

policy response

Direct Access to the Bar

The Advice Services Alliance's response to the
Bar Council's consultation paper

Direct Access to the Bar

Due to time constraints ASA has not been able to formally consult its members before responding to the Consultation Paper. What follows should therefore be considered in conjunction with any comments submitted by our member networks.

We do not feel able to comment on many of the questions raised in the consultation paper. In general, the approach taken by the paper appears to us to be reasonable, in the light of the Bar's commitment to direct access, which we would in general support. At this stage we would generally support the Bar Council's rejection of the suggestion that private practice barristers should be able to conduct litigation, although we note that the Office of Fair Trading has not been persuaded on this point, which may therefore need to be considered further.

Our main concerns relate to the types of work which barristers should be allowed to do under these proposals, the protection for clients which needs to be built into the new system, and the role of intermediaries. We will therefore only be responding to some of the questions in the paper.

Q.1

In general, we think that the principles adopted by the paper are appropriate. However, we are not sure how easy it will be in practice to make the distinction between conducting discrete pieces of work (whether advice and/or representation) and conducting litigation. It seems to us that the line may be difficult to draw in two situations in particular:

- (a) where the client is involved in litigation and using the barrister for advice on a regular or frequent basis (as compared to the "occasional" basis referred to in paragraph 15)
- (b) where the client is involved in litigation and using an intermediary (see below)

It would seem to us that these are issues which may need to be considered in detail in the Code or the Guidance.

Q.5 & 6

In principle we can see no objections to barristers doing police station work. However, we do not see why this would or should require the setting up of a Duty Bar Scheme as suggested in paragraph 35. We cannot see why barristers wishing to do this work should not have to qualify in the same way as solicitors do, and should not have to join the local solicitors duty scheme. To have two separate duty schemes running would seem to us to be unnecessary and over complicated.

We can see no objections to barristers dealing with bail applications and guilty pleas in the Magistrates Court. We can imagine some contested matters in the Magistrates Court which could also be suitable, including certain motoring offences.

The paper does not mention one possible problem, which might arise in practice. A client in the police station seeks advice from a barrister. The client is keen to have the matter dealt with as soon as possible, and wishes the barrister to represent him or her. There is a question over whether the client should plead guilty or contest the

matter, or seek to plead guilty to a lesser charge. In general, it is necessary to assess the strength of the prosecution case before advising on a plea. The barrister may well not be in a position to do this while he is at the police station. The barrister advises that he cannot represent the client unless the client pleads guilty. It is possible that this factor might help to tilt the client's mind in favour of a guilty plea in order to ensure that the barrister continues to represent him or her. It appears to us that this may well be a situation which needs to be dealt with in the Guidance.

Q. 8 & 9

It would seem to us that the paper's proposals are consistent with the principle that barristers should not conduct litigation.

Q.10

We do not see why barristers or their staff should be expressly prohibited from delivering documents to court. We would see this more as a practical issue than a question of principle. If solicitors for instance outside London are instructing Counsel in London in relation to a judicial review application, where Counsel drafts all the necessary documentation and the papers need to be lodged in the High Court, it is eminently sensible and practical for the papers to be lodged by barristers or their staff where they are able and willing to do this. We cannot see any objection to this.

Q. 16 –22

As far as the client care letter is concerned, we would suggest that consideration be given as to adding a requirement that the barrister provides factually accurate advice as to the barrister's experience in the area of law in question and/or membership of any approved panel.

We consider that it should also be a requirement that the barrister advises the client as to whether they are or might be entitled to legal aid in relation to the matter in question.

We do not agree that one can or should distinguish between different types of client. We consider that the full client care letter should be sent in all cases. If the client is indeed a "repeat client" then this should be very easy to do, given modern technology. From our reading of the reports about complaints in the Law Society Gazette, it seems to us that solicitors have often got into difficulties by assuming that the client understood something as a result of previous dealings.

We do not see a need for any assumption to be made as suggested in Q.18. Each case surely turns on its own facts, and one would have to see exactly what was said in the client care letter in order to decide whether this constituted proper information.

