

Application by the Bar Council for approval of amendments to its code of conduct: Direct Access

March 2003

**A report by the Director General of Fair Trading
to the Lord Chancellor on the application by the Bar Council to relax
its restrictions on direct access to the Bar**

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1 GENERAL SUMMARY

- 1.1 The advice below concerns alterations proposed by the General Council of the Bar to the 7th Code of Conduct of the Bar of England and Wales ('the Code of Conduct') and annexes. The advice is given on the basis of information supplied to the Office of Fair Trading by the Lord Chancellor's Department On 17 January 2003.
- 1.2 Together, the Code of Conduct and the Consolidated Regulations of the Inns of Court form the qualification regulations and rules of conduct for practice at the Bar of England and Wales. The proposed amendments to the Code of Conduct concern the introduction of rules that relax the restrictions on direct access to the Bar.
- 1.3 Under section 29 and Schedule 4 to the Courts and Legal Services Act 1990 (as amended) ('the Act'), if a body authorised to grant rights of audience or rights to conduct litigation makes an alteration to its qualification regulations or rules of conduct, the alteration shall not have effect unless approved by the Lord Chancellor. The Lord Chancellor may seek the advice of the Director General who shall consider whether the proposed alterations would have, or be likely to have any significant effect on competition.
- 1.4 I am authorised by the Director General, under paragraph 7 of Schedule 1 to the Fair Trading Act 1973, to carry out a competition scrutiny of the application for authorised status as required by the provisions of the Act described above.
- 1.5 To the extent that the proposed changes increase the numbers of lawyers free to provide legal services directly to the public, they should in principle enhance competition. However, the continuing restrictions highlighted below will tend to limit the benefits to clients of these pro-competitive changes.

2 THE AMENDMENT TO THE CODE OF CONDUCT AND ITS LIKELY COMPETITIVE EFFECT

A Background

- 2.1 The OFT report *Competition in professions* published in March 2001, identified a number of provisions in the Bar's Code of Conduct as potentially restrictive of competition. Among these was paragraph 401(a), which prohibits barristers from accepting work from anyone other than a professional client (broadly a qualified and regulated legal practitioner) or a BarDIRECT client (that is a client who has been approved by the Bar Council as being suitable, in certain areas of work, to instruct barristers direct). The Bar Council subsequently established a Committee chaired by Sir Sydney Kentridge QC to consider the points raised in the report and to make recommendations to the Bar Council. The report of this Committee recommended that the Bar Council remove the prohibition on direct access.
- 2.2 On 2 February 2002, the Bar Council accepted the recommendations of the Kentridge Report to the effect that the Bar should relax its rule prohibiting barristers from accepting instructions from people other than professional or BarDIRECT clients. Following this decision, the Bar established a Working Group under the Chairmanship of Guy Mansfield QC to consider the necessary changes to the Code and the guidance needed to implement the decision.
- 2.3 By this application, the Bar Council seeks approval for amendments to its Code of Conduct to relax the restrictions on direct access to the Bar. With the application, the Bar submits the Direct Access Rules that will govern work undertaken by barristers on a direct access basis. In making the amendments and the rules, it has remained the Bar's position that the essential function of a barrister is as an advocate and adviser whose role is not to conduct litigation or to take general responsibility for their client's affairs. Direct access will therefore remain prohibited or limited in a number of areas of practice. The Bar proposes to review the way in which the rules are working after two years.

B Amendments to the Bar's Code of Conduct

Paragraph 104

- 2.4 This rule is amended to permit barristers to act on behalf of clients directly where instructions from solicitors and other approved persons can properly be dispensed with. This is further buttressed by paragraph 401 which has been

amended to allow barristers subject to the Bar's Direct Access Rules, to accept work other than from a professional or BarDIRECT client.

