

BAR STANDARDS BOARD

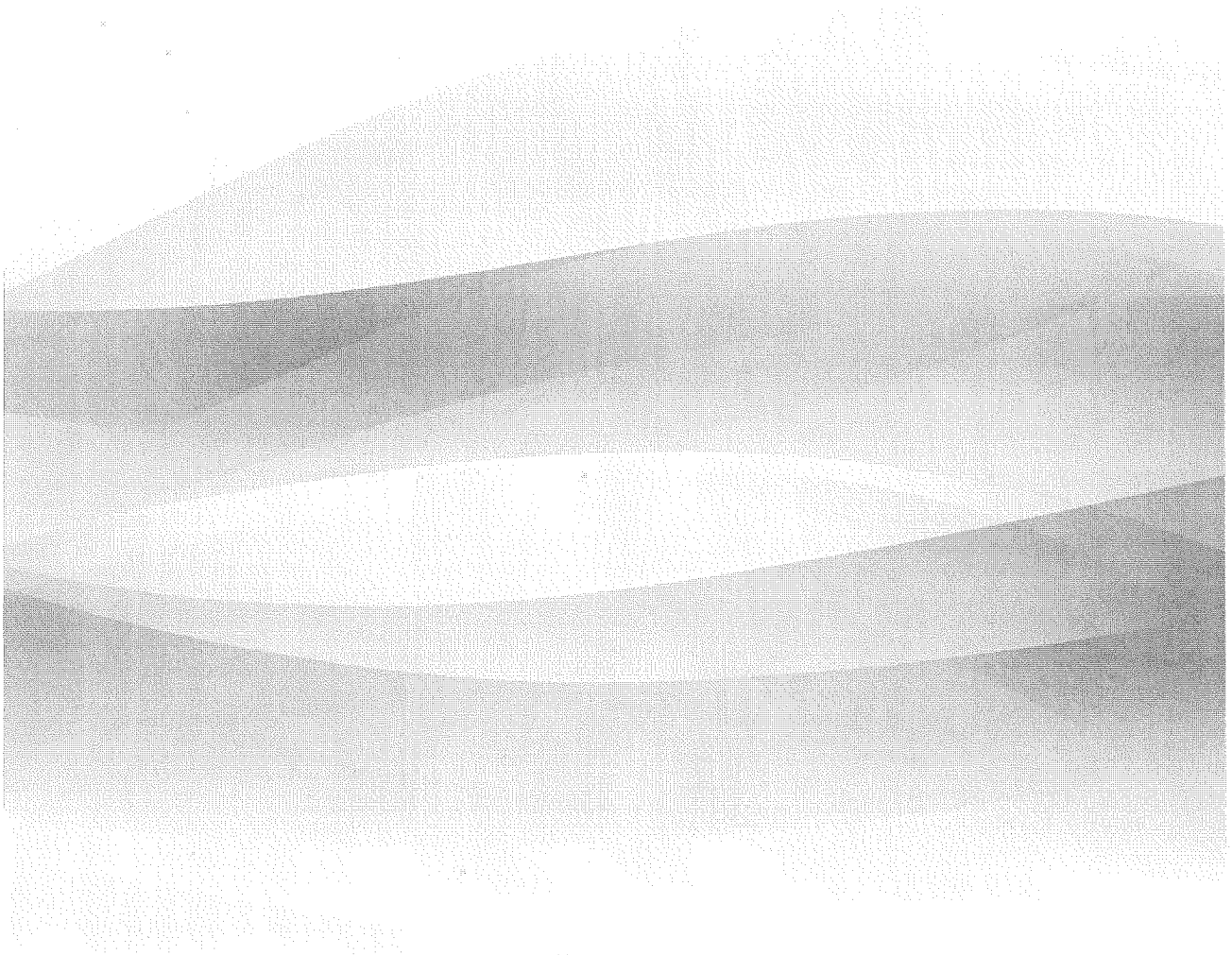
**APPLICATION FOR APPROVAL TO AMENDMENT OF CAB
RANK RULE – NEW CONTRACTUAL TERMS**

