

To:	Legal Services Board	
Date of Meeting:	29 September 2014	Item: Paper (14) 46

Title:	Investigation– Bar Council and internal governance rules – non-compliance with fourth undertaking	
Workstream(s):		
Author / Introduced by:	Fran Gillon, Director of Regulatory Practice fran.gillon@legalservicesboard.org.uk / 020 7271 0087	
Status:	Official	

Summary:
<p>This paper invites the Board to decide how to pursue the apparent failure of the BSB to give proper priority to implementation of the undertakings it made to resolve the Board's investigation in relation to the internal governance rules in October 2013.</p> <p>The BSB wrote to us on 30 July 2014 setting out the actions it had taken in response to the fourth undertaking to review the place of standard contractual terms in the regulatory arrangements by the end of July, stating that it had "<i>initiated a review into the role of the standards terms and the list of defaulting solicitors in that context, but decided that it would be premature to publish any proposals for change at the moment.</i>" and that it intended to launch a call for evidence.</p> <p>After considering the BSB's letter, we wrote to the BSB's Director on 28 August 2014 setting out our concerns about the lack of progress made on, and failure to give priority to, implementing the undertaking. The BSB has apologised in its letter of 16 September 2014 and set out intended steps to rectify this failure and to ensure that the next deadline – for making any necessary application to the LSB by July 2015 – is met. Nevertheless, its comments on the approach taken to satisfying the undertaking are disappointing.</p> <p>The Board could opt to return to consideration of the formal enforcement powers to underline the seriousness of the findings of our investigation. However, this could delay achievement of the outcomes that the undertakings were intended to achieve and divert significant resources into the process. Were an investigation to lead to a public censure of the Bar Council, the impact on BSB independence could also be problematic.</p> <p>We therefore recommend accepting the apology given in the BSB's most recent letter, and focussing on securing the intended outcome of the undertaking by the July 2015 deadline by pressing the BSB on the terms of its proposed review.</p>

Recommendation(s):
<p>The Board is invited to</p> <ol style="list-style-type: none"> (1) accept the BSB's apology for its failure to meet the July 2014 deadline (2) agree further communication with – and ongoing oversight of – the BSB in order to secure compliance with the terms of the July 2015 undertaking

Risks and mitigations	
Financial:	N/A
Legal:	Assessing use by the LSB of powers set out in the LSA is likely to require significant legal resource, as this paper poses different questions to those considered during our investigation of the Bar Council in 2013. E.g., we would need to confirm the legal basis for and implications of taking action. This is one factor in the recommendation not to pursue the option of use of our formal powers
Reputational:	Risks arise in this area from being seen not to take sufficiently robust action in response to the BSB's failure to comply. Conversely, any attempt to pursue action against the Bar Council would attract different but probably greater public criticism. A clear and exacting response to the BSB may act to address some risk in the first case
Resource:	Some additional resource will be needed to oversee change to how the BSB approaches the review and its delivery. This is a manageable burden on staff, including the senior team. Again, resource requirements will be lower than those required for revisiting enforcement action

Consultation	Yes	No	Who / why?
Board Members:		X	Due to time constraints between receipt of the BSB's letter of 16 September and the deadline for Board papers
Consumer Panel:		X	
Others:	N/A		

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
N/A		

LEGAL SERVICES BOARD

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Investigation– Bar Council and internal governance rules – non-compliance with fourth undertaking

Background / context

1. On 26 October 2011 the Legal Services Board (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.
2. 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 LSA.
3. Section 30 of the Legal Services Act (LSA) 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 objective of protecting and promoting the public interest which is contained in the LSA. The LSB has made rules concerning the ways this may be done in the Internal Governance Rules 2009 (IGR).
4. On 23 May 2013, following analysis of information gathered using our powers under section 55 of the LSA, 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.

5. 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.
6. 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 undertakings from the Bar Council at **Annex A**.

