

BAR STANDARDS BOARD

AMENDMENTS TO THE CODE OF CONDUCT

**Application for Approval under Schedule 4, part 3 of the
Legal Services Act 2007**

**Amendment to the "Cab Rank Rule" in paragraph 604(g) and insertion of new paragraph
604(h) of the Code of Conduct of the Bar of England & Wales**

This application is made in accordance with the requirements set out in the Legal Services Board's Rules for rule changes. The Bar Standards Board wishes to provide the information below to support its application to amend the Code of Conduct.

Any queries about this application should be made to:

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1. The Bar Standards Board seeks the Legal Services Board's approval of the following changes to its Code of Conduct:
 - a. an amendment to paragraph 604(g) of the Code of Conduct regarding the obligations of barristers to take instructions, known as the "Cab Rank Rule" which provides that that Rule is not to apply when the solicitor is named on the proposed List of Defaulting Solicitors; and
 - b. the insertion of a new paragraph 604(h) into the Code of Conduct regarding the Cab Rank Rule which provides that that Rule is not to apply to any work other than work under the New Contractual Terms referred to below or on terms on which the barrister holds himself out as willing to contract.
2. The insertion of the proposed new paragraph 604(h) necessitates the consequential renumbering of existing paragraphs 604(h) and 604(i) as 604(i) and 604(j) respectively.
3. It is further proposed that paragraphs 403.5(a)(iii), 404.2(f) and 603(g) be deleted, together with Annexes G1 and G2, and that a definition of "the List of Defaulting Solicitors" be inserted in part X of the Code of Conduct for the reasons given in this Application.
4. Annex 1 to this application sets out the relevant current provisions of the Code of Conduct and Annex 2 sets out the proposed amendments.
5. The amendments are required as a result of the intended replacement of the present "Terms of Work on which Barristers Offer their Services to Solicitors & the Withdrawal of Credit Scheme 1988" by new standard contractual terms.

Background

6. At present, in default of other arrangements, barristers are instructed by solicitors on the non-contractual basis provided for in the "Terms of Work on which Barristers Offer their Services to Solicitors and the Withdrawal of Credit Scheme 1988", as set out at Annex G1 to the Code of Conduct, ("the 1988 Terms of Work").
7. Because of this non-contractual structure barristers have historically been unable to insist on the resolution of fee disputes with solicitors through direct means (e.g. through the courts or through binding arbitration) but instead have been reliant upon two principal indirect methods of securing payment of outstanding fees:
 - a. The Law Society's principle requiring the payment of counsel's fees by solicitors as a matter of professional conduct;

coupled with
 - b. The Withdrawal of Credit Scheme.
8. However, as regards (a), it has been the practice, since 1998, of the Office for the Supervision of Solicitors and its successor, the Solicitors Regulation Authority (SRA), not to act on complaints from individual barristers in respect of unpaid fees. Furthermore, in July 2007, the Law Society replaced its Guide to the Professional Conduct of Solicitors with the Solicitors' Code of Conduct and, in so doing, unilaterally removed non-payment of counsel's fees from the realm of professional misconduct. Although the SRA will act in cases where the non payment of counsel's fees is considered to amount to a breach of rule 1.06 of the Solicitors' Code of Conduct ("*you must not behave in a way that is likely to diminish the trust the public places in you or the profession*") this appears to be treated by the SRA as only occurring following complaints by the Bar Council under the Withdrawal of Credit Scheme.
9. As regards (b), under the Withdrawal of Credit Scheme, a barrister who accepts instructions from solicitors under the 1988 Terms of Work but remains unpaid for work done, may make a report to the Chairman of the Bar Council. After due enquiry, the Chairman may, in the absence of a satisfactory explanation by the solicitor for non-payment, issue a direction to all barristers forbidding them to take work, on credit, from that named solicitors' practice and from the individual solicitor who instructed the barrister. The direction to withdraw credit is circulated only to individuals and firms who are subject to the direction, heads of barristers' chambers, the Master of the Rolls, the President of the Law Society and the Solicitors Regulation Authority. The direction to withdraw credit prevents, and thereby protects, the barrister from having to accept instructions on a credit basis, under the Cab Rank Rule, which would otherwise be required under the Code.
10. Although there have always been some solicitors for whom these remedies were relatively ineffective, they had in general proved sufficient for the profession's purposes in the past.
11. However, the Law Society has for some time been arguing:
 - a. that it should not be a matter of professional misconduct for a solicitor to fail to pay counsel's fees;
and
 - b. that the Withdrawal of Credit Scheme was (arguably) in breach of competition law.
12. The Law Society had been threatening to remove the professional obligation upon solicitors to pay counsels' fees. It also intimated, on occasion, that the Withdrawal of Credit Scheme might be challenged in the courts.