October 2011

ANNEX 3

2010 Consultation and Response Form

April 2010



Consultation

Contractual Terms of work

for the supply of legal services by Barristers to Solicitors



PROPOSED CHANGES TO THE BAR CODE OF CONDUCT

CONSULTATION PAPER

Introduction

1. This consultation paper seeks the views of interested parties **by the 31 July 2010** on proposals to introduce new contractual terms on which self-employed barristers practising in England and Wales are instructed by solicitors on behalf of private clients and to amend the Bar's Code of Conduct ("the Code"). Subject to the outcome of this consultation process, it is the intention of the Bar Council and the Bar Standards Board to apply to the Legal Services Board for approval under the Legal Services Act 2007 of the proposed changes to the Code that are explained in this document.
2. Put shortly, the Bar Council considers that the current basis on which barristers are engaged by solicitors in privately funded work is both outdated and unsatisfactory. The present, non-contractual, honorarium basis of payment is an anachronism and has long been obsolete. It fails to address the need for clarity in relation to the professional obligations of barristers and solicitors to each other and to the lay client. It also fails to provide, for solicitors, barristers and the lay client, an effective method of enforcement of rights and obligations and, as a consequence, has an adverse effect upon strength and diversity of the Bar, with many barristers being faced with unacceptable delays in collecting fees and, in many cases, having to write off significant amounts owing for want of an effective enforcement process. This is a particularly acute problem for barristers in the early years of practice – especially those with limited means.
3. For these reasons, the Bar Council is strongly of the view that the basis on which barristers are engaged by solicitors in matters which are not publicly funded¹ must change in order to maintain access to justice and to promote a strong, competitive and diverse legal profession.
4. This paper accordingly explains the current basis on which barristers in England and Wales are instructed, the issues which arise and the changes which the Bar Council now proposes, including the consequential amendments that will have to be made to the Code to implement the proposals and make them effective. It goes on to ask for views and comments on a number of specific issues, but consultees and other interested parties are encouraged to comment on any aspects of the proposals. All views and comments will be carefully considered and feedback will be provided on request.

The Current Position

¹ Work which is publicly funded and work from sources other than solicitors is governed by other provisions and is not affected by these proposals, except in one respect dealt with below.

5. The historical rule of law that prevented barristers from entering into contracts for the provision of their services was abolished by statute in 1991². However, that does not mean that barristers actually enter into binding contracts with solicitors. At present, the default position is that barristers are instructed by solicitors on non-contractual (i.e. non legally enforceable) terms known as "Terms of Work on which barristers offer their services to Solicitors and the Withdrawal of Credit Scheme 1988 as amended" ("the Terms of Work"). These terms are set out in Annexe G1 of the Code. A copy of them is enclosed as Annexe 1 to this consultation paper.
6. In general, the Code provides that a barrister who receives instructions from a solicitor cannot refuse to act simply because he will be engaged under the Terms of Work. Such a refusal would be a breach of part VI of the Code, which contains the well known "cab rank rule," under which barristers are only permitted to refuse instructions in a limited number of circumstances³. A barrister may of course propose that his instructions be governed by some other terms, such as the Contractual Terms 2001⁴, but the solicitor has no obligation to accept such terms and can insist on the use of the Terms of Work.
7. The effect of this is that, at present, almost all privately funded work performed by barristers in England and Wales is performed under a non-enforceable arrangement. For the reasons set out in the following paragraphs, the Bar Council considers it wholly inappropriate for this position to continue and propose to shift the "default" position to an enforceable contractual basis.
8. The Terms of Work and the rarely used contractual 2001 Terms suffer from numerous deficiencies. The most serious are that:
- a. they are extremely complicated and the procedures under them are cumbersome and lengthy;
 - b. they are not readily understood by the lay client of the instructing solicitor or by the public in general;
 - c. the Terms of Work are non-contractual, which means that none of their terms can be enforced through the Courts. Disputes as to fees can only be resolved by agreement;
 - d. this lack of enforceability can increase the delay and cost of resolving such disputes, for the barrister, the solicitor and the lay client;
 - e. since barristers operating under the Terms of Work are unable to sue for their fees, they may suffer considerable delay in the collection of undisputed fees, or may even go unpaid for some of their work. This operates contrary to the public interest as it

² Courts and Legal Services Act 1991, section 61.

³ See Annexe 2.

⁴ This is a contractual version of the Terms of Work, introduced in 2001 ("the 2001 Terms"). Under the 2001 Terms, which largely follow the format of the Terms of Work, solicitors and barristers can specifically agree to be subject to a legally binding and enforceable contract. The 2001 Terms are set out in Annexe G2 of the Bar's Code of Conduct and a copy of them is enclosed as Annexe 3. In practice they are rarely used.

can put younger and more vulnerable barristers at a serious economic disadvantage. Those from disadvantaged backgrounds are generally less able to bear the financial burden to which the Terms of Work expose them. The Terms of Work accordingly make it more difficult to attract and retain a strong and diverse entry to the profession.

9. The two informal methods available to barristers for securing payment for work done under the Terms of Work are both indirect and inadequate. These are:
- a. complaints to the Law Society (now to the Solicitors' Regulation Authority); and
 - b. the use of the Bar Council's Withdrawal of Credit Scheme.

10. The Law Society ceased to accept complaints on the basis of non-payment of barristers' fees in 1998 and removed the professional obligation upon solicitors to pay barristers' fees in July 2007, on the introduction of the Solicitors' Code of Conduct. However, one of the present Core Duties set out in the Solicitors' Code of Conduct is that a solicitor must act with integrity in all his professional dealings, with clients, the court, other lawyers and the public (Rule 1.02) and in certain circumstances, the threat of a possible finding of misconduct by the Solicitors' Disciplinary Tribunal for breach of this rule may encourage payment. However, it is not appropriate for a formal disciplinary system to be used as an indirect method of enforcing a non contractual obligation.

