

Document of Responses from Consultees who were asked to give advice to the Legal Services Board in relation to an application from the BSB to change aspects of the operation of the Code of Conduct Cab Rank Rule

List of consultees who sent a response

- 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 organisations who were asked to give 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

Advice of the Association of Costs Lawyers on the operation of the changes to the Cab Rank Rule proposed by the Bar Standards Board

1. The ACL submitted comments to the BSB on their proposed changes last Summer and broadly approved the proposed changes. The ACL made several points about the changes where it had concerns and these are repeated below.
2. The proposals appear to be limited to arrangements with “Solicitors” and since the Associations’s members, all of whom are Costs Lawyers, regularly instruct and brief counsel, the expression “Costs Lawyers” or “Authorised Litigators” should be included in the final documentation.
3. There are groups other than Costs Lawyers who also instruct counsel and care should be taken that they also are included in the new arrangements.
4. The Council of the ACL generally applauds the introduction of New Terms and Conditions. In the modern age there is little or nothing to be gained by non-contractual ‘honoraria’ but any change must ensure that instructions from solicitors and other authorised litigators are not subject to refusal other than on strictly limited grounds.
5. Competition issues should not arise if access to barristers is not unreasonably refused and providing the new contract reflects that principle, there would seem to be no difficulty in operating the Cab rank Rule in conjunction with the new Contractual Terms.
6. Disputes as to fees would be resolved in ways to which the other professions are accustomed including at the outset negotiations.
7. There seems to be no obvious obstacle in new provisions which required those instructing barristers to adopt the New Contractual Terms providing there is also a provision that the barrister and individual authorised litigator may agree between themselves to contract out of them.
8. The Council of the ACL would not object to the abandonment of the Withdrawal of Credit Scheme and its replacement by an advisory List of Defaulting Solicitors but there would have to be strict criteria for adding defaulters to the list and reasonable provision for removing them from the List. It would under those circumstances be reasonable to require a down payment in advance from persons or firms on the default list when first instructing a barrister.
9. With regard to the New Contractual terms themselves, there are various issues identified by the ACL;

(a) The provisions as to sub-contracting work in sub-clause 8.3 without the consent of those instructing the barrister is too open ended. The ACL considers that in such cases the barrister should be under an obligation to inform those instructing him or her in advance of any intention to sub-contract work.

(b) The provision that clients of barristers are prohibited from using advices etc. other than for the particular purpose for which they are prepared unless "express Permission" is given is again too open-ended. It is obviously quite reasonable not to expect such documents to be distributed en masse but it frequently occurs that previous advices are of value to other barristers in other cases or proceedings which may involve similar points and it is unrealistic to require permission to be sought in such cases. This is especially so when the document concerned may be several years old.

(c) The ACL applauds the flexibility with which it is proposed fees can be agreed both in terms of whether they can be retrospective or prospective and whether they be based upon an hourly rate or flat fee.

(d) The Council regrets that there is no provision for estimates to be made. Estimating (and in due course budgeting) is becoming a common feature of litigation and it is unrealistic for barristers to be able to opt out of providing a realistic estimate when one is required. The ACL considers that this should be a positive provision within the New Contractual Terms.

(e) Equally there is no provision in the new terms for barristers to keep a record of the time they spend in preparation or otherwise engaged on their instructions. From the point of view of a client recovering costs of litigation there should, the ACL believes, be a duty on the part of barristers to provide as much assistance as possible in maximising or facilitating that recovery yet there is no such obligation. The New Contractual Terms should provide for barristers to keep proper time records and to give as much reasonable assistance as possible to enable the lay client to recover costs.

Michael Bacon MA(Cantab)

Costs Lawyer and ACL Council Member

19th March 2012



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LEGAL SERVICES
27 FEB 2012
BOARD

Friday 24 February 2012

Proposed changes by BSB to Cab Rank Rule

Dear Chris,

I write further to your letter dated 25 January 2012, having now had the benefit of instructions I can advise CLSB has no issues to raise on the proposed change in operation of the Cab Rank Rule.

On the point raised under 4(b) of the LSB synopsis "*The BSB appears not to have undertaken the appropriate and targeted consultation with interested stakeholders necessary to address these issues*" whilst we have not raised any issues, we believe the CLSB should have been included by the BSB in its consultation process and don't have any record of having been so consulted.

Yours sincerely,

Lynn Plumbley
(Chief Executive)

A handwritten signature in blue ink, appearing to be 'Lynn Plumbley', is written over the typed name. The signature is fluid and cursive, with a long horizontal stroke at the end.

LEGAL SERVICES

14 MAR 2012

BOARD



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BOARD

THE CHAIRMAN
MICHAEL TODD QC

Mr Chris Kenny
Chief Executive
Legal Services Board
7th Floor
Victoria House
Southampton Row
London WC1B 4AD

13 March 2012

Dear Chris,

Request for advice – proposed changes to the operation of the Bar Code of Conduct – the Cab Rank Rule – new contractual terms of work – Bar Standards Board (“BSB”) application of October 2011.

Thank you for your letter of the 3 February requesting my advice under paragraph 22(1) of Schedule 4 to the Legal Services Act 2007 as to whether the BSB’s application to make certain changes to the cab rank rule should be granted.

