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Publisher Routledge

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## International Journal of the Legal Profession

Publication details, including instructions for authors and subscription information:

<http://www.informaworld.com/smpp/title~content=t713426078>

### Straight there, no detours: direct access to barristers

John Flood<sup>a</sup>; Avis Whyte<sup>a</sup>

<sup>a</sup> School of Law, University of Westminster, London, UK

Online publication date: 05 July 2010

**To cite this Article** Flood, John and Whyte, Avis(2009) 'Straight there, no detours: direct access to barristers', International Journal of the Legal Profession, 16: 2, 131 – 152

**To link to this Article:** DOI: 10.1080/09695951003588956

**URL:** <http://dx.doi.org/10.1080/09695951003588956>

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## Straight there, no detours: direct access to barristers

JOHN FLOOD & AVIS WHYTE

*University of Westminster, School of Law, London, UK*

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**ABSTRACT** *Modernity unsettles professional certainties. For centuries the Bar has enjoyed many privileges 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. The Bar is losing its grip on its professional project. Or is it? One argument is that we are not observing the end of professionalism but rather various defensive manoeuvres by professionals to maintain their privileges.*

*Direct access by clients to barristers is one such response in a differentiated market for legal services. This has had a mixed reaction among barristers and barristers' clerks. Some see it as the route to a modern diverse profession while others see it as potentially harming these traditional relationships between barrister and solicitor that have been built up over many years. Among solicitors this has been met by their own moves to become advocates in the higher courts.*

*These changes are examined in the light of further changes anticipated by the Legal Services Act 2007 with the introduction of alternative business structures. These have the potential to affect traditional modes of practice with a consequent loss to barristers' autonomy.*

### Introduction

The Clementi review of legal services (2004) and the resultant Legal Services Act 2007, have 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). Professions have always had to adapt to change. Abbott (1988, p. 92) tells of the death of railway surgeons – “disappeared without a trace” – in the early twentieth century, but the legal

Address for correspondence: Professor John Flood, University of Westminster, School of Law, 4 Little Titchfield Street, London W1W 7UW, UK. E-mail: john@johnflood.com

profession has shown strength in the defence of its professional project (Larson, 1977; Abel, 1988, 2003).

The professional project has now taken on a new urgency as the introduction of alternative business structures (ABSs) appears on the horizon for 2011 (Flood, 2008).<sup>1</sup> Traditional suppliers of legal services will be threatened. The legal trade press have speculated that more than 1,000 law firms, including chambers, 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. Both moves have been analysed by the Office of Fair Trading (2001) and Clementi and found wanting. Despite the legal profession's resistance, it is finding it increasingly difficult to maintain control over the pace of change: consumerism and free markets have become the dominant paradigm.

This article examines the Bar's most recent evocation of direct non-solicitor access to the Bar, which covers two types, namely licensed access and public access. Each is different in form and delivery. First, we sketch the background to direct access and contrast it to the 'conventional' referral route for clients. Second, we look at both users' and providers' experiences of direct access. Finally we analyse the history and consequences of this approach for the Bar and conclude that with the opening up of the legal market, the professional core of barristers' work and relations is gradually being eroded. However, the opportunities presented, for instance, by legal disciplinary partnerships and ABSs, mean there are new avenues for the barristers' profession to pursue and direct access is one way of doing this although it is one fraught with danger for the Bar.<sup>2</sup>

## Methods

We employed three main methods of enquiry for this project. 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 plus postings on blogs and websites. We also included 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. Our dataset consisted of 55 interviews, of which 11 we characterised as 'expert interviews' (specifically about direct access) and 44 other related interviews (that included discussions of direct access). Interviewees were gathered primarily through snowball sampling<sup>3</sup> 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 sent to 800 barristers but the response rates were low at around 19%.<sup>4</sup> For users of legal services we sampled across three industry sectors: financial services, property and construction, and IT services from within the UK Standard Industrial Classification of Economic Activities (SIC). Unfortunately, at least half of the contact information was out of date and the response rate for this group was very poor at 5%.<sup>5</sup> It would be fair to say that on the whole the statistical data were unreliable for analytical purposes, but they did provide some insights for illustrative purposes.

