"THE FUTURE OF THE BAR"

by:

Nicholas Green QC
Chairman, Bar Council of England and Wales

10 June 2010
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A) INTRODUCTION

1. The purpose of this symposium is to describe and discuss the future of the Bar. The Bar is a profession of ancient lineage but it is now under pressure from a number of increasingly acute sources. These flow primarily from the effects of a severe recession which carries with it a legacy of astronomical national debt. At the same time clients are ever-increasingly seeking to obtain better value for money. Both public and private clients are experimenting with different types of obtaining services and want more work for less money but delivered at the same or a higher quality.

2. Money issues aside the legal profession is an extremely competitive one; barristers compete with each other and increasingly with solicitors. Indeed, for non-reserved legal services (as they are defined under the Legal Services Act 2007 (“LSA”)), such as pure advice, one does not even have to be lawyer to provide such services for reward. In a climate of ever-increasing competitiveness the Bar has to fight its corner. This is no more so than in the field of criminal defence work which occupies the time of over 5000 members of the Bar. Here solicitor HCAs are increasingly, because of the economic imperatives operating upon their employer firms, appearing in the Crown Court in direct competition with the Bar and this has led to a reduction in the volume of work for the criminal Bar and the junior Bar in particular.
3. Change has become necessary. In some respects this has been easier to carry out during the recession because the fear of the impact of the recession and of increased competition has made the Bar more amenable to a message that urges reform. The LSA has resulted in the Bar taking a long and hard look at its rules. Despite initial reluctance and a fair degree of scepticism the Bar, through the Bar Standards Board (“BSB”), has embarked upon a systematic programme of rule review. It is now urged on in this endeavour by many in the profession who see rule change as critical to future survival. Such has been the alteration in perception that rule changes that were just a few years ago seen as heretical are now seen as not going far enough. The **volte face** in the corporate psychology of the Bar has been nothing short of remarkable.

4. So, the BSB has removed restrictions upon barristers practising in partnerships, it has increased the ability of the Bar to conduct litigation, it has increased the right of barristers to engage in direct access work, it has permitted barristers to work with dual status (for example, employed and self-employed) and it has removed anachronistic restrictions upon sharing premises. And there is yet more to come. The BSB is working on entity regulation – a quite fundamental issue - and even wider direct access.

5. The Bar Council is looking deeply at the issue of the management and organisation of Chambers and whether there are models we can recommend which will make the Bar fleeter of foot and more accessible to our clients but which still preserve the strengths of the traditional Chambers model. The Bar Council has promulgated a model of practice for the Bar known by the unglamorous and descriptive name of “ProcureCo”. This has been published after very widespread discussion with the Bar across England and Wales. It has been welcomed and sets are rapidly taking up the idea and getting on with the task of modernising Chambers.

6. As the profession modernises it will inevitably be drawn into more commercial forms of activity and this gives rise to a commensurate need to guarantee that standards do not fall. We must address how regulation is to evolve in the future. This is now the task of the BSB whose job it is to map out a route forward for the Bar. Increased commercialisation of the Bar must go hand in hand with rigorous regulation. It would be a disaster if otherwise beneficial change and increased flexibility in the way the Bar works led to a dilution of standards of conduct and behaviour. The Bar has a high professional reputation both here and abroad. That is a singular selling point and we undermine the standards that underpin that reputation at our peril. The Bar must therefore have confidence in the BSB to loosen the shackles but
simultaneously to create a comprehensive and effective regulatory regime to accompany the unshackling which balances opportunity with risk.

7. Connected to the question of the maintenance of standards is the question of continuing training and education. A specialist profession in one sense trains itself. Good Chambers provide a vigorous and stimulating breeding ground for new talent to emerge out of and learn in. But this is by no means a complete answer. In the future the Inns of Court (and indeed the Circuits and the Specialist Bar Associations (“SBAs”)) will need to engage in increased education and training. This will be most immediately felt in relation to publicly funded work where for some years the Government has been agitating for the imposition of mandatory advocacy quality standards for barristers and advocates receiving taxpayers’ money. The introduction of such compulsory standards will become a reality in the near future for criminal advocacy. The profession must not only gear up for this but must put in place training to maintain and improve standards of advocacy. In this the Inns, as well as the Circuits and SBAs, will be critical. Collectively, they can provide a formidable machinery servicing the requirements of the Bar. This is an issue to which the Inns are already giving active consideration.

8. At a broader level we must work to ensure that the justice system as a whole (criminal and civil) survives unscathed (or scathed to the least) in a period of fiscal austerity when the presently available funds will be withdrawn and diverted to service the national debt. The Bar needs, perforce, to work constructively with Government on ways and means to save money which do not harm the administration of justice – no easy task. The harsh reality of years to come of budgetary constraint means that the Bar Council has been forced to reassess its position. If the legal aid budget and the courts system are to be protected we must engage with Government at a broader policy level in ways that are constructive and enable Government to meet budgetary objectives. As a profession we have the skills to be of real utility to Ministers and if we can engage positively we can help them to save money and the quid pro quo can be that a fair share of savings is reinvested into legal aid and the justice system more broadly.

9. The purpose of this paper is to discuss the state of the Bar as it exists in June 2010 and to pull together information and evidence to paint a picture of the Bar as it is might appear in the future.

10. To inform me in this task I have spent a good part of the previous five months speaking intensively to the Bar. I have visited (as part of an ongoing
process) nearly 60 sets of Chambers; I have spoken to approaching 2,500 members of the Bar, clerks and practice managers in seminars, forums, meetings and discussion groups. I have also discussed issues concerning the future of the Bar with the Inns, Circuits and SBAs. I have spoken at length to the judiciary, to solicitors, to Government, to journalists and (importantly) to the clients of the Bar. In preparing the ProcureCo material I received literally hundreds of e-mail comments which in a variety of ways focused upon what the Bar wanted by way of more up to date business structures. The staff in the Chairman’s private office have equally spent a good deal of their working days on the telephone communicating with members of the Bar about everything that is going on. Although I am bound to confess that the conclusions I have drawn are not “scientific”, I do nonetheless feel that I have gained a realistic understanding of the dynamics of the Bar as it stands today.

11. At the end of all of this I am actually optimistic. Yes, the publicly funded Bar is under very real pressure in terms of both fees and the prospect of change in response to new conditions but there is also reason to conclude that solutions can be found to its predicament and that it can weather the present storm. And much of the privately funded Bar has in truth withstood the recession well and feels confident and indeed bullish about the future. I am convinced that provided the Bar is willing to embrace necessary change when needed (and I have no doubt that it is) it will emerge as a stronger and even more vibrant profession.

