

BAR STANDARDS BOARD

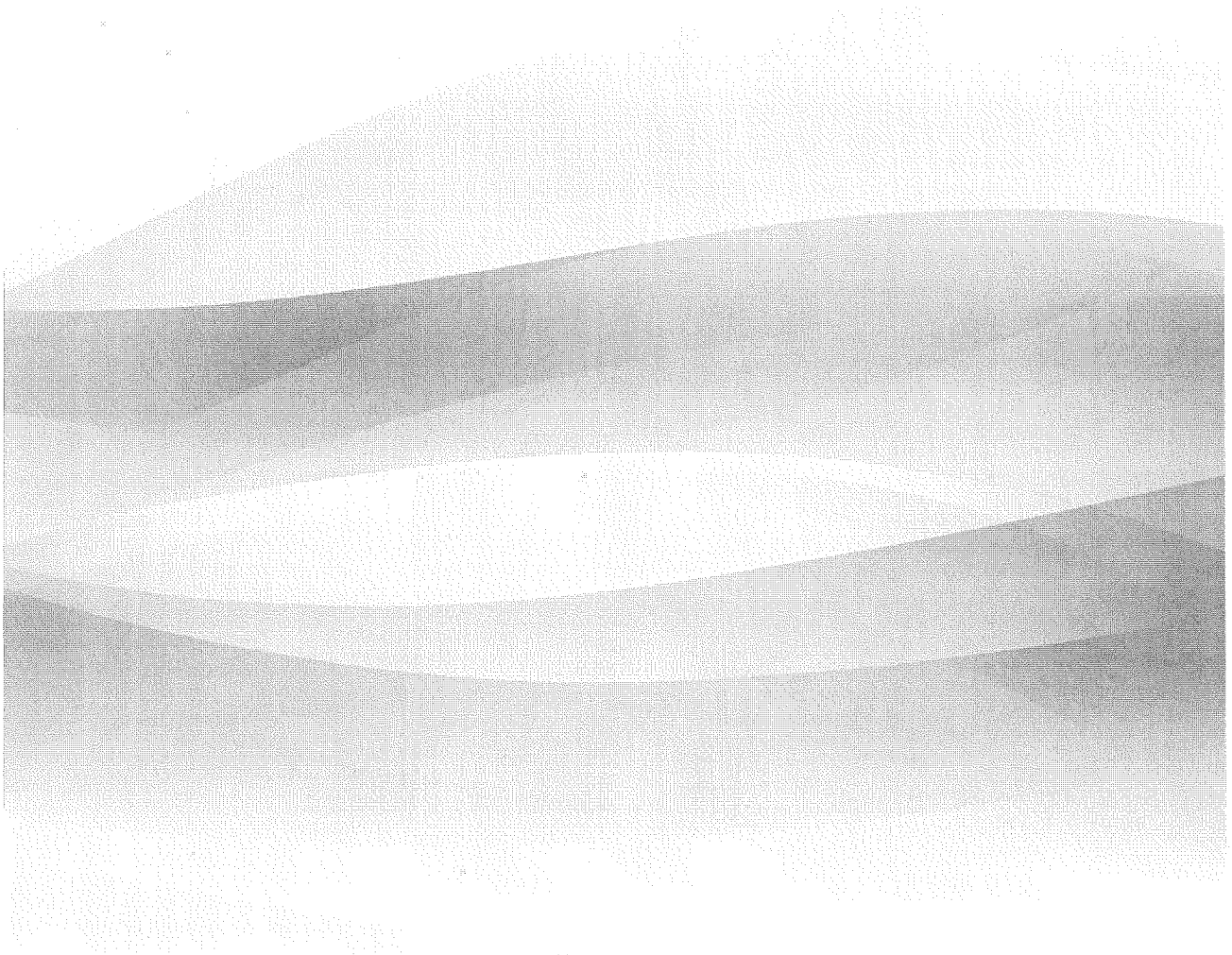
**APPLICATION FOR APPROVAL TO AMENDMENT OF CAB
RANK RULE – NEW CONTRACTUAL TERMS**

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Council considers that the current basis on which barristers are engaged by solicitors in privately funded work is both outdated and unsatisfactory.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.

