



# Straight There No Detours: Direct Access to Barristers

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### Introduction

The Clementi Review of legal services (2004) has stirred controversy among legal professionals of all kinds and in many countries. It appears as if the English legal profession could transform itself into something that no longer looks like a normal profession (Flood 2008). Clementi proposed and the Legal Services Act 2007 has implemented two simple but fundamental changes to the practice and organization of law.

The first is to create a new regulatory structure with the Legal Services Board as an over-arching regulator concerned with the activities of a series of front line regulators such as the Solicitors' Regulation Authority (SRA) and the Bar Standards Board (BSB). The second is to open up the organization of legal services provision to those who are not lawyers. It is being done in two ways: by allowing non-lawyers to become partners in law firms which become legal disciplinary practices; and by permitting the ownership of legal services providers by non-lawyers, often referred to as "Tesco Law".

Clementi follows on from a series of changes and challenges to the tradition of the legal profession which included the Green Papers of the Thatcher era and the dramatic cuts in legal aid fees. For the legal profession the start of the 21<sup>st</sup> century has been uncomfortable.

Professions have always had to adapt to change. Abbott (1988: 92) tells of the death of railway surgeons—"disappeared without a trace"—in the early 20<sup>th</sup> century. But the legal profession has shown strength in the defence of its professional project (Larson 1977; Abel 1988; 2003). In some countries, e.g., France, USA, and Australia, there have been moves towards consolidation of the legal professions, while in the UK there has been a resolute stand against any kind of fusion or even educational commonality. The result is that barristers and solicitors are still educated and practise separately. It is possible to change from one to the other more easily but functionally they remain distinct.

The professional project has now taken on a new urgency as the introduction of alternative business structures (ABS) appears on the horizon for 2011. Traditional suppliers of legal services will be threatened. The legal trade press have speculated that up to 1,000 law firms could disappear with the introduction of ABSs. Less conventional methods of delivering legal services are becoming apparent and attractive to external investors (Herman 2008). For solicitors it has been through the development of solicitor-advocates as competitors for advocacy services in the courts. For barristers it has been an attempt to communicate directly with clients without the mediation of a solicitor.

This article examines the Bar's most recent evocation of direct access by clients, public access to the Bar. First, we sketch the background to direct access and contrast it to the "normal" referral

route for clients. Second, we look at both users' and providers' experiences of direct access. This covers two types of direct access, namely, licensed access and public access. Each is different in form and delivery. Finally we analyze the consequences of this approach for the Bar.

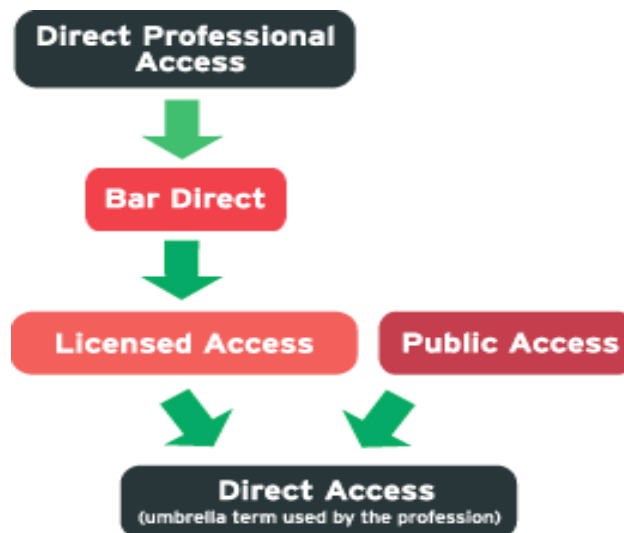
## Methods

We employed three main methods of inquiry for this project.<sup>1</sup> These included a detailed literature review covering various kinds of reports (e.g., organisational, professional, regulatory, governmental); research by academics; articles in the legal trade press; articles in the general press; postings on blogs and websites, including the rules and regulations concerning direct access work; speeches; reports of cases handled by public access, and data supplied by the Bar Mutual Fund. We interviewed a range of barristers, barristers' clerks, practice managers, and others connected with the delivery of legal services. Interviewees were gathered through snowball sampling and were interviewed predominantly face to face, but some were interviewed by telephone. Questions and topics fell into two main groups: Was direct access being exploited? And if so, how? What were the perceived challenges of Clementi and the Legal Services Act? And what would be the response? Our final method was a set of web-based surveys to barristers and users. We surveyed both licensed and public access barristers. The surveys were short comprising six questions but the response rates were below 25%. For users of legal services we sampled across three industry sectors including financial services, property and construction, and IT services from within the UK Standard Industrial Classification of Economic Activities. Unfortunately, much of the contact information was out of date and the response rate for this group was poor. It would be fair to say that on the whole the statistical data were unreliable for analytical purposes, but they did provide some insights.

