

BAR STANDARDS BOARD

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

October 2011

ANNEX 4

Summary of Responses to the 2010 Consultation



Summary of Responses to the Bar Council 2010

Consultation on Contractual Terms of Work for the supply of Legal Services by Barristers to Solicitors

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1 EXECUTIVE SUMMARY

The Bar Council had been working over a number of years to draw up basic contractual terms for barristers taking instructions from solicitors on a privately-funded basis to replace the commonly-used non contractual terms (replicated in Annexe G1 of the Bar Code of Conduct). The new terms are designed to be used as a model terms which can be easily adapted by the parties to meet their particular requirements or to be used in the absence of alternative terms having been agreed. The new terms have the advantage of being transparent, clarifying the obligations of both barristers and solicitors, and enforceable.

Having obtained the approval of the Bar Standards Board to the new scheme and to the necessary changes to the Bar Code of Conduct, the Bar Council undertook a consultation of the Approved Regulators, other interested bodies and the Bar. A list of the consultees is at page 21 and the respondents are listed at page 22. The Consultation Paper and annexes was downloadable from the Bar Council's website and responses could be sent by email or post.

Depending upon the outcome of the consultation, the next step would be to seek the approval of the Legal Services Board to the necessary changes to the Code of Conduct.

The Consultation was sent out at the end of April 2010 and closed on the 31 July 2010. The Consultation was announced by way of a press release to mainstream and legal media. In June 2010, an article by the Sarah Asplin QC, the chairman of the Implementation Committee, was published in Counsel magazine. The Implementation Committee is the Bar Council's Committee leading on the implementation of these new terms.

The detail of the consultation and responses are provided later in this report but the consultation essentially raised the following questions:

- (1) whether the existing Terms of Work and Withdrawal of Credit scheme should be abolished and replaced by the proposed new contractual terms.
- (2) whether the proposed new contractual terms should become the standard basis of accepting instructions in the absence of alternative terms having been agreed
- (3) whether the Withdrawal of Credit Scheme should be replaced with an Advisory List of Defaulting Solicitors, giving barristers the option to accept or refuse instructions from such solicitors
- (4) whether the Advisory List of Defaulting Solicitors should also apply to publicly-funded cases.

A total of 75 responses were received, with many respondents providing helpful drafting alterations to the draft Terms. The Implementation Committee, under the chairmanship of Sarah Asplin QC, has studied each of the responses.

Overwhelmingly, there was agreement that the existing Terms of Work and Withdrawal of Credit Scheme should be abolished and replaced by new contractual terms. It was recognised that the current system is as outdated and unsatisfactory.

Although there was a majority in favour of the new contractual terms becoming the standard terms of engagement for barristers in the absence of alternative terms having been agreed, there was a

number of respondents, particularly from the solicitors' profession, who considered that it would be too restrictive. The Law Society was particularly concerned that it is being proposed that the Cab Rank Rule be amended to enable counsel to refuse instructions should solicitors refuse to use these proposed contractual terms.

The response to the question of whether the Withdrawal of Credit Scheme should be replaced with an Advisory List of Defaulting Solicitors was very mixed. At present, the Bar Code of Conduct prohibits counsel from accepting instructions on credit from solicitors against whom a direction to withdraw credit has been made. It is proposed that the Advisory List of Defaulting Solicitors would only name those solicitors against whom a Court judgement had been made in respect of unpaid fees or there is an unpaid joint tribunal award but, more importantly, barristers would be free to accept or refuse to take work on credit from such named solicitors. There was a strong view that this was a severe weakening of the system to the particular disadvantage of the young Bar. It was argued that, unlike general commerce where other professionals are entitled to take into consideration the creditworthiness of a prospective client, a barrister subject to the obligations of the Cab Rank Rule, has no such protection and many respondents considered that the removal of the Withdrawal of Credit Scheme would leave the profession overexposed to bad debts.

As regards extending such protection to cover instructions covered by full publicly funded certificates, this was generally welcomed.

2 CONSULTATION RESPONSES

A total of 75 responses were received, with many respondents providing helpful drafting alterations to the draft Terms. The Implementation Committee, under the chairmanship of Sarah Asplin QC, has studied each of the responses. Below is a synopsis of the responses received.

Question 1(a) should the existing (non-contractual) Terms of Work and the (contractual) 2001 Terms now be abolished?

	<u>YES</u>	<u>NO</u>
Barristers	31	2
Chambers	13	0
Circuits, Bar Specialist Organisations & Committees	10	1
Other	9	1

The little comment made in response to this question was on the grounds that the existing terms of work should be abolished as they are no longer effective as they might be in supporting the commercial relationship between solicitor and barrister. A minority of respondents thought the change would have no beneficial effect. LCLCBA went further, writing " *There was strong feeling that the existing non-contractual terms should be left open for use by those who wish to use, since the withdrawal of credit scheme provides an inexpensive and effective sanction against non-paying solicitors. The new sanctions in the new scheme seem to be a poor alternative. The overall view is that both schemes should be available, if that were to be feasible. And that depends on whether the withdrawal of credit scheme can be challenged successfully.*"

Question 1(b) if so, should they be replaced by the proposed New Contractual Terms

	<u>YES</u>	<u>NO</u>
Barristers	30	1
Chambers	13	0
Circuits, Bar Specialist Organisations & Committees	10	1
Other	5	5

Again, little comment by supporters of the replacement by the proposed Contractual Terms. Several of those who responded "No" explained that they disagreed with the drafting. For example, **Professional Negligence Bar Association** wrote "No to Q 1(b) as we do not consider that the current draft of the New Contractual Terms should be adopted as it stands".

Law Society – "We have a number of concerns about the new contractual terms which are set out in our answer to Question 3 and we believe that the new Terms should not be introduced in their present form. In our view, indeed, these terms should be no more than guidance."

SRA – "We support the Bar Council's commitment to introduce new arrangements that will "... 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." Greater clarity and improved service for consumers using legal services must be the driver for any changes made. We recognise however that the detail of any new Terms between solicitors and barristers must be capable of supporting improved contractual and non-contractual relations, and greater flexibility for members of both professions to negotiate terms that best suit their commercial set-up. It is with this in mind that we would question the extent to which default Terms (described at paragraph 15a of the consultation paper) represent the most suitable way of achieving this flexibility, particularly where it is proposed that the default Terms would be marketed as de facto."

Question 1(c) If the answer to either a or b is in the negative, what alternative suggestions do you have? Examples of the response are detailed below.

The City of London Law Society wrote " *We agree with the view expressed in the consultation Paper that the present non-contractual basis on which barristers are instructed is anachronistic and should be replaced. Barristers should be instructed in the same commercial manner as all other professionals. We also agree that it is not practicable to negotiate on each occasion that a barrister is instructed the full terms upon which those instructions are given. There should, therefore, be standard terms that barristers and solicitors can, subject to any amendments they wish to make, incorporate into a contract, whether that contract is between solicitor and barrister or between barrister and lay client. The draft contract in Annexe 4 to the Consultation Paper is however not fit to be those standard terms. The contract proposed by the Bar Council is one-sided, and fails to reflect market realities or reasonable client expectations*"

Herbert Smith LLP, solicitors wrote " *We agree that it would be useful for there to be a standard contract between barristers and solicitors with the parties able to negotiate amendments to that contract. It seems to us however that such a contract should be agreed in principle between the Bar Council and bodies representing solicitors (such as the Law Society, City of London Law Society and LSLA) before being put out to general consultation.*

Hogan Lovells wrote " *As a firm, we are not in favour of the proposed default contractual terms, as they give barristers far more protection than solicitors and do not deal with some fundamental problems inherent in the current regime of payment.*

A major problem with the proposal is that it seeks to impose a "one size fits all" solution for a diverse range of situations in which barristers are retained. At one extreme the proposal is designed to protect the young criminal barrister from non-payment of fees in relation, for example, to urgent criminal hearings, where instructions have come from new solicitors with whom they have not yet established a relationship. At the other end it is trying to provide a basis for regulating heavy duty commercial work by barristers for long-standing law firm contacts.

The result is something which is not ideal for either situation. In our view, the draft terms should be confined to criminal work or work beneath a certain value, while for larger, commercial claims, we would advocate simple freedom of contract, where the solicitor and barrister (or his clerk) are free to agree all the terms of instruction from frequency and detail of billing to the actual fees to be charged.

Whilst the current system may not be perfect, in our view, barristers currently benefit from existing arrangements and the pendulum has swung too far in favour of barristers because of a minority of late-paying solicitors. Solicitors are primarily responsible for collecting payment of the client's fees on their behalf, removing the need for barristers to have to chase clients for their own fees. From the viewpoint of

solicitors, it would be far easier if barristers had to invoice the clients direct and then chase them themselves if they did not pay. This is a common practice with expert witnesses and would be a less artificial system.

If, however, the Bar Council decides to press ahead with the new standard terms, we believe they should be amended to make them less one-sided in favour of the Bar."

In addition, the Law Society and the Solicitors Regulation Authority (SRA) were of the view that the terms should be no more than guidance and not as default Terms. The Law Society thought that the introduction of standard terms will have the effect of restricting competition.

Question 2(a) Do you agree that the draft New Contractual Terms should be come the de facto default terms of work for barristers, in the absence of alternative terms having been agreed?

	<u>YES</u>	<u>NO</u>
Barristers	31	1
Chambers	13	0
Circuits, Bar Specialist Organisations & Committees	10	1
Other	4	5

The following comments of **Kate Hallett** were not untypical of those who answered "Yes" to this question : *"I would like to add my voice, as a junior member of the Bar, to the calls for contractual terms. It is extraordinary that barristers are unable to enforce payment: I can think of no other profession where this is the case. This is especially difficult for junior members from less financially advantaged backgrounds. Hardly the image we wish to present in the face of current attempts to encourage diversity. Pressure is put on junior members to accept work in order to benefit chambers as a whole: whilst this may not be right, it is the reality of the situation. Late or non-existent payment simply adds to this burden.*

Even if one is financially comfortable, it is unacceptable not to be able to enforce payment, particularly when it is frequency the cases over which one has expended blood, sweat and tears which do not pay. It is a matter of principle that one should be paid for one's services: it is staggering that barristers simply have to accept non-payment as a matter of course. I therefore throw my weight behind any suggestion that barristers be able to enforce payment. Whether they will or not, due to commercial fears and/or chambers' pressure, remains to be seen."