13. One effect of the current arrangements is that it discourages those of limited means from making or persevering with a career at the Bar, given the considerable delays that are frequently experienced in the collection of fees and the cumbersome and indirect means of enforcement referred to above, with the resulting risk that payment cannot be obtained or can only be obtained long after the work has been done and consequential effects on cash flow for those struggling to make a living. Because of this, there is a public interest in having clarity over the terms on which barristers will be paid as it helps to promote an independent, strong, diverse and effective legal profession.
14. As a result of the position outlined above, the Bar Council and the Law Society had for over 8 years been negotiating towards a new set of arrangements, and by 2008 had agreed in principle to the following:
 - a. that barristers will provide their services on a contractual basis, thereby giving the Bar the usual remedies available to any trade creditor, albeit to be used only as a last resort;
and
 - b. that the Bar would abolish the Withdrawal of Credit Scheme and replace the Scheme with an advisory List of Defaulting Solicitors.
15. As mentioned above, the SRA replaced its Guide to the Professional Conduct of Solicitors with the Solicitors' Code of Conduct in July 2007. The non-payment of counsel's fees is no longer specified as constituting professional misconduct. In addition, the level of challenge to the principle behind the Withdrawal of Credit Scheme from individual firms of solicitors has increased. Consequently, it is now appropriate that the barrister/solicitor relationship should be on a contractual basis, so that disputes between barrister and solicitor can be resolved efficiently and in the same manner as disputes between contracting parties generally, rather than through the current indirect, inefficient and cumbersome system.
16. The negotiations with the Law Society progressed to the stage in December 2008 that a new pro-forma set of contractual terms had effectively been agreed between the Bar Council and the Law Society, albeit that there were still some discussions to be held on matters of detail rather than substance. Those details would not have altered the position with regard to the Code of Conduct, and on that basis it was decided by the Bar Council and the Bar Standards Board to make an application for Ministry of Justice approval to the necessary proposed amendments to the Code of Conduct. That application was submitted on 16 December 2008.
17. The submission to the Ministry of Justice was identical to the submission now being made to the Legal Services Board except for two matters: (i) there is a minor revision to the wording of the proposed new paragraph 604(h) and (ii) the submission to the Ministry of Justice had incorporated a Code of Conduct provision to allow for the New Contractual Terms to be treated as the "default" terms which applied to all engagements of barristers by solicitors if no other terms were agreed. The reason for removing that provision is explained in more detail in paragraph 68 of this application.
18. A few months later, the Law Society withdrew its support for those proposed contractual terms and, as a consequence, the Bar Council requested the Ministry of Justice to suspend consideration of the application for approval of the proposed Code amendments.
19. In the absence of continuing Law Society support for a joint approach, the Bar Council went back to the drawing board and produced a simpler, more streamlined set of standard contractual terms ("the New Contractual Terms"). The proposed amendments to the Code of Conduct remained however the same. The Bar Standards Board approved the proposed code amendments and a renewed application was made to the Ministry of Justice in October 2009.
20. Unfortunately, the Ministry of Justice was not able to deal with the application before the transfer of its powers to the Legal Services Board.

21. Before the submission of this application to the Legal Services Board, the Bar Council formally consulted Approved Regulators, other interested bodies and the Bar on the proposed amendments to the Code of Conduct, on the New Contractual Terms and on the revised complaints scheme for barristers in respect of unpaid fees (the Advisory List of Defaulting Solicitors). The Bar Council handles complaints of non-payment of counsel's fees by solicitors and had started work on this issue before the BSB came into existence, it was therefore decided that the Bar Council should undertake the consultation and present its recommendations to the BSB for approval.
22. Following consideration of the responses to the Consultation and approval by the Bar Standards Board and General Management Committee of the Bar Council, the Bar Standards Board now applies to the Legal Services Board for approval of the proposed amendments to the Code of Conduct.

Overview of the new regime and proposed amendments to the Code of Conduct

23. Subject to the approval of the Legal Services Board, the structure of the proposed new regime and Code amendments is as follows:
 - a. A new basic form of legally binding contract as set out in Annex 2 ("the New Contractual Terms") will be provided in an annex to the Code of Conduct. In general, these New Contractual Terms will only apply to privately funded work;
 - b. Barristers will be entitled to opt out of the regime, for example, by way of a Conditional Fee Agreement. They are also free to negotiate and agree further or different terms in addition to or in substitution for those in the New Contractual Terms and to amend them accordingly, or to advertise their own standard terms on which they are willing to contract, as they see fit;
 - c. In accordance with the Provision of Services Regulations 2009, barristers now provide information on the general terms and conditions before a contract is concluded or service provided. The amendments proposed to the Cab Rank Rule reflect that requirement;
 - d. The New Contractual Terms set out the respective responsibilities of the solicitor and barrister clearly and succinctly, thereby protecting and promoting both the public interest and that of consumers and the maintenance of professional standards and principles. They provide for the proper and prompt execution of the work, create liability for the payment of fees and a clear means of enforcement. They also facilitate dispute resolution by way of a Voluntary Joint Tribunal, if the parties prefer such a mechanism to that provided by the courts;
 - e. The existing Terms of Work and the 2001 Terms reproduced in Annexes G1 and G2 of the Bar Code of Conduct are to be abolished;
 - f. The Withdrawal of Credit scheme is to be abolished and, with that, the prohibition on barristers accepting work on credit from solicitors named under that scheme;
 - g. As a replacement, an Advisory List of Defaulting Solicitors will be maintained by the Bar Council, with that List also being used in certain circumstances to deal with defaults in publicly funded matters; and
 - h. The necessary consequential amendments are made to the Bar Code of Conduct as set out in Annex 2.