### Direct access – background

Up to the nineteenth century, barristers received instructions directly from clients as well as through solicitors. The Bar Council presents its history of rights of audience and the development of the referral as follows. When solicitors became more prevalent, judges argued it would be in the litigants' interests if solicitors were used more frequently. "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" (Bar Council, undated). In 1888 a rule against direct access for contentious business was given effect. This was followed, in 1955, by a similar rule for non-contentious business (Bar Council, undated). Both Larson (1977, pp. 85–6) and Abbott (1988, p. 247) show that solicitors and barristers were engaged in jurisdictional conflicts over a number of professional activities, including conveyancing and advocacy in courts. Solicitors, as Sugarman (1996, p. 104) points out, were arguing and lobbying for more rights but had the might of the Bar's protectors in government lined up against them. By evolving into a referral profession and maintaining control of rights of audience in the higher and some lower courts, the Bar was able to create the semblance of a priesthood of the law (Abbott, 1981; Hollander, 1964).

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. Following Clementi, the public access scheme was introduced (6 July 2004), which enabled any person or any organisation to instruct barristers directly. The diagrammatic chronology of the Bar's access changes is shown in Figure 1.

Thus 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.

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.

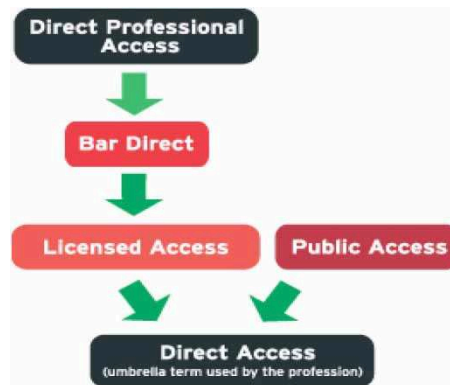


Figure 1. *Chronology of direct access*



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.<sup>6</sup>

*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 and Advice Agencies through to members of the Institute of Professional Will Writers. 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.<sup>7</sup>

#### *Public access*

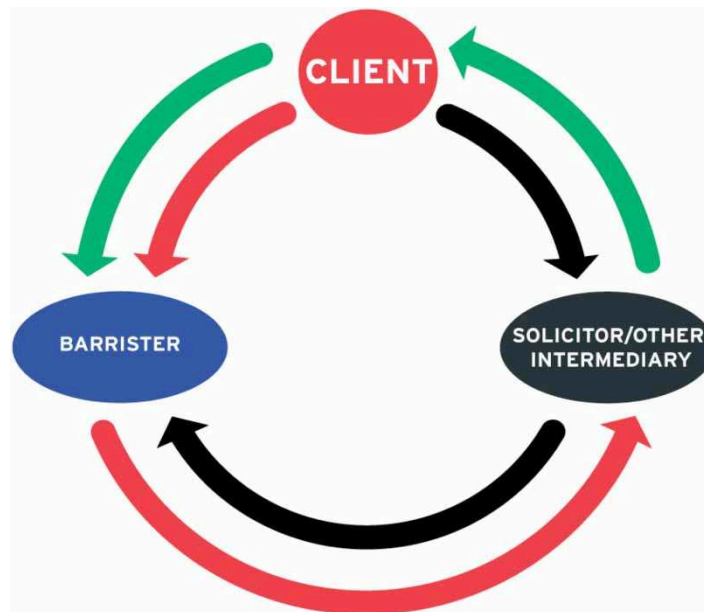
Under public access barristers can be contacted directly by any person or any organisation and can represent these litigants in court without first being instructed by a solicitor. A barrister must be satisfied that it is not in the lay client's best interest to use a solicitor or other intermediary. 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 public access arena (see further below). 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. Generally we received positive responses about the training and there was overall satisfaction with the three-year early career. There are currently 971 barristers trained and registered to do public access work and who appear on the Bar Council website.

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

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' (generic) or otherwise. Each point in the new



**Figure 3.** *The new barrister–client relationships*

relationship becomes a starting place for the initiation of professional relationships. So, for instance, a licensed access client may directly contact a barrister who in turn recommends that the client contact a solicitor as the matter involves the conduct of advocacy (which, as noted above, is currently not permitted under the licensed access rules). Or, under public access, a client or barrister could bring in a solicitor or other intermediary to deal with discrete aspects of the matter. On balance, licensed access and public access give rise to new relationships and allow for extension of professional networks.

