

ENGLAND AND WALES

Bar Council of England and Wales

This report covers the representative activities of the Bar Council.¹ It focuses on the following key issues affecting the Bar of England and Wales:

- **Implementation of the Legal Services Act**
- **Promoting Direct Access**
- **Promoting a more diverse profession**
- **Legal Aid Procurement in England and Wales**
- **Costs of Civil Litigation**

1. Implementation of the Legal Services Act

The Legal Services Act 2007 (LSA 2007) was enacted on 30th October 2007. Since then, the Legal Services Board (LSB) has been created and taken on the full range of its powers as oversight regulator for all “front-line” regulators of legal services. The Office for Legal Complaints (OLC) has also been established. The OLC will provide an ombudsman service, dealing with all complaints by clients about legal services. It plans to take on the full range of its powers in late 2010.

During 2009 the major focus of the year was on the implementation of the substantive changes envisaged by the LSA 2007 in relation to modes of practice. A key aspect of the Act is that it permits the creation of **Alternative Business Structures** (ABSs) to provide legal (and other) services. The Bar Standards Board (BSB) made key decisions in 2009 regarding a limited form of ABSs called Legal Disciplinary Practices (LDPs).

The BSB decided that:

- Barristers should be permitted to become managers of LDPs, regulated by other Approved Regulators, without having to re-qualify in any other regime. Changes to the *Code of Conduct* are required to bring this into effect. The new Code provisions have been submitted to the LSB for approval in early 2010.
- The decision to permit barristers to be managers of LDPs applies to LDPs as currently defined, which may include up to 25% non-lawyer managers. There are transitional provisions in the Act which mean that LDPs with non-lawyer managers will automatically be re-classified as full ABSs when the regulatory

¹ www.barcouncil.org.uk. The Bar Council is a single body including the independent Bar Standards Board (BSB), which took over the regulatory functions of the Bar Council in January 2006. The BSB will continue to undertake major project work in its regulatory capacity in 2010. Further consultation will be carried out during 2010 related to the implementation of the Legal Services Act 2007. The review group on pupillage (traineeship), which started in 2009, will report in early 2010. A review of the ongoing education requirements for barristers once in practice (Continuing Professional Development) will be carried out during 2010. New complaints processes were implemented in 2009 but will be subject to further change when the Office for Legal Complaints takes up its powers in late 2010. For more information about the work of the Bar Standards Board, please visit: www.barstandardsboard.org.uk

regime for ABSs comes fully into effect (scheduled for late 2011) and be licensed under that regime. The BSB expects to continue to allow barristers to practise in this restricted form of ABS, but it has not yet taken a decision on whether to allow barristers to practise in other kinds of ABS. The Board has deferred its decision on other kinds of ABS until the effects of the transitional LDP regime can be reviewed and assessed and until the LSB has reached decisions on the licensing regime for ABSs. Further consultation on this point will be undertaken during 2010.

- Barristers should be permitted to practise in more than one capacity at the same time e.g. as both managers of LDPs and as independent practitioners. This will provide more flexibility in the provision of barristers' services to the benefit of both practitioners (particularly women seeking more flexible arrangements and the young Bar starting out in practice) and consumers by offering them a variety of alternative modes of service delivery.
- Barristers should be permitted in principle to form barrister-only entities (i.e. partnerships, LLPs and companies). In agreeing to this in principle, the BSB saw real benefits in such entities being able better to share risk. However, this is so far a decision in principle only, because there currently exists no regulator for such entities. An appropriate regulator will have to be created or an existing regulator will have to apply to the LSB to regulate such entities. The BSB is going to consult in 2010 about whether it should become such a regulator, since it currently has no powers to regulate entities.
- The BSB considers that in principle the so called cab-rank rule² should apply to barrister only partnerships, as well as to the self-employed Bar, although there are practical problems which still need to be considered in detail. Indeed, the BSB considers that all advocates should be subject to the cab-rank rule and will be raising this issue with other regulators during 2010. In deciding to apply the rule to all barristers, the BSB wishes to preserve a unique attribute of the Bar, in the public interest, one the Lord Chief Justice has described as 'essential to the administration of justice'.
- The BSB has decided to consult on whether or not it should become an entity regulator of the new legal entities, and, as part of this consultation, to look at whether a modified cab-rank rule can be applied to barristers practising as managers of LDPs undertaking advocacy work in BSB-regulated entities.
- The BSB has also agreed changes to the restrictions which currently apply to how self-employed barristers work. Subject to LSB approval, self-employed barristers will be able to share premises with a wider group of other people, undertake correspondence, collect evidence, take witness statements and attend at police stations. These new activities will be subject to conditions designed in particular to protect client confidentiality and to avoid conflicts of interest and professional embarrassment. In particular, a barrister will not be permitted to act as an advocate in a case in which he has been involved earlier in another capacity if there is any risk that he might be required to give evidence about that involvement. And, of course, any barrister taking on these new roles, must ensure that that they have the necessary expertise to do so.