12. Before jumping into the detail I need to start by setting out an important caveat. Although I have received advice and comments from a wide range of people whilst preparing this paper the views are mine. I say this not least because I propose in this paper to set out my views upon issues which properly fall into the decision-making domain of the BSB, the independent regulator of the Bar. I did wonder whether in setting out my analysis I should fight shy of expressing views on regulatory matters but I came to the conclusion that regulatory issues were so intertwined with the future of the Bar, and so many members of the Bar have discussed with me issues which to a greater or lesser extent turn upon BSB decision-making, that I simply could not avoid expressing a view on these matters. However, and I should make this plain, whatever my views the BSB will and must form its own views based upon available evidence of the way forward. My paper can be a contribution to the debate but ultimately decisions on key regulatory matters are for the Board.
13. In prosaic terms the questions to be asked therefore are: Where are we now? What are the pressures we face? How are we presently responding? Where do we want to be in (say) 5-10 years’ time? And, what do we need to do to get there?

B) WHERE ARE WE NOW - THE STATE OF THE BAR

The present Bar: Some facts and figures

14. As of the start of 2010 the Bar comprised 15,300 barristers of whom 12,250 were self-employed and 3,050 were employed. In addition there are about 5,000 barristers falling into the categories of non-practising (circa 3,600) and overseas or retired (circa 1,400).

15. There are approximately 734 sets of Chambers with 347 being in London and 387 in the provinces. This however includes 391 sole practitioners of whom 143 are in London and 247 in the provinces.

16. In terms of gender in the self-employed Bar there were 8,381 men and 3,800 women at the end of 2009. Interestingly, in terms of relative percentages women were better represented in the provinces (1,465/2,996 i.e. circa 50%) than in London (2,387/5,371 i.e. circa 44%). A statistic that is also indicative of the changing gender balance of the Bar is that in 2009, 921 women and 851 men were called to the Bar i.e. 53% of those called were female.

17. Of the total practising Bar of circa 15,300 there are about 1,400 QCs, i.e. just less than 10%. A higher percentage is found in London (circa 14%) than elsewhere (circa 7%). Women are increasingly being successful in silk competitions. In 2010, 46 women applied of whom 20, or 43.5%, were successful. In 1986 of 558 silks only 20 were women (less than 3%) but by December 2008 of 1,273 silks, 127 were women i.e. circa 10%.

18. In terms of ethnicity the Bar has made considerable efforts and secured real progress in promoting diversity. The Bar Council was the first professional body to publish an Equality and Diversity Code in 1995. The Review of Pupillage, conducted by the BSB and chaired by Derek Wood QC (The Wood Report), records that the Bar shows both higher female and higher ethnic

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1 See "No Bar to the Bar" (Bar Council, 2009).
minority participation than the economically active population with higher qualifications (the relevant comparator group). The Report of the Working Party on Entry to the Bar, chaired by Lord Neuberger and published in 2007, identified 57 recommendations for improving access and entry. The Bar is working on implementing all the recommendations. These efforts have not been helped, however, by Governmental policies on reducing legal aid and, more generally, in education which makes aspirants to the Bar from wealthier backgrounds better equipped to overcome the financial stresses and strains of tertiary education. It is not uncommon for students seeking to join the Bar to leave university and professional education saddled with debts exceeding £30,000. Nonetheless, real progress has been made. 23% of pupillages are being taken up by people from Black and Minority Ethnic (BME) backgrounds, which is a higher proportion of inclusion than in the general population. In 1995 the percentage of BME practitioners at the self-employed Bar was 6.4% (376 barristers). By 2005 this had risen to 15% (1,382 barristers). In 2008, 39% of all calls to the Bar were BME. 27% of all BME applicants applying for silk in 2009 were successful and in 2010, out of 35 BME applicants, 17 were successful or 48.6%. The Bar is serious about broadening its membership in every way conceivable. This is not only a moral imperative; it is economically crucial since a Bar that reflects better the cultural diversity of society is by definition a stronger and more representative Bar better able to withstand the various pressures to which the profession is subject.

The health of the privately funded Bar

19. My discussions with civil, commercial and specialist sets lead me to feel positive about the overall health of the privately funded Bar. This area of the Bar has withstood the recession well. Clerks report an increase in work and no greatly increased pressure on fees, at least relative to the consistent evidence flowing out of civil and commercial solicitors’ firms to the effect that clients are exerting huge pressures on the level of fees being paid (described to me as “vicious” by the senior partner in one City firm). The relative comfort zone that the Bar finds itself in is a reflection of the fact that the Bar represents excellent value for money. A single incident recalled to me by an in-house lawyer is typical. He recalled that his employer had a problem which was knotty and intractable. He sought quotes from three city firms which ranged between £10,000 and £25,000 for advice. He decided to instruct a young silk who “rattled off” a ten page opinion over a weekend. It cost £2,800 and was “concise, comprehensive and spot on”. At £400/hr it was still “exceedingly good value”. A recent survey recorded that there was a
48% increase in the use of the self-employed Bar by in-house counsel, recognising both ease of access and value for money.\textsuperscript{3}

\textit{The health of the publicly funded Bar}

20. The publicly funded Bar faces quite different problems. There are over 6000 publicly funded practitioners predominantly in crime and family law.\textsuperscript{4} These practitioners do not have the luxury of an open market where clients will pay a market price based upon an ascertainable quality of service. On the contrary, the publicly funded Bar faces a monopsony purchaser – the State – which in recent years has appeared to be increasingly resentful of the troublesome chore of having to pay lawyers for the task of prosecuting and defending criminals and solving the problems of dysfunctional families. In a recession accompanied by the existence of gargantuan national debt to be serviced, lawyers are easy prey for politicians. At the time of writing the legal aid budget is set at £2.1bn.\textsuperscript{5} It has been frozen at 2004 levels.\textsuperscript{6} Had the legal aid fund kept pace with demand then it would presently be £2.7bn. In other words there has been a reduction in real terms of £600m in six years. And as the Treasury grip on spending departments, including the MoJ, tightens so that already pinched budget will be constricted further. The effect of the cuts on the administration of justice is already being felt. In many areas the system creaks and groans. So publicly funded practitioners face uncertain times.

21. Based on present rates of pay a typical criminal barrister of, say, 4-5 years’ call appearing in a range of criminal court trials would earn circa £50-60,000 p.a. This is, of course, a gross figure from which VAT, Chambers expenses, travel, IT, books, etc, must be deducted. For a young practitioner, this can easily amount to 30% and more. The net effect is that a young barrister after (a minimum of) five years of training (who frequently leaves education with £30,000 plus worth of debt) will earn as a pre-tax (take-home) income of approximately £35-42,000 per annum. Plumbers and electricians can earn more. Yet they do not act as a pivotal cog in the administration of justice.

