



BAR COUNCIL: INAUGURAL SPEECH

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Introduction

My involvement with the Bar Council started nearly 10 years ago when the then Chairman, David Bean, decided he needed a lawyer with some Regulatory experience on the General Management Committee.

Since then I have had the pleasure of working with eight Chairmen (Bean, Kelly, Irwin, Mansfield, Hockman, Vos, Dutton, Browne). They have all been very different in their approaches to the business of the day. Some were extraordinarily efficient at chairing meetings; some made a point of sending e-mails at 4.30a.m; some were international class gourmands; others had a wonderful oratorical facility. But all were very different. Yet all confronted issues which have a common thread.

Every Bar Council struggles with public funding and the implications for access to justice and equality before the law. For many years we have grappled with the implications of regulatory reform. Successive Chairmen have the task of advocating the rule of law both

abroad and at home. All travel to promote the Bar in new and existing markets around the world.

And every Chairman has seen that, day by day, the work of the Bar Council is ever more complex and increasingly the battles involved economics, statistics and accounting principles.

Over the course of the next 12 months the Bar Council will be addressing a host of detailed matters. But this evening I wish to stand back and take a small selection of key issues and attempt to place them in the broader context. This is a moment to pause and to take a more reflective gulp of air. Two themes stand out and characterise the nature of the issues that are arising. They are, first, the need for stability for the publicly funded bar. And secondly, the need for the entire Bar to address its role in a fast-moving and changing legal landscape and, in short, to modernise. These are issues which affect all sides of the Bar, employed and self-employed, and I will address the present unfortunate tensions that exist in this relationship throughout my address.

Stability

In recent times an accumulation of storm clouds has come across the horizon which threaten the stability of the Bar. The banking crisis which has plunged the world into recession has led Government to slash public expenditure. Nothing is immune including, courts administration, social services, probation, and of course legal aid.

Simultaneously another emanation of Government, the CPS, has embarked upon a process of ambitious expansion in advocacy.

And still further there is an ever-increasing incentive for HCAs to move into Crown Court work and this is a trend which could well spill over into family work as solicitors are forced to "follow the money". The effect of such pressures coming to bear upon the Bar at the same time is potentially devastating.

As a result the number of new pupillages being offered across the Bar has declined and in some areas of England & Wales dramatically so. In a number of major cities no new pupillages are being offered at all. Experienced practitioners who were busy are now sitting idle for periods of time. The Junior Bar has been especially hard hit and a disproportionate effect is experienced by women and BME practitioners. Some of the most able advocates are seeking to diversify away from publicly funded work or from the Bar itself. Research done on behalf of the family bar in response to legal aid cuts there shows that further reductions will lead to a real risk of able practitioners leaving.

Further, the Bar has made great strides in recent years to improve diversity and equality in the profession. The report of Lord Neuberger and the subsequent Neuberger Implementation Working Group has been at the cutting edge in improving access to the Bar. These very positive steps are also jeopardised by recent Government cuts which do nothing to make the profession a more attractive place to come to for a student saddled with a substantial debt as he or she leaves education and training

And this is the here and now. We have yet to feel the impact which the threatened swingeing cuts will bring.

So there are three main pressures to consider: the tightening of the public purse, the growth of the CPS and the impact of growth in competition from solicitors.

Legal aid cuts.

The first threat to stability is the wave of cuts to legal aid that the Government is intent upon. You will all have heard of the threat of huge cuts to criminal defence legal aid fees. Initially the MoJ said these could be up to 23%; now these have been revised downwards to 18%.

Just over two years ago we were arguing with the Government about the level of legal aid rates. The rates had not increased for nearly 10 years and had fallen a very long way behind a fair rate for the job. The Government instructed Lord Carter to review legal aid rates. The Bar was sceptical, very sceptical. But we were told “trust Carter” and “wait for Carter”. So we did. In the event the result was that the Government set a rate which was very far from being generous. These new rates did not involve an increase in real terms but they did restore parity with inflation and introduced a sense of stability because the scheme put in place was to be durable and long term. Importantly it was recognised by Government that the rates were fair – even by Government standards – for the job.

The Carter reforms meant for example that a mid-ranking junior would earn about £50K gross. This would produce a net income after deductions of circa £25- 30k. Hardly riches, especially when one realises that this junior member of the Bar may very well have spent years in training and then come out of education with debts of up to £50,000.

But now the MoJ are consulting over cuts of up to 18% to rates which Carter agreed were fair rates for the job. Is it any wonder therefore that the Bar is furious and that there is a widespread belief that Government is simply not to be trusted? If the Bar in the future is told “trust us” then that invitation will be treated with disbelief.

