

Consultees to note:

Below are the BSB's responses to questions posed by the LSB in the initial decision period stage of the application.

The application is concerned with specific changes to the operation of the Cab Rank Rule. The first question was posed to enable the LSB to gain a better understanding of the purpose of the rule and the impact of the proposed changes. The LSB has not been asked to decide on the continuation of the Cab Rank Rule itself. The other questions relate to the proposed changes.

Q1 What consideration has been given to removing the cab rank rule entirely from the Code of Conduct. What are the risks that the retention of the rule is seeking to mitigate.

A: The Cab Rank Rule has been reviewed as part of the review of the Code of Conduct and again in the context of entity regulation. The issue has been raised in several of the consultations. The arguments were set out most recently in the consultation on Regulating Entities published in September 2010 (paragraphs 3.10-3.30). The response from barristers and consumers has shown strong support both for continuing to apply the rule to self-employed barristers and for extending it to entities regulated by the BSB. A survey in 2010 showed that 63% of barristers considered that the rule was "important" or "very important" to them.

The Bar Standards Board is quite clear that the Cab Rank Rule is an essential requirement to protect the interests of the public. The risks it seeks to mitigate are:

- Unpopular individuals and causes might be unable to obtain representation, particularly when the counsel representing them is liable to be the subject of hostile criticism as in a recent case
- Major clients, such as banks and insurance companies, might require individual barristers, or even Chambers, not to act for other parties, thus restricting their access to justice. This is a particularly serious risk in specialist areas in which there are relatively few highly experienced barristers.
- Barristers might refuse to accept instructions in the hope of obtaining more lucrative work, thus making it more difficult for clients to obtain representation
- Unknown professional clients might find it difficult to obtain the services of top ranking barristers
- The independence of barristers might be undermined if they took cases as a matter of choice rather than as a professional duty.

The Cab Rank Rule therefore makes an important contribution to improving access to justice by ensuring that the full range of the Bar's expertise is available to anyone who needs it. It is in the interests of public and of consumers. It also promotes or is compatible with all the other regulatory objectives.

In 1999, Lord Irvine, the then Lord Chancellor, said: "The "cab rank" rule is one of the glories of the Bar. It underscores that every member of the Bar is obliged, without fear or favour, to represent clients who offer themselves, regardless of how unpopular they may be in the community or elsewhere."

The proposed amendment to the Cab Rank Rule affects only two of the exceptions to the Rule. It will make no difference to the underlying principles.

Q2 What is the evidence that there is currently consumer detriment in the operation of the rule, and how will this be reduced by the proposed changes. To assist us in assessing whether the proposed rule change is a proportionate response to the issue, please provide some data (ideally for the last two years) on 1. The number of solicitors subject to the Withdrawal of credit arrangements and the areas of law that they cover; 2. How much is owed, for how long and to how many barristers.

A: The current non-contractual Terms of Work on which barristers offer their services to solicitors lack clarity as to the services to be rendered and the precise terms of payment. That is obviously to the detriment of the consumer who may find themselves caught up in disputes. The new terms, which we reiterate are not compulsory but provide a framework for both barristers and solicitors to use, provide, in clear and unambiguous language, basic terms which solicitors and barristers can easily amend (or discard), as appropriate.

In updating the standard terms upon which barristers and solicitors will (if they so wish) conduct business, the opportunity has been taken to replace the present Withdrawal of Credit Scheme with the Advisory List of Defaulting Solicitors. It should be noted, as stated in paragraph 79 of the application, that almost all the respondents to the Consultation, including the SRA and the Law Society, agree that this change is beneficial. Under the Withdrawal of Credit Scheme, counsel is compelled to refuse work on credit from solicitors against whom a direction to withdraw credit has been made, unless the work is pro bono, special permission is given by the Chairman of the Bar or the work is covered by a full publicly funded certificate. Under the Advisory List of Defaulting Solicitors, barristers will have the freedom to refuse or accept work on credit from named solicitors.

The ability of barristers to refuse (if they so wish) work on credit from solicitors named on the Advisory List is necessary for the reasons outlined in paragraph 77 of the Application. The Cab Rank Rule requires barristers to accept any work for which they are retained (unless one of the very limited grounds apply – for example the barrister lacks the necessary expertise to handle the work, there is a conflict of interest or he is otherwise committed). Consequently, the barrister is unable to refuse instructions on the grounds of the credit-worthiness of the client which, in commerce generally, contractors are free to do. Consequently it is right that barristers should have some safeguard that will enable them to refuse, if they so wish, instructions from solicitors who, by virtue of being placed on the List, are known to have delayed or failed to make payment. Not to have that provision negates the principle of encouraging a strong, diverse and effective Bar and would be completely contrary to the desire to promote greater equality.