There were a number of demands that the New Contractual Terms should become mandatory as opposed to de facto default terms.

The City of London Law Society wrote *"The draft contract in Annexe 4 to the Consultation paper is however not fit to be those standard terms"*

The Law Society responded "No" to the Question, adding *"As suggested above, think that it is entirely inappropriate for a Code of Conduct for one professional group to bind others. We doubt that this would be effective as a matter of law and, even if it is, we believe that this is anti-competitive.*

We do not accept the argument that this is necessary for the protection of junior members of the Bar. Every other profession or business needs to devise standard terms of business and we do not understand why

barristers and Chambers are somehow incapable of doing this. A solicitor, by instructing the barrister would be deemed to be accepting the standard terms on sending the instructions or to indicate that they are not accepted. If urgent work needs to be undertaken, then there is an incentive on both sides either to take the barrister's standard terms or to agree alternative terms quickly.

We believe that the problems of uncertainty about contractual terms could be resolved by a requirement that all barristers have standard terms which are advertised on their or their Chambers' website. Heads of Chambers as part of their general duties should ensure that members of Chambers comply with this.

We believe that, rather than prescribe formal terms, the Bar's Code should prescribe the matters that should be dealt with in the contract and ensure that terms are not unreasonable as between barrister and consumer. There should be nothing to prevent the Bar Council issuing guideline terms for barristers to adopt or not as they see fit, but there is no need for any further alternative".

The SRA wrote: "... we understand the Bar Council's reasoning (as explained on pages 6 and 7 of the consultation paper) in seeking to introduce contractual terms that act as a de facto default terms where alternative arrangements between barristers and solicitors do not otherwise exist. We agree in particular with the Bar Council's suggestion that the existence of default terms would bring some clarity to consumers in being able to understand the costs associated with employing barristers. However, we would again highlight the direction of travel evident elsewhere in the wider legal services field, and the drive toward greater professional and commercial freedom to practice in accordance with the reformed legal services market emerging from the Legal Services Act 2007. We would question whether the existence of de facto terms that can be assumed to almost always underpin barrister-solicitor commercial relations is entirely consistent with these moves.

Our preference would be for the focus to be placed on barristers and chambers setting their own standard terms that are right and proportionate for the circumstances of their individual practices and business model. We appreciate entirely that last minute instructions or urgent matters can require swift agreement between solicitors and barristers, but we would advocate that in the emerging legal services world this will be best achieved by individual chambers and practitioners setting out clearly in advance their terms and their business expectations on an individual basis."

Question 2(b) If not, what alternative(s) do you suggest

4 Other organisations made suggestions regarding alternatives, as referred to above.

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?

	YES	NO
Barristers	29	1
Chambers	14	0
Circuits, Bar Specialist Organisations & Committees	9	0
Other	4	4

There was little comment made by those who responded "Yes" to this question. The **Planning Environment & Local Government Bar Association** wrote " *The Bar needs to recognise the reality that barristers rarely these days have independent means, and that as self-employed businessmen and women they should be supported by their professional code to enable them to provide their legal services on the terms that they consider are viable. They should not be obliged to advise or represent a client where there is the possibility that they will not be properly remunerated.*

The Code needs to be amended to reflect the fact that, whilst there is a clear duty not to turn away work because it is publicly-funded in favour of better paying private work, work may nevertheless be returned/declined (even on occasion at the last minute) if in their judgment the instructing solicitor may not pay. (See later re failure by solicitors to discharge their responsibility to obtain payment for the barrister in publicly funded work.)"

The Law Society replied "No" as it was critical of the drafting of a number of the Terms, which it suggests would be unacceptable to the majority of solicitors and to be blatantly in favour of the barrister. The SRA reiterated their concern that the greater emphasis being placed on standardised default terms is not fitting in with the reforms being introduced across the legal services market in England and Wales.

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

	<u>YES</u>	<u>NO</u>
Barristers	25	5
Chambers	12	0
Circuits, Bar Specialist Organisations & Committees	8	2
Other	8	1

Anxieties were expressed, particularly among barristers who responded "No" about the lack of force with the Advisory List of Defaulting Solicitors. For example, **Alaric Watson**, counsel, wrote "The proposal in Q4(a) is acceptable EXCEPT THAT there should continue to be an absolute prohibition on accepting work on credit from solicitors on the Advisory List of Defaulting Solicitors, i.e. that the prohibition that currently pertains under the Withdrawal of Credit Scheme should be retained. Unless the prohibition is retained there will be undue pressure on barristers, especially those at the junior end or with less well-established practices, to accept work on credit from solicitors who, ex hypothesis, have a proven track record of not paying barristers' fees, for whom the threat of being taken to court/the tribunal holds no sway and who do not pay even when a judgment or award is made against them. For all the reasons set out in the Consultation document the WCS is toothless enough; to allow solicitors currently on the blacklist and their successors in kind to carry on with impunity would risk putting more vulnerable members of the Bar at a disadvantage."

12 KBW wrote "The main purpose of responding to this consultation (other than to support its general thrust) is in relation to the proposal at paragraph 15(3) that the corollary of abolishing the Withdrawal of Credit Scheme should be the ending of the prohibition on barristers accepting work on credit. We do not agree that this weakening of the Bar's stance on poor payers is justified by giving barristers the ability to sue solicitors for payment. The Withdrawal of Credit Scheme is only effective to the extent that it is because all

chambers are required to refuse to accept instructions without payment up front as a matter of professional conduct.

If barristers are allowed to decide whether to take on a case from a previously defaulting solicitor, there will inevitably be some barristers who will take the risk of non-payment after the work has been completed. Whilst that is a matter for them it, in our view, considerably weakens the position of the chambers who originally reported the solicitor to the Bar Council. The very fact that a solicitor faces the prospect of being unable to use the Bar without paying up front is often the best weapon for payment of old fees. The proposed change throws that weapon away.

The consultation paper suggests that access to justice and competition for legal services will be improved by the proposal. We do not agree. There is no access to justice issue here at all. A client faced with a solicitor who says that he cannot use counsel without paying up front can (a) change solicitor to one with a better record (b) fund the payment up front himself (c) require the solicitor to make good his earlier professional default.

To the extent that this proposal encourages the provision of legal services, it encourages them in the wrong direction. Rather than supporting barristers who have done a good job and who are struggling to be paid, it encourages those who are prepared to risk trouble tomorrow for the sake of employment today. Why the first barrister should suffer at the hands of the second we cannot fathom. But it will certainly happen unless it is a matter of professional conduct that such work cannot be undertaken on credit.

We did consider that this situation might be altered by the fact that, in future, the original chambers will have had the chance to sue for the barrister's fees but we do not think that is a complete answer. Often the failure to pay fees is blamed on the client's alleged disappointment with counsel's performance when in fact it is a lack of funds that is the problem. If counsel sues for his fees, he will be met with the same defence of professional negligence raised as a set-off to the claim as befalls solicitors, accountants and other professional suing clients for their fees. Whilst some defences will be justified, many will be spurious. By denying the solicitor credit access to the bar, such defences will only be put forward where there is substance to the defence. In practice this will mean that an agreement on counsel's fees will be reached since it is extremely rare that counsel's fees have no value at all.

Furthermore, the prospect of suing solicitors will continue to be a last resort. Where a firm of solicitors instructs a number of barristers in one chambers and the problems regarding fees only apply to one barrister there are going to be considerable issues within chambers about suing a law firm generally seen to be a "good client". A referral to the Bar Council under the current scheme might be equally problematic for the barrister in this scenario. Yet the threat to the solicitor that all barristers have to be paid up front is more likely to achieve resolution of all problematic fees than the threat of being sued by one. A large law firm which uses a number of members of chambers regularly may be confident that the threat of suit is more apparent than real."

The Planning Environment & Local Government Bar Association wrote – *In the absence of anything else – yes.*

There has to be some mechanism which is quicker and more effective in notifying other Members of the Bar (or Chambers) that a firm does not have a good credit record. The problem with the WCS is that it is fairly draconian for both solicitors and other Members of the Bar and this has resulted in a too detailed and lengthy

examination by the Bar Council on whether or not a firm should be denied the luxury of credit when instructing a barrister. (See question 4b below).

We are concerned that what is proposed will not be any swifter in helping Chambers and their Members prevent unacceptable delay in the payment of fees. What a Barrister or his Chambers needs to assess quickly at the time of instruction is "is this firm likely to pay my fees?" Therefore a Clerk, or Member of Chambers, needs to be able to search a list of firms who have either been found to be bad payers or who have a track record of not paying until pressed very hard for payment. The fact that a firm has been put on the Advisory List following extensive investigation by the Bar Council and letters sent along the lines suggested takes up too much time and the outcome often comes too late. What those concerned need to know, at the time the instructions are sent in or at the time when the booking is made, is how many times a particular firm has been reported by how many barristers/chambers, and what the outcome was on each case – i.e. paid after investigation, or simply "under investigation". This would throw up the regular abusers of credit. This list could be held on the Bar Council web site. It would then be a matter of judgement for the individual whether or not they wish to accept the risk. (see question 4b below)".

The SRA wrote "We agree with the proposal to remove the current obligation upon barristers to refuse instructions from solicitors named on the Withdrawal of Credit Scheme list. The legal services market is of course evolving and modernising in accordance with the provision of the Legal Services Act 2007, and in future greater flexibility and freedom to practice will be afforded to different legal services practitioners. As such, we believe it more appropriate for practitioners to be better supported in making consumer-focussed decisions regarding their own individual business and the way in which they seek to manage their commercial affairs."

Some respondents expressed concern that barristers who had undertaken work on the old non-contractual terms would be left with no contractual terms upon which to enforce payment and only with an Advisory List of Defaulting Solicitors which was no longer backed up with the Code of Conduct requirement that counsel could not accept work on credit.

Question 4(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?

	<u>YES</u>	<u>NO</u>
Barristers	28	0
Chambers	13	1
Circuits, Bar Specialist Organisations & Committees	8	1
Other	9	0

Again, anxieties were expressed about the lack of force with the Advisory List of Defaulting Solicitors and comments were made with the Cab Rank Rule in mind.