## Direct Access—Background

In the early 19<sup>th</sup> century barristers accepted instructions of every kind, including advocacy in court, direct from lay clients. As the role of solicitors grew judges thought that it was in litigants' interests that they should have solicitors' services to instruct a barrister. In 1850 Lord Campbell CJ said that, whilst there was no rule to this effect, he hoped that barristers would, "save in exceptional cases, accept instructions only through an attorney". In 1888 a firm rule for contentious business was introduced to this effect and in 1955 the rule against direct access was extended to non-contentious work (Bar Council undated).

The debates over the role and practices of the legal profession came to a head in 1987 with the publication of the government Green Papers. This led to the introduction of Direct Professional Access in 1990, which was opened up to more groups under the BarDIRECT scheme in 1999 and renamed Licensed Access in 2004. The diagrammatic chronology of the Bar's access changes is shown in Figure 1.



**Figure 1 Chronology of Direct Access**

Following Clementi the public access Scheme was introduced which enabled any person or any organisation to instruct barristers directly. Direct access, in its various forms, has been established for many years, yet in a number of ways it is still in its infancy. This is indicated by the low numbers of barristers engaging in it and the relatively small numbers of users. In part this is cultural, despite an initial history of direct access work; the Bar has developed as a referral profession. In part it is professional, in that such work can be interpreted as entrepreneurial and outside the ethos of the Bar. And in no large part it is economic, in that there are incentives built into the structure of the Bar against this type of work.

### **Licensed Access**

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. These bodies are automatically granted direct access to barristers without first having to make an application to the Bar Standards Board (BSB), i.e., they are grandfathered on to the scheme. They include organisations such as the Royal Institution of Chartered Surveyors, the Institute of Chartered Accountants and the Chartered Institute of Taxation. Members of these organisations almost always directly instruct counsel on behalf of clients thus acting as intermediaries, much as would a solicitor.

The second category covers individuals or bodies with specialist knowledge who, requiring direct access, are obliged to make an application to the BSB (stating their credentials, why they require licensed access and to which courts). The Board then decides whether or not to grant the licence. This type of licence holder includes police forces and fire departments. Again, generally their instructions are given on behalf of the client, with the licensee acting as an intermediary.

The BSB website currently lists (in the First Schedule of the Code) 30 holders in the first category and 222 in the second category. It is possible for all barristers to undertake licensed access work (there are no requirements for special training). However, under this scheme there are restrictions as to barristers' ability to undertake court advocacy.

## Public Access

Under public access barristers can be contacted directly by any person or any organisation and can represent these litigants in court without first 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.

The mechanics of public access 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 are likely to be removed.

As a general rule in order to undertake Public access work barristers must have practised for at least three years since completion of pupillage and have taken a short training course on Public access. The course covers such basics as file handling, client care letters and anti-money laundering rules. In addition to barristers, a substantial number of barristers' clerks have taken the course. There are currently 971 barristers trained and registered to do public access work and who appear on the Bar Council website.

The lawyer-client relationship in respect of the Bar is different to most typical types in that it is usually triadic instead of dyadic (Flood 2009). The traditional relationship for barristers appears in Figure 2.

