

ANNEX B

Legal Services Board does not want the 'cab rank' rule abolished, but to understand its limitations

In recent weeks the Legal Services Board has been the focus of inaccurate comment for supposedly proposing the abolition of the 'cab rank' rule. Nothing could be further from the truth.

In October 2011 the Bar Standards Board (BSB) requested approval for rule changes on the acceptance of instructions by barristers. If implemented, clients would only be able to benefit from the 'cab rank' rule if their solicitor agreed to instruct a barrister on the BSB's standard contractual terms or the barrister's advertised standard terms.

Being well aware of the importance of the principle of the rule, we thought long and hard before approving the changes. In particular, we wanted to understand why clients might be prevented from having access to the barrister they want because of commercial decisions made by a solicitor. Any client unlucky enough to be using a solicitor on the list of defaulting solicitors cannot benefit from the rule.

In addition, we thought it right to test the appropriateness of regulators prescribing contractual terms.

We did approve the rule change: the criteria we are allowed to have regard to are strict and there is a high test for refusal. We cannot refuse simply because we would have done something different had the decision been ours.

However, becoming aware of so many caveats to such an important principle made us want to understand more about the rule and its operation.

Barristers are exempt from the cab rank rule for many cases subject to criminal or family graduated fee schemes. If, as we believe, representation should be available without fear or favour, why does the regulation designed to deliver it seem to have so many exceptions?

So we invited researchers to investigate the impact of the rule. Two proposals were received and Professors Flood and Hviid appointed. Their report, *The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market*, was published on 22 January.

They reached provocative conclusions: that the rule serves no clear purpose; is unenforceable; has never been enforced against; is applied selectively; and has so many exclusions as to emasculate it. While virtuous in intent, they say, it is redundant in practice.

The report is interesting; the debate it has generated even more so. Cynics may not believe it, but we share the professions' commitment to the principle that those in need of representation must be able to get it, regardless of the nature of the alleged crime or client.

It is because this is such a fundamental component of access to justice that we have a duty to ensure the rules designed to enshrine it deliver. It is important to ask whether commercial considerations have watered it down to such a degree that it is as easy to circumvent as to comply with.

This is for the BSB to decide. For the LSB's part, our aim is clear: regulation should be in the public interest - not the profession's.

18 February 2013