

To:	Legal Services Board	
Date of Meeting:	8 September 2015	Item: Paper (15) 46

Title:	Investigation – Bar Council and internal governance rules – BSB compliance with the ‘fourth undertaking’	
Workstream(s):	Performance, Evaluation and Oversight	
Author / Introduced by:	Kate Webb, Head of Regulatory Reviews and Investigations kate.webb@legalservicesboard.org.uk / 020 7271 Ext. 0090	
Status:	Official (Restricted)	

Summary:

Following the LSB’s 2013 investigation into the Bar Council and the Bar Standards Board, the two organisations gave four undertakings as part of a process of informal resolution. The fourth undertaking was delegated in its entirety to the BSB, and was a commitment to review whether it is appropriate for Bar Council’s Standard Contractual Terms and its List of Defaulting Solicitors to remain part of the BSB’s regulatory arrangements around the Cab Rank Rule. The deadline for completing the review and submitting any related rule change applications to LSB was end of July 2015.

This paper presents an analysis of the BSB’s approach to the review and its decision making process as documented in a recent submission made to LSB by the regulator. The decision for the LSB Board is whether the undertaking should now be considered discharged by the BSB.

Our assessment suggests that, in the round, the BSB can be considered to have discharged the undertaking notwithstanding that we have identified some potential shortcomings in its processes, one of which has led the BSB to take urgent remedial action since the deadline. While it may be argued that these issues could warrant further review or action within the scope of the 2013 investigation, in our view this would be disproportionate. Rather we consider it more proportionate and indeed appropriate to pursue these issues as part of our current review of the BSB’s performance against the regulatory standards.

We recommend that the Board:

- treat the current undertaking as discharged by the BSB, and
- address the residual concerns we have through the current LSB review of the BSB’s performance against the regulatory standards.

Recommendation(s):

The Board is asked to:

- (1) Note the analysis of the BSB’s actions to comply with the fourth undertaking
- (2) Discuss whether the BSB’s actions represent an adequate response to the commitment given in 2013
- (3) Agree that the fourth undertaking is discharged
- (4) Agree that the BSB’s submission and the LSB analysis should inform the current LSB regulatory standards review

(5) Agree that our Chair should respond to the BSB Chair's submission summarising the Board's decisions

Risks and mitigations

Financial:	N/A
Legal:	Taking additional action will require additional legal resource (notably if enforcement action is considered) to establish the legal basis and the implications of action
Reputational:	There are reputational risks in this area if the LSB is seen to take disproportionate action or be insufficiently concerned with the BSB's actions to comply.
Resource:	Resource requirements could be significant depending on the Board's view; any additional work is off-business plan. Resources for the regulatory standards review is part of the business plan, but any significant additional work in this area may require further resources.

Consultation	Yes	No	Who / why?
Board Members:	X		Chair
Consumer Panel:		X	
Others:			

Freedom of Information Act 2000 (Fol)

Para ref	Fol exemption and summary	Expires
Paras 14-23 and 25-26, Annex C – C16 first sentence and third sentence	Section 36(2)(b) - information likely to inhibit the free and frank provision of advice and the exchange of views for purposes of deliberation	
Annex C – C25 last sentence	Section 44 - restricted information obtained by the Board in the exercise of its functions [and therefore] must not be disclosed (s167 LSA)	

LEGAL SERVICES BOARD

To:	Board	
Date of Meeting:	8 September 2015	Item: Paper (15) 46

Investigation – Bar Council and internal governance rules – Bar Standards Board compliance with fourth undertaking

Recommendation

1. The Board is asked to:
 - a. Note the analysis of the Bar Standards Board's ("BSB") actions to comply with the fourth undertaking
 - b. Discuss whether the BSB's actions represent an adequate response to the commitment given in 2013
 - c. Agree that the fourth undertaking is discharged
 - d. Agree that the BSB's submission and the LSB analysis will inform the current LSB regulatory standards review
 - e. Agree that our Chair should respond to the BSB Chair's submission summarising the Board's decisions.