But we are then told that this is unfair and circumstances have changed. There is a financial crisis. We are not ostriches and we know that financial pain has to be shared out. But that is a very long way from the present situation where there is an overwhelming feeling that the Bar has been singled out for unfair and discriminatory treatment.

In the public sector rates of pay are due to freeze or be increased by only a very small amount. On 6th October of this year the Chancellor sought a 0% increase over 12 months for nearly 42,000 senior civil servants, and an increase of between 0-1% for another 710,000 middle ranking civil servants. It was also widely reported at the time of the announcement that that risked an exodus of senior civil servants who were not prepared to put up with such pay settlements.

If the Government wishes to offer a 1% rate increase only I will not say “no”. When members of the Bar see civil servants and ministers taking an 18% pay cut then we shall be silent.

Until then we shall challenge unfair and irrational pay cuts with the utmost vigour.

I say “irrational” because, as yet, the Government has not put up a scintilla of hard evidence to show that by slashing legal aid rates it will not cause unintended consequences and cost rises elsewhere.

Even before the impact of these cuts is experienced we are seeing the most able barristers seek to do less publicly funded work as they diversify into other work or even other careers. We have seen a dramatic drying up of work at the junior bar. We have seen solicitors’ firms become ever more marginal and we know that many have closed their doors. The evidence of the work of Dr Debora Price, at the King’s Institute for the Study of Public Policy, commissioned by the family Bar, is there for all to see. It made a powerful impact upon the Justice Committee of the House of Commons earlier this year. It makes clear that ever increasing cuts in legal aid risk leading to a reduction in the supply of advocates prepared to take on cases.

At a meeting some time ago in Whitehall a senior civil servant used the expression “driving rates down to the market level”. By this the Government means that there is always to be found “someone” who will do the work for the money. As to this, first, it is by no means self-evident. The strength of feeling amongst the Bar, and indeed amongst solicitors, is such that they might just think it is simply not worthwhile to continue in practice. It is entirely feasible that for the rates being offered there will over time be insufficient advocates who will be prepared to take on the cases.

But even if this does not happen and you can still find “someone” to take the brief it is obvious that if you pay less you will over time get less able or less experienced advocates.

Every barrister and every judge knows that experience really matters. It is the lubrication which ensures the smooth running of the Courts. Inexperience leads to bad decision making. It leads to delays and adjournments. It leads to defendants being held on remand for longer. It leads to witnesses giving their evidence further in time away from the date of the crime. It leads to victims being delayed justice. It can lead to defendants going to prison for longer because of facts in mitigation not being put or defendants receiving custodial sentences when a community order might have been more suitable. It leads to additional burdens on probation and on social services. It leads to expensive courts being unused whilst cases are delayed. In short inexperience and bad decision making leads to a series of adverse ripple effects all of which cost money. In the family fields it is the future of mothers and fathers and children which is put at stake.

Just 10 days ago the National Audit Office made some devastating criticisms of the Legal Services Commission for not having collected evidence and data to enable the Commission to demonstrate that its policies provide best value for money. It accused the LSC of not understanding the market. Well the same applies here.

And even more recently ...

Earlier today the Prime Minister delivered a speech hosted by the Institute for Government and the Royal Society. It was entitled "Smarter Government". The PM addressed a range of issues including public sector pay. He made a number of points of relevance to the justice system and to the Bar.

First, he is seeking to make savings of £100m per annum over 3 years in the senior Civil Service pay bill. To achieve this the Government will scrutinise new appointments, increase transparency of public sector pay and increase accountability arrangements. There will be a review of senior Civil Service pay. There will be a clamp down on unacceptable practices such as civil servants who leave with large payments and then return to work often as consultants.

Well, nowhere did he mention reducing incomes by 18% or more.

Second, he emphasised the real importance of allocating resources to ensure “excellence at the front line”. I agree. The Bar acts at the frontline; day in, day out, in the trenches. And we have a tradition of excellence.

Third, the Government wish to ensure that there is effective benchmarking so that the quality of service can be brought up to the level of “the best”. I agree. The Bar’s standards are of the best. The PM also emphasised the need for hard data. Well, before the MoJ slashes defence fees and causes real harm to our justice system let the MoJ live up to the PM’s requirements for hard data.

We know that the MoJ has not embarked on any analysis of the cost of doing it badly. Now they must wait until they have. The Treasury should be profoundly dubious about the long term logic of an easy pre-election pop at the legal profession.

So – our message to whichever Government we have to deal with next year is this: Whilst the Bar will be constructive in seeking sensible and pragmatic solutions in these difficult times we will resist tooth and nail unfair and irrational cuts.

