

# THE “CAB RANK RULE”: A FRESH VIEW

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### **(1) Introduction**

1. This Paper considers the so-called “Cab Rank Rule”, and seeks in essence to address whether it continues to serve any worthwhile purpose. It has been prepared for consideration by the Bar Standards Board (“**BSB**”) in the light of a recent report on the Cab Rank Rule commissioned by the Legal Services Board (“**LSB**”) from two academics, Professor John Flood and Professor Morten Hviid (“**the Flood / Hviid report**”)<sup>1</sup>.

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<sup>1</sup> We, the authors of this Paper, are three self-employed barristers who have voluntarily undertaken this task, without being formally commissioned by the BSB to do it. Instead, the Head of Fountain Court Chambers, Timothy Dutton QC (a former chairman of the Bar Council), thought that it might assist in the debate about the Cab Rank Rule if an analysis were undertaken by fresh minds in the light of the Flood / Hviid report and provided to the BSB. We were “volunteered” for the task and agreed to undertake it, without being paid for it. (The Cab Rank Rule did not apply to this task; we could certainly have refused to undertake it!)

2. We wish to emphasise that we have sought to approach this task in a fresh, open-minded way. Whilst each of us was well aware of the Cab Rank Rule and had encountered it in our respective practices, none of us had previously sought to analyse in any depth its merits or otherwise. None of us have served on the Bar Council, the BSB or any committees of either; so we do not have any preconceived “mindset” as regards the Cab Rank Rule which might conceivably have resulted from such activities. We practice mainly at the Commercial Bar<sup>2</sup>. Our perspective is not therefore comprehensive, although we do not consider that this has hampered our work.
3. Our methodology has included researching and reviewing the authorities and literature; and analysing the Cab Rank Rule (as currently formulated<sup>3</sup>) and the Flood / Hviid Report. We have not undertaken any interviews nor any scientific soundings; it would have been very difficult for any such steps to have been representative. Also, the time available to us to produce this Paper has been heavily circumscribed, not only by our own other commitments but also by the BSB indicating that it would welcome receipt of this report before the end of February.
4. We understand that another paper about the Cab Rank Rule is being commissioned by the Bar Council in response to the Flood / Hviid Report. We have had no discussions with the authors of that other paper; so this Paper is entirely independent of that or any other paper.

## **(2) Executive Summary**

5. The Cab Rank Rule is both important and relevant, and ought to be retained as a rule. It plays an important role in ensuring that even unpopular clients can secure representation by an advocate of their choice. It also brings significant benefits to the public in specialist areas, such as commercial and regulatory law, where its absence would create a

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<sup>2</sup> One of us also does a certain amount of regulatory / professional disciplinary work, mainly in connection with solicitors and accountants.

<sup>3</sup> We have not addressed our minds to whether the Cab Rank Rule, whether it is retained as a rule or changed to a “principle”, should be redrafted – and (if so) how it should be redrafted. That would be a task for others to undertake, if thought desirable.

real risk that major players (e.g. banks) could demand exclusivity, depriving potential opponents of much of the talent available at the Bar. Neither we nor others have been able to identify any real disadvantages or positive harm caused by the Cab Rank Rule. The Cab Rank Rule has attracted strong judicial approval (with no dissenting judicial opinion), and is widely replicated across other common law jurisdictions. Although the Cab Rank Rule has recently been challenged in the Flood / Hviid Report, that report suffers from a multitude of fundamental failings (see paragraphs 77-82 below and Appendix A) and reaches various conclusions which are incorrect and unjustified; so that report does not begin to provide any basis for the abolition of the Cab Rank Rule. We therefore come to the clear and strong conclusion that the Cab Rank Rule should be retained.

### **(3) What is the Cab Rank Rule?**

6. The Cab Rank Rule is shorthand for the professional obligation on barristers to accept instructions from a client regardless of any personal dislike of the client or the case, etc. It echoes the principle that a cabbie<sup>4</sup> available for hire cannot refuse to carry a passenger (subject to limited exceptions). But the analogy is imperfect – a passenger must also take the first cab on the rank, whereas that is no part of the Cab Rank Rule for the Bar. Thus a client, through his solicitor, is at liberty to instruct whomever he wishes. The Cab Rank Rule is to prevent any unjustified restrictions on the client's choice of barrister. This distinction illustrates a fundamental point about the Cab Rank Rule, namely that its purpose is to protect the interests of clients, not the interests of barristers.
7. The Cab Rank Rule concerns only whether and when barristers are obliged to **accept** instructions. It does not concern the different situation, as to whether and when barristers (once they have accepted instructions) may become entitled or obliged to return instructions or withdraw from a case. Regrettably, the Flood / Hviid Report conflates the two issues. As a result, some of the criticisms in the Flood / Hviid Report, relied on as affecting the Cab Rank Rule, properly analysed relate to other matters<sup>5</sup>.

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<sup>4</sup> To be accurate, a Licensed Hackney Carriage. The Cab Rank Rule echoes the law as it applies to Licensed Hackney Carriage drivers.

<sup>5</sup> See paragraph 79.d below.

8. The Cab Rank Rule forms part of Part VI of the Bar Code of Conduct, entitled “*Acceptance and return of instructions*”. Part VI deals with three separate and discrete issues. To quote the prefatory words to Part VI, “*this section deals with:*

- *the occasion on which barristers are required to accept instructions (the “Cab Rank rule”),*
- *when they are required to refuse or withdraw from a case and*
- *when they may choose to refuse or withdraw from a case”.* (bulleting added)

The way in which this is reflected in the Code is set out below.

9. Paragraph 601 is in prohibitive terms. A barrister supplying advocacy services must not withhold those services on any of three specified grounds, namely the nature of the case being objectionable; the client having unacceptable conduct opinions or beliefs; and the source of funding. These prohibitions go further than those in the Equality Act 2010 or the equivalent New York legislation<sup>6</sup>.

10. By contrast, paragraph 602 is in mandatory terms, that a self-employed barrister must comply with the Cab Rank Rule. This means that, subject only to the exceptions in

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<sup>6</sup> The Flood / Hviid Report suggests (at p.39) that the Cab Rank Rule could be recast, along the lines of Rule 10 of the New York State Bar Association’s Statement of Client Rights, as a rule prohibiting the refusal of instructions on discriminatory grounds (i.e. race, gender, sexual orientation etc.). Earlier in the report (at p. 26), it is stated that a similar rule can be found in the SRA’s code of conduct for solicitors but not in the Bar Code of Conduct. In fact, that assertion is totally wrong. In addition to the Cab Rank Rule, the Bar Code of Conduct includes rule 305.1 as follows:

*“A barrister must not, in his professional practice, discriminate unlawfully against, victimise or harass any other person on the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, gender re-assignment, sexual orientation, marital or civil partnership status, disability, age, religion or belief or pregnancy and maternity.”*

Accordingly, the Bar already has a far reaching rule against discrimination as well as the Cab Rank Rule. The Flood / Hviid Report’s suggestion (at p. 39) that the non-discrimination rule could be extended to include unpopular clients and heinous crimes (as the original rationale for the Cab Rule Rule) seems to us to be both unworkable and unenforceable. If we have understood the suggestion correctly, a barrister would have a general right to refuse to accept instructions subject to a prohibition on refusing them because of the unpopularity of the client or heinous nature of the crime. If that is right, the rule would only be enforceable if the barrister admitted that the reason for having refused the instructions had been the unpopularity of the client or the heinous nature of the crime. An arbitrary rejection, otherwise than on the basis of the unpopularity of the client or the or heinous nature of the crime, would apparently be acceptable. This cannot be desirable or justifiable. We also envisage definitional and forensic problems; for instance, how would ‘unpopularity’ be defined or tested? The only true way to ensure that odious clients are represented is to prohibit the arbitrary refusal of instructions altogether – i.e. retain the Cab Rank Rule.

paragraphs 603 to 606, he must (in summary) accept briefs and instructions in any field in which he professes to practise, irrespective of the source of payment and irrespective of the identity of the client, the nature of the case and his own opinion or belief as to the character, reputation, guilt etc. of his client.

11. Paragraphs 603 to 606 provide exceptions to the mandatory rule in paragraph 602. Several of those exceptions operate in effect to protect the client<sup>7</sup>, others to protect the barrister<sup>8</sup> and others to protect the wider administration of justice<sup>9</sup>. To the extent that there might be scope for debate as to whether some of those exceptions are too wide or too narrow, that more marginal debate is not addressed by this Paper, which instead focuses on the fundamental issue of the merits or otherwise of the basic rule.
12. Paragraph 607 obliges the barrister, where he considers that it would be in the best interests of the client to have different representation, so to advise the client. However, it neither obliges him to cease to act nor undermines his obligations under the Cab Rank Rule. Contrary to the view of Professors Flood and Hviid<sup>10</sup>, this paragraph (properly analysed) is neither an exemption from, nor an exception to, the Cab Rank Rule.
13. Paragraphs 608 to 610, as described in their heading, deal with withdrawal from a case and the return of instructions. None of these paragraphs concerns, or (in our view) is directly relevant to, the Cab Rank Rule. The Flood / Hviid Report addresses these paragraphs and their effect; but we consider that any problems resulting from those paragraphs should be considered as issues separate from the Cab Rank Rule.
14. To summarise, we have tried to focus analytically on solely the Cab Rank Rule. In doing so, we have put to one side any issues, arguments and shortcomings extraneous to the Cab Rank Rule, such as (by way of example only):

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<sup>7</sup> By way of example only, there are exceptions to the obligations to take the case if the barrister has insufficient experience or competence (para 603(a)) or inadequate time (para 603(b)), or if the interests of the lay client require a junior to be instructed as well as a QC (para 605(b)).

<sup>8</sup> For instance, there is an exception to the obligation to take on the case if the barrister will not be paid a proper fee having regard to various factors, such as the length and complexity of the case, etc. (para 604(b)).

<sup>9</sup> For instance, if the barrister's connection with the client or a member of the court would make it difficult for the barrister to maintain professional independence or the administration of justice might be or appear to be prejudiced (para 603(d)).

<sup>10</sup> See p.4 of the Flood / Hviid Report.

- a. problems resulting from the operation of the other parts of the Code of Conduct dealing with withdrawals from a case and the return of instructions; and
- b. shortcomings in the systems for the funding of cases, including Legal Aid.

In adopting this focused approach, we differ from the Flood / Hviid Report, which in our view conflates and confuses various other issues with the Cab Rank Rule – and, as a result, arrives at poorly analysed, unjustifiable and incorrect conclusions as regards the Cab Rank Rule.

#### **(4) The justification for and advantages of the Cab Rank Rule**

15. This section sets out what we perceive to be the justification for and advantages of the Cab Rank Rule. It should be read in conjunction with the next section, which (as a corollary) sets out what we perceive to be any disadvantages of and harm done by the Cab Rank Rule. As stated in the Introduction, we have sought to approach both sections with open minds.
16. The original justification for the Cab Rank Rule is well-known and generally accepted as a worthwhile and valuable goal – to promote access to justice by ensuring that legal representation is available to all who need or want it, including the odious client or unpopular cause. The Cab Rank Rule ensures that everyone is equal before the law and entitled to representation of their choice. This last point is important. The Cab Rank Rule does not merely ensure that everyone is able to get a lawyer, but rather the lawyer of their choice.
17. There is a related point which is often overlooked. The Cab Rank Rule also provides the barrister with a form of immunity that enables him to represent odious clients without incurring the wrath of the community or a social stigma. The existence of the Cab Rank Rule and the media and public's awareness of it (albeit that there is room for improvement on this score) distances the barrister from the views and conduct of his client. When a barrister or law student is asked at a social outing (as we all have been) "*would you represent a murderer?*", he or she is able to answer that he would do so because it would be his professional duty and it is important for the proper functioning of the legal system that everyone – even an odious murderer – is able to obtain competent

legal representation. This in turns helps to ensure that the primary objective of the rule is achieved.

18. However, the challenge to the Cab Rank Rule is not that its objective is unworthy, but rather that it is either ineffective or no longer necessary (or both). In other words, the Flood / Hviid Report calls into question the *instrumentality* of the Cab Rank Rule in ensuring that odious clients are able to secure representation. It is suggested that odious clients are easily able to secure legal representation because the benefits of representing a high profile client (such as publicity) far outweigh the detriments. However, OJ Simpson and Oscar Pistorius are very bad examples<sup>11</sup>. The odious client is not always on the front page of the newspaper. He is sometimes the local bigot or low level thug, or the thief who steals from an old lady, or the multinational corporation that is said to have passed off horse meat as beef or pollutes streams. The Cab Rank Rule protects them all, irrespective of any commercial or professional benefit or harm that is caused to the barrister required to represent them, and in doing so upholds and promotes the integrity of the legal system and the rule of law.
19. Likewise, the publicity-hungry lawyer will not always, and in fact may rarely, be the best or most suitable advocate for the client<sup>12</sup>. The Cab Rank Rule ensures that the choice belongs to the client, not the lawyer. As a result, the Cab Rank Rule improves the quality of legal representation available to all.
20. One important factor overlooked by the Flood / Hviid Report is the real importance of the Cab Rank Rule, and the significant benefits brought by it to the public, in the field of commercial and regulatory law. The Cab Rank Rule prevents major consumers of advocacy services (such as high street banks, insurers and regulators) from putting certain barristers “out of circulation” by making them unavailable for others to instruct, which in turn widens the pool of barristers available to act for the public in that particular field. In the regulatory sphere, such organisations would typically instruct a relatively small pool of barristers, who might do much of their work for such organisations. Frequently, such

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<sup>11</sup> And in any event, South Africa has the Cab Rank Rule so it applied in the Pistorius case.

<sup>12</sup> The publicity-hungry lawyer’s motivation for taking the case may warp his perspective; diminish his objectivity; strain his inclination to adhere to the other principles in the Code of Conduct; or mask the fact that he may not be the most suitable advocate for the task.

organisations would prefer not to have those barristers acting against them. In the commercial context, major institutions such as insurers and, notably, banks typically instruct a much larger number of barristers and, in reality, there would be relatively few (if any) barristers, particularly at the junior end of the profession, for whom such instructions did not comprise a significant part of their practice. This has a number of implications:

- a. Where the Cab Rank Rule does not operate (such as in the case of solicitor advocates), there is nothing to prevent such an organisation from requiring its advocates to agree to act only for them (i.e. to decline instructions to act against them), in default of which the advocate will obtain no further instructions. This does happen in practice; a good example is the Solicitors Regulation Authority (**SRA**), which has recently adopted the policy of admitting to its panel of solicitors instructed by it in relation to disciplinary proceedings only those solicitors who have given an undertaking not to act against the SRA<sup>13</sup>.
- b. The Cab Rank Rule prevents such a policy from being applied by such organisations to barristers they instruct<sup>14</sup>. The public benefits from this. For instance, a solicitor defending disciplinary proceedings brought against him is not limited to instructing a barrister who does not work for the SRA, i.e. barristers who only have experience of defence work. Instead, he is able to instruct a barrister who has experience of acting for the SRA in disciplinary cases and who might as a result bring a wider perspective and breadth of experience to the case.
- c. Furthermore, the Cab Rank Rule in these circumstances provides advantages beyond the basic obligation on the barrister to accept the brief. It effectively provides a degree of protection for the barrister instructed to act against his major client, enabling him to justify to his major client why he was obliged to accept instructions on behalf of the small client to act against his major client<sup>15</sup>. The

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<sup>13</sup> Of course, such a practice is far from universal, and there are contrary examples. One of us has a client, a UK airline, which understands that the pool of aviation barristers is small; and (in the context of one case where that barrister was instructed to act against the UK airline) it expressly said that it recognised that the operation of the Cab Rank Rule may well result in barristers previously instructed by it needing to act against it in a different case.

<sup>14</sup> We are told that attempts are made from time to time by banks and others to ask members of Fountain Court Chambers not to act against them, but any such requests are refused.

<sup>15</sup> Two of us have had personal experience of this. One of us, when asked to act on behalf of individual solicitors against the SRA, first checks that he can identify no conflict of interest or other reason (e.g. breach of confidential information) to preclude him from accepting those instructions; but he then double-checks with the



underpinning by the Cab Rank Rule of that explanation is an important element of the valid “excuse” for the barrister accepting instructions to act against his major client, thereby potentially reducing the barrister’s temptation to try to find some justification for not accepting the instruction from the small client.

21. This point is neither theoretical nor does it relate only to peripheral niche segments. Absent the Cab Rank Rule, we consider that there is a real risk of the large (and perhaps high-paying) organisations securing the loyalty and services of many of the best barristers, diminishing the pool of talent available to the other side (typically consumers with shallower pockets) – and potentially increasing the risk of a mismatch or inequality of arms between the legal teams. For instance, to take a situation with some parallels, some large and high quality law firms (who are not bound by any Cab Rank Rule) are reputed to have a policy of not acting against banks.
22. The problem presented by clients seeking either a contractual promise or a non-contractual assurance that a barrister will not subsequently act against them is not uncommon in practice. In some cases, clients are prepared to pay a fee – in the form of a ‘retainer’ – to obtain such a promise. Indeed, it arises sufficiently often that the Bar Council’s Professional Standards Committee issued guidance on the issue in March 2005 describing such arrangements as “*an affront to the cab rank rule, and to the free availability of legal services*”<sup>16</sup>. The guidance went on to explain the likely consequences of allowing such arrangements:

*“In our view, it is professionally improper for counsel to agree, expressly or implicitly, to such a condition. In effect, it is an attempt to ‘contract out’ of the cab-rank rule, which positively obliges counsel to accept instructions against an*

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SRA the conflict point (anonymising the identity of the new client if necessary), but importantly taking the opportunity to point out to the SRA that subject to any conflict he is under an obligation to accept such new instruction because of the Cab Rank Rule – and the SRA has accepted this and has subsequently sent further work to that barrister. Another of us, when asked to act against a bank for whom he had frequently acted in the past, expressly referred to and relied on the Cab Rank Rule when the solicitor for the bank subsequently client remarked on the fact that he was acting against the bank – and again that barrister has received further instructions from that bank. Another senior member of chambers says that he “regularly” has to say to his bank or regulator clients that he is bound to act or appear when instructed against them because the Cab Rank Rule requires it – and again that barrister continues to receive instructions from that bank or regulatory client.

<sup>16</sup> See Bar Council, Professional Standards Committee, Guidance on Retainers and Novel Fee Agreements (March 2005). This guidance is available on the Bar Council’s website at: <http://www.barcouncil.org.uk/for-the-bar/practice-updates-and-guidance/remuneration-guidance/retainers-and-novel-fee-agreements/> (last accessed 22 February 2013).

*existing or former client unless a specific conflict, generally relating to confidential information, would result. Counsel must be free to test the proposed new instructions against the existing ones on a case-by-case basis; or else major clients would quickly 'scoop the pool' and monopolise competent representation in their field."*

23. There is a real advantage in having competent specialist barristers available to be instructed. As the Flood / Hviid Report notes (at p. 17), there is empirical evidence to suggest that "repeat purchasers" (i.e. major clients) have a statistically higher success rate. While it is unclear that this can be attributed to better lawyer selection alone, it is likely that this is a relevant factor. The existing disparity would likely be amplified, perhaps dramatically so, if major clients were able to use their bargaining power to 'scoop the pool' of specialist barristers (i.e. effectively to render them unavailable for others to instruct) in circumstances where barristers were no longer able to invoke the Cab Rank Rule.

**(5) The disadvantages of and harm done by the Cab Rank Rule**

24. Somewhat to our surprise, we have found it difficult to identify any real disadvantages or positive harm caused by the Cab Rank Rule. Coming to the Cab Rank issue without any preconceptions but being aware that this was a topic being hotly debated at the moment, we had expected to find the arguments much more evenly balanced than they are and to be able to identify a much clearer case against the Cab Rank Rule than has been articulated.

25. The starting point is that the purpose of the Cab Rank Rule is to operate so as to protect the interests of the consumer (not the barrister). It seeks to ensure so far as practicable that the consumer's choice of barrister is not restricted by the barrister's subjective preference not to take on a particular case. For the reasons given in the previous section, the Cab Rank Rule goes at least some way, in our view a long way, towards achieving that purpose. In analysing the effect of the Cab Rank Rule, we have not identified any disadvantages of, or harm done by, the Cab Rank Rule.

26. It is striking that nowhere does the Flood / Hviid Report identify any positive harm which results from the operation of the Cab Rank Rule, other than alleged distortion of the

market (which seems to us a bad point for the reasons dealt with at paragraphs 29 and following below). Any other harm and disadvantages discussed in the Flood / Hviid Report seem, in our view, to result from factors other than the Cab Rank Rule, such as the rules relating to withdrawal of instructions, the problems with funding, the practical consequences of cases overrunning and double-bookings, etc. In essence, those funding and other issues seem to us to be quite separate from the underlying merits or operation of the Cab Rank Rule, and there is no justification for treating them as undermining any rationale for the Cab Rank Rule.

