



## BSB consultation on Changes to Returning Instructions Guidance

### Response to consultation on behalf of the Criminal Bar Association

The Criminal Bar Association (“CBA”) represents about 5,000 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts, ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

#### Introduction

1. This response should not be taken as any concession on the part of the Criminal Bar Association that the amendments proposed by the Regulator are lawful and it reserves its position as to whether such amendment would, if introduced, be susceptible to challenge.
2. The proposed changes are disproportionate and will have the greatest impact upon the criminal and publicly funded bar which has already sustained swinging fee cuts and remains under threat of further cuts.
3. The experience of those in practice is that barristers often undertake voluntarily that which we are not obliged to do. Barristers act and will continue to act on a pro bono basis when the circumstances of the case merit it. It is our experience that the administration of justice would often grind to a halt were it not for the goodwill of the independent criminal bar being prepared to work long hours at short notice and for little or no remuneration in order to get the job done.
4. The bar is well aware of its professional obligations to the court, the administration of justice and its lay and professional clients. However the bar is not the sole functionary of the

administration of justice and barristers should not be obligated to undertake work which is so poorly paid (or not paid at all) that it would be uneconomic for them to do so. If the administration of justice cannot function because the fees paid to the bar are inadequate it is not the role of the Regulator to impose obligations upon the profession to keep it going.

5. The criminal bar has been exhorted to adapt and to become more commercial in its approach. Aside from personal economic considerations barristers have commercial obligations to other members of chambers, staff and pupils. It would be invidious for the Regulator to expose the profession to the risk of professional misconduct for refusing to carry out work in circumstances where funding has been withheld or significantly reduced whether prior to the acceptance of instructions or during the currency of a case.
6. The practical reality of the proposed changes is that there will be few if any circumstances in which a criminal barrister could withdraw from a publicly funded matter where the level of funding is arbitrarily changed during the currency of the case without exposing him/herself to the risk of professional misconduct.
7. The existing rules enable the barrister to refuse to accept instructions if the fee is not a 'proper' one and to treat his/her instructions as having been withdrawn if there is a default or change in remuneration. In both cases the existing rules require the barrister to be able to justify his/her decision if called upon to do so. Once instructions are accepted, in the absence of any default or change or remuneration (or other prescribed circumstances) the barrister is under an obligation to continue to act. It is submitted that maintaining the status quo in this way sufficiently safeguards the interests of those identified without placing an undue burden on the barrister.

## Background

8. The Bar Council decided that remuneration levels of graduated fee schemes in criminal work were not reasonable in 2003. Accordingly since 2003 barristers have not been obliged to accept instructions if they consider that the fee is not a proper one provided that they were prepared to justify their decision in the event of a complaint. Since 2003 fees in publicly funded criminal work have been repeatedly cut.
9. In its consultation report dated January 2011 the BSB observed that in relation to the 'undeeming' of legal aid fees '*Barristers will be required to make their own decisions on whether a proposed Legal Aid fee is a proper professional fee. It would not be appropriate for the BSB as a regulator to take a general view of whether particular fees are, or are not, proper professional fees.*'<sup>1</sup>
10. The BSB went on to state as follows;

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<sup>1</sup> Review of the Code of Conduct – Consultation Report. The Bar Standards Board's response to the consultation paper on the proposed new Code of Conduct for the Bar – Summary Policy Decision

96. *The BSB remains of the view that it would not be appropriate for it to take a general view of whether particular kinds of fees are, or are not, proper professional fees. That does not come within its role. It would also not be appropriate for it to endorse guidance issued by the representative body on the subject. This position will be maintained in the revised code.*
97. *The Board recognises that the proposed new rules will create some uncertainty but believes that in practice the change is smaller than might appear at first sight.*
98. *The responses to the consultation suggest that there is some misunderstanding about the present position in relation to fees for public funded work and hence some misunderstanding of the implications of the proposed new rule.*
99. *The current position is that in relation to many areas of work, there is no guidance on whether or not proposed fees are to be regarded as proper professional fees. That has always been the case in relation to privately funded work. For legal aid fees, the effect of the deeming provision in paragraph 604(b) of the present Code is that such work is deemed to be offered at a proper rate unless the Bar Council has determined otherwise. In the absence of a Bar Council determination, barristers may not turn down work under the cab-rank rule on the basis that the legal aid fees proposed are not proper fees. In relation to those publicly funded fees where the Bar Council has made a determination, the effect is only they are not automatically held to be proper. Undeeming the fees does not mean that they are necessarily to be regarded as not being proper. On the contrary, it is for barristers themselves to consider in relation to such fees, as in relation to proposed fees for privately funded work, whether they are proper fees before deciding whether they would be justified in refusing instructions on these grounds. If they do so, they must be prepared to justify their decision in the event of a complaint. In practice, complaints on these grounds are very rare indeed.*
100. *The effect of the new rule is that no fees will be deemed to be proper. For all types of funding, if a barrister considers that the fee is inadequate, he will have to satisfy himself that refusal of instruction is justified under the terms of the rule, and be prepared to justify that decision if there is a subsequent complaint.*
101. *The Professional Conduct Department will consider any complaint against a barrister of refusing to accept work on the facts and circumstances of the case in question. If the case is referred to the Professional Conduct Committee, one of the tests which the Committee will apply, as it does in all cases, is whether it would be in the public interest to bring a charge against the barrister. One factor to be weighed in the balance is reliance by the barrister on any guidance issued to the profession by the Bar Council. However, this cannot be a determinative factor. It is essential that there is no blurring between the regulatory functions of the BSB and the representative functions of the Bar Council.*