\textsuperscript{3} See paragraph 39 below.
\textsuperscript{4} National audit Office, “The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission” (27 November 2009) at page 15. The NAO reports that there are over 5000 criminal legal aid practitioners and there are about 1800 solicitors’ firms.
\textsuperscript{5} See generally the Report by Sir Ian Magee CB “Review of Legal Aid Delivery and Governance” (March 2010).
\textsuperscript{6} Ibid para 70.
22. The Bar Council in March 2010 produced a briefing Note on barristers’ rates of pay in publicly funded crime and family work. The Note was based upon detailed recent sampling work undertaken by the Bar Council. Barristers receive a fee for a whole case and dividing that by the days of the trial gives the “daily rate”. A typical working day in court will be 7 hours with 3 hours on top essentially in the evening preparing. Dividing the daily rate by 10 gives an equivalent hourly rate. This of course is an approximation since barristers will often have been working on the case for a considerable period of time prior to the trial and very many trials will take a number of days to prepare. As a rule of thumb the longer the trial the more days needed to prepare. The work undertaken (as is shown by the examples given in the footnote which are for types of cases regularly tried in the Crown Court which involve some degree of complexity) established that the typical hourly rate of a barrister will be circa £50-60.\(^7\) Out of this the barrister must pay all practice expenses and these can very easily by as much as 30% of total income. So the £50-60 per hour becomes £35-42. And then out of this

\(^7\) Basic rates for typical cases; Bar Council Survey (2010).

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provision is needed to take account of all the things that a self-employed person must cover but which an employed person need not, such as sick pay, annual leave (if you don’t work you don’t get paid), and pensions.

23. So far as family work was concerned the Note was based upon research undertaken by the King’s Institute for the Study of Public Policy (King’s College, 2008) which found that the median comparable salary of barristers practising in family law was circa £66,000 per annum. A quarter of family practitioners had a comparable salary of £44,000 per annum. These figures include no provision for sick leave, annual leave, or employer’s pension contributions. When comparing this with average incomes across the country the number of hours worked to generate these figures must be taken into account. Barristers do not work 9.00am until 5.00pm; the median number of hours worked was 46 per week, with a quarter working more than 56 hours per week.

24. All of the above commentary is based upon analysis which precedes the huge rate reductions imposed by the MoJ on criminal defence rates in April 2010 of 4.5% in each of the next three years amounting to a total reduction of 13.5%. These cuts were coupled to further modifications of the legal aid scheme which will have the effect of dramatically reducing the amounts that can be paid in much longer and complex trials, in some cases by as much as 70%.

25. This is hardly rich pickings.

*Public perceptions about barristers’ pay: Fat cats and thin cats*

26. Yet the above picture is not properly understood by the public and misconceptions have, in the past, been fuelled by the MoJ. In the public’s eye lawyers are not as popular as nurses or doctors or teachers. So we are easy prey for Government when it comes to considering whether to hand out less of the taxpayers’ money to lawyers representing (plainly undeserving) defendants or disruptive families.

27. In this the privately funded Bar can largely be set aside. There is an understanding in the press and in Government that in that part of the Bar one gets what one pays for. Competition is very fierce. The Bar is a gold fish bowl in which often piranha-like conditions of competition prevail. Any solicitor can get fees quotes; some Chambers even publish their rates. Solicitors are generally under pressure to negotiate barristers’ rates down;
often because that means that they get a larger slice of the client’s money. And quality is easily ascertainable. The expression that “you are only a good as your last case” holds true. A barrister’s performance in court is highly visible. The recent proliferation of directories charting and putting into league tables the performance of junior and senior barristers can inform those who do not already have a clear view of whom to instruct. If there is a public perception that the Bar is “expensive” this is simply not true. The Bar is good value. It operates with a low cost base and high quality and this is not at the taxpayers’ expense. Indeed, the Bar generates a good deal of revenue from international work so contributes to invisible earnings and is one of a number of reasons why international advisory and litigation legal work flows into the UK. The Bar is a valuable complement to the remarkable success of the larger commercial firms of solicitors in attracting international work. When commercial barristers’ earnings are reported in the press there is no suggestion that this is anything other than market forces at work.

28. But at the publicly funded Bar the reality is simply not fairly reflected in the public domain.

29. I should at this point mention the practice in recent years of the MoJ to use the annual top ten legal aid earners as a politically motivated stick to bandy about when it is convenient to get the expression “fat cat lawyers” into the press. In recent years the LSC has published a list of the top ten barristers and solicitors in terms of legal aid receipts. The list has been used to convey the impression that barristers get fat on legal aid. The most recent illustration occurred on 22 March 2010, the day the MoJ announced its review of criminal legal aid. On that day the Secretary of State went into the press with the catchy observation that the country was “over-lawyered and under-represented”. Simultaneously he published the top earners’ list with his announcement of the review. The overt purpose was to convey the impression that barristers earn too much from legal aid hence the need for a review. The truth, as the above figures show, is as far away from this as it could be. The Bar Council was given no warning of the publication of this list as we had been given in previous years. Had we been given prior notice we would have pointed out the numerous inaccuracies in the data including: (i) that in a number of instances although the payment was made in a single year it reflected work done over a large number of years (in one case two thirds of the fees received related to work done in a period from 1994 – 2006); (ii) that in at least one case the figures quoted in the MoJ list included large

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8 See IFSL report, Legal Services 2009.
payments made in error by the LSC to the barrister which the barrister paid back; (iii) that some of the payment included money that the barrister who received it had to pass on to another barrister; (iv) that some of the payments included substantial sums paid under an old payment scheme which no longer existed and which has now been replaced by the Very High Cost Cases (VHCC) scheme; and (v) that the figures quoted were VAT inclusive and also did not take account of the deductions which the barristers needed to make to pay for the costs of their practices (i.e. they were gross figures).

30. The MoJ figures were hence inaccurate\textsuperscript{9} and related in any event only to the very highest earners at the criminal Bar. They were also used in a misleading manner to suggest that in some way the very top earners at the criminal Bar received sums which were reflective of the vast portion of criminal practitioners.

31. Standing back from the details of this issue the view of the Bar Council is that in any system based upon taxpayers’ money it should not be possible for barristers to earn rates which are comparable with the private sector; there is always going to be a material discount on the market rate. In a period of fiscal squeeze that clearly and self-evidently holds true.

