

Criminal Justice, Advocacy and the Bar

Criminal Justice Reform Group

Chair

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Glossary of key terms and concepts

ABE	Achieving Best Evidence
AGFS	Advocates Graduated Fee Scheme
AP	Associate Prosecutor
ATC	Advocacy Training Council
BCAT	Bar Course Aptitude Test
BPTC	Bar Professional Training Course
BSB	Bar Standards Board
CBA	Criminal Bar Association
CJRG	Criminal Justice Reform Group
COIC	Council of the Inns of Court
CPIA	Criminal Procedure and Investigations Act
CJS	Criminal Justice System
CPD	Continuing Professional Development
CPO	Case Progression Officer
CPR	Criminal Procedure Rules
CPS	Crown Prosecution Service
EGPS	Early Guilty Plea Scheme
GDL	Graduate Diploma in Law
GFS	Graduated Fee Scheme
LAA	Legal Aid Agency

LiP	Litigant in Person. An individual representing themselves in litigation.
MoJ	Ministry of Justice
OIC	Officer in Charge
PCMH	Plea and Case Management Hearing
QC	Queen's Counsel. A limited number of senior barristers become Queen's Counsel (receive 'silk') as a mark of outstanding ability. They are normally instructed in very serious or complex cases. Many senior judges once practised as QCs.
RAGFS	Revised Advocates Graduated Fee Scheme
SBA	Specialist Bar Association
SRA	Solicitors Regulation Authority

Introduction

Each working day of the year courts around the length and breadth of the country are hearing criminal cases, and decisions are being taken which vitally affect the lives of those who live amongst us. The vast majority of these cases will not be ‘high profile’; they may not even reach the local press, but each one will be regarded as of great importance to those concerned, because they will involve the liberty of the subject and the protection of the public from crime.

The criminal Bar of England and Wales (‘the Bar’) is one cog in the wheel of criminal justice. Many others, including the police, prosecution agencies, the probation and prison services, court staff and solicitors who work in this field, have a very valuable role to play in the process; but in the Crown Courts in particular, where the more serious cases are conducted before a judge and jury, barristers specialising in court procedure and advocacy, whether appearing for the prosecution or the defence, play a crucial role in the administration of justice.

The manner in which these specialist advocates at the Bar, and others authorised to represent the prosecution and defence conduct their cases, is likely to be of profound importance to those involved in individual cases. It is, however, also of importance to the public, for observance of the Rule of Law, by which we lead our lives, very much depends upon the confidence we can have in a legal system in which access to justice is seen as a fundamental right, and criminal trials are conducted fairly and in accordance with the law. In an adversarial system, this fairness inevitably depends upon the abilities of the advocates on both sides to present their cases properly.

Within the last year two important Reviews have been published: the President of the Queen’s Bench Division has conducted a wide scale *Review of Efficiency in Criminal Proceedings*,¹ and Sir Bill Jeffrey has conducted a *Review of Independent Criminal Advocacy in England and Wales*.² Each of these has played a significant part in informing and formulating our thinking, although we should stress that the substance of this Report, and the recommendations which accompany it, are independent and made on behalf of the Bar.

There are many practising in the courts, whether judges or advocates, who passionately believe that both the public as well as the national interest demand that the Crown Courts consistently provide a high standard of excellence in the administration of justice; but they are also concerned that much needs to be done to achieve it. It is with these matters in mind that in 2014 the Bar Council established the Criminal Justice Reform group, a group of criminal barristers, from the very senior to the very junior, to report on the state of the CJS and the Bar, and make recommendations which might, if carried out, secure the confidence of the public that the system is operating to the highest standard.

¹ Available at <https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>

² Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310712/jeffrey-review-criminal-advocacy.pdf

The Terms of Reference of this Group are:

Having regard to the interests of justice and the current state of public finances, to consider and formulate proposals for the future of the criminal justice system and the role of barristers in that system. In particular:

- (A) To consider and formulate proposals for the more efficient and effective conduct of the work of the Crown Court;
- (B) To consider both the current state of, and any suggestions for change to:
 - (i) the arrangements for providing representation to individuals; and
 - (ii) the manner in which barristers provide their services; and
- (C) To formulate proposals for:
 - (i) improving, and removing any obstacles, to the efficient and effective functioning of a system for providing representation to individuals; and
 - (ii) improving the manner in which barristers provide their services.

As to (A) – the conduct of the work of the Crown Court, the CJRG was grateful for the opportunity to contribute to the Leveson Review and has engaged fully with the process, attending meetings and making both oral and written representations. The report of this review is now in the public domain. It is a valuable document, and many of our recommendations have been accepted. Accordingly, although in our recommendations we shall lay emphasis on some matters of particular concern, we will not devote a separate chapter to the topic. The Lord Chancellor has recently signified acceptance in principle of all the Leveson proposals and we look forward to engaging further and constructively with the Ministry of Justice in the implementation of these reforms.

In making proposals for reform in the Crown Court we are aware of the constraints that impose a limit on this process. Mindful of the supreme importance of the Rule of Law and the need for a justice system capable of upholding it, it is impossible to ignore that the CJS is chronically short of money. Courts have been deprived of local administrative leadership, and staff has been reduced to the point where it is only by their great goodwill that some are able to function at all. Even the fabric of many courts has been allowed to deteriorate, despite their importance in the affairs of local communities, and role as civic landmarks. It is not just that the CJS cannot be improved by depriving it of resources; it would be foolish to deny that many of its problems, and perhaps most of the worst, have been caused by a shortage of funds in every part of the system.

It is feared, for example, that cuts to the police and CPS are preventing some prosecutions taking place at all. It is equally concerning that another consequence will be that more defendants may find themselves unrepresented, with all the attendant nightmare problems for the management of cases this entails – problems which are already afflicting the family courts.

The following recommendations are, however, based upon the assumption that a defendant will be represented.

As regards the CJS, the main focus of this Report is dealing with those who are likely to appear in court whether as defendants, victims or witnesses. The way they interact with the system will always affect its efficiency. Most defendants are unlikely to be willing participants in the process. Self-evidently, no one, whether they be guilty or not, wants to be arrested, charged and tried in a Crown Court; and some defendants lead chaotic lives, where attending appointments with a lawyer may be a low priority. Incentives such as discounts for early pleas and reduced discounts for late pleas cannot be counted upon to alter their behaviour and should not affect the attitude of the innocent; nor will they alter the stance of the guilty who have a strong instinct to gamble that they might escape punishment altogether.

When it comes to remuneration, we urge the MoJ to avoid policies that may have the effect of penalising lawyers for the failings of their clients, without the potential to produce any discernible improvements in efficiency. Moreover, there must be greater emphasis upon the degree of responsibility involved in conducting the case. The Leveson Review has endorsed our long held view that if it is to work, “remuneration for those engaged in the system must be commensurate with the skill and expertise which has to be deployed, otherwise the highest calibre individuals will not be prepared to work in the field and standards will inevitably drop.”

As to (B) and (C) – in approaching the second part of our Terms of Reference we have been mainly concerned with the training of advocates and provision of advocacy services. The CJRG has consulted widely amongst its members, from amongst the most senior to those who have barely entered the profession. This has given us what we believe to be a clear picture of what the Jeffrey Review calls the ‘advocacy landscape’, and we stress that this picture has been gained from his Review, and the experience of many barristers.

In recent years criminal advocacy has experienced considerable upheaval. This has been the result not only of matters of finance, but neglect, as other matters of national interest have seized political attention. All this, together with increased rights of audience for solicitors, has unleashed a hurricane of market forces: leaving in its wake serious doubts and confusion as to who is or is not really competent to do the work, and practices which are wholly wasteful of public money. We deal with these matters in this report, and suggest that they should be confronted now. If the ‘advocacy house’ is not swiftly put in order there is a potential that two great professions, upon whom the nation depends to promote the Rule of Law, will be set at odds with one another with every prospect of disadvantage to the public.

Having said that, all is not doom and gloom. Whilst it may be human nature to concentrate upon all the ills, it is important to remember that magnificent work is done in the criminal courts by many barristers and solicitors – work of which they may be justly proud. The criminal Bar is rightly described by Sir Bill Jeffrey as a “substantial national asset.” The chapters that

follow should therefore be seen as an attempt to explain the importance and value of this work, the principles that should underpin it, and an attempt not merely to identify the problems which currently stand in the way of a better public service, but to address them, so as to lay the basis for high quality advocacy for years to come.

We begin the Report with our Recommendations. This will be followed by a review of the duties of the barrister advocate and the landscape of advocacy services available today. We have devoted much time and concern to the situation of the 'Very Junior Bar'. They are rightly no less passionate about the Bar and the viability of their future in the profession, but they are faced with great difficulties, and must have the opportunity to articulate their concerns. They need a 'voice', and it should be understood that the chapter of that title, which the CJRG fully supports, is very much *their* voice, and the product of their thinking and experience.

We are grateful to all those who have assisted us in this endeavour. We are also immensely grateful to Professor Martin Chalkley for the benefit of his work on remuneration. Professor Chalkley is pre-eminent in the field of the economy of the CJS. He argues and concludes that there is a sustainable case for preserving a cadre of independent advocates on economic and other grounds. If that conclusion is accepted, it follows, importantly, that the public funding of criminal advocacy should ensure that the Bar remains a sustainable profession. Naturally, this will be a matter of great importance to those who are contemplating a career at the Bar (and making the not inconsiderable investment in their education and training). It will also be of concern to those who are considering a move away from the Bar altogether, or moving into another specialism within the profession. There should be no doubt that the choices they make will be of immense public importance, for they will affect the future supply of talent of those who are able to prosecute and defend the most serious or complex cases. It is from this pool of talent that the judiciary of the future is likely to continue, to a large extent, to be drawn.

As to the future of the Bar, no one can pretend that there is some magic formula to hand; but we believe there is a very powerful case for a strong independent criminal Bar. In the final chapter we spell out some of the possible options that are now becoming available to the Bar, whether for chambers as a whole or for barristers within chambers. The Bar should be aware that valuable work is being done by the Circuits, the Bar Council, the Bar Standards Board, the CBA, SBAs and the Inns of Court to assist in this work. No one should doubt that it is not merely in the interests of the Bar, but of the country, that these bodies should combine forces, and in association with government, use all the resources at their command to secure the future of the Bar and a first class criminal justice system.

His Honour Geoffrey Rivlin QC
Chair of CJRG

Recommendations

The Criminal Bar

1. A strong and independent criminal Bar is critical to ensure the proper functioning of criminal justice and upholding the Rule of Law. These are essential elements of the fabric of our society. Therefore, in addition to implementing the recommendations below, the Government should restate its commitment to the continued existence of the independent criminal Bar.

Criminal Justice

The links in brackets, marked with an 'L' below, refer to the relevant paragraphs of the Leveson Review.

Case Ownership and Early Preparation

2. Case Ownership is essential to an efficient and effective CJS. This *must* include early identification of an individual with responsibility for the case at each stage of the CJS whether from the police, the CPS, the Court Service or prosecution and defence advocates. [L paragraph 26] This will better enable the prosecution and defence advocates to ensure:

- 2.1 Thorough preparation for the PCMH;
- 2.2 The tendering of realistic advice on plea;
- 2.3 An ability to identify the real issues; and
- 2.4 Sensible discussions/negotiations can be conducted with the other side.

3. CPR r.3.19 should be amended to apply to both the defence and prosecution.

4. The Government should take immediate steps to remove structural impediment to early briefing. Since 2007 the 'Instructed Advocate' receives the AGFS fee whether or not he or she conducts the trial. The definition of the 'Instructed Advocate' must be amended to be the individual who will conduct the main hearing: in the event of a guilty plea, the sentence; in the event of a not guilty plea, the trial [L paragraph 31]. We are delighted to see that the Lord Chancellor has recently given an undertaking that the MoJ will now make this amendment.³

³ Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411854/response-to-leveson-review.pdf

The Police

5. It is essential that training for police officers incorporates the following:
 - 5.1 How to put a file together, to include what the CPS and the defence need;
 - 5.2 A basic guide to admissibility – hearsay/bad character;
 - 5.3 A guide as to what is needed by all parties in the CJS;
 - 5.4 The proper application of disclosure tests; and
 - 5.5 Dealing with witnesses and victims.

Charging decisions

6. The persons given the high responsibility for making charging decisions in criminal cases should always be suitably trained and fully qualified in the law. [L paragraph 63]

Allocation

7. Too many cases end up in the Crown Court, which ought to be heard in the Magistrates' Court. This problem could be alleviated by the introduction of primary legislation. [L paragraph 368]

Court Listing

8. Crown Court listing must take into consideration the availability of complainants, witnesses *and* advocates. In particular,
 - 8.1 Warned list cases should be abolished; [L paragraph 130]
 - 8.2 Greater use of time markings for hearings should be introduced; and
 - 8.3 The instructed advocate's availability should be taken into consideration when fixing hearing dates.
9. The contact details of representatives of the parties, the Judge and Case Progression Officer must be provided in all cases.

Early Guilty Plea Scheme

10. We recommend a uniform national EGPS in all Crown Courts. [L paragraph 167] In order for such hearings to be effective the following should be implemented:
 - 10.1 Pre-sentence reports should be available prior to, or on the day of sentence. If they are not ready (for whatever reason) the Probation Service should be under an

- obligation to notify the Court and advocates in sufficient time to take the case out of the list;
- 10.2 The CPS must serve, in sufficient time, the case papers including all CCTV, ABE and DVDs in good time in advance of the sentencing hearing to all parties including the Probation Service; and
 - 10.3 Initial disclosure must be completed even though a guilty plea is envisaged.
 - 10.4 Urgent consideration must be given to the appropriate fee payable for such hearings.

Further Hearings

11. There should be a presumption that further interlocutory matters ought to be concluded without the need for a formal hearing in court. Matters should, where possible, be determined between the parties and the court by correspondence i.e. email. [L paragraph 180]
12. Hearings post PCMH should be a matter of last resort in all but the most complex cases. If further hearings post PCMH are required:
 - 12.1 They should be fixed for the instructed advocate's convenience; and
 - 12.2 Wherever possible these hearings should be conducted by telephone or video link.
 - 12.3 Cases should only be listed post PCMH if an insurmountable problem has arisen that cannot be resolved out of court, which places the trial or sentence date in jeopardy.

Technology

13. In order that recommendations, such as remote hearings, are capable of implementation the Government needs to commit to improving the infrastructure and equipment available to CJS users [L paragraph 47]. This must be of high quality and reliable, in particular:
 - 13.1 All proposed users of the common platform programme need to be trained in its application;
 - 13.2 Proper training is needed for all staff in the use of the equipment; and
 - 13.3 IT support at each Court centre.
14. Increased technology should not be used as an excuse to deprive courts of the staff necessary for their proper functioning. A system that is essentially geared to people, whether defendants, victims or witnesses must have enough people of the right quality to work it.

Pre-Trial Hearings

15. In the majority of cases only one pre-trial hearing should take place. This should either be the EGPS Hearing, or for all other cases, the PCMH, the listing of which should take into consideration the advocate's availability. [L paragraph 177]
16. To ensure maximum effectiveness prior to the PCMH:
 - 16.1 The CPS must serve the case papers including all CCTV, ABE and DVDs in all matters, whether a guilty plea is envisaged or not, to ensure preparation can be undertaken and proper advice given;
 - 16.2 The attendance of the OIC and/or disclosure officer at the PCMH should be compulsory;
 - 16.3 At the PCMH the instructed advocates must be able to assist the Judge with:
 - i. The trial date (which should be fixed taking into consideration the advocate's availability);
 - ii. Identifying the issues. There should be compliance with CPR r3.2(2)(a) and r.3.3(a), namely early identification of the real issue(s) in the case;
 - iii. Detailing a timetable for preparation – defence statement, admissions, bad character, hearsay, expert evidence etc;
 - iv. Determining whether intermediaries are needed and in the case of children, vulnerable witnesses and defendants, set the date for a ground rules hearing; and
 - v. Determining the interpreter.

There should be a duty to take early instructions from the client, and in all cases in which a trial seems likely, advices on evidence should be required. In very serious and difficult cases solicitors should attend court when it is judged necessary. Payment for this should be introduced.