The Fourth Undertaking

7. The first three undertakings have been complied with, although in each case after the LSB has been involved. Over the course of the months leading up to the first deadlines associated with the fourth undertaking (31 July 2014), the LSB has sought updates on the BSB's progress in ensuring compliance. On 30 July 2014 we received a letter from the BSB setting out the action it had taken. This is attached at **Annex B**.
8. The BSB stated in its letter that its Board had "*initiated a review into the role of the standards terms and the list of defaulting solicitors in that context, but decided that it would be premature to publish any proposals for change at the moment.*" The BSB concluded that further evidence is needed before coming to any firm decisions on the standard contract terms. The BSB also stated that after the summer break the BSB intended to launch a call for evidence.
9. We reviewed the contents of the letter against the fourth undertaking to assess the Bar Council's (and by extension the BSB's) compliance. Our view is that, although the BSB published a paper in advance of the deadline, it is questionable as to whether what it has published could be said to be a completed review (as the undertaking requires). The BSB's letter that the Board has "*initiated*" a review and the paper itself notes that "*[t]his paper updates the Board on the review work that has been undertaken to date*". Neither of these statements suggests that the review is "*complete*", although it would be possible to argue that one review (the published paper) has been completed and the BSB has deemed that a further review is required.
10. As a result of our analysis, we wrote to the BSB on 28 August 2014 (**Annex C**) setting out our views that we did not consider the BSB's July 2014 Board paper to be a completed review.
11. The BSB responded to our letter on 16 September 2014 (**Annex D**). The response offered the BSB's apologies, for example stating "*I quite understand the*

concerns of your Board and would wish to put on record our regret that we were not able to conduct a fuller review and publish a report in the time frame previously agreed". However, it also stated that the BSB tended "to see July 2015 rather than 2014 as the key date and to associate the issues with other key areas (such as public access review) rather than focus on the need to deliver this explicit piece of work in line with the undertaking". The response goes on to set out the steps the BSB plans to take to ensure that the second deadline (31 July 2015) in the undertaking is met.

Options

12. As the Board agreed to informally resolve its investigation on the basis of the undertakings received, failure to comply with any of these appears to present the LSB with different options for how to respond.
13. First, it may be possible to **recommence formal enforcement action**. At its meetings in September, October and November 2013, based on the findings of the investigation, the Board considered whether to exercise its powers of public censure, directions and financial penalties as set out in the LSA. As was noted at the time, the grounds and processes for exercising these powers differ (with separate and different timetables). However, the criteria were satisfied for commencing each of the different types of action. The Board determined to proceed with public censure, with the other sanctions held in abeyance. After a draft notice of public censure was issued to the Bar Council on 17 October 2013, informal resolution of the investigation was agreed. (Section 49(4) of the LSA instructs the Board to take account of the desirability of informal resolution in its policy statement on the use of enforcement powers).
14. The objective of enforcement action would be to highlight the seriousness of the findings of the LSB investigation and underline the priority we expect to be given when commitments are given to avoid enforcement action. Our initial view, however, is that this approach would have the effect of nullifying the undertakings. It would be resource intensive – *inter alia* to navigate through the necessary procedure - to seek to secure the undertakings' intended outcomes by different means, including through issuing directions to the Bar Council.
15. Moreover, although the undertaking in question quite rightly falls to the BSB, public censure in this case would be directed to the Bar Council for a failure to ensure that the undertaking was adequately satisfied – which would be in tension with our repeated emphasis on the need for BSB-Bar Council independence.
16. An alternative and less resource intensive option would be to **accept the apology and focus on the outcome** of the undertaking by the 31 July 2015 deadline. It is reasonable to expect that this would avoid the danger of giving mixed messages in relation to the BSB and the Bar Council relationship.
17. However, work would still be necessary to remedy shortcomings in the BSB's proposed approach. Its letter of 16 September states that:

"The key questions for the BSB are:

 - 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 Cab Rank Rule being invoked in practice and are barristers using the Standard Terms or their own when responding to such requests?*
- iv. *In the light of the above questions, what would the impact be of taking a different approach on Standard Terms?"*

18. These questions seem to indicate that the BSB has not considered how the existing arrangements measure up against the requirements of the LSA, in particular the regulatory objectives, and also against the findings of the LSB's investigation. Rather, it appears that the BSB's starting point may be to consider incremental changes, rather than to challenge the appropriateness of such terms being part of regulatory arrangements, which was the intent behind the proposed undertaking. Our view is that the proper approach is that the continuation of any existing regulatory intervention needs to be justified, rather than one of focusing on justifying its removal, especially when the material is so prescriptive and its initial imposition has been inappropriately influenced by representative considerations.