32. The Bar Council should also not be supporting rates which can genuinely give rise to a “fat cat” allegation. But the present rates for ordinary barristers do not remotely approach the level of fat cattery; the criminal Bar is a profession of feline leanness, in many cases the ribs poke through. If the system were such as to enable barristers to earn the level of rates which the MoJ cited then those particular parts of the system which enabled such payments to be made would indeed warrant review, but that simply is not the case today.

The impact of cuts in legal aid on retention of young barristers and BME and woman practitioners at the Bar

33. Cuts in legal aid provision have exerted a real and potentially lasting and adverse effect upon the profile of the junior Bar. To address a growing concern about the reasons why barristers were leaving the profession the Bar Council in 2005 started to conduct surveys as to the reason why barristers

\textsuperscript{9} The LSC did not have a good record in maintaining accurate records of payments. The National Audit Office in its review of the LSC found that it had paid £24.7m in error to solicitors in 2008-2009. Of this £6.7m were payments made to solicitors where the legal aid had been provided to claimants where there was no evidence that they were eligible to receive it: See Magee Report para 96.
were leaving the Bar.\textsuperscript{10} This has thrown up conclusions which are painfully consistent with the predictions we have for a long time been making about the impact of savage legal aid cuts. So, a disproportionately high percentage of young barristers has left the profession. Practitioners called between 4-7 years earlier account for 25\% of all leavers though they amount to only 15\% of the total profession of self-employed Bar. The principal reason was that they could simply not earn a living. This chimes with the constant refrain heard from young barristers around the country, but particularly those in the South East where living costs are highest, that with young families to support the publicly funded profession offers no future. The survey showed that 44\% reported an unwillingness to put up with the level of income they could earn and 50\% stated that they feared for the future. It will come as no surprise that a disproportionately high percentage of leavers were woman and BME practitioners who make up a higher than average portion of the publicly funded Bar.

34. This survey was started in 2005 and has been repeated every year from 2007 with the latest results being dated December 2009 (before the latest round of savage cuts in criminal defence legal aid rates). The Law Society reports similar results albeit that their analysis focuses upon firms as well as individuals. But one thing is very plain – that the perpetual paring down of the legal aid budget is driving talented lawyers (barristers and solicitors) away from the profession and is harming gender and BME diversity in the justice system.\textsuperscript{11} Indeed the answer to the question whether there will be harm to the diversity of the judiciary in the longer terms is so obvious that it does not need an answer.\textsuperscript{12}

One Bar

35. The expression “One Bar” is intended to convey a Bar comprising self-employed and employed barristers all of whom abide by the same rigorous Code of Conduct. In the past few years the extremely rapid growth of in-house advocacy on the part of the CPS to the immediate loss of the self-employed Bar has been a cause of very real friction. This is not just because it has taken work away from Chambers but because it has also resulted in a flow of barristers leaving private practice to seek the security of employment in the Civil Service and has caused a dearth of work for young barristers in

\textsuperscript{10} Survey of Barristers Changing Practice Status 2001-2008 (December 2009).
\textsuperscript{11} A point even the MoJ has come to acknowledge: See “Restructuring the delivery of criminal defence services” (22 March 2010, MoJ) paragraph 6, page 4.
\textsuperscript{12} See further the Report of the Advisory Panel on Judicial Diversity (2010), at pp 24-25.
Chambers to cut their teeth upon. In some Circuits feelings have run so high as to lead to the exclusion of employed barristers from the Circuit. In some Inns I have heard members and Benchers comment that they would not wish to extend training to employed barristers because their growth has been a cause of significant damage to the junior Bar. This has been characterised as a “One Bar” issue with detractors highlighting differences between employed and self-employed barristers notwithstanding adherence to a single Code of Conduct.

36. In my view all of this has been divisive and regrettable. It is also an issue which I consider will soon be consigned to the past. This is for a number of reasons. First, the Bar is in negotiation with the CPS over questions concerning the allocation of work and an agreement should be reached. This should ensure stability in the allocation of work between the CPS and the Bar. The rapid expansion of CPS advocacy will have been halted. Once a deal is done the CPS should return to being the natural ally of the Bar that it has been in the past. I have been struck by the number of senior juniors and Silks I have spoken to who have rued the decline in good relations between the CPS and the Bar, and who have welcomed the prospect of a deal. The reasons why a deal should be achievable are many and include not just the constitutional issue which I raised in my inaugural address, but also because economics are conspiring against the CPS. The advocacy policy is an expensive one and in the looming austerity it is clearly ripe for curtailment in the drive to save costs. And there is also the fact that, as Her Majesty’s Crown Prosecution Service Inspectorate (HMCPSI) noted, the expansion of in house advocacy has given rise to some serious quality control issues within the CPS. So, a deal should be struck so that the Bar and the CPS can move on to cooperate on matters such as joint training and mutual exchanges and secondments. The natural outcome of this should be a restoration of friendly relations between CPS and the Bar and a withering away of employed/self-employed friction. Secondly, the recent changes in the rules on the part of the BSB which allow barristers to be in employment and self-employment at the same time will lead to barristers working much more

13 Fortunately the Circuit where this occurred, the Midland Circuit, has recently voted to remove the restriction and now welcomes employed barristers.
The issue is that when the CPS was set up it was made clear in Parliament that the self-employed Bar would play a key role in providing an objective, independent, bridge between the charging authority and the Court. A nationalised in-house prosecution advocacy unit was never an issue debated in Parliament.
15 The HMCPSI issued a series of critical reports on CPS performance in a range of London areas and in Gwent in January and February 2010.
widely in a variety of different organisations and the distinction between employed and self-employed will become less fixed. Thirdly, the fact that the BSB has also allowed LDPs – i.e. mixed partnerships of barristers and solicitors (presently regulated by the SRA) - means that there will be increasing numbers of barristers in employment as firms recruit barristers and HCAs seek to re-qualify at the Bar but remain employed within their firms. In short the distinction between employed and self-employed will become less clear cut as the Bar adopts new and variable ways of practice. Fourthly, many barristers in employment are not advocates (and hence do not compete for work with the self-employed Bar) and act as general counsel and legal advisers in corporations, local authorities, and in the government legal services. It is, to put it mildly, ridiculous that the Bar should adopt an anti-employed Bar stance when this serves to bite the hand that feeds it. In these hard-pressed times we should be building bridges with our employed colleagues, not burning them.