Paragraph 204(c)

- 2.5 This paragraph specifies the additional training that must be undertaken by those who wish to undertake direct access work. Rule 204(c)(i) proposes that such barristers must have been in practice for three years following the completion of pupillage. The Bar Council considers that barristers who have been in practice for less than three years are unlikely to have the experience to make judgements on whether or not a solicitor will be required in a particular case. The Bar Council also proposes an overriding power of waiver that will enable dispensations to be made in appropriate circumstances; for example in the case of former solicitors, ensuring a degree of flexibility in the application of these rules. Rule 204(c)(ii) provides that a barrister must comply with such training requirements as may be imposed by the Bar Council and 204(c)(iii) requires that the Bar Council is notified of a barrister's intention to undertake direct access work.
- 2.6 Collectively these requirements seek to ensure that barristers who undertake direct access work are competent to do so. The training requirements imposed at paragraph 204(c)(ii) have yet to be settled. In fixing these, it will be important to ensure that the requirements do not go beyond what is necessary to achieve this objective. The notification requirement in paragraph 204(c)(iii) will enable the Bar to ensure that other requirements are met by barristers who undertake direct access work.
- 2.7 The requirement at paragraph 204(c)(i) that a barrister must have been in practice, post-pupillage, for three years raises two concerns. The first is whether a three year period of supervision goes beyond what is necessary to ensure that a barrister is able competently to undertake direct access. The second is whether the substantive supervision requirements that must be met during the three year period, and the manner in which these are applied and enforced, go beyond what is necessary to ensure competence. The Bar requirements are set out at paragraph 203(1)(b) of the code of conduct.
- 2.8 Rule 203(1)(b) requires that a barrister who has less than three years' standing, must practice from a chambers or office which is also the principal place of practice of a practitioner who is suitably qualified to provide guidance. A person is considered suitably qualified if they have been qualified to practise and have practised for six of the previous eight years, two of which must be the years that immediately precede the period of supervision (Rule 203(3)).
- 2.9 The Bar Council believes that the three-year rule is in the public interest in that it

ensures that barristers, whether in independent practice or employed, operate during their early years of practice within an appropriate legal environment and have access to advice from a more experienced practitioner when needed.

- 2.10 With regard to the first concern, that the duration of the period of supervision, set at three years, goes beyond what is necessary to ensure that barristers are competent in this new area of activity, we consider a three year period to be onerous, where it is additional to the Bar Finals qualification, to pupillage, and additional also to training requirements specifically designed to equip barristers to accept direct access instructions. While such a period may be justified in the initial phase while barristers adjust to the new possibilities that direct access offers, it will be important to reconsider this period as part of the review of direct access that the Bar has committed to undertake within two years of the rules coming into force.
- 2.11 With regard to requirements that must be met during the three year period in order for standing to be acquired, there are two aspects of rule 203(1)(b) that give rise to concern. Both relate to the effects of the rule in the context of practice at the employed Bar. The first is the requirement that a barrister's place of practice must, for the duration of the qualifying period be the same as that of a person who is qualified to supervise. The second relates to the operation by the Bar Council of a discretionary power of waiver in relation to this requirement. In both cases, the focus of the concern is the implications of this requirement for barristers who seek to meet the three year rule while practising in employment rather than at the independent Bar. Here, the concern is that a barrister moving from the employed Bar into independent practice may find that, even after a significant period of practice in employment, he/she is unable on taking up independent practice to accept instructions directly from clients. This is because the requirements for the acquisition of standing will not generally be met by a period of practice at the employed Bar.
- 2.12 The requirement in Rule 203(1)(b) that a barrister's principal place of practice must, for a period of three years be the same as that of a suitably qualified supervisor governs both independent practice and employed practice. Its effects in these two contexts are however very different. In independent practice, the requirement will almost inevitably be met by practice in chambers, and irrespective of whether there is, in reality, regular contact for the purposes of supervision between the qualified person and the person supervised. By contrast, in employment, the rule acts to severely restrict the freedom of a newly qualified barrister to accept an employment contract and to restrict also the freedom of potential employers to employ newly qualified barristers. This will only be possible where the would-be employer already employs a relatively

senior lawyer who meets the exacting terms of rule 203(3). In our view, the restriction inherent in this rule might be considerably relaxed and the level of supervision maintained or even improved, if the rule were expressed in terms of regular contact with a supervisor rather than in terms of a principal place of practice. This would allow a barrister in employment to be supervised by a suitably qualified person (such as a former pupil master) whether that person shared his place of employment, was employed elsewhere or was at the independent Bar. This would greatly enhance the opportunities for barristers in employment generally, and in particular, would allow barristers in employment to acquire the necessary standing to be in a position to accept direct access instructions on return to independent practice.