11. Since it is in effect impossible for barristers themselves to invoke the solicitors' disciplinary code as a means of encouraging or compelling solicitors to pay fees due under the Terms of Work, a barrister's only remaining remedy is to lodge a complaint to the Bar Council under the Withdrawal of Credit Scheme. This procedure was not designed primarily as a means of recovering barristers' fees.

12. The Withdrawal of Credit Scheme was designed to protect all barristers from solicitors who consistently fail to pay barristers' fees for no good reason. The ultimate sanction under the scheme is that, once a solicitor is placed upon the Withdrawal of Credit scheme list, it is a matter of professional misconduct for *any* barrister to accept instructions from that solicitor without obtaining payment in advance. The scheme does not therefore have any direct effect as regards the payment of outstanding fees, although in many cases, the threat of naming a solicitor under the scheme also has the additional effect of securing fee recovery,⁵ but the Withdrawal of Credit Scheme is both a cumbersome and indirect means of securing the payment of outstanding fees.

⁵ In outline, the Withdrawal of Credit Scheme works as follows: the list produced under the scheme contains the names of solicitors in respect of whom complaints of unpaid fees have been upheld. Thereafter, in essence, barristers are only able to accept work from such solicitors if payment is made with the brief or instructions, or if the work is covered by full publicly funded certificates. The threat of having their names entered on the list is often sufficient to encourage solicitors to pay outstanding fees. Where there is a genuine dispute on the question of fees, a complaint under the scheme can lead to the appointment of a Joint Tribunal, with the Law Society and the Bar Council each nominating one member, to adjudicate on the dispute between barrister and solicitor. This, however, can only be invoked if both parties agree and is not appropriate where the fees are simply unpaid, without any dispute between the parties.

13. However, the Law Society has indicated that it may well seek to challenge the validity of the Withdrawal of Credit Scheme on competition grounds.

14. To summarise: the working relationship between barristers and solicitors in privately funded work is governed by an antiquated and inadequate system which does not promote access to justice. The Bar Council believes that it is high time that a more modern and efficient system is introduced.

Proposed Changes

15. The Bar Council proposes that:

- a. a new basic form of legally binding contract as set out in Annexe 4 (“the New Contractual Terms”) be provided for in the Bar Code of Conduct, which, the Bar Council would recommend be used by barristers and solicitors. It is anticipated that, in the absence of specific agreement in any particular case, the New Contractual Terms will operate as the de facto default terms between solicitors and barristers;
- b. the New Contractual Terms would set out the respective responsibilities of the solicitor and barrister clearly and succinctly, thereby protecting and promoting both the public interest and that of consumers and the maintenance of professional standards and principles. They would provide for the proper and prompt execution of the work, create liability for the payment of fees and a clear means of enforcement. They would also facilitate dispute resolution by way of a Voluntary Joint Tribunal, if the parties preferred such a mechanism to that of the courts;
- c. the solicitor and barrister would be free to negotiate and agree further or different terms in addition to or in substitution for those in the New Contractual Terms and to amend them as they see fit;
- d. the existing Terms of Work and the 2001 Terms reproduced in Annexes G1 and G2 of the Bar Code of Conduct be abolished;
- e. the Withdrawal of Credit scheme list be abolished and, with that, the prohibition on barristers accepting work on credit from solicitors named on that list;
- f. a scheme to maintain an Advisory List of Defaulting Solicitors would be maintained by the Bar Council, with that scheme also being used in certain circumstances to deal with defaults in publicly funded matters; and
- g. the necessary consequential changes be made to the Bar Code of Conduct as set out in Annexe 5.

16. The anticipated effect of these proposed changes, if implemented, will be that, in most non publicly funded matters, barristers will be engaged by solicitors under a binding contract which

will set out the basic legal obligations and responsibilities of both parties, but leave the parties free to negotiate the price for the barrister's services and any other specific terms that they consider appropriate. *It is important to note that it is not proposed that the rates of barristers' fees be stipulated in the New Contractual Terms. This is always left as a matter of negotiation between the individual instructing solicitor and barrister, thus promoting competition in the provision of legal services.*

17. As the "Cab Rank Rule" in the Code makes specific reference to the Terms of Work, it will be necessary to make amendments to the Code to reflect the introduction of the New Contractual Terms, so that barristers who are offered work on the New Contractual Terms are subjected to the Cab Rank Rule. In other words, the Code will be amended so that barristers will be obliged to accept instructions when a solicitor offers them on the New Contractual Terms, provided that no other provision of the Code permits or requires a barrister to refuse. Conversely, it is proposed that the Code will also provide that a barrister will **not** be obliged to accept instructions if they are not offered on the New Contractual Terms.

