



Licensed Access Guidance

- Purpose:** To draw attention to good practice in relation to instructions received from licensed access clients
- Scope:** Self-employed barristers who undertake licensed access work
- Outline:** Introduction to licensed access – explanation of who licence holders are and what they may instruct counsel to do – explanation of a barrister’s obligations under the Licensed Access Rules - what needs to be included in written terms of work agreed with the licensed access client
- Issued by:** The Direct Access Panel
- First issued:** April 2018
- Status and effect:** **Please see the notice at the end of this document. This is not ‘guidance’ for the purposes of BSB Handbook I6.4**

Introduction

1. Organisations or individuals that have an identifiable area of expertise or appropriate experience can apply to the Bar Standards Board to be licensed to instruct barristers directly. Members of certain professional bodies are automatically licence holders.
2. The licence holder can instruct a member of the Bar¹ for advice and representation on their own behalf or another's behalf in their specialist area. Unlike public access, the barrister does not need to have any special training to be able to accept instructions from a licensed access client. However the cab rank rule does not apply to licensed access work² so the barrister is not obliged to accept the instructions. A barrister who accepts licensed access instructions must comply with the Licensed Access Rules.

¹ Licensed access clients can, per Rule c132, instruct ‘a barrister in self-employed practice’ which includes pupils.

² Rule C29 imposes the cab rank rule only where instructions come from a professional client, such as an instructing solicitor.

3. The term 'Licensed Access' replaces the terms 'BarDIRECT' and 'Direct Professional Access'.

Licence holders

4. The Licensed Access Recognition Regulations (LARR)³ govern the authorisation of licence holders. Licence holders fall into two categories:

Deemed licence holders. The following are deemed by Regulations 7 and 8 of LARR to hold a licence:

- members of professional bodies listed in the First Schedule to LARR. This includes accountants, tax advisers, insolvency practitioners and town planners. A body may apply to the BSB to be added to the list. However the licence is limited to matters which fall within the member's professional expertise⁴.
- arbitrators, provided it is for the purpose of obtaining advice about an arbitration in which they have been or may be appointed.
- any person appointed to the offices of an ombudsman listed in the Second Schedule to LARR.

Any other organisation or individual who applies to and is granted a licence by the BSB. The applicant will need to satisfy the BSB that it is appropriate to grant the licence. The BSB will have regard to the following matters⁵:

- (a) the extent to which the person or organisation or its members (as the case may be) are likely to have a significant requirement to retain the services of a barrister for their own benefit or for the benefit of their employers, employees, members, clients or customers (as the case may be);
- (b) the extent to which whether as a result of professional or other relevant training or by reason of practice and experience the person or organisation or its employees or members (as the case may be) are or may reasonably be expected to be
 - (i) providers of skilled and specialist services
 - (ii) competent in some identifiable area of expertise or experience
 - (iii) familiar with any relevant area of law
 - (iv) possessed of the necessary skills to obtain and prepare information and to organise papers and information sufficiently to enable the barrister to fulfil their duties in a non-contentious matter to the client and in a contentious matter both to the client and to the court

³ <https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/licensed-access-recognition-regulations/>

⁴ Rule 7, LARR

⁵ Rule 6, LARR

- (v) possessed of the necessary skills to take charge and have the general conduct of the matters in respect of which they wish to retain the services of a barrister;
- (c) the extent to which the affairs and conduct of the person or organisation or its members (as the case may be) are subject to some appropriate professional disciplinary regulatory or other organisational rules;
- (d) the extent to which the person or organisation or its members (as the case may be)
 - (i) are insured against claims for negligence in relation to their handling of matters in respect of which they wish to retain the services of a barrister
 - (ii) have made and continue to comply with satisfactory arrangements for holding in separate accounts and maintaining as trust monies any monies received from third parties
 - (iii) have made and continue to comply with satisfactory arrangements for ensuring that barristers' fees are promptly paid; and
- (e) such other facts and matters (if any) as seem to the BSB to be relevant in the circumstances.

5. Hitherto licences granted to individuals and organisations were often restricted in scope. For example they may have been limited to obtaining advice on identified issues and may not have given the licence holder the authority to instruct counsel to appear as an advocate. The BSB now takes the view that as the competence of the licence holder will be assessed as part of the application process there will generally be no need to place limitations on the licence. Though the BSB retains the power in exceptional cases to impose limits on the scope of a licence⁶, most licences issued after 1 February 2018 will be valid for all matters, courts and tribunals.

6. Similarly, since the LARR were amended on 1 February 2018 members of professional bodies are no longer prohibited from instructing counsel in matters before the higher courts or the Employment Appeal Tribunal.

Licensed Access Rules

7. Barristers accepting licensed access instructions should familiarise themselves with the Licensed Access Rules (BSB Handbook, Section D2, Part 2). These rules are part of the Code of Conduct and therefore compliance with them is mandatory.

