**Ref no: 23045-BC08-CRR**

**Bar Council**

**25 April 2023**

**DEBATE ON THE CAB RANK RULE AND LEGAL REPRESENTATION**

**SUBMISSIONS ON BEHALF OF**

**LAWYERS ARE RESPONSIBLE**

**Summary**

1. The position of Lawyers Are Responsible (LAR) is that reference to them and to the declaration of conscience should be struck from the paper produced for the purposes of this debate (Paper). In particular (but without limiting the generality of the submissions on this point developed below), the answers that LAR would give to the key questions identified in the Paper are: (i) the cab rank rule serves the interests of justice and (ii) barristers are not entitled to refuse instructions merely because they disagree with the views or behaviour of the client, and nor should they be. These key questions thus fail to engage with the rationale for the declaration of conscience (Declaration).
2. LAR would welcome the opportunity to engage in discussion and debate with the Bar Council on matters of professional ethics in the context of the existential threat posed by the climate and ecological crises, which is killing people and without appropriate action will kill many, many more people. However, the present debate does not provide an appropriate or fair opportunity to do so.

**The Handbook**

1. Rules C28 – C30 of the Bar Standards Board Handbook (Handbook) provide materially as follows:

“**rC28**

You must not withhold your services or permit your services to be withheld:

.1 on the ground that the nature of the case is objectionable to you or to any section of the public;

.2 on the ground that the conduct, opinions or beliefs of the prospective client are unacceptable to you or to any section of the public; …“**rC29**

If you receive *instructions* from a *professional client*, and you are:

.1 a *self-employed barrister* instructed by a *professional client*; or

.2 an *authorised individual* working within a *BSB entity*; or

.3 a *BSB entity* and the *instructions* seek the services of a named *authorised individual* working for you,

and the *instructions* are appropriate taking into account the experience, seniority and/or field of practice of yourself or (as appropriate) of the named *authorised individual* you must, subject to Rule rC30 below, accept the *instructions* addressed specifically to you, irrespective of:

.a the identity of the *client*;

.b the nature of the case to which the *instructions* relate;

.c whether the *client* is paying privately or is publicly funded; and

.d any belief or opinion which you may have formed as to the character, reputation, cause, conduct, guilt or innocence of the *client*.

“**rC30**

The cab rank Rule rC29 does not apply if:

.1 you are required to refuse to accept the *instructions* pursuant to Rule rC21 …”

1. For present purposes the following provisions of rC21are material:

“You must not accept instructions to act in a particular matter if: …

.10 there is a real prospect that you are not going to be able to maintain your independence.”

1. In deciding whether the cab rank rule applies to new instructions or whether one of the exceptions is engaged and compels them to refuse them, barristers must consider these provisions and use their professional judgement, notwithstanding the views of their client, professional client, employer or any other person. Additionally, they must be able to justify their decisions and actions (rC20).

**Lawyers Are Responsible and the Declaration**

1. On 29 March 2023 a group of lawyers calling themselves “Lawyers Are Responsible” (LAR) signed a public declaration (Declaration) by which, after stating relevant factual background and their strongly held views about the climate and ecological crises, the signatories declared:

“WE DECLARE, IN ACCORDANCE WITH OUR CONSCIENCES, THAT WE WILL WITHHOLD OUR SERVICES IN RESPECT OF:

(i) supporting new fossil fuel projects; and

(ii) action against climate protesters exercising their democratic right of peaceful protest.”

1. A few barristers signed the Declaration. In number they represent approximately 0.1% of the profession.
2. The Bar Standards Board (BSB) is the statutory regulator for barristers, pursuant to the Legal Services Act 2007. Some barrister signatories to the Declaration referred themselves to the BSB in relation to what was perceived in some quarters to be a breach of the Handbook.
3. The broad issue for the BSB in respect of those self-referrals is as follows: what is the appropriate regulatory response to the Declaration?
4. In addressing the above overarching issue, and *if* they determine that the Declaration amounts to a breach of the Handbook, the BSB will no doubt have in mind the wise summation of Lord Hoffmann at para 89 of *R v Jones* [2007] 1 AC 136, as follows:

“My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account. The conditional discharges ordered by the magistrates in the cases which came before them exemplifies their sensitivity to these conventions.”

**The Climate Crisis**

1. The Bar Council’s public position on the climate crisis is as follows:

“The Bar Council recognises the scientific consensus that limiting global heating to 1.5 degrees Celsius is fundamental to preventing the very worst effects of climate change. We also recognise the likelihood that the developing crisis will bring increased global inequality and in turn an increased risk of conflict and global disruption, affecting access to justice and the rule of law.

“The Bar Council believes, for these reasons and as a matter of fundamental social responsibility, that the profession has a duty to join the global effort to mitigate and adapt to the effects of climate change and recognises its central role in supporting its members in doing so.”

