



**Country Report England & Wales**  
**for the 41st Vienna Bar Presidents' Conference 2013**  
**from the**  
**Bar Council of England and Wales**

This report covers the representative activities of the Bar Council<sup>1</sup> over the last twelve months. It focuses on the following key areas:

- 1. European Union related Work**
- 2. International Work**
- 3. Cuts to legal aid funding and key remuneration issues**
- 4. BARCO – a key new service for the Bar and its clients**
- 5. Diversity, Social Mobility and Pro Bono Work**
- 6. The Young Bar**
- 7. The Employed Bar**

**1. European Union related work**

The Bar's activities in the area of EU law are largely co-ordinated by its EU Law Committee, working closely with its Brussels representation office which enjoys excellent working relationships with other national bars represented in Brussels. The current and mid-term priorities of this work are the following.

**a. UK Government policy developments impacting on the Bar's EU activities**

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<sup>1</sup> [www.barcouncil.org.uk](http://www.barcouncil.org.uk). The General Council of the Bar is the Approved Regulator of the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

- Protocol 36 to the Lisbon Treaty – the “UK 2014 Opt-out”

As part of the deal that paved the way for adoption of the Lisbon Treaty in 2009, the UK negotiated the possibility of a one-off opt-out from EU criminal justice measures adopted before the Lisbon Treaty entered into force. At the time that those measures (around 130) were adopted, the increased competence of EU institutions in the area of criminal judicial co-operation, subsequently introduced by the Lisbon Treaty, was not in contemplation. The transitional arrangements, suspending the application of that increased competence to pre-Lisbon Treaty measures, come to an end in December 2014, hence the timing of the UK’s one-off opt-out decision. The British Government is currently determining its position, but before any decision to opt-out is exercised, the consent of the UK Parliament will be required. The Bar is playing an active role in the debate.

To inform its view, the House of Lords’ EU Select Committee has just conducted an inquiry into the UK’s 2014 Opt-out Decision, in the form of a call for evidence on the opt-outs and opt-back-ins. Our EU Law Committee provided both written and oral evidence to their Lordships. The Bar’s position is clear - it would not be in the UK’s interest to exercise the opt-out, even if it were swiftly followed by individual opt-back-ins to certain measures. In our view, the measures it affects are either vital (for example those facilitating police co-operation); or useful and better than the alternatives (for example the European Arrest Warrant (EAW) - although we do agree with others that this needs to be reviewed); or superseded and thus harmless. Beyond that, the Bar is among many organisations concerned about the potential legal, political, financial and administrative costs of such a move.

- The UK Government’s Balance of Competences review

Over the next two years, the UK Government is conducting a review of where competencies should lie between the EU institutions and the UK. The review takes the form of quarterly calls for evidence, which will then inform government subject-specific reports, to be published online at the end of each semester. The first set of calls and reports deal with subjects as diverse as the Internal Market, taxation and health and animal welfare. The Bar’s EU Law Committee is already actively contributing to this project. Given the scale of this exercise it will be necessary to focus the Bar’s available resources and the Committee and Chair, and Brussels Office Consultant Director, are already involved in a series of meetings with the UK Government to engage with this process.

#### **b. A selection of EU files on which the Bar Council is active**

- European Contract Law

The Bar has actively followed this file for more than 10 years. We agree with the European Commission's stated objectives, but continue to doubt that the proposed Common European Sales law will achieve them. We are, nonetheless, committed to contributing in a positive manner to the ongoing legislative process in an effort to maximise the benefits of any resulting instrument.

- **Public Procurement**

The Bar of England and Wales was among the CCBE members that alerted others to the potential impact of the Commission's 2011 proposal revamping the EU public procurement regime. Were the proposal to be adopted as originally tabled, it could, for example, create difficulties in the area of legal services tendering, in the UK and in some other Member States. The work done on this file by the English Bar and others over the past year and more have so far borne some success. At the time of writing, the current texts of the proposal, both in the European Parliament and in the Council, appear to concede that some form of exclusion from the full impact of the new regime for legal services is required. The Bar of England and Wales, together with other representatives of the legal profession throughout Europe, will continue to follow this file closely.