27. Entirely reasonably, the Flood / Hviid Report raises questions about the utility of the Cab Rank Rule, including whether it is widely ignored by barristers and whether it is of little or no use because it is not enforced by the regulator. We deal elsewhere in this Paper with the Flood / Hviid Report and what we see to be the true position on those issues<sup>17</sup>.

In summary:

- a. We do not believe that the Cab Rank Rule is in fact widely ignored by barristers (and certainly not to the extent made out in the Flood / Hviid Report)<sup>18</sup>.
- b. There is some evidence to suggest that the Cab Rank Rule is in fact effective, or at lowest plays a real part, in securing for clients the counsel of their choice<sup>19</sup>.
- c. We think that the Flood / Hviid Report significantly understates the extent to which the Cab Rank Rule has in fact been enforced by the regulator<sup>20</sup>.

28. However, the more fundamental point is this. Even if the Cab Rank Rule is ignored by some barristers and even if it is not as rigorously enforced by the BSB as it could or should be, it would not logically follow that the Cab Rank Rule has no utility – and still

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<sup>17</sup> For instance, we address all the points in the Flood / Hviid Report at section (11) below and in Appendix A; we deal specifically with the issue of enforcement at section (8) of this Paper; we deal with the utility of the Cab Rank Rule at section (4); etc.

<sup>18</sup> See, e.g., pp. 27 and 38 of the Flood / Hviid Report.

<sup>19</sup> In about 2007, the BSB undertook a survey into the effect of the Legal Services Act 2007. Question 2 of the BSB's consultation asked the question: "*How effective in practice, in your experience, is the "cab-rank" rule in securing for clients the Counsel of their choice?*" The BSB prefaced the published results by saying that "*Strictly, the terms of this question did not admit of a "Yes" or "No" answer*", but went on to tabulate the responses according to whether they indicated an attitude broadly supportive of the cab-rank rule or the reverse. The respondents comprised sole practitioners, an employed barrister, barristers' chambers, other lawyers, legal organisations, public bodies and a member of the public. Out of 34 respondees, 26 (i.e. over 76%) thought the cab rank rule effective in securing for clients the Counsel of their choice and only 8 thought the reverse.

<sup>20</sup> See, e.g. pp. 22, 34 and 40 of the Flood / Hviid Report.

less that it causes positive harm or that its disadvantages (if any) outweigh its advantages. Nor, if the Cab Rank Rule is not wholly effective and offers less protection than it should, would it follow that the Cab Rank Rule should be abolished or downgraded from a rule to a principle. Instead, the logical conclusion would be that consideration should be given as to whether steps should be taken to strengthen the Cab Rank Rule so as to ensure its more effective enforcement, for instance by focusing on tightening and seeking to redraft the exceptions.

29. As we have had difficulty identifying any disadvantages or positive harm caused by the Cab Rank Rule, we have examined the Flood / Hviid Report to see what disadvantages or harm it identifies. So far as we can see, the principal ‘harm’ identified by the Flood / Hviid Report appears to be the *possibility* that the Cab Rank Rule *may* be distorting the legal services market<sup>21</sup>. Their discussion is tentative because of the paucity of evidence one way or the other, from which they reach the strange conclusion that “*its abandonment ought to make market signals clearer and more direct than they are presently*”<sup>22</sup>. We disagree with both their analysis and conclusion (not to mention the absence of any logical link between the two). The Cab Rank Rule does not in any way distort the market for legal services; rather it seeks to prevent the market being distorted by toleration of an arbitrary factor.

30. In so far as we understand the discussion in the Flood / Hviid Report, it appears to be suggested that the Cab Rank Rule may distort the market in three ways.

- a. First, it is suggested that it may weaken barristers’ bargaining power because it places a restraint upon their ability to set their own fees and because it leads to solicitors seeking to retain profitable work themselves while sending unprofitable work to barristers.

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<sup>21</sup> We note that the Flood / Hviid Report’s primary position is that the relevant market is the ‘legal services market’ (in which some 250,000 people work) and the secondary position is that the relevant market is ‘advocacy’. We would suggest that the ‘legal services’ market definition is altogether too wide and the ‘advocacy’ market definition too narrow. While barristers are obviously not competing with conveyancers, the services provided by barristers go far beyond mere advocacy. Perhaps a more appropriate market definition would be ‘litigation and dispute resolution’ which would include both advisory and advocacy services. If we are right, it follows that barristers would comprise a much larger proportion of the relevant market than the Flood / Hviid Report suggests.

<sup>22</sup> Page 39 of the Flood / Hviid Report.

- b. Second, it is suggested that it may strengthen barristers' bargaining power in that it frees barristers from implicit or informal ties with powerful buyers.
- c. Third, it appears to be suggested that because barristers (or barristers' chambers) are prevented from transparently advertising their true specialisations, consumers are unable to obtain the information they need to make an informed decision on lawyer selection.

We address each in turn.

31. In respect of the first suggested possible distortion – weakening barristers' bargaining power – we accept that the Cab Rank Rule: (i) is intended to protect the interests of clients, not the interests of barristers; and (ii) by definition, does place a (limited) restraint upon barristers' ability to set their own fees. In any event, the suggestion that the barristers' economic bargaining power is reduced appears to misunderstand the effect of the Cab Rank Rule. The Cab Rank Rule does not oblige a barrister to accept instructions unless the fee is 'proper' having regard to the factors set out in rule 604(b). The Flood / Hviid Report expressly envisages a solicitor making a "take-it-or-leave-it offer" that the barrister is, by virtue of the Cab Rank Rule, unable to refuse. It appears to be implied that this enables the solicitor to obtain the barristers' services at below market rate for that kind of work performed by that kind of barrister (in terms of both seniority and experience), otherwise it is difficult to understand how this affects the barristers' bargaining position. However, the Cab Rank Rule will only be engaged if the proffered fee is 'proper' in terms of rule 604(b), which necessitates consideration of what the appropriate market rate is for that kind of barrister performing that kind of work. Accordingly, the extent of the restraint is limited and should not be overstated – it restrains the barrister from insisting, as a condition of accepting work, upon an inflated fee over and above what is 'proper'.

32. In so far as it is suggested that the Cab Rank Rule leads to barristers being more frequently instructed on less profitable cases, this promotes access to justice. Even so, it is unclear to us that this distorts the market for the same reason as set out in the previous paragraph. The Cab Rank Rule will only be engaged if the fee is proper. If the proffered

fee truly is unprofitable in the sense of making the barrister incur a loss or inadequately remunerating the barrister for his work, it will necessarily not be a proper fee<sup>23</sup>.

33. The second suggested possible distortion seems to us to miss the point. We accept that the Cab Rank Rule provides “cover” for a barrister to act against a powerful buyer, but we consider this to be one of the main virtues of the rule. We doubt that this is a distortion of the market; but if it is, it seems to us to be a positive one in that in effect it prevents (or reduces) the abuse of market power.
34. The third suggested possible distortion appears to us to be entirely fictional. The Flood / Hviid Report suggests that the specialisation of barristers goes beyond an area of practice to particular *sides*. For example, it is said that many family law practitioners ‘specialise’ in Local Authority work (in that they represent the Local Authorities against parents in care proceedings) or that criminal practitioners ‘specialise’ in defence work. It is said that consumers are harmed because the Cab Rank Rule prevents barristers (or barristers’ chambers) from properly advertising that fact.
35. We simply do not accept that there is any true specialisation in a particular side of a particular field of work. To suggest there is such a specialisation is to confuse the composition of a barrister’s practice with his specialisation. The barristers who represent the two sides of a case are arguing the same legal issues in the same field, just from opposite sides. While it may well be true that barristers tend to receive instructions to represent a particular side more often, or even exclusively (in an extreme case), this does not mean they have a ‘specialisation’ in that side – and of course the Cab Rank Rule would require him to accept instructions to act for the other side in another case. Indeed, a barrister’s practice can develop in this way largely by accident: at the outset of a barrister’s career, the barrister does not choose his clients and if the solicitor is happy with the barrister’s work he will probably be instructed again. This is the way in which a barrister’s practice is built up. If it happens that the solicitors who instruct a particular barrister all have the same type of clients (say, insurers or local authorities), it may well be that the barrister tends to be instructed on the same side repeatedly. With the possible exception of detailed (and perhaps confidential) knowledge as to those client’s businesses

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<sup>23</sup> It is perhaps for these kinds of reason that the Bar Council has deemed the family and criminal graduated fee schemes not to be ‘proper’ fees in terms of rule 604(b).

and systems, this does not mean the barrister is specialist in a particular side of a particular field, in any material sense.

36. It follows that if the suggested ‘harm’ is that consumers are directed to specialists in, for example, child care proceedings, but not informed that the particular barrister tends to represent local authorities as opposed to parents, there is no harm. The barrister is a specialist in the relevant field of law and will be able to draw upon his or her previous experience in representing the other side to the benefit of the client.
37. Indeed, to the extent that the abolition of the Cab Rank Rule would lead to an increase in such ‘side specialisation’, it may actually create consumer *harm*. For what it is worth, those who have practised at the Bar tend to accept that experience of representing both ‘sides’ within a particular field produces better barristers<sup>24</sup>. If the current tendency towards ‘side specialisation’ were to be exacerbated, the legal system would be the poorer for it and, ultimately, it is the clients who would suffer as a result.
38. It follows that we do not accept that the Cab Rank Rule distorts the ‘market’; and also, if there is any such distortion, it is in a positive way.

#### **(6) The judicial perspective**

39. The Cab Rank Rule is a regulatory rule of professional conduct. It does not have the force of law. A barrister who breaches the Cab Rank Rule will be subject to disciplinary proceedings but will not be liable in the civil courts. As such, the judiciary have confirmed that the content and enforcement of the Bar Code of Conduct is not a matter for courts<sup>25</sup>. For this reason, the Cab Rank Rule has not itself been the subject matter of case law. However, the existence and role of the Cab Rank Rule has been noted with

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<sup>24</sup> See Pannick, ‘Advocates’ (OUP, 1992) at 139:

*“Indeed, understanding how the matter must look from the other side assists counsel to argue cases for their clients. It is the experience of many barristers that the most competent representation of a client comes from those who are objective, and are not politically or emotionally involved in any cause being championed by their client.”*

See also the further references set out in footnote 92 below.

<sup>25</sup> See, for example, *Geveran Trading Co Ltd v Skjevesland* [2003] 1 WLR 912 at [42] per Arden LJ.

approval and considered in cases in which barristers' conduct has fallen to be examined – notably whether barristers should have an immunity from suit, but also the circumstances in which the Court should make a wasted costs order against a barrister or the barristers' conduct is raised as a ground of appeal, and so on.

40. Traditionally, the judiciary has been drawn predominantly from the best and brightest at the Bar who have had full and distinguished careers in practice. Having generally spent decades at the Bar and on the bench, the judiciary are particularly well placed to assess the value and importance of the Cab Rank Rule. It is important to distinguish between two types of judicial comments:

- a. those that relate to the intrinsic value and importance of the Cab Rank Rule generally; and
- b. those that relate to the relevance of the Cab Rank Rule to the particular issue before the Court.

Bearing that distinction in mind, a review of the case law referring to the Cab Rank Rule reveals *universal* judicial approval for the rule.

41. The judicial perspective as to the value and importance of the Cab Rank Rule is as follows:

Lord Reid: *“... it is essential that that duty must continue: justice cannot be done and certainly cannot be seen to be done otherwise.”*

Lord Pearce: *“This has been an essential feature of our law. ... it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers...”*

*“...it would cause irreparable injury to justice if there were any departure from the code which has so long existed, that a barrister cannot pick and choose.”*

Lord Steyn: *“It is a valuable professional rule.”*

Lord Hoffman: *“It is a valuable professional ethic of the English Bar...”*

Lord Hope: *“Its value as a rule of professional conduct should not be underestimated...”*



Lord Hobhouse: *“It is in fact a fundamental and essential part of a liberal legal system. ... It is also vital to the independence of the advocate.... The principle is important and should not be devalued.”*

*“It is fundamental to a just and fair judicial system that there be available to a litigant (criminal or civil), in substantial cases, competent and independent legal representation. ... the professional rule that a barrister must be prepared to represent any client within his field of practice and competence ... underwrite ... this constitutional safeguard.”*

Sir Igor Judge P: *“The cab-rank rule is essential to the proper administration of justice.”*

Arden LJ: *“...the cab-rank rule is a salutary rule. It is an integral and long-established element in our adversarial system.”*

We have not cherry-picked. We have not found a single example of a judge who considers that the Cab Rank Rule should be abolished or diminished. Likewise, we do not seek to take these quotes out of context – the full quotes and citations, as well as those drawn from a selection of commonwealth cases, are set out in table form in Appendix C to this paper.

42. Such approving comments from judges of such distinction who have spent their lives working in the legal system must be given due weight and cannot be lightly dismissed.
  
43. To the extent that the Flood / Hviid Report draws upon judicial authority, it appears to do so selectively. The authors of that report fasten upon comments – principally from the House of Lords decision in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 – relating to the relevance of the Cab Rank Rule to the question of barristers’ immunity, without the authors paying due regard to comments relating to the intrinsic value of the rule. The comments about the frequency with which the Cab Rank Rule arises in practice are not the damaging blow to the Cab Rank Rule that the Flood / Hviid Report makes out. If the Cab Rank Rule is not expressly invoked on a regular basis, that could be taken as an indication that the legal system is working well – it is certainly not a good reason to abolish the Cab Rank Rule. In those few cases where the Cab Rank Rule is required, it is all the more important. Thus, Lord Steyn’s statement in *Hall v Simons* that the Cab Rank Rule’s *“impact on the administration of justice in England is not great”* is not in any way inconsistent with his statement that *“It is a valuable professional rule”*.

44. Earlier this month, and following the publication of the Flood / Hviid Report, Lord Neuberger, the President of the Supreme Court of the United Kingdom, delivered a speech addressing the reforms of the legal system. In relation to the Cab Rank Rule, Lord Neuberger noted the Flood / Hviid Report and its recommendation that the Cab Rank Rule be abolished, and he made it very clear that he is firmly in favour of retention of the rule. He said:

*“A robust, independent legal profession requires robust, independent criminal law practitioners. Without this, our society takes a fatal step away from the rule of law. ... It is why we have the cab rank rule, notwithstanding its continued existence being questioned by The Law Society in 2010 and, more recently, by the Legal Services Board.”*<sup>26</sup>

We respectfully agree, and we would add that those same conclusions apply also to civil law practitioners.

#### **(7) The foreign perspective: other countries and the Cab Rank Rule**

45. It is axiomatic that the Cab Rank Rule is a long standing feature of the English legal system. Given that the English legal system has over the years been transplanted to various far-flung places, we were surprised at the thinly veiled implication in the Flood / Hviid Report that the English bar is peculiar and anachronistic in having (or still having) the Cab Rank Rule<sup>27</sup>. This implication is untrue, for the reasons set out below. We have carried out our own research into the extent to which other jurisdictions do or not have the Cab Rank Rule, or something approximating to it. This qualification (“*or something approximating to it*”) is necessary. In carrying out this research we have disregarded minor differences in the precise scope of the rule, but instead sought to identify jurisdictions which do or do not have the core rule – that is, a rule obliging legal practitioners to accept instructions from a client regardless of any personal dislike of the client or his case.

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<sup>26</sup> Lord Neuberger, ‘Tomorrow’s Lawyers Today – Today’s Lawyers Tomorrow’ (19 February 2013). See: <http://www.supremecourt.gov.uk/docs/speech-130219.pdf> (last accessed 22 February 2013).

<sup>27</sup> See the Flood / Hviid Report at n48 on p. 25 where it is stated that “*A few other areas of the world operate a cab rank rule*” and reference is then made to “parts of” Australia, South Africa and New Zealand.

46. We do not seek to suggest that the existence or non-existence of the Cab Rank Rule in other jurisdictions should be a particularly strong factor, let alone a decisive factor, in considering whether it remains a desirable rule in England and Wales. There will be a variety of factors (including historical, economic and social) which affect the desirability of the Cab Rank Rule in a particular jurisdiction. However, we do consider that a review of other jurisdictions is nonetheless a useful exercise – particularly in the absence of empirical data as to the operation of the Cab Rank Rule in England and Wales – in providing an insight as to the extent to which other jurisdictions consider the rule to be a necessary part of a functioning legal system.
47. It is worth noting that in the 21<sup>st</sup> century English barristers compete in an increasingly global market, whether defined by reference to legal services or dispute resolution. Although we cannot offer any concluded view, the existence of the Cab Rank Rule might be a positive feature playing a part (albeit perhaps modest) in attracting work to the English market<sup>28</sup>.
48. Our research of foreign jurisdictions has been far from comprehensive. In particular, it was limited by time, language ability<sup>29</sup> and methodology. In broad terms, our approach was to seek to identify the relevant professional or regulatory body in a particular legal system and to check their website for any rules of professional conduct (or other regulatory rules). In respect of a number of jurisdictions (especially smaller jurisdictions), we were unable to locate any relevant rules of professional conduct, whether because they do not exist or they exist but are not displayed on the website. Because we make no assumptions one way or the other, where we were unable to confirm the position we have simply omitted that jurisdiction from the results of our review.

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<sup>28</sup> It is unclear whether there exists a class of clients who are unable to obtain adequate or competent legal representation in their home jurisdiction and, as a result, choose to litigate their disputes in England. We advance this possibility cautiously because there is no empirical data and it would perhaps be difficult to disentangle the extent to which, for example, a politically maligned Russian litigant who brings his litigation to London is motivated by his inability to obtain adequate legal representation in Russia as opposed to his distrust of the Russian courts. We simply raise it as a possibility.

<sup>29</sup> We accept our research is biased towards jurisdictions whose legal systems have been inherited from, or at least influenced by, the English common law tradition. This is the unavoidable result of carrying out the research in English.

49. Despite its limitations, and contrary to the impression given by the Flood / Hviid Report, our research indicated that the Cab Rank Rule (or something approximating it) is relatively common in other jurisdictions. The Cab Rank Rule exists in:

- a. Scotland;
- b. Northern Ireland;
- c. The Republic of Ireland;
- d. New Zealand;
- e. Australia (all of it);
- f. India;
- g. South Africa;
- h. Hong Kong;
- i. Malaysia;
- j. Italy;
- k. Nigeria (in respect of criminal cases only); and
- l. Trinidad & Tobago (in respect of capital cases only).

50. The recent Indian experience is illuminating. The defendants in the recent Delhi gang rape and murder case initially could not obtain legal representation after the local Saket Bar Association issued a statement urging its members not to represent them. The Flood / Hviid Report cites this example<sup>30</sup> and states that “*India has no cab rank rule*”, before going on to seek to draw from the fact that all of the defendants eventually were able to secure legal representation – an inference that the Cab Rank Rule was not needed in that situation.

51. However, as stated above, the Flood / Hviid Report is plain wrong: ***India does have the Cab Rank Rule***<sup>31</sup>. The statement issued by the Saket Bar Association was in fact swiftly condemned by a retired Supreme Court of India judge<sup>32</sup>; and the Bar Council of India,

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<sup>30</sup> See footnote 66 on p.31.

<sup>31</sup> Bar Council of India Rules, Chapter II ‘Standards of Professional Conduct and Etiquette’, Rule 11. [See Appendix B, Part A, item 6.]

<sup>32</sup> Justice Markandey Katju, ‘*A dirty job, but somebody’s got to do it*’, wrote this in the Hindustan Times (6 January 2013):

*“Professional ethics require that a lawyer cannot refuse a brief, provided a client is willing to pay his fee, and the lawyer is not otherwise engaged. Hence, the action of any Bar Association in passing a resolution that none of its members will appear for a particular accused, whether on the ground that he is a suspected terrorist, rapist, mass murderer, etc, is against all norms of the Constitution, and*

which is the overarching professional body, compelled the Saket Bar Association to withdraw its statement<sup>33</sup>. So at least it seems that legal representation may well only have been secured as a result of the intervention of the Bar Council of India seeking to enforce the Cab Rank Rule, although it is impossible (sitting in England and basing oneself principally on media reports) to know the true motivations of the lawyers involved – it is possible that some of the lawyers for the accused were motivated (or motivated in part) by publicity. But, contrary to the Flood / Hviid Report, the Delhi case appears to be a strong example of both the *need* for the Cab Rule and, probably, also of its *efficacy*. It is certainly wrong to draw the inference, which the Flood / Hviid Report seeks to draw, that these accused obtained legal representation despite the lack of any Cab Rank Rule.