19. The BSB's associated timetable for action is to "generate evidence:

- *By end of September, by writing to all Specialist Bar Associations and other professional bodies to invite submission of evidence (arrange meetings between now and Christmas for those interested) and putting a general statement on the website to encourage people to get in touch with us;*
- *By Christmas, by raising the matter with our consumer stakeholder group and the LSCP to get their perspective on the Cab Rank Rule and what is reasonable*
- *Issuing a Survey Monkey-type questionnaire that can be circulated to the Bar (again, results reported by Christmas);*
- *Meeting with Law Society / SRA etc to understand solicitors' experience of the Standard Contractual Terms and/or the Cab Rank Rule".*

20. Given the considerable time remaining until the July 2015 deadline, there is currently no reason to believe this timetable cannot be achieved, whilst also doing the more intensive work the undertaking seems to demand.

Recommendation

21. Our view at this stage is that the second of these options is most favourable in terms of

- likelihood of securing the desired outcome,
- efficient use of resources, and
- longer-term relationships with the BSB and Bar Council.

In addition, it should go some way to mitigating the risk of the LSB being perceived as not acting to address under-performance.

22. We therefore propose to reply to the BSB on the terms of its review, to the effect of:

- a. the Board accepts the BSB's apology for failing to produce an appropriate review as required
- b. the Board has asked the executive to ensure it is satisfied that the work to be delivered by the BSB in relation to the July 2015 undertaking will be of the required quality and that the deadline will be met
- c. the BSB is expected to review existing regulatory arrangements relating to the Standard Contractual Terms against its statutory duties (compatible with regulatory objectives and with regard to the better regulation principles)
- d. the focus of the BSB's review should be on whether the retention of the BSB requirements can be justified, rather than on whether their removal can be justified
- e. the BSB's review is also expected to pay regard to the findings of the LSB's investigation (including that the making of the regulatory arrangements in question was unduly influenced by the Bar Council)
- f. the Board considers – and is concerned – that the approach taken by the BSB so far, including the questions set out in its letter of 16 September, does not appear to address points c. to e. above

23. The Board is therefore invited to

- (1) accept the BSB's apology for its failure to meet the July 2014 deadline
- (2) agree further communication with – and ongoing oversight of – the BSB as set out above in order to secure compliance with the terms of the July 2015 undertaking

The Bar Council undertakings

1. (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.

2. (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.

3. 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.

4. 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.



Mr Chris Kenny
Chief Executive
Legal Standards Board
One Kemble Street
London WC2B 4AN

30 July 2014

Dear Chris

Standard Contractual terms and cab rank rule – Bar Council undertaking

I am writing to update you following a discussion at last week's Bar Standards Board meeting. As you know, as part of the informal resolution of the LSB's investigation into the Bar Council, an undertaking was given that the BSB would, by the end of July 2014, publish a review as to whether it continues to be appropriate for the BSB's regulatory arrangements (via the operation of the cab rank rule) to make reference to the standard contractual terms and the list of defaulting solicitors. I attach for ease of reference the paper which the Board considered in public session.

Since the standard contractual terms were introduced, we have of course introduced the new Handbook and the BSB is now monitoring how each of these changes is bedding in. The standard terms themselves are no longer formally part of the Code, albeit a reference to them was retained for the purposes of the cab rank rule. The Board has considered whether now is the time to propose further changes to the status of the standard contractual terms within our regulatory arrangements.


It is clear that the move to a contractual basis of instruction has been a significant change for many in the profession and chambers' systems and practices have taken some time to adjust. Whilst the BSB has collected some evidence about the types of contract that barristers are entering into, the Board felt that further evidence gathering was needed before coming to any firm decisions, particularly in relation to the operation of the cab rank rule. Furthermore, the Board has just approved a new policy development framework, which emphasises problem definition and evidence gathering as key first steps in the policy process – in keeping with better regulation principles - and the Board requires that we adopt the approach set out in the framework henceforth.

The Board has therefore initiated a review into the role of the standard terms and the list of defaulting solicitors in that context, but decided that it would be premature to publish any proposals for change at the moment. After the summer break, we will launch a call for evidence in order to inform the next steps.

I should emphasise that my Board continues to be committed to the cab rank rule as an essential safeguard for the public in our regulatory arrangements, supporting as it does access to justice and the rule of law. The Board is open minded as to the role that the standard terms should play in giving effect to that rule, noting that the arrangements must be fair both to those seeking to avail themselves of the cab rank rule in order to get legal representation, and the barristers who are compelled to act because of it.