The CPS and the Bar

I have said a good deal about legal aid cuts but that is not the only cause of instability at the Bar. I need to address the present issue we have with the CPS. And I need to address solutions. I mention this at the outset because although I propose to examine the nature of the present split I also wish to emphasise the importance of the Bar and the CPS getting down to brass tacks to resolve the dispute.

In his speech in 2008, “Coming out of the Shadows”, Sir Ken McDonald, the then DPP, spoke of the CPS “resolutely moving into higher Court Advocacy”.

According to figures given to the Bar Council the CPS presently performs in the region of 27% by value and 50% by number of all work in the Crown Court.

And, so we are told, there are in principle no limits to the CPS's ambitions. The phrase "no quantitative limits" echoes around meeting rooms. The rate of expansion is, to put it mildly, dramatic. When Sir Ken McDonald referred to the CPS coming out of the shadows he should, perhaps, have referred to an Olympian sprint out of the robing room.

A review of recent annual reports issues by the CPS shows the sharp upward trend in deployment of advocates by the CPS.

In 2004 the CPS introduced an "Advocacy Strategy" scheme and it embarked upon extensive training of HCAs. In 2004 there were 529 trained HCAs, many very recently trained. Advocacy schemes were piloted in Hampshire, the Isle of Wight and in Hertfordshire.

By 2006 the CPS reported that it had listed 2872 cases for trial by CPS advocates in the Magistrates and Crown Court compared to only 955 in 2005, a rapid growth rate on any view.

In 2007/08 the number of "Crown Advocates" had risen to 945 full-time equivalents and 12 months later in 2008/09 this number had increased to 1077, over 10% more.

The stated aim was "to make the CPS an employer of choice for first class advocates".

As is well known, the Bar and the CPS have been in discussion with a view to reconciling the differences that have split them over this issue. Discussions are due to recommence shortly. The Attorney General has indicated her view that we should aim to achieve agreement by March of 2010. An agreement would be a tremendous prize and it will be a priority in 2010 to work towards this end.

So, in the prelude before work in earnest begins, I wish to consider the broader implications of this issue and to set out the nature of the Bar's concerns. I do this not to be unduly provocative but to explain why it is that the Bar sees this issue as of great importance.

The CPS was created by Statute, namely the Prosecution of Offences Act 1985. It came into force following the conclusions of the Royal Commission on Criminal Procedure, chaired by Sir Cyril Phillips. A review of that Report shows quite clearly that the *raison d'être* – quite literally the reason for being – of the CPS under the DPP was not to engage in advocacy but, on the contrary, was to create a separation of functions between the police and the prosecutor. A “national prosecution service” headed by the DPP but accountable to the Attorney General was the result.

But this was not the only separation of functions that was recognised as being important. Under the new arrangement the CPS occupied one part of the ground between the police and the courts. The CPS role was to review cases passed to it by the police after charge. They were to decide whether the evidence justified the charge. The CPS would then instruct the self-employed Bar. The relationship between the Bar and the CPS was debated during the passage of the Bill through Parliament when the Government was specifically challenged to confirm that the CPS would not engage in advocacy.

Sir Patrick Mayhew, the then Solicitor General, in summing up the Second Reading debate, gave this assurance as to the future of the Bar:

“It is no part of the Government's intentions to use that clause as a means of altering the balance between the two parts of the legal profession. The Government hold strongly to the view that the public interest requires the continuance of a strong and independent Bar, and that rights of audience in the Crown Court shall accordingly continue to be confined as at present to an independent Bar which prosecutes and defends. ... “

In the House of Lords, Lord Elton, when summarising the establishment of an independent prosecution service, emphasised the importance that the Government attached to its ability to instruct counsel emanating from a Bar which had two features. First, that it was

independent from the prosecuting authority itself and, secondly, that counsel came from a tradition that both prosecuted and defended. He stated:

“I should emphasise that the Government holds strongly to the view that rights of audience in Crown Court trials should continue to be confined to an independent Bar which both prosecutes and defends.”

And elsewhere during the course of the debate the importance in policy terms of the Bar to the prosecution process was reiterated, often - let it be admitted - in flowery and emotional language. The Bar was referred to as “that vital bulwark of our liberties” and significantly “an independent Bar is one of the mainstays of our democratic system”.

It was therefore clearly understood that one of the principles which underpinned the creation of the CPS was that prosecutions in the Crown Court would be conducted by those who were independent from the prosecuting authority itself and who came from a tradition where barristers might prosecute and defend. The importance of this principle was recognised almost 50 years ago when Lord Devlin, in his work “The Criminal Prosecution in England” also highlighted the importance of the fact that the person conducting the trial was functionally separate from the charging authority.

