



Aim and purpose

Section 83 of the Immigration and Asylum Act 1999 places a statutory duty on the Immigration Services Commissioner requiring him/her to promote good practice.

As part of this duty, the Commissioner has promoted the use of Licensed Access to provide added expertise for Level 2 and 3 advisers. The OISC believes that Licensed Access adds value to the businesses under the scheme. It provides specialist knowledge and skills that advisers may find useful in assisting their clients. This note has been made possible with the co-operation and approval of the Bar Council and we gratefully acknowledge it. While the note gives an outline of the Licensed Access scheme, it is not a definitive guide. Any enquiries about the Licensed Access scheme should be directed in the first instance to Jan Bye or Thelma Nicholls, The General Council of the Bar, 289–293 High Holborn, London WC1V 7HZ, tel: 020 7242 0082 or e-mail: JanBye@BarCouncil.org.uk. Further information can be found on the Bar Council's website at www.barcouncil.org.uk/document.asp?documentid=208

1. Background

- 1.1 The Licensed Access scheme (formerly known as BarDIRECT) enables organisations or individuals with appropriate skills and expertise in particular areas of the law to instruct barristers direct in those matters. Licences are usually tailor-made to suit the level of expertise of each organisation and can cover advice, representation or both. Licences can permit licensees to instruct barristers either on their own behalf or on behalf of their clients. This Guidance Note will explore the Licensed Access scheme and how those regulated at Levels 2 and 3 within the OISC regulatory scheme can take advantage of Licensed Access to assist them and their clients.

2. What is Licensed Access?

- 2.1 Licensed Access seeks to maximise client access to the legal profession while at the same time ensuring that the Bar retains its identity as a referral profession. The legal profession is responsible to the public for the provision of competitive and cost-effective legal services of the highest professional standards. In meeting these goals, the legal profession must ensure that the interests of the client are prioritised. Licensed Access has been established to provide those organisations and individuals who possess the necessary skills and knowledge to do so to have the opportunity to refer to the expertise of a barrister without the intervention of a solicitor.
- 2.2 Licensed Access recognises that there are significant areas of work in which the traditional two-layered legal system (in which the Bar insists that only a solicitor can refer work to it) may unnecessarily increase the costs the client is required to bear. Licensed Access gives organisations the choice of consulting either a solicitor or a barrister in cases where it is unnecessary and not cost-effective to instruct both a solicitor and a barrister.
- 2.3 Building on the experience of Direct Professional Access (DPA), Licensed Access allows direct access to the services of a barrister from a far wider range of organisations and individuals than previously permitted. It means that, under certain conditions, suitable organisations and individuals (from the business community to the voluntary sector) have direct access to a barrister.
- 2.4 A fundamental principle of Licensed Access is that access under its provisions is licensed. The Bar Council administers the Licensed Access scheme through its Access to the Bar Committee. Licences usually identify the advisers within the organisation who may use the scheme and the particular type and scope of work covered by the licence. The terms of the licence, specifying the name of the person or organisation, the period for which the licence has been granted, and the limitations or conditions on which the licence has been granted, are within the complete discretion of the Access to the Bar Committee.

3. Licensed Access work

- 3.1 The Courts and Legal Services Act recognises a distinction between advocacy services and litigation services. The principle of a primarily referral-based profession remains central to the profession and practice of a barrister. Licensed Access does not permit barristers to provide litigation services for which a litigation licence is required under the Courts and Legal Services Act.
- 3.2 The Licensed Access scheme aims to ensure that the referrer has the necessary skills and the facilities available to instruct the Bar direct.

