

To:	Legal Services Board	
Date of Meeting:	18 March 2013	Item: Paper (13) 12

Title:	Research into efficacy of the Bar Standards Board cab rank rule	
Workstream(s):	Workstream(s) (see Business Plan 2011/12)	
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Status:	Unclassified	

Summary:
<p>When considering the BSB application to introduce standard contract terms alongside its cab rank rule, the Board expressed some reservations about the rule and research was commissioned to explore the rule and its impact.</p> <p>In the months ahead the Board will be asked to consider applications related to litigation, a new code, rules for regulating entities and an application for designation as a licensing authority. The issue is live already in the context of the Bar's application for public access rights and we will update the Board orally on recent discussions on the topic.</p> <p>The attached slides set out a high level summary of the research, some of the public commentary so far and the questions this might raise for the LSB and other regulators.</p>

Recommendation(s):
<p>The Board is invited:</p> <ol style="list-style-type: none"> (1) To note and comment on the research (and commentary) on the efficacy of the BSB's cab rank rule; (2) To note and comment on the subject in particular in the context of public access (3) To note that the BSB, Bar Council and Judiciary are expected to provide written commentary in due course, and this will need to be considered carefully before any further steps are taken.

Risks and mitigations	
Financial:	N/A
Legal:	N/A
Reputational:	The publication of the Cab Rank Rule research has been subject to intensive trade media attention.
Resource:	N/A

Consultation	Yes	No	Who / why?
Board Members:	X		Barbara Saunders and Steve Green
Consumer Panel:	X		Steve Brooker, Panel currently developing policy so unable to provide views at this stage
Others:	None		

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
Para 3, second and third sentence Para 9 Para 13 Annex A	S36 - intended to promote a free and frank exchange of views for the purposes of deliberation by the Board.	

LEGAL SERVICES BOARD

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Research into efficacy of Bar Standards Board cab rank rule

Background

1. The Board recently agreed to BSB amendments to its code to introduce standard contract terms. The decision was finely balanced, but in deciding that the high statutory criteria for refusal were not met, the Board expressed significant policy doubts about the standard terms proposals and reservations about the efficacy of the cab rank rule in its entirety. It asked the executive to commission research to better understand the rule and its impact.
2. That research has now been published and attracted substantial commentary, the LSB published the report on our research web-pages with little attempt to generate media coverage. We wrote a short summary of the paper and this generated over 800 page visits on our website, compared to only 44 visits to the report itself¹. The cover paper highlighted some of the issues considered in the report and the suggestion that the rule could be reworked simply as a principle.
3. Some of the responses to the research have been insightful and informative, whereas other elements suggest that the commentator had not actually read either the research or the LSB statement at publication. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] While many have challenged the potential detrimental economic impacts of the rule (the research concluded that it was unlikely that there were any), others were misleadingly concerned that the LSB was seeking to abolish the cab rank rule.
4. **The LSB has not suggested, proposed or consulted upon abolition of the cab rank rule.** The analysis so far has not led the executive to that conclusion, though it is considered that the rule as currently framed does not appear to result in any noticeable change in behaviour that might be expected in the absence of the rule. We recognise the cultural significance of the cab rank rule to the Bar and so the challenges that the BSB faces in introducing significant reforms to its approach to regulation.
5. In managing the launch of this research the LSB has attempted to take a measured approach, launching with a clear, short summary of the status of the report. Following the extensive press, we published a short article in *The Lawyer* (see **Annex B**) responding to the criticism seen and outlining again the status of the report. As part of their response to the Business Plan

¹ As of 19 February

consultation the Bar Council have highlighted their concern at the £21,367 cost of the research. We have maintained our stance that the review was subject to a tender exercise, was peer reviewed and represents value for money given the importance of the topic and seniority of authors employed.

6. The research is available on the LSB website https://research.legalservicesboard.org.uk/wp-content/media/Cab-Rank-Rule_final-2013.pdf. The attached slides set out some of the key issues within the research and public commentary, along with some questions for the LSB in developing a view as to the efficacy of the current rule. The report was commissioned as an exploratory study using an academic who has previously carried out research with Barristers and their clerks and so is familiar with the profession together with an academic who among other work advised the then Department for Constitutional Affairs on the Clementi Review as part of its consideration and review of legal regulation. The report draws heavily on academic sociological and economic theory and a small number of interviews with the BSB, Barristers and clerks. Neither the BSB nor the Bar Council, when invited by the researchers, were able to provide any evidence or examples of enforcements against the rule, (though the LSB has subsequently discovered one example from 2006) so the report is based upon theoretical analysis and *a priori* argument. We believe that the report provides a robust analysis of the issue.

Current activity

7. The BSB is working on a series of applications to LSB during 2013. An application has already been received to extend the public access scheme. The cab rank rule, as currently drafted, only applies to barristers instructed by a professional client who accepts liability for fees, and hence is, by definition, not relevant for all public access work, (although arguably such clients without a solicitor are the most vulnerable. The rest of the analysis is virtually complete and is ready to be submitted to the Chief Executive for decision, but we have invited both the BSB and the Bar Council to consider the points about extending similar protections further. We are also considering what our options are in relation to rule approval in the absence of movement on the issue and we will update the Board orally at the meeting.
8. Further applications related to litigation, entity based regulation, a rewrite of much of the current code of conduct and an application for designation as a licensing authority are expected through the spring.
9. [REDACTED]

10. In terms of the cab rank rule this means that there are opportunities to continue the dialogue with the BSB to ensure that this particular aspect of its code is outcomes focused and risk based. That is likely to be the most effective way to secure the regulatory objectives in a manner consistent with the better regulation principles.
11. It is therefore to be welcomed that the BSB is currently considering its approach to the cab rank rule as it seeks to move to a more outcomes focused code. While its Chair has made robust statements regarding the quality of the research and in defence of the cab rank rule, we remain optimistic that the BSB may not have a narrow or closed mind on this issue.

Next steps

12. The Board will be updated as the BSB applications are developed, finalised, submitted by the BSB. They will then be considered in line with statutory requirements and LSB rules.
13. [REDACTED]

Recommendation

14. At this stage, the executive is recommending only that the Board:
 - i. notes and comment on the research (and commentary) on the efficacy of the BSB's cab rank rule;
 - ii. notes and comment on the subject in particular in the context of public access and
 - iii. notes that the BSB, Bar Council and Judiciary are expected to provide written commentary in due course, and this will need to be considered carefully before any further steps are taken.