As recommended in your letter, I have considered the documentation on your website before offering my advice on the 5 points you raise. Before turning to each of those points in turn, I should say that it seems to us that all of your points take insufficient account of the fact that the Bar is essentially a referral profession.

Point 1 - The proposed New Contractual Terms (“NCT”)

I consider that it is essential that the NCT be included in the regulatory arrangements.

The current position is that the Code of Conduct includes non-contractual terms of work which operate as a “default” position. (In fact, the majority of non-publicly

THE BAR COUNCIL

www.barcouncil.org.uk

funded work is believed to be undertaken by the Bar is on these terms.) Under the Code of Conduct, a barrister cannot refuse work offered on those terms (see below). If new, more modern terms are to be introduced in the form of the NCT, the Cab Rank rule must apply to the NCT in order to continue to have something on which to "bite" so as to ensure that the rule continues to be effective.

It is worth noting that the BSB's application repeatedly advises that the NCT are not compulsory. Parties are free to adapt or to ignore them.

I wish at this point to restate the benefits of the Cab Rank Rule.

The Bar Council strongly believes that the Cab Rank Rule operates in the interests of justice and of the public in general, as it enables consumers to obtain legal services from their barrister of choice irrespective of the identity of the client, the nature of the case and any belief or opinion that the barrister may have formed as to the character, reputation, cause, conduct, guilt or innocence of that client and irrespective of the manner in which the client is financially supported. The rule operates by prohibiting barristers from withholding their services on any of these grounds and it is obvious that the rule improves access to justice and promotes justice itself and the independence of the Bar.

There are a few exceptions to the Rule – for example where the barrister lacks the expertise to handle the particular case, is otherwise committed and lacks the time to carry out the instructions, where the instructions limit the ability of the barrister properly to carry out his functions or where the barrister would have a conflict of interest.

The other current express exception is where the instructing solicitor is listed on the Withdrawal of Credit list and requires the work to be done on credit terms. In those circumstances, the Code of Conduct prohibits the barrister from acting. Under the proposals contained in the BSB's application, that exception would be abolished.

The BSB proposes that, with the same few exceptions (but for the abolition to which I have just referred) barristers will continue to be obliged to accept instructions under the Cab Rank Rule if the terms of engagement are the NCT or the individual barrister's own advertised terms. Barristers will be entirely free to decide for themselves whether to accept instructions on credit from solicitors named on the proposed List of Defaulting Solicitors.

If the Cab Rank Rule continues (which I consider essential if the interests of justice are to be served) but is not linked to either the NCT or the barrister's own advertised terms of business, then, barristers would be obliged to accept instructions, but there would be no terms (whether legally enforceable or not) underpinning the engagement. Clearly, such a situation would be unreasonable as far as barristers are concerned and would also lead to confusion which would be detrimental to the public interest and the proper administration of justice.

In commerce, contractors are entirely free to accept or refuse work having regard to any factors that they consider appropriate, including the legal effect of the terms of business proposed to them. Because of the Cab Rank Rule, it is not possible to replicate that freedom for the Bar. Consequently a barrister should have some safeguard that will enable him to refuse, if he so wishes, instructions given on undefined or possibly unfair terms which, for example, do not allow for payment, or for payment only on an uncertain basis, or on terms that impede the necessary execution of the work.

The proposed changes are designed to do away with the anachronistic non-contractual Terms of Work, but preserve the operation of the Cab Rank Rule in that barristers will be obliged to accept work from solicitors under the NCT or on their own advertised terms of business, provided that none of the other exceptions to the Cab Rank Rule apply. For the Cab Rank Rule to operate there must be an irreducible minimum of terms on which solicitors can insist.

The BSB's application of October 2011 makes it clear that the NCT are intended to be *basic* terms of engagement for barristers undertaking work from solicitors. Clearly, such basic terms could not meet the needs of every possible permutation of engagement or deal with all possible sources of work. To devise such terms would be virtually impossible. Any attempt would certainly produce a document so unwieldy and complex as to be incomprehensible to many and irrelevant to most.

A key advantage of the proposed NCT lies in their simplicity – to the advantage of the lay consumer and, particularly, the high street solicitor who will generally have no need to enter into complicated terms of engagement.

In summary, since the Cab Rank Rule is essential for promoting justice, protecting and promoting the interests of consumers and improving access to justice, to fail to link clear terms of engagement with the Cab Rank Rule would be contrary to encouraging an independent, strong, diverse and effective legal profession.

Point 2 – Competition Issues

The competition aspect has been referred to above. First, solicitors are not obliged to accept the NCT. They are always free to negotiate on terms of engagement and both barrister and solicitor will be free to negotiate on price. Second, the NCT themselves are so basic that they could not reasonably be considered as being anti-competitive. Third, the Cab Rank Rule applies not only to these proposed NCT but also to the terms that the individual barrister himself advertises as his terms. Fourth, the only extent to which solicitors' freedom to negotiate could (arguably) be said to be restricted is that they are only able to take advantage of the Cab Rank Rule if they accept the NCT or the barrister's own published terms. Such a restriction, if it can be characterised as one at all, is much less than that placed on Barristers in the first place (see above). It is entirely reasonable and in the interests of justice. It provides a transparent way for the lay client to benefit from the Cab Rank Rule. Furthermore,

as I said above under point 1, the alternative that the Cab Rank Rule should apply without reference to any specific terms, would be wholly unreasonable and not in the interests of justice.

