

Bar Standards Board: Public Access Rules consultation

A response from
Garden Court Chambers

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ABOUT US

Garden Court Chambers is one of the largest barristers' chambers in the country. These chambers are built on a fundamental commitment to human rights, social justice and equality.

Our multi-disciplinary expertise has proved vital to clients where cases bridge a number of areas. Garden Court has 140 tenants from a wide range of backgrounds, working in and across the following areas: Crime, Immigration, Family, Housing and Civil (Claims Against The Police & Public Authorities, Community Care, Employment & Discrimination, Planning & Environmental Law, Gypsy & Traveller Rights, Inquests, Mental Health, Prison Law, Public & Administrative Law, Welfare Benefits.)

Garden Court has been involved in many landmark cases and decisions, particularly in the areas of crime, immigration, claims against the police and public authorities and inquests. We have acted in many of the recent anti-terrorism cases and have historically been involved in overturning miscarriages of justice, including the Birmingham Six and the case of Derek Bentley.

Garden Court has always been driven by strong ethics and commitment to human rights and social justice. We have advised and represented organisations such as JUSTICE, LIBERTY, the Equal Opportunities Commission, Disability Rights Commission and Commission for Racial Equality, the latter three now the Equalities and Human Rights Commission. Many of our barristers also undertake a substantial amount of pro-bono work and we have won the Bar Pro Bono Award on several occasions.

A significant proportion of barristers, across the whole of our multi-disciplinary specialisms, is accredited for and accepts public access instructions. We wish to see such practice arrangements work fairly and appropriately.

The Chambers has an extended and significant body of experience in representing clients who are entitled to, and receive, public funding. We have been representing clients under legal aid, now public funding, since chambers was founded nearly 40 years ago. Three of our barristers – Jan Luba QC, David Watkinson, Marc Willers – have been awarded Legal Aid Lawyer of the Year in recent years and several others have been short-listed.

RESPONSE TO CONSULTATION

1. We confine ourselves to comments on question 2: “*Do you agree with the proposed amendments to rules 2 and 3*”
2. We oppose the proposed amendment of the rules that would permit a barrister to accept public instructions from a client eligible for public funding providing the barrister ensures 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. From April 2013, legal aid in civil cases will only be available to the poorest of those on low incomes and in respect of only a limited number of contentious matters. Anyone who falls within that very limited class should obtain his or her entitlement to the remaining free or low cost help available and not ever need to pay barristers privately for it. The very fact that public access might be available as an alternative to public funding might encourage potential clients to put their extremely limited resources to paying lawyers rather than claim their entitlement.
4. We strongly dispute that publicly funded solicitors are not of “the best quality” and that potential clients should be encouraged to believe that to be the case. The public funding system requires accreditation and frequent supervision. It has quality checks built into it. It is correct that sometimes low-quality legal advice and representation may occur, but this is also the case with solicitors who do not accept publicly funded clients. Encouraging clients to pay privately rather than access public funding simply perpetuates the myth that publicly funded legal services are necessarily of a lesser quality.
5. Most of the concerns expressed in the paper arise from shortcomings in the present legal aid system: e.g. that it is sometimes hard to find a legal aid lawyer, delays in granting public funding etc. The answer is to work to force improvements to that system, not to encourage or enable those people whom the system fails to pay out of their own pockets for a service that should be provided at high quality but free or at low cost.
6. There is a danger of cherry picking. Legal aid providers are under enormous pressure and their numbers are diminishing. They can only survive if they have a certain proportion of successful cases from which they recover inter partes fees, charged at market rates rather than at publicly funded rates. If public access is available, there is a risk that public access barristers will take

up those cases that are most likely to be successful, leaving legal aid providers only to conduct cases that have lower prospects of success. If that were to happen, more and more legal aid providers would be driven out of the market. There is already a very serious shortage of legal aid providers and the shortage seems likely to increase as a result of the LASPO Bill changes to public funding. We do not believe that the Bar should be assisting the decline in numbers of solicitors willing to undertake publicly funded work.

