



Country Report England & Wales
for the 42nd Vienna Bar Presidents' Conference 2014
from the
General Council of the Bar of England & Wales

This report covers the representative activities of the Bar Council over the last twelve months. It focuses on the following key areas of operation:

- 1. European Union related work**
- 2. International Work**
- 3. Cuts to legal aid funding and key remuneration issues**
- 4. Diversity, Social Mobility and Pro Bono Work**
- 5. The Young Bar**
- 6. The Employed Bar**

1. European Union related work

The Bar's activities in the area of EU law are largely coordinated by its EU Law Committee, working closely with its Brussels representation office, which in turn enjoys excellent working relationships with other national bars and related organisations that enjoy a presence in Brussels. Below, we provide a non-exhaustive overview of some of our current and mid-term priorities. We are entering a period of uncertainty, both at EU level, with imminent EP elections and a change of Commission; and at national level, where the debate on all things EU-related is heating up. The Bar will continue its efforts to positively contribute to debates at both levels, despite the challenging circumstances.

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

- The UK government's Balance of Competence review (BoC)

We are just over half-way through the British government's 2-year-long review of who does

what as between the EU and the UK. The review takes the form of quarterly calls for evidence, the responses to which inform government subject-specific reports, to be made available online. The current list and sequencing of calls and reports is provided in a table on the BoC website, at: <https://www.gov.uk/review-of-the-balance-of-competences>

So far, the Bar has formally responded to 2 calls, the first semester one on the Synoptic Review of the Internal Market (February 2013), and the second semester one on Civil Justice (August 2013).

Government reports based on the first semester evidence are available on the BoC website (above). At the time of writing we await the delayed publication of the second semester reports, and are putting the finishing touches to Bar responses, or endorsements of responses, to those of the current, third semester calls that are of particular interest to the Bar, notably in the areas of fundamental rights, services and financial services.

The fourth semester, due to be launched this spring, will include a call for evidence on Police and Criminal Justice, to which the Bar also plans to respond.

- 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, you will be aware that the UK negotiated the possibility of a one-off opt-out from EU criminal justice measures adopted before the Lisbon Treaty entered into force. The transitional arrangements, suspending the application of the increased EU competence in the criminal justice field introduced by the Lisbon Treaty, to pre-Lisbon Treaty measures, come to an end at the beginning of December 2014, so the coming months will be crucial.

The Bar has played an active role in the debate over the past 18 months, in particular through evidence provided to the **House of Lords’** to inform its inquiries into the Opt-out Decision, and potential opts-back-in.

However, despite the clear consensus from key stakeholders, the Bar included, that it would not be in the UK’s interest to exercise the opt-out, even if it were swiftly to be followed by individual opts-back-in to certain measures (a view reflected in the House of Lords’ reports on same), during 2013, the government confirmed its intention to exercise the opt-out of the block of measures. It also confirmed its intention to seek to opt-back into 30 or so of the measures, covering most but not all of those widely considered to be most valuable, among them the European Arrest Warrant (EAW). All involved are thus now defining the list and terms of the opts-back-in and completing formalities at national level, where after much of 2014 will be taken up with negotiating the package with the EU institutions.

The Bar remains concerned about the legal and practical, leaving aside the political, implications of this process at both national and EU level, and is maintaining its profile in the

debate as it advances. For those interested to see a snapshot of the debate, the government's response to the House of Commons Home Affairs Select Committee report on the subject was published on 10 January, and can be viewed at:

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/954/95402.htm>

b. Focusing on Future EU Justice Policy

Maura McGowan QC, Chairman of the Bar for 2013, was among the speakers who addressed the major European Commission Conference entitled '**Assises de la Justice: Shaping Justice policies in Europe for the years to come**', held in Brussels on 21 and 22 November 2013.