Point 3 – Advisory List of Defaulting Solicitors

We consider that the introduction of the proposed advisory List of Defaulting Solicitors improves the position of solicitor and lay clients over their position under the current Withdrawal of Credit Scheme and that their new position will be both reasonable and proportionate.

I am pleased to be able to take the opportunity of assisting on this point, as it is the Bar Council's executive which operates the present Withdrawal of Credit Scheme on the Chairman's behalf and will also operate the proposed advisory List of Defaulting Solicitors.

It is appropriate at this stage if I say something about the working of both the current Withdrawal of Credit Scheme and the proposed advisory List of Defaulting Solicitors.

Under both schemes, it is the duty of the Chairman of the Bar to undertake a detailed examination of the position and there is a detailed procedure under which the solicitor has the right to explain his side of the dispute. It is only after careful consideration of all representations that the Chairman comes to a decision, aided, as I mentioned above, by the Bar Council's executive.

When, under the current Withdrawal of Credit Scheme, a direction to withdraw credit is made against a firm of solicitors, the Bar Council also lodges a complaint with the SRA on the grounds that the solicitors have behaved in a way which is contrary to maintaining the trust the public places in the solicitors' profession and the SRA takes such action as it thinks appropriate.

In the last three years, the Bar Council has received over 8,000 individual fee complaints covering an aggregate of over £19.5m in fees, yet today £12m still remains unpaid. The operation of the Withdrawal of Credit Scheme by the Bar Council and the disciplinary action by the SRA has accordingly had only very limited effect.

As you will be aware, the Bar Code of Conduct currently forbids barristers to take work on credit from solicitors against whom a direction has been made, unless the work is *pro bono* or the Chairman of the Bar has given specific permission for instructions to be accepted on credit. Not to have that provision in the Code would result in barristers having to accept instructions on credit under the Cab Rank Rule from solicitors known to be "bad payers".

A similar issue arises with the NCT. The main purposes of the introduction of the NCT are to bring clarity and enforceability to commonly used terms of engagement

by solicitors of barristers, for the benefit of consumers. However, it is believed that the use of the terms will enable barristers to recover payment from solicitors more easily. The BSB's application describes that a barrister may lodge a complaint with the Bar Council if any of the following situations arise: judgment has been obtained for non-payment of fees, non-payment of a joint tribunal award or failure by the solicitors to deal with cases having full publicly funded certificates in an appropriate manner such that the barrister is unable to obtain payment from the Legal Services Commission.

The mechanism for placing solicitors on the proposed Advisory List of Defaulting Solicitors is set out in the annexes to the BSB's application and I should stress that it is clear from these provisions that the Chairman of the Bar would only place a solicitor on that List after considering any representations by the solicitor. The provisions specify that any solicitor may apply after six months to have his name removed from the List and obviously, if there is no longer a justification for retaining the solicitor's name on the list, the name would be removed.

As described in Point 1 above, contractors are usually free to accept or refuse work having regard to the credit-worthiness of the clients. Because of the Cab Rank Rule, it is not possible to replicate that freedom for the Bar. Therefore it is essential that a barrister should have the opportunity, if he so wishes, to decline instructions offered on credit from solicitors named on the proposed advisory List of Defaulting Solicitors. The List of Defaulting Solicitors is there so that barristers are not obliged to accept work on credit under the Cab Rank Rule where there is some evidence that the solicitors cannot be relied upon to pay their fees. However, there will be no compulsion on the barrister to refuse such instructions, unlike the present position under the Withdrawal of Credit Scheme, and the barrister would still be free to negotiate payment with the solicitors.

Accordingly, one important impact of the new advisory List of Defaulting Solicitors is that defaulting solicitors will no longer be automatically "locked out" from the ability to instruct *any* barrister on credit. This will improve the position both for solicitors and their lay clients, as barristers will be free to evaluate the risk and choose whether or not to extend credit on a case by case basis. If a barrister refuses to extend credit in these circumstances, the options open to the solicitor and lay client will be either for the lay client to put the solicitor in funds so that payment can be made on delivery of the instructions, or to find another barrister who will extend credit. A further option of the lay client alone is to instruct a different solicitor who is not on the list.

We consider that the introduction of the proposed advisory List of Defaulting Solicitors improves the position of all three parties to the arrangements between barrister, solicitor and lay client. In addition, any possible remaining detriment to solicitors and lay clients that results from the existence of the proposed advisory List of Defaulting Solicitors is not disproportionate and is not unreasonable. The root cause of any detriment is the solicitor's failure(s) to pay in the past. The lay client can avoid any significant detriment by paying early or finding a more creditworthy

solicitor. The solicitor is entirely the author of his own misfortune and it is perfectly reasonable for individual barristers to be placed in a position in which they are able to decide whether to accept work from him on credit.

I should also mention that the BSB's application refers to the enforceability of the terms permitting younger and more economically vulnerable members of the Bar, from a wide range of social and/or financial backgrounds, to start and remain in practice. The encouragement into the profession of able individuals irrespective of their means and personal circumstances can only improve access to justice. The Equality Impact Assessment in the application showed that difficulty in recovering unpaid fees by barristers from solicitors has greater impact on those who are less able to bear the financial burden of non-payment, either related to their financial background and/or in their early years at the Bar. Furthermore, as made clear in the BSB's application, the annual Bar Survey of barristers leaving the profession identifies non-payment as one of the key factors influencing the decision to leave.

