

## Research Specification: Understanding the impact of the cab rank rule

### Purpose

1. To help the Legal Services Board (LSB) understand the impact of the Bar Standards Board 'cab rank rule' on the regulatory objectives set out in Part 1 of the Legal Services Act 2007 ('the Act')<sup>1</sup>.

### Background

2. The LSB has been set up to reform and modernise the legal services market place in the interests of consumers, enhancing quality, ensuring value for money and improving access to justice across England and Wales. The LSB will achieve this pursuing our regulatory objectives and providing regulatory oversight for the eight approved frontline regulators<sup>2</sup>.
3. The cab rank rule provides that a Barrister must not withhold their services on the basis of their personal views of the case, client or funding source. In practice there are a range of caveats to this basic principle which restrict the scope of the rule and thus its impact on the market, not least being subject to the Barristers' availability, competence and usual fees (among other restrictions). This in effect can mean that funding source (and level available) may itself restrict choice of barristers. The rule is set out in more detail in Annex A.
4. The table below sets out the views of the Bar Standards Board on the key reasons for having such a rule.

#### **Exert from BSB response to LSB queries of 18/11/11 regarding contractual terms**

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.

<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2007/29/part/1>

<sup>2</sup> The Law Society, General Council of the Bar, Council for Licensed Conveyancers, The Institute of Legal Executives, The Chartered Institute of Patent Attorneys, The Institute of Trade Mark Attorneys, Association of Law Costs Draftsmen, Master of the Faculties.

5. The LSB since taking its powers has made it clear that we believe that the regulatory objectives are best met through the use of outcomes focused regulation rather than detailed prescriptive rules. While we accept that in some cases rules are required, we are unclear in this case what the impact of the rule is on the market in practice. In particular, we would like to know whether the cab rank rule is necessary to continue to protect the interests of vulnerable clients.
6. Of course, the cab rank rule cannot be seen as an isolated rule in its impact on the market for barristers. It could be argued that much of the spirit of the rule is actually captured in other rules, in particular rules 302 (duty to the court) and 307 (independence)<sup>3</sup>.
7. We have considered the possibility of empirically testing the impact of the cab rank rule, but concluded that it is not possible to prove a reasonable hypothesis using empirical methods. Instead, we are seeking a broader analysis of the issues drawing in the wider economic and socio-legal literature. We do not rule out the use of original empirical research in this project whether with barristers, barristers' clerks or solicitors, but this should support and not replace an analysis of the literature.

### **Aims and Objectives**

8. We would like to the research to produce a paper for publication considering the practical and economic impact of the cab rank rule on the provision of legal services by barristers. Ideally, we would like to test the impact of the cab rank rule on the market empirically but have rejected this (at this stage) as we do not believe a rigorous test could be constructed. For example, we might test whether any vulnerable clients were unable to find an advocate to represent them in court. However, if the research found that there were no instances of vulnerable clients failing to gain representation this could mean either that the rule worked, or was unnecessary. We would welcome views in this research on possible future empirical studies on the cab rank rule.
9. Given the problems with constructing an empirical test, we are suggesting that the research builds on existing literature and theory to construct an analysis of the likely impact of the rule in practice. We recognise that this is likely to require a combination of legal and economic expertise. This report should enable the LSB to form a view of the benefits of retaining a cab rank rule within the market and its compatibility with the regulatory objectives.

### **Issues and scope**

10. There are a number of issues that need to be considered, including:
  - What types (if any) of client are unattractive to barristers?
  - What evidence (if any) is there that unattractive clients have difficulty finding representation?
  - What might make clients unattractive to barristers?
  - How does the chambers organisational model determine access to barristers?

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<sup>3</sup> <http://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/the-code-of-conduct/part-iii-fundamental-principles/>

- What impact do the exclusions from the cab rank rule have on the usability of the cab rank rule in practice?
- To what extent would we expect competition to ensure access to barristers?
- What are the features of competition between barristers?
- What are the barriers to competition working?
- To what extent do arrangements exist between firms and barristers chambers, which might block availability of barristers to competitor firms? How do such arrangements work?
- To what extent (if any) does the cab rank rule act as a block on specialisation?
- What would the impact of greater specialisation of barristers be on the regulatory objectives?
- What features of the barrister profession make a cab rank rule necessary when compared to other professions (e.g. doctors, teachers, solicitors)?
- How meaningful is the cab rank rule in practice (set against the objectives stated by the Bar)?
- What changes to the barrister model would make the cab rank rule more effective?
- What impact would a more effective cab rank rule have on market competition?
- What are the particular issues of concern for the cab rank rule when considering direct access to the Bar?