### **Responses to changes in client access**

The legal community's response to the introduction of direct access has not been one of universal praise. There are, however, two sides to this issue, namely, supply (providers) and demand (consumers/users of legal services).

#### *Supply side*

The amounts of work done under the public and licensed access schemes are small in proportion to work undertaken via traditional routes. We attempted to measure how many barristers were engaged in direct access work and to determine what categories of work were carried out. This was not a straightforward task owing to multiple contradictory data sources. We identified three key sources; the Bar Mutual Fund (BMF), our research survey and the Bar Council survey.

The BMF has been collecting these data since 2005. In order to obtain professional indemnity insurance all practising barristers must self-report to the BMF the percentages 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 2005–08 are shown in Table 1. The numbers presented are of barristers: thus, for example, in 2005 out of 12,060 barristers, 16 reported doing only public access work in addition to other categories of work, 71 reported doing only licensed access work, and one barrister reported doing both.

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 percentage amounts of direct access work actually recorded on BMF forms were reported as low.

One possibility for the low numbers is that barristers are under-recording their work proportions. For example, one senior barrister said he undertook a significant amount of this type of work but he too had never entered more than 5% in the public and licensed categories. From what we could establish this was not unusually low or high. The reasons for this 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 simply because they did not see it (the BMF is reviewing the form's design).

The second source derives from our research survey of barristers willing and able to undertake public and licensed access in which we asked if they *actually* undertook

**Table 1.** Bar Mutual Fund statistics for numbers of barristers doing direct access work

Policy year	Public access	Licensed access	Both (P + L)	Total barristers who returned renewal form
2005	16	71	1	12,060
2006	37	83	3	12,248
2007	51	55	4	12,331
2008	66	40	4	11,981



**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

*Note:* Total responses: 146 (NB: Barrister respondents could answer in relation to public or licensed access work or both, hence different totals).

work in these areas (see Table 2). These figures are considerably higher than those of the BMF and demonstrate that significant numbers of barristers are engaged in this work.

The third source is derived from an email survey undertaken by the Bar Council (response rate: 8.3%) which supports the finding from our survey that considerably more public and licensed access work is being done than suggested by the BMF.<sup>8</sup> Indeed, a small proportion, 4.7%, of this group derived 70% or more of their fees from this type of work.

*Views of barristers undertaking direct access work.* 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 asked barristers if they would like to do more public and licensed access work and found that a significant number would be in favour. This view was reinforced by the views of barristers' clerks and chambers' chief executive officers in interviews. The responses showed (see Table 3) that nearly 69% 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 direct access work levels.

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,

**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

*Note:* Total responses: 139 (NB: Barrister respondents could answer in relation to public or licensed access work or both, hence different totals).

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 a solicitor or other intermediary. We were unable to discover how often this occurred. One other point worth mentioning in this context is that direct access work is considered exempt from the "cab-rank rule" (Clementi, 2004, p. 131).

Chambers' directors and clerks<sup>9</sup> 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 the 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 specialised 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 that 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 organisations 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 clients 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 of our user respondents stated that for them licensed access worked well.<sup>10</sup> Excluding costs, other reasons identified for this were; the ability to take advantage of the specialist knowledge at the Bar and the ability to retain more control over the case, rather than that control being assumed by a solicitor. Many therefore preferred essentially, to run the case themselves bringing the barrister in for discrete sections of work.

This enthusiasm for licensed access was further demonstrated by the majority 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 would have liked to increase the amount of licensed access work which they undertook, followed by a minority who were happy for the amount of licensed access work they currently undertake to remain static. Only a negligible number 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; the limits on advocacy, lack of knowledge about it, and some difficulties over costs.

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 is 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. Direct professional access came into existence in 1990, just before solicitor-advocates were given rights of audience in the higher courts<sup>11</sup> and before litigants in person numbers began rising substantially, so the DPA rules accommodated then current modes of working. By the time public access work was introduced these changes were in place, but the DPA rules were never altered to take account of them. Under the public access rules, which were drafted within a more liberal regime, there is no equivalent exclusion against undertaking advocacy work. 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, is my simple-minded view.

As a consequence of this anomaly, confusion or at least some anxiety among 'direct access' barristers has resulted. One chamber's 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 inconsistency is a matter currently under consideration by the Bar Standards Board. Where this anomaly creates problems, the barrister recasts the client as a public access client and therefore overcomes the barrier inherent in licensed access rules.