Enforcement of the Criminal Procedure Rules

17. The CPRs are the blue print for safe and fair criminal proceedings. Everyone concerned in the administration of criminal justice should be familiar with the Rules, and the duty of all parties to engage with the court in the interests of justice. The Rules should be enforced by the courts, and observed by all courts and participants in the CJS, nationwide. Three of the most fundamental CPRs are: first, Rule 1.2 (1) which provides that each participant in the conduct of the case should prepare and conduct it in accordance with the 'overriding objective' (that criminal cases are dealt with justly) and must comply with the Rules; and then, Rules 3.2 (1) and 3.3 (a), which provide that the court must ascertain an 'early identification of the real issues,' and the parties must 'actively assist' the court in doing so. It is worth considering that if the

issues could be identified at a suitably early stage, much unnecessary expenditure of public funds on disclosure exercises might be avoided. [L paragraphs 191-193].

18. A CPO with appropriate status should be allocated to each Crown Court to enable the courts to monitor the progress of cases and compliance with court orders. Given the imperative of adherence to the CPRs, a CPO attached to a court centre must be tasked to monitor the progress of all cases, and compliance with court orders. The CPO should have the contact numbers of all those with ownership of the case from police officers to counsel, and ensure that if ownership has to be relinquished, continuity is maintained. Templates of all orders made at the PCMH, or subsequently, should be sent to the parties, via email, who should be required to respond and give notice of any risk of non-compliance. The CPO should be particularly proactive to receive assurances of trial readiness in the last month before trial. [L paragraph 195]

Disclosure

19. Disclosure protocols must be properly applied and enforced. The benefits are:

- 19.1 Early pleas;
- 19.2 Earlier and soundly based advice to defendants;
- 19.3 Information gathering for mitigation can occur; and
- 19.4 Avoidance of potential miscarriages of justice.

20. Better disclosure training is required both at police and CPS level. Common compulsory training nationwide should be developed and implemented.

21. In every case, designated Disclosure Officers (who might in many straightforward cases be the OIC i.e. with ownership of the case) should be required to sign undertakings that they have taken responsibility for disclosure and complied with the process.

22. A Disclosure Management Document must be provided to the defence and Court in any case of suitable size and gravity, explaining how disclosure is being handled.

23. Section 8 non-disclosure applications (pursuant to the CPIA), need to be properly drafted, address the specific issues the Act requires, and be CPR compliant.

24. Response to section 8 CPIA applications by the Prosecution must occur within the statutory time limit and prior to the case being listed before the Court for determination, where agreement cannot be reached.

Trial Management

Court sitting hours

25. Court sitting hours should not, save in exceptional cases, be extended beyond 10 a.m. to 4.30 p.m. This is most convenient for jurors, defendants and witnesses. It also permits sufficient time for case preparation out of court. We believe that extended arrangements would have negative implications, in particular for equality and diversity, disproportionately affecting those with childcare commitments. [L paragraph 217]

26. In the rare cases where the use of “Maxwell hours” (usually 9.30 – 13.30) is determined as being appropriate, precise arrangements will be made by the Trial Judge, but they should take into consideration the availability of all parties including the advocates. [L paragraph 218]

Pre-recorded witness evidence

27. ABE interviews are used to pre-record the evidence of children and vulnerable witnesses. Nationalised, compulsory training should be provided to the police as to the conduct of such interviews and what evidence is admissible. [L paragraph 247]

28. All interviews with a complainant/witness should be served in evidence but only the relevant parts of such interviews should be played at trial.

29. Ground Rules hearings and pre-trial cross-examination should be extended to all cases involving children and vulnerable witnesses, not only those involving allegations of sexual offences. [L paragraph 267]

Opening speeches

30. Opening speeches by the prosecution should be shorter, and should include a concise outline of the facts and matters likely to be in dispute. It is accepted that there may well be exceptions to this rule, such as cases of serious fraud. [L paragraph 272]

31. Short and focused defence speeches at the start of the trial should be introduced, to ensure the jury understands the matters in issue from the outset of the trial. [L paragraph 275]

Examination of witnesses

32. Examination-in-chief and cross-examination should be effectively managed to ensure that it remains focused on the issues a jury will have to determine. This however should not be to the detriment of the defendant’s ability properly to advance his/her case. A balance needs to be struck. There are currently sufficient powers available to the Court to ensure the proper application of the CPR. [L paragraph 280]

Summing up

33. In cases lasting 1-3 days, the review of the facts (save in complex matters) should be limited to the salient facts that go to the issue(s) the jury has to determine. [L paragraph 310]

34. In longer cases, summing-up should be as short as is possible. In any case in which the judge believes a 'timeline' may be helpful, the parties should co-operate in the preparation of a chronology of key events. This may provide a useful reminder of the key parts of the evidence in the order in which they occurred.

35. A jury should in all cases be assisted by a 'route to verdict' document prepared by the judge for the summing-up. The parties should be asked to assist the court with any submissions necessary to ensure the accuracy of this document. [L paragraph 308]

Juries

36. Every effort should be made to make trials shorter, and more manageable, but there should be no interference with the jury system. Judge-alone trials (save for cases involving jury/witness tampering) should not be on the statute book.

37. We appreciate that the Leveson Review contains no specific recommendation for reform of the jury system, and in particular the introduction of judge-alone trials. However, because the matter is of such fundamental importance, we pause to express disappointment that after the matter has been so firmly settled by recent Act of Parliament (Protection of Freedoms Act 2012, s.113), the Review is at least proposing consideration of judge-alone trials in some indictable-only cases. We oppose this, as we oppose another idea, that defendants might be entitled to choose their form of tribunal. [L paragraph 356]

38. When it comes to judge-alone trials, we take it from this Review that he has in mind cases of serious fraud. Quite apart from the overarching objections in principle, there are many reasons for not introducing judge-alone trials in these cases. Space does not allow for a debate, and we note that the Leveson Review does not advance any detailed reasons for this suggestion. We are unaware of any evidence that juries, suitably assisted by counsel, are unable to understand the issues in these cases; we take note that judicial experience is that delays and time taken up unproductively in these cases are more likely to be occasioned before the jury is sworn; we mention that the Ghosh test of dishonesty⁴ which has been in use in the courts for over 30 years, is specifically designed for juries; and we make the point that these days, cases of terrorism, or multi-handed homicide and rape are likely to last just as long, if not much longer than many fraud cases, and to involve even more difficult evidential and scientific questions for juries to determine.

⁴ See R v Ghosh [1982] EWCA Crim 2.

39. The Leveson Review suggests that an advantage of judge-only trials in these cases may be “That trials of similar complexity in the Chancery Division and Commercial Courts can be much shorter because the judge is able to provide feedback to the parties both on the evidence and the arguments that appear persuasive, and those that have only marginal (if any) relevance”. Our respectful view is that in the context of a criminal trial this is unrealistic. The culture of jury trials is deeply engrained into our justice system. It will be difficult enough for a defendant, being at risk of many years of imprisonment, to tolerate his ‘judge and jury’ being called upon at various stages of the trial to rule upon the admissibility of evidence which might be highly prejudicial to him; he can hardly be expected to endure a commentary from the same tribunal upon the nature, quality and merits of his case. [L paragraph 357]

Advocates

The links in brackets refer to the paragraphs of this Report.

40. All advocates appearing in the Crown Court should only appear to do work within their competence. That is to say that they should: be trained by qualification and experience to handle their cases within that court. There should be no category of ‘Plea only’ advocates. [Paragraph 2.25]

41. Solicitors should be required to advise their clients in writing of the reasons for recommending an in-house advocate and their right to instruct advocates independent of their firm. If the Ministry of Justice insists upon this, we would recommend that the Criminal Procedure Rules should be amended to make it a rule that judges ensure that this requirement has been fulfilled. [Paragraph 2.20-2.21]

42. Under-representation in cases must be stopped. It is accepted that some serious cases can be presented to good advantage by a QC only, but the regulations for instruction of two counsel whether for the defence or prosecution, should be amended to ensure that when a case plainly merits the services of a QC and junior, for example almost every case of homicide, or the prosecution of cases of serious organised crime involving a number of defendants, such applications should be granted. In other cases, which do not necessarily merit the employment of a QC, it may be of equal importance that the advocate should have very considerable experience, or that two junior advocates are instructed. [Paragraph 4.13]

43. Where a certificate for two counsel is granted (whether for QC and junior counsel or two junior counsel) the CPRs should be amended to introduce a rule that judges must be satisfied that all instructed advocates are of sufficient experience and ability to make a full contribution to the work of the case, and that no advocate should absent himself from the trial without the permission of the trial judge. [Paragraph 4.15]

44. We appreciate that most judges are alive to the problems caused by seemingly unjustified applications to transfer legal aid, but respectfully suggest that the CPRs might be strengthened for the assistance of ‘innocent solicitors and barristers’ and judges anxious to manage their cases, to require judges to enquire very closely into the circumstances of these applications, and either refuse dubious transfers of representation, or make them conditional on no fee being paid to the new firm for work already done, unless demonstrable incompetence in that earlier work can be established. [Paragraph 4.18]

45. In all cases where a legal executive intends to appear as an advocate in the Crown Court, the client should be advised of their right to use a solicitor or barrister to represent them. This obligation should include notifying them of contrasting training and the qualifications and training to which they are subject. [Paragraph 2.34]

46. There should be no place in a court of law for *paid* ‘McKenzie friends’. [Paragraph 2.40]

47. We refer to Chapter 4 of this Report, where we recommend that the LAA should devote resources to policing their contracts for criminal work to ensure that public money is not wasted. We ask that the professions and their Regulators should combine to adopt a zero-tolerance approach when it comes to ensuring the integrity of the criminal justice system. This would mean on the one hand, not just walking away from some unprofessional and unethical offer or proposal as to how a case should be managed, but reporting it; and on the other, the Regulators investigating any report with speed and diligence.

Advocacy Training

48. To maintain and ensure high standards of advocacy in the Crown Court, all those practising as advocates should complete training and apprenticeship of an equivalent standard. We suggest that this should as a minimum reflect the requirements of entry to the Bar. [Paragraph 2.18]

49. Subject to the qualification expressed in Chapter 2 paragraph 2.33, we recommend the ticketing of advocates to ensure that only experienced and very able advocates appear in the most difficult or serious cases. We welcome a scheme that ensures excellence in advocacy, but it must be fair and relate across the board to all advocates who have rights of audience (barristers or solicitors), whether appearing for the prosecution or defence and irrespective of whether they are privately or publicly funded.[Paragraph 2.33]

Vulnerable Witnesses/Defendants

50. All advocates who wish to conduct cases that involve children or vulnerable witnesses/defendants must demonstrate that they have completed the specialist advocacy training course currently being developed by the ATC, before undertaking such work. [Paragraph 2.23]

51. Advocates should be required to go on refresher courses every 4 years.

Very Junior Bar: Entry into the Profession

52. The standards of entry to the BPTC must be raised to ensure that only those with a realistic chance of a career at the Bar undertake it. [Paragraph 5.11]

53. BCAT is not fit for its purpose and should be replaced with the introduction of a basic level test that has the effect of ensuring that those on the course possess the necessary skills that would enable them to secure pupillage. [Paragraph 5.13]

54. The Bar Standards Board should require BPTC providers to:

- 54.1 Publish success rates in terms of pupillage or other employment; [Paragraph 5.14]
- and
- 54.2 Explain their selection procedures.

55. A review of the provision of training on BPTC courses is being undertaken. Training is likely to be split into two parts. If that happens we recommend that:

- 55.1 The content of the BPTC should properly reflect the skills needed to pursue a career at the Bar;
- 55.2 The pass mark for Part 1 must be sufficiently high to ensure that only students with the necessary skills should be able to embark on the second part;
- 55.3 The provision of advocacy training in Part 2 should be by the Inns of Court and/or the Circuits, thereby (i) easing the financial burden on students, (ii) providing a higher quality of training, and (iii) providing the different specialist Bars with an ability to influence the practice of juniors in other fields. [Paragraph 5.15]

56. The BPTC should include modules that can be accessed by other legal professions, so that those who pass part of the course have qualifications that can be used even if they do not secure pupillage. [Paragraph 5.20]

57. Early application for pupillage should be introduced, so that those applying for the BPTC know whether they have a pupillage or not. Pupillage should not, itself, be a requirement for the BPTC, but students without it must understand the risk they are taking. [Paragraph 5.17]

58. The Bar Council and the BSB should identify best practice in respect of ‘Third Six Pupillages’, requiring chambers to make clear at the outset of any period of pupillage after the first 12 months (i) the length of the further period of pupillage and (ii) whether there is any prospect of the working pupil being offered a tenancy at the end of that period. The terms of pupillage beyond 12 months should be as transparent as possible. Ideally, a decision on tenancy should be taken as soon as practically possible. Periods of pupillage beyond 12 months should not be used as a way to extend the time during which a junior barrister is working for little money and without the security of a tenancy or any voting rights in chambers. They are not part of pupillage and are therefore currently unregulated. [Paragraph 5.21]

59. Guidance should be issued by the Bar Council to Heads of Chambers:

59.1 Recommending that junior members of the Bar are included in chambers’ management committees, and are given practical training in, for example, submitting bills and practice-building; [Paragraph 5.23]

59.2 Advising chambers that it is bad practice routinely to take on several pupils and third six pupils knowing that few if any have a realistic chance of securing a tenancy in chambers.

59.3 In publicly funded work junior members of the Bar should never be required to appear in court without the same remuneration which would be received by any other advocate.

60. We recommend that the Inns of Court, Circuits and Heads of Chambers be pro-active in encouraging and supporting the Very Junior Bar in all aspects of their entry into the profession, and if they appear suitable, their retention. For example, we welcome the suggestion that the Inns could make use of their under-used library spaces to provide ‘hot-desking’ facilities for junior members of the Bar who are not based in London. [Paragraph 5.24]

AGFS and Payment Structures

61. The conclusions by Professor Chalkley in Chapter 6 as to the review and amendment of AGFS should be implemented. Barristers are predominantly paid under a system called Graduated Fees for their legal aid defence work. For the reasons given in this chapter in order to secure a sustainable criminal defence profession the MoJ should address the imbalances that have built up in this system. [Paragraph 6.33]

62. The provision of payment for advocates in the Magistrates' Court should be reviewed to ensure junior barristers are properly remunerated, both in respect of the hearing fee and travel expenses. [Paragraph 5.26]

63. If there is not already a clear rule to this effect, the SRA should introduce a clear and simple prohibition on the payment or receipt of referral fees in all publicly funded cases by solicitors including solicitor advocates, to reflect the same prohibition on barristers imposed by the BSB. [Paragraph 6.16]

The Future of the Bar

64. We ask that the Bar considers with particular care the importance of securing its future, not just in the short term, but also in the long term. In this, we seek the continued assistance of the Circuits, Inns of Court, Bar Council, our Regulators, the CBA and other SBAs. It will be necessary to work closely with the MoJ, and we must be willing, if they and the Bar Council are agreeable, to engage with the Law Society. We do not expect that all members of the criminal Bar will wish to work within precisely the same model, but with appropriate leadership all interested parties should without delay work together to acquaint themselves with the various options, and chart the best way forward. We suggest that the BSB together with the Bar Council might begin by arranging seminars to set this work in train.

65. In different ways the reviews conducted by Sir Brian Leveson and Sir Bill Jeffrey recognise that a strong and independent Bar, working alongside that of other key CJS stakeholders, is in the public interest to achieve an efficient and effective system of criminal justice. To engender the implementation of the recommendations of both of these reviews, engagement and collaboration between the stakeholders will be key. Accordingly we recommend that the two main professional bodies (the Bar Council and the Law Society) should explore the possibility of jointly arranging a meeting of representatives of key CJS stakeholders to discuss the conclusions and recommendations of this Report, in the context of the Leveson and Jeffrey reviews, with a view to agreeing next steps and, as appropriate, a programme of implementation of agreed actions.

Chapter 1: The Criminal Bar

The Barrister

1.1 The term ‘barrister’ derives from the ‘call to the Bar’. Each courtroom used to have a rail or *bar* dividing the area used by the lawyers from the general public. Only barristers were allowed to step up to the bar to plead their clients’ cases.

1.2 Today barristers may either be self-employed or employed, for example by law firms or the CPS. Self-employed barristers are often described as the ‘independent Bar’, upon which we concentrate; but when it comes to the conduct of cases in court all barristers have the same duties and responsibilities.