37. If there is a problem with “One Bar” in my view it is different in nature and turns upon the ever-widening public/private income divide. The problem is not one of resentment or suspicion but a concern about brute economics. An issue that members of Chambers around England and Wales have been keen to seek my views upon has been whether mixed sets (public/private) can survive in the future. In a number of sets I visited there was a clear tension between those (privately funded) barristers who had the resources to invest in Chambers infrastructure and those (publicly funded) barristers who did not. This has already resulted in some Chambers breaking up and I suspect that this will continue to be a source of possible friction. Whether ultimately this is a serious issue for the Bar is moot. It seems to me that some restructuring of the profession is inevitable and if large mixed sets do break up into their constituent practice groups, which then become discrete sets in their own right, this might simply be a logical response to changing market circumstances. Certainly, in the short turn there is inevitably sadness when a Chambers splits but my impression has been that where this has happened the resultant new sets have in practical terms been able to do very well since they have been able to focus all of their attentions upon a single practice area. Elsewhere in mixed sets I visited there was a clear acknowledgement of the issue but at the same time a strong feeling that for the good of Chambers the better off should subsidise the less well off. In very large sets the mixed practice issue can be managed better than in smaller or medium-sized sets. Where, for example, there are (say) 100 barristers there may well be sufficient flexibility within Chambers’ management for different practice groups to achieve an efficient scale and for the Chambers as a whole to operate
different cost models. For instance, in a number of very large sets that I visited Chambers contributions were calculated upon the areas of work that they participated in or upon a menu basis. For instance criminal practitioners who travelled a lot might choose not to pay for a room and might choose instead either a “hot desk” facility of merely a locker. Civil, privately funded, practitioners in the same set might instead choose to pay for a room. Chambers expenses came as a menu from which you could choose to pay for different services rendered. My feeling therefore is that the real issue of “One Bar” will in the future focus around the public/privately funded pay divide and the ability to Chambers to manage the differential. If, in the fullness of time, this does lead to a restructuring of Chambers I remain to be convinced that this will necessarily be harmful to the Bar as a whole.

*Competition in advocacy and related work*

38. Barristers compete with each other both *intra* and *inter* Chambers. In addition, barristers compete with solicitor advocates who have had rights of audience since the Courts and Legal Services Act 1990. The actual extent of competition is one of variable geometry.

39. In civil and commercial work the level of HCA penetration has been moderate. There are numerous reasons for this: (a) a rational client seeking to instruct an advocate confronted with an in-house advocate on the one hand and, on the other hand, the pick of the self-employed Bar is likely to take the latter to ensure that he gets the best horse for the course; (b) the more specialised and esoteric the issue the less likely it is that a solicitors’ firm will ever have considered it economic to employ an advocate with that specialist skill; (c) the Bar is very good value for money, it is intensely competitive, quality is high and costs are low and it is transparent in that solicitors are expert selectors of counsel and the track record of a particular barrister is readily available on chambers’ websites and in the numerous directories that publish this sort of information. Treating advocacy or related specialist advice as an incremental cost (a disbursement) is rational for most solicitors’ firms. Where solicitors and barristers are in competition for the work of in-house counsel the Bar is proving increasingly popular. In a very recent survey carried out by Winmark of in-house counsel, managing partners, CEOs, Chief Operating Officers of companies, and marketing directors of professional organisations it was reported that in-house lawyers are increasingly seeking the flexibility and cost savings of going directly to the Bar. Indeed, when the survey respondents were asked about changes in the amount of work outsourced to different providers a remarkable 48%
reported an increase in work sent directly to the Bar. The obvious losers here were solicitors according to the survey. The privately funded Bar should hence be confident that provided it maintains its traditional quality and provided it makes itself more accessible and welcoming to clients that they will continue to come, and in ever larger numbers. I address later on the differences in costs structures between solicitors and barristers (see paragraph 122 below); the disparity is very marked indeed. It seems to me that in future barristers’ sets will need to increase their administration and general overheads in order to keep up with market demand. But this can be achieved without making the Bar uncompetitive or indeed losing its substantial costs edge over solicitors.

40. But the above logic does not apply in the case of crime and other publicly funded work. Here the market does not operate upon the basis of price competition since the Government sets rates regardless of an individual’s market worth and it increasingly does not work on the basis of quality either for the reason that solicitors are economically incentivised by the legal aid system to retain advocacy in-house and this choice is hence made regardless of the quality of the advocate available to the firm.

41. The structure of the legal aid system and the way in which funds are distributed has meant that solicitors are economically incentivised to an ever-increasing degree to deploy in-house advocates, and not to instruct the Bar. By May 2007 there were about 3,000 HCAs. All of these had higher rights qualifications. The numbers who claim to be doing criminal work has risen from 1160 in 2004 to 2582 in September 2009. Not all of these are fully active to a level comparable with barristers, but the trend is unmistakable. In its report of November 2009 the National Audit Office reported that 45% of criminal solicitors’ firms surveyed reported that to some degree they used HCAs. In fact, many civil and commercial firms have trained their solicitors to become HCAs. But such rights are rarely, and sometimes never, exercised.

42. During my discussions with Chambers a number of additional and often interwoven factors were identified as affecting the regional or local growth and sustainability of publicly funded HCA competition. The main factors appear to be as follows.

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18 Ibid.
43. First, the size of local solicitors. The size of local solicitors’ firms varies enormously. In some cities and towns a typical criminal solicitors’ firm will be very small (a couple of fee earners and supporting administration) and have no or only limited in-house advocacy capacity. Conversely, in some cities there are a number of solicitors’ firms of larger scale (for example, 15-20 fee earners) and in-house advocacy capacity is more commonplace. As a broad, and no doubt sweeping, generality smaller firms rely upon the Bar more than larger firms.

44. Secondly, the size of criminal sets. The degree of concentration of sets of Chambers materially affects the prospects of competition. In a city already crowded with barristers (which tends to be the larger Crown Court centres) HCAs will have to fight harder than in a city where there are fewer sets or fewer barristers (which tends to be smaller Crown Court centres and areas where Magistrates’ Courts operate from) where there is hence more opportunity for them.

45. Thirdly, both barristers and solicitors also cite a range of other, much more arbitrary, criteria including the approach of the local bench. Judges who are rigorous in demanding strict adherence to rules and procedures are sometimes (quite wrongly) said by solicitors to be anti-solicitor and pro-Bar and this has been said in some cities to deter HCA penetration. Also mentioned has been the “nature” of the typical crime. Some cities have particular reputations for gangland activity or murders. Both barristers and solicitors have commented that these tend to generate more Bar work because the crimes are considered to be more serious and complex. By parity of reasoning there is less work for HCAs who tend, at present, to concentrate on less serious crime. In one city I was told by almost all the barristers in the various sets I visited that the structure of the local Bar was more fragmented than it should otherwise be owing to the falling out of Heads of Chambers more than two decades earlier which had exerted lasting splits. The somewhat fragmented structure of the local Bar created a range of incentives for HCAs which might not have existed had there been greater cohesion amongst the existing sets.