18. It is anticipated that many barristers will make it clear in advance of the acceptance of instructions that they intend to contract on the New Contractual Terms. However, it should be stressed that barristers and solicitors will always be free to negotiate whatever terms they consider appropriate and, indeed, to agree no terms at all.

Consultation

19. The Bar Council is seeking the views of the individuals and organisations whose names are set out in Annexe 6 on the following issues and on any other issues that they consider relevant. In addition, the views of any other interested parties who wish to comment would be welcomed.

Issue 1: Introduction of New Contractual Terms and Abolition of the Existing Arrangements.

20. The Bar Council is strongly of the view that the professional relationship between barristers and solicitors should be placed on a modern and more commercial footing, using contracts which provide for clear standards and allow solicitors and barristers to deal with disputes in the same way as all other professions.

21. The present, non-contractual, honorarium basis of payment is an anachronism and has long been obsolete. It fails to address the need for clarity in relation to the professional obligations of barristers and solicitors to each other and to the lay client. It also fails to provide, for solicitors, barristers and the lay client, an effective method of enforcement of rights and obligations and, as a consequence, has an adverse effect upon strength and diversity of the Bar, with many barristers being faced with unacceptable delays in collecting fees and, in many cases, having to write off significant amounts owing for want of an effective enforcement process.

22. The proposed changes would provide clarity for lay consumers of legal services by improving understanding of the manner in which barristers' services are provided. By providing barristers with an enforceable right to be paid, they would alleviate the problems outlined in

paragraph 8(e) and support and encourage an independent effective and diverse Bar. Furthermore, as barristers and solicitors will be no less free than they are at present to contract on any terms they see fit (see Issues 2 and 3 below)⁶, the proposed changes would have no anti-competitive impact. In fact, the proposed move away from the Terms of Work as the usual basis for the provision of barristers' services to contractual terms in every case is more likely to increase competition.

Question 1

- a. Should the existing (non-contractual) Terms of Work and the (contractual) 2001 Terms now be abolished?*
- b. If so, should they be replaced by the proposed New Contractual Terms?*
- c. If the answer to either a. or b. above is in the negative, what alternative suggestions do you have?*

Issue 2: The New Contractual Terms as de facto Default Terms

23. By custom and practice, combined with the "cab rank rule" contained in the Code, the (non-contractual) Terms of Work are the standard terms upon which barristers accept instructions from solicitors, though barristers and solicitors are free to accept different terms if they so wish, including the (contractual) 2001 Terms.

24. In some instances, barristers and solicitors already agree terms for a particular matter prior to the barrister's carrying out his or her work. This is most likely to occur between the larger commercial solicitors' practices and established members of the Bar in respect of major cases. However, in most instances, barristers and solicitors do not have the luxury of the time or resources necessary to negotiate individual agreements for each piece of work. Typical scenarios would be the last minute instruction, rung through to chambers the evening before a court hearing, or the busy small firm of solicitors dealing with many urgent matters at the same time and requiring urgent advice just before a deadline.

25. The Bar Council is anxious to avoid the situation in which the Terms of Work are withdrawn but are not replaced, or in which barristers are obliged by the Cab Rank Rule to accept disadvantageous contractual terms proposed by solicitors. If there were no default terms, a separate agreement would need to be reached in respect of each set of instructions to a barrister. If that were the case, it would be more likely that nothing would be expressly agreed and as a result there would be no clarity regarding the respective obligations and professional responsibilities of solicitors and barristers, no clear means by which to ensure the proper and prompt execution of the work or by which to determine the level of fees payable, the date for payment, the liability for that payment and its enforcement. All of these matters would be potential areas for dispute. Clarity and certainty in the terms between solicitors and barristers would not only assist the barrister and

⁶ It is intended that the New Contractual Terms should apply in default of any other agreement which the parties are free to enter into.

solicitor, but also the solicitor's lay client, who should have a full picture of the anticipated cost of engaging a barrister and the terms of that engagement.

26. Furthermore, were it necessary to agree separate terms or to imply such terms in relation to each and every set of instructions given to a barrister, it would be all but impossible to maintain the Cab Rank Rule. The Cab Rank Rule, which is set out in part VI of the Code, prevents a barrister from refusing instructions on the grounds that the nature of the case is objectionable to him or to any section of the public, or that the client's conduct, opinions or beliefs are unacceptable to him or to any section of the public, or that the source of funding, properly given, is unacceptable to him. A barrister can only refuse instructions under the Cab Rank Rule on the narrow grounds stipulated in the Code.⁷ The Rule is a formidable tool in ensuring equal access to justice and promoting competition in the provision of legal services.

27. The Bar Council accordingly intends to advise barristers to consider adopting the New Contractual Terms and, where practical, to draw the attention of solicitors to them before accepting work. It is likely that many barristers will adopt the New Contractual Terms as their standard terms. That, coupled with the proposed changes to the Code (see Issue 3 below), is likely to make the New Contractual Terms the de facto "default" terms on which solicitors engage barristers for privately funded work.