I will of course keep you informed. I note the deadline of July 2015 for the submission of any changes to regulatory arrangements to be submitted to the LSB. Our current plans enable us to meet that deadline, assuming of course that the evidence does lead us to recommend a change.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Vanessa Davies', written in a cursive style.

Dr Vanessa Davies
Director, Bar Standards Board

Review of standard contractual terms and the cab rank rule

Status

1. For discussion and approval.

Executive Summary

2. The standard contractual terms (and associated amendment of the cab rank rule) were introduced at the beginning of 2013, following approval of the rule change application by the Legal Services Board (LSB) in July 2012. The LSB subsequently launched a formal investigation into the Bar Council's involvement in the rule change. The investigation was resolved informally and the Bar Council gave a number of undertakings, including (via the Bar Standards Board) a review of whether the standard contractual terms should remain part of the BSB's regulatory arrangements.
3. This paper updates the Board on the review work that has been undertaken to date and seeks the Board's approval to consider removing the standard terms from our regulatory arrangements. However, it is recommended that a formal call for evidence is undertaken to inform the Board's final decision.

Recommendations

4. The Board is asked to
 - a. **agree** to consider removing the standard contractual terms and the list of defaulting solicitors from our regulatory arrangements;
 - b. **agree** to postpone such a decision until after a more substantial call for evidence has taken place; and
 - c. **note** that any such application for a change must be made to the LSB by July 2015.

Background

5. Prior to the rule change approved by the LSB on 27 July 2012, the cab rank rule did not apply to any instructions from a solicitor to a barrister that purported to be on a contractual basis. The default position was that barristers were instructed on the non-contractual basis provided for by the old Annex G1 to the 8th Edition of the Code of Conduct ("The Terms of Work on which barristers offer their services to solicitors and the withdrawal of credit scheme"). The BSB felt that those arrangements were outdated and no longer appropriate in the modern legal services market. The previous, non-contractual, honorarium basis of payment failed to provide for solicitors, barristers and the lay client, an effective method of enforcement of rights and obligations (there had previously been a solicitors' professional conduct obligation to pay barristers' fees but this ceased to be the case in 2007).
6. Clearly, contractual relationships between solicitors and barristers are not ordinarily a matter for the regulator. The BSB only takes an interest in so far as relevant to the application of the cab rank rule. The rule change (once it came into force in January 2013) meant that instructions would fall within the scope of the cab rank rule if they were made either on the standard contractual terms (which were originally inserted as Annexe T of the old Code) or any standard terms that were published by the barrister. It also provided that barristers were not obliged to act under the cab rank rule if solicitors appeared on the list of defaulting solicitors, which is maintained by the Bar Council.

7. The LSB began an investigation in June 2013 into the Bar Council's involvement in the development of these changes to the regulatory arrangements. It was resolved informally on 25 November 2013, following a number of undertakings being made by the Bar Council. These undertakings are listed at **Annex A**. One commitment, to be undertaken by the BSB, was, by the end of July 2014, 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 (which at the time included 604 (g) and 604 (h) of the Code and the definitions within part X) to remain within the BSB's regulatory arrangements. Following this, any application to the LSB to change our regulatory arrangements must be made by July 2015.
8. Since the rule change decision, the LSB has approved the new BSB Handbook. The standard terms are no longer included in the Code of Conduct section of the Handbook, but there continues to be a reference to them in rC30.9.c. The effect of this is that barristers are not obliged to accept work under the cab rank rule unless it is on either the standard terms or the barrister's own published terms. They are also not obliged to accept work from solicitors on the list of defaulting solicitors. The BSB has already taken the view that the standard terms may be published by the Bar Council on its website, rather than within the BSB's regulatory guidance, but has not regarded this as a purely representational matter because of the link to the cab rank rule.