1.3 Before being allowed to practise barristers must undergo rigorous training in court procedure and advocacy. This culminates in a year of mentoring or ‘pupillage’ under the guidance of a senior barrister, known as a pupil supervisor.

1.4 During the last 30 years the criminal law has been greatly expanded, and the rules of criminal procedure and evidence have become increasingly technical and complex. In April 2013 Parliamentary Counsel reported to the Cabinet Office: “Between 1983 and 2009 Parliament approved over 100 criminal justice Bills, and over 4,000 new criminal offences were created. In response to that trend the Ministry of Justice has established a procedure to limit the creation of new criminal offences.”⁵ As yet, there has been no sign of let-up. The criminal Bar must keep abreast of this continuing torrent of legislation, and any new rules which are brought into force which bear upon particular aspects of a trial.

1.5 Many countries have an ‘inquisitorial system’, where judges try to get to the truth of an allegation by inquiring into the case, directing investigations, and questioning witnesses. However, for centuries criminal trials in England and Wales have been conducted in an ‘adversarial system’, involving prosecution and defence as opponents, or adversaries, fighting the case out before magistrates or, in the Crown Court, a jury — each side working within a comprehensive set of rules laid down by Parliament and the courts, and producing the best evidence it can in support of its case. It follows that in our adversarial system, much depends upon the advocates: their quality and commitment is of the greatest importance.

1.6 Everyone is entitled to a fair trial, defined as “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. The CPR⁶ provide that “the overriding objective of the criminal law is that criminal cases will be dealt with justly.” This includes “acquitting the innocent and convicting the guilty ... dealing with

⁵ Available at: <https://www.gov.uk/government/publications/when-laws-become-too-complex/when-laws-become-too-complex>

⁶ Available at: <http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu>

both sides fairly ... recognising the rights of a defendant to a fair trial ... respecting the interests of witnesses, victims and jurors ... dealing with cases efficiently and expeditiously.”

1.7 All barristers owe a duty to the court to assist in achieving this objective, including “a duty to the court to act with independence in the interests of justice”, which transcends all others. This means that whilst barristers must always act in the best interests of the prosecution or defence, they must never mislead or attempt to mislead the court, nor abuse their role as an advocate.

1.8 Criminal barristers perform their courtroom work in public, and the manner in which they carry out their professional duties and behave in court is also public. Although lawyers may seem to be at ‘daggers drawn’ during a case, there are codes of professional conduct which provide that, when in court, they should always be courteous to the judge, witnesses, and to one another – hence lawyers appearing together in court refer to one another as ‘*my learned friend*’. The other side of that coin is that however close they may be as personal friends, they must never allow their friendship to get in the way of fulfilling their duty to act in the best interests of their clients.

1.9 In this country judges enjoy the highest reputation for their skill, independence and integrity. They do not, as in some jurisdictions, become judges via a separate career path, but are appointed from the legal professions. There is thus an urgent, pressing need to ensure a strong independent Bar, not only to provide the courts with barristers who have the experience and skill to handle the most demanding cases, but also to produce a pool of criminal lawyers from all sections of the community, of the highest quality, from which the judiciary can be drawn. When the distinguished constitutional lawyer Sir Sydney Kentridge QC said: “The independence of the Bar and the Judiciary are inextricably intertwined” he was making the point that this should be seen as a matter of national importance. It is, primarily, the reputation of the Judiciary that brings the country in excess of £22.6 billion per year in earnings, 1.6% of UK GDP.⁷

Advocacy

1.10 Barristers are best known for advocacy in court. The art of advocacy is central to the work of the criminal Bar, but fine criminal advocates must be more than ‘good talkers’. They are expected to master the law relating to the charges in the case, and be expert in criminal procedure and the laws of evidence. They must also, by careful preparation and analysis of the evidence, become masters of the facts of their cases.

⁷ TheCityUK, UK Legal Services 2015 (February 2015) at p 3: <http://www.thecityuk.com/research/our-work/reports-list/legal-services-2015/>

1.11 Effective presentation lies at the heart of fine advocacy. This also, and necessarily, involves taking on great responsibility. The Bar Standards Board Handbook⁸ (which contains the rules of professional conduct) provides that “You must not permit your professional client (solicitor), employer or any other person to limit your discretion as to how the interests of the client can best be served.” During the course of any criminal trial, no matter how great or small, it will be part of the advocate’s task to give advice and make decisions, sometimes very difficult ones, as to the best way in which to present the case. They must be able to adapt to the audience they are addressing – whether it be judges or magistrates sitting alone, or a jury – and to the changing fortunes of the case.

1.12 The decisions taken by barristers may be of vital importance, for they may affect the whole progress of the trial, but they do not make every decision. For example, in a criminal case it must always be for a defendant to decide whether they plead guilty; or whether they will give evidence in their own defence. They may receive advice from their barrister about these matters, but the final decision must always be for them. And when prosecuting, a barrister must consult the prosecuting authority before offering no evidence on a charge, or accepting a plea of guilty to a lesser charge. However, subject to these exceptions, all decisions as to how the case is to be conducted are the responsibility of the barrister. It follows that in every case a time comes when the quality of justice is heavily dependent upon the skill and dedication of those who present the case in court. This gives barristers a great privilege, but it is attended by a heavy burden of responsibility. The Bar is a profession, but it is a consuming one, which becomes a way of life.

1.13 In the days before films and television eminent lawyers were the ‘celebrities’ of the day, because court cases were a prime source of entertainment. When asked the secret of his success the great 1920’s advocate Sir Edward Clarke, who represented Oscar Wilde, had no doubt that it was “To be very poor, very ambitious and very much in love”. (Sadly, there is no shortage of young barristers today who, burdened with student debt, are well endowed with the first ingredient.) Sir Edward Marshall Hall, idolised as a great defender, made impassioned speeches, weeping openly as he addressed juries and in doing so managed to get them to weep with him. In his autobiography, *Clinging to the Wreckage*, barrister and author Sir John Mortimer describes his own style as “distressingly flamboyant”; but styles change, as they always will. Advocacy is as great a skill as ever, but it is now rather more matter of fact, and courtroom displays of theatricality and emotion would likely be received with amused embarrassment.

1.14 In January 2015 David Perry QC, talking about the advocacy skills of Neil Denison QC, who later became Common Serjeant of the City of London, the second most senior judge at the Central Criminal Court, gave his idea of the ideal advocate: “The difficulty in trying to describe advocacy is its ephemeral nature and trying to recreate it is hazardous. But with Neil the task is somewhat easier. In court, Neil was Neil. Courteous, modest, honourable and economical, neither flamboyant, nor given to rhetorical flourishes. As a prosecutor he was devastatingly fair.

⁸ Available at: <https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/the-handbook-publication/>

He cross-examined with restraint and to great effect. More attention to detail than waspish oratory. As a defender, he was the siren voice of reason and moderation: temperate, not given to passion, and mild.”

1.15 Public interest in the lives of fine advocates may have waned, and soaring flights of rhetoric all but disappeared, but criminal trials still hold their fascination, and attract great attention. The combination seems to be irresistible: real human drama being played out so openly, and endlessly variable, surprising, and even shocking insights into human nature. It is worth remembering that the same public is no less shocked when a miscarriage of justice is exposed.

1.16 All barristers know that the cases that come to public attention represent a minute proportion of Crown Court work. Approximately 100,000 cases are heard in Crown Courts each year,⁹ where the liberty of the subject and protection of the public from crime are at stake. If these cases are conducted by advocates who lack the necessary commitment, experience and skills, the risk of injustice will always be greater. Every barrister knows that much thought and hard work should go into even the most mundane case: to give confidence that, whatever the outcome, the interests of justice have been served, and to avoid the burning sense of injustice and alienation produced by the feeling that a case has been poorly presented or mismanaged.

1.17 One further ingredient of advocacy is the fearless presentation of cases; and its consequences should not be underestimated. When the conduct of those in authority has been overbearing or oppressive, barristers and solicitors have been courageous in exposing this. Landmark verdicts in criminal cases have led to many important developments in the law, and continue to do so. They have resulted in safeguards for defendants and victims; they have established freedoms; they have even been known to shape the course of our island story.

The Prosecutor

‘Prosecutors are to regard themselves as ministers of justice’

1.18 This statement was first made by a judge well over 150 years ago, and has been explained by a distinguished judge given the task of reviewing the role of prosecuting counsel:

There is no doubt that the obligations of prosecution counsel are different from those of defence counsel. His duties are wider both to the court and the public at large. Furthermore, having regard to his duty to present the case for the prosecution fairly to the jury, he has a greater independence of those instructing him than that enjoyed by other counsel.... He must not strive unfairly to obtain a conviction; he must not press beyond the limits which the evidence permits; he must not invite the jury to convict on evidence which in his own judgement no longer sustains the charge ... Great responsibility is placed upon prosecuting counsel, and although his description as a

⁹ Available at: <http://open.justice.gov.uk/how-it-works/courts/>

'minister of justice' may sound pompous to modern ears, it accurately describes the way in which he should discharge his function.¹⁰

1.19 The role of prosecuting counsel is therefore a very special one. They do not represent victims; they represent the Crown, in whose name almost all prosecutions are brought. The quality of our justice is heavily dependent upon their commitment and expertise.

1.20 We have seen that in a criminal case the prosecution must not seek a conviction at any cost, but this rule goes much further than that. Prosecutors must not only be aware of the evidence they propose to call, but also the course of the investigations leading to the trial, and any other evidence which might be in the possession of the investigators. If any information or evidence is known to the prosecution which might undermine its case or assist the defendant to present theirs, this must be disclosed to the defence.

1.21 When it comes to a trial, the prosecutor's *main* duties are as follows (as with the list we give for the defence lawyers it is not exhaustive; nor does every point necessarily arise in every case):

- To consider the evidence and advise whether it appears to be in admissible form and sufficient to lay before the jury in support of any charge, and whether any further evidence should be sought.
- To ensure that the charges in the indictment are correctly framed and appropriate to the evidence to be called.
- To make any pre-trial applications necessary for the proper case management and presentation of the trial, for example seeking leave to introduce evidence of the defendant's bad character; and dealing with any legal submissions that might arise during its progress.
- To ensure the police and prosecution authority have complied with their duties of disclosure.
- To meet alleged victims and, where appropriate, witnesses before the trial, not to discuss the case, but to put them at their ease and explain court procedures, and when a prosecution witness is being cross-examined, ensuring that the questions and the manner in which they are put are fair and proper.
- To present the Crown's case in an opening address that will be intelligible to the jury. A good 'opening' will be a simple, fair and helpful trailer of the prosecution case, explaining any documents which they might need to see and, where possible,

¹⁰ Farquharson Committee on the Role of Prosecuting Counsel, 1986.

giving the jury a clear understanding of the likely issues of fact which they will have to decide.

- To decide the order in which the evidence for the prosecution should be called, and then call the evidence, ensuring that special measures are in place to enable any vulnerable witness to present their evidence clearly.
- To cross-examine the defendant and any witnesses they may call.
- To present a closing speech to the jury in which they summarise and analyse the evidence.
- To be a constant 'presence' assisting the court, for example, by helping the judge to draft legal directions, and correcting any errors in the summing-up.
- In the event of a plea of guilty or a conviction, drawing the judge's attention to the appropriate sentencing guidelines.

The Defender

'A practising barrister must promote and protect fearlessly and by all proper and lawful means his client's best interests without regard to his own interests or to any consequences to himself or to any other person': The Bar Handbook.

1.22 Barristers appearing for the defence in the criminal courts are often asked:

- How can you defend someone when you 'know' they are guilty?
- Do you have to defend someone if you think they have got a poor or even hopeless, case, or if for some other reason you would prefer not to?
- How much effort can you put into defending someone against whom the evidence appears to be very strong, even overwhelming?

1.23 Three golden rules of professional conduct answer these questions, and they are not there to protect barristers. They have been developed in the interests of the public, and of justice. They are that barristers should not judge their clients, that they should be prepared to act for any defendant, and that they should always do so fearlessly and to the best of their abilities.

1.24 The first question was asked in the eighteenth century by the young barrister James Boswell of his friend Dr. Samuel Johnson (author of the great *Dictionary of the English Language*, and a man with a genius for argument): "But what do you think of supporting a cause you know to be bad?" Dr Johnson replied, "Sir, you do not know it to be good or bad until the Judge determines it. . . An argument which does not convince yourself may convince the Judge;

and if it does convince him, why, then, Sir, you are wrong and he is right! It is his business to judge; and you are not to be confident that a cause is bad, but to say all you can for your client, and then hear the Judge's opinion."

1.25 Lawyers must do their best for their clients; but first and foremost, they have a duty to the court to behave honourably, and not do anything they *know* will mislead the court and harm the interests of justice. How can lawyers representing opposite sides in a case all be acting honourably in the best interests of justice? Surely at least one team of lawyers must believe, or at least suspect, that their case is wrong?

1.26 Anyone who is charged with a crime who denies being involved in it must have a fair trial. A lawyer asked to defend that person must use all their knowledge and skill to present their client's case in the best possible light. This is so even if they feel that the defence is not a good one, and is unlikely to succeed. The criminal law has quite enough experience of unnerving cases of people who seemed to have poor, even hopeless defences, which turned out to be true. In 1969, Mr Justice Robert Megarry (later Vice-Chancellor of the Chancery Division) said in the course of a judgment: "As everybody who has anything to do with the law knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."¹¹

1.27 Advocates are there to represent people, not to judge them. It is appropriate for them to give robust advice about their client's chances of success, but if they were to refuse to represent them, or not try their best just because their case seems weak, or the lawyer does not like the client, they would be judging them. That is why barristers have the second golden rule. This overlaps the first and is called the Cab Rank Rule.

1.28 This rule is that a barrister who is available to represent a defendant should never refuse to do so because he does not approve of him, or does not believe in his case. This 'Rule' gets its name from the expectation that an empty taxi at a rank displaying its 'for-hire' sign will take you, whoever you are, wherever you want to go.

1.29 Thus, unless there are good reasons for refusing the case, as set out by the BSB, a barrister must accept a brief that comes to him in his name "irrespective of the identity of the client, the nature of the case, whether the client is paying privately or is publicly funded, or any belief or opinion [they] may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client."¹²

1.30 This rule applies only to barristers, not solicitors. It is there to ensure that everyone, whoever they may be, can call upon a barrister to accept their case. It is a rule in which every

¹¹ John v Rees [1970] Ch. 345, 402.

¹² rC29.3, BSB Handbook.

criminal barrister who obeys it, as they should, may take pride, however many times they may regret it. It has been a defining characteristic of the criminal Bar for well over two centuries. As long ago as 1792, Thomas Erskine, one of the greatest advocates (and later Lord Chancellor), proclaimed its importance in suitably stirring language.¹³

1.31 Recently, the Cab Rank Rule was described by a Supreme Court Judge as a “long and honourable tradition in the field of criminal justice that no accused person who wishes the services of an advocate will be left without representation. This is a public duty which advocates perform without regard to such private considerations as personal gain or personal inconvenience.”¹⁴

1.32 The third rule is so important that it merits repetition: “A practising barrister must promote and protect fearlessly and by all proper and lawful means his client’s best interests without regard to his own interests or to any consequences to himself or to any other person.”¹⁵ Just as judges are expected to be independent, and do the right thing, so too are members of the legal profession. This means that a barrister must be determined and courageous in putting forward his or her client’s case. As has been mentioned, many important advances in the civil liberties of the citizen may be traced to lawyers having conducted their cases fearlessly, however great the pressure.

1.33 The Bar faces advice, in a rapidly changing world, to put the past behind it and renounce the rules of long ago, but its vital service to the public is heavily dependent upon these long-standing rules being maintained.

1.34 This does not, however, mean that lawyers may make up a fictional defence for a client out of their own head, or defend someone who tells them that they have committed the crime and are guilty. The barrister’s rules relating to ‘Confessions of guilt’ are clearly set out in the Handbook. We have no reason to doubt that they differ from those imposed on solicitors. In brief, even if a client admits his guilt, he might still be properly advised that there is or may be no evidence to support it, and that it would be right to test its strength; but there are strict limitations on what barristers may do in these circumstances. They must not, for example, suggest that someone else might have committed the crime. That would be dishonest, and a lawyer’s first duty is to *the court* to conduct cases honestly.¹⁶ If, despite a clear confession, which he maintains, a defendant still insists that he should plead ‘Not guilty’ and that his case should be presented on the basis of his innocence, then the barrister must return his instructions and have nothing more to do with the case.