Question 2

- a. *Do you agree that the draft New Contractual Terms should become the de facto default terms of work for barristers, in the absence of alternative terms having been agreed?*
- b. *If not, what alternative(s) do you suggest?*

Issue 3: Changes to the "Cab Rank Rule"

28. As described in paragraph 25 above, the Cab Rank Rule prevents a barrister from refusing instructions unless one of the narrow grounds specified in the Code applies.

29. In the interests of improving access to justice, the Bar Council believes that the Cab Rank Rule must be maintained, but also believes that it is necessary to propose a further exception to it: namely that, if the instructing solicitor insists on terms other than the proposed New Contractual Terms, the barrister should be entitled under the Code to refuse the instructions. Without that exception, a barrister could be faced with having to accept instructions under the Cab Rank Rule on terms imposed upon him without any free negotiation. In extreme situations, such imposed terms might impede the proper execution of the barrister's work. Such a situation would be adverse to the public interest and contrary to the principle of encouraging a strong and effective legal profession. However, as already mentioned, the likely effect of having this new exception to the

⁷ Examples are where the barrister considers that the matter is beyond his competence or where he has a conflict of interest.

Cab Rank Rule is that the New Contractual Terms would generally operate as default terms, unless barristers and solicitors took active steps to negotiate other terms.

Question 3 *Should the Code be amended as proposed so that barristers are not obliged to accept instructions other than on the New Contractual Terms?*

Issue 4: Withdrawal of Credit

30. The Bar Council proposes, in abolishing the Terms of Work and the 2001 Terms, to remove the prohibition on barristers from accepting work on credit from solicitors named on the Withdrawal of Credit Scheme list. Instead, the creation of an Advisory List of Defaulting Solicitors is proposed, which will list solicitors on the abolished Withdrawal of Credit Scheme list at the date of abolition, together with solicitors who fail to pay judgments obtained by a barrister for outstanding fees, or who fail to pay an Award made by a Voluntary Joint Tribunal.⁸

31. The Code currently obliges a barrister to accept any instruction from a solicitor unless one or more of the specific exemptions to the Rule apply. Those exemptions include the situation in which the instructing solicitor is listed on the Withdrawal of Credit list and is only offering the work on credit. In that situation, the Code prohibits barristers from accepting such instructions. With the introduction of the New Contractual Terms and the consequent ability of barristers and solicitors to use the court to resolve fee disputes, the Bar Council considers that the Code should be amended so as to remove this prohibition. Accordingly, barristers will be permitted, but not obliged, to refuse instructions offered on credit terms by solicitors on the new Advisory List of Defaulting Solicitors. This change will promote competition in the provision of legal services.

32. The procedure to be adopted before a solicitor could be placed on the proposed Advisory List of Defaulting Solicitors is as follows. The Bar Council would, following the receipt of a complaint from a barrister, contact the solicitor in an attempt to establish the facts. If, after considering representations from the barrister and solicitor concerned, it appeared that the solicitor had failed to pay an amount awarded by the court to the barrister in respect of outstanding fees, or had failed to satisfy an award made by the Voluntary Joint Tribunal, the Bar Council would, in the absence of extenuating circumstances, place details of the solicitor on the Advisory List of Defaulting Solicitors. As with the current Withdrawal of Credit List, the circulation of the Advisory List of Defaulting Solicitors would be limited to barristers and their clerks, the Solicitors' Regulation Authority, the Law Society, certain Court officers and the named solicitors.

33. Another outcome of placing solicitors on the List would be that the Bar Council would consider whether to lodge a complaint with the Solicitors' Regulation Authority on the grounds that the solicitor has caused loss of public confidence in the solicitors' profession.

34. The purpose of maintaining the Advisory List of Defaulting Solicitors is twofold:

⁸ The Voluntary Joint Tribunal already exists as a service provided by the Bar Council and the Law Society to enable fee disputes between a barrister and his instructing solicitor to be resolved by an independent body comprising a member appointed by the Law Society and a member appointed by the Bar Council.

- a. to provide a warning list for barristers faced with a requirement to accept instructions from solicitors under the Cab Rank Rule. The Bar Council is of the view that a barrister should not be obliged to accept instructions from a solicitors' practice known to be such serial defaulters of payment that they are placed on the Advisory List of Defaulting Solicitors. Other professionals are entitled to take into consideration the creditworthiness of a prospective client. The proposed amendment to the Cab Rank Rule is therefore a compromise intended to maintain the interests of the public and the consumer in access to justice and competition in the provision of legal services, whilst providing a safeguard for barristers against having to work for solicitors who have regularly failed to pay fees.
- b. to identify the very small minority of solicitors' practices who default frequently on their obligations to pay barristers' fees, despite court judgments and/or awards of joint tribunals with which the solicitors have voluntarily agreed to comply. In identifying those solicitors, further investigation can be carried out to establish whether a complaint should be made to Solicitors' Regulation Authority. This clearly promotes the maintenance of professional principles and standards.