Gerard Rothschild wrote "Use by barristers of the proposed Advisory List of Defaulting Solicitors is compared with the ability of other professionals to take into consideration the creditworthiness of a prospective client. As appears to be acknowledged in the text of the consultation paper, it is not quite the same. Have the authors of the consultation paper considered the difficult position of a barrister who is asked

to work for a solicitor's firm known to be in a bad financial state, perhaps even one whose liability is limited but which is not yet on the Advisory List? Such a solicitor might never reach the Advisory List before insolvency, yet (under the proposals, as under the current system) it would seem that barristers would be obliged to accept such work on credit terms. This situation seems very unfair to the barrister. Have the authors taken it into account?"

Garden Court Chambers wrote "We agree to Q4(b) and go further. We suggest that barristers should be obliged to refuse instructions unless accompanied by payment. We are concerned that the replacement system will be undermined if it is not at least as effective as the Withdrawal of Credit Scheme. The risk is it will be ineffective if barristers can "choose" to accept instructions from solicitors on the Default list. We can envisage barristers coming under pressure to do so. We do not regard this as any less anti competitive than the current scheme. The proposal would enable unfair competition. What we propose would be more effective and cost effective than suing for breach of contract. Barristers should not also be obliged to accept work without payment of previous outstanding balances for all the barristers in Chambers to whom the instructed barrister belongs. In other words, barristers should have the right to refuse work from solicitors who do not pay, just as any business can stop an account for non-payment of invoices."

Criminal Bar Association responded "No" to the question and wrote "We are strongly of the view that the prohibition should be retained. The course proposed would dilute the protection of the vulnerable. The prohibition is a faceless shield behind which the young and vulnerable can presently shelter without risk of disfavour. When a bad payer is minded to exploit, he is automatically thwarted, without offence or personal recrimination by the blanket prohibition. If the shield is discarded, a solicitor on the ALDS may seek counsel to work on credit on terms less favourable than the new default terms, and the barrister, although not obliged to accept, may – in direct proportion to his youth or vulnerability in chambers or in the general market place – feel pressurised to accept. We urge the Bar Council to maintain this shield in the public interest and in the interest of those barristers least able to protect themselves from market exploitation. We cannot identify any merit in promoting 'competition in the provision of legal services' if that is achieved only at the expense of facilitating exploitative business arrangements [paragraph 31 of the consultation document]

Planning Environment & Local Government Bar Association – Yes to Q4(b) - All businesses make a commercial decision as to what length of credit if any they are prepared to extend to their clients. If a barrister (or their Clerk) knows that a firm is on the Advisory List then it is for that barrister to assess that risk as to whether or not to accept instructions (but see above 4a). Sound business sense would say "ask for payment first" but it should not be a Code of Conduct matter if a member of the Bar decides to accept instructions from a firm where there is some doubt about the credit-worthiness of that firm.

Both the **Law Society** and the **SRA** wrote in support of the replacement of the Withdrawal of Credit Scheme with an Advisory List of Defaulting Solicitors.

Question 4(c) If you consider that the answer to either a or b should be negative, what alternatives do you suggest?

7 respondents wrote, suggesting that the effect of the Advisory List is strengthened. Some recommended that it still remain professional misconduct to accept briefs without payment from solicitors named on the List. Others criticised the limited grounds and length of time it takes for a solicitor to be placed on the List, during which time counsel are required to take instructions from solicitors' practices who could well be bad credit risks. The **Criminal Bar Association – Solicitors**

who have had financial difficulties in the past may overcome them and reach a position where they can again safely instruct counsel. If so, they should do so only by paying in advance or on the approved contractual terms. An acceptable compromise might be achieved by preserving the prohibition in an amended form so that barristers were still obliged to refuse instructions from solicitors on the ALDS unless the instructions were offered on the new default terms with payment in full and in advance.

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?

	<u>YES</u>	<u>NO</u>
Barristers	28	1
Chambers	14	0
Circuits, Bar Specialist Organisations & Committees	10	0
Other	9	0

Several barristers and chambers expressed the view, both in respect of this question and elsewhere in the consultation that it was very important that the Advisory List of Defaulting Solicitors scheme should extend to cover solicitors who fail to carry out their obligations resulting in the failure of counsel being paid by the Legal Services Commission. The SRA too wrote in support of the question 5.

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?

	<u>YES</u>	<u>NO</u>
Barristers	4	24
Chambers	2	11
Circuits, Bar Specialist Organisations & Committees	2	4
Other	5	4

Comments from individual barristers included

"I believe that removing anachronisms such as this will make the Bar more attractive to those who might otherwise think that it is not for them."

"On balance, I think the positive consequences will far outweigh the negative consequences"

"There will be negative consequences for senior members of inequitably run Chambers. They will lose work from poor quality solicitors. The problem should not be mitigated because this inequitable business practice should end."

"It is possible that more junior members of Chambers will come under pressure not to enforce the contractual terms where a solicitor who instructs more senior members fails to pay. However, if the terms are

consistently applied, the current culture under which certain solicitors know they can refuse to pay with impunity because barristers will never take effective enforcement action will become a thing of the past."

The Family Law Bar Association wrote "In respect of paragraph 15b on page 4 of the consultation: The consultation recognises the potential disadvantages for younger, more vulnerable, economically disadvantaged barristers who do not receive their fees. It would be of concern if internal pressure from within Chambers were applied to barristers in general, but particularly to vulnerable barristers to "choose" dispute resolution through the Voluntary Joint Tribunal rather than the courts. Consideration should be given to what guidelines/ rules/ best practice directions should be provided to Chambers in order to regulate this. Who, for example will bear the cost of any enforcement procedures? Also, consideration needs to be given to how best to ensure that barristers are aware of their rights under the proposed new scheme.

In respect of paragraph 15c on page 4 of the consultation: Negotiation of different terms in addition to or in substitution of the New Contractual Terms or amendments. Again some consideration needs to be given to measures to protect vulnerable barristers from unscrupulous agreements reached on their behalf, for example, where the Senior Clerk agrees unfavourable terms without consultation with the barrister for an "important" Chambers' solicitor. This could take the form of guidelines/ rules/ best practice as above, coupled perhaps with an awareness drive aimed at new practitioners."

Falcon Chambers wrote "The proposed system could become administratively burdensome for chambers and in particular disproportionately for some smaller sets, especially if firms of solicitors seek to negotiate individual terms. Some sets may feel obliged to accept disadvantageous terms from firms whose work they rely on. Again this may affect smaller sets more than larger sets, or sets with a wider client base."

The Law Society commented "Yes (to Q6a), we believe that the public will be adversely affected by the loss of competition over the terms and the restrictive nature of the terms. We believe that the terms are such that most solicitors will seek to renegotiate them, thus causing delay or will have trouble finding a barrister willing to undertake work on different terms. We believe that the Bar should revise the terms significantly and that they should be no more than a template for barristers to consider."

Gerard Rothschild drew attention to the move to the new contractual terms, writing " I am concerned about the lack of transitional provisions under the proposals and their consequent negative effect on barristers with (a) considerable aged debt at the date for implementation of the proposals, and/or (b) considerable work pending at that date. It would seem that the intention is **simultaneously** to (a) implement the new contractual terms and (b) abolish the current withdrawal of Credit Scheme (paragraph 30 of the consultation paper). This would mean that

(1) barristers could not use the Withdrawal of Credit Scheme for (nor could they otherwise enforce payment of) unpaid fees for work predating the implementation date. They could use the proposed Advisory List, but that is considerably less powerful than the Withdrawal of Credit Scheme (because barristers may accept work from listed solicitors on credit terms under the former but not under the latter). They could not sue for such fees, because the agreements with the solicitors would have been made under the old regime. (2) Barristers who had started a piece of work under the old rules before the implementation date would continue to work under those rules until the work was finished, unless they negotiate afresh with the instructing solicitor to work under the new regime (prospects of which seem unlikely).

In order to ameliorate the problem I would suggest staged introduction of the proposals. Perhaps the new terms could be introduced a year or so before the Withdrawal of Credit Scheme is abolished? Or perhaps the

Withdrawal of Credit Scheme does not need to be abolished at all? The reasons given in the consultation paper for abandoning the Withdrawal of Credit Scheme are not especially cogent, given that (as noted above) even under the new proposals barristers would remain in a much weaker position than other professionals (including other lawyers such as solicitors) in bearing the risk of defaulting creditors."

Question 6(b) Do you think that there are opportunities to promote greater equality?

	YES	NO
Barristers	10	9
Chambers	8	5
Circuits, Bar Specialist Organisations & Committees	2	4
Other	4	2

There appears to have been some confusion with this question as some respondents' comments were at variance to the question.

Many respondents commented that the changes should benefit the Bar as a whole, pointing out that it should enable counsel to pursue unpaid fees more effectively and this in itself assists the junior Bar, particularly those with no financial support. It has long been recognised that uncertainty of income is one of the major barriers of entry to the profession for those from less advantaged backgrounds. Examples of typical comments are below:

42 Bedford Row – *The proposed change will benefit the bar as a whole. That said, it is most likely to assist those who feel the effects of poor cash flow most acutely, namely those starting out at the bar and those returning to work after a break for whatever reason (be it maternity or paternity leave, recovery from illness or otherwise). While this is not of itself an equality issue, it is clearly to the benefit of those particular groups.*

Falcon Chambers – *We think that the proposed changes could assist the young Bar in receiving their fees earlier and could help to achieve a standard approach to fee collection across any one set of chambers*

Criminal Bar Association – *A compulsory and prescriptive approach to the new terms will protect the most vulnerable and promote greater equality across the Bar. By ensuring that the new default terms are uniformly and universally adopted by all chambers we would promote equality and ensure that the terms were effective and sustainable.*

Family Law Bar Association - *It would be useful for heads of chambers, clerks, barristers (especially junior and other vulnerable groups) and pupil supervisors to be made aware of the potential for disadvantage to some barristers. Barristers would benefit from guidance from a source outside their own chambers as to what is/ is not a fair and reasonable arrangement when it is something other than the New Contractual Terms. The arrangements should always be subject to prior consultation with the barrister, unless individual barristers choose to delegate that to their clerk. There should also be some method of regulating any abuse of the system (as identified above by way of guidelines/ rules, best practice specifically in relation to the new proposals) to be put in place and rigorously enforced in the event of any breach.*

Old Square Chambers Chambers' Manager – *The New Terms will encourage individuals from disadvantaged backgrounds to enter into the profession since they will no longer have to endure lengthy*

“unpaid” periods as/when solicitors choose not to settle their fees in a timely and efficient manner. The current terms certainly deter those who are not financially well-off from entering the profession.