52. Further, our research indicated that it is necessary to divide those jurisdictions which do not have the Cab Rank Rule into two categories, namely those that nonetheless promote a similar professional ideal and those that do not have the rule / concept in any shape or form. The former category, which encompasses Canada, the United States and Bermuda, is interesting: lawyers there have an express right to refuse a client, but are urged to hesitate before exercising that right where the consequence will be that the person is unable to get legal representation. Ensuring that odious clients or unpopular causes have access to legal representation is left to the professional conscience and goodwill of the individual lawyer. Once it is recognised as a professional ideal but left to individuals to determine whether they wish to act in accordance with it, we fear that there is a greater risk of departure from the professional ideal.

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*professional ethics. It is against the great traditions of the bar which has always stood up for defending persons accused of a crime. Such a resolution is, in fact, a disgrace to the legal community. All such resolutions of Bar associations in India are null and void and the right-minded lawyers should ignore and defy such resolutions if they want democracy and rule of law to be upheld in this country.”*

See: <http://www.hindustantimes.com/News-Feed/ColumnsOthers/A-dirty-job-but-somebody-s-got-to-do-it/Article1-985887.aspx> (last accessed 22 February 2013). See also *AS Mohammed Rafi v State Of Tamilnadu* [2010] INSC 1060 [see extracts set out in Appendix C].

<sup>33</sup> The second of the articles cited in the Flood / Hviid Report, ‘*Devil’s advocate in India gang rape draws scorn from public*’, The National (UAE, 14 January 2013) states:

*“Rajpal Kasana, president of the Saket Bar Association, ... admitted however, that the Saket Bar Association was opposed to the men’s having any representation. But on the advice of the Bar Council of India, he said, his colleagues revised this view.”* (emphasis added)

See: <http://www.thenational.ae/news/world/south-asia/devils-advocate-in-india-gang-rape-draws-scorn-from-public> (last accessed 22 February 2013).

53. In this respect, we note that the US Model Rules expressly profess that:<sup>34</sup>

*“A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.”*

This appears to us to be an attempt to distance lawyers from their clients in order to empower them to accept work from undesirable clients. To what extent this rule is effective to create such distance in the mind of the public is unclear. In England, it has always been doubted that in the absence of the Cab Rank Rule the public would accept the idea that a barrister should not be associated with his client<sup>35</sup>. A non-lawyer would surely ask (as often occurs when people are ignorant of the Rule) *“But why did you take the case? Couldn't you say no?”*

54. We do not have the requisite empirical data or experience to assess the effectiveness of this approach in ensuring that appropriate legal representation is available to all in Canada and the United States. If odious clients are able to obtain such representation, we do not know to what extent the burden of representing such clients is borne by a courageous few or the profession as a whole.

55. Turning to the final category, we were only able to identify three jurisdictions where the Cab Rank Rule is neither a rule nor promoted as a professional ideal, namely Pakistan, Singapore and Trinidad & Tobago (except for capital cases).

56. In respect of all three categories (i.e. those that have the rule, those that do not have the rule but promote the professional ideal, and those that do not have the rule in any form), we have attached the relevant regulatory rules or references in table form as Appendix B.

57. It is difficult to identify any reliable conclusions which can be drawn from the above. The United States and Canadian experience may provide some support for the proposition that the demotion of the Cab Rank Rule from a rule to a mere professional ideal might not be completely disastrous – but we do not know how well the current system works in

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<sup>34</sup> American Bar Association Model Rules of Professional Conduct (1983), Rule 1.2(b).

<sup>35</sup> See *Rondel v. Worsley* [1969] 1 AC 191 at 227 per Lord Reid. See also Pannick, ‘Advocates’ (OUP, 1992) at 140:

*“If the advocate claims the right to refuse to act for those whose conduct he finds reprehensible, he asserts his approval of those for whom he acts, and he cannot expect the public to accept that, when he makes his submissions in court, he is speaking on behalf of his client, and not on behalf of himself.”*

Canada and the United States, nor whether it would be transferrable to England and Wales. The recent Indian experience appears to provide compelling evidence of the ongoing need for the Cab Rank Rule. The relative prevalence of the rule in other jurisdictions suggests that it is still considered a desirable rule in those places. There is a risk that the abolition or downgrading of the Cab Rank Rule in England and Wales could undermine the attractiveness of the English legal system to someone who might otherwise choose English law and/or the English forum for any disputes to be resolved. Perhaps the clearest conclusion is that it cannot be said that England and Wales fall outside the mainstream in having a Cab Rank Rule, contrary to the implication in the Flood / Hviid Report.

### **(8) Enforcement of the Cab Rank Rule**

58. We are surprised by the internal inconsistencies in the Flood / Hviid Report. In particular, in the “Abstract” on p.2 (one purpose for which was likely to have been the provision of ready quotes for the press), the lack of enforcement of the Cab Rank Rule is summarised as follows:

*“... the rule has not been the basis of any disciplinary finding by the Bar’s regulator. It is virtually unenforceable because all but the most egregious detraction from the rule will be unnoticed. ... it is unenforceable and there is no evidence to show that it has ever been the subject of enforcement proceedings; ...”*

Yet these statements are at odds with the Methodological Note at p.40 of the Flood / Hviid Report, which does indeed identify a disciplinary case brought against a barrister (Mark Mullins) who turned down a case on the grounds of his own personal beliefs, and who was duly reprimanded and ordered to pay the costs of that case.

59. Not only was the Abstract (quoted above) misleading, but also the error regrettably concerned not a peripheral point but rather a cornerstone of the authors’ conclusion – namely that the purported lack of enforcement of and (alleged) unenforceability of the Cab Rank Rule demonstrates its lack of utility and importance. These (and other) errors in the Flood / Hviid Report led us to take steps ourselves to explore the extent to which the Cab Rank Rule has in fact been the subject of complaints and has been enforced.

60. The Flood / Hviid Report had this to say on the lack of evidence of enforcement<sup>36</sup>:

*“There were, however, data we could not obtain. The Bar Council had no statistics on the operation of the cab rank rule; for example returned briefs numbers. Nor were we able to find out from the Crown Prosecution Service any data on returned briefs. We asked the Bar Standards Board how many disciplinary findings against barristers based on Paragraph 602 of the Bar Code of Conduct there were. The BSB reported zero findings.”*

However, those enquiries seem to us to have been misconceived or misdirected for these reasons:

- a. The enquiry of the Bar Council as to statistics on the operation of the Cab Rank Rule seems to us to have been misdirected. Why should the Bar Council (which is not the front-line regulator – the BSB is) be expected to have statistics on matters such as returned brief numbers? We are not aware of any obligation on barristers, clerks or others to make returns to the Bar Council of such matters. Nor can we envisage what need there would have been for the Bar Council to gather such information, in circumstances where (until the Flood / Hviid Report) there had been no significant challenge to or questioning of the utility of the Cab Rank Rule.
- b. Similarly, we are not aware (perhaps because we practise at the Commercial Bar) why the Crown Prosecution Service might reasonably be expected to have compiled data on returned briefs by reference to the Cab Rank Rule, although they might of course do so in order to monitor barristers’ availability having regard to court commitments, etc.
- c. The terms of the enquiry of the BSB, relating only to breach of paragraph 602 (e.g. not embracing breaches of paragraph 601), seems to us too narrow to embrace all breaches of the Cab Rank Rule.

61. Based on these enquiries, the Flood / Hviid Report asserts that data about the operation of the Cab Rank Rule could not be obtained. The inference from that statement is that the Cab Rank Rule is not in fact enforced; indeed the Flood / Hviid report goes further, not only stating that it is not enforced but also that it is “unenforceable” – a leap in reasoning which we do not follow. But in any event that inference would only be valid if those enquiries were such as could reasonably be expected to reveal any enforcement of the Cab Rank Rule. For the reasons given above, we do not think that this is the case.

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<sup>36</sup> See p.40, under the heading Methodological Note.



62. In order to analyse more fully the issue of alleged lack of enforcement, we asked the BSB to research its records as to not only the number of proceedings which have been brought for breach of the Cab Rank Rule, but also the number of complaints which have been made for breach of the Cab Rank Rule. Using the search criterion “breach of the Cab Rank Rule”, the BSB has so far identified for us six complaints currently recorded on their database as specifically relating to the Cab Rank Rule, of which:

- a. three were dismissed;
- b. one is in progress;
- c. one resulted in a “No Further Action” outcome; and
- d. one was upheld at a Disciplinary Tribunal (that of Mr. Mark Mullins).

Because electronic searches are not necessarily conclusive (depending on the search terms), the BSB is continuing its searches. At the time of finalising this Paper, we are told that the BSB is also retrieving paper documents from its archives, to the extent that such documents have not been destroyed. So further evidence of further complaints or proceedings might yet be unearthed.

63. Given the disparity between the BSB interim statistics given above and the Flood / Hviid Report, we asked the BSB if it could trace any record of any enquiry for such information from the LSB or Professors Flood or Hviid. We are told that the BSB cannot at present<sup>37</sup> trace any record of any such enquiry. Of course, there may be various reasons for the absence of such a record, including perhaps (at the risk of speculation) the informal nature of the enquiry<sup>38</sup>, the narrowness of the enquiry<sup>39</sup> or deficiencies in the BSB’s records of enquiries made to it. However, we are surprised that one foundation for the conclusions in the Flood / Hviid Report is information allegedly provided by the BSB, in

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<sup>37</sup> We are told that no enquiry was received by or response given by either the Professional Conduct Department or the Communications Department, but enquiries are ongoing.

<sup>38</sup> If the request for such information was written, we suggest that the BSB should be provided with a copy of that written request so that they can check whether the request was properly processed (including what answer was given), and if necessary take steps to improve their procedures for responding accurately to requests for information.

<sup>39</sup> At p.40 of the Flood / Hviid Report, it is said “*We asked the Bar Standards Board how many disciplinary findings against barristers based on Paragraph 602 of the Bar Code of Conduct there are*”. The terms of that enquiry would seem to preclude answers relating to breach of paragraph 601 of the Code.

circumstances where the BSB can find no record of that enquiry having been made and can now provide clear evidence of enforcement of the Cab Rank Rule.

64. In any event, whatever the cause of the BSB's lack of record of the enquiry, the key point is that the correct information now available from the BSB, as set out above, undermines and negates the conclusion in the Flood / Hviid Report that the Cab Rank Rule is not enforced.
65. A yet more fundamental point is that statistics do not, and cannot, tell the whole story. One possible conclusion which could be drawn from the relatively modest (albeit not nil) level of complaints and proceedings is that the Cab Rank Rule is working reasonably well. There is ample anecdotal evidence that barristers do pay regard to it<sup>40</sup>. Certainly we are considerably less sceptical than the authors of the Flood / Hviid Report as to the extent to which the Cab Rank Rule is followed. It is likely that an overwhelming (silent) majority of barristers feel compelled to comply, and do comply, with the Cab Rank Rule out of a sense of professionalism, respect for the status of the Cab Rank Rule as a rule and respect for the rule of law.
66. Implicit in the Flood / Hviid Report is the proposition that the effectiveness or utility of the Cab Rank Rule can properly be measured or assessed by reference to the number of either complaints made to the regulator about breach of the rule or disciplinary proceedings or findings in that regard. We disagree, both as a matter of logic and also given the context of this situation. The existence of the Cab Rank Rule has served to modify barristers' behaviour for many years, and still does so. In our own experience, the "mindset" of a barrister when offered a brief is not to ask the question "*do I fancy taking on that case?*" Instead we start from the presumption that we must take on the case, unless there is a reason falling within the exceptions to the Cab Rank Rule which relieves us of that obligation – our personal preferences simply do not feature in our thinking. Each of us can think of an occasion on which he has accepted instructions as a direct result of the Cab Rank Rule obligation. Whilst that experience is admittedly only anecdotal, the

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<sup>40</sup> To take one example on the internet, Eimear McAllister wrote: "*I have seen a barrister decline instructions from a big fish in a lucrative enquiry because instructions from one of the minnows had just beaten the big fish through the door.*" See <http://www.lawgazette.co.uk/news/taxi-cab-rank-rule> (comment at 22/01/2013, 20:59) (last accessed 22 February 2013).

important point is that statistics as to complaints or disciplinary findings will not capture the extent to which the Cab Rank Rule has in fact affected the culture and behaviour of the Bar for generations and continues to modify behaviour, precisely because of that culture as well as the continued operation of the rule. Remove the rule, and there would be a substantial risk that over time that culture would decline<sup>41</sup>. Yes, of course there may be transgressions of the rule which are not identified nor the subject of a complaint nor found to be proved; it would be naive to suggest otherwise. But it does not follow from the lack of large numbers of complaints or disciplinary findings about the Cab Rank Rule that the rule is of no effect at all. Ultimately, the true measure of the effectiveness of the Cab Rank Rule is whether there are people who find themselves unable to get representation – and there are no such people, as far as anyone can tell.

67. This point can also be demonstrated by postulating the corollary position: if there had been many complaints of breaches of the Cab Rank Rule and many resultant disciplinary proceedings, would the conclusion of the Flood / Hviid Report have been that the Cab Rank Rule ought to be abolished because it clearly was not working? We suspect that in those circumstances that argument might well have been advanced, and perhaps credibly so. This demonstrates, we suggest, that one should be extremely wary of making normative judgments on the basis principally of statistical evidence of the enforcement or lack of enforcement of the existing rules, because that evidence might reflect a variety of underlying factors.

### **(9) Possible consequences if the Cab Rank Rule were to be abolished**

68. We approach this hypothesis on the assumption that the Cab Rank Rule would be abolished entirely for the self-employed Bar (whether as a rule or a principle) and not replaced with any alternative rule or principle. In those circumstances, the restraints on self-employed barristers refusing to accept instructions would become much more limited, for instance to the prohibition on discrimination on the grounds prohibited by the

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<sup>41</sup> This very point was made by the President of the New Zealand Court of Appeal, Anderson P, in *Lai v Chamberlains* [2007] 2 NZLR 7. He said (at [106]):

*“I am troubled by the tendency to reduce ethical standards to commercial concepts as, it seems to me, some aspects of the debate do. In a decade or two it may be thought that if one would be likely to suffer loss or inconvenience through taking a particular brief, one should not have to accept it.”*

Equality Act 2010 and rule 305.1 of the Bar Code of Conduct. We address in turn the potential beneficial consequences and detrimental consequences of such a change.

69. The beneficial consequences:

We have not been able to identify any tangible or significant benefits which would accrue from the abolition of the Cab Rank Rule. This is perhaps the corollary to the point, addressed at paragraphs 24 to 38 above, that we have not been able to identify any harm which is currently being done by the Cab Rank Rule – treating any shortcomings in enforcement or enforceability not as being harm but instead as being an area for potential improvement. Moreover, there is in the Flood / Hviid Report no evidence or arguments (beyond assertions and speculation) that the abolition of the Cab Rank Rule would in fact bring benefits or advantages, or remedy current wrongs or disadvantages. For instance, the continuing existence of the Cab Rank Rule for the self-employed Bar, but not for solicitor advocates, does not seem to be causing any significant problems which need to be addressed.

70. The detrimental consequences:

Many of the negative effects of the abolition of the Cab Rank Rule are the corollary of the advantages of the Cab Rank Rule discussed at section (4) above, so they are summarised below relatively briefly.

- a. *Civil cases*: clients who themselves or whose cases are perceived as repugnant (“odious clients”) would suffer a greater risk of finding it difficult to obtain suitable defence counsel to represent them. This applies not just to high-profile odious clients finding it difficult to obtain suitable counsel to represent them (where the gap will not necessarily be satisfactorily filled by barristers motivated only by a desire for personal publicity), but also particularly to low-profile odious clients who will find it difficult to obtain suitable counsel to represent them (and whose cases would not attract even publicity-seeking barristers).
- b. *Criminal cases*: similar points apply. The fact that much criminal work is not in practice caught by the Cab Rank Rule (because of the funding structures and limitations<sup>42</sup>) might limit the detrimental consequences of abolition of the Cab

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<sup>42</sup> A substantial proportion of criminal work is exempted on the basis that the fees payable under the graduated criminal fee scheme are deemed not to be proper fees.

Rank Rule in the field of criminal law, but this does not affect the basic arguments as to the benefits of the Cab Rank Rule<sup>43</sup>.

- c. *Cases not heard in public* (e.g. family hearings): the same points apply, with the added point that probably the publicity-seeking barrister will not be interested, or will be much less interested, in cases which will not be heard in public.
- d. *Substantial users of advocacy services*: absent the Cab Rank Rule, barristers who frequently work for a substantial client<sup>44</sup> would find it more difficult to justify to that client the fact that they were acting against that client, with the result that the pool of barristers available to members of the public involved in cases against that organisation would be at risk of being reduced.
- e. *Decline in culture*: if the Cab Rank Rule were to be abolished, the culture at the Bar of providing, in the wider interests of justice, an advocacy service to whoever seeks representation would be at risk of declining over time. Specifically, the very fact of abolition of the Cab Rank Rule would send a message that the underlying principle (that anyone should be entitled to be represented by the advocate of their choice) no longer mattered or applied. So there would be a risk that barristers, who might otherwise have been inclined (contrary to human nature) to seek to do the decent thing in representing the unpopular client, would over time become less inclined to do so with the express abolition of the Cab Rank Rule.
- f. *Poorer quality lawyers*: that abolition of the Cab Rank Rule would be likely to lead to the loss of, or at least a reduction in, the ability of barristers to appear for opposite sides in different cases. This would risk making barristers poorer lawyers, who would make poorer arguments, and (for those going to the bench) become poorer judges writing poorer judgments – none of which is desirable, particularly for those in commercial practice trying to sell their services as English lawyers to (amongst others) foreign litigants, who should be encouraged to choose English Law and the English jurisdiction as the jurisdiction in which to litigate. It would also reduce choice for clients, potentially leaving them in the hands of barristers sympathetic to their cause, and who (being perhaps less objective about

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<sup>43</sup> The Cab Rank Rule is not concerned with ensuring that barristers work for nothing (i.e. *pro bono*) or for inadequate fees.

<sup>44</sup> i.e. a client of the type discussed at paragraphs 20 to 23 above.

the case and without experience of having acted for the other side) might not be the best counsel for the job.

- g. *Public perception of the legal profession*: there is perhaps a risk, no higher, that the perception of the legal profession would diminish, if barristers no longer bound by the Cab Rank Rule were to be perceived as taking only those (perhaps higher paid) cases which appealed to them and shunning less desirable cases, contrary to the current ethics and principles of a profession which is still generally held in high regard.

**(10) The regulatory perspective**

71. This Paper has been prepared at the invitation of the regulator of the Bar, the BSB. The BSB might perhaps have a slightly different perspective of the Cab Rank Rule than the Bar Council, which represents the Bar. So this section seeks to address specifically the regulatory perspective and any issues which might arise from the perspective of the regulator.

72. A key conclusion of the Flood / Hviid Report is that the Cab Rank Rule should not survive as a rule, although it might have a use as a mere principle. At p.39 the authors say this:

*“We can see no justification for the continuation of the cab rank rule as a rule in the modern, globalized legal services market. By all means the Bar can espouse it as a laudable principle, but it should not pretend that the rule is significant or efficacious.”*

We have addressed earlier in this Paper why we think that there are compelling arguments for characterising the Cab Rank Rule as both significant and efficacious, contrary to Professors Flood and Hviid’s perception. But leaving that point aside, we now focus from a regulatory perspective on:

- whether it is currently a rule or a principle;
- which it should be; and
- does it matter?

73. Whether it is currently a rule or a principle?

The current position is that the Cab Rank “Rule” is treated as a rule, not merely a principle. The Code describes it as a rule<sup>45</sup>. So do the judges<sup>46</sup>. Furthermore, this terminology is clearly apposite for a Code which, in its current form, pre-dated the shift towards principles-based, outcomes-focused regulation.

74. Whether it should be a rule or merely a principle?

Professors Flood and Hviid seek to draw a distinction between a “*laudable principle*” on the one hand (which they are content to see the Bar continue to espouse) and a “*rule*” on the other hand (which they believe is not significant or efficacious). This distinction implies that they view a “rule” as in some way having greater standing and being more enforceable than a “principle”. We disagree, for the reasons set out in the next paragraph. But even on the assumption that a “principle” is indeed in some way weaker than a “rule”, we see no reason or justification for the Cab Rank Rule to be downgraded in status from being a rule to being a principle. For the reasons set out in this Paper, we consider that the Cab Rank Rule serves an important purpose. It is not, and should not be, merely a toothless aspiration. If the enforcement of the rule lacks teeth, then the focus should be on improving its enforcement, not abolishing it<sup>47</sup>. So in our view the Cab Rank Rule warrants preservation as a rule, not merely some lesser principle.