35. The proposed scheme for the Advisory List of Defaulting Solicitors is in Annexe 7. Also included are the Voluntary Joint Tribunal on Barristers' Fees Rules and the Scheme for complaining to the Bar Council for Publicly Funded Matters.

36. Whilst the deletion of the prohibition on barristers from accepting work from known bad payers removes one protection for barristers, the Bar Council is of the view that a barrister will have sufficient protection from the proposed New Contractual Terms. The barrister would be able to sue for his fees if necessary, and, with the information on the Advisory List of Defaulting Solicitors, have the necessary information to enable him to choose whether or not to accept instructions in the first place. In making this change, the Bar Council considers access to justice is improved.

Question 4

- a. *Do you think it is appropriate that the existing Withdrawal of Credit Scheme be abolished and replaced with an Advisory List of Defaulting Solicitors?*
- b. *Do you agree that, unless payment accompanies the instructions, barristers should not be obliged to accept work from solicitors' practices named on the Advisory List of Defaulting Solicitors?*
- c. *If you consider that the answer to either a. or b. above should be in the negative, what alternatives do you suggest?*

Issue 5: Application of the Advisory List of Defaulting Solicitors to Certain Publicly Funded Work

37. The New Contractual Terms would only apply to work funded privately or where the instructing solicitor, although paid from public funds, is obliged to pay the barrister direct. A

typical example of the latter category is instructions funded under “Controlled Legal Representation”.

38. The proposed New Contractual Terms would not apply where the barrister is paid directly by the Legal Services Commission as part of the Community Legal Service or as part of the Criminal Defence Service, as the procedures for payment in such matters are quite different. Although in those instances the solicitors do not actually pay the barristers, the solicitors' actions (or inaction) can adversely affect the barrister's ability to obtain payment.

39. At present, barristers are able to lodge complaints under the Withdrawal of Credit Scheme in such publicly funded matters. With the proposed abolition of the Withdrawal of Credit Scheme, the Bar Council proposes that barristers should be able to lodge complaints to the Bar Council under the Scheme for the Advisory List of Defaulting Solicitors for publicly funded matters, but only where solicitors have failed to carry out their obligations and have thus prevented barristers from being paid.

40. The Bar Council considers that to fail to provide a protection mechanism for barristers who remain unpaid in such circumstances could force many barristers out of that market and discourage barristers from undertaking publicly funded work in the future. It would accordingly operate contrary to the goal of encouraging and supporting an effective legal profession.

Question 5 Do you agree that barristers should be able to lodge complaints to the Bar under the scheme for the Advisory List of Defaulting Solicitors for publicly funded matters where barristers are prevented from being paid due to solicitors' failure in carrying out their obligations?

Issue 6: Equality and diversity impact

41. The Bar Council and the Bar Standards Board are committed to promoting diversity and equality throughout the Bar and within their own organisations. They aim to ensure that their processes and procedures are fair, objective, transparent and free from discrimination and believe that the proposals described in this consultation document support those aims. An Equality Impact Assessment is attached at Annexe 9. However, you are invited to say whether you consider that any issues or proposals discussed in this consultation paper might have equality or diversity implications, including implications of discrimination on the grounds of race, gender, disability, religion or belief, sexual orientation and age. We would particularly welcome feedback on whether there are likely to be any negative consequences for any group arising from the proposed changes and how these could be mitigated, or if there are opportunities to promote greater equality.

Question 6

- a. *Do you think there will be any negative consequence for any group arising from the proposed changes and, if so, how might they be mitigated?*
- b. *Do you think that there are opportunities to promote greater equality?*

Queries and Responses

42. If you have any queries or seek clarification on any part of this consultation paper, please contact Janice Marshall of the Implementation Committee secretariat at the Bar Council at the address below.

43. We intend to publish a report on all the responses to this consultation on our website unless a respondent expressly requests that a specific part of the response, or its entirety, should be kept confidential. With confidential responses, we will record the identity of the respondent and the fact that they have submitted a confidential response. If you prefer any part or all of your response to be treated as confidential, please ensure that you advise us accordingly.