SRA – Yes. If the current arrangements are modernised in such a way that both barristers and solicitors are afforded greater flexibility and choice to manage their own terms of engagement and their own commercial relationships, we believe this could help to improve experience for consumers across England & Wales when accessing legal services. Greater freedom for practitioners to agree mutually acceptable terms of engagement with each other should encourage more dialogue and co-operation between practitioners, and more emphasis being placed on achieving the best results for the consumer in question.

Concerns about promoting equality included that, in changing, the strength of the generality of protection which the current system arguably provides would be lost.

Law Society - *We acknowledge the point made in the consultation that junior barristers tend to be at a particular disadvantage when it comes to securing payment from instructing solicitors. However, we cannot accept that problem as a justification for the distortion to the market for counsels’ services and the imposition of contractual terms which are disadvantageous to solicitors. In our view negotiations over contractual terms between solicitors and barristers are a more equitable solution to the problem. Junior barristers are more likely to benefit from establishing a business relationship with firms of solicitors and adopting contractual terms which are more reasonable in their treatment of instructing solicitors than the terms suggested in the draft standard conditions. Moreover, it is the responsibility of Chambers to ensure that payment is properly chased. We suggest that the Bar Council should be looking to encourage Chambers to ensure that their junior members are treated fairly in the administration of Chambers.*

The Effects of the Changes

The Consultation asked respondents if they would kindly comment on how they considered the proposed changes would affect themselves, colleagues or, (where appropriate) the members of the respondents' organisation. 15 barristers responded, 8 chambers, 4 Circuits, Bar Specialist Organisations and Bar Council Committees and 5 others responded.

Most respondents, particularly from the Bar, referred to the greater clarity and more security for fees that the new scheme provided. Many respondents gave details of where they had been unable to obtain payment from solicitors under the current system.

Lance Ashworth QC commented *"I head the Commercial Group at St Philips Chambers. A substantial number of the members of our team have been having difficulties with obtaining payment from solicitors for work, in particular from those who only instruct Chambers from time to time. This will enable them to seek to recover those fees, but it is recognised that the incorporation of such terms is likely to lead to more complaints of inadequate conduct by barristers as solicitors seek to avoid having to pay bills, in circumstances where they have not obtained the money on account from the clients. It is unlikely that it will be necessary to rely on the strict terms of this agreement with regular solicitors from reputable firms, however, it will provide a safeguard in the event of there being any falling out. I envisage that the more aggressive members of Chambers may well seek to insist on their strict legal rights when a more “commercial” approach for the benefit of the ongoing relationship of Chambers with the firm generally might have been adopted under the current system."*

Sebastian Clegg added "Most solicitors are honourable and pay fees due without problems; I do not believe they will be put off at all by a contractual arrangement. I think the contractual arrangements will tend to put off solicitors who do not intend to pay fees or are inclined to refuse to pay on spurious grounds and/or provide recourse when payment is not made. I do not think contractual terms will add materially to the duty of care barristers are already under to their clients."

Rowan Morton wrote "It would create a more manageable cash flow for junior barristers, less work for Clerks in chasing fees and so a more efficient clerks room for smaller sets such as ourselves, and would allow the smaller sets to survive. We have no option but to accept work given that we are smaller, and so are not a priority for solicitors to pay, because (I presume) they think they can get away with it more so than with larger sets that they rely upon."

Remuneration Committee - The Bar Council Remuneration Committee strongly supports the proposed new contractual terms and the necessary changes to the Bar Code of Conduct as identified in the consultation paper.

The Bar Council Remuneration Committee considers that the proposed changes will have the following beneficial consequences.

- (a) Update and modernise the basis on which barristers are engaged by solicitors.
- (b) Increase substantially the prospects of barristers being paid with consequential reductions to aged debt and "written off" fees.
- (c) Reduce, substantially, the delays currently experienced by many barristers in the receipt of fees.
- (d) Incentivise solicitors to obtain money on account before instructing barristers. This will provide the lay client with greater certainty as to the barrister's likely fees and reduce substantially the prospects of the barrister going unpaid through a failure on the part of the solicitor to ensure that he is funds prior to instructing the barrister.
- (e) Provide an effective and accessible method of enforcement with teeth.
- (f) Ease the financial burden on barristers in the early years of practice.
- (g) They are likely to increase the strength and diversity of the Bar.

Young Barristers Committee - The YBC is very much in favour of the introduction of contractual terms. Late payment of fees is one of the principal causes of financial difficulties for young barristers, and contributes to the loss of many young practitioners from the profession. An enforceable requirement for payment within a set time will greatly assist pupils and junior tenants in making their practices financially viable.

We hope that the new terms will be taken up enthusiastically by chambers, and that young barristers' fees will be chased assiduously, including making full use of the provisions for interest and fixed compensation payments under the Late Payment of Commercial Debts (Interest) Act 1998.

One point of concern however is that, as young barristers' unpaid fees would give rise to a large volume of small claims, pressure may be put on young practitioners to refrain from enforcing their rights, in order to avoid upsetting chambers' regular solicitor clients. We would like there to be some monitoring of the effectiveness of the new regime in securing prompt payment for young barristers once it has been in place for a year or so.

Old Square Chambers Chambers' Manager – I consider that the overall aged debt of our organisation would be reduced considerably with the implementation of these new terms of business because solicitors would have a financial benefit to settling fees within a given period i.e. 30 days, otherwise they would incur

additional interest charges. Considering members of the bar will from Jan 2012 be required to pay tax on their aged debt, this will be a significant improvement for them on a personal financial basis.

Further, it seems prudent in a time where the Legal Services Act 2007 is promoting competition within the legal sector that barristers and the bar be entitled to install commercially viable terms of payment with their solicitor clients.

OTHER COMMENTS

Several comments were received in respect of the proposals. Some respondents expressed exasperation that the Bar Council has moved so slowly in introducing the contractual terms. Concern was expressed about the transitional arrangements and queries raised about the tax implications of moving to the new terms. Other respondents recommended that the contractual terms be extended to include other legal professionals, professional direct access clients and solicitors instructing under all types of legal aid.

For example, **Jan Luba QC** wrote "*In short, this is the nature of the problem at present so far as civil legal aid is concerned:*

(1) Solicitors provide services to the LSC pursuant to contracts between them. The contract terms permit the solicitors to instruct counsel to carry-out civil legal aid work. The contracts are either in the standard form (there is a new standard contract from 14 October 2010) or are individual Very High Cost Civil Case Contracts (VHCCs). Both documents refer to payment of counsel.

(2) Counsel is not a party to either type of contract. As a prospective beneficiary of the contract, counsel might have been able to rely on the Contracts (Rights of Third Parties) Act to enforce the terms - but the contracts expressly oust the application of that Act.

(3) If the client on civil legal aid wins their case, the solicitors will claim the costs from the other party. They will be paid those costs (including any item for counsel's fees). The barrister has no right to sue for the costs that the solicitor has recovered. There is no time limit within which they must be paid over by the solicitor to the barrister. If there is a delay (as there often is) no interest is paid to counsel for late payment. The monies recovered will be held in the solicitor's practice account and not in the client account. If the firm closes or goes into administration, the barrister loses everything.

(4) If the client on civil legal aid loses the case, the solicitors should submit a CLAIM 1 to the LSC triggering a process of assessment/payment. Counsel cannot compel the submission of that claim. Until presented, counsel is not paid outstanding fees. There is no interest paid on late-claimed fees, even where the delay is wholly caused by the solicitor.

(5) If the case is being run on a VHCC, the barrister will be only £50ph (£90ph for a QC). The VHCC only "works" at these low payment rates if the solicitor promptly submits payment claims to the LSC at the end of each stage (or element) of the work described in the VHCC. The contract expressly provides for such staged payments. But solicitors do not claim them – instead following their usual practice of billing at the end of a case. The result is that all VHCC work is uneconomic for counsel.

(6) If the case run on a VHCC is only partly successful, the solicitor must elect whether to claim on the LSC or from the other party but (normally) cannot do both. Counsel cannot compel the making of an election. If the solicitor simply fails to make one, counsel never gets paid.

In the past, the Bar Council has not worried too much about all this on the mistaken assumption that the LSC is legally obliged to pay fees earned and claimed by counsel in civil legal aid cases— so that if the solicitor does not pay, the LSC eventually will. If that assumption ever was correct, it is not any longer.

It is in this context that it becomes important that even in an LSC funded case the barrister should have an underpinning right to sue the solicitor for his or her fees i.e. there should be a contract between counsel and solicitor in every civil legal aid case.

Other comments included the practical implications of the introduction of the contractual terms, observations on tax and handling of funds.

The comments below from the Institute of Barristers Clerks and the Law Society questioned, from different perspectives, the justification of bringing in standard contractual terms.

Institute of Barristers' Clerks - *In considering the IBC's response to this consultation, a sub-committee was formed of the Management Committee with members to represent the experiences of those clerking within different practice areas. We have answered the questions. Some are in the negative and we have attached what we hope is a useful overview of the potential impact this contractual arrangement would have. We wish to highlight some concerns and offer suggestions for alternative approaches that could be taken. Effective fee collection is an essential role for any clerking team. However, the majority of clerks in a senior position would consider that their primary responsibility is to ensure the level of instructions received into chambers is maintained and where possible increased. It is from this viewpoint that the majority of these views are taken. Contributors have consulted members of chambers and instructing solicitors when reaching their conclusions.*

Following our meetings it seems likely that although the terms are not mandatory most chambers will incorporate them into their standard terms.

Views were canvassed from representative clerks from the Commercial/Chancery Bar, Common Law Bar, Family Bar and the Criminal Bar. Their concerns about fees vary and consequently so do their views.