The Conference brought together justice ministers, judges, practitioners, academics, journalists and NGOs from across the EU. The Chairman of the Bar, one of only two practitioners addressing the Conference, was a member of the criminal law panel. She told the 500 delegates that the EU needs a more coordinated approach to justice, which better protects the rights of suspects and defendants, victims and witnesses of crime. Invited to speak on defence rights, she highlighted the critical importance of a properly funded and functioning legal aid system to ensure effective access to justice and protect human rights. Her full speech can be seen at: http://www.barcouncil.org.uk/media/242080/bar_of_england_and_wales_assises_de_la_justice_brussels_november_2013.pdf

The Bar subsequently submitted a written contribution addressing wider issues raised during the conference debate, in particular future EU activity in the fields of civil and criminal judicial cooperation, which response can be seen on the Commission's website at: http://ec.europa.eu/justice/events/assises-justice-2013/contributions_en.htm

In parallel, the House of Lords Home Affairs, Health and Education EU Sub-Committee has been conducting an inquiry on EU plans for Justice and Home Affairs, which has an obvious overlap with the subject-matter of the Commission's Assises. See: <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-home-affairs-sub-committee-f/news/rome-cfe/>

The Bar provided written evidence, drawing on that provided to the Commission.

c. A selection of EU files on which the Bar is active

- 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 the elements that make up the Victims' rights package.

We thus welcomed the successful adoption, during 2013, of the directive guaranteeing the right of access to a lawyer to suspects and defendants, and supported the legal profession's lobbying that ensured that, inter alia, it provided for dual representation in European Arrest Warrant cases.

We also welcomed the adoption by the Commission in late November of its package of 5 further safeguard measures, including 3 proposals for directives. However, we regret that:

- The enforceable right to legal aid is for provisional legal aid only. The accompanying, wider recommendation, though useful, can be ignored by Member States;
- Enforceable safeguards for vulnerable persons are available only to children. Again, other vulnerable groups will have to rely on the willingness of the state concerned to comply with the terms of the Commission recommendation.

We will thus seek to support the final adoption of the widest possible versions of the directives in this package, but will also seek, longer term, to have the lacunae, highlighted above, filled. We also plan to contribute to work on other criminal justice files such as the review of the European Arrest Warrant and the proposed European Public Prosecutor's Office and others.

- Other Ongoing EU Files

A range of other pending or actual EU initiatives are being closely followed by the Bar's EU Law Committee. By way of example, we have a working group that is advising the Bar on the important ongoing reform of the **EU data protection** rules; and another that is focusing on **financial services**. We are also looking at the various initiatives in the areas of **insolvency law**, **competition law**, **intellectual property** and the recently proposed revised **EU's small claims procedure**. We will continue to work with other national bars and the CCBE as the Commission reviews the "**Lawyers Free Movement regime**", and proceeds with its fourth version of the **EU anti-money laundering directive**.

2. International Work

Our work in this field, led by our International Committee, has continued in 2013 under the three headings of liaison with international organisations, Rule of Law related work and International Business Development.

a. Liaison with international organisations and other bars

We continue to send representation to conferences held by the International Council of Advocates and Barristers (ICAB), a body committed to the cooperation of advocates and their professional organisations. The 2014 conference will take place in New Zealand in September.

On the professional regulatory side, 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 and contributed actively to debates on the Professional Qualifications Directive, the Lawyers' Directives and the review of the Establishment Directive.

We have also maintained our presence at the IBA Annual Conference and hosted a number of incoming delegations. We were pleased to co-organise for a second time a successful English Law Week in Moscow in October attended by around 200 Russian and English practitioners.

We also had a significant presence at the Commonwealth Law Conference in Cape Town in April, which attracted over 1,000 international practitioners from other common law jurisdictions.

b. Rule of Law related work

We continued to engage the profession in this field via our annual International Rule of Law lecture, given this year by Chief Justice of Canada, Beverley McLachlin, and focused on whether the open court principle was sustainable in the 20th century.

We furthermore jointly hosted the 11th Ruth Steinkraus-Cohen International Law Lecture on *"The UN and Torture Prevention: theory and practice"* with the United Nations Association Westminster Branch and the Centre of International Studies & Diplomacy, SOAS. Professor Malcolm Evans, Chairman of the United Nations Subcommittee on Prevention of Torture gave the keynote address at SOAS.

