

Response to the Bar Standards Board Consultation Paper on Changes to the Guidance on Returning Instructions

on behalf of the members of

Lincoln House Chambers
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Introduction

1. Lincoln House Chambers is a set of barristers' chambers located in Manchester. Established in 1978, we have 13 Queen's Counsel and 53 Juniors. Members practise across a broad range of specialisms. We are predominantly a criminal set, with a particular expertise in complex fraud work. Chambers also has a strong civil wing, with particular attention to industrial disease litigation. Members also specialise in regulatory law, professional discipline, inquests, licensing and administrative law. This response reflects the collective views of the Members of Lincoln House Chambers.
2. The Consultation Paper poses four specific questions for consultees regarding the proposed amendments to the BSB's guidance on returning instructions. The questions overlap with one another and so it is thought that a reasoned response to the proposals might be of greater assistance to the BSB than four separate answers.
3. Essentially, we do not think it right for the BSB to remove the well established and well founded principle that a fundamental change in the basis of remuneration amounts to a withdrawal of a barrister's instructions. A barrister's instructions include the basis of remuneration for accepting and undertaking those instructions. If the basis of remuneration is unilaterally altered, the instructions that were previously given are withdrawn. It is wholly artificial to treat the instructions from the client and the basis of remuneration as separate and distinct, no matter what the source of the funding. It is a misrepresentation to characterise a fundamental change to the basis of remuneration as a barrister withdrawing from the case or returning the instructions.

4. The current guidance, contained in gC87, is fair and reflects the basic principles upon which contracts are formed within our society. The guidance is entirely appropriate and should be retained. There is no proper or reasoned basis for amending the guidance.

Perception

5. We find it difficult to ascertain the true reasons for the proposed changes to the Code of Conduct. Whilst the explicit focus of the Consultation is upon the interests of clients, there is an unfortunate perception, and one widely held, that the BSB has been prevailed upon by the Government, against the background of changes to the VHCC payment regime, to weaken the ability of the Bar to oppose such changes and to object to unreasonable conduct on the part of the Government.
6. This unfortunate perception arises because of the timing of the Consultation and the obvious impact of the proposed changes on the ability of the Bar to refuse to work in the face of unilateral and indefensible changes to the rates of remuneration for publicly funded work. This perception is regrettable because it undermines the authority of our regulator. Whilst the Consultation is ostensibly focused on protecting the interests of clients and the administration of justice, there is a clear implicit tendency to support the interest and policies of the Government and the actions of the Legal Aid Agency. The BSB must be alive to this perception and do all it can to ensure it acts, and is seen to act, in a manner wholly independent of the Government.

The arbiter of reasonable fees

7. A consequence of the proposed changes to the guidance is that the BSB, in disciplinary proceedings, will be forced to adopt the role of an arbiter required to determine whether a rate of remuneration (or a change in the rate of remuneration) is reasonable and whether the funder has acted reasonably in changing the rate and the manner in which the change was made.
8. In determining whether or not a barrister's decision to withdraw can 'reasonably be justified,' some of the proposed factors for consideration are the 'materiality of the (default or) change,' the notice given to the barrister of that change and the nature and extent of any prejudice caused to the barrister if he or she had not withdrawn.

9. Consideration of those factors in deciding whether the barrister's decision can 'reasonably be justified' will require the BSB to pronounce on the reasonableness or otherwise of the changes to fees introduced by the Government. The BSB would have to make a judgment on such issues, which is a political and economic judgment which seems to us to be wholly outside their remit as a regulator of legal services.
10. This active political role for the BSB is of particular concern given the perception, outlined above, that the proposals themselves were perhaps motivated by political pressure. What confidence would the profession ever have that its regulator would fairly conclude that a barrister was entitled to withdraw and that the Government acted unreasonably in changing the rate of remuneration?
11. The BSB should reflect with care on the proposed changes and the role it will inevitably create for itself in passing judgment on Government policy and the rates of remuneration. This is not a function of a regulator but it is an inevitable and unwelcome consequence of the proposed changes.

Shifting responsibility

12. The effect of the proposed changes will be to absolve the Government (or any third party funder) from responsibility (and accountability) for the natural consequences of a unilateral fundamental change in the basis of remuneration. The Government will inevitably be emboldened, knowing that barristers (unlike any other self-employed individual) will not be entitled, as of right, to cease to work but will be under pressure to continue to work, regardless of whether there is appropriate remuneration, for fear of disciplinary action being taken.
13. Against the current regulatory backdrop, the effect of the reduction in VHCC rates was entirely predictable. The Code of Conduct was unambiguous and protected the Bar's right, as with any independent self-employed individual, to refuse to work if not remunerated at the agreed rate. That the consequences are unpalatable for the Government is no reason to change the rules for barristers. This proposed change will simply encourage further unilateral reductions in fees and substantially weaken the Bar's ability to oppose such injustice in the future.