Introduction

2. This paper updates the Board on the BSB's recent actions with respect to the fourth undertaking it gave, through the Bar Council ("BC"), in November 2013 to resolve informally the LSB's investigation into the BC and BSB. Annex A provides a summary of the 2013 LSB investigation, its findings and the undertakings given by the BC and BSB.
3. The fourth undertaking was a commitment to review whether it is appropriate for BC's standard contractual terms and its List of Defaulting Solicitors to remain part of the BSB's regulatory arrangements around the Cab Rank Rule.¹ Based on material submitted by the BSB to the LSB, this paper provides an assessment of indicators of the BSB's compliance.
4. As discussed with the Board in May 2015 (paper 15(26)), the LSB's interest here is the BSB's process to deliver against the undertaking. The LSB investigation found that original decision taken by the BSB in 2011 was the result of a "flawed process" and the undertaking aimed to remedy this point. As such, the undertaking was drafted to allow for retention of the status quo if that was found to be the most appropriate decision at the conclusion of the BSB's review. Policy concerns would only enter into this assessment where they illustrate the BSB's

¹ 1. The fourth undertaking was: "By the end of July 2014, complete and publish a review (by delegation wholly to the BSB) as to whether it is appropriate for the standard contractual terms, the related BSB Code of Conduct Cab Rank Rule provisions (including 604 (g) and 604 (h)) and definitions within part x of the BSB's Code of Conduct to remain within the BSB's regulatory arrangements. Additionally if an application to the LSB to alter the BSB's regulatory arrangements is necessary following the review, it must be made by July 2015."

process for delivering on the commitment given in the undertaking. Further, the LSB's view on the Cab Rank Rule, that it could be strengthened through simplification and removal of exemptions and exceptions, is not a relevant factor in assessing the BSB's compliance with the undertaking.

Background

5. In November 2013, following an investigation by the LSB, the Board accepted undertakings from the BC and BSB. These were given following the BC's and BSB's acceptance of the findings of the LSB's investigation, including that the BC's actions had an adverse impact on the public interest by undermining the principle of independent regulation.²
6. The Board will recall that the BSB failed to comply with the July 2014 deadline in the first part of the fourth undertaking: to complete and publish a review. Although it opted not to take enforcement action at the time, the Board stressed to the BSB the critical importance of compliance with the second part of the undertaking.
7. Following the BSB's failure to comply with the first deadline, the LSB provided the BSB with feedback on its proposed approach and scope of the review. We emphasised that it should consider how the existing arrangements measure-up against the requirements of the Legal Services Act 2007, including the regulatory objectives, the better regulation principles and the findings of the LSB investigation rather than simply identifying whether there was a case for removal or incremental change to the two exemptions: the BC's standard contractual terms and List of Defaulting Solicitors.³ We have reviewed the BSB's project documentation on an ongoing basis since this point, alongside a programme of discussions and meetings with the BSB.

The BSB's 2015 conclusions

8. The BSB Chair wrote to the LSB Chair on 29 July 2015 to report the conclusions of the BSB's review. This letter is at Annex B. The review is described as "exhaustive".
9. The letter reported that the BSB decided, at its meeting on 23 July, to retain the current regulatory arrangements ("status quo") that allow for an exemption from the Cab Rank Rule if instructions are not on the basis of the BC's Standard Contractual Terms, or if the barrister has published them, their own standard terms.
10. With respect to the List of Defaulting Solicitors, the BSB decided to submit a rule change application to the LSB that would have the effect of removing this

² LSB. 2013. *Bar Council Investigation Report: Formal investigation into the Bar Council's involvement in the BSB application to the LSB for approval of changes to the Code of Conduct in relation to the "Cab Rank Rule"*. Available at: [http://www.legalservicesboard.org.uk/projects/pdf/LSB_investigation_into_bar_council_influencing_of_the_BSB_\(25-11-13\).pdf](http://www.legalservicesboard.org.uk/projects/pdf/LSB_investigation_into_bar_council_influencing_of_the_BSB_(25-11-13).pdf) (accessed 15 May 2015)

³ REF: CK to VD 5.11.14

specific provision in the Cab Rank Rule exemption and replacing it with an outcomes-focussed measure to capture a potentially unacceptable credit risk.⁴

11. To aid our assessment and understanding of the process the BSB undertook, we wrote to the BSB on 11 August 2015 with a request to provide additional information in a number of areas. This information was supplied on 27 August 2015.
12. The Board will recall that the undertaking was given by the BC and the BSB in the expectation that a review of the Cab Rank Rule would be completed during the course of delivering the specifics of this undertaking (initially estimated to be completed by March 2014).⁵ Since the failure to comply in July 2014, and more recently in discussions with the BSB, the BSB has adopted a narrower focus to the two issues. In his letter of 29 July, the BSB chair wrote that he anticipates that future BSB work will include a review of the wider Cab Rank Rule. Further information has since clarified that this review is not expected to commence before October 2016, with any proposals for change in the second half of 2017.

