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## **ILPA response to the Bar Standards Consultation on the Equality and Diversity Implications of the Recommendations of the Public Access Working Group**

ILPA is a professional association with some 1000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of resources and information. ILPA is represented on a wide range of government and other public body stakeholder and advisory groups.

ILPA is concerned in this response with the effect of widening the public access scheme to include immigration work.

ILPA members' views on the widening of the public access scheme to include immigration range from those who think it does not go wide enough (that the remaining prohibitions are too restrictive) through very positive endorsements to those who are opposed to the widening of the scheme to include immigration.

This response is therefore intended to include arguments which have been raised both for and against the widening of the direct access scheme, but also to draw attention to what ILPA perceives to be the need to design and monitor any such scheme with care, so as to take account of the fact that many members of the client group are likely to be vulnerable, to be especially unfamiliar with our legal system and to have linguistic and other barriers to access to justice. Some of the comments below are therefore not necessarily arguments about whether *in principle* direct access should be extended as proposed, but arguments about how *in practice* it should be extended and the difficulties which may arise in doing so.

As to the specific question of equality and diversity implications, there is no reason to think that immigration clients are a less diverse group in terms of gender, disability, sexual orientation and age than any other group. It is likely that they will

be a more diverse group in terms of race, and, given that many countries have a majority religion, religion and belief.

We understand that, given that barristers do not hold legal aid franchises, the impact of the changes to be introduced by direct access would be upon those who are paying privately for representation. This group includes those who would be entitled to free legal representation but have been unable to find someone with capacity to take their case in the timescale available. Thus it may encompass the full range of immigration work. Many immigration cases are dealt with by dedicated experts. However, many members of the client group will have little knowledge of the UK system and what they are entitled to expect in terms of handling of their case by official agencies or by legal representatives and, in particular where they are overseas, may have few people from whom they can get a steer on what to expect. Some have very little knowledge of English and many immigration cases involve the use of interpreters. Clients are often fearful that to complain against their legal representative may have adverse consequences for their immigration case. As a consequence there is concern that this is a client group vulnerable to the actions of unscrupulous and/or incompetent, or simply mediocre, representatives.

In thinking about the equality and diversity effects of the scheme it is therefore necessary to think about the effects on cases where representatives, barristers, solicitors and/or regulated advisors, do a good job for their clients and those where they do not. One (barrister) member said of those instructing them

*'...the majority... do a professional job throughout their cases in every case without errors. Sadly, however, the minority is a big minority. I say this not only from 10 years' experience but also because the most cursory perusal of the AIT caselaw... would lead to the same conclusion. Indeed, the AIT's own tightening of the rules on adjournments and breaches of directions is a response to just a situation.'*

To that extent, it may be that direct access will improve access to justice for vulnerable lay clients by enabling them to bypass the less professional minority.

It was suggested that, given that many people will be representing themselves and doing a lot of work on the case themselves, they will have a wider choice if they can go to a barrister or a solicitor or accredited representative, of sources of extra help and guidance where they need this. Much of course depends on how widely publicised the scheme is, how easy it is to understand, and the quantity and quality of information available about individual barristers. Many immigration clients are familiar with legal systems in which there is no split between barristers and solicitors and it is important to bear this in mind when producing publicity material aimed at this client group.

As to immigration barristers, solicitors and advisors, the professional bodies hold the most comprehensive data – immigration practitioners are a diverse group on all the grounds under consideration, but this is true in other areas of law. Although it is probably safe to assume that the immigration Bar is towards the more diverse end of the profession, ILPA is not in a position to say this for certain. To the extent that it is a more diverse section of the Bar, diversity arguments may point in favour of direct access, if immigration practitioners are left as the only barristers not able to accept direct access. Direct access may similarly benefit barristers from non-

traditional backgrounds in less established sets who cannot get instructions from solicitors

Members have commented that in reality many of the elements of direct access are already practised by some immigration barristers and have been for years, particularly in cases where those instructing are not experts in this area. One member commented

*'In common with virtually all of my colleagues I have had to conduct appeals more or less alone on occasions through necessity....The only differences from Direct Access being that the client has their file formally held by the Solicitor and that their initial contact was with that person'*

There are therefore potential cost savings for the clients of barristers accustomed to working in this way and willing to work in this way, an issue discussed further below.

Some members suggested that where the representative (barrister, solicitor or accredited representative) is the person appearing before the Asylum and Immigration Tribunal it is easier for the Tribunal to spot and take that representative to task for poor quality work on their part. Others note that where barristers are instructed by direct access it will not always be easy for the Tribunal to identify whether the barrister or the lay client is responsible e.g. for failure to comply with directions, particularly where the lay client is overseas and not present at the hearing. This merits careful consideration in the design of the scheme and the rules applicable to it.