² The cab-rank rule requires a barrister in principle not to withhold services from any client in any field in which he professes to practise, provided the fee is proper and the barrister is not otherwise professionally embarrassed. For more details, see Rules 601-606 of the *Code of Conduct of the Bar Council of England & Wales*, 8th Edition.

Early in 2010, the Bar Council, the Chairman of the Bar and representatives of the BSB participated in a series of seminars in England and Wales to familiarise the profession with the proposed changes (which will need to be approved by the LSB before they can take effect) and the opportunities they could offer the profession. How the profession responds and the effects of changes on clients, as well as on the profession itself, will be studied carefully by the BBSB over the next few years.

2. Promoting direct access for clients to barristers

a. Relaxation of Public Access Rules

Public access has continued to develop over the last twelve months and will become an even more important mode of practice for the Bar following the implementation of changes to the public access rules. The BSB has agreed to widen the remit for Public Access in certain areas. This means that barristers will soon be able to accept instructions in areas of law that are currently excluded from Public Access, namely family, crime and immigration. It should be noted that this will not include legal aid work. The prohibition on corresponding on behalf of the client will also be removed in public access cases. The changes proposed by the BSB are currently awaiting approval from the LSB. This is undoubtedly a significant development, and one that will be widely publicised assuming that implementation is approved.

b. Public Access Road shows

The Bar Council organised seminars in three major cities to promote public access work to the business community. A small team of barristers from the Access to the Bar Committee visited Bristol, Birmingham and Manchester to explain the possible benefits of going directly to a barrister. The road shows coincided with the launch of a Bar Council publication *Public Access to Barristers: 5 Years of Success*.

3. Promoting a more diverse profession

The profession remains committed to promoting access to the Bar for the talented regardless of their social background. The Bar Council played an active part in the Government's Panel on Fair Access to the Professions. The panel's membership included a former Chairman of the Bar, Geoffrey Vos QC (now Mr Justice Vos) and Lord Neuberger, the Master of the Rolls, whose groundbreaking work resulted in the 2007 report on Entry to the Bar which comprehensively recommended 57 measures to improve access to the Bar, a number of which have been adopted by other professions pursuing their own social mobility programmes. During the past year, the Bar Council has undertaken a number of significant initiatives which are summarised below.

a. Chambers Placement Scheme

For the third year running, the Bar Council and the Social Mobility Foundation have worked together to enable 50 or so talented young people from state schools to spend a week finding out about life at the Bar. The students spent a week shadowing barristers at work, touring the Inns of the Court and attending a Crown Court. The students gained valuable insights into the work of barristers. Only the most academically promising students were selected by the Foundation. The Bar Council received excellent feedback from participants in the scheme which it is hoped to extend beyond London.

b. Launch of *No Bar to the Bar*

In December 2009, the Bar Council, with the Inns of Court, published [*No Bar to the Bar*](#),³ a review of the various measures which have been pursued by the profession to help all those of ability to pursue a career as a barrister, regardless of their background.

The publication was launched at an event at the Inner Temple, one of the four Inns of Court, attended by the Minister of State for Higher Education and Intellectual Property, David Lammy MP who said: “The Bar Council has done an excellent job of helping those of all abilities and from all backgrounds to access a career at the Bar, so I am really pleased that *No Bar to the Bar* highlights the range of innovative schemes running.”

c. Recruitment and Diversity Toolkits for chambers

The Bar Council is developing a recruitment toolkit so that members of chambers’ selection panels can apply fair recruitment and selection methods and procedures to their selections. The Bar Council has also produced a diversity training toolkit to raise barrister awareness of the statutory equality duties that apply to them and to provide practical advice on managing equality and diversity issues in chambers. Diversity training sessions are run monthly at the Bar Council and, with assistance from the Inns of Court, are being offered more widely.

d. Revision of the Bar Council’s Equality and Diversity Code

The Bar’s Equality and Diversity Code was last revised in 2004 and is currently under review. This Code sets out the regulatory and legislative duties on barristers in chambers and contains good practice guidance. Priority areas for the review are: the fair recruitment of pupils and tenants to chambers, the fair allocation of work in chambers to enable those starting out to have an equal chance of developing their careers and the arrangements made for enabling maternity leave, flexible working and return to practice.