Compliance analysis

13. As previously discussed with the Board in May 2015, for the purposes of assessing compliance our interest is in the process the BSB adopted to reach its decisions. Annex C provides a summary of the decision making approaches that the BSB took to decisions on the two issues in the undertaking.⁶

14. [REDACTED]

⁴ The rule change application was considered, independent of the analysis described in this paper. The LSB issued a decision notice approving the BSB's application on 25 August 2015. See: http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2015/20150824_RM_To_VD_BSB_Cab_Rank_Decision_Notice.pdf

⁵ Paragraph 4, board paper 13(65) http://www.legalservicesboard.org.uk/about_us/board_meetings/pdf/13_65_bar_council_investigation.pdf

⁶ The full BSB Board paper runs to 76 pages and is available on the BSB website. https://www.barstandardsboard.org.uk/media/1681399/bsb_part_1_agenda_150723.pdf

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16. [Redacted text block]

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18. [Redacted]

Other observations

19. [Redacted]

[Redacted]

- [REDACTED]
20. [REDACTED]
- [REDACTED]

Recommendations and next steps

21. [REDACTED]

22. [REDACTED]

23. [REDACTED]

24. Having said that, given the corrective measures the BSB has committed to following our further enquiries, we recommend that the Board judge the BSB to have taken sufficient steps to have discharged the fourth undertaking.

25. [REDACTED]

26. [REDACTED]

[REDACTED]

[REDACTED]

27. However, in the light of the LSB's current review of regulatory standards, the BSB's performance as demonstrated through its submission, and the necessity of an urgent post-deadline remedy, indicates some wider points in relation to outcomes-focused regulation and the BSB's capability and capacity that should not be overlooked. We recommend that reflecting on the BSB's actions in the current regulatory standards review would be a timely and proportionate next step for the LSB.
28. The Board is asked to:
- a. Note the analysis of the BSB's actions to comply with the fourth undertaking
 - b. Discuss whether the BSB's actions represent an adequate response to the commitment given in 2013
 - c. Agree that the fourth undertaking is discharged
 - d. Agree that the BSB's submission and the LSB analysis will inform the current LSB regulatory standards review
 - e. Agree that our Chair should respond to the BSB Chair's submission summarising the Board's decisions.

01.09.15

Investigation into the Bar Council: chronology and undertakings

- A1. On 26 October 2011 the LSB received an application for approval of an alteration to paragraph 604 of the Code of Conduct to provide that the Cab Rank Rule should not apply other than where a barrister is instructed upon the “New Contractual Terms” (or by agreement). In dealing with the application, the LSB considered whether the setting of contractual terms between barristers and those instructing them was a regulatory function. The LSB accepted the BSB’s argument that the Cab Rank Rule formed part of the BSB’s regulatory arrangements, and noted its view that there was a consequential need for certainty over the contractual terms that applied where the Rule operated. The Board’s decision was set out in its decision notice of 27 July 2012.
- A2. On 7 March 2013 the Bar Council issued a statement to the effect that it had designed the New Contractual Terms to provide “appropriate protection to barristers”. It also stated that the Bar Council would be undertaking further work in relation to those terms, with the Law Society, to promote “our professional interest”. This appeared to be at odds with the BSB’s view that this was a regulatory arrangement because it referred to protecting and promoting barristers’ professional interests rather than any requirements of the Legal Services Act 2007 (the Act).
- A3. Section 30 of the Act requires regulators to separate representative functions from their regulatory functions. Indeed this principle of separation within approved regulators is regarded as being key to achieving the regulatory objective of protecting and promoting the public interest which is contained in the Act. The LSB has made rules concerning the ways this may be done in the Internal Governance Rules 2009 (IGR).
- A4. On 23 May 2013, following analysis of information gathered using our powers under section 55 of the Act, the Board agreed to start a formal investigation to understand the Bar Council’s conduct in relation to the following issues:
- a. Have acts, or a series of acts had, or likely to have, an adverse impact on protecting and promoting the public interest by undermining the principle of independent regulation?
 - b. Have acts, or a series of acts had, or likely to have, an adverse impact on supporting the constitutional principle of the rule of law to the extent that the Bar Council has breached a requirement within the IGR?
 - c. Has the Bar Council failed to comply with a requirement imposed on it by the IGR, namely the requirement at all times to act in a way which is compatible with the principle of regulatory independence and which it considers most appropriate for the purpose of meeting that principle [Rule 6(b)]?
 - d. Has the Bar Council failed to comply with a requirement imposed on it by the IGR, namely the requirement to ensure the exercise of regulatory functions is, so far as reasonably practicable, independent of any representative functions [Rule 7(c)]?
 - e. Are there any other actions by the Bar Council that emerge from the investigation that are relevant to the issue of regulatory independence?