It is true that, subsequently, rights of audience were opened up in the Crown Court.

But this is nothing to the point and does not undermine the central principle. There was a lively debate at a political level on this issue and the debate went in one direction only: The self-employed, independent Bar was a pivotal part of the prosecution process for well-established policy reasons.

If, as appears the case, the CPS is an unstoppable train and there are no quantitative limits then this raises a serious constitutional issue.

Parliament has never sanctioned the creation of a nationalised prosecution advocacy service which joins the decision to prosecute with the conduct of the trial. The creation of such a

body has profound implications. Advocates will spend an entire career - "cradle to grave" - in a prosecutorial organisation. As commentators have put it they might over time become "prosecution-minded". Their view of life might be very different to an advocate who has spent a career at the Bar and may well have both prosecuted and defended.

The public perception of the CPS is also important and it could also well change if the advocates who appeared to prosecute were all employees of the state. It is not a coincidence that the present DPP, and indeed the former DPP, were both practitioners at the Bar with formidable reputations for defence work.

It also raises serious questions as the pool from which judges will be selected. If the CPS predominates in Crown Court advocacy then when it comes to judicial selection the gene pool of the individuals to be selected from may have an entirely different set of characteristics. There are diversity and equality implications as well. And it raises questions as to the longer term sustainability of the self-employed Bar. There will come a "tipping point" when the pressures on the self-employed Bar are so great that real and possibly lasting damage is done to its structure.

Perhaps we would lose these arguments were they to be properly debated in Parliament. But I rather doubt it and crucially that debate has not in any event occurred.

And if this is the direction of travel of the CPS then it is far too important an issue not to have been tested in the crucible of Parliament.

It is a matter which not only deserves but demands public debate before mission creep becomes mission accomplished.

For its part the CPS advances a number of justifications. It says that using in-house advocates is cheaper. It says that it is necessary to provide advocacy opportunities to employees in order to further their career aspirations. It says that the CPS in-house advocates are of the highest quality. And it says that the organisational aspirations of the

Service cannot be brought to fruition without engaging in advocacy. As the DPP put it in 2008 “Advocacy changes everything for us. It enables us to grow up.”

Well, these justifications do not bear serious scrutiny as a justification for unlimited expansion.

As for the first of these justifications, cost, the CPS has published figures said to represent savings that the CPS has made by keeping work in house. Earlier this year the Bar Council set to work. Two detailed reports by independent economic experts, Europe Economics, were commissioned to investigate these claims. They completely demolish the CPS’s case on cost. Our very firm conclusions are as follows:

- (1) We have no doubt whatsoever that the self-employed Bar is cheaper to use than the employed Bar.
- (2) The CPS can only claim to be cheaper if it ignores its own fixed and other costs and does not apply normal accounting standards, including cost conventions accepted throughout Government.
- (3) We, the Bar Council, are happy to permit our experts to meet their experts to enable them to thrash out areas of agreement and disagreement and if needs be then to submit areas of dispute to an independent expert.
- (4) In an era of recession and stringent control on public finances if the self-employed Bar is, as we firmly believe, most cost effective, then there can be no rational economic basis for the steady year in, year out, expansion of CPS in-house advocacy.

As to career aspirations this is not a viable argument. We recognise that the CPS has enormous strengths and we recognise, because it is now an undeniable fact of life, that the CPS has a role to play in advocacy. Yet there is no logical correlation between never ending

expansion and the fulfilment of the career aspirations of those presently employed within the Service. Indeed, there is an acute irony in the argument since it is only because of the CPS's extraordinary expansion into advocacy at the expense of the Bar that the CPS has ever become a place where advocacy aspirations can be fulfilled.

As to the quality argument, this is a highly emotive issue. Very many former members of the self-employed Bar are now employed within the CPS and nothing I say is intended to decry the ability of many of their advocates who regularly appear in the Courts. But the Bar has prosecuted for centuries. A suggestion that the CPS has the collective diversity or quality or strength in depth of the Bar does not withstand analysis. I am not saying that every member of the Bar is a brilliant advocate and, as I have emphasised, I am not denying the ability of the CPS advocates. I also accept that over time, with properly instituted training and quality assurance schemes, the quality of the CPS will increase. But the Report in July of this year of the Independent CPS Inspectorate stands for itself. On no objective reading of that Report can the CPS claim to have superiority in relation to advocacy. The bottom line is that the CPS cannot pray in aid quality as a justification for its present expansion.