It is therefore essential that there are adequate mechanisms, both by the introduction of the contractual terms and the use of the complaints procedure under the proposed Advisory List of Defaulting Solicitors scheme, to prevent barristers being forced out of the market as a result of financial pressures caused by non-payment or significantly delayed payment of fees. Without an adequate protection mechanism for barristers who remain unpaid, barristers are likely to be forced out of the market and would be contrary to the objectives of promoting competition in the provision of legal services and encouraging an independent, strong, diverse and effective legal profession.

It is worth noting that, in responding to the consultation on the new terms in 2010, the BSB's application states that both the Law Society and the SRA supported the introduction of this advisory List of Defaulting Solicitors.

Point 4 – Whether the Changes Improve Dispute Resolution

In my view, the proposed NCT will improve the position here.

The current Terms of Work are not contractual and it is clear that barristers operating under those terms have no right in law to sue for unpaid fees. Accordingly, the current Terms of Work have to incorporate an indirect mechanism (the Withdrawal of Credit Scheme plus a subsequent complaint to the SRA) which is cumbersome and frequently ineffective. See my answer to point 3.

The Joint Tribunal provision continues in the NCT to resolve genuine fee disputes, but with the additional ability for the solicitor or barrister to enforce the joint tribunal award.

Given that there is currently no provision to enforce payment of a joint tribunal award, the proposed NCT is far more effective. The NCT will have no impact on the

resolution of disputes between barristers and lay clients – any such disputes are outside the scope of the law of contract.

Point 5 – Other Points

You ask whether there are other aspects of the proposed change which the LSB should consider. There are several.

The first concerns the papers submitted to the LSB for its extraordinary meeting on the 18 January. It would appear from those papers there is some misunderstanding on the LSB's part as to what the BSB's application is seeking to achieve.

Under paragraph 2 of the report to the Board, it is suggested that a barrister can opt out of the full new Contractual Terms (NCT) or their own standard terms by way of a Conditional Fee Agreement.

This is only the case *if the solicitor agrees*. The solicitor is always able to insist on the NCT *without variation*. The application by the BSB makes it clear that the barrister and solicitor can agree any terms at any time. The ability not to use the NCT or the barrister's own advertised terms is not confined to Conditional Fee Agreements.

Under paragraph 3, it is suggested that insufficient consultation has been undertaken and Annex A to the paper implies that the 2010 Consultation was sent only to the Approved Regulators.

That is incorrect. The BSB application, together with the Consultation Paper and Summary of Responses annexed to that application, makes it clear that the Consultation was sent to 44 organisations, besides the Bar. A number of consumer organisations were included in the Consultation.

Regarding the legal advice provided by Hogan Lovells, I have read the summary on your website with interest and should be grateful to have sight of the full advice.

As would have been noticed from the Summary of Responses annexed to the BSB's application, Hogan Lovells was one of the respondents to the Consultation Paper and I am accordingly somewhat surprised and dismayed that the LSB has subsequently taken advice from a firm which had already committed itself to a particular view.

Be that as it may, more importantly, it would appear that Hogan Lovells did not, in providing its advice, consider the form of the contractual terms attached to the application. In the summary of its advice, Hogan Lovells clearly state that the NCT would apply by default unless expressly excluded. That is wrong. The BSB application explained that, at the time of the Consultation, it was indeed intended that the NCT would be treated as default terms in the absence of other terms having been agreed. However, after the Consultation and, in view of the implementation of

the Provision of Services Regulations 2009, it was decided it was unnecessary to have the NCT as default terms.

To reiterate, the BSB application is not seeking to have the NCT treated as default terms.

Hogan Lovells are correct in advising that barristers have been at liberty to contract, since 1991. However, they do not seem to appreciate that that ability is undermined as a result of the fact that solicitors can insist on using the non-contractual Terms of Work. In addition, at the risk of repetition, the importance of the proposed NCT to the regulation of the Bar and the provision of its services lies in its interaction with the Cab Rank Rule. The BSB's application is not simply about the introduction of NCT but also the way in which those terms interact with the Cab Rank Rule in order to operate in a way which is beneficial to the public. Hogan Lovells appear not to have understood that point.

Other points raised by Hogan Lovells are dealt with elsewhere in this letter but I am of the view that their advice to the LSB that the NCT do not give barristers a right to sue for fees is mistaken.

Regarding the table of questions and concerns at Annex A of the Board paper, my brief comments are as follows:

First Section of annex A

The purpose of the NCT is to provide simple, basic terms for instructions from solicitors to barristers. As explained above, it is impractical to draw up terms that would meet every possible situation in which barristers could take instructions. Further, there are separate rules within the Bar Code of Conduct governing instructions from non-solicitors. Lay clients will benefit from the NCT by the fact that the terms are so clear and transparent, and more easily enforceable, unlike the present commonly used terms of work.

The necessity of including the NCT in the regulatory arrangements has been described above. It is a regulatory matter, as the Cab Rank Rule cannot operate without the inclusion of the terms.