## **Deliverables**

### Output

11. The output for this research should be an executive summary together with a report. The report must be suitable for publication, although the decision on the timing of publication will remain with the LSB (all reports will be published by the LSB).
12. The researcher will also be required to run two seminars of up to two hours duration at the LSB offices during the course of the project to present emerging findings and the final report.
13. The LSB will retain ownership of the report though are willing to provide unlimited licence to use the report to the authors.

### Project plan

14. Tenders should include a project plan and time schedule for the work that identifies the main task and key milestones that will be used to monitor progress. The plan should be accompanied by a resource profile, giving a breakdown of the resources in person days allocated to each task. Tenders should also indicate any publications, articles, speeches or similar in which any of the individuals part of the tendering team have expressed a view on the cab rank rule.

## **Duration**

15. The research should commence in April 2012. An interim report should be completed and submitted to the LSB by the end of May 2012. A final agreed report should be completed by 8

June 2012. We recognise that this timetable may be difficult to achieve and so would welcome views on alternative timetables.

**Legal Services Board Contact Details**

16. Any queries about the research specification should be addressed to:

Policy team: Paul Greening 020 7271 0075

Research: Alex Roy 020 7271 0060

## **Cab Rank Rule**

### **Acceptance of instructions and the 'Cab-rank rule'**

601. A barrister who supplies advocacy services must not withhold those services:

- (a) on the ground that the nature of the case is objectionable to him or to any section of the public;
- (b) on the ground that the conduct opinions or beliefs of the prospective client are unacceptable to him or to any section of the public;
- (c) on any ground relating to the source of any financial support which may properly be given to the prospective client for the proceedings in question (for example, on the ground that such support will be available as part of the Community Legal Service or Criminal Defence Service).

602. A self-employed barrister must comply with the 'Cab-rank rule' and accordingly except only as otherwise provided in paragraphs 603 604 605 and 606 he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is publicly funded:

- (a) accept any brief to appear before a Court in which he professes to practise;
- (b) accept any instructions;
- (c) act for any person on whose behalf he is instructed;

and do so irrespective of (i) the party on whose behalf he is instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause conduct guilt or innocence of that person.

603. A barrister must not accept any instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister will be professionally embarrassed:

- (a) if he lacks sufficient experience or competence to handle the matter;
- (b) if having regard to his other professional commitments he will be unable to do or will not have adequate time and opportunity to prepare that which he is required to do;
- (c) if the instructions seek to limit the ordinary authority or discretion of a barrister in the conduct of proceedings in Court or to require a barrister to act otherwise than in conformity with law or with the provisions of this Code;
- (d) if the matter is one in which he has reason to believe that he is likely to be a witness or in which whether by reason of any connection with the client or with the Court or a member of it or otherwise it will be difficult for him to maintain professional independence or the administration of justice might be or appear to be prejudiced;
- (e) if there is or appears to be a conflict or risk of conflict either between the interests of the barrister and some other person or between the interests of any one or more clients (unless all relevant persons consent to the barrister accepting the instructions);
- (f) if there is a significant risk that information confidential to another client or former client might be communicated to or used for the benefit of anyone other than that client or former client without their consent;

(g) if he is a self-employed barrister where the instructions are delivered by a solicitor or firm of solicitors in respect of whom a Withdrawal of Credit Direction has been issued by the Chairman of the Bar pursuant to the Terms of Work on which Barristers Offer their Services to Solicitors and the Withdrawal of Credit Scheme 1988 as amended and in force from time to time (reproduced in Annex G1) unless his fees are to be paid directly by the Legal Services Commission or the instructions are accompanied by payment of an agreed fee or the barrister agrees in advance to accept no fee for such work or has obtained the consent of the Chairman of the Bar.

(h) If the barrister is instructed by or on behalf of a lay client who has not also instructed a solicitor or other professional client, and if the barrister is satisfied that it is in the interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client.

604. Subject to paragraph 601 a self-employed barrister is not obliged to accept instructions:

(a) requiring him to do anything other than during the course of his ordinary working year;

(b) other than at a fee which is proper having regard to:

(i) the complexity length and difficulty of the case;

(ii) his ability experience and seniority; and

(iii) the expenses which he will incur;

and any instructions in a matter funded by the Legal Services Commission as part of the Community Legal Service or the Criminal Defence Service for which the amount or rate of the barrister's remuneration is prescribed by regulation or subject to assessment shall for this purpose unless the Bar Council or the Bar in general meeting otherwise determines (either in a particular case or in any class or classes of case or generally) be deemed to be at a proper professional fee.<sup>12</sup> .