Responding to competition

46. Aside from the structural changes that the Bar Council and the BSB are working upon it is possible to identify the sorts of steps that are occurring by sets to respond to competition.
47. The civil and commercial Bar has responded by the simple expediency of doing the work well and at lower costs than can be achieved by solicitors’ firms. In the last few years there has been a very substantial increase in the amount of work that in-house lawyers have sent to the Bar with the justification being ease of access, quality and costs. The referral model continues to work well. To supplement referral work a number of the more enterprising sets are already setting up ProcureCo vehicles and engaging increased direct access. This is the market working as it should.

48. The market does not however work well in publicly funded work and the criminal Bar has responded to (distorted) competition in a variety of different ways.

49. First, there is widespread evidence that sets of Chambers are diversifying out of crime. HCA competition has concentrated on lower end crime in the Magistrates’ Court and the Crown Court. This has had a serious effect upon the junior Bar who have reduced volumes of work to cut their teeth upon. Across England and Wales Chambers have told me that they regularly encourage pupils and new tenants to undertake civil work as opposed to crime. Chambers as a whole, where they can, have been re-orienting to increase the proportion of civil and non-publicly funded work undertaken. In broad terms those sets with options have exercised them and diversified.

50. Second, there has been a steady decline in the number of pupillages offered. Over the period when HCA growth has been most marked the number of pupillages (measured as 1st 6 registrations) at the Bar has declined. In 2004-2005 there were 556 pupillages. In 2006-2007 there were 527 pupillages. In 2007-2008 this rose to 562 but in 2008-2009 this dropped dramatically to 463. The table in the footnote below is taken from the Wood Report Table 1019 and shows the decline in pupillages and tenancies over the period. The explanation given universally around England and Wales is that it is publicly

<table>
<thead>
<tr>
<th>Year</th>
<th>Pupillage 1st 6 registrations</th>
<th>Pupillage 2nd 6 registrations</th>
<th>Tenancies at self-employed Bar</th>
<th>Positions at employed Bar</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003/2004</td>
<td>518</td>
<td>557</td>
<td>601</td>
<td>182</td>
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<tr>
<td>2004/2005</td>
<td>556</td>
<td>598</td>
<td>544</td>
<td>156</td>
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<tr>
<td>2005/2006</td>
<td>515</td>
<td>567</td>
<td>531</td>
<td>191</td>
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<td>2006/2007</td>
<td>527</td>
<td>563</td>
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<td>228</td>
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<td>2007/2008</td>
<td>562</td>
<td>555</td>
<td>494</td>
<td>239</td>
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<tr>
<td>2008/2009</td>
<td>463</td>
<td>518</td>
<td>497</td>
<td>213</td>
</tr>
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</table>
funded Chambers which are not offering pupillages. Sets faced with mandatory pupillage scholarship requirements say they simply cannot afford to offer pupillages and the substantial and damaging decline in junior work has fed into a direct and negative pupillage recruitment policy.\textsuperscript{20} Where it has long been the tradition (outside London) for sets to take on their pupils almost automatically as tenants the reduction in junior work is another deterrent.

51. Thirdly, in relation to cost minimising, many criminal sets have used information technology to accelerate a move into a “library” system whereby the Chambers will offer a public face to the world at large (including reception and conference rooms) but a “hot desking” system behind the scenes which offers limited facilities in a common room environment for barristers – who predominantly work from home – to use when they come into Chambers. This has seemingly been successful in keeping costs under control. It is of course dangerous to over-generalise and as one would expect there is still a considerable range of Chambers’ models but some Chambers have shown a real willingness to become more minimalist than others. Some criminal sets out of London have cost structures whereby only 10-17\% of overall Chambers’ fee income goes in central Chambers’ costs. When basic fee rates are being pared to the bone (and beyond) rigorous control of costs is obviously essential to enable practitioners to make a living.

52. Fourth, some Chambers are expanding direct access work. Recently the BSB’s rules have been relaxed so that the Bar’s Code of Conduct permits direct access in an increasing range of areas including private crime, private family and private immigration. Based upon the evidence of innumerable conversations that I have had with members of the Bar, there is a real appetite and enthusiasm for this work, often from younger members but by no means exclusively from that segment of the profession. One set, Argent Chambers in London, a criminal set traditionally specialising in defence work, set up a ProcureCo called “Argent Law” to access the City market for what might broadly be described as compliance work (such as restraint, confiscation, asset recovery, HMC investigations, business crime) and coupled more traditional work with specialist advisory services (such as FSA authorisations, money laundering). Argent set up a company and obtained authorisation from the BSB under the Licensed Access scheme. The net effect is that the company can directly access lay clients and then instruct the

\textsuperscript{20} The connection between pupillage funding and recruitment is accepted in the Wood Report (ibid pages 223 et seq). See also paragraph 222 which explains that prior to the introduction of mandatory funding there were about 900 pupillages. This has reduced to circa 500.
connected Chambers. It has a dedicated website and access points discreet from those of the main chambers. Early indications from the company are that it is doing very well.

53. Fifth, sets have also responded by merging. The concept of the “merger” at the Bar is something of a misnomer given that a Chambers is, in reality, an unincorporated association of self-employed individuals. But of course we know what the term means. Chambers are increasingly merging to create bigger units. In an increasingly cut-throat world size will matter. There are a number of sets with over 150 practitioners: St John’s Chambers with its headquarters in Manchester has over 160 practitioners, St Philips in Birmingham has circa 160, and Number 5 in Birmingham has over 200 barristers. All of these have grown through, inter alia, merging with other sets. A larger set has greater flexibility: to employ practice managers and support staff; to invest in ProcureCo type vehicles; to improve and renovate buildings; to invest in IT; to organise seminars and marketing and so on. In criminal work in the context of direct contracting with the LSC size could well, in addition, be a necessary pre-condition of a successful bid. Indeed mergers can increase the geographical spread and coverage of a Chambers and this might become increasingly important as block contracting becomes more common and clients need legal services delivered from multiple geographical centres.