Members' comments, both for and against direct access have focused on the quality of service to clients who, as we note above, are likely by the very nature of the work to be a more diverse group in terms of race and religion and belief than the general population seeking legal advice.

Members raised the questions of cost and value for money. Where clients are paying privately, they are likely to have limited funds. Whether paying for the barrister without having to pay for a person instructing them will save money will depend on what they need, what the barrister and solicitor/registered advisor are each doing and what they charge for this, and the extent to which there is duplication of work between barristers and those instructing them. Costs are likely to be particularly acutely felt in cases of applicants for entry clearance in countries that do not have an economy comparable to that of the UK; where people are paid less. There is also data looking at the earnings of different migrant populations relative those of the population as a whole.<sup>1</sup>

On the question of cost, it is vital that steps are taken to ensure that barristers participating in the scheme are able to identify clients who qualify for legal aid and that the clients are advised of this, because such clients will need to be represented by a solicitor or by a not-for-profit organisation holding a Legal Services Commission franchise in immigration.

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<sup>1</sup> See e.g. The changing pattern of earnings, employees, migrants and low paid families, Dickens., R. and A. McKnight, Joseph Rowntree Foundation 29 October 2008, see <http://www.jrf.org.uk/publications/changing-pattern-earnings-employees-migrants-and-low-paid-families>

One common disbursement in immigration cases, which is highly relevant to access to justice for vulnerable people, is payment for interpreters' and translators' fees. Failure to use a good interpreter can be very important in a field where inconsistencies and contradictions are picked up and used as reasons to refuse an applicant. Are barristers to handle disbursements for interpreters? If not and if the client is to take responsibility for securing an interpreter what steps are to be taken to ensure that the standard of interpretation is adequate?

As with other areas of direct access, it will be important to keep under review whether the limitations on what barristers can do are working to the advantage or disadvantage of the lay client. The attitudes and approaches of different government departments may be relevant to this assessment in different areas of law. The UK Border Agency's focus on inconsistencies and contradictions and the minutiae of the very complex and technical requirements of the immigration rules, as explained (and sometimes obscured) in lengthy and complex guidance gives rise to the question of how, in non-contentious matters such as assistance with the completion of an application form, it will, if at all, be identified that a barrister has assisted in the preparation of the case. A number of matters are relevant to the range of challenges that a barrister undertaking direct access work in this area will face and to how the limitations on what they can do may affect how direct access works: in particular, the extent to which those challenging the UK Border Agency find it necessary to resort to litigation, including in circumstances of delay; failure by the Home Office to respond to applications and correspondence; and the many highly publicised unlawful actions by the UK Border Agency.

If the barrister has provided very detailed advice on the completion of a form and the submission of the supporting evidence but is not the representative on the record, will their contribution anywhere be visible or will the client simply indicate that they are not represented? We can envisage circumstances in which the very mismatch between the client's level of English and knowledge of the UK system, and the legal accuracy of the forms, is taken by the Home Office to suggest that the application is in some way fraudulent or falsified. Equally, if a barrister has given advice only a discrete point of law, it would be wholly inaccurate to suggest that the client has had advice on all aspects of their application. This could result in problems both for clients and the barristers advising them. For the clients, if they are treated more harshly because it is considered that their failure to submit all that the Home Office wanted to see should not be treated as a mere misunderstanding, but an omission by someone who had the benefit of legal advice on what should be included. For the barrister, if, for example, a client says that they were not at fault for a particular omission because what they included with the application was selected on the advice of the barrister advising them.

One solicitor member of ILPA commented

*'Public access to the Bar...is likely to reduce expertise in the long run because no solicitor is going to retain barristers with whom they are in competition.'*

The point about the reduction of expertise is relevant to lay clients, but the question of whether solicitors will retain barristers is also relevant to the question of the effect of direct access upon barristers. Immigration is a very complex area of law, with a fast pace of change. One has only to look at the percentage of immigration

cases in the High Court and Court of Appeal, or peruse lists of new statutory instruments (not to mention new primary legislation) to understand this. Keeping up with developments in the field is a full time job and the time to specialise is vital. Legal aid funding cuts have hurt the junior Bar. If there is to be an increase in solicitors declining to instruct them because of this question of competition there is a real question about how those not already established in the field will be able to specialise in immigration as their main or exclusive area of practice. On the other hand, enabling direct access may allow barristers to diversify their practices and become less reliant on solicitors, build new forms of practice and compete equally with solicitors and others in certain fields, such as advice on status or prospects or non-litigation representation such as assistance with making immigration applications. Arguably, this would improve and enhance diversity at the Bar.

It should be added that solicitors and registered advisors have also expressed concerns at the extent to which direct access to the Bar may hurt the financial viability of their business, which also has implications for access to representation by lay clients.

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