- **Criminal law – defence and victims' rights**

The Bar, in tandem with other national bars and the CCBE, continues in its support of EU efforts to balance so-called prosecutorial measures, such as the European Arrest and Evidence Warrants, with the measures in the roadmap of procedural rights for the defence; and also with the elements that make up the victims' rights package. Where possible, we will continue to support the development of key measures, including on the right of access to a lawyer and criminal legal aid, whether or not the UK Government chooses to opt-in.

- **Other Ongoing Files**

We are closely following a number of other EU initiatives. We have a working group that is advising the Bar on the important ongoing reform of the EU data protection rules. Other developments in the area of criminal law, such as the planned creation of a European Public Prosecutor's office; and the development of instruments imposing criminal sanctions for enforcing key EU policy rules, are all being considered. We have long supported EU efforts to extend the reach of alternative dispute resolution mechanisms throughout the EU, and welcome recent EU successes in this area. We will also engage with the proposals that emerge as part of the new Company Law Action Plan.

## **2. International Work**

Our work in this field, led by the Bar Council's International Committee, has continued in 2012 under the three headings International Business Development, Rule of Law related work and liaison with international organisations.

### **a. International Business Development**

Pressures on the publicly funded Bar in England and Wales have highlighted the need for the Bar Council to expand the work of the Bar and to develop new markets for barristers, at home and overseas. Key market development activities over the past year have included missions to the South Korea and Singapore (March), New York (April) and Brazil (November). We have also maintained our presence at the IBA Annual Conference and hosted a number of incoming delegations. We were very pleased to host, for the second time, a successful Russian Law Week in November 2012 attended by around 120 practitioners from both jurisdictions. We have continued to enable the young Bar to develop international careers through a grants scheme which subsidises participation in international conferences. We are pleased to see that the statistics of the Bar Mutual Indemnity Insurance Fund prove that more of our members are engaging in international work, reflecting the cost-effective ways in which the Bar of England and Wales practises.

Our visit to South Korea was particularly successful and has resulted in much closer cooperation with the Korean Bar Association. We agreed to launch a young lawyers' exchange scheme in the first half of 2013.

In addition we hosted groups of young Chinese Lawyers and young Russian Lawyers under new exchange schemes with these two important jurisdictions.

We continued to promote London as a centre for international dispute resolution through the "Unlocking Disputes" campaign (see [www.unlockingdisputes.com](http://www.unlockingdisputes.com)), following the opening of the new Rolls Building Business Court complex in late 2011, which is an essential element in the maintenance of London's pre-eminent position in this field.

#### **b. Rule of Law related work**

We continued to engage the profession in this field through the Bar Council's annual International Rule of Law lecture, given in 2012 by Mark Mulholland QC, the Chairman of the Bar Council of Northern Ireland. His theme was "Global Terrorism and the Rule of Law: a Northern Irish perspective."

In addition, we co-sponsored an international law lecture with the United Nations Association. This year's lecture, given by Mark Ellis, CEO of the International Bar Association, drew attention to the decrease in universal jurisdiction exercised by UN Member States over international war crimes suspects.

We also intensified our co-operation with the Lord Slynn of Hadley Foundation, assisting with projects on jury trial in Russia and on disciplinary structures for the Albanian Bar Association.

#### **c. Liaison with international organisations**

In the summer of 2012 the Bar Council organised a major conference for 250 barristers and advocates from around the world, on behalf of the International Council of Advocates and Barristers (ICAB), a body committed to the co-operation of advocates and their professional

organisations. The programme covered numerous important topics, such training and standards of advocacy advocacy under conditions of persecution and the challenges of the future (for more information see: [www.worldbaronline.com](http://www.worldbaronline.com)).

In relation to international professional regulation, we have continued to take an active part in CCBE files of relevance to the profession. We have, for example, worked hard to ensure that lawyer online identity initiatives by the EU will not encroach on civil liberties or place undue burdens on the profession. We have contributed actively to the preparation of the CCBE's response to the forthcoming review by the European Commission of the "Lawyers Free Movement regime". We shall continue to work with other national bars and the CCBE as those files progress.

### **3. Cuts to legal aid funding and key remuneration issues**

#### **a. Changes to criminal cases funded by legal aid**

Government imposed cuts in criminal legal aid expenditure have continued over the period under review and will continue. There was a further 4.5% cut to criminal legal aid fees from April 2012. In autumn 2013, the Government is expected to consult on introducing price competitive tendering for criminal legal aid work. This might involve barristers and solicitors forming new business structures in order to be better placed to bid for contracts.