Effective bilateral negotiation between barrister and solicitor is not diminished. In fact, such negotiations may well be enhanced and encouraged by the existence of the NCT. The NCT, at the very least, preserves the status quo as regards the operation of the Cab Rank Rule.

Second Section of annex A

The BSB's application clearly explains that the proposed Code amendments provide that barristers who are offered work on the NCT, or on the barrister's own advertised terms, remain subject to the Cab Rank Rule. As I have already explained, the intention is that the effect of the amendments to the Code of Conduct will be that barristers remain **obliged** to accept instructions when offered on the NCT or on the individual barrister's own advertised terms, unless the barrister is permitted or required to refuse them as a result of another exception to the Cab Rank Rule set out in the Code of Conduct. Conversely, it is proposed that the effect of the amendments to the Code of Conduct is that a barrister will not be obliged to accept instructions if they are not offered on the NCT or on the barrister's own advertised terms. **In summary, if a solicitor seeks to instruct a barrister on the NCT or on the individual barrister's own advertised terms, the Cab Rank Rule will apply. If they seek to instruct on any other terms, the Rule will not apply and the barrister may choose whether or not to accept the instructions, both parties being free to negotiate.**

I entirely agree with the BSB that it is impractical to draw up one set of terms that would meet every possible situation in which barristers could take instructions. The purpose of the NCT for instructions by solicitors to barristers is to tie in with the Cab Rank Rule. The Bar Code of Conduct has separate and distinct rules relating to the instructions from non-solicitors, which are outside the Cab Rank Rule.

The NCT do not, in the least, fetter the incentives to negotiate terms and price. The BSB's application makes it clear that barristers and solicitors will continue to have the unfettered ability to agree whatever terms they feel appropriate. Furthermore, the freedom of solicitors and barristers is enhanced with the removal of the Withdrawal of Credit scheme and the ability of barristers to accept instructions from solicitors named on the advisory List of Defaulting solicitors.

It consequently follows that the lay client is not restricted or disadvantaged in any way.

Third Section of annex A

The List of Defaulting Solicitors is a list to be provided, as with the Withdrawal of Credit Scheme list at present, to barristers so that barristers are made aware that particular solicitors have failed to pay barristers without good reason. It is irrelevant who or how many barristers have lodged complaints with the Bar Council concerning a particular firm of solicitors. As described above, the NCT and List of Defaulting Solicitors are designed only for instructions by solicitors, so it is inappropriate that the List of Defaulting solicitors should cover other Authorised Persons.

Far from being a "restrictive practice across an entire profession", the List of Defaulting Solicitors is an entirely proportionate mechanism for relieving barristers from the requirements of the Cab Rank Rule in respect of those solicitors who fail to abide by a court judgment to pay, or fail to pay an award of a joint tribunal, or who

fail to take the appropriate steps in a matter having a full publicly funded certificate to enable counsel to be paid by the Legal Services Commission. It is not surprising that both the SRA and the Law Society understood and supported the introduction of the List of Defaulting Solicitors scheme.

The suggestion that the scale of non-payment does not justify the List of Defaulting Solicitors scheme is mistaken. Whilst I can confirm that, in respect of directions to withdraw credit made in the last 3 years, there was, at the time of issuing the directions, £357,119 owed to 87 barristers, that fact needs to be set against the total value of complaints received by the Bar Council during that period of £19.5m. Complaints over approximately £12m of this £19.5m are currently unresolved.

Fourth section of annex A

I note that the basis of the LSB's concern is external legal advice, which I would be interested to receive and consider. Certainly barristers have been able to enter into contracts and sue for their fees since January 1991. However, barristers are not obliged to accept instructions on contractual terms under the Cab Rank Rule. Barristers are however obliged to accept instructions under the Cab Rank Rule (unless one of the few exceptions apply) in respect of the *non-contractual* Terms of Work, which clearly prohibit any form of legal redress. It is to ensure that the effectiveness of the Cab Rank Rule continues that these anachronistic, non-contractual Terms of Work should be replaced by the NCT.

Fifth Section of annex A

I note the Board's concern that there is insufficient evidence to overcome what are perceived to be potential detriments in the proposed changes. I am hopeful that as these potential detriments seem to be based on a misreading of the BSB's application, the Board's concerns will be allayed.

Sixth Section of annex A

It is suggested that insufficient consultation has been undertaken yet the BSB application, together with the Consultation Paper and Summary of Responses annexed to that application, makes it clear that the Consultation was sent to 44 organisations, in addition to organisations that form part of the Bar. A number of consumer organisations were included in the Consultation.

Finally, may I again thank you for the opportunity to offer advice to the LSB in respect of this matter.

Please do not hesitate to contact Janice Marshall if you have any queries or seek clarification. Her contact details are jmarshall@barcouncil.org.uk, direct line 020 7611 1375.

Yours sincerely

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

MICHAEL TODD
Chairman of the Bar



28 March 2012

Our ref: ICAEW Rep 44/12

Mr Chris Kenny
Chief Executive
Legal Services Board
7th Floor
Victoria House
Southampton Row
London WC1B 4AD

Dear Chris

Request for Advice; proposed Changes to the operation of the Bar Standard's Board Code of Practice - the Cab Rank Rule

ICAEW welcomes the opportunity to respond to your *Request for Advice* dated 25 January 2012, a copy of which is available from this [link](#).