And finally, so far as political aspirations are concerned, when the CPS uses terminology such as the need for "reinvention" or uses graphic descriptions of itself as "Coming out of the shadows" then that is no more than an acknowledgment that the CPS is now purporting to do something that it was not set up to do. I return to my original point which is that if the CPS is going to move, inexorably, towards a nationalised advocacy service then that is an issue that needs to be thoroughly debated in the public interest and then tested against principles of economic rationality.

As I have already emphasised I am not here to pick or prolong a fight with the CPS and at the end of the day the real question must be as to solutions.

It must surely be, and indeed is, common ground that the CPS and the Bar Council should strive to find agreement. If we can find a solution then all of these arguments can be put behind us.

Any such agreement must re-establish stability in the publicly funded Bar and so there has to be the clearest possible understanding as to the limits of CPS expansion. I am not saying that the clocks must be turned back, but stability means stability. It does not mean steady, incremental, expansion to the permanent detriment of the self-employed Bar and the public interest.

The DPP has made it clear that in discussions nothing is on and nothing is off the table and I welcome that. I can assure the DPP that we will come to the discussions with an open mind and a willingness to explore all options.

I am firmly of the view that there is considerable benefit for both sides in a deal. Symbiotic and fruitful cooperation between the CPS and the self-employed Bar will bring forth all sorts of benefits. We might begin to see revolving doors between the CPS and Chambers. This will increase the breadth of experience within the CPS. We can look forward to joint training and secondments.

And perhaps the greatest prize of all will be the restoration and preservation of the "One Bar" ideal.

It is undoubtedly one of the most regrettable of all of the consequences of CPS expansion that it has caused dissension and hostility between former colleagues. It is essentially this dispute alone that has led to the employed and self-employed. But it cannot be emphasised enough - we are a single profession. There is far more than binds us than parts us. We share a single set of values and traditions and an agreement will help us to heal the rift.

Whether this can be achieved before March, as the Attorney General hopes, remains to be seen. But for my part seeking to achieve agreement will be one of my most important tasks for 2010.

Modernisation

Let me now turn to a new topic and an issue which is as important to the civil and commercial Bar as it is to the publicly funded Bar.

A key objective that I have is to facilitate modernisation at the Bar.

When I say this I do not intend to encourage a head-long rush into the unknown. Nor do I suggest that we act in a way which places at risk the fundamental characteristics of the Bar, which are unequivocally in the public interest.

But the changes that are occurring in the legal and market places cannot be ignored, and we do not have available to us the luxury of Canute-like opposition.

In this regard there are a number of developments I wish to comment upon. I need first to set out my views on the new regulatory regime which Parliament has mandated under the Legal Services Act 2007. This is a precursor to the changes in the ways that the Bar does business and this in turn is a lead-in to a consideration of how the Bar defines itself today.

New regulatory structures

As old Bar Council hands know well and as Bar Council debutantes will come to know all too well, the Legal Services Act 2007 has put in place an entirely new regulatory structure for the legal profession.

At the apex sits the Legal Services Board. But beneath it sits the front line regulators or “Approved Regulators” or “ARs” as we are called. This includes the Bar Council and the Law Society.

Under the Act the AR has to put in place a regulatory body or arm which has real and effective independence of action. For the Bar Council this is the Bar Standards Board now chaired by Baroness Ruth Deech.

The representative side of the Bar – that is you – and the regulatory side (that is Ruth and her team) are still part of the same overall organisation and we share facilities in this building. But the BSB has a discrete and important task, that of regulating in the public interest and in an independent manner.

A few years ago a regular item on the Saturday morning BC agenda was regulatory change in the wake of the review by Sir David Clementi of the legal market. We had years of debate on such matters including about the Legal Services Bill as it wended its way through Parliament.

I recall the looks of horror during those Saturday morning meetings when the prospect of “lay” members being appointed to an “independent” Board was being debated. The very idea of creating an “independent” body invoked cries of “a cuckoo in the nest” and, to the die-hards, “the creation of a Frankenstein-like monster”. The expression “lay” was used almost as a term of abuse. How could outsiders ever understand the Bar and its traditions it was said; and how can we dare give them “independence”?

Well, we have learned over recent times that “lay” input is invigorating and thought-provoking and invariably supportive and sympathetic. Lay members have been able to articulate and explain to the world at large how the Bar works. And they have been listened to. Indeed, even on the representative side we now increasingly call upon “lay” assistance when we are debating major issues of the day and we invariably find their contributions valuable.

And we have also learned that “independence” is not a threat. It is to be embraced. I have been on the Bar Council long enough to recall the days when it was the Bar Council and the GMC that was responsible for regulation. I can say with complete certainty that compared with the intensity and focus which the BSB now brings to the job we were rank amateurs.