#### **b. Changes to civil cases funded by legal aid**

In April 2013 fewer cases will be eligible for civil legal aid, when the changes introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), are implemented.

From 1 April 2013, generally speaking, legal aid will no longer be available in the following areas of law:

- asylum support (except where accommodation is claimed)
- clinical negligence (except in specific cases of birth-related injury)
- consumer and general contract
- debt, except in cases where there is an immediate risk to the home
- employment cases
- education cases, except for cases of special educational needs
- immigration cases (non-detention)
- private family law (other than cases where domestic violence or child abuse is present)
- tort and other general claims, and
- welfare benefits (except for specific types of appeals).

The removal of legal aid in these (and other) areas is expected to have a significant impact on the operation of the justice system, particularly with the anticipated increase in the number of self-represented litigants (SRLs), also known as 'litigants in person'. The Government has promoted greater use of alternative dispute resolution processes, but this is unlikely to fill the gap created by the withdrawal of legal aid from these areas.

#### **c. Changes to civil cases privately funded**

The Legal Aid, Sentencing and Punishment of Offenders Act 2012, other changes to civil litigation funding in secondary legislation, and changes to the rules of court will have a major effect upon privately funded civil cases. The changes include:

- Lay clients funded by a Conditional Fee Agreement (CFA or ‘no win no fee’) who win their cases will no longer be able to recover their success fees or insurance premiums from the other party.
- Qualified One Way Costs Shifting (QOCS): Claimants conducting their case properly will not have to pay towards defendants’ costs if the claim fails. Protection would be lost only if the claim is found to be fraudulent, if the claimant has failed to beat a defendant’s offer to settle, or where there is an abuse of the court’s process.
- Lay clients will be able to be funded on a contingency fee (or Damages Based Agreements) basis, whereby their legal representative can be paid a percentage share of successful damages awarded (rather than simply an uplift on regular fees as would be the case under a CFA).
- A prohibition of receipt or payment of referral fees in personal injury cases has been introduced.
- The fixed costs regime has been extended to all personal injury claims both pre- and post-litigation up to a value of £25,000.

The Bar Council is currently engaged in responding to the various consultations about the implementation of these changes and is also preparing guidance for members of the Bar.

#### **d. Changes to the basis upon which barristers accept work from solicitors**

Traditionally barristers have accepted work from solicitors under terms which are not legally enforceable with the result that barristers have so far been unable to sue solicitors for non-payment of their fees. From 31 January 2013, the default non-contractual terms of work will be abolished, and the Cab Rank Rule<sup>2</sup> will then apply to new Standard Contractual Terms that the Bar Council has produced, or to terms that the barrister has published.<sup>3</sup>

#### **4. BARCO – a key new service for the Bar and its clients**

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<sup>2</sup> A professional conduct rule peculiar to the barristers’ profession which obliges its members in private practice, in general, to accept all instructions, with narrowly defined exceptions (see Rules 601 and 602 of the Code of Conduct of the Bar Council of England and Wales, 8<sup>th</sup> ed.).

<sup>3</sup> <http://www.barcouncil.org.uk/for-the-bar/introduction-to-member-services/fees-collection/guide-to-contractual-terms/>



The Bar Council's commercial operations, which are overseen by the Bar Council's Member Services Board, are designed to make the lives of busy practitioners easier. We continue to expand the range of products and services which are tailored for the Bar at discounted rates. We provide administration and support services for Special Bar Associations, Circuits and the Institute of Barristers Clerks.

At the end of 2012, we were pleased to be able to launch our most innovative product today, BARCO. BARCO is a third party company, owned and operated by the Bar Council. It provides an escrow service to receive funds from clients which are required in relation to on-going legal services for legal fees, alternative dispute resolution costs, disbursements and settlements.

This escrow service is an arrangement made under contractual provisions between transacting parties whereby an independent trusted third party, in this case BARCO, receives and disburses money for the transacting parties, with the timing of such disbursements, dependent on the fulfillment of contractually-agreed conditions by the transacting parties.