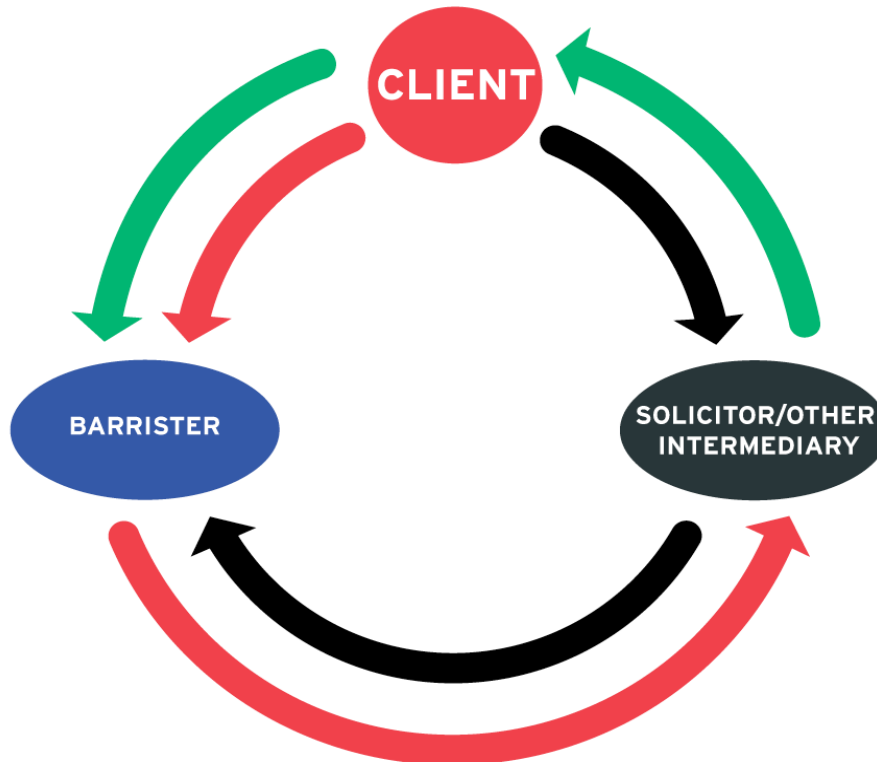


**Figure 2 Traditional Barrister-Client Relationship**

The client (or lay client) seeks assistance from a solicitor who then instructs a barrister if particular kinds of expertise are required, especially advocacy. The primary relationship for the client is with the solicitor. The lack of directness for the client was often felt in court hearings where the barrister might be double-booked, owing to a trial and appeal conflicting for example.

Clients were not permitted to reschedule their cases and therefore would have to hire another barrister at short notice.

With the advent of direct access the lawyer-client relationship has remodelled itself as in Figure 3.



**Figure 3 The New Barrister-Client Relationships**

More dramatically, direct access has created the possibility for barristers' chambers to forge new alliances with related professional groups such as accounting firms, giving rise to specialised groups that focus on niche fields of work with particular brands—whether “white label” or otherwise. Each point in the new relationship becomes a starting place for the initiation of professional relationships.

### **Responses to Changes in Client Access**

The legal community's response to the introduction of direct access has not been one of universal praise. The numbers engaged in direct access work are low but showing a tendency to grow. There are, however, two sides to this issue, namely, supply, i.e., providers, and demand, i.e., consumers/users of legal services.

### **Supply Side**

As much as barristers and solicitors appear to live in a symbiotic relationship, there are tensions built in. For example, both direct access and the use of solicitor-advocates abrogate longstanding modes of working harmoniously. Perceptions of a system such as direct access are important in determining its success.

We attempted to measure how many barristers were engaged in direct access work and determine what categories of work were carried out. The amounts of work done under the public and licensed access schemes are small in proportion to work undertaken via traditional routes. Still, this was not a straightforward task owing to multiple contradictory data sources. We identified three key sources.

*1. Bar Mutual Fund*

Our first source was the Bar Mutual Fund (BMF), which has been collecting these data since 2005. In order to obtain professional indemnity insurance all practising barristers must report to the BMF the proportions of work undertaken in different categories, such as criminal, commercial, family, etc. There are, in all, 28 practice areas covered. In addition two further special categories exist for public access and licensed access work. The BMF statistics for 2005 to 2008 are shown in Table 1.

**Table 1 Bar Mutual Fund Statistics for Amounts of Direct Access Barristers**

<b>Policy Year</b>	<b>Public Access</b>	<b>Licensed Access</b>	<b>Both (P+L)</b>	<b>Total Barristers who returned renewal form</b>
<b>2005</b>	16	71	1	12,060
<b>2006</b>	37	83	3	12,248
<b>2007</b>	51	55	4	12,331
<b>2008</b>	66	40	4	11,981

The figures presented above are unusual for a number of reasons. They do not comport with the numbers of barristers available for such work as recorded by the Bar Council, namely 971 (the numbers of barristers trained and registered on the Bar Council website). Being trained for the work does not necessarily mean that a barrister will engage in it. While the numbers have shown steady but slow growth for public access work, they have declined for licensed access. Those recorded as doing both types of work are remarkably low. Not only are the numbers low, but the proportions of direct access work reported were also very low. For example, one barrister who said he undertook a significant amount of this type of work had never entered more than 5% in the public and licensed categories. From what we could establish this was not unusually low or high.

Two possibilities for the low numbers are that barristers are under-recording their work proportions. The reasons are unknown but should not take account of suspected premium loading as the BMF explicitly does not use the data for this function; so its request for this information should not therefore act as a disincentive to providing information. A second possibility is to do with the design of the BMF renewal form. The form asks about percentages of gross fees received from different areas of practice. The bulk of the form requests this information in a straightforward and direct manner. But when the request for public and licensed access fees information is made it is clumped with international work in a separate part of the form below the main information request. It is possible that some barristers have omitted to

complete this part of the form because they did not see it. The BMF is reviewing the form’s design.

### 2. *Research Survey*

Our second source derives from our survey of barristers undertaking public and licensed access Work in which we asked if they actually undertook work in these areas. See Table 2.