4. Licensed Access and the OISC

- 4.1 The Access to the Bar Committee examines a wide range of criteria when determining whether a proposed organisation or individual should be granted a licence, including, for example: the type of work it wishes to refer directly to a barrister; its expertise or experience; its familiarity with any relevant area of law; its ability to obtain and prepare information and to organise papers and information for the barrister and in a contentious matter for the court; its ability to take charge and have the general conduct of the matter in which it wishes to instruct the barrister directly; the extent to which it has arrangements for holding in separate accounts and maintaining as trust monies any monies received from third parties; and the extent to which the affairs and conduct of the person or organisation or its members are subject to professional, disciplinary, regulatory or other organisational rules and have professional indemnity insurance. These factors, amongst others, have made OISC-regulated organisations suited to take advantage of licensed access. The OISC has therefore worked in partnership with the Bar Council to develop Licensed Access schemes for immigration advisers regulated at Levels 2 and 3. Further details of the terms of the licences granted are contained in the following paragraphs.
- 4.2 It is important to remember that barristers can only accept instructions under Licensed Access where the instructions fall properly within the terms of the licence. For this reason, all licensees must send a copy of their licence to counsel with each set of instructions. This will enable the barrister to ensure that the licence covers the instructions.

5. Immigration advisers regulated at Level 3

- 5.1 The Level 3 OISC/Licensed Access scheme enables those organisations with immigration advisers regulated at Level 3 by the OISC to obtain Licensed Access. The organisation must register with the Bar Council to obtain their licence. The licence permits them to instruct barristers on behalf of their clients for both advice and representation before adjudicators, the Immigration Appeal Tribunal, the Special Immigration Appeal Commission and the Immigration Appellate Authority. Under this scheme, advisers must reapply for their licences annually.
- 5.2 This licence only permits organisations to instruct counsel before the authorities specifically listed and does not permit organisations to instruct counsel for representation before any other tribunals or courts, e.g. the High Court. The licence does not allow for advice for judicial review either.
- 5.3 Licensees must send a copy of the licence to counsel with each set of instructions.

6. Immigration advisers regulated at Level 2

- 6.1 The Level 2 OISC/Licensed Access scheme enables organisations with immigration advisers regulated at Level 2 by the OISC to obtain Licensed Access to enable them to instruct barristers direct on behalf of clients for advice only in immigration and asylum law matters. The licence for those regulated at Level 2 is restricted to advice only and does not include representation in any court or tribunal or other hearing. Licences are obtained through registration with the Bar Council. Advisers must send a copy of the licence to counsel with each set of instructions.

7. Overview

- 7.1 The rest of this note comprises guidance notes for Licensed Access clients covering cases in which it is appropriate to instruct a barrister, choosing a barrister, instructing a barrister, identifying the information and materials to send to the barrister, and billing. Licensees should read carefully the 'Licensed Access Terms of Work' that apply to instructions given and accepted, unless otherwise first agreed in writing.

8. In which cases is it appropriate to instruct a barrister?

- 8.1 The overriding consideration when deciding whether it is appropriate to instruct a barrister alone, or whether to instruct a solicitor (whether that solicitor in turn instructs a barrister or not), is whether to do so would be in the best interests of the client. OISC-regulated advisers must consider whether it is possible for them to undertake the role of advocate (where appropriate), or whether a suitably qualified solicitor or counsel is required. This would require an understanding of the case, the client's needs, and a number of factors discussed below. If an adviser thinks it appropriate to engage counsel, it is essential that they have a proper understanding of what a barrister can and cannot do.
- 8.2 The following is an outline of those things that a barrister is normally expected and entitled to do:
- 8.2.1 advisory work (e.g. giving advice on the law generally and/or on the merits of any particular matter, whether contentious or non-contentious, and/or on the drafting of documents such as contracts, standard terms and conditions, correspondence, letters before actions, reports, etc.);
 - 8.2.2 drafting of claim forms, petitions and other applications;
 - 8.2.3 drafting of statements of case;
 - 8.2.4 advice on the factual and expert evidence that will be needed in order to establish the case at the hearing, whether oral or written;
 - 8.2.5 advice on which witness statements, expert reports and documents must or should be disclosed to the other side;
 - 8.2.6 assistance in the preparation of affidavits and witness statements for use at a hearing;
 - 8.2.7 preparation of any documents, such as skeleton arguments, chronologies, etc., used for the purposes of presenting a case in court;
 - 8.2.8 representation at any court hearing;
 - 8.2.9 representation at a hearing before a tribunal other than a court, for example a disciplinary tribunal; and

8.2.10 advice on tactics in relation to the litigation generally and its settlement. The typical case in which a barrister might be instructed directly to appear in court will be one:

- of lesser factual complexity; and
- where there is unlikely to be a need for extensive investigation into and gathering of evidence, whether oral or documentary.