75. Does it matter whether it is a rule or a principle?

Whether anything turns on whether the Cab Rank “Rule” is characterised as a rule or a principle matters is a moot point. The answer might depend to some extent, we think, on whether the relevant Code comprises principles, rules or a combination of the two.

- a. The current Code consists of rules. In that context, it seems to us that there is no justification for downgrading the Cab Rank Rule to a mere principle.

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<sup>45</sup> See para 602 of the Code; the heading above para 601 of the Code; and the opening words under Part VI of the Code.

<sup>46</sup> See the quotations from *Arthur JS Hall & Co. v. Simons* [2002] 1 AC 615, set out at section (6) above and Appendix C (Lord Hobhouse, dissenting, although not using the word “rule” referred to it as a duty, going on to describe it as an important principle.)

<sup>47</sup> See the comments to this effect by High Court of Australia judge Brennan J in *Giannarelli v Wraith* (1988) 165 CLR 543 [set out in Appendix C below].

- b. On the other hand, if a future Code were to consist solely of principles<sup>48</sup> and if those principles were to be effective and enforceable, then it might not matter in that context if the Cab Rank Rule were to be described and characterised as a principle. In substance it would remain enforceable (as at present), even though the nomenclature might have changed.
- c. We draw attention to the fact that there is a preference in modern regulation for overarching and important matters which govern a profession's conduct to be set out as "Principles", with Rules then being set out to define what is or is not permissible conduct in certain circumstances. The Legal Services Act 2007 is itself drafted with this approach in mind. The SRA has, under Section 31 of the Solicitors Act 1974, adopted "Principles" which all those they regulate must comply with at all times and "Outcomes" relating to various particular areas which are mandatory. The FSA has a similar approach to its regulatory functions. In these regulatory models, breach of a Principle is likely to comprise serious misconduct, where breach of a Rule or Outcome may not. We therefore find the Flood & Hviid perception that a Principle is something less important than a Rule somewhat difficult to follow.

However, in practice, this debate is probably academic and semantic. If the principle behind the Cab Rank Rule is accepted, then the issue should instead be how best to enforce that principle. Whether it is termed a "rule" or a "principle" is a matter of mere nomenclature and of secondary importance. In this context, it is noteworthy that one of the regulatory objectives in the Legal Services Act 2007 is "*promoting and maintaining adherence to the professional principles*"<sup>49</sup>. Given that the "principle" or "rule" should be enforceable (whatever its nomenclature or nature), we consider that any debate should more usefully focus instead on how much prescriptive detail should govern the rule / principle and any exceptions.

## 76. Other regulatory issues

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<sup>48</sup> However even where the regulatory structure has shifted further towards principles-based regulation and outcomes-focused results, there will probably still be some rules; see, for instance, the continuing existence of the Solicitors Accounts Rules.

<sup>49</sup> Section 1(1) of the Legal Services Act 2007 provides as follows: "*In this Act a reference to "the regulatory objectives" is a reference to the objectives of —... (h) promoting and maintaining adherence to the professional principles.*"



Certain other regulatory issues might arise, which we have not addressed in this Paper. They might include the following:

- a. *Drafting*: Should the Cab Rank Rule be redrafted, for instance to make it simpler or more easily able to be enforced? As to this, the drafting would be for others to undertake. Any such work would need to be informed by a view (following wider debate) as to what would be the objective(s) of the redrafting, and whether it should reflect a rule or a principle.
- b. *The role of the LSB*: It is unclear to us whether or not it was appropriate for the LSB or within their powers to commission a report on the Cab Rank Rule, or whether the LSB's role is instead confined (in this context) to reviewing changes to the Code proposed by the BSB. Nor do we comment on the manner in which the report was commissioned or paid for. As for these matters, others can form a view, if such matters are considered relevant. But we are concerned by the very poor quality of the Flood / Hviid Report as a piece of academic research.

(11)      **The Flood / Hviid Report: a critical overview**

77. We consider that the Flood / Hviid Report suffers from a number of fundamental defects, including basic factual errors, loose thinking and poor analysis, which we set out in detail in Appendix A to this Paper. In this section, we summarise in general terms what we see as just some of the key failings of the Flood / Hviid Report, divided into five main categories.

78. Defective approach:

The approach adopted by the Flood / Hviid Report can be criticised on various levels. To take just two examples:

- a. The methodology adopted the Flood / Hviid Report is limited and provides far too thin a basis on which to argue for the abolition of the Cab Rank Rule. It is based on two main sources of evidence:
  - i. a literature review of admittedly scant ambit; and

- ii. interviews with 15 anonymous people (such as “one clerk”, “an unnamed QC”)<sup>50</sup>– but there is no clarity as to the makeup of interviewees, whether they are representative, or how they were selected.<sup>51</sup>

Otherwise the Flood / Hviid Report largely relies on assertion and speculation<sup>52</sup>. None of this provides an adequate basis or approach for the strong empirical claims in the report, such as that the Cab Rank Rule does nothing, is never enforced and is regularly breached<sup>53</sup>.

- b. The Flood / Hviid Report asks the wrong questions, and sets undue store by the (sometime inaccurate answers) to them. For instance, assessing the value of the Cab Rank Rule value by reference to whether there have been many disciplinary findings in respect of it (i.e. by asking whether the rule has repeatedly broken down) is a flawed approach. Whether there have been many disciplinary findings relating to the Cab Rank Rule tells us nothing useful about whether the Cab Rank Rule is working well: a nil return on disciplinary findings (which is what the Flood / Hviid Report wrongly records) is equally consistent with the Cab Rank Rule working well.

#### 79. Flawed reasoning:

The Flood / Hviid Report frequently leaps to conclusions which do not follow from the premises relied on, or suggests things that are impossible or do not make sense. By way of example:

- a. It argues that the Cab Rank Rule is not a true rule because it is subject to so many exceptions<sup>54</sup> (although it admits that rules can have exceptions); and because there is no evidence of disciplinary findings in relation to it (although the difficulty of detecting or proving breach does not lead to the conclusion that it is not a rule)<sup>55</sup>.
- b. It argues that, because the Cab Rank Rule is subject to too many exceptions which are too widely drawn, the exceptions make it unenforceable and therefore the Cab

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<sup>50</sup> See, for example, p.11 of the Flood / Hviid report (the “unnamed QC”). See more generally the methodological note at p.40 of the Flood /Hviid report.

<sup>51</sup> We have come across one instance of Flood soliciting discussion from an angry critic of the rule in the comments section of the Law Society Gazette website: <http://www.lawgazette.co.uk/news/bar-victory-over-cab-rank-rule> (last accessed 23 February 2013).

<sup>52</sup> See, for instance, pp.20-21 for the discussion of the Cab Rank Rule and bargaining power.

<sup>53</sup> See, for instance, pages 2, 22, 32, 38 of the Flood / Hviid report.

<sup>54</sup> Page 22 of the Flood / Hviid Report.

<sup>55</sup> Pages 2, 22, and 38 of the Flood / Hviid Report.

Rank Rule should be abolished<sup>56</sup> – whereas the logical approach, were there any problem, would be to focus on redrawing the exceptions.

- c. It argues that that the Cab Rank Rule is concerned with fee negotiation<sup>57</sup>, bargaining power<sup>58</sup>, and risk analysis<sup>59</sup>, but it does so by relying on anecdotal evidence relating to cases where the Cab Rank Rule does not apply<sup>60</sup>.
- d. It relies (in support of abolition of the Cab Rank Rule) on problems which have nothing to do with the Cab Rank Rule, and which abolition of the Cab Rank Rule would not solve. For example, it highlights the point that it is difficult for some legally aided persons to find representation for financial reasons<sup>61</sup> – but the Cab Rank Rule does not require, and has never set out to require, that a barrister work other than for a proper fee, and the abolition of the Cab Rank Rule would do nothing whatsoever to fix this problem. The problem of inadequate legal aid provision is ultimately a matter which goes to whether the state is complying with its duties to provide access to justice, fair trials, and equality of arms.
- e. It suggests that problems of substantial clients being able to demand that barristers do not act against them (which would exist if the Cab Rank Rule were abolished) could be solved by “*conflicts rules*”<sup>62</sup>. But that suggestion makes no sense at all: conflict of interest rules can only ever preclude representation – they can neither mandate nor permit it.
- f. It proposes the introduction of a rule of the New York Bar, but this (on the authors’ own case) would be no more enforceable than is the Cab Rank Rule<sup>63</sup>.

80. The conclusions rest on weak or non-existent premises:

The Flood / Hviid Report repeatedly draws strongly-phrased conclusions from premises which are either wrong, non-existent, or wholly speculative. By way of example:

- a. It argues that the Cab Rank Rule is not enforced; but this is incorrect<sup>64</sup>.

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<sup>56</sup> Pages 2, 22, 38 of the Flood / Hviid Report.

<sup>57</sup> Pages 20-22, 33-37, 39 of the Flood / Hviid Report.

<sup>58</sup> Pages 20-22 of the Flood / Hviid Report.

<sup>59</sup> Pages 33-37, 39 of the Flood / Hviid Report.

<sup>60</sup> Pages 33-36 and 39 of the Flood / Hviid Report.

<sup>61</sup> See, for instance, pages 27-28, 30 and 33-36 of the Flood / Hviid Report.

<sup>62</sup> Pages 28 and 33 of the Flood / Hviid Report.

<sup>63</sup> See pages 58-59 of Appendix A.

<sup>64</sup> See paragraphs 58-62 above.

- b. It argues that the rule prevents “*clear market signals as to specialisation*”; but again this is incorrect<sup>65</sup>.
- c. It argues that there is no evidence that the Cab Rank Rule helps to secure representation; but again this is incorrect<sup>66</sup>.
- d. It relies on potential distortion of the market, by reference to bargaining power, despite earlier acknowledging that the effect of the Cab Rank Rule on bargaining power is a matter of pure speculation<sup>67</sup>.

81. The Report misquotes cited material and omits relevant material:

The Flood / Hviid Report repeatedly relies inaccurately on the materials it cites, giving a misleading impression as to their contents or omitting relevant material so as to suggest that a (non-existent) consensus exists. By way of example:

- a. It asserts that all of the Law Lords in *Arthur JS Hall v Simons* agreed with Lord Steyn’s view that the Cab Rank Rule was not of great significance in day to day practice – but in fact, only two Law Lords (out of the seven sitting) said any such thing<sup>68</sup>.
- b. It asserts that Mr. Michael Beloff QC, in A View from the Bar, “*recognised the truth*” of Lord Steyn’s comments. But he did no such thing – the quote from Lord Steyn’s speech is prefaced by the words “*Others have suggested*”; and Mr. Beloff later goes on to say that the Cab Rank Rule is precious and should be protected<sup>69</sup>.
- c. It relies on Sharon Dolovich’s work on ethical lawyers, but omits to mention that (by Dolovich’s own admission<sup>70</sup>) her position is very much a minority one. Likewise, in covering the US academic literature, the Flood / Hviid Report conspicuously fails to note that a substantial number of US commentators argue for stringent limits on lawyer autonomy and/or in favour of the orthodox conception of the lawyer as non-partisan. This over-simplistic presentation of the existing literature fails to acknowledge the serious debate in the US academic

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<sup>65</sup> See pages 66-67 of Appendix A.

<sup>66</sup> See footnote 19 above.

<sup>67</sup> Pages 39, cf. pp.20-21, of the Flood / Hviid Report.

<sup>68</sup> Lords Steyn and Hobhouse.

<sup>69</sup> See page 60 of Appendix A.

<sup>70</sup> Dolovich, 70 Fordham L Rev 1629 at 1629 – 1630,

literature about client selection<sup>71</sup> and the merits of a rule similar to the Cab Rank Rule<sup>72</sup>.

- d. It asserts that the Cab Rank Rule inhibits advertising that a chambers specialises in a particular area of work and argues that its abolition would make market signals clearer<sup>73</sup>. This is wrong: the Cab Rank Rule has no effect at all on such advertisement so long as they are not framed in absolute terms (i.e. “members of chambers carry out exclusively defence work”)<sup>74</sup>.

## 82. The Report is riddled with factual errors

Surprisingly, the Flood / Hviid Report is full of basic errors, even relating to the Code of Conduct itself. To give just a few examples:

- a. It states that India has no Cab Rank Rule<sup>75</sup> – but it does<sup>76</sup>.
- b. It states that the self-employed Bar grew more “slowly” than the rest of the Bar<sup>77</sup>, when the statistics on which it relies show that both grew at about the same rate<sup>78</sup>.
- c. It states that “professional embarrassment” is a term of art, implying that it is not defined<sup>79</sup> – but in fact it is defined, in paragraph 603 of the Code of Conduct.
- d. It refers to a merger between 39 Essex Street and 4-5 Gray’s Inn Square<sup>80</sup>. This is factually incorrect. Various members of 4-5 Gray’s Inn Square left to join various chambers<sup>81</sup>, 24 members joined 39 Essex Street, and 4-5 Gray’s Inn Square remains in existence as a set of Chambers<sup>82</sup>.

For full details, see Appendix A. These errors reinforce the serious doubts we have as to the reliability and quality of the Flood / Hviid Report.

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<sup>71</sup> See page 56 of Appendix A.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Indeed, many barristers can and do put who they acted for in a previous case on their chambers profile; and clients have access to a vast amount of information concerning specialisation via chambers’ websites, online legal directories and solicitors.

<sup>75</sup> Flood / Hviid Report at page 31, fn.66.

<sup>76</sup> See Appendix B to this Paper.

<sup>77</sup> See page 13 of the Flood / Hviid Report.

<sup>78</sup> See page 47 of Appendix A.

<sup>79</sup> See page 7 of the Flood / Hviid Report.

<sup>80</sup> See page 11, fn.26 of the Flood / Hviid Report.

<sup>81</sup> Including Matrix Chambers, 11 Kings Bench Walk, Landmark Chambers.

<sup>82</sup> See page 45 of Appendix A.

**(12) Conclusions**

83. For the reasons set out above, we firmly conclude that the Cab Rank Rule is still relevant and still effective in achieving its goal of helping to ensure that a client can secure representation by counsel of their choice. There is no real or substantial downside to the rule.

84. The challenge mounted to the report by the Flood / Hviid Report fails: its conclusions are unjustified and incorrect, and it suffers from a number of fundamental flaws. Even when read in isolation it provides a poor basis for the abolition of the rule – but when read in context and subjected to close analysis, it provides no basis whatsoever for the abolition of the rule.

85. We conclude, therefore, that the Cab Rank Rule ought to be retained.

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28<sup>th</sup> February 2012

## APPENDIX A – Detailed response to the Flood / Hviid Report

This Appendix is a comprehensive paragraph by paragraph critique of the Flood / Hviid Report, in tabular form.

Reference	Point	Response
Page 5, second paragraph	<i>“If [the Cab Rank Rule] were to be abolished, how would that affect advocates’ immunity?”.</i>	Advocates’ immunity was abolished in <i>Arthur JS Hall v Simons</i> so the question does not make sense.
Page 7, third paragraph	Flood & Hviid say that all of the Law Lords who heard <i>Arthur JS Hall v Simmons</i> agreed with Lord Steyn, concluding that the Cab Rank Rule (“the CRR”) is of little significance in daily practice.	Wrong and misleading. Only two Law Lords of the seven sitting made any comment to the effect that the CRR was of limited significance in daily practice. Lord Hoffmann mentioned the CRR but made no such comment, while Lord Hobhouse only went so far as to acknowledge it might sometimes be breached.
Page 7, final paragraph	Flood & Hviid state that professional embarrassment is a key concept but is not explicitly defined. They state that it is a term of art.	‘Term of art’ implies jargon – which is incorrect. Professional embarrassment is defined in the only context it is relevant, namely where a barrister <b>must</b> refuse instructions. Professional embarrassment is expressly defined in the sub-paragraphs of paragraph 603 of the Code.
Page 8, second paragraph	Flood & Hviid state that some of the grounds on which a barrister must refuse instructions, set out in paragraph 603 of the Code, seem <i>“to be the result of mismanagement in chambers, e.g. competence, too little time, blacklisted solicitors, and direct access clients”</i>	Paragraph 603(g) – which relates to direct access clients - requires <u>the barrister</u> be satisfied it is in the interests of the client or of justice for a solicitor or other professional client to be instructed. Therefore it cannot be mismanagement to put the instructions to the barrister as they cannot exercise that judgment until they have seen them.  Flood & Hviid fail to take account of the point that circumstances can

Reference	Point	Response
		<p>change after instructions have been accepted: for example, new issues can arise which the advocate is not sufficiently experienced to deal with.</p> <p>Finally, withdrawal from cases is nothing to do with the CRR.</p>
Page 8, third paragraph	<p>Flood &amp; Hviid:</p> <ul style="list-style-type: none"> <li>• suggest that paragraphs 601 and 604 of the Code are inconsistent: <i>“To what extent a barrister is subject to 601 or how the two are balanced is not spelled out in 604”</i>; and</li> <li>• state that <i>“How fees are negotiated under the Bar’s “contractual terms” means some aspects of public funding can give rise to negative obligations (i.e. the deeming and non-deeming of proper professional fees)”</i></li> </ul>	<ul style="list-style-type: none"> <li>• The relationship between paragraphs 601 and 604 is clear. The relevant part of paragraph 601 – sub-paragraph (c) - relates to the source of fees, whereas the relevant parts of paragraph 604 relate to the level of fees and/or the terms on which fees are paid and services are provided.</li> <li>• The references to contractual terms in paragraph 604(h)(i) - (ii) have nothing to do with the deeming or non-deeming of proper professional fees, or indeed the level of fees at all. <ul style="list-style-type: none"> <li>○ Deeming and undeeming of proper professional fees happens independently of any contractual terms and is carried out by the Bar Council.</li> <li>○ The contractual terms referred to in paragraph 604(h) have nothing to say about the level of fees, whether in publicly funded cases or at all. For example, the “Fees” section of the Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons 2012 provides (by way of summary only) for a fee to be agreed, and that in the absence of a fee being agreed a reasonable fee will be payable.</li> <li>○ Equally, fees under the SCT’s or other standard terms are not “deemed” to be proper fees. Barristers just are not obliged to work on other terms.</li> </ul> </li> </ul>



Reference	Point	Response
Page 8 final paragraph, page 9	<p>Flood &amp; Hviid assert that Paragraph 605 “enables a Queen’s Counsel to determine whether he should appear alone or with a junior”. They say that this exception to the CRR is:</p> <p><i>“the most peculiar in that it harkens back to an earlier time when Queen’s Counsel typically appeared with junior barristers. A considerable amount of litigation – for example, in the Commercial Court – is now conducted with a single barrister, but the cab rank rule enables QCs to insist on double manning cases if they so insist”</i></p>	<p>Wrong: the implication that QCs can insist for their own reasons (e.g. personal convenience) on the instruction of a junior, and the pejorative implication in the phrase “double-manning”, are both untrue. The circumstances in which a QC is not obliged to accept instructions as a result of paragraph 605 are carefully circumscribed. The instructions must either be:</p> <ul style="list-style-type: none"> <li>• to settle a document alone any document of a kind generally settled only by or in conjunction with a junior; or</li> <li>• to act without a junior if the QC considers that the interests of the lay client require that a junior should also be instructed</li> </ul> <p>Taking 50 hearings in the Commercial Court, one or more QCs appeared in 37 of those, and in 27 of those hearings at least one party fielded a QC leading one or more juniors.<sup>83</sup> A number of cases featured a senior QC leading a more junior QC and one or more juniors, or a QC leading multiple juniors.<sup>84</sup></p>
Page 11 first paragraph	<p>Flood &amp; Hviid assert that organizational professionalism is becoming more relevant for the Bar, and that there is a shift away from professionalism as an occupational value towards organizational professionalism.</p>	<p>This point rests on an unsupported assumption that organisational professionalism necessarily replaces professionalism as an occupational value, instead of adding to it.</p>
Page 11	<p>Flood &amp; Hviid cite with approval the (12 year old) LECG report</p>	<p>There is no strong support for the proposition that barristers do not</p>

<sup>83</sup> To be precise, the last 50 that appeared in Westlaw as at 11am 17 February 2012. This is a particularly generous sample given that the sample is not restricted to trials, or very large interim applications, where one might expect to more frequently see a QC leading one or more juniors.

<sup>84</sup> That is not to say that sole QCs are atypical – they do appear in a reasonable amount of cases, albeit still in fewer than 50% of cases (17 out of 37). In 7 cases one party only fielded a sole QC against a QC leading one or more juniors, in 5 cases a sole QC represented each party, in 4 cases one party fielded a sole QC against a junior, and in 1 case a QC appeared against no-one.