- A5. A detailed investigation was undertaken which included an analysis of information provided by the Bar Council during the investigation. The investigation concluded, amongst other things, that the Bar Council had failed to comply with requirements imposed on it by the IGR and that its actions had an adverse impact on the public interest by undermining the principle of independent regulation.¹¹
- A6. On 30 October 2013, the Bar Council wrote to the LSB accepting the investigation's findings and the outcomes required to remedy them; it sought informal resolution of the investigation. We were content that the response meant that informal resolution was desirable. On 20 November 2013 the LSB accepted the following undertakings from the Bar Council:
- i. (a) Develop proposals to achieve the outcome that Bar Council staff and officers that provide advice or assistance to the BSB on regulatory functions will respect the principle of regulatory independence by ensuring their involvement is transparent and the risk of undue influence on regulatory functions is minimised
(b) Seek the approval of the LSB to those proposals by 16 December 2013 and publish them by 20 December 2013; and
(c) Report to the LSB any material failure to implement and comply with the approved proposals.
 - ii. (a) Develop proposals to achieve the outcome that Bar Council staff and officers do not attend non-public sessions of the BSB Board and its committees other than in exceptional circumstances and that any reasons for attendance is documented and made public. For the avoidance of doubt this does not preclude arranging meetings between the BSB and Bar Council to enable the Bar Council to represent or promote the interests of barristers.
(b) Seek the approval of the LSB to those proposals by 16 December 2013 and publish them by 20 December 2013; and
(c) Report to the LSB any material failure to implement and comply with the approved proposals.
 - iii. Implement measures to ensure that the funding of the process whereby a barrister can complain about unpaid fees will only be via the Practising Certificate Fee from April 2014. This must remove the requirement that a barrister must have paid the Bar Council Member Service Fee, or any other voluntary fee, in order to complain about non-payment of fees by a solicitor or other authorised person under the rules relating to the list of defaulting solicitors and other authorised persons 2012 (approved 2 March 2013) and the scheme for complaining to the Bar Council for publicly funded matters 2012 (approved 2 March 2013). For the avoidance of doubt the Bar Council may not impose any voluntary fee, levy or percentage charge for considering whether to or adding a solicitor or other authorised person to the list of defaulting solicitors as defined in Part X of the BSB's Code of Conduct.

¹¹ LSB. 2013. *Bar Council Investigation Report: Formal investigation into the Bar Council's involvement in the BSB application to the LSB for approval of changes to the Code of Conduct in relation to the "Cab Rank Rule"*. Available at: [http://www.legalservicesboard.org.uk/projects/pdf/LSB_investigation_into_bar_council_influencing_of_the_BSB_\(25-11-13\).pdf](http://www.legalservicesboard.org.uk/projects/pdf/LSB_investigation_into_bar_council_influencing_of_the_BSB_(25-11-13).pdf) (accessed 15 May 2015)

- iv. By the end of July 2014, complete and publish a review (by delegation wholly to the BSB) as to whether it is appropriate for the standard contractual terms, the related BSB Code of Conduct Cab Rank Rule provisions (including 604 (g) and 604 (h)) and definitions within part x of the BSB's Code of Conduct to remain within the BSB's regulatory arrangements. Additionally if an application to the LSB to alter the BSB's regulatory arrangements is necessary following the review, it must be made by July 2015.

The fourth undertaking

- A7. In July 2014, the BSB failed to comply with the first deadline in the fourth undertaking. Following this, the Board discussed formal enforcement options, including public censure. Meetings and correspondence with the BSB led to an apology from the BSB for not complying and assurances that it would not happen again. The LSB Board did not take the matter further but re-emphasised to the BSB in light of its failure to meet the first deadline, the critical importance of compliance with the second.



Sir Michael Pitt
Chairman
Legal Services Board
One Kemble Street
London
WC2B 4AN

29 July 2015

Dear Mike,

Undertaking to the LSB: Standard contractual terms and the list of defaulting solicitors

I am writing on behalf of my Board in response to the undertakings given by the Bar Council in October 2013. The undertakings delegated to the BSB were:

- To complete and publish a review as to whether it is appropriate for the standard contractual terms, the related BSB Code of Conduct cab rank rule provisions (including 604(g) and 604(h)) and definitions within part X of the BSB's Code of Conduct to remain within the BSB's regulatory arrangements¹; and
- If an application to the LSB to alter the BSB's regulatory arrangements is necessary following the review, to make it by July 2015.