24. The anticipated effect of these proposed amendments, if implemented, will be that, in most non-publicly funded matters, barristers will be engaged by solicitors under a binding contract which will set out the basic legal obligations and responsibilities of both parties, but will leave the parties free to negotiate the price for the barrister's services and any other specific terms that they consider appropriate. **It is important to note that it is not proposed that the rates of barristers' fees be stipulated in the New Contractual Terms. This is always left for negotiation between the individual instructing solicitor and barrister (or his clerk on his behalf), thus promoting competition in the provision of legal services.**
25. As the "Cab Rank Rule" in the Code [paragraphs 603(g) and 604(g)] makes specific reference to the 1988 Terms of Work, it is necessary to amend the Code to reflect the introduction of the New Contractual Terms.
26. The Cab Rank Rule (Rule 602) obliges a barrister to accept any instruction from a solicitor unless one or more of the specific exemptions applies. Under the Cab Rank Rule, barristers are forbidden to withhold services on the grounds that the nature of the case is objectionable, or the conduct, opinions or beliefs of the prospective client are unacceptable or the prospective client is being financially supported. The Cab Rank Rule therefore improves access to justice and promotes the independence of the Bar. Exemptions to the rule include where the barrister lacks the expertise to handle the particular case, the barrister is otherwise committed and lacks the time to carry out the instructions, the instructions limit the ability of the barrister properly to carry out his functions or where the barrister would have a conflict of interest. At present, there is another express exemption where the instructing solicitor is listed on the Withdrawal of Credit list and requires the work to be done on credit terms. As already mentioned, the Code of Conduct presently forbids barristers from accepting instructions on credit from solicitors named on the Withdrawal of Credit list.
27. The proposed Code amendments provide that barristers who are offered work on the New Contractual Terms or on the barrister's own advertised terms remain subject to the Cab Rank Rule. The intention is that the effect of the amendments to the Code of Conduct will be that barristers remain **obliged** to accept instructions when offered on the New Contractual Terms or on the individual barrister's own advertised terms, unless the barrister is permitted or required to refuse them as a result of another exception to the Cab Rank Rule set out in the Code of Conduct. Conversely, it is proposed that the effect of the amendments to the Code of Conduct is that a barrister will not be obliged to accept instructions if they are not offered on the New Contractual Terms or on the barrister's own advertised terms. **In summary, if a solicitor seeks to instruct a barrister on the New Contractual Terms or on the individual barrister's own advertised terms, the Cab Rank Rule will apply. If they seek to instruct on any other terms, the Rule will not apply and the barrister may choose whether or not to accept the instructions.** This is the proposed change to the Code of Conduct in relation to the Cab Rank Rule under paragraph 604(h).
28. It is anticipated that many barristers will use these New Contractual Terms as their advertised terms. However, it should be stressed that barristers and solicitors will always be free to negotiate whatever terms they consider appropriate and, indeed, to agree no express terms at all.
29. The reason why the Cab Rank Rule will not apply to instructions on a basis other than the New Contractual Terms or on the individual barrister's own advertised terms is to ensure that barristers are not forced by the Cab Rank Rule to take on work on contractual terms specified by solicitors and which the barrister has no opportunity to negotiate or influence.
30. The former Code provisions for fee notes and joint tribunals have been broadly replicated, with some tidying up.
31. The joint tribunal process will be retained as an optional alternative to court action. The tribunal process, which has been operated by the Bar Council and the Law Society together for many years, provides an informal mechanism whereby fee disputes between solicitor and barrister are

placed before a tribunal. The tribunal comprises a member appointed by the Law Society and a member appointed by the Bar Council and it usually deals with the dispute on the basis of written statements from both sides.

32. In the event of an award made by a joint tribunal remaining unpaid and/or a court having given judgment in favour of the barrister, it is intended that the unpaid barrister can make a complaint to the Bar Council under the new List of Defaulting Solicitors scheme instead of the old Withdrawal of Credit scheme. In essence, the List of Defaulting Solicitors scheme follows the old Withdrawal of Credit Scheme structure, but at the end of the process **where a solicitor is placed on the List of Defaulting Solicitors, rather than it being a matter of professional misconduct for barristers to accept work from such solicitors without payment in advance, the Cab Rank Rule will not apply to instructions from those solicitors, i.e. it will be up to individual barristers to decide whether or not to accept such work.** This is the proposed change to the Code of Conduct in relation to the Cab Rank rule under paragraph 604(g).
33. This provision in paragraph 604(g) of the Code also applies to instructions where the barrister is paid by the Legal Services Commission through the Community Legal Service or the Criminal Defence Service. Although it is not currently the case that solicitors actually pay the barristers, the solicitors' actions (or inaction) can adversely affect the barristers' ability to obtain payment. Presently the Cab Rank Rule as set out in the existing Code of Conduct does not provide this flexibility. The new Scheme for complaining to the Bar Council for publicly funded matters enables barristers to make complaints where solicitors have failed to carry out their obligations to enable barristers to be paid.

Why we wish to make the alterations

34. The current basis on which barristers are generally engaged by solicitors in privately funded work is outdated and no longer appropriate in the modern legal services market. The present, non-contractual, honorarium basis of payment is an anachronism and has long been obsolete. It fails to address the need for clarity in relation to the professional obligations of barristers and solicitors to each other and to the lay client. It also fails to provide, for solicitors, barristers and the lay client, an effective method of enforcement of rights and obligations. The proposed amendments to the Code of Conduct (in particular to the Cab Rank Rule) allied to changing the normal basis of instruction, will address these issues and will be in the interests of lay clients as well as the practitioners by providing more certainty and transparency.