8.3 Even in the more complex cases, or cases where extensive investigation is required, it may be appropriate to instruct a barrister direct to advise, or to appear in court on a particular application within the litigation.

9. Choosing a barrister

9.1 The following factors are relevant in determining the appropriate barrister:

- 9.1.1 whether the case merits more than one barrister. It may be appropriate to instruct two (or more) barristers to work as a team, possibly each from a different field of expertise;
- 9.1.2 whether the case merits the use of a Queen's Counsel or a junior barrister, or both. There is no hard and fast rule as to when it is appropriate to use a Queen's Counsel. In general, it is appropriate where the issues involved in the case are particularly complex, where the result is likely to have significant consequences for the client, and where there is a sufficient amount at stake to warrant the higher cost. Similarly, there is no hard and fast rule as to when it is appropriate to instruct both a junior barrister and a Queen's Counsel. In general, it is appropriate to do so where the criteria for the use of a Queen's Counsel are satisfied and there is likely to be a significant amount of preparatory, drafting or research work that could be carried out by a junior barrister at a significantly lower cost than by the Queen's Counsel;
- 9.1.3 the seniority of the barrister. A barrister's seniority is denoted in the various published directories and guides by reference to the year in which he or she was called to the bar; and
- 9.1.4 expense. Particular regard should be paid to the cost of employing the services of different barristers. In so doing, the following should be taken into consideration.

There are three basic methods by which barristers charge for their services:

- an hourly rate so that the fee varies according to the amount of time taken to complete the work;
- a fixed fee agreed in advance for a particular piece of work; and
- a 'brief' fee, which is a fixed fee to cover preparation for a hearing and the first day in court, and a 'refresher' or a daily charge for each subsequent day.

Additionally, in certain types of case some barristers may be allowed and prepared to accept instructions pursuant to a conditional fee agreement, in which the payment or the amount of the fee will depend upon the outcome in the case.

9.2 Generally, Licensed Access clients should be prepared to negotiate with the barrister or his clerk in relation to the method of charging for the barrister's services as well as the overall amount to be charged.

In comparing hourly rates offered in respect of different barristers, it should be borne in mind that a barrister well versed in the relevant field of expertise is likely to spend fewer hours on the matter than one who has a more general experience.

Having identified a set or sets of chambers whose members are held out as having expertise in the relevant field, it is worth contacting the chambers to discuss with the clerk the member or members who would be most suitable for your purposes, and to discuss the possible charging structure and charge-out rates of the relevant members.

10. Instructing a barrister

10.1 Once the Licensed Access client has decided upon a barrister to instruct, it is always preferable to contact that barrister's clerk in the first instance in order to ensure that the barrister is available.

In making enquiries of the barrister's clerk, there are four particular points to check:

- 10.1.1 Is the barrister available to carry out the specific piece of work in relation to which he or she is to be instructed?
- 10.1.2 If the barrister is to be instructed in a matter that will be ongoing, is he or she likely to be available for any court dates that are to be arranged in the future?
- 10.1.3 If the barrister is being asked to advise in conference, or to attend a specific court hearing, his or her clerk should be asked at the outset to reserve the date and time in the barrister's diary for that purpose.
- 10.1.4 Fees. A barrister's fees are normally negotiated with his or her clerk. The way in which barristers charge for their services is referred to above. Negotiations at the outset should include whether a fixed fee should be paid, and if so how much, whether payment should be on the basis of an hourly rate, in which case an indication of the number of hours that the matter is likely to take should be asked for and given, or whether a brief fee/refresher approach is appropriate, in which case the amounts should be agreed in advance.

11. Identifying the information and materials to send to the barrister

- 11.1 There is no required form or procedure for informing a barrister of the matters in relation to which he or she is to advise or represent you. It is the content of the instructions that is important, not the form. In most cases, it is sufficient that the information is provided to the barrister by way of a letter or note.