The review process

The BSB has undertaken what it believes to be an exhaustive review of the relevant elements of the cab rank rule. The key elements of this review were:

- A call for evidence, issued October 2014 and an associated survey, the responses to which are available on the BSB website²;
- A subsequent consultation³, the outcome of which was considered by the Board at its 23 July meeting (the relevant paper is available on the BSB website and is attached to this letter).

The Board has taken care to ensure that this decision has been taken independently of the profession, and in the light of the consumer perspective and the other regulatory objectives. The detailed consideration of responses was undertaken by a working group of Board members and a special adviser. This consisted of two lay people and two barristers. When considering the responses to the consultation and the recommended response to the BSB Board, the lay members of the group first considered the issues and reached a conclusion without barrister involvement. In practice there proved subsequently to be unanimity across the lay and barrister members of both the working group and the Board.

¹ The relevant provisions are now rC30.7.b and rC30.9.c

² https://www.barstandardsboard.org.uk/media/1658487/annex_a_summary_of_responses_to_call_for_evidence.pdf
https://www.barstandardsboard.org.uk/media/1658491/annex_b_-_cab_rank_rule_and_standard_contractual_terms_survey_analysis.pdf

³ https://www.barstandardsboard.org.uk/media/1657974/cab_rank_rule_consultation_final_-_march_2015.pdf

The working group, and subsequently the Board, looked at the issues from first principles and with a presumption against the retention of the rules being reviewed, unless a need could be identified with reference to the regulatory objectives. The purpose of this letter is to summarise the conclusions reached by the Board. More detail is provided in the attached Board paper. We have already shared previous, private Board papers with your team and we would be happy to provide any further information that you require in the interests of transparency.

The standard contractual terms

The lay members of the working group made an interesting observation to the Board: that they had initially been in favour of replacing the reference to standard contractual terms with a general obligation to accept reasonable terms (this would be broadly equivalent to “alternative option 3” in the BSB’s consultation paper). However, both lay members were persuaded (for reasons identified in the Board paper) that this would not be workable and ultimately accepted that the status quo was the only way of adequately ensuring the consumer’s interests were protected.

The minutes of the Board discussion will show that it sought to challenge itself on the extent to which the standard terms could be replaced by an alternative regulatory intervention, which required all barristers to publish reasonable standard terms for the purpose of the cab rank rule (this was an option not explicitly consulted on, but was a logical variation of what we described as “alternative option 2”). This would have the advantage of transparency: all clients would be able to see the terms of business on which barristers were prepared to be instructed for the purposes of the cab rank rule (these terms could of course be the Bar Council’s standard terms). Ultimately, the Board concluded that this would not be a feasible alternative, largely because of the incentive for barristers to publish terms that might be unacceptable to solicitors and/or clients, where the extent to which they were reasonable would be at least debatable. Although the prospect of disciplinary action would be available as a deterrent in such circumstances, that would inevitably drag the BSB into discussions about whether particular sets of terms were reasonable or not if a complaint were made to the BSB (and in any event disciplinary action after the event was of little benefit to clients, for whom the opportunity to instruct the barrister in question would by then have been lost). Whether as part of a supervision or enforcement function, the BSB does not believe that providing adjudication over whether certain terms are reasonable on a case by case basis is an effective use of its resources, nor would it provide any real public benefit. For similar reasons, the Board dismissed the option of approving multiple sets of contractual terms. Although sensitive to the criticism of inappropriately “picking winners”, the Board saw no added benefit in picking multiple winners; rather it was important to ascertain whether a standard set of terms was in fact necessary for the proper functioning of the cab rank rule, in the light of the regulatory objectives, and if so whether the current terms were appropriate.

The Board’s conclusion was influenced by its interpretation of the key client benefit of having standard terms – that there should be reliable and prompt access to the barrister of the client’s choice. The Board felt that the interests of simplicity and transparency were best served by having standard terms, giving absolute clarity about the terms on which the barrister can be compelled to work and that, notwithstanding the barrister’s ability to publish his or her own terms, there should be terms available as a safeguard, that the regulator has approved as reasonable for all parties and on which the client (via the professional client) can always rely. The BSB has attempted to get a broad range of views on this issue, in particular by contacting a number of organisations who are capable of representing the consumer interest. Only one of these organisations (Advice UK) responded with any substantive comment: its preference was for retention of the standard terms.