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 138,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

Our comments and response are contained in the Appendix to this letter.

Yours sincerely

Michael Izza
Chief Executive

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APPENDIX

1. The Cab Rank Rule itself is a fundamental and successful building block of the legal system in England and Wales, and its benefits for consumers and practitioners alike should be retained.
2. The current arrangements for payment of counsel fees appear anachronistic and it is disappointing that agreement for review could not be reached by the parties over the years. The current proposals, whilst not perfect, are at least a step in the right direction.

Question 1

The New Contract Terms – the original proposed terms and revised terms received from the BSB are on the LSB's website (see link in footnote). We would be interested in your 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 alternative business structures of introducing such terms in conjunction with the Cab Rank Rule?

3. ICAEW has no difficulty with the concept of incorporating the New Contract Terms (NCT) as part of a suite of regulatory provisions. We believe it is in the interests of justice that professionals properly instructed should have an entitlement to sue for unpaid fees on clear terms.

Question 2

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 these particular terms are drafted and/or their application in conjunction with the Cab Rank Rule?

4. ICAEW sees no competition issues of concern in how the NCT are drafted. These are not compulsory terms. A solicitor and barrister can;
 - accept the NCT in which case the cab rank rule will apply
 - accept a barrister's bespoke terms in which case the cab rank rule will apply
 - negotiate their own arrangements, which if successful will result in an adequate alternative to the cab rank rule. Neither client nor solicitor will be disadvantaged as the solicitor will be able to use their barrister of choice.
5. The question therefore appears to be what happens if independent agreement cannot be reached but we are not aware of examples of this arising. To ensure they do not, we assume that the BSB will have ability and mechanisms in place to review barristers' bespoke terms if they operate as a barrier to competition and operation of the Cab Rank Rule in practice. Provided these mechanisms exist then we see no reason why the proposals cannot be introduced for the reasons, and with the monitoring proposals, set out in our response to Question 4 below.

Question 3

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?

6. Firms that do not pay bills incurred in professional practice are potentially more of a problem for the administration of justice than the proposed action of the Bar Standards Board. In our opinion the operation of the NCT linked to the cab rank rule may operate to discourage such practices and instead allow those operated on sounder footings to fill gaps created, with consequent benefits for the administration of justice and consumer access to it.
7. As far as individual clients are concerned, individuals within firms do not work in isolation. A problem with one client is likely to be replicated across the firms and/ or can be drawn out at the investigative stage. We do not consider individual firm clients are unduly prejudiced by decisions made in the context of the whole firm for the reasons set out in the preceding paragraph.
8. Furthermore, a defaulting solicitor appearing on the proposed List of Defaulting Solicitors can **still** instruct barristers if specific agreement is reached which is quite different to current arrangements with the Withdrawal of Credit Scheme. If there are extenuating circumstances then they can be identified.

Question 4

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 this outcome.

9. Current arrangements for resolving disputes appear unsatisfactory. Given this issue has been unresolved for a number of years, then it may be better to introduce something that;
 - will change the current and unsatisfactory status quo, and
 - more closely reflect the commercial realities with the advent of ABS
10. And then monitor the results with a view to refining and introducing suitable arrangements to apply across future ABS regulated by other regulators at a later date.
11. If law firms instruct accountancy firms or vice versa, then there are simple and legitimate contractual expectations that fees will be met. We do not see why this expectation should continue to be denied to the Bar, although we sympathise with the LSBs position in having to navigate the issue without an adverse impact on the Cab Rank Rule.

Question 5

Whether there are any particular aspects of the proposed change in addition to those highlighted above that the LSB should consider.

12. Accountants routinely instruct barristers direct, however we are not aware of difficulties raised by members of the Bar concerning non-payment of fees. We do not know whether this is a result of

the smaller numbers involved compared with solicitors, or whether it is due to differences in financial management.



The Law Society

From the Chief Executive

Chris Kenny
Chief Executive
Legal Services Board
7th Floor
Victoria House
Southampton Row
London WC1B 4AD

22 March 2012

Dear Chris

Request for advice: proposed changes to the operation of the Bar Standards Board Code of Practice – the Cab Rank Rule.

I am responding on behalf of the Law Society to your letter of 25 January 2012 seeking advice on whether the Legal Services Board should grant the application of the Bar Standards Board for changes to its Code of Practice which would have the effect of changing the operation of the Cab Rank Rule.

We accept that the present position is not satisfactory, with barristers instructed in the main on a non contractual basis and unable to insist on the resolution of fee disputes directly with solicitors. It is unusual today for work to be provided by one professional to another in the absence of contractual terms and protections.

The Withdrawal of Credit Scheme does not provide a quick remedy for the non payment of fees. The scheme leads only to a direction to all barristers prohibiting them from accepting work without payment up front from the solicitor or his/her firm and relieving barristers from having to accept instructions on a credit basis under the Cab Rank Rule. In effect the scheme penalises barristers rather than the defaulting solicitor as it becomes a matter of misconduct for a barrister to accept instructions on a credit basis from a solicitor listed under the scheme. Furthermore, the Law Society continues to be of the view that the Withdrawal of Credit Scheme does not bear scrutiny from the perspective of competition law.