The following guidelines are to be read in the light of the preceding paragraphs and are intended to be of general assistance only.

- 11.2 as a general rule, the following is the information and material that a barrister would normally expect to receive upon his or her initial instruction:
- 11.2.1 a brief description of the circumstances giving rise to the issue in relation to which he or she is instructed, including a brief history of the matter and a description of the parties involved;
 - 11.2.2 an outline of the issue or issues in relation to which he or she is instructed either to appear in court or to advise;
 - 11.2.3 in the case of existing proceedings, copies of any documents already filed with the court or exchanged between the parties that are relevant to the issue upon which the barrister is instructed;

- 11.2.4 a clear statement of what it is the barrister is being asked to do;
- 11.2.5 photocopies of those documents that you think are relevant to the matters upon which his or her advice is sought. The following should be noted:
- It is in relation to this aspect that communication with the barrister is particularly recommended, whether prior to sending any instructions, or having sent instructions with a few 'core' documents so as to identify what other documents ought to be sent.
 - It is important not to send original documents, since these should not be marked and should remain in their original form and should be available for inspection by third parties, whether by reason of disclosure orders that might be made in litigation or otherwise.
 - Where correspondence or similar documentation is to be sent, it will save time and expense if it is arranged in chronological order.
 - It is also helpful to include an index of the documents, or of the classes of documents, sent;
- 11.2.6 a clear statement of the time within which a response is sought from the barrister;
- 11.2.7 where there is a time limit on commencing proceedings, or taking a step in existing proceedings, or for any other matter, a clear statement of this in the instructions; and
- 11.2.8 in the case of Licensed Access, a copy of the licence.

12. Steps following the initial instructions

- 12.1 Having received the instructions, the barrister should take an initial look through the papers. There are four potential reasons why at this stage the barrister could decline to continue to act:
 - 12.1.1 It is possible that the barrister will identify a conflict of interest that was not picked up during your discussions with his or her clerk.
 - 12.1.2 The barrister may decide that, because the case requires taking detailed statements from witnesses or extensive office back-up that he or she does not have, it is not an appropriate case for direct access and needs the expertise of a solicitor. In those circumstances the barrister is required to take no action until an appropriate intermediary is instructed.
 - 12.1.3 On closer inspection of the papers, the barrister may decide that the subject matter falls outside his or her area of expertise, or that the case is more complex than he or she is equipped to deal with. He or she is then entitled to decline the instructions.
 - 12.1.4 The barrister may decide, having accepted the instructions on the basis that they were likely to occupy a certain amount of time that he or she had available, that the instructions will in fact require considerably more of his or her time than is available.
- 12.2 Alternatively, the barrister may decide that, while the case is within his or her expertise, it is more suitable for a barrister of different seniority. In that case, the barrister is obliged to advise you of his or her view, but you may choose whether or not to accept that advice.
- 12.3 Assuming that the barrister is able to continue to work on the case, the course of conduct thereafter will depend on the circumstances of the individual case.
- 12.4 It will often be useful to arrange a face-to-face meeting with the barrister in order to discuss either the advice that the barrister is to give or what work needs to be done in preparing the case for court.

A face-to-face meeting is particularly useful in order to discuss and agree upon the division of work between the barrister and the Licensed Access client in progressing a case towards a court hearing.

13. Billing

- 13.1 The barrister will send a fee note, either at the end of the case or after each separate item of work done or, in an ongoing matter, at periodic intervals.
- 13.2 The Licensed Access client (i.e. the adviser) is contractually liable for the fee of the barrister. Any disputes with the barrister over the fee should be taken up with the barrister's chambers as soon as possible. It will often be the case that any dispute over the fee, or other complaint, can be resolved informally with the barrister's chambers.
- 13.3 The Bar Council is not usually able to involve itself in disputes over fees, except where there is an allegation of professional misconduct. If the fee dispute cannot be resolved informally, there is little alternative but for the matter to go to court.
- 13.4 The OISC will view allegations of the non-payment of fees seriously and may take further action if warranted.

14. Licensed Access Process Flowchart