1. Chair of the Bar, Nick Vineall KC, amplified this statement last week in the context of the Law Society Guidance on The Impact of Climate Change on Solicitors as follows:

“Alongside the Law Society, the Bar Council is supporting legal professionals in England and Wales who wish to demonstrate climate leadership within their own practice.”

1. As is recorded in the Declaration, in 2021 the International Energy Agency concluded that there could be no new oil or gas fields or coal mines if the world was to reach net zero by 2050, and in April 2022 the UN Secretary General stated that “investing in new fossil fuel infrastructure is moral and economic madness”.
2. Further relevant context for the Declaration is as follows: (i) the UK Government is continuing to grant licences for new coal mines and new oil and gas fields within the UK and (ii) the City of London supports approximately 15% of global carbon emissions[[1]](#footnote-2) (a figure equivalent to more than double the territorial emissions of India). It will be noted that the pledge at para 5(i) of the Declaration is not limited to UK territorial emissions.
3. The IPCC AR6 synthesis report, summary for policymakers, was published on 20 March 2023 (SPM). Such summaries are approved by the governments of states who are members, including the UK Government.
4. The IPCC predicted that it is likely that warming will exceed 1.5°C this century and it is now harder to limit warming below 2°C, with a best estimate of reaching 1.5°C by 2040. Continuing with implemented emissions policies will lead to projected global warming of 3.2°C this century. This is against the background that over 3 billion people live in contexts that are highly vulnerable to climate change. They stated that there is a rapidly closing window of opportunity to secure a liveable and sustainable future for all and the decisions implemented this decade will have impacts for thousands of years.
5. Limiting warming to 1.5°C or to 2°C requires deep global GHG emissions reductions this decade (they are still increasing year on year). In sum, the IPCC advised that rapid and far-reaching transitions across all sectors and systems are necessary to achieve deep and sustained emissions reductions and secure a liveable and sustainable future for all.
6. Whilst the above is all relevant context, key from the perspective of the Declaration is section B.5 of SPM. This provides authoritative confirmation that, prima facie, there can be no expansion of fossil fuel infrastructure, if global heating is to be limited to 1.5°C:

“B.5 Limiting human-caused global warming requires net zero CO2 emissions. Cumulative carbon emissions until the time of reaching net-zero CO2 emissions and the level of greenhouse gas emission reductions this decade largely determine whether warming can be limited to 1.5°C or 2°C (high confidence). Projected CO2 emissions from existing fossil fuel infrastructure without additional abatement would exceed the remaining carbon budget for 1.5°C (50%) (high confidence).” (underlining added)

1. It is submitted that it follows as a matter of logic from the above that the Bar Council’s position is, or should be, that, as a matter of fundamental social responsibility, the profession has a duty not to support new fossil fuel infrastructure projects, within the UK or abroad. There is thus a potential conflict between the cab rank rule and the profession’s wider duty as a matter of fundamental social responsibility.