44. Responses should be received by the Bar Council by the 31 July 2010 and be emailed or posted to the address below:

Janice Marshall
Bar Council
289-293 High Holborn,
London WC1V 7HZ
DX 240 London Chancery Lane.
email: contractconsultation@barcouncil.org.uk direct line: 020 7611 1375

date: April 2010

Annexes

Annexe 1 - Terms of Work on which barristers offer their services to Solicitors and the
Withdrawal of Credit Scheme 1988 as amended (Annexe G1 of the Bar Code of Conduct)

Annexe 2 – "Cab Rank Rule", Part VI of the Bar Code of Conduct

Annexe 3 – Contractual Terms of Work on which barristers offer their services to Solicitors
and the Withdrawal of Credit Scheme 1988 as amended (Annexe G2 of the Bar Code of
Conduct)

Annexe 4 – New Contractual Terms

Annexe 5 – Current relevant passages of the Code of Conduct and proposed amendments

Annexe 6 – List of consultees

Annexe 7 – Rules relating to the List of Defaulting Solicitors together with the Voluntary Joint
Tribunal on Barristers' Fees Rules and the Scheme for complaining to the Bar Council for
Publicly Funded Matters

Annexe 8 - Definitions

Annexe 9 – Equality Impact Assessment

**Annexe 1 – Consultation on Contractual Terms for the
supply of legal services by barristers to solicitors**

ANNEXE G1

BAR CODE OF CONDUCT

**THE TERMS OF WORK ON WHICH BARRISTERS
OFFER THEIR SERVICES TO SOLICITORS AND
THE WITHDRAWAL OF CREDIT SCHEME 1988**

**THE TERMS OF WORK ON WHICH BARRISTERS OFFER THEIR
SERVICES TO SOLICITORS AND THE WITHDRAWAL OF CREDIT
SCHEME 1988**

(As authorised by the General Council of the Bar on 16 July 1988 and
amended by authority of the General Council of the Bar
on 10 November 1990, 17 July 1999, 24 March 2001 and 17 November 2001)

WHEREAS:

(1) These Terms have been authorised by the General Council of the Bar and are intended to apply (save as hereinafter provided) in any case where a barrister is instructed by a solicitor;

(2) Any solicitor who sends a brief or instructions to a barrister will be deemed to instruct that barrister on these Terms unless and to the extent that the barrister and the solicitor have agreed in writing in relation to the particular matter or generally (a) that the Contractual Terms on which Barristers Offer their Services to Solicitors 2000 shall apply, or (b) to exclude or vary these Terms;

AND WHEREAS:

(3) By the established custom of the profession a barrister looks for payment of his fees to the solicitor who instructs him and not to his lay client;

(4) Except in publicly funded cases a solicitor is personally liable as a matter of professional conduct for the payment of a barrister's proper fees whether or not he has been placed in funds by his lay client;

(5) Where instructions have been given in the name of a firm all partners at that date incur personal liability and remain liable for the payment of counsel's fees incurred on behalf of the firm by a deceased bankrupt or otherwise defaulting former partner of the firm; and

(6) The liability of a sole practitioner and of partners for the liabilities of their co-partners is a continuing one and is not cancelled or superseded by any transfer of the practice or dissolution of the partnership;

General

1 A solicitor may in his capacity as a director partner member employee consultant associate or other agent of a company firm or other body brief or instruct a barrister.

2 In any case where a barrister accepts a brief or instructions from a solicitor in his capacity as a director partner member employee consultant associate or agent of a company firm or other body:

- (1) the solicitor warrants that he is authorised by his company firm or other body to instruct the barrister;
- (2) the obligations of the solicitor under these Terms (including in particular his responsibility for the payment of the barrister's fees) shall be the joint and several obligations of him and that company firm or other body.

Instructions

3 A barrister has the duty or the right in certain circumstances set out in the Bar Code of Conduct to refuse to accept a brief or instructions and these Terms will apply only where the barrister has accepted the brief or instructions.

4 Notwithstanding that a brief or instructions have been delivered to a barrister the barrister shall not be deemed to have accepted that brief or those instructions until he has had a reasonable opportunity:

- (1) to peruse them;
- (2) in the case of a brief to agree a fee with the solicitor.

5 A barrister accepts a brief or instructions upon the understanding:

- (1) that he must and will comply with the Bar Code of Conduct;
- (2) that he will deal with instructions as soon as he reasonably can in the ordinary course of his work
- (3) that he may return the brief or instructions in accordance with the Bar Code of Conduct, and that, if he does so, he will incur no liability to the solicitor under these terms as a result of so doing.

- 6 (1) Where for any reason time is of the essence the solicitor must at the time when he delivers the brief or instructions but separately from the brief or instructions themselves inform the barrister of that fact and of the particular reason for urgency in order that the barrister may decide whether in those circumstances he can accept the brief or instructions. In addition the brief or instructions must be clearly marked "Urgent".
- (2) In the case of publicly funded work, the solicitor must at the time when he delivers the brief or instructions (or if any relevant certificate is not then available to him as soon as reasonably practicable thereafter) supply the barrister with copies of any relevant public funding certificates.

Copies of Briefs and Instructions and Records of Advice

7 A barrister shall be entitled for the purposes of his records (but not otherwise) to retain his brief or instructions or any papers delivered therewith or (if the solicitor requires the return of such brief or instructions and papers) to take and retain a copy of such brief or instructions and papers and of any written advice PROVIDED that nothing shall entitle a barrister to exercise any lien over any brief instructions or papers.