Comment

The importance of the cab rank rule

9. The BSB's belief in the continuing importance of the cab-rank rule has been reaffirmed in the new Handbook. The cab-rank rule is an unusual feature of the Bar's regulatory arrangements, given that it can be professional misconduct for a barrister to refuse to represent a lay client because the barrister, for example, does not want to appear to be associated with a particular client, or would prefer for commercial reasons to act for a different party. The Board has taken the view that this is clearly in the interests of consumers of barristers' services, and an essential safeguard of access to justice, the public interest and the rule of law (hence in the interests of the regulatory objectives).
10. However, the Board would not think it reasonable to expect barristers to be obliged to act with no contractual right to be paid for their services or clarity around when and how they are to be paid (non-payment or uncertainty as to fees is likely to affect the regulatory objective of encouraging an independent, strong, diverse and effective legal profession and may undermine competition in the provision of legal services).
11. It is not proposed that the cab rank rule itself be reviewed at this stage – this review is limited to the need for the standard contractual terms.

Stakeholder feedback to date

12. Feedback from stakeholders in the profession so far has suggested that many chambers have not routinely been entering into contracts when accepting instructions from solicitors. There are early indications that our Supervision visits may confirm this. Whilst nothing obliges barristers (other than in the context of the cab rank rule) to accept instructions on a contractual basis, there is a risk that in failing to do so they may also be failing in their obligations under rC22 to confirm in writing the acceptance of instructions and the terms and/or basis on which they will be acting, including the basis of charging.

13. It has also been alleged that solicitors are generally seeking to impose their own terms on barristers. This is not ordinarily a matter for the regulator – barristers and solicitors are free to agree the terms of instructions between themselves. However, it has further been alleged that certain solicitors may be using “bullying” tactics to require barristers to accept terms that may be contrary to their regulatory obligations. Whilst this may give rise to some conduct concerns in respect of the solicitors involved, it is not relevant to the cab rank rule (since solicitors must accept either the standard terms or the barristers’ own terms if they wish the barrister to be obliged to act under the cab rank rule).
14. We have not so far received any direct feedback about the impact on the operation of the cab rank rule of the new terms; nor have we had any specific consumer concerns raised directly with us. It is therefore recommended that further and additional evidence is needed before forming a definitive view on the issues.

Alternative approaches: standard terms

Option A: Require the barrister to accept “reasonable terms” under the cab rank rule

15. The BSB originally considered and rejected the proposition that a barrister would be obliged to accept instructions in a case if they were proffered “on reasonable terms”.
16. This option had the advantage of succinctness, and of not prescribing any content for such terms, other than that they be reasonable. However, the perceived problem was that this version of the rule did not establish a bright line in a situation where a bright line was essential. It was felt that a barrister needed to be able to judge, in urgent cases as soon as he or she is offered work, whether the cab-rank rule applies to that offer, because a barrister needs to know, there and then, whether it would be a breach of the code of conduct not to accept the instructions.
17. While barristers are expected, in the context of the cab-rank rule, to make judgments about whether or not a reasonable *fee* has been offered, requiring them to make judgments about the reasonableness of *terms* offered is more complex and could lead to disagreements about whether the terms as a whole, or aspects of them, are reasonable or not (and it may not be possible to resolve any such disagreements in a short timescale).
18. It was felt to be unsatisfactory for the content of a disciplinary rule to be so unclear, and hence for there to be doubt about when it will apply.

Option B: Require barristers to publish their own “reasonable” terms (which might be standard terms produced by the Bar Council, Specialist Bar Associations or others)

19. This option would have the advantage of certainty for the barrister in situations where he or she were required to make decisions quickly. It might also aid compliance with rule rC22 and ensure that clients understood better the terms on which barristers were instructed.
20. However, there might be an incentive for barristers to adopt terms that solicitors might object to, which might lead to complaints from solicitors about breach of the cab rank rule due to unreasonable terms. The decision about what is or is not reasonable is a complex one and may be difficult to police. And as with the proposal above, there is a risk of undermining the cab-rank rule because of the scope for differences of view between the parties as to whether terms offered are reasonable.

Alternative approach: List of defaulting solicitors

21. The Handbook retains the provision that barristers are not obliged to accept work under the cab rank rule from solicitors named on the list of defaulting solicitors. The rationale for this is that it is unfair to oblige a barrister to accept a credit risk by the operation of the cab rank rule. This is quite reasonable for the reasons outlined above. The list of defaulting solicitors is maintained by the Bar Council and the BSB has no involvement.
22. An alternative approach on this matter might be to include an exemption from the cab rank rule for cases where the barrister has formed the reasonable opinion that the solicitor is an unacceptable credit risk. Appearing on the list of defaulting solicitors might well be evidence of such a view. Again, the implications of this would need to be considered fully – in particular whether there was a risk that this would undermine the cab rank rule.