Reference	Point	Response
second paragraph	for the OFT, and LECG’s statement that “ <i>even under existing rules it is unclear to what extent barristers compete as individuals</i> ”.	compete as individuals. Nor could there be. In any case where a client is presented with a shortlist of available members of chambers, those members are competing between themselves. <sup>85</sup> If one member obtains the client’s instructions, the other members cannot do so and will not obtain the instructions (and associated fees) from that client. The same is true in any situation where a client seeks quotes from two named barristers for a case.
Page 11 second paragraph	Flood & Hviid point to several large sets of chambers and state that “ <i>they are equivalent in size to law firms and perhaps in structure</i> , referring to 3 Paper Buildings, Brick Court, and No 5 Chambers	<p>Wrong:</p> <ul style="list-style-type: none"> <li>• Insofar as Flood &amp; Hviid assert that the named chambers are the same size as law firms, that is only correct on the basis of comparing apples with pears (i.e. the largest chambers with small / medium-sized firms of solicitors). The chambers cited are not, and could not conceivably become, the size of large law firms. By way of example, as at April 2009 Linklaters LLP April 2009, it employed approximately 2260 legal advisers and 2830 other staff.</li> <li>• Flood &amp; Hviid’s extreme choice of examples presents an extremely misleading impression of the ordinary size of chambers and structure of the bar in general. No.5 is also the second largest chambers in the country. There are 12,247 barristers practising in 768 chambers = average size 15.946 (i.e. 16). The choice of chambers is extremely misleading. All 3 are extremely large – their total members (463) amount to 3.7% of barristers practising in chambers but they represent 0.39% of the total number of chambers. Even assuming that</li> </ul>

<sup>85</sup> A very common occurrence at the more junior end of the bar where instructing solicitors may simply seek a barrister of around X years call with some experience in Y type of matter.

Reference	Point	Response
		<p>the average size of chambers is increasing, the phenomenon is nowhere near as extreme as Flood &amp; Hviid make out and the claim that chambers in general are starting to resemble law firms is wrong.</p> <ul style="list-style-type: none"> <li>• More importantly, insofar as Flood &amp; Hviid assert that large sets of chambers are similar to law firms in structure, they are speculating. They admit this with the use of the phrase “perhaps in structure” (emphasis added), and their omission of any supporting evidence. In fact, there are many differences, including not least that a barrister’s fees are paid to him, not into a collective pot.</li> </ul>
<p>Paragraph 11, third paragraph</p>	<p>(citing Michael Beloff QC, <i>A View from the Bar</i>) Chambers have sought to specialize and have, in order to do so, released barristers who no longer fit chambers profile.</p> <p>(citing a remark by an unnamed QC and Michael Beloff QC, <i>A View from the Bar</i>) Chambers are not fully corporate but “<i>have a quasi-corporate entity</i>”, as they are like law firms with QCs as senior partners and juniors as junior partners and associates.</p>	<p>Many chambers are becoming more specialised. But otherwise, Flood &amp; Hviid are wrong.</p> <ul style="list-style-type: none"> <li>• We have been unable to find any example of chambers “releasing” a member for not fitting chambers’ profile. Flood &amp; Hviid cite <i>A View from the Bar</i>. The relevant part of Mr. Michael Beloff QC’s speech (page 5) neither states that this practice exists nor gives any example of it ever happening. The citation is therefore misleading.</li> <li>• Although different chambers have different constitutional rules, many chambers do not even have the power to “release” a member, if by that it is meant that the member is expelled or forced to leave chambers against their will.</li> <li>• A single remark by a single unnamed QC does not constitute a</li> </ul>

Reference	Point	Response
		<p>reliable sample size for any purpose. It would be wrong to attempt to draw any general conclusions from the QC's (wrong) remark. In any event the unnamed QC does not explain in what ways chambers supposedly resemble law firms (so it is unclear whether, for example, the QC agrees that members of chambers do not compete at an individual level).</p> <ul style="list-style-type: none"> <li>• The second part of Flood &amp; Hviid's evidence in support of the proposition that chambers are "<i>quasi-corporate</i>" consists of Michael Beloff QC, in <i>A View from the Bar</i>, quoting a lecture by Lightman J. <ul style="list-style-type: none"> <li>○ But the relevant pages of Mr. Beloff's lecture (pp.20-21) correctly notes that Lightman J criticised the change which he thought was occurring.</li> <li>○ Further, Mr. Beloff was unwilling to agree that the statement has more than "<i>a wrinkle</i>" of truth.</li> <li>○ Additionally, Lightman J gave the lecture containing the quote which Flood &amp; Hviid rely on a decade ago, and did so having been a judge (and therefore out of chambers) for almost a decade.</li> <li>○ Lightman J's bare assertion, made a decade ago and after almost a decade out of chambers, does not substantiate an empirical claim about how chambers operate in practice in 2013.</li> </ul> </li> </ul>
Page 11, footnote 26	Flood & Hviid refer (in footnote 23) to 39 Essex Street and 4-5 Grey's Inn Square having " <i>effectively merged</i> "	There was no such merger. On 18 December 2012, <u>prior to the publication of the Report</u> , the remaining members of 4-5 Gray's Inn

Reference	Point	Response
		Square announced that it would continue to operate (rather than being wholly absorbed into 39 Essex Street). <sup>86</sup>
Page 12, footnote 24	(in support of their argument that Chambers are quasi-corporate, as a footnote to a quote of Lightman J suggesting many chambers are partnerships in all but name) Flood & Hviid refer to an arbitral tribunal’s ruling on whether a QC from the same set as a tribunal member could act in an arbitration. They note that the tribunal accepted that two members of the same chambers could be seen <i>de facto</i> as having a collective connotation.	<p>Flood &amp; Hviid make important omissions and the point does not support their argument:</p> <ul style="list-style-type: none"> <li>• They fail to mention that the tribunal acknowledged there was no actual impropriety, and that the objection was based on perception. Given that, the decision – based entirely on <i>perception</i> – cannot possibly support the proposition that barristers’ chambers are <i>in fact</i> quasi-corporate entities.</li> <li>• They fail to mention that the tribunal also rejected the proposition that there was any hard and fast rule that barristers from the same chambers could not be counsel and arbitrator in the same case. Any exclusion of counsel would turn on the facts of the specific case. This is inconsistent with any suggestion that simply by being members of the same chambers barristers necessarily are, or are even perceived to be, part of a corporate or “<i>quasi-corporate</i>” entity.</li> <li>• Further, an arbitration is unlikely to be a very good example. Many arbitrations involve foreign parties who are unfamiliar with, and frequently struggle to come to grips with, the chambers model, and who may protest greatly at what it perceived (wrongly) as a disadvantage. The mere fact that a single arbitral tribunal accepted that this perception was legitimate proves nothing,</li> </ul>

<sup>86</sup> See <http://www.legalweek.com/legal-week/news/2232784/45-grays-inn-square-remains-in-business-despite-defections>.

Reference	Point	Response
Page 12, final paragraph	Flood & Hviid refer to instances “ <i>where the profession extends its work jurisdiction by pushing boundaries, e.g. the dramatic rise of judicial review, as well as economic regulation and general competition law</i> ”	This is misleading – barristers do not manufacture work for themselves. Furthermore, much of the increase in litigation in those areas has arisen as a result of changes made by the government and/or Parliament (e.g. the enactment of the Human Rights Act 1998, the Competition Act 1998) and demand from the market. The Bar cannot “extend its work jurisdiction” unless the government, Parliament, judges and the market allow it to do so.
Page 13, footnote 29	Flood & Hviid state that in 2006 there were 14,890 barristers in practice, rising to 15,387 in 2010. They also say that “ <i>However, the numbers of all self-employed barristers rose slowly</i> ” from 12,034 in 2006 to 12,420 in 2010 and “ <i>there has been a shift from self-employed status into either in-house counsel, into law firms or exit</i> ”	Wrong: this point is unsupported, indeed belied, by the statistics quoted by Flood & Hviid. <ul style="list-style-type: none"> <li>• The number of all self-employed barristers did not rise “slowly”, but in fact at the same rate as the rest of the bar. 14,890 to 15,837 is a 3.3% rise, and 12,034 to 12,420 is a 3.2% rise. On any view, the 0.1% difference is statistically insignificant</li> </ul> So the statistics do not bear out the shift from self-employed status they refer to: there was no such shift.
Page 14, second paragraph	Flood & Hviid “ <i>speculate</i> ” that there is little academic law and economics literature on the CRR because it has little impact and is of little significance	It is equally valid to speculate in the other direction, and speculate that there is a lack of economic literature on it because there is no particularly interesting debate to be had as the orthodox view, that the CRR is valuable and effective, is correct. <sup>87</sup>

<sup>87</sup> In addition, as set out more fully elsewhere in this appendix, Flood & Hviid’s claim that the CRR is not effective is wrong.

Reference	Point	Response
Page 14 third paragraph	Flood & Hviid state that the title of QC “denotes specialization”	Wrong: the title of QC denotes excellence <sup>88</sup> , not specialisation – an egregious error.
Page 14 final paragraph, page 15	Flood & Hviid refer to LECG’s 2001 report for the OFT and its conclusions that (i) competition amongst barristers happens at chambers level rather than at an individual level and (ii) that the CRR is a barrier to entry as it prevents the formation of ABS.	<p>This is wrong on both counts:</p> <ul style="list-style-type: none"> <li>• Regarding competition: as set out earlier in this appendix, that claim is demonstrably wrong. Moreover, the best evidence that LECG could marshal in support of its claim was an opaque reference to “[its] observations”</li> <li>• The CRR does not prevent the formation of ABSs. The current draft for the new principles-based BSB Handbook makes provision for entity regulation and for the CRR to apply in an appropriate form to authorised persons within BSB regulated entities (see rules 31.2 and 31.3 in the current draft Handbook).</li> </ul>
Page 15 first full paragraph	Flood & Hviid reiterate that QCs are exempt from the CRR and cite LECG’s conclusion that the QC system was not a reliable kite mark and was anti-competitive.	<p>Wrong, for various reasons:</p> <ul style="list-style-type: none"> <li>• As set out above QCs are not exempt from the CRR.</li> <li>• The entire section of LECG’s report relating to the QC system is obsolete. It relies on criticisms of the previous system for QC appointments and assumptions about QCs that are no longer true.</li> <li>• In 2004 the selection process for QCs changed, so that QC recommendations were made by a wholly independent panel.</li> </ul>

<sup>88</sup> See [http://www.qcappointments.org/?page\\_id=36](http://www.qcappointments.org/?page_id=36). See also the guidance for applications on the QC Appointments website.

Reference	Point	Response
Page 15 fourth paragraph	<p><i>“as regards the merit of [the CRR] the issue is whether the defendant or the public might struggle to find representation. Broadly speaking this market failure could arise for two reasons, either the fee is viewed as inadequate or the case is so unsavoury that no amount of compensation would bring forth a champion. The latter type one might expect to be high profile with considerable media attention where the defendant stands accused of doing something truly horrific”</i></p>	<p>This is inaccurate and the analysis is lacking.</p> <ul style="list-style-type: none"> <li>• The CRR also protects the client’s range of choice of counsel: it does not simply help the client to find <i>someone</i>, but to find counsel they want.</li> <li>• Flood &amp; Hviid fail to account for the mundane yet undesirable client, or instances where proceedings will be heard in private.<sup>89</sup></li> </ul>
Paragraph 15 final paragraph	<p>Flood &amp; Hviid query whether “free riding” (i.e. some barristers refusing to take unpopular clients because others will do so), which would be avoided by the CRR, would be disincentivised absent the CRR by reputational damage to those barristers who free ride.</p>	<p>The point is a wholly speculative query. Flood &amp; Hviid acknowledge this, prefacing the final sentence of the paragraph with “<i>One might wonder, to what extent...</i>”.</p> <p>In making the point Flood &amp; Hviid fail to address whether reputational damage would constitute a strong enough disincentive not to free-ride (even assuming that all barristers had perfect information as to who was free-riding). They also miss the point that without the CRR a long term cultural change within the bar would likely take place, legitimising such free-riding.</p>
Page 17 second	<p><i>“it is possible that [the CRR], by making barristers take cases with potentially low remuneration, could leave the barristers with poor</i></p>	<p>Wrong, on various counts:</p>

<sup>89</sup> See <http://pinktape.co.uk/legal-news/a-trickle-not-a-flood/>.



Reference	Point	Response
paragraph	<p><i>financial incentives to perform to an expected standard. If that were the case, and little else in the literature would support such a claim, the benefits to clients of getting some representation might be counter-balanced through an adverse effect on the quality of that representation”</i></p>	<ul style="list-style-type: none"> <li>• If the barrister does not do his best then he will be in breach of his professional obligations and may risk disciplinary action based on (e.g.) paragraph 304 of the Code of Conduct. So Flood &amp; Hviid totally fail to take account of non-financial incentives. In any event, the barrister may also be financially liable for negligence.</li> <li>• In any event, if a barrister is obliged to accept instructions under the CRR, then the fee offered must have been a proper one – and therefore a certain level of financial incentive to perform well is in play.</li> <li>• The points above are just two obvious reasons why there is nothing in the literature to suggest that the CRR has this effect.<sup>90</sup></li> </ul>
Final paragraph page 17, first paragraph page 18	<p>Flood &amp; Hviid argue that:</p> <ul style="list-style-type: none"> <li>• empirically, repeat users of barristers’ services achieve better results;</li> <li>• experienced barristers achieve better results;</li> <li>• the CRR could, at best, and if it applied so each client had to take the next available barrister, deal with the second of these points by giving everyone access to the same pool of talent, but cannot deal with the first point;</li> <li>• therefore the CRR cannot ensure a truly level playing field.</li> </ul>	<p>This is a “straw man argument”. No-one has ever argued that this is the purpose or the effect of the rule. That the CRR does not achieve an objective which it does not have, and which no one has argued it has, does not advance the debate as to whether it should be retained.</p>

<sup>90</sup> Equally, poor performance may dissuade potential clients from hiring the barrister in the long run. But - in fairness to Flood & Hviid - this point is alluded to in the opening paragraph of page 16 of the Report.

Reference	Point	Response
<p>Page 18, third paragraph</p>	<p><i>“nothing in the existing law and economics literature provides strong arguments which supports [sic] either the removal or retention of [the CRR]...”</i></p> <p>Flood &amp; Hviid turn to LECG’s (outdated) report for the OFT to assert that the CRR is an impediment to change in barristers’ business structures, and would make partnerships impossible because barristers would have to consider the impact on partners before accepting a case.</p> <p>They then argue that the report serves as a reminder of the <i>“intimate link between the sole trader rule and [the CRR]”</i> and that <i>“The report also offers a reason for the removal of [the CRR] if the adoption of business structures that the current sole trader arrangements”</i>.</p>	<ul style="list-style-type: none"> <li>• The first point is a stark admission that the academic law and economics literature provides no reason to abolish the CRR.</li> <li>• As set out above, LECG was wrong to suggest that the CRR acted as an impediment to changes to barristers’ business structures. Moreover, on any view LECG were wrong to suggest that the CRR and partnerships were incompatible. If the CRR applied to barristers in partnerships then the other partners, by entering into partnership with a barrister subject to the CRR, could arguably be taken to have impliedly consented to the barrister accepting cases under the CRR when not in the partnership’s best interests to do so.</li> <li>• As set out above, the idea that there is an intimate (or necessary) link between the sole trader rule and the CRR is a myth. It is not clear what <i>“The report also offers a reason for the removal of [the CRR] if the adoption of business structures that the current sole trader arrangements”</i> means. The sentence is not intelligible as a matter of English. If it is an endorsement of the LECG report, then for the reasons set out above it is misplaced.</li> </ul>
<p>Page 18 -20</p>	<p>These paragraphs set out an argument that: (a) legal services are a credence good; and (b) applying a stylised model, the CRR does not assist in dealing with problems of monitoring and assessing quality. Ultimately, Flood &amp; Hviid conclude that <i>“At a first blush the principal-agent approach does not provide support for or</i></p>	<ul style="list-style-type: none"> <li>• At least some customers, some of the time, can assess the quality of their barrister’s services. After all, successful professional negligence claims against barristers and solicitors exist</li> </ul>

Reference	Point	Response
	<p><i>against the cab rank rule</i>".</p>	<ul style="list-style-type: none"> <li>Flood &amp; Hviid admit that the assumptions on which their model is based are frequently not true (see paragraph 3 of page 19)</li> </ul>
<p>Page 20 – opening lines of page 21</p>	<p>These paragraphs build into an argument that:</p> <ul style="list-style-type: none"> <li>The CRR might undermine barristers’ bargaining power with regard to fee setting;</li> <li>If the CRR does undermine barristers’ bargaining power, and does so unequally, then it may distort the market. For example if it is more junior practitioners that are disproportionately affected then aspiring barristers may be put off entering the profession, to the detriment of clients and the benefit of senior barristers.</li> </ul> <p>In support, Flood &amp; Hviid state:</p> <ul style="list-style-type: none"> <li><i>“The extent and significance of [undermining of barristers’ bargaining power] is an empirical matter. The lowest fee which cannot trigger a refusal based on its inadequacy may still be substantial and the occasions on which such a fee is offered may also be infrequent. The bottom line is that we currently do not have this information”</i>; and</li> <li><i>“The nature and magnitude of the bargaining power reducing effects of the cab rank rule on fees and entry levels is an empirical matter, but would likely be hard to assess. The necessary data, for example on the characteristics of the barrister and the case where the cab rank rule does bind is simply not available at present”</i></li> </ul>	<p>This argument is wrong, for the reasons set out in the main Paper at paragraphs 30-33.</p> <p>Specifically, the arguments in italics (left) are entirely speculative.</p> <p>Also, Flood &amp; Hviid ignore or disregard the possibility that any market distortion caused by the CRR might be justified by the wider roles it serves.</p>

Reference	Point	Response
<p>Page 21 – opening lines page 22</p>	<p>While the CRR may be one way of resisting attempts by powerful clients to prevent barristers acting against them:</p> <p><i>“a major client may only be pacified by the can rank rule if they believe it to be difficult for the barrister to extricate themselves from its consequences”</i> and</p> <p><i>“Where the undertaking seeking to distort the market for barrister services through exclusivity arrangements is a dominant firm in the market relevant to the proposed legal action, competition law may possibly offer a remedy”</i></p>	<p>Wrong, for the reasons given in the main Paper at paragraphs 20-23 and associated footnotes.<sup>91</sup></p> <p>Clients do not tend to share Flood &amp; Hviid’s cynicism regarding the CRR and (unsurprisingly) do not ask barristers to commit misconduct.</p> <p>As for the points about distortion of the market, competition law:</p> <ul style="list-style-type: none"> <li>• cannot easily deal with a situation where a powerful client does not enter into an agreement with the barrister but simply makes a unilateral demand for exclusivity;</li> <li>• cannot easily deal with the client who is commercially important to the barrister but not in a dominant position in the market;</li> <li>• is uncertain in its application (e.g. in terms of defining the relevant market, or what constitutes abuse of a dominant position); and</li> <li>• results in competition litigation which is slow and expensive.</li> </ul> <p>The suggestion that a barrister (or a potential client) would initiate a competition law claim to prevent a client monopolising their / the barrister’s services is fanciful.</p>
<p>Page 22, first and second paragraphs</p>	<p>Flood &amp; Hviid argue that the exemptions to the CRR transform the CRR from a rule into a principle or a policy.</p>	<p>This is internally inconsistent with the final sentence of the first paragraph of page 21 where Flood &amp; Hviid accept that rules may have some exemptions.</p>

<sup>91</sup> As to other reasons it is beneficial to both practitioners and clients that barristers have the opportunity to ‘do both sides’ of cases; see Beloff, *A View from the Bar* 23 Denning L.J. 1 (2011); Widgery, *The Compleat Advocate* 43 Fordham L. Rev. 909 (1974-1975) at p921; and Arden, *A Plague on Partisanship* JHL 2007, 10(5), 69 – 72.