Licensed access is readily promoted to members of organisations automatically granted this right, and they have long been aware of the scheme and its benefits. Among other potential applicants for licensed access (the second category of licence) our survey indicated a lack of awareness of and knowledge about the scheme. When users were asked how familiar they were with licensed access, half were unfamiliar, a further third had no idea what the scheme was and the remainder

claimed some slight familiarity with its existence. This is a point confirmed by surveys conducted by Hardwicke Building chambers (2007, 2008), which found a lack of knowledge about how to instruct barristers and also about barristers' fees and specialisms.<sup>12</sup>

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,<sup>13</sup> employed tax experts at Tenon Media. In their capacity as members of the Chartered Institute of Taxation, Tenon had license to instruct counsel under the first category of the licensed access scheme. 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 *Agassi*. 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; Boon & Levin, 2008, p. 27).

2. *Public access.* 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. For most, litigation was clearly ahead of other types of use but this includes all types of disputing from alternative dispute resolution through tribunal representation to advocacy in court. The next substantive category was expert witness and small proportions of agreement drafting and opinion writing.<sup>14</sup>

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, which effectively excludes most legal

aid work.<sup>15</sup> It was not clear what the grounds for this exclusion were. The BSB 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.<sup>16</sup> Although some have perceived this behaviour as professionals furthering their own interests at the expense of the client, other 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.

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' (Lambert, 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 letter head of a professional rather than under the client's own hand.

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.

As mentioned, the main caveat entered by our respondents was that they did not want to become the functional equivalent of solicitors. From this perspective, they saw the expansion of their work as becoming focussed on certain areas and specific issues within those areas. Rather than becoming general practice lawyers, they preferred to specialise more.

Public knowledge of the public access scheme has, on the whole, been limited. It is clear that the 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>17</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 although a number of chambers have opened branches in different towns in order to capture a greater range of 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.<sup>18</sup> 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. Organisations 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 the 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. Much of what barristers appear to do is informal networking within their local legal communities and while it may be effective it lacks the sustained marketing drives that solicitors' firms undertake.

Both the Hardwicke Building surveys (2007, 2008) and ours indicated that the public perceives difficulties in dealing with the Bar, which included organisational difficulties, perceptions of barristers being out of touch with commercial realities, and unclear fee structures.<sup>19</sup> 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 surveys 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 would be running the case. In our interviews with users, it was emphasised 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.<sup>20</sup> 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 above). The usual direction in the provision of legal services is client to solicitor to barrister (see Figure 2 above). 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”; and
- “good communication”.

And a practice manager summarised it thus: “And we are probably, not 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 (cf. Abbott, 1981). 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 epitomised 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 barristers and clerks even feared it as a step towards a fused profession, however unlikely that will be.

### Revisiting the history of change

Historically the move towards direct access has come about because of the regulatory pressures on the profession. The legal profession has generally been successful in holding onto the professional standard of self-regulation, albeit with some oversight from the state. Yet in the Thatcher period and the following New Labour administrations, the drive has been towards a new accountability and responsibility with an increasing diminution of self-control (Sommerlad, 1995; Hanlon, 1999).

Thatcher's Green Papers drew howls of frenzy from the Bar pushing it to take out full page advertisements drafted by Saatchi & Saatchi in *The Times* (Flood, 1995; Abel, 2003). One effect was the opening up of the conveyancing market. This was followed up by the Lord Chancellor's Advisory Committee on Legal Education and Conduct approving and promoting the opening up of higher court advocacy to solicitors (Boon & Flood, 1999; Kerridge & Davis, 1999). This has raised a series of debates about quality and cost of legal services provided by 'alternative sources' to the norm. Lawyers were watching as the state started to reconfigure their 'traditional' boundaries and there was little they could do to constrain it. Moreover, lawyers had been one of the last holdouts against professional liberalisation and modernisation in the sense that university academics and doctors had to tackle. Their position in government helped shore up their protective barriers.

Two sets of circumstances began to increase the difficulties for lawyers in maintaining this position. Globally, there were drives through international institutions such as the General Agreement on Trade in Services to liberalise cross-border trade in services, which chimed with a rise in anti-competition manoeuvres by governments and regional power blocs such as the European Community. There was also a rise in complaints against lawyers which was not being cleared up as quickly as government would like. However, for the large City law firms none of this was of significant consequence as they operated in a liberalised economy and had systems in place to deal with complaints from their sophisticated clientele.