Having concluded that a set of standard terms was in the public interest, the Board considered whether the current standard terms were appropriate and in the public interest. The Board noted that most of the terms were likely to be uncontroversial and of the kind that

would appear in any contractual terms. Of those that were likely to be more controversial (particularly with regard to solicitors' interests) the Board agreed that the provisions as to payment terms were fair to all parties and in line with good practice elsewhere.

The Board, having concluded that it should retain the current standard terms, was keen to ensure that it has appropriate governance arrangements in place should either it or the Bar Council wish to amend the terms. Obviously any change to the terms would impact on the BSB's regulatory arrangements and as such it must have oversight of any changes. If the Bar Council wishes to suggest any amendments to the terms, the BSB will expect it to make representations in the normal way through the joint protocol. The BSB would not approve any changes without forming its own view as to whether they are appropriate and fair and, if appropriate, following consultation. The BSB of course reserves the right to review the terms independently of the Bar Council and has agreed to do so within the next two to three years.

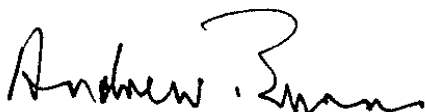
The List of Defaulting Solicitors

In relation to the list of defaulting solicitors, the Board has taken the view that it is no longer appropriate for its rules to refer to a list operated by the representative body. As with the standard terms, the Board's view was that such a rule could only be justified if it was necessary in the light of the regulatory objectives. The Board believes that the desired outcome can be better achieved by a provision that permits barristers an exemption from the cab rank rule where the credit risk to which they would be exposed would be unacceptable. This will be supported by guidance that has been drafted with the intention of limiting the circumstances in which barristers might rely on this exemption to avoid their cab rank obligations. The guidance will for the time being refer to the list as one possible source of evidence of credit risk, but the BSB will keep this under review. We are separately sending a rule change application, seeking the LSB's approval for this change.

The cab rank rule: general

As you will appreciate, this review has highlighted a number of complexities with the operation of the cab rank rule and the various detailed exemptions. The call for evidence suggested that in practice the rule is observed as a general principle by the profession rather than a rule that needs to be enforced by professional clients. Nevertheless, the Board takes the view that the enforceability of the rule is a key safeguard of the client's interests. The need to comply with the specifics of the undertaking in the required timescale has meant that the BSB has not undertaken a wider review of the need for and nature of the cab rank rule at this time, but it remains our intention to do so as part of a wider review of the Handbook within our next strategic plan.

Yours sincerely



Sir Andrew Burns KCMG
Chair, Bar Standards Board

Cc: Stephen Crowne, Chief Executive, Bar Council
Enclosure: Board paper

Summary of BSB decision making process

- C1. This annex is the LSB's summary of the BSB's decision making process on the fourth undertaking, produced to aid the Board's discussion on the BSB's compliance. The full description of the BSB's approach (76 pages) is published in their July 2015 Board Paper and available on the BSB's website:
https://www.barstandardsboard.org.uk/media/1681399/bsb_part_1_agenda_150723.pdf
- C2. The BSB's objectives for the review committed it to a "first principles" approach to decisions on the place of both the BC's Standard Contractual Terms and the BC's List of Defaulting Solicitors in the Cab Rank Rule, with a presumption against the rules being retained.

Evidence gathering

- C3. The BSB issued a call for evidence and surveyed self-employed barristers and clerks in a 12-week period starting in October 2014. They examined the Bar's use of contractual terms generally and in the context of the Cab Rank Rule. For example, the call for evidence asked:
- i. What are the contractual terms actually being used by the Bar since the rule change was introduced?
 - ii. Are there "reasonable terms" being offered within the market other than the Standard terms?
 - iii. How regularly is the CRR being invoked in practice and are barristers using the Standard Terms or their own when responding to requests?
 - iv. In the light of the above questions, what would the impact be of taking a different approach on Standard Terms?
- C4. There were 13 responses to the call for evidence and the survey was completed by 159 respondents. In brief, results showed that there are a number of different bases of contractual instruction in use and that instructing on a non-contractual basis remains common practice in some chambers. The value of the Cab Rank Rule was as a general professional principle that guided the decisions of barristers. Responses to the call for evidence also suggested that barristers felt it to be too soon to make a change to the approach on standard terms.
- C5. The survey's methodology means that results should be seen as indicative not statistically significant. Topline findings included:
- The vast majority of survey respondents have never had the Cab Rank Rule invoked by those proposing referral instructions – approximately three quarters have never had the rule expressly invoked (74.7%), and just over a fifth have only rarely had the rule expressly invoked (22.1%)
 - Only 5 respondents had been proposed instructions where the Cab Rank Rule was explicitly invoked in the period since January 31st 2013 when the Bar Council's Standard Contractual Terms were introduced.
- C6. In the light of the call for evidence responses, the consultation identified four possible options on the contractual terms issue:
- Retain the Status Quo – the cab rank rule does not apply if accepting the instructions would require the barrister to act other than on the Bar Council's