Next steps

23. Now that the new contractual terms have had time to bed in and the new Handbook has been launched, it is right for the Board to look again at the appropriateness of the Handbook rules. It is therefore suggested that the Board seek further evidence from the Bar, solicitors, the SRA and other approved regulators, consumer groups and the wider public about the issues raised in this paper. The specific aim should be to challenge the assumptions made previously and investigate whether the alternative approaches above might be feasible without undermining the principle and effectiveness of the cab rank rule and the regulatory objectives.
24. Given the normal working patterns of barristers, it would not be practical to publish such a review at the end of July. It is therefore suggested that we:
 - a. Publish a call for evidence in September, open until December;
 - b. Reach a final decision by the March 2015 Board meeting; and
 - c. Make any application to the LSB in April 2015.

Resource implications

25. There will be implications for the Regulatory Policy and Communications teams – these will largely be staff time and can be incorporated into business as usual (if necessary, this important review will be prioritised over other work). Advice will be sought from the Research team as to whether any specialist research resource would be beneficial.

Equality Impact Assessment

26. An equality analysis has not yet been undertaken, but the call for evidence will include representative groups for those with protected characteristics. The impact on access to justice for these groups will be an important factor to consider in the Board's final decision.

Risk implications

27. This is an issue that goes to the heart of the regulatory objectives and evidence collected will be a useful addition to our knowledge base about the risks in the market and the proportionality of our responses to them. The Regulatory Risk Manager will be in post when we launch the call for evidence and may be treated as a 'pilot' for some of our new processes under the regulatory risk framework.

Consultation

28. We have had discussions with some members of the profession and sought evidence about the type of contract on which barristers are accepting instructions. No formal consultation has been undertaken since the rule change was implemented, hence the recommendation for a call for evidence.

Publicity

29. A communications plan will be agreed prior to any call for evidence being issued. It is important that the views of non-barristers (including solicitors and consumer groups) are targeted.

Annexes

Annex A – summary of undertakings given by the Bar Council following the LSB investigation

Lead responsibility:

Ewen Macleod
Head of Regulatory Policy

Bar Council investigation – the required undertakings

1. (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 is 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.

2. (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.

3. 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.

4. 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.



**LEGAL SERVICES
BOARD**

The Chief Executive's Office
Legal Services Board
One Kemble Street
London
WC2B 4AN

T 020 7271 0043
F 020 7271 0051

www.legalservicesboard.org.uk

Dr Vanessa Davies
Director
Bar Standards Board
289-293 High Holborn
London WC1V 7HZ

28 August 2014

Dear Vanessa,

Undertaking to review Standard Contractual Terms

We discussed this issue when we met on 14 August and I undertook to write to set on the record the LSB's concerns about the lack of progress made on, and failure to give priority to, implementing a key part of the informal resolution of our investigation into the Bar Council.

As you know, the BSB and Bar Council committed to:

- *"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 s604(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"*

As part of the BSB's board meeting on 24 July 2014 the public agenda included an item titled: *"Review of standard contractual terms and the cab rank rule."* You wrote to me on 30 July enclosing a copy of the paper. The letter stated that the Board has *"initiated a review into the role of the standard terms and the list of defaulting solicitors, but decided that it would be premature to publish any proposals for change at the moment."* After the summer break we understand that the BSB intends to launch a call for evidence.

The LSB does not consider the July paper to be a "completed review", as set out in the undertaking. Indeed the paper itself says that it simply "*updates the Board on the review work that has been undertaken to date*". Its substantive content is thin and certainly does not provide any level of comfort that any significant level of effort and consideration has been expended in its production. This is clearly not an appropriate way for a regulated body to implement an undertaking that was given to prevent formal regulatory action. It is likely to cause significant concern when it is reported to the LSB Board at its meeting in September, both in relation to the immediate issue and in relation to proposals for resolving any future investigations informally.

The Board is therefore likely to consider whether the LSB should investigate the lack of progress made. Although there would appear to be a clear case to do this, we would prefer to ensure that rapid action is taken to secure the intended outcome of the undertaking rather than focus further on what has clearly been a flawed BSB process to date.