This past year also saw the establishment of the Bar Council's Rule of Law Working Group established to promote the rule of law by assisting those overseas to strengthen both their legal system and an independent legal and judicial sector by offering training programmes on rule of law issues such as the independence of lawyers and the judiciary as well as sharing our experience of best practice in rule of law issues and situations.

c. International Business Development

The Bar Council has continued to carry out business development activities at home and overseas. Key market development activities over the past year have included visits to Kiev and St Petersburg (March), and South Korea and China (September).

We have continued to enable the young bar to develop international careers via 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, undoubtedly due to the cost-effective ways in which the Bar practises.

3. Cuts to legal aid funding and key remuneration issues

a. Changes to criminal cases funded by legal aid

The Government is currently finalising plans for further cuts to criminal legal aid following its Transforming Legal Aid consultations in 2013.¹ The Bar Council submitted strong responses to both consultations.² A 30 per cent fee cut for Very High Cost Cases (VHCCs), which are cases where trials are expected to last longer than 60 days, was implemented on 2 December 2013. This cut was applied to contracts already in operation, as well as new contracts. A large number of barristers exercised their contractual right to serve notice of termination on their VHCC contract following the unilateral 30% cut to the rates of existing contracts that the Government introduced³. It is not yet known whether advocates of sufficient experience will be found to take on those cases.

b. Changes to civil cases funded by legal aid

Since the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) legal aid is no longer 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);

¹ Ministry of Justice, Transforming Legal Aid: Delivering a more credible and efficient system (2013). Available at: <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>. See also Ministry of Justice, Transforming Legal Aid: Next Steps (2013). Available at:

https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/consult_view

² Bar Council response to Transforming Legal Aid consultation

http://www.barcouncil.org.uk/media/213901/the_bar_council_response_to_moj_transforming_legal_aid_consultation_040613.pdf Bar Council response to Next Steps consultation

http://www.barcouncil.org.uk/media/236264/bar_council_response_to_the_transforming_legal_aid_next_steps_final.pdf

³ http://www.barcouncil.org.uk/media/242721/update_to_the_profession_on_crime_vhccs_.pdf

- 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 civil legal aid in these (and other) areas has had a significant impact on the operation of the justice system, including a significant increase in the number of people wanting access to pro bono legal assistance. There has also been anecdotal evidence of an increase in the number of self-represented litigants.

While there is provision for 'exceptional funding' of cases otherwise out of scope, between April and October 2013 only 23 cases were granted exceptional funding.

The Bar Council is currently reviewing the impact changes to civil legal aid and aims to publish a full report in September 2014.

Further changes to civil legal aid continue to follow from the Government's Transforming Legal Aid agenda. These include:

- removing funding for all cases where it cannot be determined whether or not the case has a greater potential for success than 50 per cent
- the introduction of a residence test so that only those who have been lawfully resident in the UK for at least 12 months can qualify for legal aid, and
- only paying fees for work done on judicial review if a judge subsequently grants permission for the case to be argued, or where specific requirements are met.

These changes are expected to be implemented in early 2014.

c. Changes to civil cases privately funded

The Legal Aid, Sentencing and Punishment of Offenders Act 2012, together with other changes to civil litigation funding implemented through secondary legislation, introduced wide-ranging changes to civil litigation in privately funded civil cases which came into force on 1 April 2013. The changes included:

- 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 lawyer's success fee from the losing party; the instructing party now pays the success fee. ATE (after the event) insurance premiums are also no longer recoverable.
- Qualified One Way Costs Shifting (QOCS): Claimants conducting their case properly do not have to pay towards defendants' costs if the claim fails. Protection is 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 process.

- Lay clients can now be funded through a Damages-based Agreement (DBA), or contingency fee basis. Under this arrangement the lay client's 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). However, the Bar Council currently recommends that its members do not use DBAs, due to problems with the current DBA regulations.
- A ban on receipt or payment of referral fees in personal injury cases.
- 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 reviewing the impact these changes have had and aims to publish a full report in September 2014.

d. Changes to the basis upon which barristers accept work from solicitors practising in England and Wales

Traditionally barristers accepted work from solicitors under terms which were not legally enforceable, meaning barristers were unable to sue solicitors for non-payment of fees. However, the default non-contractual terms of work were abolished on 31 January 2013 and the Cab Rank Rule⁴ now applies to new Standard Contractual Terms that the Bar Council has produced, or to terms that the barrister publishes as his normal terms of engagement.⁵

