing barristers as easy as instructing the solicitor they had used most frequently.
D  LICENSED ACCESS

1  Introduction

Licensed Access is a well established means of using barristers’ services without first engaging a solicitor; it takes two forms. The first category covers members of professional bodies, e.g., RICS, automatically granted ‘direct access’. The second category covers individuals and organisations with specialist knowledge who have applied for a licence, e.g., Police forces. Generally their instructions are given on behalf of the client, with the licensee acting as an intermediary.

The BSB website currently lists 30 holders in the first category and 222 in the second category. It is possible for all barristers to undertake LA work (there are no requirements for special training), however, there are certain restrictions as to barristers’ ability to undertake court advocacy (see 3.1 below).

2  The Benefits of Licensed Access Work

2.1  Work is Indistinguishable from Solicitor Led Cases

Our survey showed that barristers find that the expertise of professionals and their ability to handle cases make LA work virtually indistinguishable from solicitor led cases. A typical response was:

[If] you’ve got an astute professional who is used to doing reports; that's what you're getting their report on the issues as they see it. It's down to you to ask supplemental questions then. It might be in a more modern style, and you certainly don’t get pink ribbon, but who cares? (Senior Clerk)

Overall barristers found that instructions received from professional clients were ‘decent’ and that any additional work required was not onerous.

2.2  The Work is Cost Effective for the Client

Clearly in comparing the cost effectiveness of engaging a solicitor and a barrister or solely engaging a barrister, much depends on hourly charge rates. Nevertheless, in some cases when two lawyers are involved in an action there can be duplication of work. Plus, LA holders are capable of undertaking much of the administrative work typically done by the solicitor. Our survey of LA holders found that 89% of respondents agreed with the statement: ‘instructing a barrister directly is better value for money than going through a solicitor.’ Moreover, during the recent Court of Appeal case, Agassi v Robinson [2005], the Senior Costs Judge accepted that in using the LA scheme, costs were one-third what they would have been had solicitors been instructed.

Though LA has proved to be an economically efficient method of obtaining legal services there are concerns about the recovery of costs for the conduct of litigation as exemplified by the Agassi case, where the licensee’s costs were held not to be recoverable. Ironically then, despite the Cost Judge’s
acknowledgment, had the licensee engaged solicitors, “the £60,000 they would have charged would have been completely recoverable” (McKinnon: 2005). The Bar Council has issued guidance on this (see Recovery of Costs in Non-Solicitor Cases).

2.3 Licensed Access Holders are Enthusiastic about Licensed Access

Almost all (93%) of our survey respondents stated that for them LA worked well. Excluding costs, other reasons identified for this were the ability to take advantage of the specialist knowledge at the Bar and that by instructing they were able retain more control of the case.

This enthusiasm for LA was further demonstrated by the 73% of respondents who felt that more organisations and public bodies ought to be encouraged to apply for a licence.

And matched by equal enthusiasm from barristers (those already engaged in ‘direct access’ work) for taking LA instruction. In addition, the Bar Council is keen to encourage more bodies and trade associations to join the scheme.

3 The Difficulties of Licensed Access Work

3.1 Advocacy

Those with LA can approach a barrister direct but cannot always instruct the barrister to appear in court as this is not always permitted under the terms of the licence. For example, those clients instructing through the first category of licensed access, i.e. members of professional bodies, can instruct barristers to appear in most tribunals but not in most other courts. As PA barristers can be instructed in all courts, there is some confusion within the profession about what levels of advocacy can be undertaken under direct access.

3.2 Lack of Knowledge about Licensed Access

Licensed Access is readily promoted to members of organisations automatically granted access, they are well aware of the scheme and its benefits. However, the indication from our survey was that other potential users of LA lacked real knowledge of the scheme. When respondents were
asked how familiar they were with LA, 50% were unfamiliar, 33% had no idea what the scheme was and the remainder (17%) claimed slight familiarity.

4 Conclusion
4.1 Barristers find LA work indistinguishable from solicitor led cases.
4.2 Licensed Access is a cost effective way of engaging barristers in appropriate cases.
4.3 Licensed Access holders are enthusiastic about the scheme.
4.4 It would be desirable if the number of professional bodies and organisations holding licences were to be increased.
4.5 There could be better promotion of LA to increase awareness amongst potential users.

E PUBLIC ACCESS

1 Introduction

Under PA barristers can be contacted directly by any person or any organisation and can represent these litigants in court without being instructed by a solicitor. A barrister must be satisfied that it is not in the lay client’s best interest to use a solicitor or other intermediary. The barrister must be satisfied that the lay client, with the guidance of the barrister, will be able to do all the necessary court work.