It is important to note that, in respect of work undertaken on these new contractual terms, the only solicitors placed in the Advisory List of Defaulting Solicitors will be those against whom a judgment has been made for non-payment of fees and/or those who have failed to pay a Joint Tribunal award. Consequently, it is anticipated that the number of solicitors appearing on the List will be far fewer than those under the Withdrawal of Credit Scheme, which is based on the non-enforceable Terms of Work.

Regarding the statistics requested, 5 revisions to the Withdrawal of Credit List were issued between December 2009 and November 2011 (inclusive), in which a total of 14 solicitors' practices had directions to withdraw credit made against them and 3 practices had their directions revoked.

The area of law that the 14 practices cover are immensely varied. On the basis of the published information provided by these practices to the Law Society, they are: administrative & public law, advocacy, agricultural, banking law, business affairs, chancery, children, civil liberties and human rights, civil litigation, clinical negligence, commercial litigation, commercial property, common law, consumer law, conveyancing, criminal, debt and money advice, employment, EU, family, fraud, immigration, insolvency, insurance, intellectual property, landlord & tenant, media & entertainment law, mergers & acquisitions, neighbour disputes, personal injury, professional negligence, trust, welfare benefits, wills & probate.

The number of fee complaints outstanding at the time the directions to withdraw credit were made totalled 137. An analysis of the areas of law of those fee complaints show that over 50% were related to commercial or contractual matters, including landlord & tenant and employment. About 35% related to immigration matters. There were just 2 criminal matters.

A total of £357,119 was owed, to 87 barristers, at the time the directions to withdraw credit were made. 23 cases had been outstanding for more than 4 years, 39 cases for between 3 and 4 years, 50 cases between 2 and 3 years, 21 cases between 1 and 2 years and 4 cases for less than 1 year.

Q3: What arrangements are in place to ensure that a barrister seeking to decline an instruction on the basis of this provision uses only the most recent list of defaulting solicitors

A: Hard copies of the Withdrawal of Credit List are issued to all chambers and single practitioners on the date of issue, when there are additions or deletions to the List and this will continue with the Advisory List of Defaulting Solicitors. Usually, there are three updated Lists published annually. In addition, the Code of Conduct at paragraphs 404(1)-(3) places obligations on the Heads of Chambers to ensure that their chambers are properly administered, which necessarily includes making sure that the chambers has up to date information regarding the appropriate List. This is supplemented by the guidance issued by the Bar Council and the Bar Standards Board. A barrister who used an out-of-date list and declined to accept instructions from a solicitor who was no longer on the list of defaulting solicitors would be in breach of the cab rank rule.

Q4: Please can you confirm that you are satisfied that the proposed contractual terms are compliant with current law and that, to the best of your knowledge, all of the proposed provisions are valid and enforceable and what evidence you have to support this.

A: The Contractual Terms were drafted and approved by a sub-committee comprising highly experienced barristers from differing backgrounds, including several with extensive commercial law practices. They prepared the Contractual Terms on the basis that they would be legally enforceable. As well as being sent out in the 2010 Consultation to all Heads of Chambers and single practitioners, the new Contractual Terms have also been considered by the following committees of barristers within the Bar Council: Fees Collection Committee, Implementation Committee and General Management Committee. The Terms have also been considered by the Standards Committee and the Bar Standards Board itself, upon which a number of barristers sit. All issues raised have been considered and acted upon as appropriate. For example, arising from

the 2010 Consultation, the contractual terms were amended to provide for the timely issuing of fee notes to solicitors, amplification as to when interest would start and clarity concerning liability.

At the time when it was proposed that the Contractual Terms should be treated as the default terms which would apply to all instructions to barristers (unless other arrangements were specifically made), an Opinion was sought from Counsel specialising in competition law on the question whether the application of the Cab Rank Rule to the contractual terms would restrict or distort competition. The Opinion advised that it would not. Nevertheless, the Law Society suggested in the Consultation that to treat these contractual terms as default terms would be anti-competitive. However, as explained in paragraph 68 of the Application, the Bar Standards Board no longer propose that the contractual terms be treated as the default terms and that therefore the issue of whether the terms being used default terms restrict or distort competition no longer applies.

Q5: As we understand it, the lay client would not be a party to this contract. Are there provisions elsewhere that require the barrister to seek the consent of the lay client for the use of their case in marketing and similar materials?