Fees

8 Save in the case of publicly funded work or in the case of a Notified Solicitor a barrister and solicitor may (subject to any rules regarding contingent fees) make such agreement or arrangement between them as to the time or times whether at the time of delivery of the brief or instructions or subsequently thereto or otherwise at which the barrister's fees shall be paid as they may think fit and the barrister's fees shall be paid by the solicitor accordingly PROVIDED that every such agreement or arrangement shall be in writing.

9 Save in the case of publicly funded work or in the case of work the fees for which are to be paid out of a fund but cannot be so paid without an order of the court a barrister may and in the case of fees payable by a Notified Solicitor a barrister (unless and except as otherwise previously authorised in writing by the Chairman) must require his fees to be agreed and paid before he accepts the brief or instructions to which the fees relate.

- 10 (1) Fees and/or charging rates shall be (i) as agreed between the barrister and the solicitor before the barrister commences work under the brief or instructions; or, in default of such agreement, (ii) a reasonable professional rate for the barrister instructed

- (2) The barrister shall submit an itemised fee note not later than three months after the work to which the fee note relates has been done or at the conclusion of the matter in which the barrister is briefed or instructed whichever is the sooner.
- (3) The barrister shall as soon as reasonably practicable comply with a request by the solicitor for a fee note.
- (4) Every fee note shall include the solicitor's reference and (where appropriate) the barrister's case reference number, the barrister's relevant account number for the purpose of receiving payment in publicly funded cases and (if known to the barrister) any relevant public funding certificate number and date of issue.
- (5) If any fees remain outstanding at the conclusion of a case the solicitor shall as soon as reasonably practicable inform the barrister that the case has concluded.

11 In the case of publicly funded work:

- (1) The solicitor and barrister shall respectively take such steps as may be open to each of them to take under the applicable Regulations for the time being in force for the purpose of obtaining payment of the barrister's fees as soon as reasonably practicable;
- (2) The solicitor shall as soon as reasonably practicable comply with a request by the barrister for information by (i) notifying the barrister of the date of issue and number and supplying the barrister with copies of any relevant public funding certificates (ii) notifying the barrister of the date of any order for assessment of costs under the relevant certificate or other event giving rise to a right to such assessment (iii) informing the barrister of the steps taken by him pursuant to paragraph 11(1) hereof;
- (3) The barrister unless such information and an explanation for non-payment satisfactory to him is thereupon received from the solicitor shall then report the facts to the Chairman.

12 In the case of work the fees for which are to be paid out of a fund but cannot be so paid without an order of the court:

- (1) The solicitor shall use his best endeavours to obtain such order or orders as may be requisite to enable payment of the fees to be made as soon as reasonably practicable;
- (2) The solicitor shall as soon as reasonably practicable comply with a request by the barrister for information by informing the barrister of the steps taken by him pursuant to paragraph 12(1) hereof;

- (3) The barrister unless such information and an explanation for non-payment satisfactory to him is thereupon received from the solicitor shall then report the facts to the Chairman;
 - (4) Subject to paragraph 12(5) below, the barrister's fees shall be payable one month after the making of the order of the court required for the payment of such fees out of the fund.
 - (5) In the event of any breach by the solicitor of his obligations under paragraph 12(1) and/or 12(2) above, the fees will be payable forthwith and the amount outstanding from time to time will carry simple interest at the stipulated rate from one month after the date of the letter referred to in paragraph 15(1) hereof until payment.
- 13
- (1) Subject to any such agreement or arrangement as is referred to in paragraph 8 hereof the barrister's fees if and to the extent that such fees have not been previously paid shall unless challenged by the solicitor as hereinafter provided be paid by the solicitor within one month after the fee note relating thereto has been sent to the solicitor whether or not the solicitor has been placed in funds by his client and whether or not the case is still continuing.
 - (2) In the event that the barrister's fees are not paid in full in accordance with subparagraph (1) above, the fees outstanding from time to time will carry simple interest at the stipulated rate from one month after the date of the letter referred to in paragraph 15(1) hereof until payment if that letter includes a statement to that effect.
- 14
- (1) Any challenge by a solicitor to a barrister's fee (whether giving rise to an issue of competence or a dispute on quantum or otherwise) must be made by the solicitor in writing within three months after the first fee note relating to that fee has been sent to him or within one month after such letter relating to that fee as is referred to in paragraph 15(1) hereof has been sent to him whichever is the later.
 - (2) No challenge to a barrister's fees will be accepted either by the barrister or in the case of a complaint by the barrister to the Bar Council of failure to pay those fees by the Bar Council unless:
 - (a) the challenge was made in accordance with paragraph 14(1) hereof; and
 - (b) the solicitor has within 14 days of being requested to do so either by the barrister or by the Bar Council agreed in writing (i) to submit the issue or dispute giving rise to the challenge to the decision of a Tribunal and (ii) to abide by and forthwith give effect to the decision of the Tribunal.