**Table 2 Do You Undertake Public and/or Licensed Access Work?**

Item	Yes	No	Total
Public Access Work	92.4%	7.6%	145
Licensed Access Work	60.0%	40.0%	110

Total responses: 146

These figures are considerably higher than those of the BMF and demonstrate that significant numbers of barristers are engaged in this work.

### 3. *Bar Council Survey*

The third source is derived from an email survey undertaken by the Bar Council which supports the finding from our survey that considerably more public and licensed access work is being done than suggested by the Bar Mutual Fund. Indeed, a small proportion of this group derive 75% or more of their fees from this type of work.

#### *Views of Barristers Undertaking Direct Access Work*

Our research found that a significant number of barristers would like to undertake more public and licensed access work. We should add that the major emphasis was on increasing public access work. This view was reinforced by the views of barristers’ clerks and chambers’ chief executive officers in interviews.

We asked barristers—see Table 3—if they would like to do more public and licensed access work:

**Table 3 Would You Like To Do More or Less or the Same Amounts of Public and Licensed Access Work?**

Item	More	Less	Same	Total
Public Access Work	68.6%	4.4%	27.0%	137
Licensed Access Work	72.1%	1.2%	26.7%	86

Total responses: 139

The responses showed that nearly 69% per cent of barristers surveyed would like to do more public access work, with over 72% wanting to do more licensed access work. The percentages

for those wanting to do less were minuscule by comparison. Yet significant percentages (around 27%) desired no change in work levels.

The areas of law covered by the public and licensed access schemes are as diverse as any other work area, but on the whole the work done under these schemes appears to cluster in certain areas. The key areas are as Table 4 shows:

**Table 4 Areas of Work Under Public and Licensed Access Schemes**

<b>Public Access</b>	<b>Licensed Access</b>
Employment	Same
Commercial	Same
Property	Same
Construction	Same
Contract	Same
Education	Same
Professional Negligence	Same
Insolvency	Same
IT/IP	Same

These areas scored the highest percentages in the survey to barristers. Nevertheless, many other areas were reported including, eg. chancery, agriculture, Police Federation, partnership, and VAT. We should emphasize that these areas of work cover both advisory and contentious matters.

Barristers instructed in licensed access work found that the expertise of professionals and their ability to handle cases personally made licensed access work virtually indistinguishable from solicitor led cases. While the barristers, senior clerks and practice managers we interviewed conceded that there were differences between receiving instructions from a solicitor and from a licensed access client, they did not perceive these differences to be of significance. A senior clerk gave us a typical response:

There are [differences] because obviously solicitors write their instructions in a highly formal way. But...what's the [real] difference? You get a letter. You get a file. You get dividers in the file. You can ask for further information. [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?

Generally speaking barristers found that instructions received from professional clients were “decent” and that any additional work required was not onerous.

In public access work barristers represent litigants in court without being instructed by a solicitor although this type of representation worked best where the documentation was already in place or was not extensive. Barristers had to be satisfied it was not in client’s best interest to use solicitor or other intermediary. The mechanics of public access enabled barristers to work directly for clients and yet place limits on how that work could be carried out. As we mentioned above the range of work being done under public access is diverse and covers both non-contentious and contentious work

Chambers’ directors and clerks reported seeing advantages and opportunities in increasing public and licensed access work. One chambers practice director said, “I’m all for innovative ideas of us approaching direct access clients, unions, insurance companies, corporates.” A senior clerk was also enthusiastic about this area of work:

You want to get the right type of case. On the employment side, if you can get work from local human resources departments of large local firms, things like that where you don’t necessarily need a solicitor. Human resources managers are normally very switched on as to the employment laws and regulations and they can do a lot of the background work to enable a counsel.

And, indeed, enthusiasm was a common theme as the two following chambers chief executives reported. The first said, “We’ve been very open-minded about public access. I’m a great enthusiast about it.” The second believed in having as many barristers as possible in chambers trained to take on public access work:

“Our take as a chambers, our policy, 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.”

Of course not all clerks and chief executives shared this level of enthusiasm. There was also some worry from a number of barristers that taking on more direct access work might lead to tensions with their solicitors and a reduction in work from this traditional source. One practice manager expressed the situation as one of *realpolitik*:

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

A senior clerk argued that there were a number of barristers “who were not prepared to take on instructions on a direct access basis because they felt that in the area of work they specialized in it wouldn’t be good to be seen acting for a client directly if they came up against one of their regular firms on the other side.” Another clerk reported the dire consequences of being seen to be too keen to do direct access work:

Years ago they opened up the rules on insolvency and a lot of barristers who did that work went direct after some of the clients they'd got work from. When the solicitors got wind of that, they completely turned the tap off rather than give the work they were sending to those people. You have to be very careful about biting the hand feeds.

At present the state of knowledge within the legal profession about public and licensed access is such that the majority is not yet prepared to enthuse about these schemes. For them a key issue is to protect areas of work from incursion.