The Bar Council is committed to encouraging good equality practice and compliance with the Bar’s Equality and Diversity Code for Chambers through the provision of good practice guidance and advice. The business case for following such advice is

³ *No Bar to the Bar: Barristers promoting social mobility* (2009):
<http://www.barcouncil.org.uk/assets/documents/No%20bar%20to%20the%20Bar%20final.pdf>

becoming more important in the procurement of legal services from barristers by government who require chambers to demonstrate their commitment to promote equality. Both the Crown Prosecution Service and the Attorney General have drawn up Equality and Diversity Expectations Statements based on the Bar's Equality and Diversity Code. In addition, the Law Society's Diversity Charter is drawing in firms which will expect the chambers they instruct to meet diversity standards. The Bar Council is working with the Law Society to ensure that these standards are based on the Equality and Diversity Code for chambers.

e. Assistance with career progression

Facilitating opportunities for members of the self-employed and employed Bar to progress within the profession and into senior judicial (and other) appointments is another important area of the Bar Council's work. These include appointments to the Attorney General's Civil Prosecution Panels and Crown Prosecution criminal work as well as judicial and silk (Queen's Counsel) appointments. Diversity Mentors appointed on each circuit are working to inform and encourage practitioners from all chambers and practice areas to consider applying for suitable appointments.

f. Support for female members of the profession

A recent Bar survey revealed that about 8% of female self-employed barristers work less than 35 hours per week. Increasing retention rates of women is a high priority. The Bar Council produced practical guidance (available on the Bar Council website)⁴ on career breaks and flexible working. It also runs an annual course for returners on 'Managing a Career Break' and provides sessions on managing career breaks for chambers' clerks.

g. Support for disabled members of the profession

Data from the same survey revealed that over 7% of barristers practise with a disability and that 10% work less than 35 hours a week. The Bar has set up a panel of Specialist Disability Advisers who advise those with disabilities on entering the profession, practitioners who become disabled or chambers which need advice on making reasonable adjustments for clients or members. The Group has produced a checklist on making chambers accessible to disabled people that is on the Bar Council website: www.barcouncil.org.uk.

4. Legal Aid Procurement in England and Wales

a. Government departments and agencies responsible for legal aid

The Ministry of Justice (MoJ) was created in 2007, bringing hitherto disparate responsibilities for the justice system within one department. The Ministry's responsibilities include prisons, probation, the courts, tribunals and legal aid. The Government makes legal aid available through the Legal Services Commission (LSC), which spends £2.1 billion a year on buying civil and criminal legal aid, mainly from barristers and solicitors. In November 2009, the National Audit Office (NAO),

⁴ <http://www.barcouncil.org.uk/guidance/MaternityPaternityParentalLeavePoliciesThingstothinkabout>

which is responsible for reviewing the efficiency and effectiveness of government departments and agencies, published their report on "*The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission*." The NAO concluded, amongst other things, that "the division of responsibilities [between the MoJ and LSC] has sometimes led to confusion and duplication in the oversight of criminal legal aid".⁵

The NAO's findings were accepted by the Public Accounts Committee, an influential select committee of the House of Commons, whose report, published on 2 February 2010, was highly critical of the LSC's performance.⁶ The Committee criticised the LSC, amongst other things, for failing to get a grip of its financial management, for weak internal controls (leading to its accounts for 2008-09 being qualified) and for threatening the long-term future of the junior criminal Bar and placing the quality of advocacy in the Crown Court at risk. The Committee criticised the LSC for the lack of a clear strategic direction (reflected in its poor management of changes initiated following Lord Carter's review of legal aid in 2006). Significantly, the Committee found that the LSC's failings were such that it was not able to demonstrate that its management of the legal aid funds was delivery value for money for taxpayers.

Independently of the NAO inquiry in October 2009 the Ministry of Justice announced⁷ a review into the delivery of legal aid, by Sir Ian Magee. He was asked, amongst other things, to examine whether the Government fund for legal aid should be separated into two 'ring fenced' funds, one for civil, the other for criminal legal aid. One reason for this is that in the past civil legal aid funds have been cut by the Government in order to fund the increasing number of criminal cases. The recent economic recession has meant that demands on civil legal aid have increased (for example, debt advice and housing repossession) whilst criminal legal aid spend has remained stable.