The proposed prescription by the regulator of contractual terms of business governing the relation between its members and the members of another profession does not square with the Bar Standards Board's better regulation obligations. In our view it is not for a regulator (the Bar Standards Board) to prescribe standard contractual terms governing a business relationship between its members, instructing solicitors and clients.

We are concerned about the implications of the proposals for the Cab Rank Rule. We suggest that they would further undermine the utility of the Rule by adding to the already long list of exceptions to it. Indeed in our view these proposals reinforce the case for a more fundamental review of the future of the Cab Rank Rule. Whilst the Cab Rank Rule exists, it is unacceptable to exclude instructions from the Rule if the New Contractual Terms, or other terms adopted by the barrister, are not agreed by the solicitor. That would have an anti competitive effect for those solicitors seeking to instruct on behalf of clients on terms other than those specified by the barrister.

The Law Society remains of the view that barristers should determine their own contractual terms of business and publish them so that solicitors are able to consider those terms before deciding whether or not to instruct that barrister. We would have no objection to the Bar Council as the profession's representative body publishing model contractual terms as guidance to its members. That approach would have the added benefit of avoiding the undermining of the Cab Rank Rule which would not be in the public interest.

We remain disappointed that the Bar Standards Board has not listened to our concerns on the details of the New Contractual Terms. They are plainly balanced in favour of the barrister in the relationship as opposed to the solicitor.

For the reasons I have set out in this letter, the Law Society considers it appropriate for the Legal Services Board exceptionally to exercise its powers under Schedule 4 of the Legal Services Act 2007 and to decline to approve the application for approval to these rule changes from the Bar Standards Board.

Yours sincerely



Desmond Hudson
Chief Executive

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Chris Kenny
Chief Executive
Legal Services Board
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Victoria House
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21 March 2012

Dear Chris,

Re: request for advice on the proposed changes to the operation of the Bar Standard's Board Code of Practice – the Cab Rank Rule

Thank you for your request for advice (under paragraph 22(1) of Schedule 4 to the Legal Services Act 2007) in relation to the proposed changes to the operation of the Bar Standard's Board Code of Practice – the Cab Rank Rule.

You have requested our advice and evidence from the experience of the Legal Ombudsman to inform whether or not to approve the proposed changes in operation of the cab rank rule. You asked us to focus on some specific areas, which I have sought to address in turn. Before I do that, we also have some general observations to make about the proposed changes which I hope are helpful.

In preparing this response, we have looked to draw evidence from our investigations. As you will be aware, the Legal Ombudsman records details of complaints in relation to the service provider (and their regulator), the reasons for the complaints and the area of law they relate to. We have looked into whether there is evidence from the complaints we have seen to indicate that the proposed changes pose a risk of detriment to consumers. We have also considered whether the changes are inconsistent with regulatory objectives (in particular those to protect and promote the interests of consumers and encourage an independent, strong, diverse and effective legal profession) and how these interact with better regulation principles.


LEGAL
OMBUDSMAN

As you will appreciate, it is not a simple exercise to quantify this experience and at this stage there is no clear evidence to either support or dispute the proposed changes to the cab rank rule and Withdrawal of Credit Scheme, or the move to working on a contractual basis. Nevertheless, included in Annex A to this letter is a commentary that draws on our experience and that outlines potential risks that we hope will assist you draw conclusions in relation to this application.

Yours sincerely

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

Adam Sampson
Chief Ombudsman

Response to Legal Services Board

Request for advice on proposed changes to the operation of the Bar Standard's Board Code of Practice

The logo for the Legal Ombudsman features the word "LEGAL" in a bold, pink, sans-serif font. A large, elegant, pink cursive flourish is positioned above the letters "L", "E", and "G". Below "LEGAL", the word "OMBUDSMAN" is written in a black, all-caps, sans-serif font.
LEGAL
OMBUDSMAN

Annex A – Legal Ombudsman response to request for advice

New contract terms

We know from our experience that one priority for consumers is to know how much they are going to be charged – they want to know where they stand and to be updated if things change. When customers think they have been overcharged or work is not up to standard, they are prepared to challenge the fees. Our recent costs report, published on 6 March 2012, set out what we see as the impact on consumers who have made a complaint. The learning from this report is relevant here as the proposed form of contract may affect relationships between barristers, solicitors and customers: it may impact on the cost information that customers receive – how will solicitors pass on barrister’s costs to the customers in the future, and how will barristers respond when customers raise complaints about their costs?

From the complaints we investigate, there is no indication that a shift towards standard contracts will have a positive or negative impact on consumers. We see complaints where a dispute arises when it is unclear how a solicitor and barrister will work together to pass on fees and so there may be circumstances in which the proposed contract is beneficial to all concerned. However, if a contract is explained or administered poorly, we anticipate it is an area where complaints may be raised. As with all complaints, however, this is likely to be due as much to the clarity of communication about the contract and costs as it is about the contract itself. There is a general shift towards standard forms of contract in many areas of legal services and there is no reason, in our view, to suppose these may pose a greater risk to consumers than other arrangements to seek to recover costs by a legal services provider.

We would like to understand in more detail why the standard contracts will not cover alternative business structures (ABS). Our reading of the proposals suggests that customers who instruct an ABS firm and need to instruct a barrister will fall outside the cab rank rule. Consumers may not know this in advance and this could lead to complaints if they have difficulty obtaining representation from barristers. It would also be helpful to know if the LSB is aware of other sources that indicate that there is a

risk of detriment to consumers. We accept this will also be influenced by the applications made to become ABSs, and if these focus on conveyancing transactions, for instance, or cover areas more likely to involve barristerial services.