Standard Contractual Terms or, if the barrister publishes standard terms of work, those terms.¹²

- Alternative 1 - retain the status quo as a backstop but give greater flexibility to the barrister to propose reasonable terms for the specific instructions in question
- Alternative 2 - remove the standard terms, but require the barrister to either adopt their own standard terms or propose reasonable terms for the specific instructions in question
- Alternative 3 - remove the standard terms, require the barrister to accept any reasonable terms offered by a solicitor or other professional client

C7. The consultation paper also sought views on a single alternative to the List of Defaulting Solicitors exemption:

- Whether the reference in the BSB Handbook to the list of defaulting solicitors might be replaced by an exemption from the Cab Rank Rule for a barrister where it is reasonable to conclude that the professional client represents an unacceptable credit risk.

C8. It also sought responses on a more general point: whether the regulatory objectives would be better met by moving to more broadly defined exemptions for instructions on unreasonable terms or where there was an undue credit risk.

C9. The BSB issued a consultation on options for regulatory arrangements around the standard contractual terms and the list of defaulting solicitors in late March 2015.¹³ This ran until 19 June 2015.

C10. Aside from a response from The Law Society, the responses to the consultation were from individual barristers and barrister representative groups, including the BC. Consumers' views were less forthcoming. The BSB describes in its Board paper, how it tried a number of different approaches to obtain consumers' views. Eventually, informal feedback was received from two consumer organisations, only one of which expressed a firm view on the options presented in the consultation paper, to retain the status quo.

Decision making process

C11. Following the conclusion of the evidence gathering the BSB's decisions on the two issues were reached through a three stage process.

C12. First, at its meeting in June 2015, the BSB Board considered an "initial paper". The initial paper did not include analysis against the regulatory objectives. At the meeting the BSB Board reached a decision "in principle" on the contractual terms issue to retain the status quo: "This was because the case against it had not been made with specific reference to the regulatory objectives and it was not clear that any of the other identified options better satisfied the regulatory objectives."¹⁴

C13. The BSB Board then tasked a Working Group with "conducting a detailed review of the consultation responses and the earlier call for evidence and survey,

¹² Note: in these circumstances it is for the professional client, not the barrister, to determine which set of terms will form the basis of the contract, ie they may reject the barrister's own published terms.

¹³ https://www.barstandardsboard.org.uk/media/1657974/cab_rank_rule_consultation_final_-_march_2015.pdf

¹⁴ BSB July Board Paper, paragraph 5

making any recommendations to the Board in the light of that analysis”.¹⁵ The letter from the BSB Chair describes the approach the Working Group took:

*When considering the responses to the consultation and the recommended response to the BSB Board, the lay members of the group first considered the issues and reached a conclusion without barrister involvement. In practice there proved subsequently to be unanimity across the lay and barrister members of both the working group and the Board.*¹⁶

- C14. The Working Group drew on analysis of each set of consultation options against the regulatory objectives. To supplement the relatively limited responses from consumer representatives, the BSB analysed the four options explored to address the standard contractual terms issue against the Legal Services Consumer Panel’s Consumer Principles.¹⁷
- C15. The third and final stage was at the BSB Board meeting in July where a summary of the working group’s discussions and recommendations was presented and the BSB Board made its final decision.

List of Defaulting Solicitors

- C16. [REDACTED]
[REDACTED] With respect to this issue, the BSB’s July Board Paper states that its “overriding objective [is] that barristers should not be compelled to work in situations that would be unfair or cause hardship.”
[REDACTED]
[REDACTED] It formed a smaller part of the consultation proposals, with a single alternative and no specific question about retaining the status quo. After the June Board meeting provisional decision, the working group deliberations on the List of Defaulting Solicitors issue were informed by analysis of the status quo and the proposed alternative against the regulatory objectives.¹⁸
- C17. The July Board Paper emphasises that practicalities were put to one side, and the BSB’s first principles approach to decision making on this issue “first considered whether it is in principle appropriate for such a function, with a direct impact on our regulatory arrangements, to be administered by the Bar Council in its representative capacity.”
- C18. The Working Group recommended that the alternative should be adopted as it “would retain any benefits of the List of Defaulting Solicitors Scheme but avoids relying on what is essentially a representative function within the BSB’s regulatory arrangements and enables the barrister to draw on other evidence to the same effect”. The Working Group argued this proposal was supported by analysis against the regulatory objectives, in particular that the public interest is promoted and protected by a clear separation of regulatory and representative functions. The BSB Board agreed.