We consider that a written agreement with the client should be a pre-condition of doing direct access work.

We cannot see how the terms of the proposed letter (including "the exact work which the barrister is asked to do") can be easily extended to cover a retainer, as described in Q.20.

It is suggested that the client care letter should outline any arrangements to provide the client with an alternative barrister (paragraph 66 (g)). We find it difficult to imagine situations in which the client would rather that the work was not done if the chosen barrister was not available. In our view, consideration should be given as to whether it should be a requirement for direct access work that clients are offered

alternative arrangements to deal with the various situations mentioned in the paper which may prevent a barrister from doing the work he had contracted to do. This could involve the transfer of the case to another barrister, or a solicitor, with equivalent experience. We appreciate that this will mean in effect that barristers will be covering for each other, but that is of course what happens normally, as the paper recognises. While it may be more difficult for some sole practitioners to make such arrangements, there is no reason in principle why they cannot do this. We imagine that they must do this to a certain extent already.

Q.23

We are particularly concerned about the role of intermediaries, especially those which are “unapproved”.

We are not convinced that it will be unnecessary for formal arrangements to be agreed in every case, and that a detailed client care letter can be dispensed with. The fact that the relationship is similar to that between barrister and instructing solicitor may be true in respect of the liability for the barrister’s fee, but it is not true in other respects. The intermediary will not have to provide the information to the client that solicitors are required to provide. They will also in many cases not be able to provide the client with the confidence and assurance which clients often feel on instructing solicitors. Given the problems which can arise in such situations, as set out in paragraph 61, we think that the requirement for a full client care letter should apply in all cases where intermediaries are involved.

A further problem which the paper does not seem to consider is what the reality of the situation is likely to be when an intermediary is involved. If the client has instructed a particular type of intermediary who advertise their services in a particular area of law, the client is likely to think that he or she has “instructed” the intermediary in much the same way as if he had instructed a solicitor. If the papers are then sent to a barrister for advice, and the barrister advises that certain further steps be taken, for instance in relation to evidence gathering, the situation in many cases is likely to be that it will in fact be the intermediary who takes on responsibility for this, rather than the lay client, and whatever the terms of any written agreement between them may say. There is a danger that some such intermediaries will effectively be conducting litigation, with help from the barrister, which they may not be qualified (either legally or by experience) to do. We think that further consideration needs to be given to this issue.

Q.30

While we agree in principle with these proposals, we consider that Guidance should be given as to what might constitute reasonable grounds for a barrister to believe that the solicitor is competent to do the work. There are now several forms of accreditation available to solicitors, either by way of panel membership or by being accepted as a supervisor in relation to contracts with the Legal Services Commission. Such matters could be specified as being prima facie reasonable grounds. There is bound to be the suspicion in some quarters that a barrister is recommending a particular solicitor in the expectation that the solicitor will instruct the barrister in that case, and possibly other cases. It would provide a safeguard to the barrister as well as the client if there were some agreed bases on which it was reasonable for the barrister to believe that a solicitor is competent to do a particular type of work.

Q.33

We are not convinced that it would be sufficient merely to require barristers to ensure that the lay client's expectations are not beyond what can and will be delivered. It appears to us that consideration should be given as to certain minimum standards which should be required in all cases, in terms of administrative support, returning telephone calls etc.

Q.36

For all the reasons mentioned in the paper, we think that a training course is essential before barristers undertake direct access work.

Q.37

We agree in principle with the proposition in relation to Junior Members of the Bar. We think it would be easier not to permit such barristers to do such work until they have complied with the "three year rule". An exception could possibly be made for barristers working with leading counsel.

Q.38

We do not see that sole practitioners are in principle different from other barristers in terms of the problems inherent in direct access work in relation to administrative support, and cover in the event that the barrister cannot do the work for which he has contracted.

We would suggest that consideration be given to requiring all barristers doing direct access work to satisfy the Bar Council that they have the appropriate arrangements in place in respect of both matters.