Regulatory Objectives

35. We believe the proposed amendments support the eight Regulatory Objectives of Part 1 of the Legal Services Act 2007 as follows:

Protecting and promoting the public interest

36. The New Contractual Terms, together with the proposed amendments to the Code of Conduct, ensure that there are clearly understood and enforceable standards and terms upon which barristers undertake work for solicitors, when solicitors are acting for clients or on their own account. In addition, the fact that the Cab Rank Rule will apply to the New Contractual Terms and to the barrister's own published terms will protect and promote the public's access to the Bar.

Supporting the constitutional principle of the rule of law

37. The proposed amendments do not have any adverse effect on this objective.

Improving access to justice

38. The relationship between barrister and instructing solicitor should be based on a clear and firm foundation, relevant to current business practices. At present, the relationship is based to a considerable degree on custom and practice, dating back centuries. Barristers are still generally instructed on an *honorarium* which is vague and unenforceable except as a matter of goodwill; with an inefficient, indirect and cumbersome system of enforcement if payment is disputed or delayed. This greatly discourages those of limited means from starting and continuing a career at the Bar (see paragraphs 43 and 45 below). In the interests of providing a relevant modern structure, the New Contractual Terms have been drawn up and the relevant Code of Conduct amendments proposed so that the relationship between barristers and solicitors is placed on a readily identifiable modern and more commercial basis that allows members of both legal professions to deal with disputes in the same way as all other professions, and in a more timely and cost effective manner. One key advantage is that younger and more economically vulnerable members of the Bar, from a wide range of backgrounds, should find it easier to start and remain in practice. The encouragement into the profession of able individuals irrespective of their means and personal circumstances can only improve access to justice.
39. The fact that the Cab Rank Rule will apply to the New Contractual Terms and to the barrister's own published terms will ensure the continuation of access to justice by making sure that consumers can continue to obtain the services of a barrister of their choice on easily identifiable terms.

Protecting and promoting the interests of consumers

40. This objective will be promoted by the fact that the New Contractual Terms involve setting out the role and obligations of barristers in a way which is clearer and easier to understand than is currently the case. In addition, removing the prohibition of taking instructions from solicitors named on the Withdrawal of Credit List will meet the Law Society's concern that the solicitors' market was being unduly restricted in its access to the Bar.

Promoting competition in the provision of services

41. As with the objective of encouraging a diverse legal profession (see below), the Bar Standards Board is keen to remove obstacles which act as a barrier to entry to the Bar. The proposed amendments will make it easier for barristers to recover unpaid fees and should ameliorate many of the financial problems for individual barristers caused by non payment by solicitors. The resulting improvement in financial certainty and cash flow for barristers should encourage entry and retention at the Bar of those without independent means, and will therefore increase competition in the provision of barristers' services. In addition, removing the restriction on barristers accepting work on credit from solicitors named on the Withdrawal of Credit List will help maintain competition in the provision of legal services.

Encouraging an independent, strong, diverse and effective legal profession

42. Paragraph 43 of the Legal Services Board's paper "The Regulatory Objectives" refers to the need to promote a diverse legal profession that reflects the full spectrum of the population it serves.
43. Enabling barristers more easily to recover unpaid fees will encourage entrants to the Bar from a wider range of social and/or financial backgrounds. The Equality Impact Assessment showed that difficulty in recovering unpaid fees by barristers from solicitors has greater impact on those who are less able to bear the financial burden of non-payment, either related to their financial background and/or in their early years at the Bar. Furthermore, the annual Bar Survey of

barristers leaving the profession identifies non-payment as one of the key factors influencing the decision to leave.

44. In commerce, professionals are free to take into account the creditworthiness of prospective clients before accepting instructions. This freedom is not available to barristers because of the operation of the Cab Rank Rule. It is therefore essential that there are adequate mechanisms, both by the introduction of the contractual terms and the use of the complaints procedure under the Advisory List of Defaulting Solicitors scheme, to prevent barristers being forced out of the market as a result of financial pressures caused by non payment or delayed payment of fees. This concern is even more acute in respect of publicly funded work. Without an adequate protection mechanism for barristers who remain unpaid, barristers are likely to be forced out of the market.
45. An Equality Impact Assessment was contained in Annex 9 of the 2010 Consultation on Contractual Terms (see Annex 3 to this paper) and an updated Equality Impact Assessment is at Annex 7.

Increasing public understanding of the citizen's legal rights and duties

46. Improving the clarity of the terms of engagement between barristers and solicitors by adopting the New Contractual Terms or similar can only enhance the understanding of the barrister's service by the lay client by bringing greater transparency and certainty to the barrister/solicitor relationship. There are separate rules in the Bar Code of Conduct that cover public access work, which require a barrister to notify the lay client in writing of the work that the barrister has agreed to perform and the fees that the barrister proposes to charge.

Promoting and maintaining adherence to the professional principles

47. The New Contractual Terms clarify the rights and duties of both barrister and instructing solicitors and make the legal rights of both sides fully enforceable. The New Contractual Terms will therefore promote acting with independence and integrity. Furthermore, the thrust of the professional obligations contained in the Cab Rank Rule of the Code of Conduct remains unaffected.