A: The new Contractual Terms restate, at paragraph 5.5, the current position. Barristers will continue to be subject to the requirements of paragraph 702 of the Bar Code of Conduct,

Confidentiality

702. Whether or not the relation of counsel and client continues a barrister must preserve the confidentiality of the lay client's affairs and must not without the prior consent of the lay client or as permitted by law lend or reveal the contents of the papers in any instructions to or communicate to any third person (other than another barrister, a pupil, in the case of a Registered European Lawyer, the person with whom he is acting in conjunction for the purposes of paragraph 5(3) of the Registered European Lawyers Rules or any other person who needs to know it for the performance of their duties) information which has been entrusted to him in confidence or use such information to the lay client's detriment or to his own or another client's advantage.

However, to the extent that the details of a case are in the public domain, there is no remaining confidentiality, and the barrister may use such publicly available information.

Q6: Please provide details of the governance arrangements (e.g. Structure, terms of reference, membership) of the Voluntary Joint Tribunal (VJT)

A: The Voluntary Joint Tribunal facility is a free service that has been provided to barristers and solicitors for many years to enable disputes between barristers and solicitors concerning the level of fees to be resolved. Until March 2009, the administration from the "solicitors' side" has been handled by the SRA and it was then transferred to the Law Society. Attached are the current standing orders, agreed by the Bar Council and the Law Society and which are available on both organisations' websites. Each joint tribunal has a barrister appointed by the Chairman of the Bar Council and a solicitor appointed by the Law Society. The Law Society selects its joint tribunal members from a large pool of volunteers. The Chairman of the Bar Council normally selects a Queen's Counsel with expertise in the area of law in respect of which the work was carried out by the parties to the joint tribunal. Consequently each joint tribunal is unique in its membership. Obviously, neither the barrister member nor the solicitor member of the joint tribunal would accept their nomination to sit on the tribunal if either were well acquainted with one or both of the parties to the tribunal.

This service will continue with the introduction of the new Contractual Terms.

Presently, directions to withdraw credit are made against solicitors who fail to pay a Joint Tribunal award but, under the new Contractual Terms, solicitors could, if they fail to pay an award of a Joint Tribunal, be placed on the Advisory List of Defaulting Solicitors.

Q7: In the event that a referral is made to the VJT before a matter is concluded, can the barrister cease to act for the lay client? What risks does this present for the lay and how are these risks mitigated.

A: The chances of a referral to a Joint Tribunal before the conclusion of a case are minimal. Certainly, in the last 11 years, we are unaware that there have been any such instances. However, irrespective of the referral to a Joint Tribunal, barristers are obliged to ensure that they do not contravene paragraph 610(d) of the Code of Conduct – namely to withdraw from a case or return instructions in such a way that the client is unable to find other legal assistance in time to prevent the lay client being prejudiced.

Q8: Do the governance arrangements of the VJT allow for an appeal where an application to be removed from the List of Defaulting Solicitors is declined?

A: No. The Voluntary Joint Tribunal process is of no relevance to an application to be removed from the List of Defaulting Solicitors. The Voluntary Joint Tribunal process will be quite separate from the operation of the List of Defaulting Solicitors. The Voluntary Joint Tribunal process is entirely a means of resolving fee disputes between barrister and solicitor.

The List of Defaulting Solicitors will comprise those solicitors who have failed to pay a judgment for fees or have failed to pay an award issued by a Voluntary Joint Tribunal. Where a judgment for fees or a Joint Tribunal award is unpaid, the barrister may report this fact to the Chairman of the Bar Council.

Under the Rules relating to the List of Defaulting Solicitors, the Chairman of the Bar Council will write to the solicitors asking the solicitors to pay within 14 days and the solicitors have the opportunity then to explain why payment has been delayed or is not being made. If a further complaint is received within 12 months of the fees relating to the first complaint being paid or the fees relating to the first complaint remaining unpaid, and there was no justification for the delay or non payment in respect of that first complaint, then the Chairman writes again explaining that he is minded to place the solicitors on the Advisory List of Defaulting Solicitors unless the solicitors provide a satisfactory explanation for non-payment of the fees

Similar provisions apply for complaints made to the Bar Council in respect of cases having a full publicly funded certificate where a satisfactory explanation is sought from the solicitors regarding the steps taken to enable counsel to be paid by the LSC.

The Rules relating to the List of Defaulting Solicitors also provide for the solicitors to be placed on the List in respect of one complaint only, but only after consultation with the Law Society.

Under the Rules, a solicitor can, after six months on the List, apply to have his name removed.

Q9: Throughout there are various references and cross references to 2010 (when the Rules were consulted on). These will need to be updated to 2011

A: We can only apologize for the failure to ensure consistency of dates. When the LSB authorises the rule change, all the dates will be revised to 2012.