11. Until 6 January 2014 the Code of Conduct relating to the acceptance of instructions was expressed in the following terms;

*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.*

*(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) if the instructing solicitors are named on the List of Defaulting Solicitors, regardless of whether his fees will be paid by the Legal Services Commission or the Criminal Defence Service;*

*(h) save in a matter where the barrister is paid directly (a) by the Legal Services Commission as part of the Community Legal Service or the Criminal Defence Service or (b) by the Crown Prosecution Service, after 31 January 2013 to do any work other than on:*

*(i) the Standards Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons 2012 reproduced at Appendix T as amended and in force from time to time; or*

*(ii) if the self-employed barristers publishes standard terms of work, on those*

*standard terms of work*

*(i) 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>*

*(j) 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).*

12. Guidance issued by the BSB in 14 February 2012 relating to the return of instructions and withdrawal in circumstances where there had been a material change to the basis of a barrister's remuneration stated;

*The BSB takes the view that if there is a material change made to the basis of Counsel's remuneration, his original instructions have been withdrawn by the client and substituted by an offer of new instructions on different terms.*

*Accordingly, Counsel must decide whether he is obliged by the cab rank rule (see Rule 601) to accept the new instructions.*

*If Counsel is obliged under the cab rank rule to accept the new instructions, he must do so.*

*If Counsel is not obliged to accept the new instructions, he may decline them.*

*If Counsel declines to accept the new instructions in such circumstances, he is not to be regarded as returning his instructions, nor as withdrawing from the case, nor as ceasing to act, for the purposes of Rule 609 or 610, because the previous instructions have been withdrawn by the client. The BSB considers that it would be good practice for Counsel to explain to the lay client (if it is feasible to do so) why he is no longer acting; but Counsel is not obliged by the Code to do so.*

13. In a policy statement dated 25 November 2013, addressing the issue of VHCCs the BSB stated;

*The BSB is aware of changes to the basis of remuneration to Very High Cost Cases in criminal proceedings ("VHCCs") that it is intended should come into force on 2 December 2013 by Statutory Instrument . The proposed SI would have had the effect of bringing VHCCs within the scope of the deeming provision under Rule 604 for the first time, a matter of weeks before that provision is due to be abolished with effect from 6 January 2014 when the BSB's new Code of Conduct and Handbook comes into force.*

*The BSB has therefore decided that the right way to preserve the status quo and avoid an unintended regulatory change during that short interim period is to issue a policy statement to the effect that **the deeming provision in rule 604 will not be treated by the BSB as becoming applicable to VHCCs during this brief interim period.** The effect of*

*this is, in substance, to bring forward the regime in the new Handbook under which it is the responsibility of individual barristers to make their own, reasonable, judgments as to whether or not a fee is a proper fee, for the purposes of the cab rank rule, rather than there being a difference of treatment, in this respect, between privately funded and publicly funded cases.*

The statement went on to acknowledge that the transitional arrangements meant that imminent trials were not adversely affected but it noted

*The BSB believes that it may be in the public interest to require barristers in these situations to consider a number of factors and assess the proportionality of ceasing to act, in order to protect the interests of consumers and the wider regulatory objectives.*

14. Changes in the level of remuneration for VHCC cases in December 2013 resulted in a significant number of barristers treating their instructions as having been withdrawn. Had they done so under the proposed regime it is likely that many, if not all, would have been exposed to disciplinary action notwithstanding the personal financial impact that continuing to act at the reduced rates would have had upon them. The BSB is no doubt aware that such cases remain to be a source of concern and conflict between the Criminal Bar Association and the Government. Whilst this continues many defendants continue to be unrepresented. It is submitted that until there is some resolution regarding this conflict there should be no alteration of the BSB code of conduct. Clearly if barristers are right in their argument that fees should not be reduced or legal aid cut in relation to AGFS then the government may yet see sense in relation to VHCC cases. If barristers were in effect forced to continue to act in all cases where there was a fee reduction it would not force the bar to continue to accept reduced rates rather it would simply delay the inevitable – that is barristers choosing not to accept new instructions at reduced rates. Therefore the proposal does little other than to delay an impasse, which has recently caused a government rethink. Contractually agreed rates of pay ought to be honoured by third parties and the BSB should not lend a hand in disciplining those professionals who seek to enforce agreed terms of a contract.
15. If any change is considered necessary or desirable the CBA submits that the only professional obligation should be to advise all lay clients (whether privately or publicly funded) at the time that instructions are accepted that in the event of default or change in the level of remuneration the barrister will automatically be entitled to treat his/her instructions as withdrawn.