**LAR’s Mission**

1. LAR’s mission, as stated on our website, is to engage with the profession and more widely on issues of professional ethics at a time when we face the existential threat of the climate and ecological crises: see <https://www.lar.earth/statement-in-response-to-media-coverage/>
2. For reasons expanded upon below, the present debate is not conducive to a constructive examination of these issues, which LAR would wish to engage in with the Bar Council. However, it may be helpful to sketch out LAR’s position on some relevant issues.
3. The climate crisis is the largest threat to human health that we have ever faced. In 2021, over 200 health journals urged world leaders to tackle the “catastrophic harm” from climate change.[[2]](#footnote-3) It also represents an existential threat to our society, as recognised by among others HM Treasury. The LAR signatories take the view, based on the scientific evidence, that expanding fossil fuel infrastructure will kill large numbers of people and lead to other catastrophic consequences, which ultimately threaten the Rule of Law itself. The laws that permit this are unjust; they cause climate injustice.
4. It is the above central belief that also provides the motivation for other groups of professionals campaigning against climate injustice, such as Doctors for Extinction Rebellion, as well as the campaign of non-violent civil disobedience (NVCD) Just Stop Oil.
5. Leaving aside the issue of whether it is in the public interest to prosecute those committing proportionate NVCD at all, we have set out above the traditional democratic approach in the UK to NVCD, involving restraint on both sides, as described by Lord Hoffmann in *R v Jones*. It is important to appreciate that, in terms of policy and practice, the developing criminal law and its enforcement against peaceful climate protesters is increasingly departing from this approach and is becoming increasingly unjust in its application. This matter has been the subject of authoritative reports, such as CIVICUS Monitor’s annual report 2022, which found that there has been a significant deterioration in civic freedoms in the UK, in particular as a result of the Police, Crime, Sentencing and Courts Act 2022 and the Public Order Bill before Parliament.
6. The above provide obvious points of distinction with the application of the cab rank rule in accordance with its primary purpose of enabling access to justice in relation to, for example, representation for defendants in criminal proceedings. The barrister acting in such a case is upholding the right to a fair trial and therefore justice. Along with the rest of the legal profession, LAR are grateful to and support them for doing so. It is only organisations like the Daily Mail and, very regrettably from time to time, members of the Government who seek to criticise lawyers for doing this important work.
7. By contrast, when they act so as to uphold unjust laws, lawyers including barristers are contributing towards injustice. There are a number of different ways in which to analyse the LAR Declaration. The simplest is the “unjust law paradigm”: is it the professional duty of barristers to uphold unjust laws, including for the purposes of argument racist laws under Apartheid? More precisely, how should professional ethics respond to a minority of conscientious objectors, who object to taking on a narrowly defined class of cases on conscientious grounds?
8. We flag below the misattribution in the Paper of the statement and quotation there mentioned to LAR. In fact, LAR’s position is that signing the Declaration is not a breach of the cab rank rule, and that the existing rules (in particular Rule C21.10) provide a mechanism to accommodate conscientious objectors who, after all, currently amount to only 0.1% of barristers. A couple of signatories to the Declaration have adopted the position that they are breaching the cab rank rule, which is their privilege, however it is not the collective LAR position.
9. We take inspiration from the well-established pluralist approach of the common law, which during its long history has responded to conscientious objection with humanity and pragmatism. Conscientious objection in these isles dates back at least as long ago as the English Dissenters of the 17th Century (the same century that saw the British Civil War, in the aftermath of which the cab rank rule was born). For example, the historical origins of the affirmation lie in the refusal of Quakers to swear oaths. Quaker witnesses were not forced to do so, rather, in 1696, following the English Parliament’s Quakers Act 1695, Quakers were permitted to make an affirmation instead of swearing an oath.[[3]](#footnote-4)
10. Since the Daily Mail’s front page article on 24 March, barrister signatories to the Declaration have been directly in the firing line of attacks in the newspapers and trolling on social media. They do not have similar support to that which, for example, the Criminal Bar Association offers. We would suggest that fortitude in the face of such attacks in the media draws on our tradition at the Bar of fierce independence.
11. LAR are fully committed to professional independence. Whenever the barrister members of LAR take on cases, they are committed to achieving the best possible outcome for their clients, within the law and their professional rules. This is part of our great tradition at the Bar. Barristers who have signed the Declaration object to taking on a narrowly defined class of cases, where acting as they always do for their clients would bring their professional duties into conflict with their conscientiously held beliefs about the climate crisis. They are drawing a red line around those cases. This operates to protect and preserve their professional independence at all times, as is envisaged by Rule C21.10.
12. To add some realism to the issue, a signatory to the Declaration was advised by their former pupil master, called in 1979, that similar situations arose from time to time in his chambers. They were dealt with by the clerks advising the solicitor who wished to instruct counsel to argue for a position, to which he or she was vehemently opposed, that they might not wish to instruct said barrister, as they would be likely to lose the case. The Declaration merely makes such a pragmatic solution to a difficult situation more transparent.

**This Debate**

1. The topic, which Members are invited to debate, is the ongoing importance of the cab rank rule and its role in promoting access to justice and the rule of law. Members are invited to focus on two key questions, as follows:
* To what extent are the interests of justice served by the cab rank rule and the duty not to discriminate?
* Should individuals be entitled to decline to accept instructions because they disagree with the views or behaviour of the party seeking to instruct them?
1. The paper produced in support of the debate (Paper) specifically refers to the Declaration. Presumably it is intended to be implied that the above key questions engage directly with the Declaration. If that is the intention, LAR’s position is that they miss the mark.
2. The Paper also wrongly attributes to LAR the following statement, which it claims inaccurately to be a quotation from LAR:

“the barristers now face the prospect of disciplinary action for breach of professional regulations (such as the ‘cab-rank rule’), which require them to take on any case within their competence. Some of them have self-reported to the Bar Standards Board. This is understood to be the first time in legal history that barristers have engaged in a collective act of civil disobedience.”

1. The above statement was not made on behalf of LAR. Their press releases are set out on their website [www.lar.earth](http://www.lar.earth) under the tab “Press”. The origin of the above statement appears to be a press release from Plan B, a Charitable Incorporated Organisation, which is separate from LAR and has a separate website planb.earth. The Plan B press release in question contained quotations from a number of individual signatories to the Declaration, but did not purport to be a press release on behalf of the group LAR. As stated above, their press releases are set out on their own website.
2. The above misattribution highlights a structural difficulty for this debate, insofar as it purports to be a debate on the merits of the Declaration. Individual signatories are entitled to their own views, and to express them. However, they are unable without more to represent the collective views of the group LAR, which need to be agreed by the group. Further, the signatories have each made their own, bespoke submissions to the BSB.