Nevertheless, the Office of Fair Trading (OFT) undertook its investigation into whether restrictive practices were distorting professional competition. This was promoted by the UK Treasury and included the professions of architects, lawyers, and accountants. The OFT focused on three themes: restrictions on entry, restrictions on conduct, and restrictions on methods of supply, which included aspects of price competition, advertising, and types of business organisations through which professions deliver their services (OFT, 2001, 2002). By the time Clementi and the Legal Services Act had been introduced, "the logic of the market, with its celebration of flexibility,

transparency and ‘boundarylessness’, certainly [seemed] inimical to the boundary work central to the making of professions” (Fournier, 2000, p. 84). For the Bar, taking steps to direct access was a means of coping with the potential of boundarylessness while attempting to appear to retain some form of limits around its normal fields of practice.

As boundaries fade, the consequences for those within them are not always predictable. In Boon and Flood’s (1999) study of solicitor-advocates it is apparent that despite the opening up of this terrain solicitors were in no rush to colonise it. Indeed the solicitors interviewed and surveyed were reluctant to take on extra challenges when their original set posed enough difficulties. Moreover, they saw value to them and consumers in the division of labour between barristers and solicitors, and cost savings. Similarly as barristers have moved into the areas of licensed and public access progress has been cautious and slow. For most barristers in practice there is a strong preference for remaining a referral profession with the solicitor mediating between them and the client. The situation thus becomes, as Abbott phrases it, a settlement by division of labour (1988, pp. 73–4). Whether it can be maintained is unclear and the reforms prefigured in the Legal Services Act may give rise to radically new settlements.

### 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; moves towards bureaucratic control and *potential* proletarianisation (Larson, 1977, p. 232). In Larson’s terms this is coming about through increasing specialisation and fragmentation with the threat of “skill obsolescence” and erosion of market value (1977, p. 234). The Bar is losing its grip on its professional project. Or is it? Muzio and Ackroyd (2008, p. 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 the point Boon and Levin (2008, p. 77) make that “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 bureaucratic 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 specialised 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.

Yet despite these changes, the Office of Fair Trading (2001, pp. 76–7) identified the restrictions on direct access as a hindrance to clients' interests and barristers' freedom of practice. It argued that there should be no restrictions imposed by the Bar but that barristers should be able to choose whether to be referral professionals or not. Clementi (2004) reinforced these views. The problem with the present structure of direct access is that it places barristers in an irreconcilable situation. They have the appearance of freedom of practice with the reality of restrictions on how that practice can be conducted. The matter of settlement by division of labour becomes complicated by regulatory constraints which hinder free practice. Such a settlement is fragile and prone to collapse (Abbott, 1988, p. 74). It is not a situation that can remain stable; and from the perspective of consumer interest, as promoted by the OFT and Clementi, the situation cannot endure as a necessary restrictive practice even from the perspective of the public interest as advocated by 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 organisational possibility for the conjoining of the two;<sup>21</sup> and when alternative business structures make themselves known, many conventional arrangements might begin to fail. ABSs will seriously affect numbers and structures within the legal profession and increase the employed section of the legal profession. We suggested that up to 1,000 law firms could fail in competition with supermarkets and other legal service providers. Barristers too will be affected.

It is worth emphasising that despite the Bar's success at resisting change, or rather imposing its own velocity on the rate of change, it may find that it will become less powerful in the future. When the Thatcher government tried to control the legal profession through its set of green papers, the Bar challenged the government powerfully as mentioned above. If we compare the scale of resistance to the Legal Services Act 2007 we find the Bar's response has been quite muted. Why is this? In part the Bar relied on its usual allies and rhetorical skills. Moreover, the Bar believed that the changes embodied in the act would not affect it. The Bar believed it could appeal to 'public interest' as the determining factor in this battle, but by this time public interest no longer possessed the strength of past times. It had been usurped by more modern demands for 'consumer interest' and 'freedom of competition'. In effect, the Bar's hand had been trumped. Yet the Bar cannot remain aloof nor will it be permitted so to do. Elements in the Bar are ready to embrace the ideal and the actual of alternative business structures. If the Bar Standards Board and the Bar Council oppose change then the new regulator will likely take a strong line and impose change from above.