In that context therefore, we have noted that the paper states that the BSB remains committed, as required by the undertaking, to apply to the LSB to alter the BSB's regulatory arrangements by July 2015, if such an application is necessary following the review. When we spoke you also pointed out that you now have access to richer data from the Institute of Barristers' Clerks on the extent to which the terms are being used in practice and the issues which are arising. We expect that you will use this material to "jump start" the review and for more rapid progress to be made in coming weeks.

It would be helpful to have a response to this letter and, in particular, a clear statement of how the BSB will ensure that its commitment to the July 2015 date is met by 18 September to enable us to brief the Board on its full range of options.

I am copying this letter to Stephen Crowne for information.

Yours sincerely



Chris Kenny
Chief Executive





Chris Kenny
Chief Executive
Legal Standards Board
One Kemble Street
London WC2B 4AN

16 September 2014

Dear Chris

Undertaking to review Standard Contractual Terms

Thank you for your letter of 28 August.

I note that you do not consider our July 2014 Board paper and the work we have done to date to constitute a satisfactory implementation of the undertaking that was given last year. I quite understand the concerns of your Board and would wish to put on record our regret that we were not able to conduct a fuller review and publish a report in the time frame previously agreed.

We have been working hard to ensure we prioritise our regulatory work on a risk and evidence basis and I think it is fair to say with hindsight that we may also have applied this approach to this topic, at the (inappropriate) expense of our obvious obligation to the detail of the undertaking. We conducted work on it as set out in the paper you have received, tending to see July 2015 rather than 2014 as the key date and to associate the issues with other key areas (such as public access review) rather than focus on the need to deliver this explicit piece of work in line with the undertaking.

I appreciate of course that an undertaking is precisely that, and I set out below our proposed plan to ensure we are in a position to make any application for a change of regulatory arrangements to the LSB by July 2015 (should our work lead us to that).

The key questions for the BSB are:

1. What are the contractual terms actually being used by the Bar since the rule change was introduced?
2. Are there “reasonable terms” being offered within the market other than the Standard terms?
3. How regularly is the Cab Rank Rule being invoked in practice and are barristers using the Standard Terms or their own when responding to such requests?
4. In the light of the above questions, what would the impact be of taking a different approach on Standard Terms?

In relation to these questions, we already have some of our evidence for 1 and 2. Our initial survey of the terms offered by solicitors has been that there may be concerns about the reasonableness of some of them if we were to say barristers were obliged to act on them. We need to seek further evidence of whether the Institute of Barristers’ Clerks’ experience is representative of experience elsewhere.

We aim to generate evidence:

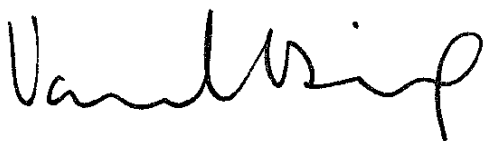
- By end of September, by writing to all Specialist Bar Associations and other professional bodies to invite submission of evidence (arrange meetings between now and Christmas for those interested) and putting a general statement on the website to encourage people to get in touch with us;
- By Christmas, by raising the matter with our consumer stakeholder group and the LSCP to get their perspective on the Cab Rank Rule and what is reasonable
- Issuing a Survey Monkey-type questionnaire that can be circulated to the Bar (again, results reported by Christmas);
- Meeting with Law Society / SRA etc to understand solicitors' experience of the Standard Contractual Terms and/or the Cab Rank Rule;

We will expect to take a paper to the Board by March 2015 with final recommendations (we will have the flexibility to do this earlier if we think we are likely to need further consultation on any specific rule changes); and aim to submit any rule change application to the LSB in April 2015.

I trust the above addresses any concerns about substantive delivery, and would like to take this opportunity to apologise for any impression that may have been created that we do not take our regulatory obligations seriously. We appreciated the informal resolution of the earlier investigation and fully understood this to be contingent on the undertakings given. We have had a huge volume of work to deliver over the year so far in relation to the regulatory reforms to which we are committed and I hope that we can continue to focus on achieving the intended outcomes. In this regard, our policy team has been strengthened recently and a revised system for better tracking of the many pieces of interlocking policy work has recently been put in place. I am confident that a similar situation would not arise again.

Please let me know if there is anything you would like to discuss further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Vanessa Davies', written in a cursive style.

Dr Vanessa Davies
Director, Bar Standards Board

Cc: Stephen Crowne, CEO, Bar Council