There is a pervading view expressed in relation to the amendment to the code of conduct and the replacement of the withdrawal of credit scheme with the list of defaulting solicitors. It was generally felt that that the withdrawal of credit scheme was an effective means of ensuring payment. There is concern that as the defaulting solicitors list removes the requirement for a firm on the list to ensure payment is made up front before commencing work on an instruction, it will also remove one of the few effective weapons in our arsenal. A solicitor listed on the scheme currently feels the impact of not having previously honoured fees and although for many the reputational implication of being on the defaulting solicitors list will be sufficient threat. For the rogue firms it could still allow them to switch between sets making false promises and have their instructions accepted with the obvious consequences.

The main concern is the entering of a binding contract. All chambers are able to operate under whichever terms they choose and individual terms can be agreed for specific cases. It is however anticipated that the

terms outlined in the consultation paper will be adopted as standard across all chambers regardless of practice area.

It is impossible to canvass the views of every set of chambers and they are likely to vary subject to differing management styles, however we believe these views are a fair reflection.

Commercial/Chancery - Amongst the Commercial/Chancery clerks consulted, the view was that the new contractual arrangements are unnecessary. There is not considered to be a significant debt problem and whilst some fees are ultimately written off they represent a very low percentage of turnover. In a modern business world it is exceptional to accept high value instructions without a binding contract over the fees. In practice however, the vast majority of solicitors who are instructing in these cases are financially and administratively well structured and fulfil their obligations. In the circumstances when an issue arises with a bad debt, negotiation would take place and a resolution reached, the additional threat of court proceedings does not add great benefit. The occasions where it would be felt necessary to recover fees through the courts are considered to be remote. There is also concern that an individual disgruntled member may choose to take court action. Although this would be an internal issue, the consequences of such action could be detrimental for others in chambers. It is considered that a binding contract could be restrictive on instructions. Whilst of course no instructions should be accepted without confirmation that the solicitor or professional client is in funds, in practice on occasion instructions are accepted when they are not. The clerk may not be aware that they are not but the solicitor may have a client who they are confident will be able to place them in funds and that client needs urgent advice or representation from counsel. The prospect of the enforcement of these terms could deter the solicitor from instructing counsel and either choosing to deal with the matter in-house or feel that the burden of fee risk is too great and not undertake the case at all. The majority of solicitors canvassed have expressed concern over the proposed changes.

Family - The Family Bar representatives have a similar view on many of these issues so we will not repeat them. There is undoubtedly due to the nature of the work the need to be flexible. Cases involving domestic disputes can escalate rapidly and the solicitors are required to respond quickly. Their client's funds are not always readily available and they require considerable flexibility from the chambers they instruct. They would feel very uncomfortable in these circumstances with a binding contract. They may feel it necessary to manage the case in a much more stringent manner which on the face of it would seem a good thing but may not be in the client's interest. The junior members of the bar canvassed whilst having to accept some losses on the whole did not think those losses affected their overall earnings target.

Common Law - The view from those sets that have a very broad area of practice differs, for some the new contractual arrangements represent a significant step forward and provide an opportunity to ensure that the smaller firms honour their commitments.

Crime - With some exceptions a criminal practitioner particularly at the junior end undertakes a considerable amount of work that is publicly funded for which the solicitor is responsible for the fees for Magistrates Court hearings and Crown Court hearings where the Solicitor is the 'Instructed Advocate'. The fees are individually likely to be small, but most chambers will have a high volume. It is unlikely on an individual case basis that a court action would be embarked upon to retrieve an individual fee. However, bearing in mind the nature of many of the firms practising in crime, the threat of court proceedings will carry far more weight than the threat of the Withdrawal of Credit Scheme or Defaulting Solicitors list and for that reason the option the new terms will create is welcomed. The greater fear faced by those practising in this area is that the soon to be imposed reduction in the number of contracts awarded by the LSC will lead to the majority of high street criminal firms going out of business within the next two years. There will be many

on the first rungs of practice that face losing comparatively large sums of money. Whilst theoretically this can be alleviated through tighter controls now the reality is often different. Many of these firms operate on very tight budgets and require flexibility from those chambers that they instruct. This concern perhaps falls to the relevant LSC Direct Contract working group but it would seem a sensible idea for the Bar Council to devise an 'action plan' that can assist chambers in dealing with firms that cease practice through the loss of a contract whilst owing fees to members of the bar.

Conclusion - It is anticipated that the consultation will result in the amendment to the code of conduct and the contractual terms being implemented. The one agreed conclusion is that ideally we would not wish to see the Withdrawal of Scheme removed. Flexibility is the key to the new arrangements. They will offer a very useful implement which, when used, will be sharp but it is hoped that the threat of it will be of the greatest benefit. It is not necessarily suitable for all chambers and they should consider carefully whether they are in their best interests to incorporate them as standard terms. It may be advisable to have alternative terms available for the occasions when they may not be appropriate and the retention of the Withdrawal of Credit Scheme or similar could provide that. Without doubt, if talented people from lower socio-economic groups are more confident about entering the profession with their fees being subject to a binding contract then that is clearly a positive step. It is however felt that the current scheme could be used to greater effect to assist them. We recommend that if the amendments are made that Chambers are informed of the options that are available and is clear that the new terms will not be mandatory.

Law Society - *The Law Society welcomes the opportunity to respond to this consultation. We have been in discussions with the Bar Council on this issue for approaching ten years and we welcome the fact that others will have the opportunity to comment upon the issues.*

The Law Society's policy that it is appropriate in the modern world for barristers and solicitors to contract with each other. We consider that the existing arrangements for non-contractual terms are outdated and should be abolished. The Withdrawal of Credit scheme is a blunt instrument and may lead to significant competition problems. We believe that there may be value in retaining guideline terms but that it should be open to solicitors and barristers to negotiate the terms themselves and that they should not be bound by terms imposed by the professional bodies.

We have particular concerns about a number of issues surrounding the proposals in the consultation paper. In summary, these are as follows:

- *The proposal that a barrister will only be obliged to accept work under the cab-rank rule if the terms offered are in accordance with the minimum terms;*
- *The proposal that the terms should be the default terms in the absence of agreement is unacceptable and appears to be likely to breach competition law;*
- *There are a number of individual aspects of the terms which are likely to be unacceptable to solicitors.*

The "cab-rank" point is important. If, as the Bar claims, it is a crucial rule ensuring access to barristers, it is important that there should be it should not be used (sic) as a way of enabling barristers to put unreasonable conditions on their instruction and use this as a way of manipulating the market. The Society accepts that, if the cab-rank is to continue, there needs to be an appropriate level of protection for barristers but, in our view, these should be the minimum need and the ones in this proposal go too far. In fact, the Society questions whether the cab-rank rule remains a necessary and proportionate rule for the Bar at a time when there is increasing competition for advocacy services.

Moreover, it is puzzling that a consultation about a regulatory change is being undertaken by the representative arm of the Bar Council, rather than the Bar Standards Board. We believe that it is essential that all responses to the paper should be shown to the BSB so that it is able to take an independent view on the merits of the scheme.

Drafting Suggestions

Several respondents, from the Bar and from the solicitors' profession, made detailed drafting suggestions to the proposed terms. The most frequently repeated observation was that the terms should deal with the limitation of counsel's professional liability.

Other drafting suggestions and queries raised included changes to the timing of issuing fee notes and of payment, provision in the terms that the solicitor in funds from the lay client should hold those funds in trust for the barrister, clarification of the role of employed lawyers and of in-house lawyers in non-legal companies, clarification on barristers delegating work, money laundering, the confidentiality of counsel's work, duty of care, periodic review of counsel's hourly rate, use of counsel's advice or services for other proceedings, provision of estimates, recording of work undertaken, the liability of solicitors for payment when without funds, the liability of individual solicitors within an LLP, the duty on barristers to undertake work in a timely manner, the barrister's responsibility to keep solicitors informed of the level of fees being incurred.

The **Law Society** made several observations on the draft, concluding "*These points suggest that the terms will be unacceptable to the majority of solicitors. The barrister will thus be left in the position of either having to refuse the work or renegotiate the terms with different solicitors. We do not believe that it can be in the public interest for such terms to be so blatantly in favour of the barrister, particularly when a barrister is entitled to insist on them,*

If there are to be terms which a barrister can insist upon then they need to be more balanced. In our view, however, it is preferable for barristers to develop their own terms which can be negotiated with solicitors as appropriate."

Each of the drafting suggestions and comments are being studied and amendments to the Contractual Terms will be made as appropriate.

3 LIST OF CONSULTEES

Association of Chartered Certified Accountants
Association of Law Costs Draftsmen
Association of Muslim Lawyers
Attorney General and Shadow Attorney General
Bar Council of Northern Ireland
Bar Mutual Indemnity Fund
the Bar, including Specialist Bar Associations, Circuits and other Bar groups
CBI
Chartered Institute of Patent Attorneys
Chartered Institute of Public Finance & Accountancy
Citizens' Advice
Consumer Focus
Council for Licensed Conveyancers
Council of the Inns of Court
Department for Business Innovation & Skills
Faculty of Advocates
Federation of Small Businesses
ILEX Professional Standards Board
Institute of Barristers' Clerks
Institute of Chartered Accountants in England & Wales
Institute of Chartered Accountants in Northern Ireland
Institute of Chartered Accountants of Scotland
Institute of Directors
Institute of Legal Executives
Institute of Paralegals
Institute of Trade Mark Attorneys
Intellectual Property Regulation Board
Law Centres Federation
Law Society
Legal Action Group
Legal Complaints Service
Legal Practice Management Association
Legal Services Board
Legal Services Board Consumer Panel
Legal Services Commission
Legal Services Ombudsman
Local Government Association
Master of Faculties
Ministry of Justice
Office of Fair Trading
Society of Asian Lawyers
Society of Black Lawyers
Solicitors Regulation Authority
Treasury Solicitor
Which?