With these eventualities, direct access work grants a possibility of holding onto traditional values and procedures.<sup>22</sup> Prest (1986) is clear that the settling of the referral structure of the Bar did not come into being until the nineteenth 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 yet fragile.

### Acknowledgements

This article is based on research funded by the Bar Council. We are grateful for that funding and for the valuable research assistance the Council provided by giving us access to a range of documents, people, and by giving us feedback. We thank the barristers, solicitors, barristers' clerks, chief executives, practice managers, and others who allowed us to interview and survey them. The views and interpretations expressed in this article are those of the authors alone. We are also grateful for Andy Boon's helpful comments and those of the two anonymous reviewers, and to Seema Kandelia for ensuring the manuscript was presentable.

### Notes

- [1] The Legal Services Board and the Solicitors Regulatory Authority both anticipate the first ABS licences to be granted in 2011; see the SRA consultation at [www.sra.org.uk/consultations](http://www.sra.org.uk/consultations) and the LSB discussion paper, *Wider Access, Better Value, Strong Protection*, available at: [http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/2009/pdf/140509.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/2009/pdf/140509.pdf)
- [2] One possible outcome of the Bar's move into direct access work is a rise in the scope of access to justice by the public. More avenues of access ought to be beneficial but that is open to question. And as it is another question; it is not one broached in this article.
- [3] There is no list of barristers undertaking licensed access and though one can ascertain the number of barristers registered to do public access work there is no means of ascertaining who *actually* does this work and there is no obligation on barristers to appear in the Public Access Directory. Therefore, snowballing was used as a practical means of best identifying and contacting those at the vanguard of direct access work, hence experts were used to identify other experts. Our 'sample' of expert interviews consisted of barristers who explicitly undertook public access work and in some cases acted as advocates for this work both within and outwith the Bar. In addition, we found a number of chambers' executives, and a smaller set of barristers' clerks, who were actively seeking to expand the eligibility of their barristers for this work and generally increase the proportion of direct access work within their chambers. Given this perspective our sample was generally in favour of direct access work. The remainder of our interviewees included chambers' executives, clerks and barristers who presented more diverse views. These ranged from publicly advocating direct access work, to accepting it as part of the portfolio of chambers' work, to those who decried it for undermining the referral relationships which they considered normal for the Bar.
- [4] The respondents were those listed on the Bar Council website as holding themselves out for either public access or licensed access work or both. The list includes a range of barristers from junior levels (minimum three years call) to senior barristers. Approximately 65% of these respondents came from the middle experience/call range with the remainder evenly divided between junior and senior barristers.
- [5] We sent out 400 surveys, however, the contact information derived from the UK Standard Industrial Classification of Economic Activities (SIC) was out of date and poorly collected; this may help explain the 5% response rate.