Proof of the pudding lies in the fact that just a few days ago the BSB adopted a series for decisions on new business structures. These decisions were the culmination of a truly enormous amount of work. As Ruth Deech put it “the BSB is taking decisions which are fundamental and amongst the most important taken by the Bar in 50 years”. The BSB has responded to the everyday pressures facing the Bar and has addressed these problems pragmatically, and with rigour, and – critically – in a way which enables us to say to the non-legal community that what we are seeking to do is firmly in the public interest.

I will return to these new developments in just one moment but what I can say from my perspective is that irrespective of our initial concerns and fears about the BSB, the Bar found a way of turning a challenge into an advantage. A fruitful and positive working relationship between the BC and the BSB will service not only the public very well, but also individual members of the profession.

New business structures

And so to business.

On 19th November 2009 the BSB adopted a series of decisions which, in principle, have paved the way for the Bar to adopt new commercial and corporate vehicles in their everyday practices.

The need for these vehicles has come about largely, though not exclusively, because of funding pressures on the publicly funded Bar. Here the Bar is subject to increased pressure from solicitors who are conducting their own advocacy. The incentive to use the Bar as a

referral service to perform high quality advocacy clashes with the commercial imperative to retain advocacy in house and earn the fees paid for that work.

The Legal Services Commission (LSC) has geared itself up to allocate work based upon a market for legal services which assumes that solicitors will instruct the Bar. It grants contracts which require the service provider to be able to deliver an entire range of services from the initial advice to clients through litigation and then to advocacy. If work is forever to be allocated upon this basis then the Bar will increasingly be shut out.

However, as we have worked on this issue over the past 12 months or so it has become increasingly clear that parts of the civil Bar also need greater flexibility.

Local authorities, insurance companies, and other large block purchasers of legal services are increasingly interested in seeing the Bar adopt more flexible structures. This will enable them to contract directly with the Bar. Indeed, some of the most vociferous supporters that I have spoken to in favour of change have come from the civil Bar.

If the Bar is to meet these changing circumstances it must change. To do this we – the Bar Council – must seek to remove from practitioners those obstacles which hinder their ability to obtain work.

It is, at the same time, the difficult task of the BSB to ensure that in introducing rule change, the public interest is preserved.

And as we contemplate these changes we are all of us conscious of the imperative need to retain the traditional strengths of the Bar.

Let me make three observations about the position we are in.

First, none of the changes is mandatory. They are permissive. No one will be forced to go into partnership or to set up companies or enter into consortia with solicitors. What we are

seeking to do is to increase the options available to the Bar but not to compel anyone to do anything they do not want to do.

Secondly, the Bar cannot tell individual barristers and chambers how to run their practices. One thing I have learned over the past 12 months is that there are already sets that have well-advanced plans and blue-prints for the future. Quite a few have shared their business plans with me on a confidential basis. I have learned that it would be a serious error for the Bar Council to spell out what types of business plan individual sets should follow. There are a large number of permutations and I am quite clear that the best judge of what will and what will not work is not for me or the Bar Council but it is for the individual barristers and sets themselves to decide.

Thirdly, as to the rate of change, we must walk before we run. It is for the BSB to judge the nature and the pace of change and Ruth Deech has made clear that in this regard the BSB will be evidence-based. I deliberately put it in this way because there are those within Government who have suggested that the BSB should move more rapidly to introduce all sorts of alternative business structures. However, the BSB has rightly made clear that it favours an incremental approach to change which preserves the Bar's strengths but at the same time protects the public interest.

The changes that have recently been heralded essentially concern the ability of the Bar to enter partnerships whether with other barristers or with solicitors. They also concern the ability of barristers to work through companies. The changes to the rules cannot occur instantaneously. The BSB has work to do to modify rules, produce guidance and obtain the statutory approval for the rule changes from the Legal Services Board. We are looking now to the LSB to work with us to speed the process of approval through. There is also work to be done to determine how the BSB should regulate entities ie the new corporate bodies that barristers might wish to set up.

In this context I want to set out some predictions and a statement of what the Bar Council will be doing over the next few months. Because so much of this is new and the implications

unclear we are organising seminars, road shows and discussion groups across England and Wales in order both to explain how these changes can be exploited by the Bar but also, and equally importantly, to listen to the views and ideas of individual members of the Bar.

This I will do in conjunction with the Circuits. We have already started fixing dates for January 2010 and have 7 meetings already planned.

One aspect of these new ideas is what has become known somewhat unglamorously as the "ProcureCo".