¹³ “I will forever at all hazards assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end.” *R v Paine* (1792) 22 State Trials 357, 412.

¹⁴ *Hall v Simons* [2002] 1 AC 615 per Lord Hope at p 714.

¹⁵ rC15, BSB Handbook.

¹⁶ See Core Duty 1 in the BSB Handbook.

1.35 From the moment barristers are entrusted with a defendant's case they should work in their best interest. It may involve advising as to what evidence might be required to test or refute the prosecution case. It may involve advising as to the need for expert evidence. It may also include giving them unpalatable advice as to the strengths of their case, and the possible advantages of pleading guilty.

1.36 When it comes to a trial, the defender's main duties mirror the first three of those imposed on the prosecutor, but in addition defence counsel have a duty:

- To ensure they have full instructions as to the nature of the defendant's case.
- To analyse the case, including the strength and quality of the prosecution evidence, and decide how it might best be presented.
- To consider what evidence needs to be challenged by the defence in the trial, and prepare cross-examinations of these witnesses.
- To make applications to the judge to exclude or admit evidence.
- To consider, at the close of the Crown's case, whether, in respect of any charge, they should submit that as a matter of law there is 'no case to answer'.
- To call any defence witness, including the defendant, if they choose to give evidence.
- To protect defendants and any of their witnesses from unfair treatment.
- To present a closing speech to the jury.
- In the event of a conviction (following a plea of guilty or a trial) to present to the court any mitigating circumstances relating to the offence or the offender, which might lessen the sentence.
- To advise whether appeal against either conviction or sentence is justified.

1.37 It is in the interests of justice that no one should be convicted of an offence except on proper proof of their guilt by admissible and reliable evidence. Those who represent defendants in criminal trials do so knowing this, but they also know the likely consequences to that person and their family of a conviction. This is a responsibility not to be underestimated.

1.38 It will be seen from all the above that the obligations and responsibilities placed on the criminal advocate, whether for the prosecution or the defence, can hardly be overstated. They must be shouldered even in the simplest case, but they will increase dramatically in the more difficult cases.

Chapter 2: Advocacy Today

The Three Essentials: competency, preparation, integrity

Competency

2.1 The work of the criminal courts, in particular that of the Crown Court, is far too important to be entrusted to advocates unable to demonstrate a high degree of competence for the work they undertake. We make no apologies for reminding the reader that the work of the criminal advocate is central to the Rule of Law; and in the tough practical world of criminal justice, this routinely involves high stakes for defendant, victims, and the community.

2.2 We have already outlined in some detail the responsibilities of the defence advocate. Given their nature, perhaps we need go no further than to ask: how careful would those with influence in the administration of justice be in their choice of an advocate, and how concerned about his or her expertise, if they or any member of their family, were in trouble with the law?

2.3 As to prosecutors, the skills required of them in the most serious criminal offences such as terrorism, homicide, rape, and serious fraud are formidable, and more often than not, taken for granted; but the public is entitled to protection not merely from high profile offending. The lives of many citizens are conditioned, some even blighted, by crime or fear of crime. Calling this 'petty crime' may be accurate if the comparator is murder, but this label is not accurate in any meaningful sense. Crimes such as robbery, burglary, fraud, and the supply of dangerous drugs impact upon lives and routinely attract sentences of imprisonment. Prosecutors play a pivotal role in the justice system, and whether independent or employed, it is vital that they should be at least as able and well prepared as their opponents.

2.4 Is the public being served as it should be by the present system of advocacy? Can the public be confident that the presentation of cases by advocates appearing in the Crown Court is generally of the quality necessary for the type of case being conducted? These questions deserve very serious consideration.

2.5 In April 2014 the MoJ published a Review by Sir Bill Jeffrey into *Independent Advocacy in England and Wales*.¹⁷ This entirely independent review, has been widely accepted by the Bar as representing a careful and fair assessment of the professional advocacy services currently available to the public. We believe that all those who appear

¹⁷ *Independent Review of Criminal Advocacy* available at: <https://www.gov.uk/government/publications/independent-criminal-advocacy-in-england-and-wales>

regularly in the criminal courts, whether judges or advocates, will be familiar with the picture he paints.

2.6 The Jeffrey Review is generally highly complimentary about the Bar, and the essential service it provides to the public. He comments that “The particular strengths of the English and Welsh criminal Bar – intellect, expertise, independence, ability to represent both prosecution and defence – may not be unique; but they are a substantial national asset which could not easily (or perhaps at all) be replicated, and they contribute significantly to the high international reputation of our legal system. There is also a distinct national interest in having available sufficient top-end advocates to undertake the most complex and serious trials.”

2.7 Nevertheless, the Jeffrey Review is by no means uncritical of the present ‘advocacy landscape’, expressing serious concerns both for it, and the future of the Bar. Leaving aside problems of efficiency within the system itself, he is troubled that, in the present climate, the Bar appears to be inward looking, and uncertain of its direction. He comments upon its failure to retain young barristers, with the fear that it is developing into an ‘ageing profession’ – making the point that you cannot look forward to the ‘top-end’ advocates of the future, without training and giving experience to the ‘bottom-end’ advocates now. The Jeffrey Review urges the Bar to look to its future and consider now how it might take shape in the years to come, in its own interests and the interests of the public. There is considerable force in all of these comments, although it would be wise to acknowledge that when it comes to publicly funded work, the Bar can do only so much, for the shape of the ‘market’ is not in its gift, but in the hands of the government of the day.

2.8 In this Report we will not attempt to address each and every one of the Jeffrey Review’s recommendations. Suffice it to say that they played a major part in formulating our consultation, and are still under active consideration by the profession. Although many of the views expressed in this chapter go beyond the scope of the Jeffrey Review, we wish to emphasise that, with very few and relatively minor exceptions, we accept and rely upon his conclusions as to the state of advocacy services at the present time.

2.9 Many members of the Bar believe that the profession has arrived at a ‘tipping point’, a palpably dangerous time in the history of the justice system at which not merely the future of the Bar, but the quality of criminal justice is in danger. We agree with this, and hope that the following points, and the spirit in which we make them, will help to determine the mindset both of government and the profession as to the way forward.

2.10 We must express dissatisfaction with a system, which permits some solicitors to practise in the courts with insufficient skills, but we emphasise that we do not exempt barristers from this criticism. The views which follow are governed by one measure only: whether the public good is being served by the advocates prosecuting and defending within the CJS.

2.11 We have stressed that many solicitors are excellent advocates, who take their duties to their clients and the courts as seriously as any barristers, and provide a valuable service to both. The fact is that there are many fine and committed lawyers in both branches of the profession, who put immense effort and care into their work, and who are a credit to it. Almost all of these may be relied upon to spend many more hours working on a case than is generally acknowledged, either by recognition or payment. This Report applauds them all, and allies itself to solicitors in their concerns about the level of fees for publicly-funded criminal work, the dwindling number of contracts available to firms wishing to do this work, and the introduction of unqualified 'advocates' in the justice system.

2.12 Barristers and solicitors working within their competency are a crucially important ingredient in a safe justice system. It is here where, in the first instance, requirements of training and apprenticeship set the tone. The Jeffrey Review records: "To practise as an advocate in any criminal court, a barrister will need to have undertaken around 120 days of specific advocacy training pre-qualification, plus pupillage"¹⁸ (i.e. a minimum of 12 months apprenticeship with an experienced barrister, including six months before the young barrister may appear in the lower courts).

2.13 By contrast, a qualified solicitor can practise in the Magistrates' Courts, and, subject to obtaining higher courts rights accreditation, in the Crown Court with as few as 22 hours of such training. The CPD requirements also expect more of barristers. The Jeffrey Review makes reference to the fact that many solicitors are "highly capable" and have acquired skills and experience over a period of time, especially in the Magistrates' Courts, but he comments that "the disparity in training is almost impossible to defend."¹⁹

2.14 In relation to competency in court, the Jeffrey Review also refers to a "perceptions study" commissioned in 2011 by the BSB and carried out by ORC International of the standards of criminal advocacy.²⁰ This included over 750 online surveys completed by criminal barristers, legal executives and lay justices and 16 in-depth interviews. We stress that this survey did not include solicitors. Nevertheless, over half of respondents felt that existing levels of underperformance in criminal advocacy were having an impact on the fair and proper administration of justice, with almost one third rating the impact as 'very high'. A quarter of those interviewed felt that criminal advocates "very frequently" acted beyond their competence.

¹⁸ Paragraph 4.3, *Independent Review of Criminal Advocacy* available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310712/jeffrey-review-criminal-advocacy.pdf

¹⁹ Paragraph 4.5, *Ibid.*

²⁰ Available at: <https://www.barstandardsboard.org.uk/media-centre/press-releases-and-news/perceptions-of-criminal-advocacy-report/>

2.15 The Jeffrey Review's own, quite separate, enquiries revealed a perception of "an underperformance in criminal advocacy ... having an impact on the fair and proper administration of justice." He talks of a "widespread view" among the judiciary "that the basic level of competence displayed by an increasing number of advocates is a matter of serious concern ... in particular a risk that in smaller solicitor practices the employed in-house advocate would for commercial reasons retain cases beyond his or her expertise." Disturbingly, he mentions a "strong and consistent view" expressed by a number of judges that "although the best was still very good indeed, among both barristers and solicitor advocates standards had in general declined; that it was not uncommon for advocates (for both the prosecution and defence) to be operating beyond their level of competence; and that judges frequently felt concern about the 'inequality of arms' between prosecution and defence if one side or the other was inadequately represented."

2.16 In a speech delivered on 20 June 2014, Lord Neuberger, President of the Supreme Court,²¹ reinforced these concerns saying "... therefore the Rule of Law also requires that all citizens have access to justice, and by that I mean effective access to competent advice and effective access to competent legal representation." In this context, we might pause to consider what *access to justice* really means, for we believe that it means far more than the opportunity to be advised and represented in court. We do not believe that anyone charged with crime truly has access to *justice* unless the police investigate fairly, the CPS charges promptly, trials are conducted swiftly and fairly by prosecution advocates who are well prepared, and defendants are represented by suitably qualified advocates, who have the judgment and skills to concentrate upon the real issues in the case.

2.17 In the first instance, all this requires training. The Bar has reason to be proud of its contribution to criminal justice, but nevertheless must not be complacent. A review of its advocacy training programme has been undertaken, and the Bar is looking to provide more training, of an even higher quality. As will be seen in Chapter 5, we are hopeful that the Inns of Court and the Circuits, who have always played a valuable part in advocacy training especially at the pupillage and newly qualified stage, will now assume a leading role in this important work, alongside the ATC and CBA.

2.18 We acknowledge that some experienced barristers require extra training, and that on-going study and training must be a priority for the Bar. Indeed, the Handbook makes it clear that "In order to be able to provide a competent standard of work, you should keep your professional knowledge and skills up to date, regularly taking part in professional development and educational activities..."²² It should hardly be surprising, therefore, that we believe that advocates should not be given rights of audience in the Crown Court unless they have received *at least* the level of training currently expected of barristers. As we have demonstrated, the difficulty and the importance of the work demand no less.

²¹ Available at: <https://www.supremecourt.uk/docs/speech-140620.pdf>

²² gC39, Bar Handbook, January 2014.

2.19 We believe that the experience of the courts is clear: that some advocates, usually (but not invariably) in-house advocates, are not sufficiently competent to handle the cases in which they appear. Indeed, we have heard a number of accounts of them frankly admitting this to be so, in some cases explaining to their colleagues in the case that they were ordered to do the case for the financial reasons of their firms. The appearance of any advocate, who is unable to cope with the demands of the case, is liable seriously to disadvantage the client, and create enormous difficulties for the court. Whether they are barristers (self-employed or employed) or solicitors, is not of itself relevant. What is relevant is that the Jeffrey Review, the BSB's polling, our consultation, and professional views and experience combine to suggest that the problem is more prevalent and acute amongst solicitor advocates. This is one of a small herd of 'elephants in the room' that the justice system cannot afford to ignore, however inconvenient it may be.

2.20 Accordingly, the Bar Council has made a plea to the MoJ to provide and enforce a requirement that solicitors should always advise their clients in writing of (amongst other things) the reasons for recommending an in-house advocate and their right to instruct advocates independent of their firm.

2.21 In a letter to the Chairman of the Bar, dated 22 December 2014, the Lord Chancellor undertook to "take steps to ensure that defendants in criminal cases have an informed and effective choice of an advocate who is to represent them." We would wish to go further than this and, in the event that this promise is fulfilled, request the Criminal Procedure Rules Committee underline the importance of this rule, and where appropriate give judges encouragement to ensure that it has been fulfilled. It is a sad reflection on the current state of affairs that the Jeffrey Review comments "Competition is strongest (i.e. experienced advocates are most likely to be briefed) when the defendant has previous experience of the criminal courts."

2.22 The selection of barristers for a particular case is not necessarily governed by judgement; sometimes it is governed by finance. There are some cases that plainly merit the services of a QC, and many serious cases in which a QC and a junior should be instructed, such as almost every case of homicide, and prosecutions of serious organised crime involving a number of defendants. Other crimes, for example, serious sexual offences, may not necessarily merit the services of a QC, but it will be of equal importance that the advocates should have considerable skill and experience. We understand that budgetary constraints are said to force under-representation upon the prosecution or defence, but this is not merely foolish: the outcome may well be counter-productive, with serious cases being disadvantaged, even foundering, because they are not being handled by persons with appropriate qualifications for the work in hand. Treasury Counsel at the Central Criminal Court have expressed deep concern that those who appear in particularly difficult and serious cases should be experienced and competent, and that there are opportunities for juniors to develop the skills which are necessary to ensure high standards of advocacy in the future.

2.23 We have no objection to the ticketing of advocates if it ensures that only experienced and very able advocates will appear in the most difficult or serious cases; nor do we object to a scheme, which protects the quality of advocacy. Indeed, we would positively welcome both, but these schemes must be fair and relate across the board to all advocates who have rights of audience (barristers or solicitors), and whether for the prosecution or defence. An example of this is the course currently being designed by the ATC dealing with “advocacy and the vulnerable”. A pan-profession committee chaired by His Honour Judge Rook QC is currently reviewing the provision of training for advocates who appear in cases involving vulnerable complainants, witnesses and defendants. (We observe that the current ‘QASA’ scheme is the subject of challenge before the Supreme Court. We make no further comment on the merits of that scheme, save to say that nothing in this Report should be taken as supporting the scheme as currently constituted.)

2.24 Again, and apparently only for reasons of expense, yet more unqualified ‘advisers’ are being encouraged to the view that they too may represent parties in the criminal courts. The Legal Services Board, which oversees the regulation of the legal profession, has hardly resisted these moves, and this is to be deplored. We believe that the following should not be permitted higher rights of audience to act as ‘professionals’ to represent defendants charged with crime:

Plea only advocates

2.25 We fear that ‘plea only’ advocates, whether solicitors or barristers, is a move towards ‘dumbing down’ within the profession. There are, of course, highly qualified solicitors who are capable of putting forward a plea, but we reject the notion of ‘plea only’ advocates as a type of advocate. The scheme is that some qualified lawyers may not be competent to deal with criminal trials, but might nevertheless appear in court to deal with those who plead guilty. The idea betrays a serious misunderstanding of the role of the advocate, and carries with it a significant risk to the administration of justice.

2.26 Pleas of guilty can be just as important and onerous as trials. Sir Bill Jeffrey says: “I can see no objection in principle to his (the client) being represented in court by a less accomplished advocate than would represent him if he pleaded not guilty.” We respectfully disagree. This may be right in a very few cases, but there are cases where the demands on the advocate when a defendant pleads guilty can be even greater than the demands of a trial. We talk of two to three weeks as a patient in hospital as a long time, of three months as a very long time. Very often, particularly in the Crown Court, when people plead guilty to indictable offences, (or are sent there for sentence by magistrates) their liberty is at stake, and they may be at risk of years of imprisonment.