1 The Use of Public Access

The range of work being done under PA is diverse, covering non-contentious and contentious work. We asked users what they used their barristers for:

What did you use your barristers for? Please tick all those that apply.

<table>
<thead>
<tr>
<th>Item</th>
<th>Percent %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Litigation work</td>
<td>77%</td>
</tr>
<tr>
<td>Expert work</td>
<td>54%</td>
</tr>
<tr>
<td>---------------------</td>
<td>-----</td>
</tr>
<tr>
<td>Drawing up agreements</td>
<td>8%</td>
</tr>
<tr>
<td>Opinions</td>
<td>8%</td>
</tr>
<tr>
<td>Tax opinion</td>
<td>8%</td>
</tr>
</tbody>
</table>

Litigation is clearly ahead of other types but this does cover all types of barrister work from ADR through tribunal representation to advocacy in court.

The mechanics of PA both enable barristers to work directly for clients and yet place limits on how that work can be carried out, such as restrictions on communicating with the third party on chambers’ headed notepaper and the exclusion of immigration, family and crime from the PA arena. Both these issues are currently under review by the BSB and may well be removed.

3 Training

In order to undertake PA work barristers must take a short course covering, for example, file handling and client care letters. In addition to barristers a substantial number of barristers’ clerks have taken the course.

4 Types of Work Suitable for Public Access

Most types of civil work appeared suitable for PA. One particular area mentioned to us was the ability of counsel to give ‘red/green light’ opinions on cases. This could be done far quicker and for less cost than by a solicitor.

Our survey of barristers undertaking Public Access work indicated a very wide range of which the following are a sample beyond the ones mentioned earlier:

- Gambling licensing
- Highway status disputes
- Clinical negligence
- Sports law
- Trusts and wills
- Discrimination
- Healthcare law
- Media law
- Costs
- Disciplinary hearings
- Charities

We also had mentions of pre-issue family work and some immigration work, which suggests the current limitations on types of work might be no longer relevant to modern practice.

Opinions varied on the kinds of Public Access work that barristers would like to do. Those who did less of it preferred to keep the work areas within stricter bounds than those who did more considerable amounts. Barristers who had embraced Public Access work wholeheartedly were keen to expand the range of work, especially in the non-contentious areas.
The main caveat entered by our respondents was that they did not want to become the functional equivalent of solicitors. From this perspective they saw the expansion of their work as becoming focussed on certain areas and specific issues within those areas. Rather than becoming general practice lawyers, they preferred to specialise more.

## 5 Knowledge of Public Access

Public knowledge of the PA Scheme is limited and the most significant form of marketing is word of mouth. However, changes are beginning to occur with, for instance, the list of PA barristers on the Bar Council website, and other commercial websites providing information. It is clear from interviews that business users are more likely to be aware of using barristers directly than individual members of the public. When users were asked about perceived benefits of instructing barristers certain features stood out:

We would like to gain a picture of the perceived benefits, if any, of instructing a barrister direct compared with working through a solicitor. Could you tell us, by agreeing or disagreeing with the statements below, how far you agree that ‘direct access’ will provide greater benefits than working through a solicitor? Please tick each statement.

<table>
<thead>
<tr>
<th>Item</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Neutral</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Better value for money</td>
<td>7.7%</td>
<td>30.8%</td>
<td>38.5%</td>
<td>15.4%</td>
<td>7.7%</td>
<td>7.7%</td>
</tr>
<tr>
<td>Faster response</td>
<td>7.7%</td>
<td>23.1%</td>
<td>38.5%</td>
<td>15.4%</td>
<td>30.8%</td>
<td>7.7%</td>
</tr>
<tr>
<td>Speedier provision of summary of options available</td>
<td>23.1%</td>
<td>53.8%</td>
<td>15.4%</td>
<td>7.7%</td>
<td>7.7%</td>
<td>7.7%</td>
</tr>
<tr>
<td>Early dispute resolution more likely</td>
<td>23.1%</td>
<td>23.1%</td>
<td>30.8%</td>
<td>15.4%</td>
<td>7.7%</td>
<td>7.7%</td>
</tr>
<tr>
<td>More personal relationships</td>
<td>15.4%</td>
<td>23.1%</td>
<td>30.8%</td>
<td>15.4%</td>
<td>7.7%</td>
<td>7.7%</td>
</tr>
<tr>
<td>Better specialist expertise in areas of law</td>
<td>7.7%</td>
<td>30.8%</td>
<td>30.8%</td>
<td>23.1%</td>
<td>7.7%</td>
<td>7.7%</td>
</tr>
<tr>
<td>More transparent costs and fees</td>
<td>15.4%</td>
<td>38.5%</td>
<td>30.8%</td>
<td>7.7%</td>
<td>7.7%</td>
<td>7.7%</td>
</tr>
<tr>
<td>More efficient process</td>
<td>23.1%</td>
<td>23.1%</td>
<td>38.5%</td>
<td>7.7%</td>
<td>7.7%</td>
<td>7.7%</td>
</tr>
<tr>
<td>Better knowledge of my business</td>
<td>46.2%</td>
<td>23.1%</td>
<td>23.1%</td>
<td>7.7%</td>
<td>7.7%</td>
<td>7.7%</td>
</tr>
</tbody>
</table>