## **Demand Side**

Some corporates 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 organizations that routinely required specific legal services, e.g., insurance companies, property companies, IT companies, and human resources departments. These users were knowledgeable repeat players who tended to know what services they required. We asked users about their use of legal services. The majority initiated contact with lawyers through a solicitor although some had used direct access methods to hire barristers. And those that had used both methods reported that there was no difference in dealing with a solicitor or barrister.

### *1. Licensed Access*

Licensed access holders were enthusiastic about the scheme. Almost all (93%) of our survey respondents stated that for them licensed access 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 barristers they were able retain more control of the case; rather than that control being assumed by a solicitor. Many therefore preferred to essentially run the case themselves bringing the barrister for discrete sections of work.

This enthusiasm for licensed access was further demonstrated by the 68% of respondents who felt that more organisations and public bodies ought to be encouraged to apply for a license. It was matched by equal enthusiasm from barristers (those already engaged in direct access) for undertaking licensed access work. Most, 72%, would like to increase the amount of licensed access work which they do, followed by 21% who are happy for the amount of licensed access work they currently undertake to remain static. Only 1% wanted to see a decrease in this type of work. Moreover, the Bar Council has stated it is keen to encourage more bodies and trade associations to join the scheme.

There were, however, three main difficulties associated with licensed access work. These included the limits on advocacy, lack of knowledge about it, and some difficulties over costs.

### *Advocacy*

Those with licensed access can approach a barrister direct but, on the whole, cannot instruct the barrister to act as an advocate in court as this is not permitted under the Bar's conduct rules. This was most likely due to historical reasons in that when direct professional access, as it was then called, was originally introduced the rules in relation to advocacy were not relaxed. One barrister explained:

I think it's just time lapse. No more. At the time, it was a revolutionary step, when they brought in licensed access, and the rules have just not, I assume, been tidied up to take account of the anomaly with public access. It's got to be looked at, in my simple-minded view.

This is an anomalous situation as under public access there is no equivalent exclusion against undertaking advocacy work. As a consequence, confusion or at least some anxiety among 'direct access' barristers has resulted. One chambers' chief executive described the situation:

...a question that's come up quite a few times with licensed access, is specifically in relation to hearings, where another party will raise the issue of precisely how the counsel are instructed and on what basis. And you immediately get the panicked phone call from your barrister saying, which basis am I instructed on?

Ironing out this anomaly is a matter currently under consideration by the Bar Standards Board.

#### Lack of Knowledge about Licensed Access

Licensed access is readily promoted to members of organisations automatically granted this access, and they have been aware of the scheme and its benefits. Among other potential applicants for licensed access (license type two) there seems to be a lack of awareness of the scheme. However, our survey indicated that potential users lacked any real knowledge about the scheme. When respondents were asked how familiar they were with licensed access, 50% were unfamiliar, a further 33% had no idea what the scheme was and the remainder (17%) claimed some slight familiarity with its existence. This is a point confirmed by surveys conducted by Hardwike Building chambers (2008), which found a lack of knowledge about how to instruct barristers and also about barristers' fees and specialisms.

#### Cost Effectiveness for Clients

Clearly in comparing the cost effectiveness of engaging a solicitor and a barrister or solely engaging a barrister, much will depend on their hourly charge rates. Nevertheless, in some cases when two lawyers are involved in an action there can be duplication of work. Moreover, licensed access holders are capable of undertaking much of the administrative work typically done by the solicitor. Our survey of licensed access holders found that 89% of respondents agreed with the statement that "instructing a barrister directly is better value for money than going through a solicitor."

The cost advantages of using barristers without a solicitor have been judicially recognised. In the recent Court of Appeal case, *Agassi v Robinson* [2005], the tennis star, Andre Agassi, employed tax experts at Tenon Media. In their capacity as members of the Chartered Institute of Taxation they had license to instruct counsel under the license access scheme, type one). During the case, the Senior Costs Judge accepted that in using the licensed access scheme the costs were one-third what they would have been had solicitors been instructed.

Though licensed access 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. The Court of Appeal ruled that HM Revenue & Customs did not

have to pay Tenon’s costs as Tenon were neither solicitors nor authorised litigators. Ironically, therefore, despite the Cost Judge’s acknowledgment, had Tenon engaged solicitors, “the £60,000 they would have charged would have been completely recoverable.” (Julian Hedley, Office Managing Director for Tenon, see McKinnon: 2005).

## 2. *Public Access*

### The Use of Public Access

The mechanics of public access both enable barristers to work directly for clients and yet place limits on how that work can be carried out. As we mentioned above the range of work being done under public access is diverse. It covers both non-contentious and contentious work. We asked users what they used their barristers for. Table 5 provides the main categories.

