

To:	Legal Services Board	
Date of Meeting:	11 July 2012	Item: Paper (12) 47

Title:	BSB application to alter regulatory arrangements – Cab Rank Rule
Workstream(s):	Statutory Decision Making
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Status:	Protect

Summary:

This paper provides an update to the Board on the assessment of the BSB's application in relation to the Cab Rank Rule. It summarises the actions that have taken place since the last report to the Board (notably the outcome from the warning notice process) and sets out proposed next steps with a view to reaching a decision on this application by the end of July.

We intend to ask Counsel to review and critique our analysis of the application and therefore at this stage we are not in a position to propose for discussion at the Board meeting the final recommendation to the Chief Executive on this application. We are specifically not asking Counsel to advise as to the specific outcome we should reach; that is a matter for the LSB decision makers. An update (if available) on the legal advice will be given at the Board meeting.

If the Board accepts the recommendation 3 (below), our aim would be to convene the sub-committee by conference call as soon as possible after we have received Counsel's advice to enable the decision to be reached by the end of July.

Recommendation(s):

The Board is invited:

1. To note the progress on the assessment of the application
2. To comment on the conclusions from Warning Notices responses and the BSB representations on those responses
3. To delegate to a sub-committee of the Board the review of the final recommendation with a view to providing advice to the Chief Executive before he makes the final decision

Risks and mitigations

Financial: N/A

Legal:	Should this application be refused, there is a risk that the BSB will seek to challenge the decision by judicial review. Counsel has been asked to have this in mind when carrying out his own analysis. However, Counsel has not been asked to provide a definitive opinion about the merits of the BSB's application or the strengths of the set of concerns that the LSB has, as the LSB Legal Team recognises the distinct role of the LSB as the decision maker. (JC)
Reputational:	Potentially high profile if we reach the decision that the application should not be granted.
Resource:	N/A

Consultation	Yes	No	Who / why?
Board Members:		√	(Barbara Saunders and David Wolfe provided input to the application earlier in the year)
Consumer Panel:		√	Legal Services Consumer Panel were invited to comment on the application as part of the Warning Notice process but decided not to make a submission.
Others:	Annex A lists those that were invited to provide advice on the application as part of the Warning Notice process; seven organisations (identified in Annex A) made submissions		

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

LEGAL SERVICES BOARD

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BSB Application to alter regulatory arrangements: Cab Rank Rule

Background / context

1. The Board received a substantive report (Paper 12(01)) on this application at its meeting on 18 January 2012 at which time the Board endorsed the proposal to issue a Warning Notice to the Bar Standards Board that the LSB was considering refusing the application.
2. The changes that have been proposed relate to the operation of the Cab Rank Rule. The changes are:
 - Insertion of a new paragraph to the Code of Conduct to provide that the Cab Rank Rule is not to apply to work other than work offered on either the New Contractual Terms (NCT) to be included in the Code of Conduct or any standard terms on which the barrister holds himself as willing to contract
 - Amendment to Cab Rank Rule to the effect that it would not apply to cases proposed by solicitors named on the List of Defaulting Solicitors (which would replace the current Withdrawal of Credit Scheme)
3. The Board is reminded that the scope of the decision in this case is merely the proposal to mandate the new contract terms. This particular rule change decision therefore does not raise questions about the desirability of the principle or operation in practice of the Cab Rank Rule as a whole. We have recently initiated some research by Professors John Flood and Morton Hvid which explores these issues in more detail.
4. The Board is also reminded that the judgement to be made is not whether it “agrees” with the proposal nor whether it constitutes “good regulation”, but whether it passes the specific high tests for rejection set out in paragraph 13 below. In broader policy terms, the proposal does underline some of our doubts about the BSB’s approach to regulation – notably the tendency to elaborate rules and guidance rather than specify outcomes. However, these themes are more appropriately explored in the context of the regulatory effectiveness work and in consideration of capacity in the context of a licensing authority application rather than material reasons for turning down this application.
5. The Warning Notice procedure has now been completed and we have considered the advice received from consultees and the BSB’s representations on that advice.

6. We are in the process of seeking Counsel's advice on our analysis of the issues we have identified in the application and assessment of the application against the criteria in paragraph 25(3) of Schedule 4 to the Act (the "refusal criteria").

Warning Notice advice, representations from the BSB and LSB conclusions

7. The Warning Notice was issued to the BSB on 20 January 2012. The request for advice was sent on 25 January 2012 to 22 organisations and advice was received from seven. **Annex A** lists those who were invited to provide advice and those who responded.
8. The Solicitors Regulation Authority (the approved regulator whose arrangements are most likely to conflict with the proposals) did not make any submission.
9. The advice received was sent to the BSB on 2 April 2012 and they made their representations on 11 May 2012. The advice and the representations were published on the LSB website on 17 May 2012.
10. **Annex B** summarises the issues on which advice was sought; the advice received; the BSB's response; and LSB's assessment. Copies of the advice and the representations can be provided and will be available at the Board meeting.
11. The key points to note are
 - Only the Law Society raised any specific concerns about the proposal; most respondents supported (or at least did not object to) the NCT being included in the regulatory arrangements
 - The BSB have accepted the advice that the terms should be extended to ABS and legal disciplinary practices authorised by the SRA and submitted revised rules to reflect this. They have noted the feedback that the provisions should extend to other authorised persons; they believe that further work needs to be done to ensure that there are no unintended consequences before extending it beyond SRA authorised persons
 - The warning notice process has not identified any significant new information on the potential impact on consumers
 - There was no real comment on the competition issues which makes it difficult to draw any firm conclusions on this aspect
 - The proposed Defaulting Solicitors List is seen as an improvement on the current Withdrawal of Credit Scheme; we agree with this view.