The Better Regulation Principles

Transparent

48. In the long history of addressing the basis on which instructions from solicitors are given to barristers, several consultations of the Bar were undertaken. Between April and July 2010, a more widespread consultation took place, including representatives of the solicitors' profession, organisations concerned with the administration of justice and protecting the public interest and consumer organisations. The list of consultees is contained in Annex 6 of the Consultation Paper (which is at Annex 3 of this Application) and the responses to that Consultation are at Annexes 4, 5 and 6 of this Application. As a result of the consultation, revisions were made to the proposed amendments to the Code of Conduct and to the New Contractual Terms themselves.

Accountability

49. As the regulator for the Bar, the Bar Standards Board is accountable for any regulatory amendments that are made and for ensuring that the regulatory objectives are met. The Bar

Standards Board believes that these new arrangements will modernise the relationship between solicitors and barristers and promote the regulatory objectives.

Proportionality

50. The Bar Standards Board considers that the proposed amendments are proportionate in removing an obsolete and unsatisfactory common basis of solicitors' instructions to barristers whilst retaining the benefit, in the interests of access to justice, of barristers' obligation to accept instructions under the Cab Rank Rule. The Bar Standards Board had considered whether a looser framework of "key" terms could be in place as an alternative to the existing scheme but, as described in paragraph 64, this was found to be unworkable. The purpose of the new Terms is to provide basic terms of engagement between barristers and solicitors which maybe used or altered as appropriate. However, as described in paragraph 77, because of the operation of the Cab Rank Rule, barristers do not have the same freedom as other commercial contractors to refuse instructions. The provision of these basic terms of work not only prevent unfair terms being imposed on a barrister, but also require the barrister to take the instructions under the Cab Rank Rule (unless one of the exceptions specified in the Bar Code of Conduct apply) if the instructing solicitor is agreeable to these basic terms.

Consistency

51. Changing from an anachronistic, non-contractual, honorarium basis of payment to that backed by enforceable contractual terms is clearly consistent with modern business practices and brings clarity and enforceability to the relationship of the barrister with his instructing solicitor and with the lay client.

Targeted

52. The proposals are for the purpose of the instruction of barristers by solicitors only, as it is only in respect of those instructions that the present unsatisfactory system applies. The amendments to the Code of Conduct will be systematically reviewed to ensure that they remain necessary and effective.

Desired Outcome

53. The desired outcome of this application is that the payment arrangements between solicitors and barristers should be placed on a modern, contractual basis in order to bring clarity and enforceability in the interests of clients. If accepted by the LSB the arrangements will be put into effect as early as possible, after appropriate publicity and training.

Other Regulators

54. The 2010 Consultation was sent to all Approved Regulators and the Law Society and the Solicitors Regulation Authority responded in full. Their representations are reproduced at Annex 5 and 6 of this Application. Their representations, together with those made by the other consultees, are more fully described in 'Details of the Consultation' below.

Date of Implementation

55. It is intended to put the change into effect as early as possible after the proposed amendments are accepted by the Legal Services Board and after appropriate publicity and training has been undertaken. A communications plan is being developed, which will be headed by the Bar Council

As the Bar Council handles complaints of non-payment of counsel's fees by solicitors, not the Bar Standards Board, it is appropriate that the Bar Council leads on the implementation.

Details of the Consultation

56. The Bar Council had consulted the profession previously but, before presenting the proposals again to the Bar Standards Board for approval, the Bar Council undertook a wider formal consultation on the New Contractual Terms, together with the proposed amendments to the Code of Conduct. The Consultation paper was sent out at the end of April 2010 and closed for responses on 31 July 2010. All the Approved Regulators together with other interested bodies and the Bar were invited to respond. The Consultation Paper and annexes were downloadable from the Bar Council's website and responses could be returned by email or post. It was announced by way of a press release to mainstream and legal media and, in June 2010, an article by Sarah Asplin QC, the chairman of the Bar Council's Implementation Committee, was published in *Counsel* magazine explaining the consultation and the proposals, and encouraging responses to the Consultation paper. The Implementation Committee is the Bar Council's Committee leading on the implementation of the New Contractual Terms.
57. A copy of the Consultation Paper and response form is at Annex 3 and the Summary of Responses at Annex 4. The Summary of Responses contains a list of consultees at page 21 of the Summary and a list of the respondents at page 22. As can be seen, several organisations representing consumers were consulted though no responses were received. The Law Society and the Solicitors Regulation Authority (SRA) responded, and their replies are replicated in full in Annexes 5 and 6.
58. It should be noted that the New Contractual Terms as now proposed are slightly different from those put out to consultation, as amendments have been made in the light of responses received. The amendments are not considered to be controversial.
59. A total of 75 responses were received. Each response has been studied and the Bar Standards Board's comments are as follows.
60. Question (1) asked whether the existing Terms of Work and Withdrawal of Credit scheme should be abolished and replaced by the proposed New Contractual Terms.
61. There was a very clear majority, including the Law Society and SRA, who supported the abolition of the current 1988 Terms of Work and Withdrawal of Credit Scheme. Suggestion was made by some respondents that the current 1988 Terms of Work and the New Contractual Terms should be run concurrently but, having considered this option as being a possibility during the early years of the operation of the New Contractual Terms, it has been discarded as being impractical and confusing for all concerned.
62. The majority of those who responded were in favour of the replacement of the 1988 Terms of Work by the New Contractual Terms but there were a number however, particularly from the solicitors' profession, who considered that the proposed terms would be too restrictive. Some major solicitors firms agreed that there should be standard terms, capable of amendment by the parties as required, but the Law Society suggested that the New Contractual Terms should be no more than guidance and that barristers should take responsibility for the contractual terms they offer subject to the necessary minimum rules required and contained in the Code of Conduct. The Law Society further suggested that the Bar Council should provide guidance as to what types of terms could be deemed as unreasonable.
63. The Bar Standards Board disagrees with the Law Society's view for reasons outlined in greater detail under Question 2 below. In summary, barristers will not be obliged to use the New Contractual Terms.