The reactions of solicitors to the changes at the Bar

54. The solicitors’ press likes to keep an eye on Bar developments. They most enjoy stories about barristers and solicitors competing so they have shown considerable interest in the Bar’s efforts to introduce new business models. The reaction of both the press and solicitors themselves has been interesting. A common response has been: “It’s about time the Bar woke up; we have been expecting that for a long time”. And since solicitors are effective businessmen and women an increasingly common response reported to me by numerous clerks who have taken soundings amongst solicitors has been “I’m interested in your new business model, if you are setting up panels I would like to be in on them”. And yet further there are those criminal law and family law firms who look down the line to further radical legal aid reform and see that this could involve a culling of significant numbers of solicitors’ firms. In that case, they reason, if the Bar is going to be a significant contractor with the LSC then the Bar might be a route back into the market so we had better seek to team up with them. Not every solicitors’ firm considers that it is rational to develop advocacy when the MoJ is putting the squeeze on rates and the
Bar is becoming more competitive. It might no longer make good business sense to expand advocacy. In which case the Bar, even if it contracts with the LSC for direct access work, will still mix that work with strong referral practices.

55. Outside of publicly funded work the relationship between the Bar and solicitors remains strong and positive. We recognise complementary skills. We need each other and large numbers of solicitors I have spoken to would be concerned at the prospect of the Bar losing its predominately referral nature. Moreover, with a growth in in-house counsel instructing the Bar direct, and with the advent of some increased direct access, many solicitors will be seeking a more symbiotic relationship and looking themselves to referral work from the Bar.

56. These changes are all occurring within the sphere of the Bar’s core strengths of advocacy and specialist advice. The Bar is modernising so as to revitalise and strengthen these skills and strengths. There is no desire nor intent to spread beyond into more traditional solicitors’ work. In the final analysis it is likely that there will be some repositioning between the Bar and solicitors but the fundamentals will remain the same.

Pro bono work

57. Finally a word on the moral obligations of the Bar. The Bar performs a prodigious amount of pro bono work each year. It does this in a variety of ways. First via the Bar Pro Bono Unit and the Free Representation Unit (“FRU”) take circa 2000 cases per annum. FRU performs front line advocacy and acts in circa 1200 cases per annum and the Pro Bono Unit facilitates another 800 or so cases. The Bar does not do this work to satisfy any expectation on the part of its clients. On the contrary the Bar does this because it is considered right and proper that it should and it is a way in which the Bar returns a contribution to society at large. And over and above the work of these two units individual barristers and Chambers also do an admirable amount of pro bono work. Closer to home members of the Bar provide their time and services free of charge to assist the professional work of the Bar Council and the BSB. When the Legal Services Bill was going through Parliament we calculated the number of hours contributed gratis per annum by members of the Bar to Bar Council work and it amounted to a staggering 25,000 hours.
C) WHAT ARE THE PRESSURES UPON THE BAR REQUIRING CHANGE?

Sources of pressure

58. The myriad forces which are shaping the modern Bar are in large measure beyond our control. The Bar has little or indeed no ability to control the effects of the banking crisis, or to wish away the existence of the national debt. The Bar cannot wave a wand at the LSA and see it disappear (assuming we wanted that). We cannot repeal the Courts and Legal Services Act 1990 and watch as HCAs melt away from the court room.

59. On the contrary we have to take these as the present facts of life. What we can do is to assess these pressures and then devise solutions. These need to be brave and bold and turn difficulties into opportunities. Ironically a recession is a good time to bring about change; the profession recognises that change is needed and is willing to support measures which are designed to improve its overall vitality.

60. Let me start by identifying the broad nature of the pressures. These are both economic and political.

61. The economic pressures stem from two principal sources. First, competition from solicitor HCAs. Secondly, the severity of the present recession and the fact that it is accompanied by record levels of national debt which must, over the next few years, be reduced with an inevitable and dramatic consequence upon levels of public spending. The recession is also having an effect upon the way in which clients across both the public and private sectors purchase legal services.

62. As for the political pressures these flow primarily from the coming into force of the LSA. This has brought about change to the manner in which the profession as a whole is regulated and represented but also, and equally if not more importantly, to the rules and regulations which govern how barristers practise.

63. The cumulative effect of these pressures will be felt in almost every corner of the profession.
64. I have dealt with competition above. At this point I simply summarise the extent of competition as a pressure necessitating a response from the Bar. The Bar has no monopoly on advocacy; solicitor HCAs, members of ILEX and others such as patent attorneys can and do appear in the courts and in tribunals in competition with the Bar. The extent of this competition is however a variable picture and it is not always governed by market forces.

65. Advocacy is an art that requires constant practice and honing. In a common law jurisdiction where there is a premium on oral advocacy it is not always easy to combine advocacy with a “litigation” practice. The latter necessitates time spent in the office; the former requires a devotion to the court room. In the main (across the privately funded Bar) HCAs have made limited progress; the traditional reliance upon the Bar for advocacy has remained. In family law the position is different. Family law solicitors have made real inroads into advocacy but there is still a rough and ready demarcation between the work undertaken by the Bar and that undertaken by solicitors. The more complex, factually based, hearings are still conducted in the main by the Bar. At the top paying end of family law work (ancillary relief) the Bar (silks, juniors and clerks) have invariably told me that solicitor advocacy is now at a lower level than it was 10-20 years ago. In crime the position is very different. The advent of the Litigators Graduated Fee Scheme (“LGFS”) which reduced solicitors’ income dangled a carrot in front of solicitors’ firms since the rates available for advocacy seemed more profitable (in relative terms) than those for pre-Crown Court work. The very structure of the fees set by Government hence created a significant incentive for solicitors to move into advocacy. These same economic pressures created incentives to pursue advocacy at low costs and this in turn meant that solicitors’ firms would recruit at the lowest viable rate advocates who, in order to earn their keep and make a profit for the firm, perforce had to do as much advocacy as possible and this would include acting in cases which were beyond their experience or capability.

66. This has become a major bone of contention between the Bar and solicitors. The Bar cannot (at the moment and pending rule changes) compete with solicitors for the client and has relied upon being a referral service. But with a system which is configured by the legal aid rules to create incentives for solicitors not to refer work to the Bar the notion of the criminal Bar remaining a referral profession rapidly breaks down. The pressure of HCA competition on the Bar is reflected in the fact that the numbers of solicitor
HCAs in crime had risen to over 2,500 by 2009.\textsuperscript{21} The pressure on the publicly funded Bar is thus substantial and this necessitates a response from the Bar. That response has to take the form of restructuring of the publicly funded Bar and a regulatory response to introduce formal standards of advocacy.

Recession and national debt: Government rules on the distribution of legal aid

67. The incidence of increased pressure of competition from solicitors is intertwined with Government policy on legal aid distribution. Government policy vis-à-vis legal aid is determined by the requirements of the Treasury. These are, in these recessionary times, focused upon extracting savings from the legal aid budget. These savings are achieved by two main methods. First, by a straight-forward pruning of the budget which makes lawyers do more work for less money. This is all encapsulated in the much misused expression “gaining best value for money”. Secondly, by systemic changes designed to reduce the administrative cost of allocating funds. These methods do not always work in the same direction.