2.27 In many of these cases, expertise in presenting a mitigation (a plea for leniency, traditionally regarded as the purest form of advocacy) is of real importance. A good mitigation can make a real difference to sentence.

2.28 Defence advocates dealing with defendants who might be minded to plead guilty must have the expertise to evaluate evidence and negotiate the plea to be tendered. Where there is a range of possible charges, they must be able to advise as to the right charge(s) to which to plead, and deal properly with the factual basis of the plea. They must advance their plea for leniency with reasoning, and measure their words with care and discretion. They must also be prepared, where appropriate, to call witnesses (including medical witnesses) and produce references on their client's behalf, assist the judge with the relevant law, ensure that the sentence passed is actually lawful, and if necessary, advise on appeal.

2.29 This work, when carried out well, may make a significant, sometimes a substantial difference to the plea offered and accepted, and this may well have an impact on the type or length of sentence. Except in the simplest case, this is not a job for the inexperienced advocate, who is given a partial qualification on a fundamental misunderstanding that because someone has pleaded guilty, it must be 'easy'.

2.30 Sentencing is not an exercise in which information is submitted and the result is dispensed at the touch of a button. Every case is different, and advocates can and do make a real contribution to the process. Those with a particular eye to finance might also bear in mind that the difference between sentences of, say, two or three years imprisonment represents a difference to the public purse of many £1000s. This a theme to which we must return.

Legal Executives

2.31 The Legal Services Act 2007 has paved the way for legal executives to become partners in law firms, effectively removing the last major hurdle distinguishing solicitors from legal executive lawyers. There are now over 100 legal executive partners across the country and this figure is rising. A chartered legal executive is trained and qualified to specialise in a particular area of law. Training takes place through the Chartered Institute of Legal Executives and combines working in a legal organisation with studying for recognised professional qualifications. Entry levels and training depend on qualifications, but the starting point is a minimum of four GCSEs.

2.32 Providing they obtain the appropriate certificate, legal executives have been given certain advocacy rights of audience in criminal cases. This includes rights to appear in the Magistrates' Courts and youth courts, and to appear in the Crown Court under certain conditions on appeals from the Magistrates' Courts and on committals for sentence. They may also appear in bail applications in the Crown Court. These inevitably involve the liberty of the subject and are notoriously some of the most important and difficult

applications.

2.33 We recognise that vocational training and experience are invaluable, but as with ‘plea only advocates’ the duties and skills required of advocates in these cases raise important issues. There are bound to be cases in which ‘book-law’ and a more rigorous academic background will be of benefit to the client. Persons lacking training and appropriate qualifications to carry out this work should not be given the immense responsibility of doing so.

2.34 We do not believe that legal executives should have rights of audience in the Crown Court. If this right continues, in all cases where a legal executive intends to appear as an advocate in the Court, the client should be advised of their right to use a solicitor or barrister to represent them, together with clear notification of the contrasting qualifications for the work.

Associate Prosecutors

2.35 In 1998 legislation was introduced that enabled trained but non-legally qualified CPS staff to review and present certain types of non-contested cases in the Magistrates’ Court. These individuals are now called APs (formerly ‘Designated Caseworkers’). Recently these rights of audience have been subject to extension, but their rights of audience do not include appearing in trials of ‘imprisonable’ offences. Now these caseworkers - who may have no formal legal training and just a 12-day internal training course under their belt - have been rebranded ‘Associate Prosecutors’, and may prosecute various types of trial, and contested bail applications, and may review (ie initiate or drop) various types of criminal proceedings.

2.36 We have dealt with charging decisions in our recommendations. In so far as APs have been given rights of audience (in limited circumstances) in the Crown Court, we understand that, in practice, this does not happen. We reiterate that should it be contemplated, it is in our belief that only those who are legally qualified and have undergone appropriate training should appear in the Crown Court.

McKenzie friends (paid or otherwise)

2.37 A ‘McKenzie friend’²³ is the term used to refer to someone asked to give assistance to a defendant who is not represented at all.

²³ *McKenzie v. McKenzie* was a divorce case in England. In 1970 Levine McKenzie, who was petitioning for divorce, had been legally aided but the legal aid had been withdrawn before the case went to court. Unable to fund his own legal representation, McKenzie had broken off contact from his solicitors. However, they asked an Australian barrister (unqualified to appear in England) to help him present his case. The Court of Appeal ruled that he was entitled to this assistance.

2.38 McKenzie friends have survived the tests of time, and might still be available to a person who has been denied legal representation or chooses to represent himself. Historically, they have rarely been given leave to address the court. Indeed, their use in the criminal courts is rare, but they have formed organisations, which are intended to give them some training and status.

2.39 There are moves to introduce the McKenzie friend as an alternative 'legal' career. There is, for example, a company called The Society of Professional McKenzie Friends Ltd. They claim to offer a "low cost alternative to instructing a solicitor." They claim to be self-regulated, and to understand the limits of what they are able to offer. This involves presence in court with the Litigant in Person ('LiP') and giving advice, but does not include actually appearing for the LiP as a barrister or solicitor advocate might. They talk, however, of their ability to seek permission to speak in court. This would drive a bulldozer through the Legal Services Act, which is intended to regulate 'reserved activities'.

2.40 In a criminal case we can see no justification for McKenzie friends to seek fees for their work. If a defendant has been granted legal aid and has refused for no good reason, there can be no place for a paid McKenzie friend. We accept that in the civil courts some judges might prefer the services of a McKenzie friend to the stark alternative, but as Lord Dyson, Master of the Rolls, has pointed out: "Paid professional McKenzie friends do not owe a duty to the court, and our system depends so much on the advocates having a professional duty not to mislead the court ...There is no regulatory body at the moment to regulate them. There is quite a raft of issues which, if we are to go down that route, would have to be addressed."²⁴ If contrary to our strong recommendation, this is permitted, the public should be aware of the risk to the administration of justice, and the judge, following careful enquiry, should impose very clear ground rules for their time in court.

²⁴ Legal Services Consumer Panel, *Fee Charging McKenzie Friends* (April 2014).

Chapter 3: Advocacy Today

The Three Essentials: competency, preparation, integrity

Preparation

3.1 Skill alone is not enough. Case ownership and preparation are the keys to high quality advocacy. Cases are prepared to the highest standards, and conducted most efficiently, when all those involved, whether police, CPS, solicitors or barristers, take ownership of the case. That means that from an early stage they take full and on-going responsibility for its conduct. This feature of the justice system, which has been so well acknowledged over many years, has to its great disadvantage, become largely ignored.

3.2 The courts cannot provide the service expected of them unless the advocates who appear are able to prepare, and given the responsibility to conduct their cases. This involves the time and space to study the indictment, to assimilate and absorb the evidence and other relevant material, and advise. Indeed, we think it reasonable for each side to require a written advice on evidence in all cases. We have been informed by the Director of Public Prosecutions that this is routine in CPS cases, and suggest that it should also be routine when representing defendants. The advice need not be long, but it is invariably of advantage. It seals 'ownership', but also gives comfort that the 'owner' has considered the issues that might arise at trial, and how the case might be strengthened. It will also be of great assistance if the case has to be returned.

3.3 There are too many cases in which barristers are instructed far too late for this to happen: notices to adduce evidence in accordance with the CPR are not given; valuable court time is taken dealing with matters that should have dealt with long ago. In this regard, we believe there is an opportunity to build on the Leveson Review recommendations, for the streamlining of pre-trial hearings and processes should always mean that the trial advocate is instructed early, with the result that he or she is given more time and assistance to prepare.

3.4 The main reasons for this appear to be three-fold. The first two are normally the responsibility of solicitors or the CPS, the third, of barristers: (1) Lack of understanding of, or indifference to, the values and advantages of case ownership; (2) Briefing barristers, whether for the prosecution or defence, at a very late stage, for example, because a case has not been properly prepared, or where the in-house advocate due to appear returns the case late for one reason or another. In either case, the barrister is left having to clear up the mess, with insufficient time to prepare, and no time to advise; (3) Juggling work within barristers' chambers, which allows briefs to be returned at the last minute to other barristers. This may, rarely, be unavoidable, or a consequence of the present system of Crown Court listing, but it may well be the fault of a chambers' culture of trying to please solicitors, or to ensure

that as many of its members as possible are in court – a culture which has the grave disadvantage of discouraging early preparation.

3.5 We have observed that anyone who has worked as a criminal advocate will know that it is a profession that becomes a way of life: it is unpredictable in time needed for preparation pre-trial, and is uncertain in its demands upon the advocate during trial. Finding oneself directed to appear in a case that has been poorly prepared, and possibly feeling bound, in the worst instance, to apply for an adjournment, will be a daunting and dispiriting experience for the barrister; it is likely to be even worse for the client.

3.6 It takes little to imagine the anxiety of a defendant faced with the prospect of meeting their advocate for the first time on the day of their appearance at court and worrying if they will be on top of their case, but far too often simple human considerations of this kind are ignored. As to the prosecution, there are encouraging reports of the CPS in some parts of the country (but by no means all) moving towards the early instruction of barristers, but when this does not happen, and a prosecution brief is held back until the last minute, the situation is hardly less serious. Rule C18 of the Handbook requires the barrister to ensure time for proper preparation.

3.7 Failure of early pre-trial preparation by some solicitors is a particularly serious matter, which hinders the administration of justice: we have heard accounts of failure to take instructions from the client, or prepare Defence Case Statements (where appropriate) or obtain witness statements. In difficult or serious cases it may sometimes become important for the solicitor to attend court. There should be proper provision for payment in this regard, but we believe that solicitors should never, for lack of payment, refuse to attend the client together with the barrister if the need is there; nor, once a brief has been accepted, should any advocate, for lack of payment, refuse to do work which is essential in their client's interests.

3.8 The lack of early preparation has become widespread. It justifies the unfortunate impression that advocacy is now regarded as a business rather than a profession.

3.9 There is a further matter: in keeping with the principles of Case Ownership, we believe a barrister who is instructed to represent a defendant, and who has undertaken the preparation of a case and negotiated a plea of guilty, must always be instructed to conduct the sentencing hearing. Instructions should not be accepted on any other basis.

Chapter 4: Advocacy Today

The Three Essentials: competency, preparation, integrity

Integrity

4.1 Barristers and solicitors who practise criminal advocacy, who take the trouble to ensure that they do so within the limits of their competency, provide the best possible service to their clients and a valuable service to the public. They are almost without exception of great integrity and immensely hard working.

4.2 Turning to the Bar, it has over many years built an enviable reputation for independence and integrity. It still holds that reputation, and it is the duty of all barristers to guard it jealously. Guidance to ensure high ethical standards is set out in the Handbook: “Your honesty, integrity and independence are fundamental. The interests of justice and the client’s best interests can only be properly served, and any conflicts between the two properly resolved, if you conduct yourself honestly and *maintain your independence from external pressures.*”²⁵ The clear theme in the Handbook’s guidance on ‘behaving ethically’, i.e. with honesty and integrity, is an essential ingredient of independence.²⁶

4.3 No profession, however, is without its black sheep. The Bar is no exception, but the position has been exacerbated over the past years by certain developments which have placed considerable strain on its ability to withstand bad practices. These have undoubtedly and understandably affected the morale of many barristers (and, we believe, the morale of many fine solicitors) who are well aware of their impact, for they have damaged the quality of service offered by the professions, and resulted in significant dissipation and waste of public funds.

4.4 Fees have been cut to the bone, and there are deep scars on the bone. It is no secret that the Bar believes, and has demonstrated (as have solicitors) that fees for publicly funded work are too low, and have been held back for far too long. It is an irony, and foreseeable consequence of the pay structure, that reducing the level of fees so far has encouraged some unscrupulous lawyers to identify and take advantage of weaknesses in the system of publicly funded cases, so as to feather their nests. Low pay can never be an excuse for bad practices, but the current system of payment for advocacy services, which gives solicitors so much control over their distribution, has caused some advocates to look around for ways in which their income might be increased.

4.5 In our opinion, these matters require exposure in the interests of the justice system. We do not believe that they are altogether unfamiliar to the MoJ, the professions, or the

²⁵ gC14, BSB Handbook.

²⁶ rC8, gC16. BSB Handbook.

courts. They represent yet more of our ‘elephants in the room’. Unless they are fully and urgently addressed, they will continue to engender disquiet and resentment within the professions and result in a substantial and entirely unnecessary waste of public funds – funds which would be far better spent ensuring that those who require access to justice receive it and that those engaged in the profession are fairly paid.

4.6 We preface what follows with a word about ‘incentives’. Many forms of payment carry within them incentives. Incentives are inducements, intended or not, to behave in a particular way; they may be legitimate, in encouraging the advocate to behave efficiently within the rules of the criminal justice system, but they should never be intended or used as an excuse for bad practices, let alone doing anything which works against the best interests of the client.

4.7 We are of course aware of the pressures that the current financial climate places upon both branches of the profession. These can be very great. For instance, there are circumstances in which, with regard to pleas of guilty and transfers of representation, it may be entirely proper for advice to be given which may result in these not being tendered at the earliest opportunity, or very early transfers of representation being allowed (usually on paper) for good reason. The removal of perverse incentives from the fee structure is, however, something the MoJ and CPS need to address urgently; but that said, perverse incentives could never be an excuse for conduct by members of either branch of the profession, which they might prefer not to reveal to the client or become public knowledge.

The Untimely Plea of Guilty

4.8 We have no doubt that persons who are charged with crime on sufficient evidence and who are prepared to admit their guilt are sometimes advised to plead not guilty in the first instance, and tender their pleas of guilty later or shortly after their trial has commenced. Under the present system of payment this may well result in significantly more money going into the hands of the lawyers. We place this at the top of the list because not merely is the result a dishonourable (and potentially dishonest) waste of public funds, but it is pernicious in that it is calculated to deprive the client of what is normally their most cogent and impressive mitigation — that they have pleaded guilty, recognised their guilt and accepted it before the court at the earliest opportunity.

4.9 The conventional discount for a plea of guilty is universally well known and clearly set out in the Sentencing Guidelines. To deprive any offender of this for financial reasons, or prejudice his chances of receiving the discount is shameful. Those with a blinkered eye to the public purse might also consider that if an offender, who does not receive this discount, receives a lengthier sentence of imprisonment as a result, the financial cost of that sentence (which will be considerable) will also be borne by the public. We have heard some barristers say that their solicitors have insisted that, for some reason or another, their clients should plead not guilty in the first instance. If this happens and if, for no good reason, the

barrister either encourages or condones it, the shame is as much his or hers, as that of the solicitor.

Referral Fees

4.10 The term referral fees refers to the making or receiving of payments in order to procure or reward the referral to the barrister by an intermediary of professional instructions. Rule C10 of the Bar Handbook is that “You must not pay or accept referral fees.” This applies to all cases. In relation to solicitors, some argue that position is less certain, although we are reluctant to accept this, for in relation to publicly funded cases, as we shall see, the Lord Chancellor has made it plain that in his opinion *all* such payments are prohibited. However, despite this prohibition, we must report that some solicitors do insist that they will only give work to barristers – whether to chambers as a whole, or individual barristers – on condition that they receive in return a significant percentage of the barrister’s fee. We do not criticise solicitors alone for this practice. It takes two to perform this dance. The conventional euphemism is to refer to this payment as an ‘administration charge’, but in a public speech delivered shortly before the end of his term as Chairman of the Bar, Nicholas Lavender QC, was inclined to use rather more direct language:²⁷

Likewise, the Bar Standard’s Board’s clear and simple prohibition on advocates paying or receiving referral fees is a good example which I believe that the Solicitors Regulation Authority would do well to follow. A litigator has a duty to give proper, unbiased advice to his client as to the best choice of advocate for the client’s case, and to instruct the advocate chosen by his client in the light of that advice. It cannot be right for a litigator, in this case a solicitor regulated by the SRA, to demand and receive a payment from another lawyer (whether a solicitor advocate or a barrister) as a condition of recommending and instructing that lawyer as an advocate.

If the advocate is the right man for the job, then the litigator ought to be able to say so, and indeed is required to say so, without demanding a kickback from the advocate. If the advocate is the wrong man for the job, then the litigator has a duty to say so to his client, uninfluenced by the advocate’s willingness, if he is willing, to pay a kickback to the litigator.