64. The Bar Standards Board (with input from the Bar Council) spent considerable time and effort prior to the consultation working on whether it would be feasible to introduce "key" or "reasonable" terms as an alternative to the New Contractual Terms and this issue was reconsidered following the consultation. It was found to be impracticable and to create too many uncertainties. Clearly such "key" or "reasonable" terms, or guidance on those terms, cannot be so tightly defined as to avoid being in all potential cases anti-competitive in nature or being unsuitable for the particular circumstances in which the instructions are offered. Similarly with the suggestion by the Law Society that the Bar Council should issue guidance on what could be considered "unreasonable" terms. It may not be feasible for a barrister, faced with the terms offered to him by a solicitor in an urgent matter, to judge at short notice whether these terms are "unreasonable". This problem is particularly difficult if the work is to be undertaken in a hurry and the terms offered are long and complicated. This practical problem is a serious one, as an incorrect decision by the barrister to refuse the work on the grounds that the terms offered were unreasonable would constitute a breach of the Code of Conduct and would have implications for the lay client's ability to access legal representation. There is, of course, always potential for argument as to what is reasonable. The application of the Cab Rank Rule to the New Contractual Terms and to the barrister's own published terms overcomes these difficulties.
65. Question (2) asked whether the proposed New Contractual Terms should become the standard basis of accepting instructions in the absence of alternative terms having been agreed
66. There was almost unanimous agreement to the above from the Bar. One major solicitors' practice responded "no" on the grounds that they disagreed with the drafting of the proposed terms. The Law Society repeated its concerns summarised above, considering that it was wrong for the Bar Standards Board to provide terms, that individual barristers and/or chambers should instead have their own standard terms and that the New Contractual Terms should not become default terms.
67. It is worth re-emphasizing that the Bar Standards Board does not propose that the New Contractual Terms are imposed or are in any way compulsory for solicitors to use in their dealings with barristers. The effect of the Cab Rank Rule will be that Solicitors can insist, if they so wish, on the use of the New Contractual Terms or on the terms that an individual barrister has advertised as being his general terms and conditions of engagement, but that they are not obliged to do so – they are entirely free to propose whatever terms they wish to barristers, but if they do, the Cab Rank Rule will not apply and the parties are free to negotiate. Not only would it be a restraint on trade for the New Contractual Terms to be compulsory, but those terms cannot meet every possible circumstance which might arise. As already explained, what is being proposed is that the New Contractual Terms will meet most common situations and will be available to be used if the parties do not come to any other specific agreement. Nothing which is being proposed by the Bar Standards Board would inhibit individual barristers or chambers from having their own standard terms, which solicitors would be free to accept or negotiate. Indeed, barristers and solicitors can continue to agree special terms of work for a particular matter prior to the instructions being carried out and this mostly occurs with the large commercial solicitors' practices and for major cases. In the guidance and training that will be provided to the Bar concerning the introduction of the New Contractual Terms, chambers and barristers will be advised strongly that they make clear to their client solicitors, at the outset, the basis of the terms on which instructions are accepted in order to prevent any misunderstanding or unnecessary dispute.
68. At the time of the consultation in 2010, the Bar Council was concerned that there would be instances where no terms have been agreed, where for example barristers and solicitors do not have the luxury of time or resources to negotiate individual agreements for each instruction. However, in considering the matter further, the Bar Standards Board considers there is no need for the New Contractual Terms to be treated as default terms because the Provision of Services Regulations 2009 require barristers to provide information on general terms and conditions before a contract is concluded or service provided. Consequently the instances of an absence of terms

should not arise and it is not now being proposed that these New Contractual Terms should become default terms.