## Response to Consultation Questions

**Q.1: Have we adequately identified the risks to clients, the administration of justice, third parties and the wider public interest where a barrister withdraws from a case? Are there any additional impacts or any unintended consequences arising from this guidance?**

No.

The identified risks give disproportionate weight to the rights of the lay client, witnesses and running of the court system and no weight to other wider interests.

The proposal fails to take into account a number of wider public interest factors;

- i) That a contract freely entered into should be honoured.
- ii) The right of any working person to refuse to work if their contractual terms are not honoured.
- iii) The right of any working person to refuse to undertake work at a less than profitable level of remuneration.
- iv) The continued existence of a properly remunerated independent bar.
- v) The moral obligation of third party funders to honour their commitment to the administration of justice.

The proposal is a license for unscrupulous third party funders to withhold funding at the eleventh hour secure in the knowledge that the barrister will have no choice but to continue to act or face disciplinary proceedings.

In cases where the client is publicly funded a change in remuneration means any difficulty caused by a barrister treating instructions as having been withdrawn is a problem of the government's making and the barrister should not be obligated to solve it.

The proposal fails to have any regard to the impact on black and ethnic minority groups and women who form the larger proportion of barristers who choose to practise at the criminal bar and which will be disproportionately affected by the proposal.

**Q.2: Are the additional considerations included in gC87.1-7 adequate to assist a barrister in deciding whether or not they would be justified in withdrawing?**

No.

The additional considerations give insufficient weight to the economic interests of the barrister and, in the context of criminal proceedings would make it nigh on impossible to treat the client as having withdrawn instructions without running the risk of disciplinary proceedings.

By way of example; the government decides to implement proposed cuts to legal aid fees with immediate effect;

1. The default is material but may have been foreshadowed by months of speculation. Criminal cases can be listed 12 to 18 months in advance. Is the barrister required to continue with a full diary of 12 – 18 months work notwithstanding the fact that his fees will be 20% less than he originally budgeted for and notwithstanding the fact that he could return them and conduct more lucrative work.
2. The client is not at fault; it is the government that is responsible for the change.
3. The position is not capable of remedy; the client is not entitled to top up legal aid fees even if he could afford to do so.
4. Whether the client was warned of the risk or not is unlikely to be material in circumstances where the default is not the responsibility of the client.

5. The likely consequences of the barrister withdrawing are
  - a. The client will have to represent himself as no other barrister is likely to take the case at the reduced rate because it is uneconomic for him to do so.
  - b. Inevitably other parties to the proceedings will be affected.
  - c. Impact on the administration of justice is inevitable.
6. All criminal cases have witnesses, many have co-defendants and interested parties such as a victim's family.
7. The prejudice to the barrister is a loss of fee income potentially for a considerable period of time.

Given that 6 of the above considerations relate to the interests of others and only one which relates to the interest of the barrister it is difficult to see any circumstances where the balance would fall in favour of the barrister being able to treat instructions as having been withdrawn.

In a set of criminal practitioners the financial impact on chambers as a whole would be considerable.

**Q.3: Do you consider it proportionate to remove the automatic assumption in guidance that instructions are withdrawn if there is a fundamental change in remuneration? Does the revised guidance achieve the right balance between the interests of the barrister and of clients, witnesses and the interests of justice? If not what safeguards would you propose to protect the wider public interest?**

No

Maintaining the status quo does not prevent government making cuts to levels of remuneration for future work if it so chooses.

The level of remuneration for publicly funded criminal work has been undeeded since 2003. Barristers should not be obligated to work at reduced rates which make independent practice economically unviable. Nor should barristers be obligated to work in circumstances where another party to the contract decided not to honour the terms of the agreement. The CBA is not aware of any other profession which would be obligated to work in similar circumstances. In particular it would be wrong and wholly unfair to expect barristers to continue to act in circumstances where there is no similar obligation imposed upon solicitors.

**Q.4: Are there any further matters the BSB should take into account that are relevant to this guidance?**

The coincidence of the proposed changes with the ongoing dispute between the criminal bar and government over fees gives rise to the suspicion that the Regulator is acting at the behest of government. If government has made representations to the BSB that this rule change should take place, the Criminal Bar Association should be made aware of it so that it can fully respond to any such proposals.