The Government is proposing to cut criminal legal aid fees in order to "safeguard" civil legal aid. However, instead of transferring any savings from criminal legal aid to civil legal aid, the total funds for legal aid will be reduced as part of the Government's plans to cut public expenditure.

b. Criminal Very High Cost Cases

Trials expected to last more than 40 days are designated "Very High Cost Cases" (VHCCs) and advocates are paid an hourly rate. Barristers do not like the current scheme because it involves much bureaucracy and unpaid negotiations with LSC staff for the number of hours an advocate is allowed to work on a case. Barristers prefer graduated fees, involving the payment of one fee for the whole case, set by a mathematical formula, depending on the complexity of the case. Graduated fees mean that barristers who prepare their cases more efficiently are rewarded accordingly and incentivised to become even more efficient. However, the current graduated fee scheme for 1-40 day cases is not considered suitable for VHCCs,

⁵ Paragraph 4, "The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission", 27 November 2009

http://www.nao.org.uk/publications/0910/procurement_of_legal_aid.aspx

⁶ *The Procurement of Legal Aid in England and Wales by the Legal Services Commission* (HC 322, 2010): <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmpublic/322/322.pdf>

⁷ <http://www.justice.gov.uk/news/newsrelease131009a.htm>

because the latter have different features which are not picked up by the current formula for the former.

Accordingly, a group of advocates, in consultation with the Law Society, the MoJ and the LSC, has designed a graduated fee scheme that would be suitable for VHCCs (called 'GFS Plus'). The group were required to achieve a 5% saving on current rates.

However, in November 2009 the Government insisted that the LSC consultation document on changing the VHCC scheme, should include in addition to 'GFS Plus', an option to extend the current Graduated Fee Scheme, which would result in a cut in advocates' fees for those cases of between 30% and 50%.

c. Criminal Graduated Fees

In December 2009 the MoJ published a consultation document⁸ on the Advocates' Graduated Fee Scheme for Crown Court cases where the trial is expected to last between 1 and 40 days. The proposal is to cut £47-£48 million from advocates' fees for these cases. Two options were presented. The first option was an immediate 17.9% cut in every fee. The second option was a 13.5% cut in every fee phased in over three years; plus the 30%-50% cut for VHCCs; as well as, at a future date, combining the advocates and litigators' fee scheme (this would be 'one case one fee' with the money for the case expected to go to the solicitor and the solicitor deciding how much to pay the barrister).

5. Costs of Civil Litigation

In January 2009, Lord Justice Jackson began a review into "the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost."⁹ The review was not concerned with civil legal aid, but only with privately funded cases.

The Bar Council submitted evidence¹⁰ to Lord Justice Jackson's review; a paper covering a wide range of areas, and two further discussion papers on the viability of funding some aspects of civil justice through a Contingent Legal Aid Fund.

In January 2010, Lord Justice Jackson published his final report.¹¹ It concluded that costs in civil cases had risen inexorably and disproportionately over the last 15 years and needed to be contained. The recommendations of the report included the following:

- "Proportionality – the costs system should be based on legal expenses that reflect the nature/complexity of the case (Chapter 3);

⁸ Ministry of Justice, "Legal Aid: Reforming Advocates Graduated Fees" 16 December 2009, <http://www.justice.gov.uk/consultations/legal-aid-reforming-advocates-fees.htm>

⁹ http://www.judiciary.gov.uk/about_judiciary/cost-review/index.htm

¹⁰

<http://www.barcouncil.org.uk/consultations/responsestoconsultationpapers/ResponsesToConsultationPapers2009/>

¹¹ http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf

- Success fees and after the event insurance premiums should be irrecoverable in no win, no fee cases (CFAs – Conditional Fee Agreements), as these are the greatest contributors to disproportionate costs (Chapters 9 & 10);
- To offset the effects of this for claimants, general damages awards for personal injuries and other civil wrongs should be increased by 10% (Chapter 10);
- Referral fees should be abolished - these are fees paid by lawyers to organisations that ‘sell’ damages claims but add no real value to the process (Chapter 20);
- Qualified ‘one way costs shifting’ – claimants will only make a small contribution to defendant costs if a claim is unsuccessful (as long as they have acted reasonably), removing the need for after the event insurance (Chapters 9 & 19);
- Fixed costs to be set for ‘fast track’ cases (claims up to £25,000) to provide certainty of legal costs (Chapter 16);
- Establishing a Costs Council to review fixed costs and lawyers’ hourly rates annually, to ensure they are fair both to lawyers and clients (Chapter 6);
- Allowing lawyers to enter into Contingency Fee Agreements, where lawyers are only paid if a claim is successful, normally receiving a percentage of actual damages won (Chapter 12); and
- Promotion of ‘before the event’ legal insurance, encouraging people to take out legal expenses insurance, e.g. as part of household insurance (Chapter 8).”¹²

The Bar Council is currently considering the wide-ranging recommendations resulting from Lord Justice Jackson’s review, the implementation of which will require the support of the MoJ.

¹² http://www.judiciary.gov.uk/publications_media/media_releases/2010/0210.htm