

LSB Board paper (12) 47 Annex B

The issues on which advice was sought	Consultee Advice – summary of substantive points	BSB Representation	LSB comments
<p>The New Contract Terms (NCT) – we would be interested in views on whether it is appropriate for such terms to be included in regulatory arrangements. Is there anything in particular (either in the terms themselves or the proposed way in which they would be applied) that the LSB should consider in relation to the impact on consumers, solicitors, other lawyers and ABS of introducing such terms in conjunction with the Cab Rank Rule.</p>	<p>With the exception of the Law Society most of the consultees did not raise major objections to the New Contract Terms. The Bar Council was in support as expected. The ACL repeated what it had said in the earlier consultation that other approved persons should be included in the terms and that solicitors should be informed if barristers' work is being subcontracted (as allowed in the NCT). LeO did not have any objections to barristers having contract terms in principle but had concerns as to impact on clients and believed more work needed to be done to assess consumer risk. LeO also asked why ABS and LDPs were not included. The Law Society accepts that current position is not satisfactory but concludes that the NCT are uncompetitive and favour barristers. Would not have a problem if professional body produced model contract terms but did not believe it was the place of the regulator to produce such terms as part of its regulatory arrangements. ICAEW said it had no difficulty with the NCT or it being part of the regulatory arrangements of the BSB as current arrangements are unsatisfactory.</p>	<p>Noted that it was only the Law Society that had voiced major objections to the proposals. BSB feels the Law Society has misunderstood the NCT and its purpose. Pointed out that other terms can be agreed between barrister and solicitor (via the barristers own advertised terms).</p> <p>Highlighted the support of the ICAEW. On the ACL point about including other approved persons, the BSB has moved on this issue. It said that in the light of the advice received by the LSB, it is considering whether or not the proposed terms should be further extended to cover all authorised persons. It believed this needed further thought with the possibility of a further mini-consultation.</p> <p>On LeO's ABS/LDP point, BSB have now conceded that ABS/LDP should be included in NCT. On the issue of consumers, BSB said client care is dealt with in other parts of the Code. For example, 701(f) requires that adequate records are kept by the barrister to support the fees charged or claimed and this provision is re-stated in the Bar Council's Practice Management Guidelines.</p>	<p>Only the Law Society raised the issue of NCT being part of regulatory arrangements. The BSB repeated the stance made in the application that the NCT helps promote the regulatory objectives and supports the operation of the Cab Rank Rule by ensuring confidence in contracts so that barristers can be clear about whether a case falls within the Cab Rank Rule. LSB needs to consider whether this argument for including the NCT as part of regulatory arrangements in order to support the effective operation of the Cab Rank Rule is compelling.</p> <p>Good that the BSB is open minded to review the NCT restriction to solicitors and extended to ABS/LDP. On the issue of impact on solicitors, the BSB makes the point in its representation that while barristers are not obliged to accept any alternative terms the solicitor may propose, it does require the barrister to act if either the NCT or own published terms are accepted by the solicitor.</p> <p>Neither the consultees' advice nor the BSB representations shed particular new light on concerns about the wider impact of the NCT on consumers. LEO flagged clients as a particular risk that needed further exploration. Other than reference to 701f of the BSB Code there has not been a detailed assessment by the BSB of the potential impact on clients. The LSB needs to judge whether or not the NCT or its tie in with the Cab Rank Rule presents a sufficiently large risk to consumers that we should refuse the application.</p>
<p>Bearing in mind the regulatory objective to promote competition in the provision of legal services, are there any competition concerns raised by the principle of having standard terms and/or the way in which the particular terms are drafted and/or their application in conjunction with the Cab Rank Rule.</p>	<p>The Law Society was the only consultee primarily concerned with the tie in of the NCT with the Cab Rank Rule and the conditions of the contract. Was especially concerned about it being anti- competitive. The OFT declined to offer advice as they wished to await the outcome of the LSB commissioned research into the Cab Rank Rule in general.</p>	<p>The BSB did not consider the NCT to be anti-competitive. Stated that nothing in the proposed rules prevents barristers from advertising their own terms and that barristers and solicitors are remain free to enter into arrangements for the provision of the barrister's services on any terms they may choose.</p>	<p>Disappointing that the competition issues were not addressed by the consultees. This makes it difficult for us to come to any firm conclusions. The question for the LSB in terms of competition therefore is whether there is sufficient flexibility in the regulatory arrangements for negotiation between solicitors and barrister for solicitors not to be unduly disadvantaged.</p>
<p>The impact on individual solicitors and their clients of being put on the List of Defaulting Solicitors and whether that impact is proportionate. Are there any issues concerning the process for putting solicitors on, and removing them from, the List of Defaulting Solicitors that we should take into consideration?</p>	<p>The Bar Council said that the proposed List improved the position for all parties and was more flexible than existing arrangements. The ACL said it did not object the ending of the old arrangement but commented that there should be strict criteria for adding defaulters and reasonable provision for removing defaulters from the List. LeO asked how clients will know whether or not their solicitor can access a barrister. The Law Society said it strongly opposed the existing scheme but did not offer comment on the new List proposals. The ICAEW agreed with the need for a List and supported the flexibility of the proposed new arrangements.</p>	<p>Believes the more 'light touch' List is proportionate and an improvement on the Withdrawal Scheme.</p>	<p>The consensus from consultees is that the proposed List is an improvement on the Withdrawal scheme and the LSB broadly concurs with this. LeO raises legitimate concerns about the transparency of the List for clients and if the LSB were to approve or part approve we may want to seek assurances from the BSB on the transparency of the List.</p>

<p>Whether, and how, the proposed change improves barristers ability to resolve disputes about payment taking account of the existing mechanisms for resolving such disputes that are currently available to barristers, and whether it is a proportionate way to achieve the outcome.</p>	<p>The consultees did not address this concern explicitly in their advice or whether they thought the rationale given in the application for making the change was convincing. However, the Law Society said that Barristers should determine their own contractual terms of business.</p>	<p>BSB representation repeated the rationale made for the change in the application. Maintain that the solution they have proposed was made after careful consideration and was best suited to supporting the Cab Rank rule, whilst reconciling this with parties' freedom of contract. They acknowledge it is a difficult balance. Also mention that an alternative which the BSB considered and rejected was a rule which simply stated that a barrister was obliged to accept instructions in a case if they proffered "on reasonable terms".</p>	<p>It does appear that the BSB have considered other options, in particular the "reasonable terms" alternative. The LSB must ascertain if this is adequate in the absence of advice from consultees that contradicts the BSB position.</p>
<p>Whether there are any particular aspects of the proposed change in addition to those highlighted above that the LSB should consider.</p>	<p>No substantive comments outside of the principle issue we asked about. The the Law Society said it was disappointed that the BSB did not listen to its concerns on the proposed NCT. The CLSB mentioned it had not been consulted at all.</p>	<p>The BSB did not offer views on the Law Society's comment that its views had not been listened to. It said it would make sure the CLSB was included in future BSB consultations.</p>	<p>While we remain concerned that there was not a more targeted consultation and that the main consultation on the issue happened over a year before the submission of the application, there was nonetheless a consultation and responses from key stakeholders, such as the Law Society. We do not see the shortcomings in consultation as a reason on its own for refusing the application. The BSB could reasonably argue that it consulted over a long period.</p>