This is nothing more than a rather mundane name for an incorporated vehicle which administers and procures legal services. It does not provide the services itself (for example, through employees). On the contrary, it provides the administrative capability for others to provide services. The administration of chambers through clerk's rooms is quite close to what a procureco would do. But the important point is that procurecos can exist to enable chambers to bid for work. Moreover, they might also be used as vehicles whereby barristers can arrange for litigators such as solicitors to join with them in consortia to bid for work that requires a fully composite service of advice, litigation and advocacy. By using in a creative manner corporate vehicles barristers can plan to compete for work from which they presently risk being excluded.

The beauty of such vehicles is that they do not involve the creation of partnerships between barristers. A set of chambers can retain its traditional structure but increase its room for manoeuvre in the market by joining with other lawyers to create bidding units.

As for predictions, for my part I would not view it as a tragedy if few if any barristers get into partnership with each other. My feeling, based upon conversations I have had, is that there is little appetite for partnership at the Bar. This is not just because the existence of the conflicts rule would risk making partnerships uneconomic but also because of a widely-held feeling that a key and defining feature of the Bar is the fact that each barrister is independent from his or her colleagues.

There is a real belief in the value of independence from an employer and from other members in chambers and from resultant pressures such as a collective profit motive. Partnership would also undermine the cab rank rule. The cab rank rule is not a figment. It received almost overwhelming support from those who responded to the BSB consultation. It is real and operates everyday especially in those areas of work such as crime and family where difficult clients need representing with firmness of purpose and vigour. It is part of the DNA of the Bar and sits alongside that iconic core to the Bar's Code of conduct whereby barristers owe their primary duty to the Court.

In my view the more that the Bar can increase the menu of options open to practitioners the more we will be able to give the Bar the flexibility it needs to respond to the market but without losing or diluting those features of the Bar which are so powerfully in the public interest.

So a clear message is: Over the next 12 months the Bar must begin to examine its methods of working. New choices on the menu will not appeal to all. I am aware of the fact that many members of the Bar were opposed during the BSB consultation to opening up new ways of business which departed from the tried and tested methods. But for some they may be critical.

I take it that an important part of my task next year will therefore be to help the Bar steer its way through these untested and tricky waters.

New sources of funding for litigation / Jackson

Another pressure on the Bar which will trigger a fundamental rethink is the report, due within weeks, from Lord Justice Jackson on costs.

In all probability the report will address some of what are perceived to be the worst excesses of the present costs regime. We know that conditional fee agreements are in the line of fire. A change in costs rules will throw up a range of new issues for the profession.

One such issue will arise if the report recommends severe constraints upon the recoverability of costs under conditional fee agreements. We all understand the arguments for and against but we do not wish to see fundamental reform lead to the drying up of funds to the prejudice of claimants with worthy claims who risk being denied justice as a result.

This raises a broader question which is this: How can funds be made available from non-governmental sources to overcome the limitations of civil legal aid and other funding shortfalls if CFAs are placed in restraint?

As to this we must keep an open mind. An overriding concern must be that of maintaining access to justice. It is all very well removing the excesses of CFAs if a consequence is a shrinking of the ability of deserving claimants to obtain a much needed remedy. All sorts of ideas are being mooted. These include CLAFs or Contingent Legal Aid Funds. These are market-led funds set up to support litigation which take their return out of damages. Critics say that allowing schemes which reduce a claimant's award risks creating severe hardship to (say) a personal injury victim whose award, which is designed to cover medical expenses, is then cut in order to pay the Fund. But there are solutions such as Courts being empowered to award the CLAF payment on top of damages.

There are all sorts of other solutions and other ideas are floating around in addition to CLAFS. Once we know the outcome of the Jackson report we will set to work in seeking objectively-justified solutions and to working with Government to ensure that access to justice is preserved.

What it means to be a "barrister"

With so much change in the air many barristers are now beginning to ask the question: What is it that being a barrister actually means these days? Let me turn to this now.

Twenty years ago we could look to the rules and we could define ourselves by what we did not do. We did not have direct access to clients; we did not enter partnerships; we did not engage in litigation (as opposed to advocacy). There were many things we simply did not do.

But these old truths no longer hold firm. They no longer define us because they are no longer truths.

Today we must define ourselves by what we do.

We can point to our core values and to our excellence in our core activities and say that these define us.

We are still predominantly advocacy specialists.

We are specialist advisors often but by no means exclusively in relation to litigation.

We are still essentially a referral advisory service. The Bar has always represented a pool of very high quality specialist advice.

We are still predominantly self-employed. There has always been, and there remains, a powerful feeling that individuality is a hallmark of the profession. But there are also increasing numbers of employed barristers and the fact that they are employed does not mean that they do not share many of the other values of the profession. A definition of "barrister" that concentrates upon what we do will in time also blur the distinction between self-employed and employed. I suspect that in the future we will see a greater revolving

door between these two methods of practice and the perceived importance of the distinction might very well diminish.

