

## SRA response

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

Published on 04 August 2010

#### *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.