14. If the guidance is changed in the manner suggested, it would give the government unfettered power to rip up existing contracts yet still expect barristers to meet their duty to represent their clients. It is a situation which would not be tolerated in any ordinary contractual relationship. It is exposing barristers (and therefore their clients) to arbitrary action by the government. Barristers are officers of the court who can be expected to act in the best interests of their client, but should not be treated as slaves to the justice system who can be obliged by a unilateral decision of the government to offer their labour on terms which they have never accepted.

Basic principles

15. The proposed changes offend the most basic principles upon which our society is based. Any individual who offers a service in return for an agreed rate of remuneration, from whatever source, is entitled, should that agreed rate be reduced, to refuse to continue to work. Why should barristers be treated any differently simply because the consequences of them ceasing to act can be detrimental to others?
16. At paragraph 9 of the Consultation Paper the BSB seeks to draw a comparison between barristers and “any other professional providing a service to the public” who are entitled to reconsider their position if the agreed terms of the contract are changed. However, by these proposals, the BSB would impose a regime upon barristers that set them apart from any other professional providing a service to the public.
17. Whilst the BSB recognises that “it would be unfair for barristers to be obligated in all circumstances to continue to represent clients if the terms of the contract between them had been unilaterally changed”, they do consider that it will be “necessary for a barrister to continue” to act where his or her withdrawal would result in a disproportionate impact on the lay client, administration of justice or the public interest.
18. Such an approach shows no respect for the rights of the barrister as an independent professional, entitled to enter contractual relationships on agreed terms and to treat those relationships as terminated where the agreed terms are not met. There is no legitimate basis upon which the BSB can claim the responsibility of determining whether or not a barrister has acted reasonably in not continuing to act after the agreed rate of remuneration, an essential part of his instructions, has been altered fundamentally.

The Regulatory Objectives

19. The 'regulatory objectives' under the Legal Services Act 2007 are quoted selectively at paragraph 10 of the Consultation Paper. It is hard to conclude otherwise than that the BSB has selected to focus upon those regulatory objectives that it believes support its proposals and ignored those that do not.
20. The BSB focuses only on the promotion and protection of the interests of clients, supporting the constitutional principle of the rule of law, ensuring access to justice, the proper administration of justice and adherence by barristers to proper professional principles. The BSB appears to ignore, for whatever reason, the other regulatory objectives under the 2007 Act, namely: the protection of the public interest; promoting competition in the provision of services; and, most importantly, encouraging an independent, strong, diverse and effective legal system.
21. If one focuses solely on the interests of clients and the administration of justice at the expense of other regulatory objectives, the BSB's proposals might appear to have merit. However, when one considers all of the regulatory objectives, the proposals in the Consultation Paper are shown to be ill conceived and unjust.

The rule of law

22. Despite stating its proposals would protect and promote the rule of law, the BSB appears to ignore that the principle of the rule of law includes protecting individual citizens against arbitrary action by the executive arm of Government. These proposals will have the opposite result. Their effect will be to subject barristers to arbitrary action by the Government and to prevent their ability to object to such action for fear of disciplinary sanction by the regulator.

Public interest

23. The BSB has, apparently, had no regard to the effect of these proposals on the wider public interest. It is acknowledged that the public has an interest in clients not being left unrepresented through no fault of their own. It ought to be remembered, however, that the courts have a duty to protect such clients, and while that does not offer an entire answer to this concern, it is a relevant consideration when considering the weight of it.

24. But the public also has an interest in ‘third party funders’ being prevented from unilaterally reducing the level of remuneration that has been agreed. This interest is not merely the interest in refusing to tolerate implicitly dishonourable conduct. It is also an interest in ensuring that suitably experienced and senior counsel are available for cases, particularly complex cases. This is not something that can be ensured if such counsel do not have the comfort of knowing that a fundamental change in remuneration will automatically enable them to withdraw.
25. It is unacceptable for any professional person to have to accept instructions for a case in the knowledge that the remuneration terms might change like the wind. This is not conducive to continuity of representation, nor the encouragement and development of junior members of the profession.
26. Furthermore there is a wider public interest in ensuring that third party funders know that the responsibility for their conduct in a fundamental change to agreed levels of remuneration, will fall squarely and entirely at their door. Importantly, the current guidance operates as a disincentive for those tempted to renege on what has been agreed. That disincentive would be weakened if the funder was able to play upon the barrister’s concern that professional disciplinary consequences might follow and able to blame the barrister for any poor consequences for the client. That weakening of responsibility is clearly not in the public interest.

The interests of consumers

27. Despite focusing its attention on the interests of clients, the BSB has focused excessively on the interests of clients in specific cases and not on the wider interests of all clients of legal services.
28. The proposed change, whilst on the face of it addressing the objective of protecting a client who becomes unrepresented, makes the mistake of focusing only on the plight of a given consumer in a given case. A broader perspective demonstrates that the change will bring about a diminution in the interests of consumers generally, for the reasons given above.
29. There is no avoiding the fact that there are wider policy considerations at play. An intention to remedy or ameliorate the injustice caused in an individual case is a worthy

one, but if the impact of the change is to enable funders more latitude in unilaterally cutting levels of remuneration after work has begun, the interests of consumers generally is not well served. There needs to be certainty of remuneration. Regulators and their infrastructure should work on this premise.