Client checks⁷. The barrister may only accept instructions if the licensed access client 'is identified'. No further explanation is given in Rule c134.1 as to how a client might be identified. Additionally the barrister must ensure that the licensed access client holds a valid licence issued by the BSB, either by

⁶ Rule 3(e) LARR

⁷ Rule c134, LAR

requiring the licensed access client to send a copy of the licence or by referring to the list of licensed access clients published on the BSB's website⁸.

Terms of work. These must be in writing. This is dealt with in more detail below.

Record keeping. Record keeping obligations are set out in Rules c140 and c141 and mirror those for public access work. The period for which documents have to be retained is seven years from the last item of work done.

Best interests. The barrister must immediately notify the lay client in writing if they consider it is in their best interests or the interests of justice to instruct a solicitor or other person authorised to conduct litigation or other appropriate intermediary.

Terms of work

8. The Licensed Access Rules (LAR) envisage that the barrister might agree standard terms with a client, which will govern ongoing or future instructions, or that terms are agreed on an ad hoc basis.

- Standard terms. If a barrister agrees standard terms with a licensed access client then, on accepting any new instructions, the barrister must promptly send the client a statement in writing confirming that he/she has accepted those instructions on the standard terms previously agreed.
- Ad hoc terms. If the barrister has accepted instructions otherwise than on standard terms he/she must promptly send the licensed access client an agreement setting out the terms on which the instructions are accepted.

9. The LAR previously stipulated that instructions must either be accepted on standard terms previously agreed in writing or on the Licensed Access Terms of Work which were produced by the Bar Council. Since 1 February 2018 the references in the LAR to the Licensed Access Terms of Work have been removed. This is because the BSB believes there is little regulatory justification for prescribing the terms that on which instructions are accepted. The Bar Council continues to publish Licensed Access Terms of Work on its website but it is not, therefore, mandatory to use them. Whatever terms are used, however, must comply with the following requirements.

Written. Rule c137 in the LAR require the terms upon which instructions are accepted to be in writing. Rule c22 imposes a general obligation on a barrister, whoever the client is, to confirm in writing acceptance of instructions and the terms and/or basis on which the barrister will be acting.

⁸ <https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/licensed-access-recognition-regulations/> For deemed licence holders see the Schedules to the LARR. For individuals and organisations click on link 'General licensed access for organisations/individuals'.

Fees. The terms must set out the basis on which the barrister is to be paid.

The effect of rC21. Rule C21 sets out circumstances in which a barrister must refuse instructions. The LAR require barristers to inform their licensed access clients of the 'the effect of rC21 as it relevantly applies in the circumstances'. Rule c21 says a barrister must not accept instructions if:

- (1) due to any existing or previous instructions you are not able to fulfil your obligation to act in the best interests of the prospective client; or
- (2) there is a conflict of interest, or real risk of conflict of interest, between your own personal interests and the interests of the prospective client in respect of the particular matter; or
- (3) there is a conflict of interest, or real risk of conflict of interest, between the prospective client and one or more of your former or existing clients in respect of the particular matter unless all of the clients who have an interest in the particular matter give their informed consent to your acting in such circumstances; or
- (4) there is a real risk that information confidential to another former or existing client, or any other person to whom you owe duties of confidence, may be relevant to the matter, such that if, obliged to maintain confidentiality, you could not act in the best interests of the prospective client, and the former or existing client or person to whom you owe that duty does not give informed consent to disclosure of that confidential information; or
- (5) your instructions seek to limit your ordinary authority or discretion in the conduct of proceedings in court; or
- (6) your instructions require you to act other than in accordance with law or with the provisions of this Handbook; or
- (7) you are not authorised and/or otherwise accredited to perform the work required by the relevant instruction; or
- (8) you are not competent to handle the particular matter or otherwise do not have enough experience to handle the matter; or
- (9) you do not have enough time to deal with the particular matter, unless the circumstances are such that it would nevertheless be in the client's best interests for you to accept; or
- (10) there is a real prospect that you are not going to be able to maintain your independence.

Conduct of litigation warning. Unless authorised by the Bar Standards Board to conduct litigation, the barrister must inform the licensed access client that

they cannot be expected to perform the functions of a solicitor or other person who is authorised to conduct litigation and in particular to fulfil obligations arising out of or related to the conduct of litigation⁹.

Need to instruct a solicitor warning. The LAR also require the barrister to inform a licensed access client that circumstances may arise which require the client to retain a solicitor or other person who is authorised to conduct litigation at short notice and possibly during the case¹⁰.

Complaints procedure. Rule c99 requires all barristers to notify their clients in writing when instructed (or if that is not possible, at the next appropriate opportunity) of their right to make a complaint. This information must include how and to whom they can complain, their right to complain to the Legal Ombudsman (if they have such a right) and any time limits for making a complaint.

Important Notice

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not “guidance” for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please refer to the professional practice and ethics section of the Bar Council’s website [here](#).

⁹ Rule c137.3.b, LAR

¹⁰ Rule c137.3.c, LAR