Barristers are prohibited from handling client funds under Rule 407 of the Bar's Code of Conduct. BARCO preserves this prohibition while still enabling the Bar to offer its services to those who require them. It provides a straightforward, easily accessible, client-focused facility, whilst maintaining the Bar's high quality and cost-effective services. We expect this service to be particularly appreciated by barristers practising internationally and by their clients.

The UK's Financial Services Authority (FSA) granted regulatory approval of BARCO on 8 January 2013. This paves the way for BARCO's next phase involving a limited number of chambers (from which barristers in England and Wales practice), followed by full implementation currently planned for Spring 2013. Chambers from across the country and a range of practice areas are taking part.

## **5. Diversity, Social Mobility and Pro Bono Work**

In 2012 the Bar Council continued its activity in this field (which has been acknowledged as pioneering in many respects), by promoting a more diverse profession.

### **a. Strengthening Recruitment Practices at the Self-Employed Bar**

The Bar Council has continued to assist barristers from all practice specialisms to recruit the best candidates from the widest possible pool. This is achieved now through a brand new on-line guide to fair recruitment methods (The Fair Recruitment Guide) for members of chambers'

selection panels. Training courses are currently being developed based on the Guide for those members sitting on recruitment panels.

#### **b. Increasing the diversity of applicants for Judicial and Silk Appointments**

We continued to hold information events or webinars linked to the judicial and Queen's Counsel (QC) appointment processes and have developed opportunities for mentoring to support candidates from currently under-represented groups. We also continue to work with the Judicial Office, the Judicial Appointments Commission (JAC), the Law Society of England and Wales and the Chartered Institute of Legal Executives (CILEx) to increase diversity in the judiciary. We are currently working with the JAC on a piece of research ("Barriers to Application for Judicial Appointments") which aims to discover influential factors when deciding on a judicial career. The results of this research will help the Bar Council develop a strategy for identifying barristers who might otherwise not apply for a judicial appointment.

#### **c. Careers Days**

Over many years the Bar Council has successfully run careers days all around England and Wales, and aims to have one career day event in each region every year. These career days provide an opportunity for students to gain information about a career as a barrister. The recruitment of students to these events is being looked at in order to ensure they are used to their full potential.

Over the past year, these career days have been held in London, Cardiff, Birmingham and Leeds.

### **6. The Young Bar**

The Young Barristers' Committee (YBC) has had another very busy year, hosting the annual Young Bar Conference in October 2012, as well as assisting in the organisation of a successful International Weekend 2012. The latter is an annual conference held in London, preceding the Opening of the Legal Year in England and Wales on 1 October, for young international lawyers. It is jointly organised by the YBC, the Junior Lawyers Division of the Law Society, the European Young Bar Association and the London Young Lawyers Group. The YBC also published its annual Young Bar Magazine, which is distributed to all barristers under 10 years' Call across England and Wales.

The YBC was represented at a number of international events, including:

- European Young Bar Association (EYBA) Summer Conference in Oslo
- American Bar Association Young Lawyers Division Meeting in Nashville
- EYBA Spring Conference in Rome

Finally the YBC have organised several seminars throughout the year, including a seminar on mediation (together with the ADR committee), a seminar at the World Bar Conference '*What the Young Bar needs from Advocacy Training*', a workshop at the Bar Conference on the future face of litigation, covering written advocacy, paperless trials and 'hot-tubbing', and a seminar jointly with three of the twelve *secrétaires* of the Conference du Stage in Paris, providing a comparative analysis of the legal aid systems in France and in England and Wales.

## **7. The Employed Bar**

The Employed Barristers' Committee (EBC) have held a successful Employed Bar Conference 2012 in March, focusing on the effect of the changing legal and regulatory landscape on the day-to-day work of an employed barrister. This event included a keynote address by the Director of Public Prosecutions, Keir Starmer QC.

The EBC also organised a breakout session at the Annual Bar Conference on Saturday 10 November, entitled '*Has the employed Bar come of age? Is it more accessible, adaptable and relevant than the self-employed bar?*'

The EBC have also worked on improving their communication with the employed Bar through publishing and distributing three newsletters, providing information, updates and articles of importance to those at the employed Bar, including ethical guidance, practising certificate fee and quality standards updates, helpful tips on written advocacy, and an address from the Chairman of the Bar.

**Bar Council of England & Wales**  
London

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