Reference	Point	Response
		<p>It is also an arid, academic / semantic debate, and one which ignores the role of principles in modern principles-based, outcomes focused regulation. The real question is whether the CRR should be an enforceable norm, and (if so) how it should be enforced. See paragraphs 74-75 of the main Paper.</p> <p>Insofar as Flood &amp; Hviid say that the exceptions to the CRR transform it into a policy, they ignore the point that if that was correct (which it is not) the most logical answer would be to cut back the exceptions to the CRR, rather than abolishing the CRR. Even if the premises which Flood &amp; Hviid rely on were correct (which they are not) then Flood &amp; Hviid’s suggested course of action – abolition of the CRR – does not follow.</p>
Page 22, first and second paragraphs	“ <i>as a rule [the CRR] fails lamentably because there is no apparent application of enforcement procedures</i> ”.	<p>The argument is wrong on the facts: see paragraphs 58-63 of the main Paper.</p> <p>The argument also asks the wrong question: see paragraphs 66-67.</p> <p>The argument is also bad, as a matter of logic:</p> <ul style="list-style-type: none"> <li>• it is equally plausible to infer that the CRR is complied with by all but a few (which we believe to be the case);</li> <li>• simply because breach of a rule is difficult to prove or the rule is sometimes breached without detection does not mean that it is not a rule; and</li> <li>• so long as another barrister satisfactory to the client complies with the rule and appears for the client then the client is unlikely to complain.</li> </ul>

Reference	Point	Response
		So an absence or a low volume of complaints proves nothing.
Page 22, penultimate paragraph	<p><i>“barristers practice within entities, chambers, which have a collective personality”</i> and</p> <p><i>“The cab rank rule fails to speak to the organizational aspects of a barrister’s practice so ... it is unlikely that under the rule any sanction could be imposed on chambers as a collective for a barrister’s or clerk’s actions in connection with it”.</i></p>	<p>Chambers are not separate legal entities; they have no legal personality. There is no separate legal entity known as “chambers” on which to impose sanctions.</p> <p>In cases where other members of chambers had nothing to do with a given barrister’s breach of the CRR, it would be unfair to impose disciplinary sanctions on chambers as a whole. Absent a positive obligation to monitor colleagues’ compliance with the CRR (which would be impossible and untenable), imposing disciplinary sanctions on the other members makes no sense.</p>
Paragraph 23, third paragraph	Flood & Hviid refer uncritically to Dr. Sharon Dolovich’s work on ethical lawyers.	<p>Flood &amp; Hviid omit to mention that Dolovich’s view is a minority view (Dolovich admits as much in the first two pages of the very piece referred to).<sup>92</sup></p> <p>The view advocated by those who say that lawyers should pursue justice in a wider sense and take account of the effect of their actions on third parties and society generally is directly contrary to not only the orthodox understanding (both in the US and England and Wales) of acting ethically as a lawyer but also paragraph 303(a) of the Code of Conduct.<sup>93</sup></p> <p>Flood &amp; Hviid do not mention any of the academic defences of the orthodox conception of legal ethics and the role of the lawyer, save for</p>

<sup>92</sup> Dolovich, 70 Fordham L Rev 1629 at 1629 – 1630.

<sup>93</sup> E.g. as wider concerns may weigh against making a submission, notwithstanding it is in the client’s best interests to do so.

Reference	Point	Response
		a single reference in a footnote to ‘ <i>The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer’s Role</i> ’ by Dr. Tim Dare.
Page 24, second paragraph	“ <i>In contrast, lawyers in the US view lawyer autonomy as crucial and something that should not be sublimated to that of the client</i> ”.	<p>This is overly-simplistic as a description of the position in the US and in the US literature as a whole. It ignores a substantial body of academic literature arguing in favour of limits on lawyer autonomy and in favour of a duty to provide representation. To provide just two examples:</p> <ul style="list-style-type: none"> <li>• In <i>Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection</i> Wendell W Bradley argues in favour of a general obligation to provide representation that can only be overridden in the most extreme cases.<sup>94</sup> For him, second-order institutional reasons to provide representation preclude looking to first-order reasons not to provide representation (e.g. the lawyer’s own views of what is just);</li> <li>• In <i>Common Good and the Duty to Represent: Must the Last Lawyer in Town Take Any Case</i> Teresa Stanton Collett examines whether the last lawyer in town has a duty to represent a client.<sup>95</sup></li> </ul> <p>Despite not having the CRR, the US has never been comfortable abandoning its ethos<sup>96</sup>.</p>

<sup>94</sup> 34 Hofstra L. Rev. 987 (2005-2006). Flood & Hviid cite this piece on p25 – 26 of the Report but locate it away from e.g. the Wolfram literature to which it provides something of a counterbalance.

<sup>95</sup> South Texas Law Review, Vol. 40, Issue 1 (Spring 1999), pp. 137-180 Collett, Teresa Stanton 40 S. Tex. L. Rev. 137.

<sup>96</sup> Rostow 48 A.B.A. J. 25 (1962).

Reference	Point	Response
Page 24, second paragraph	Flood & Hviid note that as a result of the CRR barristers are in theory obliged to accept instructions and represent clients regardless of the “ <i>morality</i> ” of the outcome sought by the client.	<p>This line of argument betrays a fundamental lack of understanding as to the role of barristers; it is the court which decides the case, and the barrister’s role is to assist the court in the proper discharge of its functions. Further:</p> <ul style="list-style-type: none"> <li>• It is not clear how the “morality” of the outcome sought by a client is to be assessed. How should barristers go about deciding what does and does not constitute a moral outcome? What if the barrister is wrong?</li> <li>• Why should the morality of the outcome sought by the client ever outweigh the wider reasons in favour of providing representation?</li> <li>• Why should it be barristers who decide whether the (im)morality of the outcome sought by the client outweighs the wider reasons for accepting instructions and representing the client? Barristers are poorly placed to make this decision.</li> <li>• Why should the barrister’s moral agency trump the client’s? Why does the barrister’s view of what constitutes a moral outcome matter more than the client’s?</li> <li>• In any event, barristers are required to exercise independent judgment and should not argue hopeless points (and if their client insists, should refuse to do so). If a point is not hopeless then it is not for the barrister to apply any moral judgment (as above).</li> </ul>
Page 25, first paragraph	Flood & Hviid cite two examples where appeals have had to be made to find barristers to take on cases, and ask whether the difference between the English and American approaches to lawyer autonomy is as clear-cut as is often suggested.	<p>The examples cited do not prove that the CRR is ineffective or not followed, nor does it follow that the CRR broke down (or if it did, to what extent it did so). Rather:</p> <ul style="list-style-type: none"> <li>• Given that representation was secured for the undesirable clients in question, it can be argued that ultimately the CRR</li> </ul>



Reference	Point	Response
		<p>worked.</p> <ul style="list-style-type: none"> <li>• In any event, even if the two instances cited could be seen as evidence that the CRR broke down, it would not follow that the CRR was generally ineffective.</li> </ul>
Page 25, first paragraph	Flood & Hviid rely on Disney’s (1986) assertion that “ <i>the cab-rank rule is not infrequently evaded. Such evasion is difficult to detect, and even more difficult to prove with sufficient certainty to justify disciplinary action</i> ”.	<p>No evidence is produced in support of the empirical claim that the CRR is frequently breached. As set out more fully above, the evidence that is available is equally consistent with the CRR generally being followed.</p> <p>Any difficulty detecting and proving breach does not preclude a rule being a rule, or a rule being a valuable rule.</p>
Page 25, fn48	<i>A few other areas of the world operate a cab rank rule</i> ”. Flood & Hviid refer to “ <i>Parts of Australia where there is an independent Bar and South Africa...New Zealand</i> ”	Wrong and misleading: it is far more than “ <i>a few other areas of the world</i> ” which operate a cab rank rule. See paragraphs 45-57 of the main Paper and Appendix B.
Page 26, first and second paragraphs	<p>Flood &amp; Hviid set out certain provisions of the Statement of Client’s Rights promulgated by the New York State Bar Association including section 10, which prohibits refusing <i>representation on the basis of race, creed, colour, age, religion, sex, sexual orientation, national origin or disability</i> (‘the New York Bar Rule’).</p> <p>Flood &amp; Hviid say that the BSB code lacks a similar provision and that section 10 “<i>goes much further than [the CRR] without compromise</i>”.</p>	<p>Wrong and misleading again: the Code of Conduct in fact has a wider provision – see paragraph 305.1 of the Code and footnote 6 to the main Paper.</p> <p>The CRR covers some situations which the New York Bar Rule does not – e.g. the commercially undesirable client.</p> <p>Furthermore, detecting and proving a breach of the New York Bar Rule would be harder than detecting and proving a breach of the CRR, and it is in fact subject to more exceptions. Any of the reasons for refusing</p>

Reference	Point	Response
		instructions under the CRR would be a non-discriminatory reason for refusing representation under section 10, and the lawyer could also refer to any other non-discriminatory reason they could think up on the spot.
Page 26, final paragraph, opening lines page 27	<i>“The essential difference between the US perspective of lawyer-client relationships and that of the UK is one of moral philosophy versus pragmatism. We have shown that American scholars are rightly concerned about access to justice, zealous advocacy and due process. For the English these issues are almost pushed into the background”</i>	<p>The English perspective of lawyer-client relationships does not turn on pragmatism, rather than moral philosophy. The English perspective remains one based on moral philosophy but the analysis and the outcome of that analysis is different. There are a plurality of ways in which concern for access to justice, zealous advocacy, natural justice and the rule of law can be expressed.</p> <ul style="list-style-type: none"> <li>• The US writers relied on by Flood &amp; Hviid openly place lawyer autonomy ahead of any considerations of access to justice.</li> <li>• The barrister gives access to justice precedence over lawyer autonomy. There is a rule which enshrines this: the CRR.</li> <li>• Barristers are obviously concerned with zealous advocacy, subject to their overriding duty to the court. They subject themselves to a rule which obliges them to promote and protect fearlessly and by all proper means their lay client’s interests without regard for their own interests or those of any other person, and which must be followed under pain of disciplinary sanction: see paragraph 303(a) of the Code of Conduct.</li> <li>• It is entirely unsurprising that English lawyers would not be concerned with due process: it is not a concept which exists in</li> </ul>

Reference	Point	Response
		English law. In contrast, English lawyers are plainly concerned with natural justice and the rule of law.
Page 27 first paragraph	Flood & Hviid state that in <i>A View from the Bar</i> Michael Beloff QC “recognizes the truth of Lord Steyn’s [comments in the <i>Arthur Hall case</i> that the impact of the CRR on day to day practice was not great]”.	This is wrong and misleading. Mr. Beloff prefaces the relevant passage of Lord Steyn’s speech with the words “ <b><i>Others have suggested that the rule is more mantra, than mandate</i></b> ” (emphasis added). Mr. Beloff never approves Lord Steyn’s comments. In fact, he states later in the same piece – in relation to a barrister’s overriding duty to the court - that:  “ <b><i>as with the cab-rank rule, the duty to the court, the second pillar of the Bar’s wisdom, is something rare and precious, to be preserved and protected</i></b> ” (emphasis added)
Page 27, third paragraph	Flood & Hviid state that they will consider some of the responses made to the Bar’s consultations on partnerships and ABS involving discussion of the CRR	Flood & Hviid omit to mention a consultation response which directly contradicts their thesis.  In about 2007, the BSB undertook a survey into the effect of the Legal Services Act 2007. Question 2 of the BSB’s consultation asked the question: “ <i>How effective in practice, in your experience, is the “cab-rank” rule in securing for clients the Counsel of their choice?</i> ” The BSB prefaced the published results by saying that “ <i>Strictly, the terms of this question did not admit of a “Yes” or “No” answer</i> ”, but went on to tabulate the responses according to whether they indicated an attitude broadly supportive of the cab-rank rule or the reverse. The respondents comprised sole practitioners, an employed barrister, barristers’ chambers, other lawyers, legal organisations, public bodies and a member of the public. Out of 34 respondees, 26 (i.e. over 76%) thought the cab rank rule effective in securing for clients the Counsel of

Reference	Point	Response
		their choice and only 8 thought the reverse
Page 27 final paragraph	Flood & Hviid rely on Stephen Mayson’s criticisms of the CRR – that it does not assist legally aided clients, and it is easily evaded.	<p>Both criticisms are wrong and/or irrelevant.</p> <ul style="list-style-type: none"> <li>• The first criticism (that the CRR does not assist legally aided clients) arises not due to a defect in the CRR but due to the low level of funding in legal aid cases. Moreover, it has never been part of the CRR that a barrister should accept instructions for less than a proper fee.</li> <li>• As to the second criticism (that the CRR is easily evaded), while proving breach of the CRR may be difficult, there is no evidence to support the empirical claim that it is widely breached. The evidence available suggests that in fact the CRR is generally followed, and is effective.</li> </ul>
Page 28, penultimate paragraph	(in response to the Chancery Bar Association’s 2008 argument that abolition of the CRR would result in consumer choice becoming limited by anticompetitive forces) <i>“The ChBA has in mind the difficulty, for example, of clients who want to sue a bank obtaining legal advice because law firms are either on a bank’s panel or have decided on principle not to take action against banks in order to preserve future opportunities of work...The client’s alternative is direct access to the Bar. <u>But even here it is virtually impossible to say that it is [the CRR] that is the core value that ensures the client is represented: rather it could be the conflicts of interest rules”</u> (emphasis added)</i>	The suggested solution is wrong, and makes no sense. The conflict of interest rules can only ever <b>preclude</b> representation.

Reference	Point	Response
Page 28, last paragraph	<p>“[In] a YouGov (2010) survey of barristers commissioned by the Bar Standards Board on new business structures...When asked about important factors in business structures barristers placed [the CRR] seventh out of eleven factors with 63% of respondents citing its importance...barristers interested in new business structures were less likely than those not interested in maintaining the rule and it obtained a negative score”</p>	<p>Participants were only asked about the importance of the CRR to business structures, not the importance of the CRR in general.</p> <ul style="list-style-type: none"> <li>• The majority still thought the CRR important, even in that limited context.</li> <li>• Barristers interested in new business structures are a minority: <a href="https://research.legalservicesboard.org.uk/analysis/supply/dynamic-market-analysis/alternative-business-structures/">https://research.legalservicesboard.org.uk/analysis/supply/dynamic-market-analysis/alternative-business-structures/</a></li> </ul> <p>As an aside, that survey is arguably obsolete or overtaken by events, because it dates back to a time when it was thought that ABSs and partnerships were incompatible with the CRR, which is not the case now.</p>
Page 29, second paragraph	<p>“We are unable to find any commentator who can say that clients have suffered as a result of the misapplication of the rule or how many might be injured if the rule were no longer to exist”</p>	<p>The (implied) point is bad as a matter of logic. If most practitioners comply with the rule, then clients should not suffer as a result of one misapplication: other suitable counsel will comply with the rule and take the instructions. The absence of a commentator referring to clients suffering as a result of breach of the CRR proves nothing.</p> <p>The point also ignores data from practitioners and others who state that the CRR is generally effective in securing representation by the client’s chosen counsel. See (e.g.) the responses to the BSB consultation on LSA 2007 cited in the main text.</p>
Page 30,	<p>“Clearly, we are, in Bagehotian terms, dealing with the</p>	<p>This is (unjustified and unsupported) supposition. It assumes – without</p>

Reference	Point	Response
second paragraph, final sentence	<i>“Dignified” and “Efficient” versions of the application of the rule”</i>	explanation as to why the assumption is made – that the interviewees who supported the CRR and thought it effective and important are wrong about how it works in practice. It is equally plausible that those who thought the rule of little effect are a minority.
Page 30, third paragraph	<i>“The origin of the cab rank rule is to ensure that the unwanted client receives representation, but what is apparent today is that such a client hardly wants for representation. The client who may be undesirable is one who might cause a cracked fee resulting in a lower fee for counsel”</i>	<p>The CRR today carries with it benefits beyond helping to ensure undesirable clients obtain some representation: see paragraphs 15-23 of the main Paper.</p> <p>Further, the statement that unwanted clients hardly want for representation today:</p> <ul style="list-style-type: none"> <li>• is an oxymoron;</li> <li>• fails to take account of the low-profile but undesirable client, or the mundane client who is commercially undesirable in the long run (e.g. who wants to sue a bank);</li> <li>• fails to take account of hearings in private;</li> <li>• proves nothing - that ”unwanted” clients do not lack representation today may be down to the CRR.</li> </ul> <p>Neither abolition of the CRR nor implementation of the New York Bar Rule would prevent a client whose trial might crack being undesirable. Neither proposal removes the commercial risk caused by the structure of funding and fees in such a case.</p>
Page 30, fourth paragraph	<i>“One solicitor, for example, argued that it enabled country solicitors to battle equally against the likes of Linklaters as each had access to the same barristers. This is clearly a naïve view, as</i>	<p>The second sentence is wrong and makes no sense as a matter of logic:</p> <ul style="list-style-type: none"> <li>• Whether the client can monitor the barrister instructed says nothing about which barristers are available to be instructed.</li> </ul>

Reference	Point	Response
	<i>we know there are monitoring difficulties in the principal-supervisor-agent model as discussed earlier”</i>	<p>They are two completely different points.</p> <ul style="list-style-type: none"> <li>• Flood &amp; Hviid’s assumption that there are significant monitoring difficulties depends entirely on a model which they admit rests on false assumptions: cf. p19 of the Report.</li> <li>• On their own argument the monitoring difficulties exist <u>for the lay client</u>: cf. p19 of the Report. This argument therefore cannot answer the point made by the solicitor interviewee: <u>all</u> solicitors have lay clients.</li> <li>• Any argument that repeat users (e.g. large firms) monitor barristers better is pure speculation. See p18 of the Report: “<b><i>It could be that the more experienced purchaser is ... better able to monitor the barrister</i></b>” (no evidence cited)</li> <li>• In any event, the ability to instruct better counsel helps to mitigate disparity of arms.</li> </ul>
Page 30 fourth paragraph penultimate sentence	<i>“The cab rank rule does not protect against, for example, the supervisor and agent conspiring against the principal”</i>	Wrong. The CRR places another obstacle in the way of only working with solicitors who will collude with the barrister: see Vining, <i>Information Costs and Legal Services</i> , 4 Law & Pol’y Q. 475 at 491.
Page 30 final paragraph, opening lines p31	One commentator thought it was wrong that the CRR dissociates barristers from their clients.	That commentator is wrong; this is an important positive effect of the CRR, and protects both barrister and client.
Page 31, third paragraph	<i>“[Other than the Birmingham Six] No other case since then seems to have attracted such opprobrium that no counsel could be found.</i>	<p>Both points are bad as a matter of logic:</p> <ul style="list-style-type: none"> <li>• If the CRR works, then you will very rarely (if ever) see such</li> </ul>

Reference	Point	Response
	<i>Indeed the very opposite has occurred; the “worse” the client, the more attractive and desirable”</i>	<p>cases. Therefore the evidence is at least as consistent with the CRR being obeyed as with the CRR not being needed.</p> <ul style="list-style-type: none"> <li>• The second sentence fails to take account of the low-profile but undesirable client, or the mundane client who is commercially undesirable in the long run (e.g. who wants to sue a bank); or hearings in private.</li> </ul>
Page 31, footnote 66	(in the course of referring to the Delhi gang rape case) <i>“India has no cab rank rule”</i>	<p>Plain wrong; India has a cab rank rule. See Appendix B.</p> <p>Indeed, one of the defence lawyers in the Delhi case gave as a reason for appearing the CRR:  <a href="http://www.nytimes.com/2013/01/11/world/asia/lawyer-says-indian-gang-rape-suspect-was-tortured-by-police.html?_r=0">http://www.nytimes.com/2013/01/11/world/asia/lawyer-says-indian-gang-rape-suspect-was-tortured-by-police.html?_r=0</a> <i>“He also noted that despite the heinous nature of the crime, defendants are legally entitled to representation, a constitutional principle that some lawyers nevertheless vociferously challenged during a chaotic hearing on Monday. “If someone approaches you under the Advocates Act, you cannot refuse,” Mr. Sharma said.”</i></p>
Page 31, third paragraph – page 32 opening lines	Speculation that barristers would be eager to represent Anders Brehvik, and noting that lawyers in the US had been eager to represent OJ Simpson	<p>As Flood &amp; Hviid fairly admit, this is pure speculation: <i>“this obviously remains hypothetical and untestable”</i>. Many or most undesirable clients do not come with publicity; and not all hearings are in public.</p> <p>A separate but important point is that the client should not be restricted to a choice of those counsel who are eager to represent them for reasons of (e.g.) publicity or sympathy.</p>



Reference	Point	Response
Page 32, first full paragraph	Flood & Hviid state that the exceptions to the CRR do not mention specialization and therefore in cases of specialisation within areas where cases are heard in the same court “ <i>problems arise</i> ”.	Wrong again. <ul style="list-style-type: none"> <li>• Under paragraph 602 of the Code, a barrister is only obliged to accept instructions “<i>in relation to work appropriate to his experience and seniority</i>”.</li> <li>• Under paragraph 603 barristers are obliged to reject instructions if they lack “<i>sufficient experience or competence to handle the matter</i>”.</li> </ul>
Page 32, second paragraph and final paragraph	<p>“[Information as to which chambers specialise in what – using criminal defence and family law as examples] <i>is available to [the legal profession] but not the general public: it operates through networks...these distinctions are informal and not publicized in ways that would incur the BSB’s wrath</i>”</p> <p>Flood &amp; Hviid say this makes it difficult for a client who wants or does not want a barrister with a particular speciality.</p>	Wrong again. <ul style="list-style-type: none"> <li>• The CRR does not prohibit stating what type of cases a barrister has been instructed in in the past and who the barrister acted for.</li> <li>• Even in the practice areas referred to the point is untrue. E.g. see criminal defence set 25 Bedford Row’s website,<sup>97</sup> quoting Chambers &amp; Partners (a free online legal directory, that any member of the public can check): <p style="margin-left: 40px;"><i>“Professional and well-organised 25 Bedford Row is a set that focuses on criminal defence work of all levels of complexity to a very high standard. From a base 20 years ago when it had no silks it has built itself up to such an extent that it can now claim 15 QCs within its ranks.”</i></p> </li> <li>• The internet exists. It is now easily possible to look up cases that a barrister has appeared in, check references to cases on their profile on chambers’ website, and check free legal directories (such as Chambers &amp; Partners and Legal500) and</li> </ul>

<sup>97</sup><http://www.25bedfordrow.com/home/about-us.asp>.