69. Question 3 asked if the Code should be amended as proposed so that barristers are not obliged to accept instructions other than on the New Contractual Terms.
70. Again, there was almost unanimous agreement to the above from the Bar. The Law Society disagreed, giving its principal reason as objection to the drafting of the terms, which it considered to be too much in favour of the barrister. The SRA questioned whether having standardised default terms is in keeping with the reforms taking place across the legal services market, a matter which we have already addressed above.
71. The Law Society was particularly concerned that it is being proposed that the Cab Rank Rule be amended to enable barristers to refuse instructions should solicitors refuse to use the New Contractual Terms and took the view that it was “not 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.” The Bar Standards Board does not agree with these concerns. Barristers will not be entitled to insist on the New Contractual Terms – the essence of the Cab Rank Rule is that barristers cannot refuse instructions offered on the basis of the New Contractual Terms applying, not that they can insist on them. Nor is it believed that the New Contractual Terms (whether in the form sent out for consultation or in the slightly amended form following consideration of consultations – see below) are “blatantly in favour of the barrister”.
72. As regards the drafting of the terms, the Law Society and several other respondents made detailed drafting suggestions. Some of those have been incorporated into the text of the New Contractual Terms. The amended version has not been sent out for further consultation, as the amendments are not considered to be sufficiently fundamental to require that course.
73. In considering the responses to the Consultation and in recognising the obligations on barristers to publicise their terms and conditions as required by the Provision of Services Regulations 2009, the Bar Standards Board has extended the scope of the Cab Rank Rule so that, apart from the exemptions outlined in paragraph 26 above, barristers are obliged to accept instructions if offered on these New Contractual Terms or on the barrister's own publicised terms of work.
74. The Bar Standards Board recognises that the market for providing legal services is moving beyond the traditional barrister: solicitor relationship. New terms will need to be formulated with the new business structures evolving. The SRA was not alone in pointing out the limitation of these New Contractual Terms. For example, the Association of Law Costs Draftsmen recommended all litigators should be covered by the New Contractual Terms and the Planning & Environment Bar Association recommended that the Advisory List of Defaulting Solicitors should also incorporate Direct Access clients. Suggestion was also made of extending the applicability of the New Contractual Terms to cover all types of publicly funded work, including those cases where counsel would normally be paid direct by the Legal Services Commission.
75. The view of the Bar Standards Board is that to include non-solicitors within the scope of the New Contractual Terms and Advisory List of Defaulting Solicitors risks making them overly complicated and has concluded that it would be better to confine the applicability of the New Contractual Terms to the basic barrister: solicitor instruction. Obviously parties can amend the New Contractual Terms as they feel fit to meet the requirements of the particular instruction and could agree that they should apply to an instruction by someone other than a solicitor (with any necessary modification).
76. In addition, the New Contractual Terms have been drawn up for use in privately funded cases or where the barrister would normally be paid by the solicitor. In this latter context, the New Contractual Terms could be used for publicly funded work such as Controlled Legal Representation, where counsel is paid direct by the solicitor, albeit the solicitor is paid by the

Legal Services Commission. As regards the suggestion that the New Contractual Terms should be extended to cover work covered by a full publicly funded certificate whereby counsel is paid direct by the Legal Services Commission (or, if there is to be no call on the public funds due to the other side bearing the costs), the Bar Standards Board concluded it would not be feasible to draw up one set of standard terms that would suit both privately funded matters and such publicly funded matters as well because, in the latter case, the contract would have to have regard to the contract between the Legal Services Commission and the solicitors. This does not of course prevent the barrister deciding to amend the New Contractual Terms or draw up a new contract for such publicly funded work.

77. The Law Society queried at the beginning of its response whether the Cab Rank Rule is a necessary and proportionate rule for the Bar. The Bar Standards Board disagrees with the Law Society's view. It is clearly in the interests of access to justice that the Cab Rank Rule remains because, under the Rule, barristers are forbidden to withhold services on the grounds that the nature of the case is objectionable, or the conduct, opinions or beliefs of the prospective client are unacceptable or the prospective client is being financially supported. This Rule remains just as relevant and important in modern times as it has done historically. However, it must be borne in mind that, because of the operation of the Cab Rank Rule, barristers are not at liberty to refuse instructions on the grounds of perceived shortcomings of the solicitor clients, for example concern over credit-worthiness. In commerce, contractors are generally free to accept or refuse work having regard to the credit-worthiness of the clients. Because of the Cab Rank Rule, it is not possible to replicate that freedom for the Bar as that would restrict access to justice and be contrary to the interests of consumers. Consequently a barrister should have some safeguard that will enable him to refuse, if he so wishes, instructions given on possibly unfair terms which, for example, do not allow for payment, or for payment only on an uncertain basis, or on terms that impede the necessary execution of the work. Such a situation could be considered as contrary to the principle of encouraging a strong and effective legal profession.
78. Question 4 asked respondents if they thought it appropriate that the existing Withdrawal of Credit Scheme should be abolished and replaced with an Advisory List of Defaulting Solicitors and 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.
79. Almost all respondents agreed with the above, including the Law Society and SRA. However, many barristers and chambers considered that the Advisory List of Defaulting Solicitors lacked the same effectiveness as the Withdrawal of Credit Scheme and that there should still be an absolute prohibition on accepting work on credit from solicitors named on the Advisory List of Defaulting Solicitors. There was also criticism of the likely delays in placing a firm of solicitors on the Advisory List and the necessity of having to sue the solicitors first, instead of simply making a complaint to the Bar Council as with the old scheme.
80. The Bar Standards Board recognises the limitations of the Advisory List of Defaulting Solicitors when compared with the Withdrawal of Credit Scheme. However, bearing in mind that barristers will generally be using contractual terms instead of the present, non-enforceable Terms of Work, the barrister should generally find sufficient remedy in suing non-paying solicitors. The Advisory List is to provide a warning list of bad payers, who have failed to satisfy a judgment or a joint tribunal award and thereby to give barristers advance notice of the credit risk presented and the option of refusing instructions on credit in respect of work which, under the Cab Rank Rule, they would otherwise be obliged to accept. As discussed above, this is considered to be a proportionate response.
81. Question (5) asked whether the Advisory List of Defaulting Solicitors should also apply to publicly-funded cases and received almost unanimous support. Both the Law Society and SRA were fully supportive of this suggestion.