**Table 5 What Did You Use Your Barristers For?**

Item	%
Litigation work	77%
Expert work	54%
Drawing up agreements	8%
Opinions	8%
Tax opinion	8%

Litigation is clearly ahead of other types but this includes all types of disputing from alternative dispute resolution through tribunal respresentation to advocacy in court. Again the range is wide.

It is not our purpose to critique the Code of Conduct in detail but rather to comment on aspects of it that were mentioned during the research. For example, the main concern raised by barristers in our survey was for the Bar Council to remove its restriction on communicating with the opposing party, or third parties, by writing letters on chambers’ notepaper. This was considered unjustified and unduly restrictive. Some also commented that it could have a negative effect by undermining the strength of the client’s case, since the letter would come from the client direct, even though it had been drafted by the barrister, it would lack the imprimatur of the barrister and chambers. Some even considered the rule as antithetical to the interests of the consumer. There were criticisms on the exclusion of family, criminal and immigration from the public access arena. It was not clear what the grounds for this exclusion were. The Bar Standards Board is likely to change this restriction.

No barrister we talked to wanted to change the rules to allow barristers to become functional equivalents to solicitors. They were content with their present roles. It was mentioned that the capacity to employ other barristers would assist in doing public access work. Nevertheless, deciding whether to refer a client to a solicitor or legal intermediary appeared to take care of case

handling issues when they arose. Indeed, some barristers saw this as a means of developing further professional relationships that could engender more work, which was the new type of professional relationship envisaged in Figure 3.

### Training

In order to undertake public access work barristers must take a short course on the topic. It covers such basics as file handling, client care letters and anti-money laundering rules. In addition to barristers a substantial number of barristers' clerks have taken the course. Generally we received positive responses about the training. And there was overall satisfaction with the three-year early career restriction on taking up public access work.

### Types of Work Suitable for Public Access

Most types of work appeared suitable for public access. One particular area mentioned to us was the ability of counsel to give "red light/green light" opinions on cases. This could be done far quicker and for less cost than by a solicitor. An example of the speed of reaction by barristers is given by Jane Lambert in her blog "IPYorkshire" (2008). In a trademark matter the barrister was able to examine the case papers and give an opinion within a few hours and refer the client to appropriate patent and trademark agents. She believed it necessary that the response the client needed to make should come under the letterhead of a professional rather than under his own hand.

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

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

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 specialize more.

### Public knowledge of the Public Access

Public knowledge of the public access Scheme has on the whole been limited. It is clear that front line range of providers of legal services to the general community is not perceived to include barristers unless they are employed by a company or law firm. Barristers have for so long portrayed themselves as a referral profession that changing the image has become difficult.

Rather than depend on the Bar Council as a marketing agency for public access barristers a number of general and specific websites have sprung up to expand this type of work, e.g., [www.findabarrister.co.uk](http://www.findabarrister.co.uk) provides a search facility for public access barristers by area of law and geographical region.<sup>2</sup> Unlike solicitors barristers do not operate with offices in the High Street clearly labelled with easy access. Chambers as a whole lack the “retail” function found in solicitors’ firms. They are clustered in particular areas of cities and towns without regard to maintaining proximity to clients. From the point of direct access this makes finding barristers difficult for clients. For this reason barristers have begun to use web marketing to overcome physical constraints. Thus some chambers have set up websites specifically for public access work, e.g., [www.barristersdirect.co.uk](http://www.barristersdirect.co.uk), [farnhamchambers.co.uk](http://farnhamchambers.co.uk), and [www.hardwickebuilding.co.uk](http://www.hardwickebuilding.co.uk) in southern England and [www.rougemontdirect.co.uk](http://www.rougemontdirect.co.uk) in the south west of England. And some barristers have developed their own websites and blogs as a way of informing potential clients of their services. For example, [ipyorkshire.blogspot.com](http://ipyorkshire.blogspot.com) directs itself at the IP industry in the north-east, as does [nipclaw.blogspot.com](http://nipclaw.blogspot.com). Others have taken a more general approach such as [www.windsorchambers.com](http://www.windsorchambers.com) and [www.anisrahmanchambers.co.uk](http://www.anisrahmanchambers.co.uk) in east London.

Moreover legal intermediary companies are now providing services to clients by “packaging” lawyers’ services for them. These often involve “barristers-direct” services without the intermediation of solicitors. And in the case of small and medium enterprises (SME), a number of referral bodies that give information and advice already exist. Organizations such as the Federation of Small Businesses, Chambers of Commerce, and the Institute of Directors have various kinds of help lines which although they may include barristers are usually connected to and funded by law firms. Barristers’ chambers are generally absent from this market.