Legal advice

12. In connection with another application we have sought Counsel's opinion on the general decision-making process and the assessment of applications against criteria for refusing an application.

13. In summary, Counsel's advice is
- There is a presumption that a change will be approved – “the Board may refuse an application only if it is satisfied that” one or more of the criteria in paragraph 25(3) of Schedule 4[the refusal criteria] is met
 - Where there is a positive (as opposed to discretionary) statutory duty to act, there is an expectation that there will be a detailed examination by the decision maker which is capable of detailed scrutiny by the courts
 - Paragraph 25 sets out the test to be applied when deciding whether to grant or refuse an application. This must be applied in the wider context of the Section 3 duties (the LSB's duty to promote the regulatory objectives etc.).
 - The threshold for refusing an application is quite high. LSB must seek sufficient information in order to evidence that the refusal criteria have been satisfied with a full explanation of its reasons. The burden threshold linked to paragraph 25 decisions ought to be that if the LSB considers an application to be 50:50, owing to the higher burden on it (i.e. approval is assumed unless one or more of the refusal criteria are is satisfied), LSB should grant the application.
14. With this advice in mind, we have considered all of the information we have received on this application, including the advice and representations from the Warning Notice process and produced a summary of the potential grounds for refusal of the application, linked to the issues on which advice was sought. Most of the areas of concern can be linked in some way to the refusal criteria of being prejudicial to the Regulatory Objectives (25(3)(a)). We will be requesting Counsel to critique this analysis.
15. In addition, as the detailed assessment of the application has continued, we have questioned whether the proposal falls within the remit of the regulatory arm of the profession or whether the main driver is representation and promotion of barristers' interests.
16. The extent to which this has been considered by the BSB in formulating its proposals was raised with them in a meeting on 28 June 2012 and they reiterated the comments already in their representations letter of 11 May 2012. Their arguments are that if barristers are to enter into contractual arrangements with professional clients more frequently, then this needs to be done in a way that does not undermine the operation of the Cab Rank Rule (currently, cases that are accepted on a contractual basis are not subject to the Cab Rank Rule). The BSB view is that the NCT will allow barristers to enter into a contractual relationship while maintaining the fundamental principle of the Cab Rank Rule. Where a barrister advertises his own standard terms, professional clients will have a choice as to whether to use those or the NCT – and if either are selected the Cab Rank Rule will apply and the barrister will have to accept the instructions or risk action being brought for being in breach of the Code.

17. We do not accept the BSB's proposition that the need for the NCT *necessarily* flows from the Cab Rank Rule: it would be quite possible for the rule to stand alone or for there to be a general outcome about reasonable standard terms being available. However, our initial conclusion is that this disagreement with the policy approach does not, of itself, constitute sufficient evidence that the main purpose of the change is primarily representative. While one of the consequential effects of the change will be that barristers are in a better position to seek redress for non-payment, the main driver from the BSB's point of view is to ensure that the Cab Rank Rule (which in their eyes is fundamental to the provision of legal services) continues to operate as intended.
18. Counsel's view has also been sought on this, particularly whether our approach of assessing whether the dominant purpose of the provision is representative or regulatory is appropriate.
19. In seeking the critique of our analysis, we are specifically not asking Counsel to advise as to the specific outcome we should reach; that is a matter for the LSB decision makers. An update (if available) on the legal advice will be given at the Board meeting.

Next steps

20. Counsel's advice is being sought on analysis of the application against the criteria in Paragraph 25(3) of Schedule 4. If there has been any progress on this then an oral update will be given at the Board meeting.
21. The proposed sub-committee will be convened (by conference call) as soon as possible after receipt of Counsel's advice to enable a decision to be reached in July.

04.07.2012

Warning Notice – List of Consultees

Consultees who submitted a response to the invitation to give advice

Association of Costs Lawyers
Costs Lawyer Standards Board
The General Council of the Bar
The Institute of Chartered Accountants in England and Wales
The Law Society
Legal Ombudsman
The Lord Chief Justice
Office of Fair Trading

Full list of consultees invited to provide advice

The Lord Chief Justice
The representative and regulatory arms of all approved regulators under the Legal Services Act 2007
The Institute of Chartered Accountants for England and Wales
The Office of Fair Trading
The Legal Services Consumer Panel
Which?
Consumer Focus
Citizens Advice