We are part of a collegiate profession. We all belong to the Inns. Many belong also to Circuits. We invariably work in chambers with like-minded colleagues. And routinely we also work in teams with barristers from other chambers enabling the client to pick and mix the best.

We have a strong ethos as a profession that our work is in the public interest. The cab rank rules and the fundamental acknowledgment that our duty is to the Court are still very important. The profession has a stellar record in *pro bono work* which is not done because there is a compelling business case for it in order to keep clients happy. A solicitor who takes on a 5-day case *pro bono* can still be paid his or her salary even though the firm might receive no remuneration for the work. A barrister who does the same gets nothing. Closer to home I have always been proud of the fact that whenever the incumbent Chairman of the Bar has needed advice, he or she has been able to pick up the 'phone to the top Silk or leading junior and request assistance in the full knowledge that such will be offered willingly and without expectation of reward. Equally, it is the leading lights of the Bar who give of their time to the Bar Council and to its various committees.

I accept that these characteristics are not easy things to quantify but they are part of what enables the Bar Council and the BSB to say that we regulate and represent specialist advocates in all their guises. And long may that continue.

Peering into the future we need to ask ourselves some basic questions. If we are to define ourselves by our functions then I would pose the question: Should the Bar be opening its doors to all specialist advocates? So, for example, a solicitor who specialises in advocacy could choose to become a barrister and be regulated by the Bar Council through the BSB. Equally, should the Inns open their doors when it comes to training and education? These are questions which we must begin to ponder.

Other issues

It is regrettable that there is simply not enough time this evening to deal with other important issues that the Bar council is already working upon. But they are not forgotten nor overlooked.

There is yet work to be done on the vexed issue of referral fees. We will continue with our work on equality and diversity at the Bar and in promoting access to the Bar. We will continue to take practical steps to improve the position of disabled barristers. We will pursue an effective quality assurance scheme based upon appropriately high standards of excellence. We will continue to promote the crucially important work of the Bar and the BHRC in human rights work aboard. We will continue our strong support for the *pro bono* activities of the Bar. We have important work to do in the rest of Europe and in the CCBE. And we will work very hard to promote the Bar in markets around the world.

Changes closer to home

Very much closer to home Desmond and I have given a good deal of thought in the past few months to how we can make the Bar Council itself more effective. We have had valuable input on this from Bar Council staff. I will be introducing a series of changes to the way in which the Bar Council operates both as to the conduct of meetings and as to methods of communication with the Bar as a whole. I also wish to institute a panel of experienced juniors who are not presently on the Bar Council but who are willing and able to lend their skills to Bar Council and BSB projects as they arise be they responding to consultation papers, assisting in briefing ministers or MPs on specialist issues. I will be writing in the New Year to SBA chairs for nominations.

The team

I come from the commercial bar. But it is a real privilege for me to be able to stand here and represent the entire Bar. Ours is a remarkable and unique profession. We are also resilient.

As a profession we will see through our present travails. In due course the recession will lift. But in the meantime we will fight our corner hard on a principled and a pragmatic basis.

In these battles ahead the Chairman is never alone.

In his capacity as Vice Chairman I will have Peter Lodder's advice and assistance next year which, I already know from experience, will be invaluable.

It goes without saying that the Treasurer will assist by maintaining an iron grip on the purse.

I will have a large GMC whom I expect to be vociferous and active.

I have those Imperial Storm Troopers, the Circuit Leaders, for moral support and to act as a critical conduit pipe into the Circuits.

The Chairs of the SBAs are, as ever, key to all of the Bar's work. This year the contributions made by Peter Mandelle QC of the CBA, Lucy Theis QC of the FLBA and Alexander Learmonth of the YBC have been unstinting. Each year I am amazed at the sheer amount of work that the YBC performs. In Belle Turner as Chair and Nicola Higgins as her Vice Chair I will next year have two strong and influential characters to articulate the views of the Junior Bar.

And of course there is the dedicated staff at the Bar Council, all of whom are worth their weight in gold. As every barrister who works on Bar Council knows they add enormous value and experience to our battles and to our projects.

Last but unquestionably not least you still have 3 weeks left of that shrinking violet, Desmond Browne.

I paid tribute to him at the last Bar Council meeting but it is still appropriate for me, before he goes noisily into the night, to finish with a final thanks to him for the prodigious amount of work he has put in this year always coupled with good humour and enormous common sense.

I have enjoyed working with him immensely and wish him and his libellous clients all the best for next year.

[ends]