When we asked about usage of barristers’ services under public access, the answers indicated fairly low use. Other providers were more heavily subscribed than barristers. What is clear from our interviews is that business users are more likely to be aware of using barristers directly than individual members of the public. In part this is due to marketing efforts of such barristers and it does appear that marketing is necessary and effective, and barristers’ networking capabilities—being in touch with industry sources.

Both the Hardwicke Building surveys (2007; 2008) and ours indicated that the public perceives difficulties in dealing with the Bar, which included organizational difficulties, perceptions of barristers being out of touch with commercial realities, and unclear fee structures. When asked about prejudices surrounding barristers and their chambers users were most critical about the confusing nature of chambers and the clerks and barrister arrangement and also the view that barristers were focussed on litigation. Yet when asked about perceived benefits of instructing barristers certain features stood out. “Better value for money” was the strongest benefit. The Hardwicke Building survey also confirmed this finding. Interestingly, both questions indicated that barristers were not remote and unapproachable as was often portrayed. Indeed, the

opposite. One effect of public access means that the client actually deals with the lawyer who will be doing the case. In our interviews with users, it was emphasized that when instructing barristers one communicated with the barrister him or herself, whereas with solicitors' firms much of the work was done by associates or trainees rather than partners. Thus the combination of seniority, expertise, service, and value for money was most effective in creating a positive image and effect in clients' minds.

When a barrister who is right for the task in hand has been identified, the process of instructing the barrister appears to move smoothly. In our interviews it was clear that both barristers and clerks had initiated procedures to help public access clients by asking for summaries of the legal problem so that an initial diagnosis could be made. Some chambers have put these on their websites; others respond to emails or telephone enquiries.

Initial diagnoses occur quickly with notification of estimated costs. Barristers decide if the matter is worth taking on or not and, if it is, the client is issued with the client care letter and the matter proceeds. One question that has to be answered is whether or not the client is perceived as capable of "conducting the litigation". In the case of professional or corporate clients it is expected not to be a problem unless the matter is complex. In the case of the public the answer is less simple. The primary objective is to act "in the best interests of the client", but with the proviso of avoiding duplication of work if possible. The answer may mean recommending a solicitor or other legal services provider to act in the matter. This has enabled barristers to establish referral networks of their own (see Figure 3). The usual direction in the provision of legal services is client to solicitor to barrister. Public access work allows for the reversal of this process whereby the barrister effectively refers the client to a solicitor. Indeed, one client was reported to say: "Thank you for placing me in exceptionally capable hands with [XXX solicitor]."

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"
- "good to deal with the main person on the case"
- "respect for budgets"
- "very knowledgeable"
- "thoroughness and attention to detail"
- "good communication"

And a practice manager summarized it thus, "And we are probably, no always, cheaper than the solicitors." Or as was articulated clearly by a senior clerk:

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.

But there is a substantial fear among barristers and clerks noted in our interviews of dealing with "Joe Public". One senior clerk said, "Just the thought of someone just walking off the street and saying...no, keep it the other side of the solicitor, please." Another remarked simply, "Absolutely dread the thought of it." Barristers liked the barrier provided by the solicitor between them and the client so they could concentrate on the case without having to be concerned with the "flotsam and jetsam" that accompanies it. To counter this effect a senior clerk stated, "If it's public access work invariably, not every time but invariably, we'll ask for the money upfront because we don't want to be in the position of having to sue for our fees." This was epitomized by a clerk thus:

I know it sounds awful but dealing with lay people is a nightmare and I know that from working the Court Service. It will bring enormous problems but if it's a change that we have to take on board then I would take in on board. Bring it on.

Some even feared it as a step towards a fused profession.

## Conclusion

Modernity unsettles professional certainties. For four centuries the Bar has enjoyed many privileges (Prest 1986) but there has been a hollowing out of its professional core as its reserved areas have come under threat. The gradual erosion of the referral aspects of barristers' relationships with solicitors and others exposes barristers to the contingencies of the market in a raw form not usually experienced. The rising intervention of the state into the lawyer-client relationship through the control of the legal aid budget is accelerating these moves. These are moves to bureaucratic control and potential proletarianization (Larson 1977: 232). The Bar is losing its grip on its professional project. Or is it? Muzio and Ackroyd (2008: 49) argue we are not observing the end of professionalism but rather various defensive manoeuvres by professionals to maintain their privileges.

How does the rise in direct access work fit with the changes in the Bar? In part it has to do with what Boon and Levin (2008: 77) described as "The legal services market has a multitude of sites in which different norms proliferate." Barristers occupy many positions outside traditional private practice. They are in business, government, the Crown Prosecution Service, and even inside solicitors' firms. And when we add to the mix an increasing diversity of professional members in gender and ethnicity, common cultural values change and may not hold. This is reinforced by the division in work at the Bar between those who largely undertake publicly aided work and those who act for private clients. Barristers paid by the state operate under considerable control in terms of what they can do and what they can charge for their labour. No equivalent constraints fall on private client practitioners: they function within the market. Further controls are imposed by chambers arrangements which are becoming more corporate in focus. Chambers are increasingly specialized in their practice areas. They target potential lateral hires, including groups of practitioners, and establish business targets, all of which compromises the ethic of individuality espoused in the Bar.