82. Question 6 asked "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 and whether there are opportunities to promote greater equality?"
83. Most respondents viewed the proposed changes as a positive step in reducing inequality. Concerns expressed included that pressure would be put on more junior members of inequitably run barristers' chambers not to sue for unpaid fees for fear of losing business to more senior members, and the lack of transitional measures. The Law Society considered the public would be adversely affected by the loss of competition over the New Contractual Terms and what they considered to be the restrictive nature of those terms. The Law Society also wrote that there could be delays for lay clients due to solicitors having to renegotiate the terms or having to find a barrister willing to undertake work on different terms and expressing the wish that the terms should be revised and that they should be no more than a template for barristers to consider.
84. Regarding the concern that pressure would be put on junior barristers not to sue for fear of loss of business, the Bar Code of Conduct requires Heads of Chambers to ensure proper and prompt action to recover fees for all members of his/her Chambers and the Bar Standards Board is quite clear that this pressure on junior members is completely unacceptable. It is however not something that can be remedied by the New Contractual Terms: nor is it considered that their adoption will adversely change the situation of junior members of the Bar in this regard.
85. Regarding transitional arrangements, whilst it is proposed that the details of solicitors currently on the Withdrawal of Credit Scheme will be transferred to the new Advisory List of Defaulting Solicitors, it is recognised that the position of those barristers whose work predates the Advisory List of Defaulting Solicitors is weakened. However, it should be explained that the Bar Council does lodge complaints with the SRA in respect of solicitors against whom a direction to withdraw credit has been made and the SRA takes such action as appropriate. There is nothing further the Bar Council can do in respect of those unpaid fees and therefore there will be little further deterioration of any barrister's position as a result of the transition from the Withdrawal of Credit Scheme to the new Advisory list of Defaulting Solicitors.
86. The Bar Standards Board rejects the Law Society's suggestion that the public will be adversely affected by any loss of competition as a result of adoption of the New Contractual Terms. The Equality Impact Assessment (in Annexe 7) demonstrates the reverse to be true as regards competition. The very fact that there are difficulties under the present system in recovering fees obviously has greater impact on those less able to sustain financial loss or considerable delay in payment and shows that the current system operates contrary to the Regulatory Objective of encouraging an independent, strong, diverse and effective legal profession.
87. As regards the Law Society's concern regarding delay, the Law Society's alternative suggestion (that the New Contractual Terms should be "no more than a template for barristers to consider") would, if anything, lead to far greater delay. This is because there could then be no Cab Rank Rule and the terms of every instruction would have to be individually negotiated. The proposed New Contractual Terms, as with the barrister's own published terms of engagement, avoid this by setting out terms which will be known to all solicitors (and which they can opt for if they wish under the Cab Rank Rule) so that risk of delay for negotiation is considerably reduced in most cases.
88. Again, in response to the Law Society's suggestion that the New Contractual Terms should only be a template, it is reiterated that they are, in fact, model terms, which solicitors will be able to insist on using, but are not obliged to accept. Solicitors are free to propose amendments to the New Contractual Terms as appropriate to the particular case or to agree totally different provisions; on the other hand, a barrister may agree different contractual terms with a solicitor, but is obliged to accept work on the New Contractual Terms or on his published terms of engagement if the solicitor wants to instruct him or her on either of those bases. In effect these New Contractual Terms are to be used as a template.

Other Issues arising from the Consultation

89. The Consultation response form invited comments on how consultees considered the proposed amendments would affect them, their colleagues and (where appropriate) the members of their organisation. Most respondents wrote of their support for the change and the positive aspects the change would bring, but a sizeable number of respondents from the Bar criticised the removal of the prohibition in the Code of Conduct of accepting work on credit from solicitors named on the Advisory List of Defaulting Solicitors. However, for the reasons outlined in paragraphs 7 – 13 of this paper, the Bar Standards Board believes it appropriate to remove the absolute prohibition on accepting work on credit from such solicitors and to move to a position where it is for the individual barrister to decide whether or not to accept such instructions, free from the obligation to do so of the Cab Rank Rule.
90. Other comments included training needs and taxation questions. In addition, several respondents, from the Bar and from the solicitors' profession, made detailed drafting suggestions to the proposed New Contractual Terms.
91. The Bar Standards Board approved the proposed amendments to the Code in the light of the New Contractual Terms at its meeting on 15 September 2011, and the New Contractual Terms were noted by the General Management Committee of the Bar Council on 6 June 2011.
92. The Bar Standards Board therefore seeks approval of the above amendments to the Code of Conduct under the procedure in the Legal Services Act 2007

The Bar Standards Board
date 25 October 2011

Attachments:

- Annex 1 – current provisions of the Bar Code of Conduct
- Annex 2 – proposed amendments to the Code of Conduct, including proposed new annexes to the Code of Conduct:
 - Annex T1 – draft Standard Contractual Terms
 - Annex T2 - Voluntary Joint Tribunal on Barristers' Fees Rules
 - Annex T3 – Scheme for complaining to the Bar Council for publicly funded matters
 - Annex T4 – Rules Relating to the List of Defaulting Solicitors
- Annex 3 – 2010 Consultation and Response form
- Annex 4 – Summary of Responses to the 2010 Consultation
- Annex 5 – Response to the 2010 Consultation by the Law Society
- Annex 6 – Response to the 2010 Consultation by the Solicitors Regulation Authority
- Annex 7 – Equality Impact Assessment