

Warning notice - further information and next steps

On 20 January 2012, the Legal Services Board (the Board) issued to the Bar Standards Board (BSB) a [warning notice](#) pursuant to paragraph 21(1)(b) of Part 3 of Schedule 4 to the Legal Services Act (the Act). The warning notice informs the BSB that the Board is considering whether to refuse the BSB application [BSB application](#) to change the operation of the Code of Conduct Cab Rank Rule.

The attached table sets out the reasons behind the decision to issue the warning notice and indicates the areas in which the Board is particularly, but not exclusively, keen to receive further input. This table reflects our thinking at this stage of the analysis; it may be that other issues will emerge as our analysis continues. No decision has yet been taken on any of the issues noted.

Paragraph 22(1) of Part 3 of Schedule 4 to the Act provides that where the Board has given an approved regulator a warning notice, the Board may invite such persons as it considers appropriate to give the Board advice regarding whether the application should be granted.

In relation to this application from the BSB, the Board intends to invite the following (the Consultees) to give advice to the Board as to whether the application should be granted:

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

This list is not exhaustive and others may be asked to provide advice.

We will publish details of the advice we have asked for from these organisations. The consultees can ask the BSB for additional information.

The Consultees will be invited to provide their advice by 21 March 2012. Under paragraph 23(1) of Schedule 4 to the Act, the Board must give to the BSB a copy of any advice obtained. The BSB may make representations to the Board on the advice. Paragraph 23 of Schedule 4 to the Act and Section G of The Board's [Rules for Rule Change Applications](#) set out the procedure for making representations.

All advice and representations received will be published on the Board's website.

Legal Services Board
23 January 2012

BSB Rules Change application: changes to operation of the Cab Rank Rule

Aspect of the rule change	Questions/concerns that leads us to consider refusal	Possible refusal criteria
<p>The New Contract Terms</p>	<p>The BSB says that the Cab Rank Rule is in the public interest and supports access to justice. But the proposed changes appear to undermine its effectiveness by</p> <p>Excluding lay clients advised by non-solicitors from its benefits; Reducing the attractiveness of the benefits to solicitors by imposing potential burdens on them; Reducing access to the benefits generally by reducing the scope for effective bilateral negotiation on the terms on which access is possible.</p> <p>Including a contract in regulatory arrangements seems to be contrary to the BSB's better regulation obligations on proportionality. Although it may be appropriate for the Bar Council to offer a model contract as guidance, giving something more appropriately owned by the representative arm regulatory force and linking it to other regulatory arrangement does not seem to be appropriate.</p> <p>Impact of those terms on authorised persons who are regulated by another regulator does not appear to have been properly considered - there is potential for regulatory conflict given impact on solicitors and on other ARs whose authorised persons are excluded from access to the Cab Rank Rule for their clients by these changes. We do not consider the BSB stance in the application that to</p>	<p>Schedule 4 25(3)(a) - prejudicial to regulatory objectives: public interest/access to justice/interests of consumers</p> <p>Schedule 4 25(3)(b) - contrary to any provision in the Act - better regulation principles (LSA s28)</p> <p>Schedule 4 25(3)(b) contrary to any provision in the Act – regulatory conflict LSA s52-53</p>

	<p>include non-solicitors within the scope of the NCT or List of Defaulting Solicitors would make the arrangements overly complicated a convincing reason.</p> <p><i>We would like to invite advice from other ARs following publication of the Warning Notice to enable us to properly assess impact and to explore any issues of regulatory conflict</i></p>	
<p>The conditional tie in of the New Contract Terms with the Cab Rank Rule and the conditions of the contract itself</p>	<p>Standard contract terms and their restriction to only being used with solicitors are potentially prejudicial to promoting competition in the provision of services and protecting and promoting the public interest.</p> <p>They are likely to fetter the incentives to negotiate on terms and price. The terms also take no account of impact on the ultimate lay client if the result is a restriction on solicitors' choice of barristers, or less favourable payment terms and/or financing arrangements than there would be if there was negotiation between barrister and solicitor</p> <p><i>We would like to invite advice from OFT to help us explore the competition issues further. We would also like to consult the representative arms of ARs to see how they assess the impact on their members' ability to contract fairly.</i></p>	<p>Schedule 4 25(3)(a) - prejudicial to regulatory objectives: public interest/access to justice/interests of consumers/promoting competition</p> <p>Schedule 4 25(3)(b) contrary to any provision in the Act – regulatory conflict (LSA s52-53)</p>
<p>List of Defaulting Solicitors</p>	<p>The impact on individual solicitors of being put on the List of Defaulting Solicitors and whether this has been considered fully by the BSB</p> <p>The transparency of the process given that the BSB has told us that the name of the barrister or chambers will not appear on the</p>	<p>Schedule 4 25(3)(b) contrary to any provision in the Act – regulatory conflict (LSA s52-53)</p> <p>Contrary to any provision made by virtue of the Act Schedule 4 25(3)(b) particularly in relation to the Better Regulation</p>