Although the fusion of barristers and solicitors is unlikely to happen, the introduction of Legal Disciplinary Partnerships in 2009 has opened up the organization possibility for the conjoining of the two. And when alternative business structures make themselves known, many conventional arrangements might begin to fail. Alternative business structures will seriously affect numbers and structures within the legal profession and increase the employed section of the legal profession. We suggested that up to a thousand law firms could fail in competition with supermarkets and other legal service providers. Barristers too will be affected.

With these eventualities direct access work grants the possibility of holding onto traditional values and procedures. Prest (1986) is clear that the settling of the referral structure of the Bar did not come into being until the 19<sup>th</sup> century, so that an earlier paradigm of professionalism for the Bar encompassed direct relations with clients. Attorneys and solicitors stepped in when geography made it difficult for clients. Direct access recaptures these pre-modern ideals of working. But perhaps of more significance is that barristers can situate themselves more centrally in the market through doing direct access work. Their potential for control over their work and professional relationships is enhanced.

## References

- Abel, R (1988) *The Legal Profession of England and Wales* (Oxford, Blackwell).
- (2003) *English Lawyers Between Market and State: The Politics of Professionalism* (Oxford, Oxford University Press).
- Abbot, A (1988) *The System of Professions: An Essay on the Division of Expert Labor* (Chicago, University of Chicago Press).
- Bar Council (undated) "The Grant of Litigator Rights to Tax Professionals Under s.28(2)(c) Courts and Legal Services Act 1990", Paper from the General Council of the Bar.
- Boon, A and Levin, J (2008) *The Ethics and Conduct of Lawyers in England and Wales* 2<sup>nd</sup> ed (Oxford, Hart Publishing).
- Clementi, Sir David (2004) Review of the Regulatory Framework for Legal Services in England and Wales: Final Report <<http://www.legal-services-review.org.uk/content/report/index.htm>>.
- Flood, J (2008) "Will There Be Fallout from Clementi? The Global Repercussions for the Legal Profession after the UK Legal Services Act 2007"  
<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1128398](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1128398)>.
- (2009) "Ambiguous Allegiances in the Lawyer-Client Relationship: The Case of Bankers and Lawyers" <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=962725](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=962725)>.
- Hardwicke Building (2007) *Direct Access to Barristers: A Survey of Market Views and Needs Feb 2007* <<http://www.hardwickebuilding.co.uk/reports/HardwickeDirectAccessReportFeb2007.pdf>>.
- Hardwicke Building (2008) *Public Access to Barristers: A Survey of Market Views and Needs June 2008*.
- Herman, Michael (2008) "Legal Services Set for 'Big Bang' as Buyout Fund Targets Law Firms" *The Times* March 6 <<http://business.timesonline.co.uk/tol/business/law/article3497281.ece>>.
- Lambert, J (2008) <<http://ipyorkshire.blogspot.com/2008/09/trade-marks-no-names-no-pack-drill-but.html>>.
- Larson, M (1977) *The Rise of Professionalism: A Sociological Analysis* (Berkeley, University of California Press).
- McKinnon, M (2005) "Agassi Case Smashes Bar Access" *The Law Gazette* 12<sup>th</sup> August.
- Muzio, D and Ackroyd, S (2008) "Changes in the Legal Profession: Professional Agency and the Legal Labour Process" in Muzio, D, Ackroyd, S & Chanlat, J-F (eds) *Redirections in the Study of Expert Labour: Established Professions and New Expert Occupations* (Basingstoke, Palgrave Macmillan).
- Prest, W (1986) *The Rise of the Barristers: A Social History of the English Bar 1590-1640* (Oxford, Clarendon Press).

## Cases

*Agassi v S Robinson (HM Inspector of Taxes)* [2005] EWCA Civ 1507, [2006] 1 WLR 2126.

## Legislation

Legal Services Act 2007 <[http://www.opsi.gov.uk/acts/acts2007/ukpga\\_20070029\\_en\\_1](http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_1)>.

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<sup>2</sup> Whether the Bar Council should actively market barristers doing public access work or merely passively list them on its website, as it currently does, aroused enormous controversy among barristers surveyed and interviewed. The majority felt the Bar Council was not doing enough to assist public access barristers, either in financial or practical terms. A minority preferred to exclude Bar Council activities from marketing. The Bar Council itself denied that its role had anything to do with marketing individual barristers' practices.