¹⁵ July BSB board paper, paragraph 5

¹⁶ 29 July 2015 letter to LSB

¹⁷ see Annexes D, E and H of BSB July Board paper

¹⁸ Annex H to July Board Paper

Standard Contractual Terms

- C19. The BSB Board does not think it reasonable to expect barristers to be obliged to act (as under the Cab Rank Rule) absent any contractual right to be paid for their services or clarity around when and how they are to be paid; hence the current exemption from the rule if the barrister is required to act on instructions other than on the BC's Standard Contractual Terms, or other standard terms of work that may be published by the barrister.
- C20. The Working Group "noted that the Board had made a decision in principle to retain the status quo in relation to the standard contractual terms, but took the view that it needed to be satisfied that this was the correct decision in the light of all responses and that the maintenance of the status quo was necessary from the perspective of the regulatory objectives."¹⁹
- C21. First, a general obligation to propose or accept reasonable terms without reference to the Standard Contractual Terms was considered (Alternative 3). In terms of the regulatory objectives, the Working Group felt Alternative 3 would risk undermining the objective to promote competition as barristers would be under a professional obligation to accept terms that may be unreasonable. If such terms included variation in payment terms, the Working Group felt that this could undermine the objective regarding encouragement of an independent, strong, diverse and effective profession if it led to the viability of some barristers' practices being called into question. Alternative 3 was rejected for being unworkable as it could lead to disputes about the reasonableness of terms proposed by the professional client and / or barrister and that resolving any such disputes would delay access to justice and would not promote competition. Alternatively a barrister may feel obliged to accept terms to avoid the prospect of disciplinary action.
- C22. Alternative 2 was then considered. This option requires a barrister to act on their own published standard terms or on "such other terms as you may reasonably propose for the given instructions". The Working Group felt there may be a risk that barristers could frustrate or sidestep the Cab Rank Rule by proposing terms that were unacceptable to solicitors. It was felt that such a lack of certainty would undermine access to justice and could lead, as in the scenario described above, to disputes between barrister and client about the reasonableness of terms which could escalate to disciplinary action. The effect on competition of Alternative 2 was seen to be through the potential to increase the range of terms on offer offering greater choice to consumers. But the prospect of more variety led the Working Group to anticipate other problems: if a barrister opted to publish standard terms the BSB would be called upon to assess the reasonableness of each set of terms. Publication of standard terms offers the benefit of transparency, but the Working Group considered that it was not a good use of regulatory resources to require the BSB to monitor and adjudicate on the reasonableness of different sets of terms. The working group considered that the BSB could "offer to endorse more than one set of terms" but saw no practical way of managing this. The working group rejected Alternative 2.
- C23. The Working Group then considered the consultation options that retained the Bar Council's Standard Contractual Terms. Alternative 1 would allow a barrister to propose terms for a given instruction in addition to the current arrangements.

¹⁹ (para 10 July BSB Paper)

Despite seeing potential benefits in relation to the regulatory objectives around public interest, competition and access to justice, the Working Group agreed with consultation respondents that Alternative 1 added nothing to the status quo.

C24. The Working Group then turned to the remaining option, the status quo, and whether it was a necessary regulatory intervention to meet the regulatory objectives. The Working Group considered that the status quo could improve access to justice for clients, and also avoid undermining the regulatory objective of encouraging an independent, strong, diverse and effective profession by removing uncertainty around payment for barristers (as those with protected characteristics or at the more junior end of the Bar may be particularly at risk). It was felt that competition would be largely unaffected by the status quo, and may lead to a small net increase in competition from the client's perspective.

C25. The Working Group recommended retaining a single set of standard terms. The BSB Board agreed with this recommendation and then turned to consider whether the current terms published by the BC were appropriate and in the public interest. It concluded it should retain the current terms, on the basis of an earlier view taken by the BSB that the BC's terms are "an appropriate safeguard for barristers". [REDACTED]