**Preliminary Objection**

1. It is submitted that the reference to the Declaration should be struck from the Paper, for the reasons that follow.

*Respect for the regulatory process*

1. Whether or not signing the Declaration amounts to a breach of the Handbook is a serious regulatory matter between individual signatories to the Declaration and the BSB. Appropriate respect for that process would be shown if the Bar Council refrained from prejudging the outcome of the proper regulatory procedure. Therefore, any debate on the merits of the Declaration should be postponed until after the regulatory process has been completed.

*Justice should be done and seen to be done*

1. The fact that LAR/signatories to the Declaration have not been informed of or invited to attend the debate before this meeting serves to amplify the unfairness, actual or apparent, of a “show trial” on the merits of their individual positions *vis a vis* their regulator, in their absence.

*A straw man*

1. In any case, LAR agree that the cab rank rule and the duty not to discriminate set out in the Handbook contribute towards ensuring access to justice for all, which is a value that LAR share with the profession as a whole.
2. LAR do not contend that a barrister should be entitled to decline to accept instructions merely because they disagree with the views or behaviour of the party seeking to instruct them. It is, we submit, clear that the above is not LAR’s position, which position would be tantamount to calling for the abolition of the cab rank rule, which LAR are emphatically not calling for. Viz., the Declaration is couched in terms of conscientious objection. LAR’s press releases on their website make clear that the collective position of the group is an objection to serving unjust laws which cause climate injustice and ultimately threaten the Rule of Law itself.
3. In short, the framing of the Paper is either a careless or perhaps a tactical mischaracterisation of LAR’s position, a straw man.

*The unsoundness of the thin end of the wedge argument*

1. If it is intended to be implied that the Declaration amounts to the “thin end of the wedge”, with respect, this line of argument is legally and historically unsound. It is legally unsound because our law recognises that a conscientiously held belief, that mankind is heading towards catastrophic climate change and everyone is under a moral duty (*a fortiori* that individuals should be free to decide on conscientious grounds) to lead their lives in a manner which mitigates or avoids that catastrophe for the benefit of future generations, is capable of being a philosophical belief for the purposes of (inter alia) Equality and Human Rights legislation: see *Grainger pls v Nicholson* [2010] ICR 360, EAT (Burton J).
2. It is also historically unsound. In this regard, we remind the meeting that Oliver Wendell Holmes, the often cited US judge, stated of the common law that:

“The life of the law has not been logic; it has been experience... The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”[[4]](#footnote-5)

1. The well-established pluralist approach of the common law is to respond to conscientious objection with humanity, pragmatism and a keen appreciation of history. It is not in accordance with our tradition to punish the conscientious objectors severely “pour encourager les autres”. We have referred above to the origin of the affirmation for witnesses. There are many other historical examples. We trust that the BSB will approach the self-referrals in this light.

*Project fear*

1. Further, many of the views expressed within the profession that are antithetical to the Declaration amount to “project fear”. Is the cab rank rule really such a fragile edifice that 0.1% of the profession conscientiously objecting to accepting instructions in two narrowly defined classes of case threatens to bring it tumbling down? We submit not.

*Basic fairness*

1. Insofar as the terms of the debate as set out in the Paper imply that LAR’s position is in substance as set out in the second “key question”, this is a serious allegation that is advanced by insinuation. Basic fairness requires that such a serious allegation is advanced in plain terms, with a proper explanation of the grounds on which it is advanced, and that a fair opportunity is given to answer these grounds.

**Conclusion**

1. In conclusion, for the reasons set out above, it is not appropriate for the Bar Council to debate the merits of the Declaration at the present time. LAR thus submit that the reference to the Declaration should be struck from the Paper.
2. LAR would welcome the opportunity to engage in discussion and debate with the Bar Council on matters of professional ethics in the context of the existential threat posed by the climate and ecological crises. However, we humbly request that this be done at a time that does not put further pressure on junior members of the bar who have shown moral courage in signing the Declaration (which one can recognise regardless of whether one agrees with their position) and under a procedure conducive to a constructive examination of these important issues.

LAWYERS ARE RESPONSIBLE

24 April 2023

1. <https://carbontracker.org/uk-net-zero-2050-good-intentions-but-arent-we-missing-something/> [↑](#footnote-ref-2)
2. <https://www.bmj.com/content/374/bmj.n2177> [↑](#footnote-ref-3)
3. F W Maitland, *The constitutional history of England: A course of lectures delivered by F. W. Maitland* (1908/2008) [↑](#footnote-ref-4)
4. OW Holmes, *The Common Law* (1881), p. 1 [↑](#footnote-ref-5)