(c) to do any work under a conditional fee agreement;

(d) save in a matter funded by the Legal Services Commission as part of the Community Legal Service or the Criminal Defence Service:

(i) unless and until his fees are agreed;

(ii) if having required his fees to be paid before he accepts the instructions those fees are not paid;

(e) from anyone other than a professional client who accepts liability for the barrister's fees;

(f) in a matter where the lay client is also the professional client;<sup>3</sup>

(g) to do any work under the Contractual Terms on which Barristers offer their Services to Solicitors 2001 as amended and in force from time to time (reproduced in Appendix G2) or on any other contractual terms,

(h) where the potential liability for professional negligence in respect of the case could exceed the level of professional indemnity insurance which is reasonably available and likely to be available in the market for him to accept.<sup>4</sup>

(i) to investigate or collect evidence (save for taking proofs of evidence or preparing witness statements urgently as part of the barrister's conduct of the case at court), to attend at a police station with or without a solicitor, or to conduct correspondence with other parties (save where reasonably necessary as part of the barrister's conduct of the case at court).<sup>5</sup>

605. A self-employed Queen's Counsel is not obliged to accept instructions:

(a) to settle alone any document of a kind generally settled only by or in conjunction with a junior;

(b) to act without a junior if he considers that the interests of the lay client require that a junior should also be instructed.

606.1 A barrister (whether he is instructed on his own or with another advocate) must in the case of all instructions consider whether consistently with the proper and efficient administration of justice and having regard to:

- (a) the circumstances (including in particular the gravity complexity and likely cost) of the case;
- (b) the nature of his practice;
- (c) his ability experience and seniority; and
- (d) his relationship with the client;

the best interests of the client would be served by instructing or continuing to instruct him in that matter.

606.2 Where a barrister is instructed in any matter with another advocate or advocates the barrister must in particular consider whether it would be in the best interests of the client to instruct only one advocate or fewer advocates.

606.3 A barrister who in any matter is instructed either directly by the lay client or by an intermediary who is not a solicitor or other authorised litigator should consider whether it would be in the interests of the lay client or the interests of justice to instruct a solicitor or other authorised litigator or other appropriate intermediary either together with or in place of the barrister.

606.4 In cases involving several parties, a barrister must on receipt of instructions and further in the event of any change of circumstances consider whether, having regard to all the circumstances including any actual or potential conflict of interest, any client ought to be separately represented or advised or whether it would be in the best interests of any client to be jointly represented or advised with another party.

607. If at any time in any matter a barrister considers that it would be in the best interests of any client to have different representation, he must immediately so advise the client.

#### **Withdrawal from a case and return of instructions**

608. A barrister must cease to act and if he is a self-employed barrister must return any instructions:

(a) if continuing to act would cause him to be professionally embarrassed within the meaning of paragraph 603 provided that if he would be professionally embarrassed only because it appears to him that he is likely to be a witness on a material question of fact he may retire or withdraw only if he can do so without jeopardising the client's interests;

(b) if having accepted instructions on behalf of more than one client there is or appears to be:

- (i) a conflict or risk of conflict between the interests of any one or more of such clients; or
- (ii) risk of a breach of confidence;

and the clients do not all consent to him continuing to act;

(c) if in any case funded by the Legal Services Commission as part of the Community Legal Service or Criminal Defence Service it has become apparent to him that such funding has been wrongly obtained by false or inaccurate information and action to remedy the situation is not immediately taken by the client;

(d) if the client refuses to authorise him to make some disclosure to the Court which his duty to the Court requires him to make;

(e) if having become aware during the course of a case of the existence of a document which should have been but has not been disclosed on discovery the client fails forthwith to disclose it;

(f) if having come into possession of a document belonging to another party by some means other than the normal and proper channels and having read it before he realises that it ought to have been returned unread to the person entitled to possession of it he would thereby be embarrassed in the discharge of his duties by his knowledge of the contents of the document provided that he may retire or withdraw only if he can do so without jeopardising the client's interests.

609. Subject to paragraph 610 a barrister may withdraw from a case where he is satisfied that:

(a) his instructions have been withdrawn;

(b) his professional conduct is being impugned;

(c) advice which he has given in accordance with paragraph 607 or 703 has not been heeded; or

(d) there is some other substantial reason for so doing.

610. A barrister must not:

(a) cease to act or return instructions without having first explained to the client his reasons for doing so;

(b) return instructions to another barrister without the consent of the client;

(c) return a brief which he has accepted and for which a fixed date has been obtained or (except with the consent of the lay client and where appropriate the Court) break any other engagement to supply legal services in the course of his practice so as to enable him to attend or fulfil an engagement (including a social or non-professional engagement) of any other kind;

(d) except as provided in paragraph 608 return any instructions or withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client..