Competition issues

The proposed changes also remove the solicitor's liability for fees. What complaints to the Ombudsman show is that what seems to be of paramount importance to consumers is to know where they stand, and how a legal service or transaction will play out over time. With the proposed form of contract, barristers will need to ensure that clients are well informed: bringing a focus to customer service that may well represent a cultural shift from past practices. This echoes some of the factors that may come into play also with a move to direct access (it is not clear from the information we have seen how this proposal will link to a move to direct access by barristers; this seems to be an initiative that needs to be considered with these proposed changes). We have recently responded to the BSB's consultation on this topic, and our response may provide further information to assist you.

The cab rank rule is a long-standing principle of access to justice, which ensures equality of representation. There may be a risk in relaxing this principle and linking it to standard contracts that difficult clients – or potential clients – may find it harder to access appropriate representation. Again, we raise this as a risk; to date, we have seen no cases to the Ombudsman that indicate that there is evidence for this concern. We do see, however, cases concerning other parts of the profession where consumers contact us with concerns about discrimination or their ability to access legal services. For this reason, we will consult publicly on the issue of the eligibility of prospective customers to complain to the Ombudsman as part of our scheme rules review.

Impact on individual solicitors

Our question in relation to possible impacts on individuals relate to consumers rather than solicitors. Would consumers know that the

solicitor they are instructing might be unable to engage a barrister, for instance without paying in advance?

We have no evidence to suggest that placing solicitors on the Withdrawal of Credit Scheme list may have a negative impact on clients. As the new scheme is advisory only, it may be that the potential for impact on the client is reduced further.

The BSB's data also indicates, however, that 35% of cases of unpaid barristers' fees relate to immigration cases. It may be helpful to explore this area further to be assured that there is no particular risk indicated here for a potentially vulnerable client group.

Barristers' ability to resolve disputes about payment

We have touched on this in our response above. In general it is our view that the requirements on barristers both to resolve complaints at the first tier, or if they are escalated to the Ombudsman, should be sufficient irrespective of the specific circumstances of the complaint.

Legal Ombudsman

14 March 2012



JUDICIARY OF
ENGLAND AND WALES

THE RIGHT HONOURABLE THE LORD JUDGE

Chris Kenny Esq
Chief Executive
Legal Services Board
7th Floor, Victoria House
Southampton Row
London
WC1B 4AD

LEGAL SERVICES

21 MAR 2012

BOARD

16 March 2012

Dear Mr Kenny,

**Request for advice: proposed changes to the
operation of the Bar Standard's Board Code
of Practice**

Thank you for giving me the opportunity to advise.
However, on this occasion it would not be
appropriate for me to do so.

Louis McHenry, Judge

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OFFICE OF FAIR TRADING

Mr Chris Kenny
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LEGAL SERVICES
16 MAR 2012
BOARD

Your ref		Tel	020 7211 5811
Our ref		Fax	020 7211 8505
Date	15 March 2012	Email	nelson.jung@oft.gsi.gov.uk

Request for advice: proposed changes to the operation of the Bar Standard's Board Code of Practice – the Cab Rank Rule

Dear Chris

Thank you for your letter dated 25 January 2012.

The Office of Fair Trading (OFT) has previously provided initial views on the 'Cab Rank' rule (the 'Rule') in response to a Consultation Paper by the Bar Standards Board (BSB) in 2008.¹

At the time, the OFT expressed doubts as to the effectiveness of the Rule, consistent with its views expressed in the context of the regulation of legal services in Scotland.²

In light of the BSB's application to amend the Rule, we understand that the LSB intends to commission research with a view to gathering evidence of the practical and economic impact of the Rule on the provision of legal services by barristers. We understand further that this evidence would be made available to the OFT as well as other stakeholders.

¹ http://www.oft.gov.uk/shared_oft/consultations/BSB.pdf

² See http://www.oft.gov.uk/shared_oft/reports/oft_response_to_consultations/oft1076.pdf; and http://www.oft.gov.uk/shared_oft/reports/professional_bodies/Legal-Services-Scotland-bill.pdf



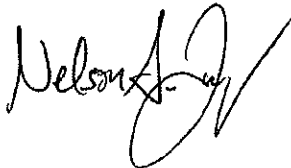
INVESTOR IN PEOPLE

Office of Fair Trading
Fleetbank House
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Switchboard: (020) 7211 8000
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As you are aware, the OFT is supportive of the evidence based manner in which the LSB carries out its work. On this basis, and in light of the OFT's remaining concerns relating to the effectiveness of the Rule, the OFT considers it appropriate to defer its opinion on the questions outlined in your letter until such evidence is obtained. We are hopeful that this will allow us to form an evidence based view of the effectiveness of the Rule, which will in turn shape our opinion regarding the extent to which the proposed changes to the operation of the Rule will be of benefit to consumers of legal services.

If you have any queries in the meantime, please do not hesitate to contact me on 020 7211 5811.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nelson Jung', with a stylized flourish at the end.

Nelson Jung
Assistant Director
Office of Fair Trading