It is fanciful to think that these problems can be solved by disclosure to the client. Just imagine how a litigator would make full and frank disclosure. In theory, of course, he could say the following: “Mr. A is a good advocate, with 20 years’ experience of conducting cases like yours. He would be a good man to conduct your case. However, he is not allowed, and not willing, to pay me a kickback. Mr. B has only two years’ experience, mostly on cases which are less complex than yours.

²⁷ Lawyers and their regulators, 24 November 2014 available at http://www.barcouncil.org.uk/media/313156/14-11-24_lawyers_and_their_regulators_final.pdf

However, he is willing to pay me a substantial kickback. So, on balance, I recommend Mr. B as the best man to represent you.” Can you really imagine that any litigator, whoever his regulator, is going to say that? But if that is the truth, and he doesn’t say it, then he may even be falling foul of the criminal law.

4.11 We do believe that solicitors are indeed prohibited from receiving referral fees in publicly funded cases, and we discern welcome signs that the MoJ is taking the problem on board. In his letter of 22 December 2014,²⁸ the Lord Chancellor says:

The Government proposes to take measures to strengthen the current Legal Aid Agency prohibition on the payment or receipt of referral fees or other inducements for the referral of a defendant to an advocate and to address potential conflicts of interest.

4.12 In our view the LAA, being aware of this (and other) problems, should police the progress of their contracts with care; and any evidence of this practice which comes to the notice of the Bar should be reported forthwith, both to the BSB and the SRA.

Two Counsel Cases

4.13 Where a criminal case is sufficiently serious to justify two counsel (advocates) on one side of the case, only suitably experienced advocates as the junior counsel should ever appear behind their leaders. This means that by and large – although not necessarily in every situation during the trial – they should be capable of carrying on the case in absence of their leaders. We regret that in a number of these cases, the junior advocate chosen to assist the leader is a solicitor, as yet wholly unqualified to assist in this way. These ‘assistants’, unflatteringly nicknamed ‘cardboard cut-outs’, find themselves elevated to the status of junior counsel. Indeed, there may hardly be a presence at all. (We should add that in some cases solicitors who have attended police interviews with their clients go on to take the role of junior counsel. This seems to us to be plainly undesirable for the simple reason that they may always be at risk of having to give evidence in the case.)

4.14 The same considerations, and criticisms must apply equally to the Bar should the choice of junior counsel be in their or their chambers’ hands. We let ourselves, and our clients, down if very junior barristers are instructed as second counsel either because there is no one more senior available, or as a ‘learning experience’. If a case justifies two counsel, who are both paid out of public funds, then it justifies two experienced counsel. Quite apart from the fact that the leader, and therefore the client, is deprived of the help for which the public is paying, it deprives appropriately qualified advocates who are making their way in the profession of the much-needed experience of being involved in the more serious cases. It may also create serious problems for the court.

²⁸ ‘Protecting the Quality of Advocacy’ 22 December 2014 available at http://www.barcouncil.org.uk/media/316611/141222_lord_chancellor_letter_to_chairman.pdf

4.15 If any inexperienced advocate wishes to benefit from a 'learning experience' they should sit in court, paid or unpaid, as noting juniors or observers. In our view not merely should leaders insist upon being properly assisted; judges also need to take a hand in this. They can see as clearly as anyone what is happening in their court. The party concerned is entitled to proper representation. There may well be parts of the case where two counsel are not necessary, but we believe that there should be a CPR that judges must be satisfied that all instructed advocates are of sufficient experience and ability to make a full contribution to the work of the case, and that no advocate should absent himself from the trial without the permission of the judge.

Poaching Clients

4.16 This happens in some criminal cases, and is to be deplored. Perhaps the worst manifestation of this is the approach to, and the poaching of, clients who are already represented by solicitors and barristers. This usually results in a spurious application to transfer legal aid. A particularly distasteful feature of the process may be the employment or use of 'agents' to capture clientele, even with inducements, to instruct a particular firm of solicitors.

4.17 It will be appreciated how vulnerable persons charged with serious crime, or their families, are to blandishments of this kind, and how easy it may be to destabilise existing arrangements, especially if the accused has been held in custody for some time. Some defendants and their families are only too eager to succumb. These applications inevitably take their toll on the first representatives, and upon court time. A particularly serious problem is that public money is at stake. The courts are not unused to applications to transfer representation in publicly funded cases – sometimes where many tens of thousands of pounds have already been spent upon the preparatory work. They are familiar with these applications being so carefully managed as to make it difficult to refuse them, leaving defendants in complex cases to represent themselves – difficulties which are heightened in multi-handed cases, where a defendant who is obliged to represent himself will be a 'loose cannon' in the trial.

4.18 The public expense involved in paying a second team to read and prepare what the first team has already read and prepared is enormous. We have no doubt that judges do their utmost to deal with the problems. We believe that they should be able to enquire closely into the circumstances of these applications, and take strong action in any case in which they judge an application to be spurious. They might at least make transfers of representation conditional on no fee being paid to the new firm for work already done, unless demonstrable incompetence in that work can be established. We suggest that such a rule, properly enforced, would go a long way towards solving the problem.

Page Counts and Contracts

4.19 A system must be devised to ensure that the person who actually does the work in a criminal case should be paid for it. This does not always happen under the present fee system. Choosing the number of pages served by the prosecution to govern the rate of fees may be a simple way of calculating the fee to be paid, but it is a very blunt weapon in the hands of those anxious to be better remunerated for their work. A fee should in the main be related to the importance and difficulty of the case, and the issues that have to be determined by the court. We are gratified that the Leveson Review endorses our view that the fee should be paid to the person who does the bulk of the work, rather than the first advocate to appear in the case.

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4.20 We have mentioned that the LAA should devote resources to policing their contracts for criminal work in order to ensure that public money is not wasted on bad practices, but we would go further than that. Leaders of both professions (including in particular Circuit Leaders and Heads of Chambers) and their Regulators should combine to adopt a zero-tolerance approach when it comes to ensuring the integrity of the criminal justice system. This would mean not just walking away from some unprofessional and unethical offer or proposal as to how a case should be managed, but reporting it. For their part, the Regulators should appreciate how damaging bad practices can be to the justice system, and investigate any complaint with due speed and diligence.

Chapter 5: The Very Junior Bar

Introduction

5.1 The criminal Bar faces a huge challenge in recruiting and retaining candidates who are (i) the most talented and (ii) from a diverse range of backgrounds. Recruitment is problematic due to the high cost of training combined with the risk involved in investing in a career at the criminal bar in the current climate. Retention is an increasing problem as criminal practitioners' work is diminishing, particularly at the more junior end, and legal aid cuts have reduced fees for work that is offered.²⁹ Recent Bar Council research suggests that members of the junior criminal Bar are the most likely to leave self-employed practice, with the most commonly cited reasons being insufficient earnings or uncertainty about future earnings.³⁰

Background

5.2 The BPTC is expensive³¹ and is not highly regarded by practitioners. Around 1700 students on the course each year pass, but most of these will not secure pupillage. As the overall number of BPTC graduates increases, the number of pupillages available falls.³² In 2014 fewer than 425 pupillages were available. Criminal pupillages in particular are reducing year on year as chambers can no longer afford, or are too cautious, to take pupils on, feeling unable to guarantee that sufficient work will be available for their junior tenants. This is a serious problem indeed, and it must be urgently addressed if the criminal Bar is to survive.

5.3 The cost of training and the insecurity of an unsustainable income once qualified impacts particularly on those from less well-advantaged backgrounds. Those without access to funds are less able to take the financial risk in aiming for a career at the Bar or in surviving the first few years of practice with substantial debt. The Bar is therefore likely to miss out on this talent, with a knock-on effect for the future of a diverse judiciary.

²⁹ From 2007- 2013 Crown Court Legal Aid defence fees were reduced by 21%- Bar Council's October 2013 response to the Government's 'Transforming Legal Aid: Next Steps' consultation.

³⁰ The Bar Council's 'Change of Status' survey 2013/14. Between 1/1/2013 and 31/12/14, there were 598 respondents (approximately a 20% response rate), of which 119 barristers changed their practising status to transfer to the employed Bar or other legal or non-legal employment. 65% (55) of these were less than 8 years call, of which 51% were in criminal practice and 8% in mixed criminal practice. 74% cited income as the main factor to influence their decision to change practising status.

³¹ Fees for the full-time one year BPTC commencing 2014 at BPP are £17,980 in London and £14,690 in Leeds and Manchester.

³² The number of first six pupillages registered with the Bar Standards Board has fallen each year since 2011: 2011- 444, 2012 - 435, 2013- 431 and 2014 - 422.

5.4 As BPTC fees have increased at a faster rate than scholarships from the Inns, it appears that the large scholarship sums being paid by the Inns to prospective barristers may be increasingly going directly to the BPTC providers, with little if anything left over to go towards living costs during the BPTC year.

5.5 The work available to junior criminal practitioners is being significantly eroded by solicitor advocates, solicitors' agents and McKenzie friends. For junior level work, solicitors often believe it makes better financial sense to use in-house advocates or agents who are not qualified barristers or solicitors, rather than to instruct a junior barrister.

5.6 The emergence of Higher Court Advocates is impacting on the overall standard of advocacy at court.³³ That, in turn, drives down standards at the self-employed Bar. Those considering the criminal Bar are presented with the possibly more attractive alternative of paid employment as a solicitor, with little short or medium term benefit perceived from being a barrister in independent practice.

5.7 The junior Bar's vulnerability in earning capacity is exacerbated because they often work for little or no fee. We deplore any manifestation of this. Poorly paid or free Magistrates' Court work is sometimes used as a bargaining tool by chambers for receiving Crown Court briefs. For example, in some instances a firm of solicitors will require a Magistrates' Court appearance to be covered by a barrister for free so that the Crown Court brief will remain with the same chambers. In these circumstances the junior barrister will not benefit from the Crown Court brief and their work is simply unpaid. Often, even travel costs are not reimbursed. In some cases, the fee is paid but the non-reimbursed travel costs are higher than the fee – with the result that even when paid, the junior barrister is still out of pocket.

5.8 Moreover, very junior barristers also find that any relatively small fees for Magistrates' Court work are often not chased by chambers. This is driven by inequity in the market, because the fees come from solicitors rather than the LAA. Some chambers choose not to harm relations with a solicitor that provides Crown Court briefs by chasing aged debt. Such difficulties are likely to increase following the recent further cuts to solicitors' fees in Magistrates' Court cases.

5.9 New funding arrangements aimed at reducing costs impact on the training of junior practitioners. This has significant implications for the excellent reputation that the Bar currently enjoys. Increasingly, the most junior members of the criminal Bar are struggling to secure the experience that they need to become specialist advocates. The traditional model where junior barristers learn through being led by a QC, or a senior junior, is being curtailed, as fewer cases are granted funding for two advocates.³⁴ Very junior barristers cannot expect to be briefed as full juniors in such cases, but juniors of a few years call can. In the previous chapter, we have learned what is happening in these cases.

³³ Recommendations 1-5. *Independent Criminal Advocacy in England and Wales*.

³⁴ A higher level of need must now be demonstrated in this form:
<http://hmctsformfinder.justice.gov.uk/courtfinder/forms/5138-eng.doc>

5.10 As specialist advocates at the top of the criminal Bar begin to retire, within the current environment they may not be replaced. In the medium to long term the standard of advocacy in the most serious criminal cases will decline significantly. This may also lead to a significant diminution in the Bar's ability to earn via foreign transactions: it is right to consider that the commercial Bar's attraction to foreign litigants is believed to be largely based on the incorruptibility of the Judiciary and the dedication of the CJS to justice for all, but we venture to suggest that this may also stem from the reputation of the criminal courts.

The Future

5.11 Whilst we recognise that the BSB does not wish to cap numbers on the BPTC,³⁵ we fear that commercial providers are using the system to make money from people with no realistic prospect of pupillage. This should not happen. A solution could be achieved by raising the standards of entry on to the course, to prevent those with no realistic chance of a career at the Bar from undertaking it.

5.12 We acknowledge those who have previously considered this issue, most notably Lord Neuberger in his *Entry to the Bar Working Party Report*.³⁶ He wished to keep the pool of candidates as wide as possible for as long as possible in the hope that this would assist diversity. However, there is still no evidence to demonstrate whether this does, in fact, assist diversity at the Bar. In any event, to encourage anybody, but especially those likely to have higher levels of debt, to undertake an extremely expensive course with little chance of success is worse than irresponsible. Diversity issues are better tackled by considering the selection criteria applied by chambers when recruiting pupils.

5.13 As the current BCAT does not provide an effective filter,³⁷ the BSB should instead introduce a basic level test, possibly including an interview that has the effect of ensuring that those on the course possess the necessary skills, including soft skills, that would enable them to secure pupillage. A more thorough investigation into what skills are required and how they can be assessed would need to be carried out, alongside an impact assessment to ensure that these processes did not exclude certain groups. This might also improve the experience of those on the course; current feedback from students suggests the low calibre and poor communication skills of some students has a negative impact on their learning experience.³⁸

³⁵ To do so would require a change to the Legal Services Act. The Office of Fair Trading is opposed to controlling numbers.

³⁶ Lord Neuberger's *Entry to the Bar Working Party Report 2007*
<http://www.barcouncil.org.uk/media/164103/finalreportneuberger.pdf>

³⁷ The BCAT was introduced in 2012 and the pass rate is 98% (BSB figures).

³⁸ See for example an article published in the Guardian in December 2014 by a BPTC graduate:
<http://www.theguardian.com/law/2014/dec/18/why-we-must-raise-the-bar-to-becoming-a-barrister>

5.14 At present, most students undertake the BPTC without being able properly to assess their career prospects. The BPTC providers do not publish success rates in terms of pupillage or other employment³⁹ nor do they explain their own selection procedures. They should be required to do both by the BSB. This would enable them to share responsibility for a student's decision to seek the qualification, and would mean that they could make a more informed choice.

5.15 It is currently proposed that the Bar course is split into two parts.⁴⁰ The first part must be sufficiently demanding to ensure that only those students with the necessary skills will be able to embark on the second part. This would mean that those who realistically will never secure pupillage would not be enticed into greater debt with false hopes. It should also enable the standard of advocacy training in Part 2 to be raised, as only the most talented students would progress to this stage. If Part 2 became smaller, then we would hope that advocacy could be taught by the Inns and/or the Circuits, thereby (i) easing the financial burden on students, (ii) providing a higher quality of training, and (iii) providing the different specialist Bars with an ability to influence the practice of juniors in other fields. Pupils would no doubt be taught some of their advocacy by experienced practitioners, and civil practitioners could input their skills into paper exercises, resulting in a higher quality of training for all.

5.16 There are encouraging signs that the Inns of Court may be about to make this happen. The Council of the Inns of Court (COIC) met recently and approved the final report of the Inns College Working Group. This will be provided to the Inns for their consideration. In particular, COIC invited the Inns to approve the creation of the Inns of Court College of Advocacy, and approve in principle a commitment to develop (through the College) online resources to support a reformed BPTC. These commitments will necessarily be subject to approval by the Inns, and financing this project (either externally or internally), and a decision of the BSB to adopt the proposals.

5.17 Ideally, the Bar would return to a system where those applying for the BPTC would know whether they had pupillage or not. At present, around two thirds of those who secure pupillage, do so either during or after their BPTC year.⁴¹ Pupillage should not, itself, be a requirement for the BPTC, but students without it must understand the risk they are taking. That requires the cooperation of the entire profession, and moves in this direction should now be pursued. The Bar Council is already looking at encouraging earlier pupillage selection by chambers to enable those undertaking the BPTC course to do so with a clearer idea of their

³⁹ In spring 2015 the BSB intends to publish statistics on the comparative pass rates and (as far as their data permits) pupillage success rates of students on the BPTC across the various providers. There is no obligation on the BPTC providers to publish such information.

⁴⁰ The BSB has indicated that they favour a more flexible approach to training, with a Bar course that is delivered in two parts: (i) knowledge-based and (ii) practical.

⁴¹ *Bar Barometer* (March 2014), p81. http://www.barcouncil.org.uk/media/287767/bar_barometer_report_updated_-_june_2014_.pdf

career path.⁴² This could deter some of the most talented students from choosing a more secure route in to criminal practice, such as a training contract with a solicitor's firm.