Without doubt ‘better value for money’ is the strongest benefit. The Hardwicke Building surveys also confirmed this finding. Interestingly, both surveys indicate that barristers are not remote and unapproachable as often portrayed. Indeed it is the opposite.

Furthermore when we asked about satisfaction with barristers’ services the response was positive:

Overall were you satisfied with your barrister’s response to your problem?
Interviews with users, and comments by users, confirmed this result. When PA is experienced in action the results are welcomed by all.

6 Instructions via Public Access

In our interviews it was clear that chambers had initiated procedures to help PA clients by asking for summaries of the legal problem so that an initial diagnosis could be made. This diagnosis occurs quickly with the barrister deciding if he wishes to act in the matter. If he decides to do so, the client is issued with a client care letter and notified of costs. The one issue that must be decided is whether or not the client is perceived as capable of 'conducting the litigation'. In the case of professional or corporate clients, this will often not be a problem. But the position may be different with lay clients. As the main objective is to act in the client's best interests (with a proviso of avoiding duplication of work if possible), the result may be the barrister recommending a solicitor or other legal services provider to act in the matter. This has enabled barristers to establish referral networks of their own and is a demonstration of the New Relationships chart on page 3.

7 Client Views of Public Access

Our interviews have indicated that clients who have engaged barristers directly have found the experience positive. Responses often include terms such as: 'great value for money', 'fast', 'very knowledgeable' and good communication'.

8 Barristers' Views of Public Access

Our interview uncovered substantial fear among some barristers and clerks, of dealing with "Joe Public", characterised by one Senior Clerk as precipitating "absolute dread". Another commented: "just the thought of someone just walking off the street and saying 'I want a chat with your barristers'...no, keep
it the other side of the solicitor, please.” But on the other side the cost efficiencies of PA were highlighted:

I mean the whole thing behind the direct public access to be frank is to save money for the client. That’s why it’s going to take off because the public will look at it as a money saving. They’ll look at it and say well I can instruct one person instead of having to instruct two. That’s why I believe that it’s going to be a growing area. (Senior clerk)

As the quotations show, because this is an emerging area, views remain diverse. But it is likely that as PA becomes more prevalent and its attractions more apparent, there will be a realigning of views towards the positive.

F. FINAL CONCLUSIONS

1. The Bar offers significant value for money in the provision of legal services compared to other lawyers. With the Bar’s present configuration it enjoys significant cost advantages. This is universally welcomed by both PA and LA clients.

2. The public knows little of PA, nor where to find information. The responsibility for marketing barristers’ services in the PA realm is an area that causes debate and confusion. The Bar Council believes its job is to promote the scheme but that it is for individuals and chambers to do their own marketing. However, some barristers engaged in ‘direct access’ work were vocal in their demands for change arguing that the Council ought to be more active in marketing and education.

3. At present the state of knowledge within the legal profession about PA and LA is such that the majority of all members of the legal profession are not yet prepared to enthuse about these schemes. We identify a concern that a barrister who is accepting work through the solicitor route and via Public Access may find himself placed in an embarrassing position with regular instructing solicitors, and this in turn leads to reservations in certain sectors of the Bar about Public Access as a means of instruction.

4. There seems to be little understanding of possible effects of LSA on barristers’ work and on PA in particular. The Act will have a significant impact on the Bar. And once the LSA comes into force, LA and PA will be real opportunities for growth in the work of the Bar. Public Access could be a key area for tackling the new competitive environment proposed in the act.

5. The Bar needs to better understand the range of potential direct access clients. There is some awareness of a number of ‘publics’, which include individuals, small and medium size enterprises, corporate clients, and professionals. All will have their role within LA and PA and the Bar must better understand how to respond to their different needs.

6. Barrister relationships and flows of work need reassessment. Not only is there the traditional party relationship between client, solicitor and barrister but new relationships are developing between barristers, solicitors, intermediaries and clients. With ‘direct access’ the Bar can channel work including referring work to solicitors, thereby creating new networks.
7 The availability of ‘Direct access’ to the Bar in appropriate cases is in the public interest.

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