	<p>List of Defaulting Solicitors (although solicitors themselves will know the identity of the barrister and the case involved).</p> <p>It does not cover other Authorised Persons instructing.</p> <p>The ability to have a restrictive practice across an entire profession against a law firm and all of its clients in the context potentially of one dispute between one solicitor in the firm about a matter for one client looks potentially disproportionate, anti-competitive and does not promote the interests of the consumers. Effectively this may restrict access to barristers' services through no fault of the client.</p> <p>The proportionality and need for this requirement to exist at all, given the facility for barristers to contract and probably to be able to sue under contract for that debt and the marginal scale of the problem (according to the BSB £360k in total was owed to 87 barristers at the time the directions to withdraw credit were made).</p> <p><i>We will continue our analysis of the proposal against all of the criteria specified in Schedule 4 Part 3 for considering regulatory arrangements changes, taking account of any further points put to us while the Warning Notice is in force.</i></p>	<p>Principles s28(3) especially whether the process for putting a solicitor on the List of Defaulting Solicitors is transparent.</p> <p>Schedule 4 25(3)(b) contrary to any provision in the Act – regulatory conflict LSA s52-53</p> <p>Schedule 4 25(3)(a) - prejudicial to regulatory objectives: public interest/access to justice/interests of consumers/promoting competition.</p> <p>Contrary to any provision made by virtue of the Act Schedule 4 25(3)(b) particularly in relation to the Better Regulation Principles s28(3) - Proportionality</p>
<p>The rationale given in the application for making the change.</p>	<p>No convincing evidence is provided in the application of the necessity for the alteration or that it is the most appropriate and proportionate regulatory response. Crucially, there is no</p>	<p>Contrary to any provision made by virtue of the Act Schedule 4 25(3)(b) particularly in relation to the Better Regulation Principles s28(3) especially whether it is targeted and</p>

	<p>consideration of why barristers cannot rely on normal legal routes to resolve disputes about non-payment or why it is proportionate for the solution to be one that appears to favour barristers by denying the solicitor access to the benefits of the rule and threatening his/her business more generally by use of the List of Defaulting Solicitors.</p> <p><i>We have taken external legal advice that indicates that these contract terms do not materially improve on the options that are available for barristers other than in their apparently discriminatory effect.</i></p>	<p>proportionate because it may duplicate other provisions that enable barristers to pursue payment</p>
<p>The information and evidence provided by the BSB to support the application</p>	<p>While the BSB has presented opinion in the application in relation to the regulatory objectives and better regulation principles, the BSB has not provided adequate qualitative evidence to support its assertions positively that the change supports the regulatory objectives and the better regulation principles. Given that we see potential detriments in relation to the objectives on consumer interest, access to justice, competition and public interest, the absence of any countervailing evidence is a very important gap.</p> <p><i>We will continue our analysis of the proposal against all of the criteria specified in Schedule 4 Part 3 for considering regulatory arrangements changes, taking account of any further points put to us while the Warning Notice is in force.</i></p>	<p>Schedule 4 25(3)(f) - not in accordance with statutory or other procedures – our rules require an appropriate evidence based explanation of impact of the change on the regulatory objectives</p>
<p>The BSB's consultation process on the proposed change</p>	<p>While the BSB says in the application that the Bar Council negotiate with the Law Society for over 8 years and that in 2010 a consultation was sent to all Approved Regulators, including</p>	<p>Schedule 4 25(3)(f) - not in accordance with statutory or other procedures – our rules are specific on the need to consider regulatory conflict</p>

	<p>the SRA and the Law Society, given the potential wider impact of the change on solicitors, other authorised persons and clients, we would have expected a more targeted and in depth consultation with key stakeholders that went beyond simply sending a consultation paper and taking responses. .</p> <p><i>We would like to invite advice more widely after we issue a Warning Notice.</i></p>	
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