5.18 The Inns of Court education departments should consider focusing their student activities at undergraduate or GDL level, in order to prepare students for pupillage applications before they embark on the BPTC, and to ensure that those intending to pursue a career at the Bar are aware of the difficulties and costs involved. If students can secure pupillage pre-BPTC this removes part of the risk of self-funding the course and prevents the course from being only undertaken by those who can 'afford that risk'.

5.19 The BPTC content should be reviewed to ensure that it addresses any gaps identified by the profession and better prepares candidates for practice, i.e. that it reflects skills needed to pursue a career at the Bar.⁴³ At present, at least parts of the profession have an unclear picture of what qualities are required when people begin pupillage and what chambers need to add by way of the pupillage itself. The profession needs to identify the skills required at each stage, so that the BPTC can be focused on what is actually needed pre-pupillage.⁴⁴

5.20 The BPTC should include modules that can be accessed by other legal professions, so that those who pass part of the course have qualifications that can be used even if they do not secure pupillage. This is in line with the Jeffrey Review recommendations on the standards of Crown Court advocacy.⁴⁵

5.21 We understand that some chambers do specifically offer 18-month pupilages. These should be clear and entirely transparent arrangements between the chambers and the barrister. The Bar Council should issue guidance, however, on what are known as 'Third-Six Pupilages', asking chambers to make a decision as quickly as practically possible on whether or not to offer a tenancy to a pupil. They should not be used as a way to extend the period during which a junior barrister is working for little money and without the security of a tenancy or any voting rights in chambers. They are not part of pupillage and, being unregulated, in the absence of agreement, there are no minimum guaranteed earnings during this period.

5.22 The term 'Third Six Pupillage' has no regulatory meaning. A more appropriate term should replace it that reflects the fact that the barrister will be fully qualified, have a full practising certificate and be covered by their own insurance.

5.23 We are particularly anxious that the Bar Council and the BSB should issue guidance on the fair treatment of junior members of the Bar, recognising the highly vulnerable position of

⁴²Bar Council's Social Mobility Committee *Report on the timing of pupillage selection* (February 2015).

⁴³ We acknowledge the work of Legal Education and Training Review (LETR), but we are suggesting a further detailed review of the course content.

⁴⁴ As part of its Future Bar Training programme, the BSB is currently writing Professional Statements, in consultation with the profession, that will describe what skills and knowledge a barrister should possess on completion of pupillage.

⁴⁵ *Independent Criminal Advocacy in England and Wales* recommendations 2 and 3.

those who are hoping to secure tenancy, or who are in their first years of practice. We have heard of promising young barristers who have chosen to leave their chambers because they feel excluded or exploited by more senior members. We recommend that junior members of the Bar are included in chambers' management committees, and are given practical training in, for example, submitting bills and practice-building.

5.24 We request that the Inns of Court, Circuits and Heads of Chambers be pro-active in encouraging and supporting the very junior Bar, and making as many criminal pupillages available if they can. As to the Inns, we greatly welcome, for example, their important 'Pupillage Matched Funding Scheme' aimed at increasing the number of pupillages available, as long as there is enough work available to consider the pupil for tenancy. We encourage the suggestion that they might make use of their under-used library spaces to provide 'hot-desking' facilities for junior members of the Bar who are not based in London.⁴⁶

5.25 By way of contrast, whilst not discouraging chambers from taking on pupils for criminal work, the Bar Council should alert chambers to the fact that it is bad practice to operate as 'pupillage factories', routinely taking on several pupils and third-six pupils knowing that few, if any, have a realistic chance of securing a tenancy in chambers. Internal competition in such circumstances does not necessarily increase diversity; it simply adds another layer of risk to people who will already be unsure about their decision to enter a profession with huge debt and poor prospects of early repayment.

5.26 The Government should introduce minimum fees and rules on travel expenses for Magistrates' Court work so that the junior Bar are more fairly treated. Further, sacrificing the legitimate interests of junior tenants for the sake of a relationship with solicitors from which more senior members of chambers primarily benefit is improper.

⁴⁶ This idea was suggested by Lord Judge in a speech at Middle Temple delivered in July 2014.

Chapter 6: Remuneration and the Sustainability of a Self-employed Referral Advocacy Profession

The effect of the Graduated Fees system on the independent advocacy profession, by Professor Martin Chalkley, Professor of Economics, University of York, February 2015

The context: graduated fees from 1996 to 2014

6.1 The now dominant fees mechanism for paying advocates for higher court criminal advocacy is the AGFS. It was designed in 1995 to cover 95% of higher court cases (trials lasting up to ten days). The essence of the (then termed) GFS was to set a price for a case that was flexible (graduated) to reflect variations in the complexity, time and skill requirements of different cases. Complexity time and skill were measured by the 'after the fact' taxation of cases occurring in 1994. Graduation was achieved by categorizing cases (the more complex attracting higher payment), allowing for a number of uplifts (pages of evidence, witnesses and length of trial) and paying separately for additional elements such as conferences, additional hearings and viewing tapes and videos.

6.2 It was extended a few years later to trials lasting 25 days, but problems were encountered in matching the formula to the demands of longer case cases and the formula was modified to result in a steep increase in payment for longer trials. By this time it covered more than 99% of cases.

6.3 GFS was subject to a major review and modification under Lord Carter's investigation into legal aid procurement. The RAGFS did away with the steep increases of payment for longer trials, bundled more elements into the main fee (reducing the number of additional or *bolt-on* items), rebalanced payments in favour of shorter trials and guilty pleas and increased the overall payment envelope for graduated fees by approximately 20%. The latter was in recognition that fees had been frozen in cash terms since 1996 and thus had become seriously eroded by inflation.

6.4 From 2008 onwards there have been numerous amendments and revisions and the scheme is now usually referred to as the AGFS. The effect of almost all of these changes has been to reduce fees overall and to target greater reductions on the top end payments. Thus both fees and graduation have been reduced. I have previously documented the extent of fee reductions and noted that they are by any normal measure extreme. I have also noted the substantial variation in the impact of these cuts on different types of cases and grades of advocate.

6.5 Except in its first incarnations, there has never been any serious evidence used to determine the level of fees and the relativity between fees for different cases. Lord Carter

assumed that fees had been eroded too far and formed a series of informed opinions regarding how increases should be targeted. Those opinions drew on consultation with the profession and his own business sense – that fees should be tapered in longer cases to give an incentive to advocates to speed cases through the system. Subsequent to Carter’s review fees have been cut differentially according to *perceptions* that certain cases are paid too much. None of these opinions or perceptions has been anchored in evidence.

6.6 There has never been any serious consideration of the incentives that the various schemes give rise to in relation to the allocation of work. The original GFS was formulated at a time when the separation of advocacy and litigation across different branches of the profession seemed immutable. At the time of Lord Carter’s review solicitor advocates were still a relatively small part of the market, and future developments in regard to advocacy were largely regarded as matters for another day. Subsequent fee cuts and rebalancing have been driven by budgetary targets, not a concern for the impact of the scheme on work allocation.

Why it matters: the economics of advocacy services

6.7 There are two commonly discussed modes of delivering advocacy services – through self-employed independent referral advocates and through in-house advocates employed by solicitors. A third mode appears to be emerging solicitor advocates who operate independently of a contract of employment but have a close affiliation with one or more firms of solicitors.

6.8 The third mode raises some new issues, which I return to below.

6.9 First I consider a number of the costs and benefits associated with independent and in-house modes of delivery.

6.10 The standard view of independent advocates is that their self-employed status, their organisation into groupings (chambers) and their business model (expense sharing) facilitate probably the maximum choice and access to specialised advocacy possible. These are reinforced by professional rules such as the cab-rank rule and the prohibition of referral fees. The former should ensure that an available advocate who is offered a case takes it, whilst the latter limits the extent to which a particular advocate can be removed from the market by some business arrangement with a particular firm of solicitors.

6.11 It is difficult to quantify the social benefit of this choice and access but it must be considerable. Therefore, any change away from the independent advocacy model requires evidence regarding any potential benefits it might produce. Hitherto, in the context of proposing changes to facilitate and/ or encourage an integrated in-house approach the MoJ have relied upon a belief that the independent model fails to take account of economies of scale and scope.

6.12 These notions are commonplace in economics. The former arise if larger size organisations benefit from lower costs because of real efficiency savings due to their size. This is not the same as large firms simply have lower costs. Often size confers an advantage in terms of market power, but that is not an overall saving to society it is simply a transfer usually from the small supplier to the large purchaser.

6.13 Whilst in theory it is possible that increasing the size of a law firm results in genuine efficiency savings it is difficult to explain the reasons for that in practice. I have not seen any such plausible reasons. And the empirical evidence such as it is (and it is neither extensive nor strong) does not even support the view that larger law firms are able to operate at lower costs (either due to efficiency or market power.)

6.14 Economies of scope are subtler and even more difficult to evidence. The idea is that integrating stages of production or extending the range of goods and services produced produces real savings. This may be because knowledge gained through one activity is transferrable to another. It is certainly possible that there are complementarities between litigation and advocacy so that an integrated firm may operate at lower costs. But it is equally possible that separation, independence and specialisation confer advantages. In the absence of any compelling argument for one or the other I think it is for those who propose a change to make the case and it is telling that this has not been done. If integration really were a big advantage in legal services it would be expected that lawyers of each branch of the profession and from diverse specialisms would rush to integrate. The absence of such a move is some evidence against the existence of substantial economies of scope.

6.15 So we are left with a strong case for the economic benefits of independence and little countervailing evidence of any benefit of integration. It would not be socially responsible to destroy an independent profession since to do so would risk imposing large losses to society. And yet I argue below that is one risk of failing to properly design and maintain the public funding of independent criminal advocacy.

6.16 I note above an emerging third mode of delivery: solicitor advocates who are not attached to firms of solicitors through employment or business integration and are also not independent practitioners. I am not an expert on these business arrangements but I think they are in practice closer to the integrated supply model than to genuine independent advocacy because truly independent advocacy is underpinned by rules affecting access, the Cab Rank Rule and prohibition of referral fees and my understanding is that free-standing solicitor advocates are not bound by these rules. An additional issue that arises here is that these advocates, because they can attach themselves to particular sources of work, can operate without the traditional services that connect advocates to work, i.e. a barrister's chambers. Thus they can, if they choose, pay fees for being given work out of what is saved by not having to contribute to the cost of a chambers organisation. This would seem to give rise to a potential for social loss bilateral arrangements between such advocates and their preferred referrers will limit choice and access. There is a legitimate concern that this form of market foreclosure is

against the public interest, and a further concern if it is being funded out of publicly financed fees. These may be matters that competition authorities might wish to investigate.

6.17 In summary, I think the economics and the evidence supports the case for maintaining a cadre of independent advocates. Their absence would limit choice and access and there is scant if any evidence that their business model limits efficiency. There is a second issue concerning how large a proportion of the provision of advocacy services such independent advocates should constitute. That is an interesting question but beyond my remit here.

6.18 Given the desirability of preserving at least some element of independent advocacy in the public interest, it is vital that remuneration for their services is designed in such a way so as not to lead to extinction.

6.19 I next consider the incentives the evolution of remuneration of publicly funded advocacy have produced, and argue that they are not conducive to the survival of independent advocacy.

Graduated Fees and the sustainability of independent advocacy: investing in a career

6.20 Economists view education and training as forms of investment that individuals and firms undertake with a view to the future. By analogy with investment in other domains where the object of investment is the accumulation of capital, this process is called investment in 'human capital.' Investments in human capital underpin the creation of skills and expertise necessary to sustain economic activity. Where the skills are idiosyncratic to a particular job, occupation or profession they are termed *specific* human capital. Such is the nature of the skills that are needed to undertake specialised criminal advocacy work.

6.21 Investment in human capital can be viewed like any other form of investment – it is worth undertaking if the future rewards exceed the present costs. In order to invest in human capital individuals need to undergo costly tuition and forego otherwise remunerative employment. If these costs remain the same and the future returns to investment are reduced it is to be expected that investment will be reduced or cease. This is a serious issue in regard to public funding of criminal defence advocacy where the state is the sole purchaser of the specialised service and so the prices it sets for those services determine the future returns to investing in the skills needed to supply them.

6.22 The implications of reducing these future returns are long term. Decisions regarding which profession or which branch of a profession to enter are taken years in advance of entering that profession and becoming productive within it. If investment is reduced or withdrawn the consequences will be felt in future years when a suitably trained profession ceases to exist in adequate numbers to meet demand.

6.23 Cuts in AGFS and rebalancing of the scheme have been undertaken without consideration of (or research into) the implications of those changes for the likely fee earnings of barristers or the likely effects of those reduced fee earnings on human capital investment.

6.24 In relation to changes in earnings that are generally observed in the economy the magnitude of cuts in AGFS are very substantial. I have previously presented findings of cuts since 2007 (Lord Carters evidence-based review of fees) that show there has been an *average* reduction of 21% in cash terms equating to 37% in real terms. These are average figures – the impact on some groups of criminal legal aid practitioners has of necessity been greater – but who these practitioners are, or exactly how much their fees have reduced has never been considered.

Pursuing a career

6.25 Along with the overall level of future earnings, it is important to consider the pattern of earnings over a career. The remuneration of most professions exhibits a quite steep time profile. Individuals enter with relatively modest earnings and expect to see substantial increases as they become more established and skilled in their work. This time profile also plays an important role in sustaining a profession. It makes continuing in the profession more remunerative than transferring skills into another profession or specialism.

6.26 Just as there has been no consideration of the impact of the overall remuneration offered by AGFS when reforming the system, there has been no consideration of career progression. The nearest I have observed to such a consideration was under Lord Carter’s review when purely hypothetical ‘straw barristers’ were assumed and an attempt was made to cost the cases that these imagined barristers would be likely to do. The assumptions and hypotheses were never tested against real data – in spite of the fact that the fees system generates a lot of relevant data.

6.27 Fee changes subsequent to Lord Carter’s review have almost certainly had the effect of eroding career progression, since it has become almost routine to target complex cases (those that would require the most experienced practitioners) for the largest fee cuts.

Distributing work

6.28 A further aspect of AGFS is that it pays fees that reflect the average requirements of a case. This is commonly referred to the ‘swings and roundabouts’ principle. Hence, even if fees overall are regarded as offering reasonable remuneration there will be individual cases where the fees will be inadequate compensation for the work required. Such a system is only sustainable if advocates receive a fair mix of winners and losers.

6.29 When the GFS was originally conceived, self-employed barristers were effectively the only suppliers of criminal defence advocacy services in the Crown Court. Hence the allocation

of cases was a matter for solicitors in conjunction with a barrister's chambers. The prohibition on referral fees and the nature of the split profession was held to offer security against *gaming* the scheme in regard to allocating work. Such gaming is considered a real issue in other contexts. For example there is a good deal of concern that hospitals in fixed price payment systems in health care might "cherry-pick" easy cases or "dump" difficult ones.

6.30 The implication of a mixed market for advocacy, comprising self-employed barristers, employed HCAs and now third party HCAs, have never been considered. However, the possibilities for cherry-picking and dumping would appear substantial. With a fixed fee for a particular type of case, there is little to prevent a solicitor's firm retaining the easy examples of that type whilst referring the difficult cases to self-employed barristers.

6.31 It is possible that otherwise benign and well-intentioned restructuring of AGFS has had unintended consequences in this regard; again the issues have never been considered or researched.

Sustainability going forward

6.32 None of the issues that I have outlined above is an inevitable consequence of the AGFS. They all arise out of a failure to either understand, or act upon the principles that should underpin such a scheme if it is to be compatible with the sustainable delivery of publicly funded defence work by a self-employed profession.

6.33 I have argued that sustaining the profession is economically prudent. What then should happen in regard to AGFS? I would summarise my position as follows:

- Graduated Fees are in effect a fixed price for a given case; this is a system that had won great support for its control over costs and accountability.
- Fees under this system have been reduced repeatedly, largely for short term cost-saving and without consideration for the impact this might have on the overall remuneration of defence barristers, or the incentives to train for this area of practice.
- Since 2007 fees have been reduced by more than 20% on average - some areas of practice have faced much larger reductions. Changes of this magnitude are likely to have substantially reduced the viability of training as a criminal barrister.
- Problems have been compounded by the ability of solicitors to retain work in-house, which undermines the 'swings and roundabouts' approach that the graduated fees scheme relies on.
- All of the above require a new commitment to approach AGFS as an inherent part of the sustainability of criminal legal aid and not simply a convenient tool for delivering

cost savings.