- [6] Note that after the House of Lords decision in *Hall v Simons* (2002) 1 AC 615, under current law advocates no longer have immunity from suit in the conduct of civil proceedings (unanimous agreement) or criminal proceedings (a majority decision at four to three). It was generally accepted that lawyers had potential liability for negligence outside the courtroom, thus in preparation of the case rather than its delivery in court, e.g. misdrafting documents or giving incorrect advice. *Hall* has swept away this distinction, which was seen as artificial and difficult to sustain. Moreover in respect of insurance, all legal professionals must have professional indemnity insurance and as barristers are self employed they will have to meet any damages claimed out of their personal professional indemnity insurance policy (see [http://www.findabarrister.co.uk/more\\_info.asp?current\\_id=89](http://www.findabarrister.co.uk/more_info.asp?current_id=89)).
- [7] Members of approved professional bodies are able to instruct a barrister in most tribunals to provide advocacy services, but instructing for other court appearances is more limited. With individual licenses, there is great variation. Each licence is different and is tailored to meet the needs and expertise of the licensee.
- [8] In September 2008, the Access to the Bar Committee sent out an email to all 1,274 public access trained barristers listed on its database, asking them what percentage of their work was public access. Some 106 barristers responded to the query (it should be noted that though 1,274 are listed only 800 approximately advertise themselves as undertaking public access work).
- [9] In earlier days barristers' clerks were often remunerated by a percentage of the brief fee (Flood, 1983). This is now rare with most clerks being paid a salary with the possibility of a small percentage bonus. However, our research does not allow us to say whether or not the clerks and chambers' directors we interviewed were salaried and/or in receipt of a percentage. Thus no correlation can be made between this and their levels of enthusiasm for direct access work.
- [10] Despite this quite uniform enthusiasm among users for licensed access a much smaller proportion of barristers report doing this work when compared to public access. This anomaly may possibly be explained by the points we raise above under the 'Supply side' with regard to multiple contradictory data sources. See also Note 3.
- [11] Section 27 of The Courts and Legal Services Act 1990 created the route for solicitors to qualify for a grant of higher rights of audience where they had sufficient experience and training.
- [12] The 2007 survey was based on 65 respondents and the 2008 survey 61 responses. The surveys, however, do not contain information on the total population sampled. Hardwicke used SIC data – thus their respondents were corporate entities – for their sampling and their response rates were subject to the same caveats as ours.
- [13] Andre Agassi is a former champion tennis player who is now a businessman and founder of the Andre Agassi Charitable Foundation for underprivileged and at-risk children (see Roberts, 2001). The case came about because Agassi challenged the right of the Inland Revenue to tax his earnings in the UK because he was non-domiciled. The House of Lords ultimately rejected his position.
- [14] The range of public access work undertaken by barristers also included, gambling licensing, highway status disputes, clinical negligence, sports law, trusts and wills, discrimination, healthcare law, media law, costs, disciplinary hearings, Charities and Pre-issue family work.
- [15] Barristers are unable to accept work funded by the Legal Services Commission (LSC), i.e. legally aided work because the LSC prohibits barristers from making funding applications on behalf of clients (see [http://www.findabarrister.co.uk/more\\_info.asp?current\\_id=88](http://www.findabarrister.co.uk/more_info.asp?current_id=88)).
- [16] In Annex F2 – The Public Access Rules to the Bar Standards Board Code of Conduct, rule 2 states: "Before accepting any public access instructions from or on behalf of a lay client who has not also instructed a solicitor or other professional client, a barrister must take such steps as are reasonably necessary to ascertain whether it would be in the best interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client" (see <http://www.barstandardsboard.rroom.net/standardsandguidance/codeofconduct/section2-annexestothecode/annexef2-thepublicaccessrules/>).
- [17] 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.

- [18] Legal intermediary companies assist lay clients by arranging sets of lawyers for particular tasks that clients need doing. They are often used when a client does not have a solicitor or whose solicitor does not possess the expertise needed. They also stand in for solicitors in direct access cases where the client needs someone to handle the documentation. See, for example, Kennedy Cater Legal, available at: <http://www.kennedycater.com/index.html>.
- [19] With public access work the normal routine is for the barrister to ask for payment in advance. This means fixing a single fee rather than billing on an hourly basis.
- [20] Barristers are allowed to make their own fee arrangements with clients under the Public Access Rules and these must be communicated to clients in writing. See [http://www.barcouncil.org.uk/guidance/publicaccessinformationforlayclients/#How\\_Will](http://www.barcouncil.org.uk/guidance/publicaccessinformationforlayclients/#How_Will). When the barrister's client comes via a solicitor, payment received is not a contractual payment but an honorarium meaning that a barrister cannot sue for unpaid fees, nor prove for fees in bankruptcy. In the case of direct access it is a simple contractual relationship between barrister and client and therefore a barrister can sue for unpaid fees. The rule which prevented a barrister from entering a contract for the provision of his services as a barrister was abolished by s. 61(1) of the Courts and Services Act 1990.
- [21] Legal Disciplinary Partnerships (LDPs) allow lawyers and non-lawyers to form partnerships. Thus solicitors and barristers, chief executive and human resources officers could form a partnership provided the non-lawyers did not constitute more than 25% of the partnership. The Bar Standards Board currently allows barristers to be employed by LDPs but not to be managers in them (see <http://www.barstandardsboard.rroom.net/standardsandguidance/LegalServicesAct/>).
- [22] If we compare the English situation with Australia we see interesting similarities and differences. In certain Australian states there is a split profession while in others it is fused but there is a *de facto* separation in the activities of solicitors and barristers (see <http://www.hancy.net/resources/briefing/>).

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