Reference	Point	Response
		<p>quickly gain a grasp as to what a chambers and/or one of its members tends to do.</p> <ul style="list-style-type: none"> <li>• Most clients are still represented by solicitors.</li> </ul>
Page 33, first full paragraph	<p>Flood &amp; Hviid argue that the problem of powerful clients demanding exclusivity “<i>is covered more appropriately by a conflicts rule or possibly even competition law rather than the cab rank rule</i>”</p>	<p>This argument is wrong and makes no sense.</p> <ul style="list-style-type: none"> <li>• Conflicts rules only <b>preclude</b> representation. By definition they cannot deal with the problem of a bank or a regulator demanding a barrister not appear against it.</li> <li>• Resort to competition law is slow, expensive, uncertain and commercially unrealistic. It also cannot easily deal with the powerful but not necessarily dominant firm and/or with unilateral demands for exclusivity.</li> </ul>
Page 33 final paragraph – first full paragraph 36	<p>Discussion of funding. Amongst other things the point is made that a large portion of legally aided work is no longer deemed to be at a proper fee, excluding it from the operation of the CRR.</p> <p>Flood &amp; Hviid also mention one clerk interviewee who states that in regard to either way offences, where a case might ‘crack’, the CRR puts the bar in an “<i>ethically weaker position</i>” (and Flood &amp; Hviid say - in fn77 - a weaker bargaining position)</p>	<p>This discussion is irrelevant because those cases fall outside the CRR.</p> <p>In any event, the problem is one of the level of public funding for those cases, not the scope of the CRR. The CRR has never extended to forcing barristers to work for other than a proper fee. The logical answer would be to fix the level of funding, rather than abolish the CRR.</p> <p>Further, because the cases referred to fall outside the CRR, abolition of the CRR would do precisely nothing to fix the problems described.</p> <p>The statement that the CRR leaves barristers in a weaker bargaining position with regard to the cases referred to makes no sense. The CRR is not in play in those cases. In any event, Flood &amp; Hviid admit that</p>

Reference	Point	Response
		<p>their argument that bargaining power is affected by the CRR is wholly speculative: see p20/21 of their Report.</p> <p>The interviewee’s statement that the CRR leaves the Bar in an “<i>ethically weaker position</i>” does not make sense.</p>
Page 36, penultimate paragraph	Some clerk interviewees had not heard a rational explanation of the CRR	<p>This is irrelevant. Clerks are not (personally) subject to the CRR; what matters is that they follow it.</p> <p>In any event, the logical answer would be education about, rather than abolition of, the CRR.</p>
Page 36, final paragraph	Because the rule is based on individual behaviour but chambers act as a collective “ <i>it is possible for certain parts of the collective to evade corporate responsibility</i> ”	<p>It is not clear what “corporate responsibility” Flood &amp; Hviid are referring to. If they mean responsibility for complying with the CRR, then they are suggesting that barristers who cannot control whether colleagues comply with the CRR should be liable for professional misconduct where a colleague breaches the CRR. That suggestion is plainly wrong and unfair.</p> <p>As set out above, it is a flawed assumption that chambers necessarily act as a collective or are corporate entity, so the argument does not make sense.</p>
Paragraph 37	Flood & Hviid refer to an example where a double-booking meant that a client had to switch to another member of chambers who was convinced that the client had no case and “ <i>as a result the client lost a considerable amount of money</i> ”. They say chambers provided	The Canadian system provides for the lawyer declining instructions to assist in obtaining the services of another lawyer qualified to act. But no system goes as far as Flood & Hviid’s suggestion.

Reference	Point	Response
	<p>extremely poor service and should have found another barrister  <i>“who would have followed the lines of the first if such were not available in house”</i></p>	<p>Further, Flood &amp; Hviid’s interviewee’s anecdote is not evidentially useful (as with all one-off anecdotes), and their suggestion is naïve and unworkable:</p> <ul style="list-style-type: none"> <li>• The first barrister may well have been wrong.</li> <li>• If the client lost money it is likely because they had no case. It is implausible that the client lost money simply because of a lack of faith in their case on the part of counsel.</li> <li>• It would be impossible for chambers to simply find a barrister who agreed with the first barrister. The replacement barrister could not possibly know if they agreed with the first unless they analysed the case.</li> <li>• The alternative would be to seek advice from the possible replacement barrister first. Are the first chambers meant to pay for that advice? Are the first chambers meant to call around other chambers instructing barristers to give advice until a replacement gives an opinion substantially matching the first barrister’s view?</li> </ul> <p>In any event, this point is completely unrelated to the CRR, and abolition of the CRR would do precisely nothing to solve it.</p>
<p>Page 38,  second  paragraph</p>	<p><i>“We have no evidence as to its efficacy nor that it is understood in the legal marketplace...The BSB has no disciplinary findings based on the rule...No-one appears to know of any infractions of the rule. Indeed we have no means of knowing if it has been breached. How would one police such a rule? We are left with the question is the cab rank rule unenforceable?”</i></p>	<p>Wrong:</p> <ul style="list-style-type: none"> <li>• Generally, the CRR is understood to be effective in securing client representation by counsel of their choice: see footnote 18 to the main paper.</li> <li>• The rule is generally understood in the marketplace. See, for example, footnotes 11 and 18 in the main Paper.</li> <li>• We have located complaints made to the BSB, including</li> </ul>

Reference	Point	Response
		<p>ongoing complaints and an upheld complaint, and the BSB does have data on the rule. See paragraphs 58-63 of the main paper.</p> <ul style="list-style-type: none"> <li>• The CRR can be, and is, policed in the same way as any other rule of professional conduct.</li> <li>• The logic of the argument is bad: difficulty in detecting or proving breach of a rule does not prevent it being a rule.</li> </ul>
Page 38 third paragraph	<p><i>“We know that at an informal level it is regularly breached because the nature of chambers specialization means that it is not invoked...it is of limited applicability...it fails to apply between public access clients and barristers...its partial application raises the valid question about whether it is legitimate to ask if the cab rank rule distorts the legal services market”</i></p>	<p>Rejecting a case because the barrister is not sufficiently experienced in a field is not a breach of the CRR and never has been. The CRR has never aimed to force barristers to take cases outside of their experience, and to do so would cause consumer harm.</p> <p>The point is also bad as a matter of logic. That a client does not expressly invoke the rule does not mean that the barrister does not have it in mind, or that it is not a good rule.</p> <p>It is irrelevant what proportion of the legal services market the CRR applies to. The question is whether the CRR is defensible. The answer is ‘yes’. If it is a good rule then the question becomes whether it should be applied more widely.</p> <p>Flood &amp; Hviid adduce no coherent evidence of market distortion.</p>
Page 38 final paragraph	<p><i>“We could find no evidence to suggest that an absence of [the CRR] would make any difference to the representation of clients. Indeed, we have no evidence that its presence ensures representation”</i></p>	<p>Wrong: see footnote 18 to the main paper.</p> <p>In any event, the argument does not make sense. So long as the CRR works, there should be relatively little evidence that it ensures</p>

Reference	Point	Response
		<p>representation / that people would go unrepresented without it. Everybody is represented and barristers almost never give detailed reasons as to exactly why they accept a case (also, commercially, who would openly tell a client they are only appearing for them because they are obliged to?). So it is a nonsensical question to ask.</p> <p>Had any non-representation been found, Flood &amp; Hviid would presumably have said that showed the CRR did not work.</p>
Page 38 final paragraph	<p><i>“A principle of representation would be acceptable but a rule that undermines the collective responsibility of chambers and effectively absolves the barristers from responsibility is less acceptable today.”</i></p>	<p>This is empty rhetoric. Collective responsibility <b>for what</b>? There is no link between the CRR and chambers bearing collective responsibility for anything or not doing so. Flood &amp; Hviid seem to have confused the CRR and being a sole trader.</p> <p>Insofar as barristers are absolved of responsibility for their clients’ views and goals, it is right that they should be so absolved. See paragraph 53 of the main Paper.</p>
Page 39 second paragraph	<p><i>“The modern legal market is not one in which clients are unable to obtain representation for the character of their offences or the despicability of their personalities. The barrier to representation is one of finances and access to legal aid. These fall outside the purview of [the CRR]. Indeed, as we have tried to show, the rule is about money – how it is negotiated, how it is divided between solicitor and barrister, and the risk analysis of cases and who bears that risk. This is not the work the cab rank rule was meant to do”</i></p>	<p>Wong: the CRR is not about money and never has been – and it is fundamental error by Flood &amp; Hviid to conflate and confuse funding issues with the underlying merits of the CRR. Furthermore:</p> <ul style="list-style-type: none"> <li>• The first sentence does not prove any point: the modern legal market is one with the CRR.</li> <li>• Flood &amp; Hviid fail to take account of the client who is commercially undesirable for reasons beyond immediate remuneration.</li> </ul>

Reference	Point	Response
		<ul style="list-style-type: none"> <li>• They also fail to take account of the point that the reason why a client’s (alleged) offences or despicable personality are not considered important is because of the culture fostered by the CRR. Without the CRR, those will in time likely become seen as legitimate grounds to refuse representation.</li> <li>• The barrier to representation for many might well be finances and legal aid. But the CRR does not aim to make barristers work for less than a proper fee, and its abolition would not fix the cases in question as the CRR does not necessarily apply in them. So the criticism makes no sense at all.</li> <li>• Flood &amp; Hviid did not (so far as we can tell) try to show that the CRR is about fee negotiation or risk analysis; or (if they did try) they signally failed. All of their discussion regarding problematic fees, and the (slim) interview evidence on that topic relates to cases where the CRR simply does not apply.</li> </ul>
<p>Page 39 second and third paragraph</p>	<p><i>“If a rule is necessary then one could be drawn up similar to [the New York Bar Rule]...It protects clients...It has no need of exceptions and exemptions, which presently serve only to confound and confuse clients. For the purposes of the client and consumer representation will be supplied and access to justice and the upholding of the rule of law would be ensured by the profession”</i></p>	<p>Wrong, and the suggestion is facile:</p> <ul style="list-style-type: none"> <li>• Paragraph 305.1 of the Code already covers all of this. The CRR presents a further layer of client protection on top.</li> <li>• If their view is that the CRR is unenforceable the same objection logically applies with even greater force to this rule. A racist could always say they were too busy or too inexperienced to take a case.</li> </ul>

Reference	Point	Response
		<ul style="list-style-type: none"> <li>• While the New York Bar Rule “<i>has no need of exceptions and exemptions</i>”, any of the reasons mandating or permitting refusal of instructions as an exception to the CRR would answer any complaint of breach of the New York Bar Rule by providing a non-discrimination based answer to why the instructions were refused.</li> <li>• So the New York Bar Rule would in fact have all the same exceptions as the CRR, plus whatever reasons for refusing instructions the (for example) racist could make up on the spot.</li> </ul> <p>The suggestion is therefore defective, and its adoption would achieve none of what Flood &amp; Hviid claim it would.</p>
Page 39, third paragraph	<p><i>“Lawyers should not be unrealistically barred from choosing clients”</i></p> <p><i>“[the CRR’s] abandonment ought to make market signals clearer and more direct than they are presently. There would be clearer and more direct specialization and lawyers should be able to inform clients more thoroughly about the services they offer”</i></p>	<p>Wrong: why should lawyers get to pick and choose? There is also no basis (and certainly no stated basis) for the supposition that a bar on choosing is “unrealistic”.</p> <p>Market signals are clear now and there is nothing stopping lawyers informing clients of specialization or the services they offer: see comments on p.32 second paragraph and final paragraph, above.</p>



## APPENDIX B – Provisions akin to the Cab Rank Rule in Other Countries

### A. Countries that have the Cab Rank Rule (or something approximating to it)

Country		Provision
1	Scotland	<p>Faculty of Advocates Guide to the Professional Conduct of Advocates – Rules 8.3.1 and 8.3.4:</p> <p>8.3.1 It is an important principle of practice that an Advocate should not, when available to accept instructions, refuse to accept instructions to act for any litigant before Scottish Courts which are accompanied by payment of a reasonable fee or the obligation of a Scottish solicitor to pay such a fee.</p> <p>8.3.4 An Advocate should not refuse to accept instructions on :-                      (i) unacceptable discriminatory grounds such as race, religion, gender or sexual orientation; or                      (ii) grounds of mere personal preference or personal dislike of the potential client or his views; or                      (iii) grounds that do not have some other reasonable justification.</p>
2	Northern Ireland	<p>Bar of Northern Ireland’s Professional Code of Conduct – Rules 4.08 and 4.09:</p> <p>4.08 A barrister in independent practice is under a duty to accept a brief to appear in any court in which that barrister holds out for practice (having regard to experience and seniority) and to mark a proper and reasonable professional fee having regard to the length and difficulty of the case.</p> <p>4.09 A barrister should refuse to accept a brief where special circumstances such as a conflict of interest or the possession of relevant and confidential information exists.</p>
3	Republic of Ireland	<p>Code of Conduct for the Bar of Ireland – Rules 2.1 and 2.14:</p> <p>2.1 Subject to these Rules, barristers as members of an Independent Referral Bar hold themselves out as willing and obliged to appear in Court on behalf of any client on the instructions of a solicitor and to give legal advice and other legal services to clients. A barrister who accepts an appointment as Attorney General is hereby deemed to continue to be a barrister in practice at the Bar.</p> <p>2.14 Having regard to the anticipated length and complexity of a case and having regard to their other professional commitments and the provisions of this Code of Conduct barristers are bound to accept instructions in any case in the field in which they profess to practice (having regard to their experience and seniority)</p>

		subject to the Payment of a proper professional fee. Barrister may be justified in refusing to accept instructions where a conflict of interest arises or is likely to arise or where they possess relevant or confidential information or where there are other special circumstances.
4	New Zealand	<p>Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 – Rules 4 and 4.1:</p> <p><b>Availability of lawyers to public and retainers</b></p> <p>4 A lawyer as a professional person must be available to the public and must not, without good cause, refuse to accept instructions from any client or prospective client for services within the reserved areas of work that are within the lawyer's fields of practice.</p> <p><b>Refusing instructions</b></p> <p>4.1 Good cause to refuse to accept instructions includes a lack of available time, the instructions falling outside the lawyer's normal field of practice, instructions that could require the lawyer to breach any professional obligation, and the unwillingness or inability of the prospective client to pay the normal fee of the lawyer concerned for the relevant work.</p> <p>4.1.1 The following are not good cause to refuse to accept instructions:</p> <ul style="list-style-type: none"> <li>(a) any grounds of discrimination prohibited by law including those set out in section 21 of the Human Rights Act 1993:</li> <li>(b) any personal attributes of the prospective client:</li> <li>(c) the merits of the matter upon which the lawyer is consulted.</li> </ul> <p>4.1.2 A lawyer who has a retainer under which he or she is to remain available to receive instructions from the client concerned is entitled to decline instructions from others that would be inconsistent with the lawyer's obligations under the retainer.</p> <p>4.1.3 A lawyer who declines instructions must give reasonable assistance to the person concerned to find another lawyer.</p>
5	Australia ( <u>all</u> <sup>98</sup> states and territories)	<p>Australian Bar Association, Model Rules – Rules 21 and 22 (“<b>Aust. Model Rules</b>”):</p> <p><b>21.</b> A barrister must accept a brief from a solicitor to appear before a court in a field in which the barrister practises or professes to practise if:</p> <ul style="list-style-type: none"> <li>(a) the brief is within the barrister’s capacity, skill and experience;</li> </ul>

<sup>98</sup> In Australia, there is a truly split profession in New South Wales and Queensland. In the other states and territories, notwithstanding that the legal profession is technically fused, there remains an independent bar. See the Australian Bar Association website: [www.austbar.asn.au](http://www.austbar.asn.au).

		<p>(b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client’s interests to the best of the barrister’s skill and diligence;</p> <p>(c) the fee offered on the brief is acceptable to the barrister; and</p> <p>(d) the barrister is not obliged or permitted to refuse the brief under Rules 95, 97, 98 or 99.</p> <p>22. A barrister must not set the level of an acceptable fee, for the purposes of Rule 21(c), higher than the barrister would otherwise set if the barrister were willing to accept the brief, with the intent that the solicitor may be deterred from continuing to offer the brief to the barrister.</p>
		ACT – The ACT Barristers’ Rules – Rules 85 and 86 [corresponding to the Aust. Model Rules]
		NSW – New South Wales Barristers’ Rules – Rules 21 and 22 [corresponding to the Aust. Model Rules]
		NT – Barristers’ Conduct Rules – Rules 85 and 86 [corresponding to the Aust. Model Rules]
		QLD – Bar Association of Queensland Barristers’ Conduct Rules – Rules 21 and 22 [corresponding to the Aust. Model Rules]
		SA – South Australian Bar Association Barristers’ Conduct Rules – Rules 21 and 22 [corresponding to the Aust. Model Rules]
		TAS – Rules of Practice 1994 (SR 1994 No. 229) – Rule 94(1):
		<p><b>94. Acceptance of briefs</b></p> <p>(1) Subject to subrule (2), a barrister must accept a brief in any court in which that barrister practises unless, as a result of that brief, the barrister is required to cross-examine a relative or friend.</p>
		VIC – The Victorian Bar Incorporated Practice Rules – Rules 86 to 88:
		<p><b>87.</b> A barrister who is generally available to accept a brief shall not discriminate, in any way, for or against a client, or class of clients.</p> <p>[Rules 86 and 88 correspond to the Aust. Model Rules]</p>
		WA – Western Australian Barristers’ Rules – Rules 21 and 22 [corresponding to the Aust. Model Rules]
6	India	<p>Bar Council of India Rules, Chapter II ‘Standards of Professional Conduct and Etiquette’ – Rule 11:</p> <p>11. An advocate is bound to accept any brief in the Courts or Tribunals or before any other authorities in or before which he proposes to practise at a fee consistent with his standing at the Bar and the nature of the case. Special circumstances may justify his</p>

		refusal to accept a particular brief.
7	South Africa	<p>General Council of the Bar of South Africa Uniform Rules of Professional Conduct – Rule 2.1:</p> <p><b>2.1 Duty to Accept Briefs</b></p> <p>Counsel is under an obligation to accept a brief in the Courts in which he professes to practise, at a proper professional fee, unless there are special circumstances which justify his refusal to accept a particular brief. In particular, every person who is charged before the Court has a right to services of counsel in the presentation of his defence. Subject to what has been said above, it is the duty of every advocate to whom the privilege of practising in Courts of Law is afforded, to undertake the defence of an accused person who requires his services. Any action which is designed to interfere with the performance of this duty is an interference with the course of justice.</p> <p>2.1.1 Counsel may decline a specialist brief if he considers himself not competent to accept the brief.</p>
8	Hong Kong	<p>Code of Conduct of the Bar of the Hong Kong Special Administrative Region – Rule 21:</p> <p><b>21</b> A practising barrister is bound to accept any brief to appear before a Court in the field in which he professes to practise at his usual fee having regard to the type, nature, length and difficulty of the case. Special circumstances such as a conflict of interest or the possession of relevant and confidential information may justify his refusal to accept a particular brief.</p>
9	Malaysia	<p>Legal Profession (Practice &amp; Etiquette) Rules 1978 – Rule 2:</p> <p><b>Rule 2. Obligation of advocate and solicitor to give advice on or accept any brief.</b></p> <p>An advocate and solicitor shall give advice on or accept any brief in the Courts in which he professes to practise at the proper professional fee dependent on the length and difficulty of the case, but special circumstances may justify his refusal, at his discretion, to accept a particular brief.</p>
10	Italy	<p>Royal Decree Law No. 1578/1933 – Article 11:</p> <p><b>Art. 11</b> Il avvocato non può, senza giusto motivo, rifiutare il suo ufficio.<sup>99</sup></p>

<sup>99</sup> An approximate (and unofficial) translation is as follows: “*Article 11 – The lawyer may not, without just cause, refuse his services.*”

		Consiglio Nazionale Forense – Article 10:  <b>Art. 10 – Doveri di indipendenza.</b> Nell'esercizio dell'attività professionale l'avvocato ha il dovere di conservare la propria indipendenza e difendere la propria libertà da pressioni o condizionamenti esterni. <sup>100</sup>
11	Nigeria (criminal cases only)	Rules of Professional Conduct in the Legal Profession – Rule 7(a):  <b>7. Employment in Criminal Cases</b>  (a) Every person accused of crime has a right to a fair trial, including persons whose conduct, reputation or alleged violation may be the subject of public unpopularity or clamour. This places a duty of service on the legal profession and, where particular employment is declined the refusal of the brief or to undertake a defence may not be justified merely on account of belief in the guilt of the accused, or repugnance towards him or to the crime or offence as charged.
12	Trinidad & Tobago (capital cases only)	Legal Profession Act 1986, Third Schedule 'Code of Ethics' – Paragraphs 9 and 17:  <b>9.</b> Subject to paragraph 17, no attorney-at-law is obliged to act either as adviser or advocate for every person who may wish to become his client; he has a right to decline employment.  <b>17.</b> An attorney-at-law shall not except for good reasons refuse his services in capital offences.