- 2.13 The Bar Council has a general discretion to waive the requirements of Rule 203(1)(b) on application. Applications are considered by the Transitional Arrangements Sub-Committee¹.
- 2.14 The operation of a waiver system in this context creates a very high degree of uncertainty for barristers who wish to practice at the employed Bar and to acquire standing to meet the three year rule. Given that the numbers of barristers qualifying greatly exceeds the number of openings at the independent Bar, it is likely that this uncertainty affects the majority of the recently-qualified Bar. Taking into consideration the discretionary nature of the waiver system, the absence of clear published criteria, and that barristers seeking an exemption are unlikely to be in a position to make an application for waiver until they have entered employment, the hurdles that face those who wish to have practice in employment are considerable.
- 2.15 In summary, the current rules and the way they are applied operate to prevent a barrister from knowing in advance whether a period of practice in employment will qualify him/her to the same degree as a period at the independent Bar. It appears to us likely that in many cases a barrister returning to the independent Bar after a period of employment will not have met the requirements of the three year rule and therefore will not be in a position to provide services directly. The

¹ Two categories of waiver must be distinguished. Barristers who were entitled to exercise lower courts rights of audience for at least three years enjoy what is in effect an automatic exemption from the requirements of rule 203(1)(b) and are likely to be considered as having acquired three years' standing (Para 1104). By February 2003, exemption had been granted to barristers in this category in 461 cases. For recently-qualified barristers and barristers who otherwise do not fall within this category, application may be made to waive 203(1)(b) requirements, including the principal place requirement. Of the 38 applications that had been received by the Committee by February 2003, more than 40 per cent were rejected. The reasons for an applicant's success or failure are not generally known to other potential applicants

criteria for meeting rule 203(1)(b) should be clarified and simplified to allow a barrister who wishes to enter employment to know in advance where the period in employment will meet the requirements. In order to widen the range of employment that will meet the requirements, we also recommend that the Bar Council consider amending rule 203(1)(b) to allow appropriate supervision to be undertaken by any suitably qualified person who is willing to undertake it. Consideration should also be given as to whether a period of three years goes beyond what is necessary to prepare a barrister to deal directly with clients unsupervised.

Rule 603(h)

- 2.16 This new paragraph requires a barrister to refuse instructions if he or she considers that it is in the interest of the client or in the interest of justice for the lay client to instruct a solicitor or other professional client. Rule 604 has also been amended to clarify the operation of the 'cab rank rule' in direct access cases. This rule, set out at paragraph 602 of the Code, provides that a barrister is obliged to accept instructions in any field in which he or she professes to practice, including instructions to appear in any court in which he or she professes to practice, on being offered the proper fee.
- 2.17 Paragraph 604 makes it clear that a barrister is not obliged to accept instructions from a direct access client. Moreover, it provides that a barrister is not obliged to accept instructions even from a professional client if that client is not to accept personal liability for fees. As solicitors are required under present arrangements to pay barristers fees whether or not they are put in funds by the client, we agree that it may not be appropriate that barristers should be required to accept work on any other basis.
- 2.18 Furthermore, paragraph 608 of the code provides that if it subsequently becomes apparent to the barrister that it is in the interest of the lay client or of justice for a professional client to be instructed, the barrister must inform the client of this and cease to act unless such professional client is instructed.
- 2.19 By these amendments, the Bar Council requires barristers to exercise judgement in determining whether a client seeking direct access has the appropriate resources to instruct a barrister in the particular case and, should it be necessary, to undertake the work of a solicitor. It is not clear what considerations will guide barristers in making these decisions. However, in our view, to the extent that these changes will require barristers to reject cases that may involve litigation, general administration or management of a client's affairs, they continue to reflect unnecessary restrictions on the freedom of barristers to provide services.

Amendments to disciplinary and fitness Rules

2.20 These amendments allow disciplinary and other bodies to prohibit barristers from undertaking direct access work. This is intended to ensure that the present disciplinary framework applies to barristers who undertake direct access work. To the extent that the mechanism for dealing with professional misconduct is fair, balanced and transparent, this criterion appears to be justified and unlikely to have an appreciable adverse effect on competition.

C The Direct Access Rules

2.21 The main features of the Direct Access Rules are as follows:

- They set out areas of law in which barristers may not undertake direct access instructions; broadly immigration or asylum work and family or criminal proceedings other than for advice or appeals.
- They set out the basic information that a barrister must give to clients dealing with the service that the barrister is able to provide, the barrister's charging practice and likely fees and other information that the client needs. Barristers will be required to send 'client care' letters to all clients setting out this information.
- They require barristers to keep an appropriate case record of instructions and work done and also permit a barrister to refuse to deliver work to the client pending payment.