30. Similarly other ‘consumers’ – witnesses, judges, jurors, etc. are not well served by this change. A diminution in the quality of barristers willing to undertake the risk of engaging in long cases amounts to an obvious disservice to these court users. Whereas an unrepresented client presents its own problems for many court users the system caters for and has to deal with such cases from time to time. In any event the considerations of this group of court users do not outweigh the public interest in deterring dishonourable conduct by third party funders.

Encouraging an independent, strong, diverse and effective legal profession

31. The independence and strength of the bar is not only an asset to the bar, but an asset to the public. There is a public interest, not only in maintaining but in enhancing the independence of barristers and in making them (or keeping them) strong and protected when they need to be. It is essential that the BSB stands up for barristers, especially where unconscionable behaviour by those that fund barristers is concerned. Standing up for barristers here is not in conflict with the interests of clients: on the contrary the automatic nature of the entitlement to withdraw per the current guidance, protects not just the bar and its independence but, for the reasons given above, also protects consumers in general.
32. The BSB should not feel nervous about protecting a rule that is clear and provides an automatic protection for barristers who have been wronged. By seeking an amendment which effectively says that every case is fact-specific and that the barrister's conduct must be ‘justified’ by reference to the impact on clients, witnesses, the vulnerable etc., the BSB will erode the protection that the certainty of the existing position provides. That will weaken the bar, and that is not in the public interest.
33. The current position encourages funders to make an accurate assessment of their exposure to fees before counsel is instructed. The provision of latitude to funders to unilaterally reduce fees after the brief has been delivered will have the inevitable effect of unscrupulous funders luring counsel into cases and thereafter reducing fees knowing

that it will be more difficult if the changes are made for counsel then to withdraw. Such an outcome should be of real concern to the BSB as a regulator of legal services.

34. A comprehensive analysis of all the regulatory objectives clearly mitigates against the BSB's proposals and in favour of retaining the *status quo*.

Criticism of the current guidance

35. The BSB's concern regarding the current guidance appears to be that there is a risk of undue detriment to clients, who through no fault of their own find themselves without legal representation, for example because a third party such as the Legal Aid Agency had changed the rate of remuneration for the barrister. The outcome that the BSB seeks to achieve is to ensure that instructions are not accepted, refused, or returned in circumstances which adversely affect the administration of justice, access to justice or (so far as compatible with these) the best interests of the client. Accordingly, the BSB's focus is solely on the interests of the client and the wider administration of justice and has no regard for the fundamental contractual rights of the barrister.
36. The BSB suggests that "the presumption underlying gC87 is that the fundamental change to counsel's remuneration is directly attributable to the client. Therefore provided that the client has been properly informed of the potential consequences of such an action any resulting prejudice suffered would be a direct result of their own informed action." It is unclear why the BSB considers that there is any presumption of fault enshrined in gC87. There is no basis for such a conclusion in the text itself. This appears to be an unfair criticism of those who drafted the existing guidance. The guidance does not speak of, or presume anything about, whose fault the change in remuneration may be. That is because it is irrelevant. A barrister's instructions are withdrawn, not because of any fault on the part of anyone, but because the agreed rates of remuneration are reduced. The BSB however uses this alleged presumption as a fallacious basis for criticising the guidelines as being anti-client.

Conclusion

37. For the reasons we have stated, we do not support the BSB's proposals to amend the guidance in the Code of Conduct regarding the returning of instructions. We believe that the guidance as currently drafted properly reflects the reality, i.e. instructions are

accepted at an agreed rate of remuneration which, if reduced, amounts to a withdrawal of those instructions. We do not see any proper justification for any amendment. Further, we do not believe that the proposals are in line with the regulatory objectives under the 2007 Act. On the contrary, those objectives are better furthered by the current guidance.

38. If, contrary to our primary submission, the BSB concludes that amendment to the guidance is required and that, in the future, a fundamental change of remuneration may amount to some other substantial reason for returning one's instructions, we suggest that the wording of the proposed amendment is inappropriate and imbalanced in favour of the Government and Legal Aid Agency. We would propose that the following be inserted into the guidance:

“There will be a strong presumption that a fundamental change made to the basis of your remuneration by way of a unilateral change in contractual terms or scheme rules introduced by the LAA or other public authority responsible for funding representation would amount to a substantial reason justifying withdrawal from an ongoing case. This is because it is reasonable to expect the LAA and other public authorities to honour the terms on which a barrister has agreed to accept instructions in an individual case”.

39. The above passage would not effect cases funded by private third party funders or those funded directly by individuals, but only those funded by the State. Such a provision would ensure that practitioners had some confidence that unreasonable behaviour by the Government would be likely to justify a return of instructions, subject to consideration of the other factors contained in the guidance.

**On behalf of the Members of
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