- All of the above require a commitment to gathering and analysing evidence and to base changes in any scheme on that evidence, not as in the past on assumptions and untested hypotheses.
- The resources required to fulfill this commitment are available. One of the unsung virtues of AGFS is that it creates data in a form that could constitute a valuable evidence base. What has been missing is not the means to create a sustainable system but the commitment to do so.

Chapter 7: Looking Ahead

7.1 In the introduction to his Review, Sir Bill Jeffrey states: “The Lord Chief Justice has encouraged the criminal Bar to consider where it wishes to be in ten years’ time. Such a reappraisal of the future of the criminal Bar is, in my view, urgently needed.” Our answer to this is that we do know where we would wish to be in ten years’ time. The difficulty will be in making the correct decisions to achieve this wish.

7.2 We begin with the wish. It is apparent from the answers to our consultation that the overwhelming desire of the criminal Bar is that it should remain self-employed, independent, subject to the Cab Rank Rule, and continue to provide a first class advocacy service, both prosecution and defence, to the public at large. The Bar would wish to remain in its present Circuit form, which we are satisfied works well in its best interests and it is in the public interest. Also there is little appetite for changing the basic chambers model, which has served the profession and society for so long, and appears to provide the most economic and efficient arrangement not only for the Bar but also for those who use its services.

7.3 We turn to the more difficult question of how the Bar is to survive the present pressures of a system that is moving towards greater and greater control by solicitors. There is no doubt that this question must be addressed. The warnings are clear. We have referred to that given by the Lord Chief Justice. We mention just two more: in the speech to which we referred in Chapter 2, Lord Neuberger said “Our experiences of the law and practice have changed over the past twenty years, and are likely to be even more different twenty years from now.” Then we commend to the reader Lord Judge’s speech on the future of the Bar, Middle Temple Hall,⁴⁷ where the former Lord Chief Justice took his theme from the writings of di Lampedusa, that ‘If we want things to stay as they are, things will have to change.’ He went on to pose the \$64,000 question:

It is for the Bar to decide how the threat of backdoor fusion, assuming it is perceived to be a threat, should be addressed. Does the Bar go along with it? If so, nothing need be done. If not, it must take practical steps now, I mean now. And for the Inns, in the next decade, and perhaps longer, their main function would then be to offer sufficient support to the profession to ensure the survival of the Bar (whether publicly funded or not) as a truly independent profession, and to continue to attract bright intelligent men and women to commit themselves to working in publicly funded areas.

7.4 More specifically, Sir Bill Jeffrey states: “if the Bar lacks the confidence in the future of criminal work, or the willingness to adjust how they conduct their business to compete on a

⁴⁷ The Future of the Inn, 15 July 2014 available at <http://www.middletemple.org.uk/document-library/the-future-of-the-inn/>

more level playing field, the continuation of recent trends will become a self-fulfilling prophecy.”⁴⁸ He continues:

The Bar could adjust its way of working sufficiently to compete effectively for legal aid contracts of broadly the existing kind. ... Simply carrying on as at present, in an effort to keep intact every aspect of the model as it existed many years ago, does not seem to me to be a viable option.

7.5 We agree that if the Bar chooses to ignore these warnings, it will do so at its peril. It must be a risk to go on mindlessly, as though our world was the old world, and the Bar must consider very carefully if its wish can be fulfilled and its future assured, as it should be, if we do.

7.6 The context in which the Bar is operating is uncertain and cannot be ignored. The first problem is the current uncertainty of the landscape, and the potential significance of the ‘Dual Contracts’ changes. The Government’s proposals for the Dual Contracts would, if implemented, radically alter both the number and size of solicitors’ firms operating in publicly funded defence work. This will inevitably have consequences for the amount of work available for those self-employed barristers who do publicly funded work.

7.7 We are not sure that the Bar’s ‘confidence in the future of criminal work’ or ‘willingness to adjust’ is in issue here. In the first instance, the real issue is in the supply of work, and whether the government of the day is willing to adjust the legal and regulatory landscape so as to remove the unequal arrangements that favour solicitors and make it harder for barristers to compete. The Jeffrey Review explains how the strengths of the criminal Bar are a “substantial national asset”. The Bar provides the bulk (though not all) of the highly trained advocates who prosecute and defend in the most serious cases. It is from the pool of some of the most experienced and able of these that the majority of judges who preside over these cases are drawn.

7.8 It is of course possible for the Bar to re-structure, but if its essential character were not to be lost, this would have to be done with the greatest care and subtlety. The desire of the profession to preserve the independence of the Bar, the Cab Rank Rule and the ability of barristers both to prosecute and defend in criminal cases is strong and, we would argue, in the public interest. We should not dismantle all that has been built up over so many years in a country which traditionally prides itself on its legal system and adherence to the Rule of Law. It might be expected that our laws and our legal system, with their ancient and memorable traditions, and reputation for independence and incorruptibility, are deeply ingrained in the psyche of this country. We often hear it said that they do also represent one way in which we are perceived around the world.

7.9 When Alan MacFarlane, a distinguished Cambridge Professor of Social Anthropology was asked: ‘*How important is law in the development of English society and politics?*’ he made the very considerable claim, that it is ‘all important.’ He said:

⁴⁸Paragraph 9.11, *Independent Criminal Advocacy in England and Wales*.

Every civilisation has something which really you can point to, and say 'If you understand that, you can understand everything else about their society.' If you go to India you can look at their religious system; if you go to America, you would probably look at their economy; if you go to China, traditionally you would look at their educational and political system. If you then went to England at any time within the last five hundred years and you were with a foreigner, and he said 'Point me to the area by which I could understand you', you would say 'Law'. It's an odd thing because there is hardly any other civilisation where you could have said this, but certainly in England . . . everything is 'Law'. This is our greatest institution; our most sophisticated and developed institution. It encompasses everything—it encompasses government, thought, economic activity and it is wonderfully complex, and very continuous. It is the thing that generates almost everything else. So, as has been said, 'it is a nation—an island of law.'

7.10 If this is so, there can be little doubt that the criminal justice system is an important and renowned feature of this 'island'. Lord Justice Laws recently referred to the integrity of the administration of criminal justice as being 'a benchmark of the Rule of Law.'⁴⁹ The Bar's contribution to what has recently been described in Parliament as the UK's 'soft power' should not be underestimated.⁵⁰

7.11 We need to understand that the sort of changes that the Jeffrey Review appears to contemplate may mean that barristers will end up providing advocacy and related services through entities that resemble firms of solicitors. Those who wish to preserve a strong and vibrant referral profession, with solicitors and barristers working together, in particular in the more serious cases, which has served the public so well for so long, would see a different Bar from that to which they are used.

7.12 Following significant rule changes made by the Bar's independent regulatory arm, the BSB, barristers have been able to provide their services in different ways and to structure themselves in ways which had previously been prohibited. There is a history of work in this field. The Bar Council had been working for several years on a business model for the Bar which would give sets of chambers increased flexibility in bidding for work in new and existing areas of practice, and in areas where sets of chambers faced increasing competition from other legal services providers.

7.13 Following a number of meetings with barristers around England and Wales, in April 2010 the Bar Council launched a model for new business structures called 'ProcureCo'. The then Chairman of the Bar, Nicholas Green QC, wrote to the profession outlining in detail how a ProcureCo might work. The documents (which are still available on the Bar Council website)

⁴⁹ The Queen on the application of the Law Society and others v the Lord Chancellor [2015] EWCH 295 (Admin) para 25.

⁵⁰ Report of the Select Committee on Soft Power and the UK's Influence on Persuasion and Power in the Modern World, which can be found at: <http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/150310-0001.htm#15031037000387>

include guidance on the relationship between the members of the chambers and the ProcureCo. The changes that were in contemplation were intended to benefit consumers and large procurers of legal services (such as local authorities and insurance companies), so that they could access the Bar's high quality services quickly and efficiently, and therefore be able, ultimately, to reduce their legal costs.

7.14 The launch of the ProcureCo model and guidance was in response to representations which had been made by members of the Bar as well as by clerks and practice managers that the Bar needed greater flexibility in what was, and remains, a rapidly changing market place. The model terms and guidance that the Bar Council published were designed to enable chambers that wished to pursue their business objectives in a new way within the developing regulatory structure to do so by modifying and developing the terms to suit their particular needs.

7.15 Although a number of individual sets of chambers were understood to be setting up ProcureCo type vehicles, designed to give them access to new opportunities, or to be considering the creation of such vehicles, in the events which happened ProcureCo did not get taken up by the Bar.

7.16 What steps has the Bar already taken in response to the Jeffrey Review?

1. Alistair MacDonald QC, then Chairman-elect, led a Business Models group which considered the suggestions by Sir Bill Jeffrey, and proposed the following steps:

- (1) The Bar Council Executive will consider possible models that may work for the continuance of the Criminal Bar in its current guise and in structures alternative to the chambers model.

- (2) The Bar Council Executive will lead on a substantive programme to educate and support the Bar should they wish to enter into BSB regulated entities.

- (3) The Bar Council Executive (together with the representatives from the Circuits and relevant SBAs) will explore options for contracting directly with the LAA for both chambers and regulated entities.

2. In December 2014 the BSB was granted authority to approve barrister-owned entities. In January 2015 the BSB began to accept its first applications from the Bar, who wish to operate out of a regulated entity. The Bar Council will consider the configurations of models that will work for the Bar depending on their objects.⁵¹

7.17 At the same time much work has been done (by both the Bar Council and the BSB) to

⁵¹ The Bar Council will update the profession regularly on the progress of this work but should you wish to contribute to any of the work that is being developed by the Bar Council Executive please contact Jess Campbell, MemberServices@BarCouncil.org.uk or 020 7611 1321.

create as much flexibility as possible in the regulatory structures available to the self-employed Bar. In summary, leaving aside the two extremes of fusion and embracing no change, the current and rapidly evolving regulatory framework appears to us to offer the following possible structures. As we consider them, it may be helpful to have in mind another part of Lord Judge's speech:

Chambers are no longer known by the name of the Head of Chambers. Most have adopted some kind of corporate name. The idea of developing these basic structures into a more formal corporate entity may sound like an anathema. But I am asking that you should consider it. We have read about alternative business structures, now described as legal services bodies. The Bar Standards Board is seeking amendments to provide for "entity regulation". I am not going to insult you, or alarm myself, by asking you to raise a hand if you have read the full paper containing these proposals. But if you have not, I respectfully suggest that you should.

SRA regulated entities

7.18 The Bar can be owners and operate out of SRA regulated entities. Members of the Bar can provide legal services and, if properly authorised, litigation services. The model that they operate out of will be subject to SRA rules, but the barrister will also be regulated by the BSB as an individual. This option will see the barrister become part of a firm of solicitors.

Regulated entities as annexes to chambers

7.19 A regulated (by the BSB or SRA) entity can be an annex to chambers; this model is being carefully considered by some sets of chambers.

7.20 The entity can provide legal services if desired or needs be, including litigation services, through a solicitor or a properly authorised barrister, and can be used should the Bar wish to tender for block work. It may be seen by some as having a firm attached to chambers, but this optional add-on may prove useful for certain work.

Companies created to procure work

7.21 Some chambers have management companies in place that manage the operations of chambers. These management companies cannot provide any legal services, but they can be used as the vehicle by which the Bar can procure block contract work. Difficulties arise as to how the management company would instruct barristers within chambers, and in reality it is unlikely to work for criminal defence work.

Barristers working in association with a solicitor within chambers

7.22 Some chambers have invited a solicitor to join chambers to carrying out all litigation within chambers, and to instruct its members. This is permissible under the BSB Handbook at Rule C79-85 so long as the BSB are informed. This allows chambers to continue in its usual structure, but means it can offer more services to members of the public.

BSB regulated entities (from April 2015)

7.23 The Bar will be authorised to provide legal services through a BSB regulated entity from April 2015 (applications are currently being considered and accepted by the BSB). This will allow the Bar to contract directly for work should they wish. It is another option for the Bar that will allow them to hire solicitors, paralegals and other legally qualified people to support barristers and provide legal services. The Bar will be able to maintain its high level of advocacy service, and if the entity and barrister are authorised to do so, to conduct litigation. The entity and the individual will be regulated by the BSB. Some may see this as similar to working in a solicitor's firm, albeit regulated by the BSB. The main difference is that the Cab Rank Rule applies to BSB entities, and independence can be retained. The BSB entity may form part or all of chambers. The real issue that arises is that conflicts rules will prohibit the members of the entity from both prosecuting and defending.

7.24 These models may prove useful and efficient tools in a number of fields of work. Only, experimentation and experience will tell if any of them will assist in the provision of publicly-funded defence advocacy services in the market that exists at present. We would be happy to be proved wrong, but feel bound to say that this seems a somewhat unlikely outcome.

7.25 The reality is that not merely have no BSB-regulated entities been formed yet, there are as yet no criminal defence contracts for advocacy services available to the profession. If they existed or were thought desirable, then we anticipate that barristers could rapidly adapt and take up such work; but no one should be optimistic that such contracts would preserve the qualities of the Bar as we know it today. The virtues and essence of the self-employed referral Bar is that barristers are (or should be) instructed because the solicitor and client think that this formula is the best available for advocacy in the case. When barristers receive work because they are parties to a contractual arrangement, there could be different advantages, but those virtues and benefits could be lost.

7.26 The Bar Council acknowledges, therefore, that each barrister has a number of options to consider, namely:

- A. Whether to remain in the traditional chambers model.
- B. Whether s/he wishes to practise from an entity which can enter into contracts with the LAA (were they to exist) or alternatively other users of legal services; and
- C. Whether s/he wishes to practise from a regulated entity, and if so whether to do this in conjunction with chambers or solely through the entity.

7.27 Those who choose to remain in traditional chambers may take some comfort from the Lord Chancellor's reply, on 6 January 2015, to a parliamentary question about the Jeffrey Review. We have already referred to a letter in which these representations were made. The following statement was made in Parliament:

The Jeffrey Review clearly identifies a number of challenges for criminal advocacy services. The Government is committed to working with the profession in the first half of 2015 to make progress on reforms that will ensure the legal aid advocacy market operates competitively, sustainably and in such a way as to optimise quality. In particular, the Government proposes to take steps to ensure that defendants in criminal cases always have an informed and effective choice of the advocate who is to represent them. The Government also proposes to take measures to strengthen the current ban by the Legal Aid Agency on the payment or receipt of referral fees and to address any potential conflicts of interest. We want to make sure that defendants are fully aware of the choices available to them and that only advocates who are sufficiently qualified by their training and experience represent defendants in cases in the Crown Court.⁵²

7.28 Whatever model may be favoured by the Bar, and given serious consideration for the future, we greatly welcome this answer.

7.29 If we need to change in order 'to remain the same', it will be seen from the above that now is the time to be considering this very seriously. Many chambers are already examining their structures with a view to deciding how they might best meet the problems that face the Bar.

7.30 If we may address the Bar very directly: The fact that contracts and entities are so new, means that it would be irresponsible for this Report to make any tangible, let alone hard and fast recommendations to you, other than to encourage you to find out as much about the various options as you can, and assess the best way forward to benefit you and the work that you do.

*

7.31 There is much to be done to improve the quality of criminal justice in England and Wales, and the Bar has the capacity to be a leading force for good in this process. The implementation of the Leveson Review will involve the development of new ways of working, to which the Bar must be prepared to adapt. These reforms, if well implemented, should free up money which is badly needed in the system; and we venture to suggest that if the more modest proposals in this Report are heeded, substantially more public money will become available, not least to provide a better return for the advocates for such important and responsible work. No one doubts that this is a critical period in the history of the Bar, but also that of the justice system. The Leveson and Jeffrey Reviews are independent confirmation of this view. There are hopeful signs that the support which the criminal Bar urgently needs from its Leaders, the Inns of Court, and other bodies, will be forthcoming; but first and foremost, every member should be aware of their ability to make a contribution to the future of their profession, if only by maintaining the very high standards which are expected of them.

⁵² Available at <http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/150115-gc0001.htm>

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