## B. Countries that do not have the CRR as a rule but promote it as a professional ideal

Country		Provision or Guidance
1	Canada	Federation of Law Societies of Canada Model Code of Professional Conduct – Rule 4.1-1 (“ <b>Can. Model Rule</b> ”):  <b>Making Legal Services Available</b>  4.1-1 A lawyer must make legal services available to the public efficiently and conveniently and, subject to rule 4.1-2, may offer legal services to a prospective client by any means.  <b>Commentary</b> ...

<sup>100</sup> An approximate (and unofficial) translation is as follows: “*Article 10- Duty of independence – In the exercise of the profession, the lawyer has a duty to maintain his independence and protect his freedom from external influences or pressures.*”

		<p><b>[4] Right to Decline Representation</b> - A lawyer has a general right to decline a particular representation (except when assigned as counsel by a tribunal), but it is a right to be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, a lawyer should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. A lawyer declining representation should assist in obtaining the services of another lawyer qualified in the particular field and able to act.</p> <p>Alberta – Law Society of Alberta Code of Conduct – Rule 3.01 and commentary [corresponding to the Can. Model Rule]</p> <p>British Columbia – Code of Professional Conduct for British Columbia – [silent – rule 4.1 deliberately omitted]</p> <p>Manitoba – Law Society of Manitoba Code of Professional Conduct – Rule 3.01 and commentary [corresponding to the Can. Model Rule]</p> <p>New Brunswick – Law Society of New Brunswick Code of Professional Conduct – Chapter 4 Rule 17:</p> <p><b>Declining to provide legal services</b></p> <p><b>17.</b> Save where the court orders otherwise, the lawyer may decline to act for a person requesting legal advice of any other professional legal service.</p> <p>Nova Scotia – Nova Scotia Barristers’ Society Code of Professional Conduct – Rule 3.01 and commentary [corresponding to the Can. Model Rule]</p> <p>Ontario – Law Society of Upper Canada Rules of Professional Conduct – Rule 3.01 and commentary [corresponding to the Can. Model Rule]</p> <p>Saskatchewan – Law Society of Saskatchewan Code of Professional Conduct – Rule 3.01 and commentary [corresponding to the Can. Model Rule]</p>
2	United States	<p>American Bar Association Model Rules of Professional Conduct (1983)<sup>101</sup> – Rule 1.2(b) and commentary:</p> <p><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p>...</p> <p>(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's</p>

<sup>101</sup> The Model Rules have been adopted (albeit occasionally with minor variations) in most states: see the ABA’s list of states that have adopted the Model Rules at: [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html).

		<p>political, economic, social or moral views or activities.</p> <p><b>[Comment:]</b></p> <p><b>Independence from Client's Views or Activities</b></p> <p>[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.</p>
3	Bermuda	<p>Barristers' Code of Professional Conduct 1981 – Rules 77 and 78:</p> <p><b>77</b> A barrister may decline to act for a prospective client, except where he has been assigned by a court to act for him, but he should be loath to exercise that privilege if the prospective client is likely to have difficulty in obtaining other legal advice or representation.</p> <p><b>78</b> A barrister should not refuse to act for a person merely because that person is unpopular or notorious or because he is espousing an unpopular cause or because he is charged with a particular criminal offence; nor should he be affected by the fact that powerful interests may be involved in the matter in respect of which he is asked to act.</p>

### C. Countries that do not have the CRR at all

Country		Provision or Guidance
1	Pakistan	<p>Pakistan Legal Practitioners &amp; Bar Councils Rules 1976– Rule 171:</p> <p><b>171.</b> No advocate is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline professional employment. Every advocate upon his own responsibility must decide what business he will accept as an advocate, what cause he will bring into Court for plaintiffs, and what cases he will contest in Court for the defendants.</p>
2	Singapore	<p><i>Chong Yeo v Guan Ming Hardware &amp; Engineering Pte Ltd</i> [1997] 2 SLR 729 (Sing CA) at [43] per Yong Pung How CJ</p> <p>Legal Profession (Professional Conduct) Rules – [silent]</p> <p>But cf. Rule 72:</p> <p><b>Defending accused regardless of personal opinion</b></p> <p><b>72.</b> Subject to these Rules, an advocate and solicitor shall defend any person on whose behalf he is instructed on a criminal charge irrespective of any opinion which the advocate and solicitor may have formed as to the guilt or innocence of that person.</p>

3	Trinidad & Tobago (except for capital cases)	<p>Legal Profession Act 1986, Third Schedule ‘Code of Ethics’ – Paragraphs 9 and 17:</p> <p><b>9.</b> Subject to paragraph 17, no attorney-at-law is obliged to act either as adviser or advocate for every person who may wish to become his client; he has a right to decline employment.</p> <p><b>17.</b> An attorney-at-law shall not except for good reasons refuse his services in capital offences.</p>
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## APPENDIX C – Judicial Quotes about the Cab Rank Rule

### A. England and Wales

Case	Judge	Quote
<b>Barristerial Immunity cases</b>		
<u>Rondel v Worsley</u> <sup>102</sup> [1969]	Lord Reid (at 227D–F)	<p><i>“It has long been recognised that no counsel is entitled to refuse to act in a sphere in which he practises, and on being tendered a proper fee, for any person however unpopular or even offensive he or his opinions may be, and it is essential that that duty must continue: justice cannot be done and certainly cannot be seen to be done otherwise. If counsel is bound to act for such a person, no reasonable man could think the less of any counsel because of his association with such a client, but, if counsel could pick and choose, his reputation might suffer if he chose to act for such a client, and the client might have great difficulty in obtaining proper legal assistance.”</i></p>
	Lord Pearce (at 275A–D)	<p><i>“This has been an essential feature of our law. Many generations of students have been taught to follow Erskine's famous words in which he justified his unpopular defence of Tom Paine:</i></p> <p style="text-align: center;"><i>"From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end."</i></p> <p><i>It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter and that would be the inevitable result of allowing barristers to pick and choose their clients. It not infrequently happens that the unpleasant, the unreasonable, the disreputable and those who have apparently hopeless cases turn out after a full and fair hearing to be in the right and it is a judge's (or jury's) solemn duty to find that out by a careful and unbiased investigation. This they simply cannot do if counsel do not (as at present) take on the less attractive task of advising and representing such persons however small their apparent merits.”</i></p>
	Lord Pearce	<p><i>“I agree with Erskine that it would cause irreparable injury</i></p>

<sup>102</sup> Rondel v Worsley [1969] 1 AC 191 (HL).

Case	Judge	Quote
	(at 276B–C)	<i>to justice if there were any departure from the code which has so long existed, that a barrister cannot pick and choose.”</i>
<u>Saif Ali v Sydney Mitchell &amp; Co (a firm)</u> <sup>103</sup> [1980]	Lord Diplock (at 221C–F)	<i>“But with the virtual disappearance of the dock brief the effect of the cab-rank principle is limited to preventing a barrister from refusing from a solicitor instructions in a field of law within which he practises simply because he does not like the solicitor or the solicitor's client or the nature of a lawful claim or ground of defence of which that client wishes to avail himself. I doubt whether in reality, in the field of civil litigation at any rate, this results often in counsel having to accept work which he would not otherwise be willing to undertake. But even if there are rare cases where it does, this does not seem to me to affect the character of the decisions that the barrister has to make in carrying out instructions that he receives through the client's solicitor. True it is that he may be obliged to accept instructions on behalf of an obstinate and cantankerous client who is more likely than more rational beings to bring proceedings for negligence against his counsel if disappointed in the result of his litigation; but the existence of this risk does not, in my view, justify depriving all clients of any possibility of a remedy for negligence of counsel, however elementary and obvious the mistake he has made may be.”</i>
<u>Arthur JS Hall &amp; Co v Simons</u> <sup>104</sup> [2002]	Lord Steyn (at 678H–679A)	<i>“It is a matter of judgment what weight should be placed on the "cab rank" rule as a justification for the immunity. It is a valuable professional rule. But its impact on the administration of justice in England is not great. In real life a barrister has a clerk whose enthusiasm for the unwanted brief may not be great, and he is free to raise the fee within limits. It is not likely that the rule often obliges barristers to undertake work which they would not otherwise accept. When it does occur, and vexatious claims result, it will usually be possible to dispose of such claims summarily. In any event, the "cab rank" rule cannot justify depriving all clients of a remedy for negligence causing them grievous financial loss.”</i>
	Lord Hoffman (at 686H)	<i>“It is a valuable professional ethic of the English Bar that a barrister may not refuse to act for a client on the ground that he disapproves of him or his case. Every barrister not otherwise engaged is available for hire by any client willing and able to pay the appropriate fee. This rule protects barristers against being criticised for giving their services to a client with a bad reputation and enables unpopular causes to obtain representation in court.”</i>

<sup>103</sup> Saif Ali v Sydney Mitchell & Co (a firm) [1980] AC 198 (HL).

<sup>104</sup> Arthur JS Hall & Co v Simons [2002] 1 AC 615 (HL).

Case	Judge	Quote
	Lord Hope (at 714E–G)	<i>“Its value as a rule of professional conduct should not be underestimated, but its significance in daily practice is not great and the extending of the rights of audience of solicitor advocates who are not bound by the same rule has reduced such importance as it may once have had in the context of discussions about advocates' immunity. I do not think that there is any sound basis for thinking that removal of the immunity would have the effect of depriving those who were in need of the services of advocates in criminal cases of the prospect of obtaining their services. The independent Bars have a long and honourable tradition in the field of criminal justice that no accused person who wishes the services of an advocate will be left without representation. This is a public duty which advocates perform without regard to such private considerations as personal gain or personal inconvenience.”</i>
	Lord Hobhouse (at 739G–740B)	<i>“This is a duty accepted by the independent bar. No one shall be left without representation. It is often taken for granted and derided and regrettably not all barristers observe it even though such failure involves a breach of their professional code. It is in fact a fundamental and essential part of a liberal legal system. Even the most unpopular and antisocial are entitled to legal representation and to the protection of proper legal procedures. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) confirms such right. It is also vital to the independence of the advocate since it negates the identification of the advocate with the cause of his client and therefore assists to provide him with protection against governmental or popular victimisation.</i>  <i>The principle is important and should not be devalued. But the relevant question is whether it provides a justification for the immunity. In my judgment it is properly taken into account as a factor since it restricts the freedom of action of the advocate and casts light upon the true nature of his role. (In the procedure of criminal courts, it goes hand in hand with the restrictions upon the ability of the defence advocate to withdraw during the trial.) But it does not in itself justify an immunity.”</i>
<b>Wasted Costs cases</b>		
<u>Medcalf v Mardell</u> <sup>105</sup> [2003]	Lord Hobhouse (at [51]–[52])	<i>“ 51The starting point must be a recognition of the role of the advocate in our system of justice. It is fundamental to a just and fair judicial system that there be available to a litigant (criminal or civil), in substantial cases, competent and independent legal representation. ...</i>  <i>52 It follows that the willingness of professional</i>

<sup>105</sup> Medcalf v. Mardell [2003] 1 AC 120 (HL).

Case	Judge	Quote
		<i>advocates to represent litigants should not be undermined either by creating conflicts of interest or by exposing the advocates to pressures which will tend to deter them from representing certain clients or from doing so effectively. In England, the professional rule that a barrister must be prepared to represent any client within his field of practice and competence and the principles of professional independence underwrite, in a manner too often taken for granted, this constitutional safeguard. Unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed whether by the executive, the judiciary or by anyone else.”</i>
<b>Appeal against conviction on basis of absence of legal representation</b>		
<i>R v Ulcay</i> <sup>106</sup> [2008]	Sir Igor Judge P (at [40])	<i>“The cab-rank rule is essential to the proper administration of justice. It is not without its critics, although criticism is largely directed at the possible evasion of the principle, rather than the principle itself. ... We simply emphasise that if the cab-rank rule creates obligations on counsel in civil proceedings, it does so with yet greater emphasis in criminal proceedings, not least because to a far greater extent than civil proceedings, criminal proceedings involve defendants charged with offences which attract strong public aversion, with the possibility of lengthy prison sentences, when more than ever, the administration of justice requires that the defendant should be properly represented, so allowing the proper exercise of his entitlement at common law and his Convention rights under article 6...”</i>
<b>Application to remove the other party’s counsel</b>		
<i>Geveran Trading Co Ltd v Skjevesland</i> <sup>107</sup> [2003]	Arden LJ (at [43])	<i>“Moreover, an advocate is subject to the cab-rank rule. If the court too willingly accedes to applications to remove advocates, it would encourage advocates to withdraw from cases voluntarily where it was not necessary for them so to do and the cab-rank rule would be undermined. We accept that the cab-rank rule is a salutary rule. It is an integral and long-established element in our adversarial system. Down the centuries the cab-rank rule has been the way in which unpopular causes have been represented in court.”</i>

## B. The rest of the world

Case	Judge	Quote
<b>Australia</b>		

<sup>106</sup> *R. v. Ulcay* [2008] 1 WLR 1209 (CA).

<sup>107</sup> *Geveran Trading Co Ltd v Skjevesland* [2003] 1 WLR 912 (CA).

Case	Judge	Quote
<i>Giannarelliv Wraith</i> <sup>108</sup> (1988)	Wilson J (at [32])	<i>“Next, there is the ‘cab-rank’ principle; however, important though this principle is in itself, I would not accord it significant weight in considering the question of immunity.”</i>
	Brennan J (at [4])	<i>“Whatever the origin of the rule, its observance is essential to the availability of justice according to law. It is difficult enough to ensure that justice according to law is generally available; it is unacceptable that the privileges of legal representation should be available only according to the predilections of counsel or only on the payment of extravagant fees. If access to legal representation before the courts were dependent on counsel's predilections as to the acceptability of the cause or the munificence of the client, it would be difficult to bring unpopular causes to court and the profession would become the puppet of the powerful. If the cab-rank rule be in decline - and I do not know that it is - it would be the duty of the leaders of the Bar and of the professional associations to ensure its restoration in full vigour.”</i>
	Dawson J (at [15])	<i>“Nor do I see any great force in the argument that immunity is to be justified by the cab-rank principle which requires a barrister to accept instructions to act on behalf of a client, provided he is free, a proper fee is tendered and he practises in the particular jurisdiction. Again like Lord Diplock (in <i>Saif Ali v. Sydney Mitchell &amp; Co.</i>, at p 221), I have never thought the principle to have as much practical operation as is sometimes suggested and it is hardly enough, to my mind, to differentiate the profession of a barrister from other professions.”</i>
<i>D’Orta-Ekenaike v Victoria Legal Aid</i> <sup>109</sup> (2005)	Gleeson CJ, Gummow, Hayne & Heydon JJ (at [27])	<i>“Highly desirable as the maintenance of the cab rank rule is in ensuring that the unpopular client or cause is represented in court, it does not provide a sufficient basis to justify the existence of the common law immunity.”</i>
	Callinan J (at [377])	<i>“It would be wrong for a barrister, or a barrister's clerk in Australia, and it is not the practice therefore in this country, to raise a barrister's fee as a device to avoid an unwanted brief....In this country, I do not doubt that the removal of the immunity would intrude upon and diminish the utility of the valuable cab rank rule. Related to the utility, and therefore the desirability of the retention of the cab rank rule, is the practice in Australia, particularly in this Court, of the undertaking of work on a pro bono basis</i>

<sup>108</sup> *Giannarelli v Wraith* (1988) 165 CLR 543 (High Court of Australia).

<sup>109</sup> *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 (High Court of Australia).

Case	Judge	Quote
		<i>on behalf of indigent parties. Legal aid funds are likely to continue to be scarce. In consequence, the Court's reliance upon the altruism of advocates in offering their services on a pro bono basis is unlikely to decrease. The removal of the immunity has a real capacity to deny the courts access to these services."</i>
<b>New Zealand</b>		
<i>Lai v Chamberlains</i> <sup>110</sup> [2005]	Anderson P (at [106])	<i>"The cab rank principle has conventionally been advanced in support of immunity. It is a professional obligation to facilitate the administration of justice. It is not overstating the obligation to call it one of the foundation stones of a free and democratic society. The right to consult and instruct a lawyer, affirmed by s 24 NZ Bill of Rights Act could not be honoured if lawyers had an entitlement to withhold their services on an arbitrary basis. Immunity is neither a reward for nor a corollary of that obligation to act, but I think there is a real risk that the principle may in due course become undermined by abolition of immunity. The cab rank rule protects minorities, the unpopular, the despised, the outcasts as well as the simply querulous. Although the courageous traditions of the bar may prevail for a generation or so, fundamental protections of a free and democratic society must last immeasurably longer. I am troubled by the tendency to reduce ethical standards to commercial concepts as, it seems to me, some aspects of the debate do. In a decade or two it may be thought that if one would be likely to suffer loss or inconvenience through taking a particular brief, one should not have to accept it. I believe there is an unacceptable risk that the cab rank rule would be eroded by removal of barristerial immunity. This also indicates a public benefit in retention."</i>
<i>Lai v Chamberlains</i> <sup>111</sup> [2007]	Elias CJ, Gault & Keith JJ (at [54])	<i>"The cab-rank principle is an important ethical obligation imposed on legal practitioners, but its practical importance in the administration of justice in New Zealand should not be exaggerated."</i>
	Tipping J (at [158])	<i>"The ethical duty which rests on practitioners to act irrespective of personal preference (usually referred to as the cab-rank principle) remains important. Nevertheless, I cannot see any cause for concern that vulnerability to civil action will inhibit barristers who would not otherwise have been inhibited from accepting a brief on behalf of an unpopular client or cause."</i>

<sup>110</sup> *Lai v Chamberlains* [2005] 3 NZLR 291 (NZ Court of Appeal).

<sup>111</sup> *Lai v Chamberlains* [2007] 2 NZLR 7 (NZ Supreme Court).



Case	Judge	Quote
<b>India</b>		
<u>AS Mohammed Rafi v State Of Tamilnadu</u> <sup>112</sup> [2010]	MarkandeyKatju J (at [16])	<i>“In our opinion, such resolutions are wholly illegal, against all traditions of the bar, and against professional ethics. Every person, however, wicked, depraved, vile, degenerate, perverted, loathsome, execrable, vicious or repulsive he may be regarded by society has a right to be defended in a court of law and correspondingly it is the duty of the lawyer to defend him.”</i>
	(at 32)	<i>“Professional ethics requires that a lawyer cannot refuse a brief, provided a client is willing to pay his fee, and the lawyer is not otherwise engaged. Hence, the action of any Bar Association in I passing such a resolution that none of its members will appear for a particular accused, whether on the ground that he is a policeman or on the ground that he is a suspected terrorist, rapist, mass murderer, etc. is against all norms of the Constitution, the Statute and professional ethics. It is against the great traditions of the Bar which has always stood up for defending persons accused for a crime. Such a resolution is, in fact, a disgrace to the legal community. We declare that all such resolutions of Bar Associations in India are null and void and the right minded lawyers should ignore and defy such resolutions if they want democracy and rule of law to be upheld in this country. It is the duty of a lawyer to defend no matter what the consequences, and a lawyer who refuses to do so is not following the message of the Gita.”</i>

<sup>112</sup> AS Mohammed Rafi v State Of Tamilnadu [2010] INSC 1060 (Supreme Court of India).