4 LIST OF RESPONDENTS

Barristers - 38 respondents

Christopher Austins

T L Ballantine Dykes

Lance Ashworth QC

James Abrahams

barrister – 22 years family practice

barrister – QC, 27 years professional negligence and local government practice

barrister – 5 years commercial practice

barrister – 23 years commercial practice

barrister – 26 crime and family practice

Andrew Beaumont

Marc Beaumont

Stanley Best

Sebastian Clegg

Richard Gregory

Kate Hallett

Colin Hart

Naomi Hawkes

Lucy Hawkins

John Hendy QC

Charles Holroyd

David Hyde

Geraint Jones QC

Michael Keehan QC

Derek Kerr

David Knifton

Jan Luba QC

Christopher Makey

Colin McDevitt

Richard Miller QC

Rowan Morton

Veronica Newman

Reuben Pandey

Alastair Panton

Gerard Rothschild

Melanie Tether

Michael Vere-Hodge QC

Alaric Watson

Timothy White

CHAMBERS - 14 respondents

7 Bedford Row,

9 Bedford Row,

42 Bedford Row,

Brick Court,
Falcon Chambers,
Francis Taylor Building
Garden Court Chambers,
2-3 Gray's Inn Square,
Guildhall Chambers Bristol,
12 KBW,
8 New Square,
4 Pump Court,
Serle Court,
St John's Chambers Bristol,

Circuits, Bar Specialist Organisations and Bar Council Committees – 11 respondents

Chancery Bar Association,
a Circuit,
Criminal Bar Association,
Family Law Bar Association,
London Common Law & Commercial Bar Association (LCLCBA)
Planning Environment & Local Government Bar Association
Professional Negligence Bar Association,
Professional Practice Committee,
Remuneration Committee,
TECBAR
Young Barristers Committee

Others – 12 respondents

Association of Law Costs Draftsmen,
Council for Licensed Conveyancers
Chief Executive of a London chambers
City of London Law Society
Francis Taylor Building Senior Clerk,
Herbert Smith solicitors
Hogan Lovells International LLP solicitors,
Institute of Barristers' Clerks,
Law Society,
Old Square Chambers Chambers' Manager,
Solicitors Regulation Authority (SRA),
St Pauls Chambers Senior Clerk

BAR STANDARDS BOARD

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

October 2011

ANNEX 5

Response to the 2010 Consultation by the Law Society



The Law Society

CONSULTATION ON CONTRACTUAL TERMS OF WORK FOR THE SUPPLY OF LEGAL SERVICES BY BARRISTERS TO SOLICITORS

The Law Society welcomes the opportunity to respond to this consultation. We have been in discussions with the Bar Council on this issue for approaching ten years and we welcome the fact that others will have the opportunity to comment upon the issues.

The Law Society's policy that it is appropriate in the modern world for barristers and solicitors to contract with each other. We consider that the existing arrangements for non-contractual terms are outdated and should be abolished. The Withdrawal of Credit scheme is a blunt instrument and may lead to significant competition problems. We believe that there may be value in retaining guideline terms but that it should be open to solicitors and barristers to negotiate the terms themselves and that they should not be bound by terms imposed by the professional bodies.

We have particular concerns about a number of issues surrounding the proposals in the consultation paper. In summary, these are as follows:

- The proposal that a barrister will only be obliged to accept work under the cab-rank rule if the terms offered are in accordance with the minimum terms;
- The proposal that the terms should be the default terms in the absence of agreement is unacceptable and appears to be likely to breach competition law;
- There are a number of individual aspects of the terms which are likely to be unacceptable to solicitors.

The "cab-rank" point is important. If, as the Bar claims, it is a crucial rule ensuring access to barristers, it is important that it should not be used as a way of enabling barristers to put unreasonable conditions on their instruction and use this as a way of manipulating the market. The Society accepts that, if the cab-rank is to continue, there needs to be an appropriate level of protection for barristers but, in our view, these should be the minimum need and the ones in this proposal go too far. In fact, the Society questions whether the cab-rank rule remains a necessary and proportionate rule for the Bar at a time when there is increasing competition for advocacy services.

Moreover, it is puzzling that a consultation about a regulatory change is being undertaken by the representative arm of the Bar Council, rather than the Bar Standards Board. We believe that it is essential that all responses to the paper should be shown to the BSB so that it is able to take an independent view on the merits of the scheme.

Question 1

- a. Should the existing (non-contractual) Terms of Work and the (contractual) 2001 Terms now be abolished?

The Law Society believes that it would be appropriate to abolish the existing non-contractual terms and the contractual terms to be abolished because there are features of

these (notably, the Withdrawal of Credit Scheme) which are inappropriate. We also consider that it is appropriate for barristers to take responsibility, as every other professional does, for the contractual terms on which they offer their services subject to minimum rules, which could be in the Code of Conduct to ensure appropriate public protection against inappropriate terms.

b. If so, should they be replaced by the proposed New Contractual Terms?

We have a number of concerns about the new contractual terms which are set out in our answer to Question 3 and we believe that the new Terms should not be introduced in their present form. In our view, indeed, these terms should be no more than guidance.

c. If the answer to either a. or b. above is in the negative, what alternative suggestions do you have?

The view of the Law Society is that it should be sufficient for the Bar Council to allow barristers to refuse to accept instructions on a case by case basis where a solicitor seeks to impose wholly unreasonable terms. The Bar Council could provide guidance as to the types of terms which could be deemed to be unreasonable.

We accept that it is right that barristers should be entitled to refuse instructions if the terms are wholly unreasonable. However that cannot justify the institution of default standard terms. They will become the standard terms on which barristers will seek to operate. There will be no incentive for barristers to negotiate terms with solicitors when they can rely on the Bar Council's standard terms.

It is our view that the introduction of such standard terms will have the effect of restricting competition even if it is not intention of the Bar Council to do so. If the Bar Council does not recommend standard terms, there would be greater variation in the terms on which barristers are engaged and competition between barristers to offer more attractive terms to secure business from solicitors.

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?

No. As suggested above, think that it is entirely inappropriate for a Code of Conduct for one professional group to bind others. We doubt that this would be effective as a matter of law and, even if it is, we believe that this is anti-competitive.

We do not accept the argument that this is necessary for the protection of junior members of the Bar. Every other profession or business needs to devise standard terms of business and we do not understand why barristers and Chambers are somehow incapable of doing this. A solicitor, by instructing the barrister would be deemed to be accepting the standard terms on sending the instructions or to indicate that they are not accepted. If urgent work needs to be undertaken, then there is an incentive on both sides either to take the barrister's standard terms or to agree alternative terms quickly.

b. If not, what alternative(s) do you suggest?

We believe that the problems of uncertainty about contractual terms could be resolved by a requirement that all barristers have standard terms which are advertised on their or their

Chambers' website. Heads of Chambers as part of their general duties should ensure that members of Chambers comply with this.

We believe that, rather than prescribe formal terms, the Bar's Code should prescribe the matters that should be dealt with in the contract and ensure that terms are not unreasonable as between barrister and consumer. There should be nothing to prevent the Bar Council issuing guideline terms for barristers to adopt or not as they see fit, but there is no need for any further alternative.

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?

No. The new Contractual Terms are problematic for the following reasons and are likely to deter solicitors from instructing barristers or require further negotiation of the terms. Particular concerns about the terms are as follows:

1. An imbalance between barrister and solicitor in that solicitors appear to be required to undertake work promptly while barristers are required to do so "in a reasonable time" (see paragraphs 3 and 4), and there is no requirement on the barrister to confirm acceptance or refusal of the instructions in a reasonable time. In fact, it is surprising to find terms governing the period before a contract is agreed in contractual terms.
2. We consider that it is essential that the barrister should obtain the client's consent for using information that is not in the public domain in marketing material (paragraph 5).
3. The time within which a barrister must provide the service is described "reasonable". This is unclear and unhelpful. It would be preferable for the timescale to be prescribed with each set of instructions (paragraph 8).
4. It is surprising that the barrister should be able to subcontract services without any reference to the client. Frequently a barrister is instructed for his or her individual expertise and any subcontracting should be undertaken with the knowledge and consent of the client, or the nature of it be explicitly stated in the contract (paragraph 8).
5. This condition in paragraph 9 concerning intellectual property should be expanded to ensure that the solicitor and the client have an unrestricted, irrevocable, royalty free and perpetual licence to use the product of the Services. On the basis that the barrister is asserting moral rights in the product of the Services, the solicitor and/or client will need to ensure that the barrister is identified as the author of any product of the Services and that any product is not subjected to derogatory treatment. It would also be advisable to obtain a warranty from the barrister that the product of the Services does not breach any third party intellectual property rights.
6. The conditions in paragraph 9 do not deal with ownership of either the solicitor's or the client's intellectual property rights. This is particularly important in terms of documentation that the solicitor and the client will be providing to the barrister in the instructions. Absence of a specific provision dealing with ownership of the solicitor's and/or client's intellectual property rights leaves both parties unnecessarily exposed. A new condition should be added, whereby the solicitor grants to the barrister a revocable and non-exclusive licence to use the solicitor's and/or client's intellectual property rights, solely for the purposes of providing the

Services. Further, if any of the solicitor's and/or client's intellectual property rights are used in the product of the Services, these should be specifically carved out from the term "product of the Services", over which the barrister claims ownership.

7. In respect of paragraph 11, there should be an acknowledgement that the barrister's clerk has the authority to act on the barrister's behalf both in respect of negotiating fees and the Conditions in their entirety (for example, the barrister's clerk should also have authority to agree timescales on the barrister's behalf). A more detailed procedure for agreeing fees retrospectively needs to be provided, as well as the timescale in which such procedure should take place.
8. If the barrister is providing the Services on an agreed hourly rate, he should be required to inform the solicitor on a regular basis (e.g. weekly) as to the level of work he is undertaking; to provide a breakdown of his time if requested to do so by the solicitor/client; and to update the solicitor regularly as to the level of fees incurred. The solicitor should also be able to set a maximum level of fees and to require the barrister to seek the solicitor's authorisation before incurring additional fees in excess of this figure. Ideally the "periodic review" in Condition 11.3.2 should be no more frequent than once per year. Further, any increase in the barrister's hourly rate should be subject to the solicitor's approval as it is likely that the solicitor will need to obtain the client's approval to any increase in rates (paragraph 11).
9. If no fee is agreed the barrister should provide the solicitor with his hourly rates, an estimate of the number of hours to deal with the instructions, any necessary revision to the estimate, an estimate of costs and the revision of the estimate before any additional costs are incurred (paragraph 11).
10. In respect of paragraph 12, we consider that there needs to be some reference to a right to withhold fees if a client is dissatisfied and withholding payment. Similarly, a solicitor should not be obliged to pay an invoice until final determination of a disputed note fee or has been put in funds by the client.
11. In addition, we consider that a barrister should not be able to send an invoice until the work has been completed, unless this has been agreed with the solicitor. We also consider that the requirement for payment of the invoice on delivery with "time being of the essence" is unrealistic and contrary to the provision in the 2007 draft. It is more reasonable and usual for payment within 30 days of receipt of an agreed fee note. The time for a barrister to sue is also unreasonably short.
12. In respect of termination, it should be made clear that the solicitor is only liable for the fees incurred until that date.