2.22 The information and record keeping requirements noted above do not appear to go further than is necessary to ensure the proper handling of direct access cases.

2.23 The continuing prohibition on barristers accepting direct access instructions in large areas of practice such as immigration and asylum and crime and family law (subject to some minor exceptions) appear, in our view, to be unnecessarily restrictive.

2.24 The arguments relied upon by the Bar Council are on the one hand the fact that much of the prohibited work is publicly funded and the responsible funding bodies have indicated that they are not willing to fund a direct access client, and on the other, the sensitivity of the work and the asserted incapacity of barristers to provide appropriate 'client care'.

Criminal and family law practice

2.25 We recognise that the current policy of the Legal Services Commission (LSC) is not to fund barristers who take instructions directly from clients in the areas of criminal law and family law practice. However, this should not prevent the amendment of Bar rules that act as an obstacle to barristers undertaking practice in these areas on a direct access basis. While the ban on litigation remains and until it is lifted, the principle should be that non-litigation work is permitted. While some barristers will not want to put in place the necessary arrangements to ensure that they are in a position to provide client care to vulnerable clients, others will and we have received representations from individual barristers to this effect. To suggest, as the current proposals do, that no barrister would be capable of this appears patronising. It will be for the LSC to consider subsequently whether its current policy in relation to funding should continue where barristers are otherwise free from restrictions in professional rules and willing to provide services directly.

Immigration and asylum law practice

2.26 While we recognise that the current policy of the Office of Immigration Services Commissioner (OISC) is only to fund barristers who take instructions from approved intermediaries, this should not prevent the Bar from amending its rules to enable barristers to adapt their working practices and to provide such services directly. We have received representations from the Immigration Barristers Forum² on behalf of barristers practicing in this area. These evidence a willingness among certain barristers practicing in this area to do so on a direct access basis. Again, it is our view that while the ban on litigation remains and until it is lifted, the principle should be that non-litigation work is permitted. Barristers who wish to make the necessary arrangements to provide advice on immigration and asylum law should not be prevented from doing so by professional rules. It will be for the OISC to consider subsequently whether its current policy in relation to funding should continue where barristers who are well qualified to advise are otherwise free and prepared to do so.

² Letter of 14 February 2003 from the Immigration Barristers Forum to Director General

D The continuing restriction on litigation

- 2.27 The Bar Council considers the essential function of a barrister as an advocate and an adviser whose role is not to conduct litigation or take general responsibility for a client's affairs. Moreover, it does not consider barristers to have the requisite skills and support available to undertake full case management. In effect, therefore, direct access will be prohibited in cases where litigation is envisaged. This will limit the practical effect of the relaxation of access rules to the extent that barristers in independent practice are not granted rights to conduct litigation. As stated in our report, this prohibition prevents potential efficiencies, restricts freedom of choice and limits the number of lawyers available to conduct litigation.
- 2.28 Though section 40 of the Access to Justice Act 1999 expressly empowers the Bar Council to lift the prohibition, the Bar dictates that in no circumstances can any member of the independent Bar conduct litigation. It is not clear why a barrister cannot take responsibility for a client's case, take witness statements, collect evidence or instruct experts other than that the Bar Council does not consider it desirable that they should do so. If a client has to instruct a solicitor to do these tasks, then the object of direct access, which is to make legal services more accessible and cheaper for the client would be largely defeated.
- 2.29 Rules that permitted direct access to the Bar and granted barristers in independent practice the rights to conduct litigation would be likely to lead to increased competition in the market for legal services. Nevertheless, the new rules will reduce to some extent an existing restriction on competition by permitting direct access to barristers in some circumstances.

3 CONCLUSIONS

- 3.1 In summary, to the extent that the proposed changes increase the numbers of lawyers free to provide legal services directly to the public, they should in principle enhance competition. However, continuing restrictions maintained by the Bar - in particular that on litigation, will tend to limit the benefits to clients of these pro-competitive changes.
- 3.2 The above advice is given subject to any relevant issues that may arise from OFT's ongoing review of competition in professions.

Margaret Bloom
Director of Competition Enforcement
Office of Fair Trading, March 2003