4. Diversity, Social Mobility and Pro Bono Work

In 2013 the Bar Council continued its traditionally strong activity in this field, promoting a more diverse profession. To encourage access to the profession, led by the Equality and Diversity and Social Mobility Committees the Bar Council has coordinated or been involved in:

Led by our Equality and Diversity and Social Mobility Committees, the Bar Council has strengthened and expanded its work to ensure that background is no barrier to a successful career at the Bar:

a. Widening Access

- We are improving availability of information and advice at key decision points and tackling barriers to the profession through partnerships both within the profession and with schools, universities, the Government and key NGOs.
- We are improving chambers' recruitment practices with our Fair Recruitment Guide. Combined with our Fair Recruitment Training, chambers now have the support

⁴ A professional conduct rule peculiar to the barristers' profession which obliges its members in private practice to generally accept all instructions, with narrowly defined exceptions (see rC28 and rC29 of the Bar Standards Board Handbook).

⁵ <http://www.barcouncil.org.uk/for-the-bar/introduction-to-member-services/fees-collection/guide-to-contractual-terms/>

necessary to ensure they are using fair and objective criteria and processes when awarding pupillages and appointing staff.

- We have a strong programme of schools careers and information events to ensure students around the country have the information and guidance they need to reach an informed decision about a career at the Bar. These include our Bar Placement Weeks which offer work experience to high-achieving students from low-income backgrounds, regional careers days and our 'Speak up for Others' initiative which sees barristers deliver careers talks in over 500 state schools each year.

b. Improving Retention

- We are supporting barristers and practice managers in identifying, implementing and sharing equality and diversity good practice.
- We are using our Exit Survey to monitor all those who change practice status annually. This will inform activity as we find ways to improve retention in the profession, especially critical as we anticipate falling retention as public funding cuts hit the Bar.
- We are extending our flagship event to support clerks and barristers in managing maternity and other career breaks at the Bar, sharing barristers' experiences of taking a career break, and chambers' good practice on flexible working and return to work.

c. Supporting Progression

- We are launching the Bar Mentoring Service, and supporting other mentoring schemes across the profession to support candidates from currently under-represented groups through the application stages of the QC and judicial appointment processes.
- We are working with the Judicial Office, the Judicial Appointments Commission (JAC) and the QCA to better inform candidates from under-represented groups on navigating the judicial and Queen's Counsel (QC) appointment stages.
- We are tackling other barriers to judicial appointments (such as negative perceptions of flexibility and progression opportunities) with the help of the Judicial Office to achieve a more representative judiciary.

5. The Young Bar

The Young Barristers' Committee (YBC) have had a very busy year, hosting their annual Young Bar Conference in October as well as assisting in the organisation of a successful International Weekend 2013. The latter is an annual conference held in London, preceding our Opening of the Legal Year on 1 October, for young international lawyers and 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:

- Commonwealth Law Conference in Cape Town in April 2013

- International Bar Association Conference in Boston
- ABA Young Lawyers' Division Conference in Minneapolis
- ABA Conference in San Francisco

Finally, the YBC have organised several seminars throughout the year including a seminar on *Counsel's duties in the litigant in person* and another on *Tax changes for barristers* and a successful seminar at last year's Bar Conference on the future of the Bar entitled *Is the future fused?*

6. The Employed Bar

The Employed Barristers' Committee (EBC) held a successful Employed Bar Conference 2013 in March, which included a keynote speech from Sir Alastair Breckenridge, Chair of the Emerging Science and Bioethics Advisory Committee and former Chair of MHRA.

The EBC have organized a number of successful events including a breakout session at the Annual Bar Conference on Saturday 10 November, entitled *The ethics of dual practice* as well as a seminar on *the future of economic crime and asset recovery*, hosted by Stephenson Harwood LLP.

In addition, the Employed Bar Committee have been contributing to the development of a Bar Mentoring Service, which seeks to assist those who wish to apply for silk and judicial appointment.

Bar Council of England & Wales
London, 20 January 2014