These points suggest that the terms will be unacceptable to the majority of solicitors. The barrister will thus be left in the position of either having to refuse the work or renegotiate the terms with different solicitors. We do not believe that it can be in the public interest for such terms to be so blatantly in favour of the barrister, particularly when a barrister is entitled to insist on them,

If there are to be terms which a barrister can insist upon then they need to be more balanced. In our view, however, it is preferable for barristers to develop their own terms which can be negotiated with solicitors as appropriate.

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?

Yes.

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?

Yes.

c. If you consider that the answer to either a. or b. should be in the negative, what alternatives do you suggest?

The Law Society accepts that there should be a mechanism whereby barristers have a remedy against solicitors who refuse to pay fees incurred. We have no objection therefore to the replacement of the Withdrawal of Credit Scheme with an Advisory List of Defaulting Solicitors.

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?

Yes we accept that barristers should have a remedy available to them in those circumstances.

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?

Yes, we believe that the public will be adversely affected by the loss of competition over the terms and the restrictive nature of the terms. We believe that the terms are such that most solicitors will seek to renegotiate them, thus causing delay or will have trouble finding a barrister willing to undertake work on different terms. We believe that the Bar should revise the terms significantly and that they should be no more than a template for barristers to consider.

b. Do you think that there are opportunities to promote greater equality?

We acknowledge the point made in the consultation that junior barristers tend to be at a particular disadvantage when it comes to securing payment from instructing solicitors. However, we cannot accept that problem as a justification for the distortion to the market for counsels' services and the imposition of contractual terms which are disadvantageous to solicitors. In our view negotiations over contractual terms between solicitors and barristers are a more equitable solution to the problem. Junior barristers are more likely to benefit from establishing a business relationship with firms of solicitors and adopting contractual terms which are more reasonable in their treatment of instructing solicitors than the terms suggested in the draft standard conditions. Moreover, it is the responsibility of Chambers to ensure that payment is properly chased. We suggest that

the Bar Council should be looking to encourage Chambers to ensure that their junior members are treated fairly in the administration of Chambers.

It would also be appreciated if you could comment on how you consider that the proposed changes would affect you, or your colleagues or (where appropriate) the members of your organisation.

The proposed new standard contractual terms for the supply of legal services by barristers to solicitors would clearly be unattractive to solicitors with the results either that solicitors will feel unwilling to instruct barristers and so consider taking more work in-house, or they will seek to renegotiate, which negates the point of these terms.

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.

We have no objections to the Law Society's response being published.

Name of respondent STEVEN DURNO

Organisation Law Society of England and Wales

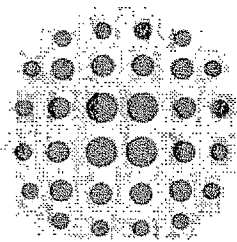
Address 113 Chancery Lane, London, WC2A 1PL

BAR STANDARDS BOARD

**APPLICATION FOR APPROVAL TO AMENDMENT OF CAB
RANK RULE – NEW CONTRACTUAL TERMS
October 2011**

ANNEX 6

Response to the 2010 Consultation by the Solicitors Regulation
Authority

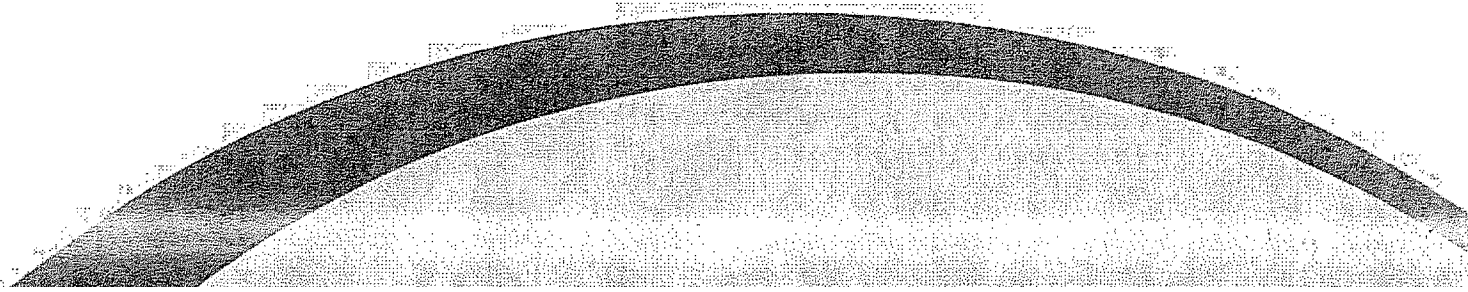


Solicitors
Regulation
Authority

Bar Council consultation:
***'Contractual terms of work for the supply of legal
services by Barristers to Solicitors'***

Response from the Solicitors Regulation Authority

July 2010



Bar Council consultation: "Contractual terms of work for the supply of legal services by Barristers to Solicitors"

Response from the Solicitors Regulation Authority

Introduction

1. The Solicitors Regulation Authority (SRA) is the independent regulatory arm of the Law Society for England and Wales. We regulate individual solicitors, certain other lawyers and non lawyers with whom they practise, solicitors' firms and their staff.
2. We welcome the opportunity to take part in this consultation, and have set out our comments below.

SRA comments

Q1(a) Should the existing (non-contractual) Terms of Work and the (contractual) 2001 Terms now be abolished?

3. We agree that the existing contractual and non-contractual Terms of Work have not always been as effective as they might otherwise be in supporting robust commercial relationships between solicitors and barristers.
4. As the consultation paper confirms, the SRA sometimes receives complaints relating to alleged non-payment by solicitors of Counsel fees. Our current policy is not to investigate such allegations unless particular matters have been reported by the Bar Council on the basis that an individual has failed to comply with a decision from the Joint Tribunal, or where an individual solicitor or firm has become subject to the Bar's Withdrawal of Credit Scheme.
5. In a typical 6-month period we receive more than 30 complaints concerning the alleged non-payment of Counsel fees by solicitors. The regularity of these matters arising suggests to us that the current framework is not functioning as effectively as it could; as such, we agree that the existing Terms ought to be revisited and alternative arrangements should be explored.
6. We note also the deficiencies inherent in the current arrangements as described at paragraph 8 of the consultation paper, and we would agree with the Bar Council's conclusion that, by and large, the existing arrangements are not working in the best interests of consumers. The terms of business that link solicitors and barristers should be clear and transparent, and should not lead to consumers finding themselves 'caught in the middle' between solicitors and barristers. It is not right that consumers could potentially experience delays in the provision of their legal services as a result of a breakdown in contractual or non-contractual relations between different legal services practitioners.

Q1(b): If so, should they be replaced by the proposed New Contractual Terms?

7. We support the Bar Council's commitment to introduce new arrangements that will "...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." Greater clarity and improved service for consumers using legal services must be the driver for any changes made.

8. We recognise however that the detail of any new Terms between solicitors and barristers must be capable of supporting improved contractual and non-contractual relationships, and greater flexibility for members of both professions to negotiate terms that best suit their commercial set-up.
9. It is with this in mind that we would question the extent to which default Terms (described at paragraph 15a of the consultation paper) represent the most suitable way of achieving this flexibility, particularly where it is proposed that the default Terms would be marketed as de facto.

Q1(c): If the answer to either a. or b. above is in the negative, what alternative suggestions do you have?

10. The Bar Council will be aware that, at the time of writing this response, the SRA is engaged in a radical modernisation programme to drive forward regulatory reform and to introduce an outcomes-focused approach to the way in which we regulate.
11. Under future arrangements those we regulate will be afforded greater freedom and flexibility to manage the way in which they practice and provide outcomes for consumers. We are concerned that the imposition of default contractual terms that will potentially become regarded as the base standard for barrister-solicitor commercial relationships is at odds not only with our own current direction of travel, but that also of the wider legal services market, in introducing greater professional and commercial freedom to practise in different ways.
12. We acknowledge that under the Bar's proposals legal services practitioners would still be free to "...*negotiate and agree further or different terms in addition to or in substitution for those in the New Contractual terms...*" (paragraph 15c of the consultation paper), and our view is that this approach ought to be encouraged - as opposed to over-reliance on a 'one size fits all' standardised set of terms operating as the default option.

Q2(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?

13. As we have discussed above, we understand the Bar Council's reasoning (as explained on pages 6 and 7 of the consultation paper) in seeking to introduce contractual terms that act as de facto default terms where alternative arrangements between barristers and solicitors do not otherwise exist. We agree in particular with the Bar Council's suggestion that the existence of default terms would bring some clarity to consumers in being able to understand the costs associated with employing barristers.
14. However, we would again highlight the direction of travel evident elsewhere in the wider legal services field, and the drive toward greater professional and commercial freedom to practice in accordance with the reformed legal services market emerging from the Legal Services Act 2007. We would question whether the existence of de facto terms that can be assumed to

almost always underpin barrister – solicitor commercial relationships is entirely consistent with these moves.

Q2(b): If not, what alternative(s) do you suggest?

15. Our preference would be for the focus to be placed on barristers and chambers setting their own standard terms that are right and proportionate for the circumstances of their individual practices and business model. We appreciate entirely that last minute instructions or urgent matters can require swift agreement between solicitors and barristers, but we would advocate that in the emerging legal services world this will be best achieved by individual chambers and practitioners setting out clearly in advance their terms and their business expectations on an individual basis.

Q3: Should the Code be amended as proposed so that barristers are not obliged to accept instructions other than on the New Contractual Terms?

16. We note that the potential impact of introducing this amendment to the 'Cab Rank Rule' would be that the Contractual Terms would operate effectively as the default terms between barristers and solicitors. As we have explained above we are not convinced that greater emphasis being placed on standardised default terms is entirely fitting with reforms being introduced across the legal services market in England and Wales.
17. As any proposed change in approach is intended to require changes to the Bar Code of Conduct we will be particularly interested in the views of the Bar Standards Board on this matter.