7. We are aware of the recent history of CFA litigation which has included CFAs being found to be invalid because the client was not properly advised about his or her possible entitlement to public funding. For that reason, we have little confidence that *any* regulatory measures would ensure that clients are *always* advised to obtain advice on whether they might be entitled to public funding before a barrister accepts the case on public access. This is particularly important because public funding gives a party considerable protection against an adverse costs order in civil matters. Public access arrangements offer no such protection
8. The consultation does not seem to address the various different methods of delivering publicly funded services: legal help for advice work, emergency certificates which can be granted by providers using devolved powers (so as to avoid delay in granting the certificate) etc.
9. We do not believe that any client whose resources are so limited that he or she is financially eligible for public funding can ever be said to exercise a real choice in opting to pay a barrister privately rather than claim his or her entitlement. Why should someone try to husband his or her low resources, or borrow money from friends, relatives (or even commercial loan companies) to pay a lawyer when he or she can get free or low cost advice? Surely that would only happen if a client, wrongly, believes that there is an advantage to instructing counsel privately over public funding. It would be wrong –and undermining of the public funding systems – to encourage that belief.
10. In addition, if a client is potentially entitled to public funding, it follows that he or she cannot afford legal fees (even low-cost one-off counsel's fees through public access). We are concerned that the possibility of paying counsel through public access would encourage someone on a very low income to borrow well beyond his or her means. Chambers are already aware of financial difficulties incurred by immigrant families who borrow to pay for private legal assistance. Such debts incur exorbitant interest rates for the family.

11. We note that several of the examples cited in support of the change of Rule suggest that the contributions required under public funding for clients on low incomes would be in excess of counsel's fees under public access. We consider that these are very unusual examples and that normally contributions will be less than the amount charged under public access. In addition, contributions are capped during the period of the litigation, whereas a client instructing counsel under public access may find that the amount of work required from counsel (and paid for by public access) is significantly greater than first envisaged.

12. We do not understand the final example, suggesting that in a family dispute the fact that one party has decided to conduct the litigation by him or herself and instruct counsel for "important hearings" is at an advantage over a publicly-funded party. Public funding is available to instruct counsel for important hearings.

13. We note the comments that a decision on public funding might be delayed, the scope of a certificate might be limited to preparation and not to representation etc. In our experience, these problems are not experienced by solicitors who specialise in public funding. They have, and exercise, devolved powers to grant emergency certificate and to amend the scope of the certificate and are skilled at contacting the LSC urgently if necessary.

14. Litigation is a time-consuming and difficult business. The conduct of litigation is a professional and specialist job. Whilst we support public access where appropriate, it is our experience that many clients find the conduct of litigation stressful, hard to understand and very time-consuming. It is for exactly that reason that those who can afford to pay a solicitor do so. We have a vast amount of experience in representing publicly-funded clients. Many of those clients would not be able to cope with the intricacies of litigation: filing and serving pleadings, conducting negotiations, complying with disclosure duties, preparation of witness statements and instructions of experts. This will be even more so once the changes to public funding are implemented in April 2013.

15. It would be wholly wrong, in our view, for a client who was entitled to public funding - so that a solicitor could conduct the very difficult task of litigation - to be steered in the direction of funding this work personally. As such clients by definition have very limited means - such funding necessarily involves them borrowing. For persons eligible for legal funding the cost and the accrued debt incurred for public access work will always be disproportionate. The BSB has given insufficient attention to the very limited means of those who will remain eligible for legal aid funding.

16. The proposed change in the public access rule further undermines legal aid funding arrangements. Garden Court along with other reputable, committed chambers and solicitor practices has provided high quality publicly funded legal work over many years. Such cases have been the core vehicles for much important jurisprudence. Such contribution from the Bar should be celebrated and preserved and the BSB's efforts directed to securing the future for such legal work – not seeking to replace it or diminish its value by facilitating public access for clients of very modest means.

CONCLUSION

17. Our answer to Question 1 (page 31) is, therefore No. We do not agree that rule 3 (1) should be deleted.