Q4(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?

18. We agree with the proposal to remove the current obligation upon barristers to refuse instructions from solicitors named on the Withdrawal of Credit Scheme list. The legal services market is of course evolving and modernising in accordance with the provision of the Legal Services Act 2007, and in future greater flexibility and freedom to practice will be afforded to different legal services practitioners. As such, we believe it more appropriate for practitioners to be better supported in making consumer-focused decisions regarding their own individual business and the way in which they seek to manage their commercial affairs.

Q4(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?

19. Yes we do support this proposal. As per our comments above under question 4(a), we agree that legal services practitioners should as far as possible be provided with sufficient freedom to make their own business choices in the best interests of their clients and their own commercial circumstances.

Q4(c): If you consider that the answer to either a. or b. above should be in the negative, what alternatives do you suggest?

N/A.

- Q5. 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 public funded matters where barristers are prevented from being paid due to solicitors' failure in carrying out their obligations?**
20. We agree that barristers should be provided with this option. We note (on page 10 of the consultation paper) the Bar Council's concern that failure to provide this route of complaint to barristers could "...force many barristers out of that market and discourage barristers from undertaking publicly funded work in the future". This understandably would not be a desirable situation and we agree the Bar Council is right in aiming to mitigate this problem.
- Q6(a): Do you think there will be any negative consequences for any group arising from the proposed changes and, if so, how might they be mitigated?**
21. The Equality Impact Assessment included with the consultation paper identifies a number of important potential impacts upon different stakeholder groups. We would add (as we have stated above) that the key driver for any change in approach agreed upon following this consultation exercise must be to ensure that consumers across England and Wales do not suffer unacceptable disruptions in the provision of legal services as a result of commercial disputes between solicitors and barristers.
- Q6. b) do you think that there are opportunities to promote greater equality?**
22. Yes. If the current arrangements are modernised in such a way that both barristers and solicitors are afforded greater flexibility and choice to manage their own terms of engagement and their own commercial relationships, we believe this could help to improve experience for consumers across England and Wales when accessing legal services. Greater freedom for practitioners to agree mutually acceptable terms of engagement with each other should encourage more dialogue and co-operation between practitioners, and more emphasis being placed on achieving the best results for the consumer in question.

**Solicitors Regulation Authority
July 2010**

BAR STANDARDS BOARD

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

October 2011

ANNEX 7

Equality Impact Assessment

EQUALITY IMPACT ASSESSMENT NEW CONTRACTUAL TERMS OF WORK

Date of Screening	March 2011
Assessor Name & Job Title	Janice Marshall, secretariat, Implementation Committee
Policy/Function to be Assessed	Introduction of standard Contractual Terms and related changes to the Cab Rank Rule of the Bar Code of Conduct
Aim/Purpose of Policy	<p>To replace the present standard Terms of Work with a new basic form of legally binding Contractual Terms upon which barristers could accept instructions from solicitors in respect of privately funded work or where the instructing solicitor, although paid from public funds, is obliged to pay the barrister direct.</p> <p>Barristers and solicitors would continue to be free to negotiate different terms.</p> <p>In brief the changes are:</p> <p>(1) abolition of the Withdrawal of Credit Scheme and transfer of details of solicitors against whom a direction has been made to the new Advisory List of Defaulting Solicitors. Barristers will no longer be prohibited under the Bar Code of Conduct from taking instructions on a credit basis against those named solicitors, thus enhancing competition in the provision of legal services.</p> <p>(2) the new Advisory List of Defaulting Solicitors provides a warning list to barristers of the small minority of solicitors who default in their obligations to ensure barristers are paid, despite, for example, court judgements or a joint tribunal award.</p> <p>(3) whilst barristers and solicitors are free to negotiate any terms, the change to the Cab Rank Rule enables barristers to refuse instructions if the solicitors insist on terms other than the new Contractual Terms or any terms that the barrister holds out. This would enable a barrister to refuse instructions on such terms which might impede the proper execution of the barrister's work or impose unreasonable terms, yet still ensure that the Cab Rank Rule operates to ensure equal access to justice and promotion of competition</p>

<p>Background</p>	<p>in the provision of legal services to all.</p> <p>(4) the Advisory List of Defaulting Solicitors is also to apply to those solicitors who fail to carry out their obligations to ensure barristers are paid in respect of those civil cases covered by full publicly funded certificates. To fail to provide this protection mechanism for barristers would be contrary to encouraging and supporting an effective legal profession and force many barristers out of the market for economic reasons. By the very nature of these cases, the lay clients are predominantly in the lower socio-economic groups and therefore a strong and effective legal profession is essential for their protection.</p> <p>(5) In terms of the regulatory objectives under the Legal Services Act 2007 s.1, it is considered particularly beneficial to the public in clarifying the role and obligations of barristers, whilst at the same time promoting competition and encouraging an independent, strong, diverse and effective Bar.</p> <p>The present standard terms, entitled "The Terms of Work on which Barristers offer their Services and the Withdrawal of Credit Scheme", replicated in Annexe G1 of the Code of Conduct, suffer from numerous deficiencies, including:</p> <p>(1) lack of clarity to the detriment of all involved, including the lay client.</p> <p>(2) the present standard Terms are non-contractual, which means that none of their terms can be enforced through the Courts. Consequently self-employed barristers, being unable to sue for their fees, may suffer considerable delay in receiving payment or may even be forced to write-off their fees as irrecoverable. This operates particularly to the disadvantage of the younger and more vulnerable members of the Bar.</p> <p>There is a contractual version of the present standard terms, in Annexe G2 of the Code of Conduct, but it is rarely used.</p> <p>(3) The Law Society's rule that failure on the part of a solicitor to pay counsel's fees could constitute professional misconduct has been abolished.</p>
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	(4) the only means to secure payment is for barristers to lodge a complaint with the Bar Council under the Withdrawal of Credit Scheme, which was designed purely to protect the Bar as a whole from solicitors who consistently fail to pay for no good reason. Such complaints do result in some payment but analysis shows that only about 40% of fees are collected under that Scheme.
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Do you consider the policy to have an adverse impact on equality?

Gender equality	Yes	No
Race equality	Yes	No
Disability equality	Yes	No

If yes, is there any evidence to support this?	<p>GENDER, RACE, DISABILITY</p> <p>(1) Self-evidently, the difficulties in recovering fees have greater impact on those from disadvantaged backgrounds who are generally less able to bear the financial burden of non-payment. A bar-wide survey for the Development of the Quality Assurance for Advocates Scheme in 2007 identified that women and BME self-employed barristers have disproportionately lower earnings than white and male barristers, although this was to some extent related to years in practice.</p> <p>(2) The 2010 annual Bar survey of barristers changing their practising status identifies the key factors that influence barristers' decisions to leave. Barristers in self-employed practice are most influenced by "uncertainty over future levels of income" (48%), "level of income" (43%) and then "non-payment of fees" (30%). 45% of BME barristers cited "non-payment of fees" as a significant factor in their decision to leave self-employed practice. This suggests that the impact of the failure to recover fees from solicitors has had a significant impact on barristers, particularly BME and female barristers.</p> <p>(3) Statistics on complaints of unpaid fees made under the Withdrawal of Credit Scheme over the last 3 years show an average of about 40% of fees being paid.</p>
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To further test the above assumptions, the Bar Council undertook a consultation between April and July 2010 on the proposed replacement of the present Terms of Work by standard contractual terms and a total of 75 responses were received. The consultation included proposed amendments to the Code and the schemes for making complaints to the Bar Council in respect of unpaid fees under the new advisory List of Defaulting Solicitors. The Consultation Paper was sent to the Approved Regulators, other interested bodies and the Bar and was accompanied by press releases and articles in the legal press. The Consultation asked the following questions:

“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?”

Do you think that there are opportunities to promote greater equality?”

With regard to the first question, the ratio of respondents disagreeing and agreeing was 4:1. The principal concerns of those who considered there could be negative consequences were (a) the weakening of the “protection” of barristers by removing the Code of Conduct requirement that barristers must abide with the direction to withdraw credit from named solicitors and replacing it with an advisory list of defaulting solicitors (b) pressure by chambers on more junior counsel not to sue for unpaid fees for fear of losing lucrative instructions to more senior counsel (c) lack of transitional provisions (d) loss of competition by treating the new contractual terms as default terms and/or the restrictive nature of the terms

In response,

(a), whilst accepting that removing that “protection” does have a deleterious effect on barristers, it is countered by the fact that barristers would be able to sue for payment. In addition, the “protection” is sometimes thought to be anti-competitive

(b), this problem is not worsened by the change to contractual terms and is a matter which the Bar Council and the Bar Standards Board continually seek to eradicate.

(c) transitional arrangements are provided for, so that

	<p>barristers who undertook work on the old Terms can continue to make complaints to the Bar Council</p> <p>(d) following the Consultation, the proposal that the new contractual terms be treated as default terms in the absence of alternative terms having been agreed has been dropped.</p> <p>With regard to the second question, most comments were strongly of the view that the changes proposed would indeed promote greater equality by reason of easier recovery of unpaid counsel fees. Recommendations to improve greater equality include (a) making the new contractual mandatory across the Bar, (b) guidance for barristers, clerks and chambers on appropriate terms or best practice</p> <p>In response,</p> <p>(a) making the contractual terms mandatory would be contrary to competition law</p> <p>(b) the Bar Council will ensure that training and guidance is made available on the introduction of the contractual terms</p>
<p>If no, are your reasons for this?</p>	

POLICY ANALYSIS

<p>What are the (potential) barriers to equality arising from this policy?</p> <p>What evidence supports the existence of such barriers?</p>	<p>Race, Gender and Disability</p> <p>There is believed to be no adverse impact on gender, race or disability equality</p> <p>On the contrary, as the introduction of the contractual terms would more likely benefit lower socio-economic groups, the impact would most likely be positive. This view was supported by the respondents to the Consultation carried out in 2010.</p> <p>However, a review will be undertaken six months after the introduction of the new scheme and annually thereafter</p>
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Action Planning

Generally: (1) review the effectiveness and operation of the new Terms and Code amendments six months after the introduction and annually thereafter. (2) Monitor complaints received about the operation of the scheme.	Secretariat, Implementation Committee	6 months after the implementation of the new Contractual Terms
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29 March 2011