68. Fee reductions and the consequential effects: As for the crudest form of cost saving, slashing the rates, this was exemplified most clearly by the decision of the last Administration in April 2010 to reduce graduated fees by 4.5% in 3 successive annual periods amounting to total cuts of 13.5% over a three year period. Other changes to the legal aid payment scheme have reduced further the payments. In particular the changes to the Very High Cost Cases (“VHCC”) scheme will cause substantial extra reductions in fees. The actual reduction for many barristers will therefore be considerably more than 13.5%. The present rates are a reduction on the rates which were negotiated between the Bar and the Government by Lord Carter just 4 years ago. The rates agreed then were very far from generous but the Government agreed they were – even by its own parsimonious standards – fair. Hence a reduction of 13.5% plus is now to reward a barrister at a rate the Government must, logically, acknowledge is an unfair rate.

69. The Bar Council offered to discuss with the Government more rational ways of making savings, which risked causing less damage to the structure and operation of criminal defence work. Nonetheless, the cuts were forced through in the dog days of the last Parliament. For some considerable time

\textsuperscript{21} NAO report on the Procurement of criminal Legal Aid in England and Wales by the Legal Services Commission (November 2009) para 1.11, page 15.
the Bar Council has been talking about “The cost of doing it badly”. It is becoming very apparent that a slash policy also entails burn. Reducing fees has unintended consequences; it results in a material diminution of quality over time and this then leads to a deterioration (burn) in the administration of justice. Put bluntly – you tend to get what you pay for.

70. The low level of rates is already causing lawyers to leave the practice of crime. Solicitors’ firms are going out of business. Those law firms which survive can often only do so by reducing costs which include using cheaper, and by definition, less experienced, advocates to appear in the courts. The obvious consequence has been a steady erosion of advocacy standards. In my discussions with the Bar it has become very clear that chambers are reducing recruitment in crime. There are fewer pupillage places being offered. Frequently, new tenants are discouraged from practising in criminal law. For those established practitioners who have mixed practices there is a pressure to diversify the legal aid element of the work they undertake. The Chair of the Young Barristers’ Committee commented that the young Bar is not making a fuss but it is “quietly slipping away”, and leaving the Bar or the law. And as the criminal bar shrinks and some of the best advocates leave so the pool or cadre of advocates who in the fullness of time stand to become judges also dwindles.

71. For their part judges are predictably and understandably reticent about complaining about poor quality advocacy because a significant percentage of those underperforming are young and inexperienced HCAs and CPS lawyers. There is a fear that by being outspoken they will be accused of being Bar-friendly and solicitor-prejudiced.

72. Yet privately judges repeatedly complain about the reduction in the quality of advocacy before them. Correctly, they observe that there is poor quality advocacy at the Bar and there are able HCAs. But there is also widespread concern about poor quality advocacy from the HCAs and the CPS. To them it is blindingly obvious that a root cause of the reduction in the quality of advocacy is the economic pressure to reduce costs and reduce fees. No one should be surprised by this. It is no more than common sense that a consequence of reducing legal aid funding is a diminution in the quality of advocacy before the courts. And it is equally obvious, and utterly transparent

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to the judges themselves, that this causes knock-on costs for the system of the administration of justice.

73. More mistakes are made by inexperienced advocates in court; disclosure errors seem to multiply; there are more adjournments; defendants risk being held on remand for longer; there is a greater risk of juries having to be discharged; witnesses are made to wait longer before they appear to give evidence increasing personal stress and risking a dimming of memories of key events; victims are denied justice by increasingly significant delays in the listing of trials and so on. So, reductions in legal aid can have consequential costs elsewhere in the system. It is a remarkable fact that Government does not retain or compile data which seeks to measure and quantify in financial terms these consequences. There is no assessment within Government of the “cost of doing it badly”. So, fee reductions are exerting major effects throughout the justice system. The Bar perforce has to respond.

74. System changes: So far as rules for the grant of legal aid are concerned, these allocate the overwhelming portion of all legal aid funds to solicitors. The starting point is that the overwhelming portion of LSC funds are allocated by long term contracts to solicitors. In practice the Bar has been excluded from direct contracting with the LSC, the payor of all Government legal aid.

75. A Government that is under pressure to reduce costs will be constantly on the lookout for system changes which reduce costs. The basic assumption underpinning the MoJ paper on restructuring of legal aid of 22 March 2010 is that there are cost savings to be made by handing larger sums of money to larger units. If, following the present planned legal aid review, the Administration comes to the same conclusion then if the Bar is to respond it must do so in a way that enables it to obtain direct access to the legal aid pot.

76. If the Bar remains resolutely referral in crime then rule changes will, as time marches on, have the effect of marginalising the Bar. A former leader of the Midland Circuit, Rex Tedd QC, put it to me thus: “if the criminal Bar remains purely a referral profession, it will be death by a thousand cuts”.

77. The discussion paper issued by the MoJ on the 22nd of March 2010 makes this point forcibly. The criminal Bar has, traditionally, been instructed by an array of solicitors. However, it remains true that the firms most likely to develop in-house advocacy are the larger firms. So if the entire legal aid system is

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24 Restructuring the delivery of criminal defence services (22 March 2010) (MoJ), paras. 8-15.
engineered and calibrated to favour larger firms over smaller firms the Bar is at risk. The incentive to avoid instructing counsel will increase not decrease. It follows again that if the Bar is to survive the change it must be able to contract directly with the legal aid authority.

78. At present the advocacy element is ring fenced and calculated separately from other aspects of the preparation of a case. The expression “one case one fee” (“OCOF”) or “single graduated fee” means that the advocacy element of the funding for a case will not be ring fenced or pre-determined. There is a view that OCOF or single graduated fee could become a part of the funding system in the future. If this is so then there will be no breaking down of a fee into constituent components and no fee attributed to advocacy.

79. From the perspective of the Bar it seems obvious that if its fees are both unfixed and in the hands of solicitors who are increasingly competitors then solicitors will seek to avoid instructing counsel, but if they do so they will seek to do so at minimal cost.

80. The economic and political pressures referred to above are likely to result in the criminal Bar seeking to exploit direct access work and seeking direct contracting with the Legal Services Commission. It is a matter of impression but there is a general view that the family Bar is likely to be no more than a couple of years behind the criminal Bar in terms of legal and economic developments which impact upon the imperative for change. Hence the changes that must occur to bring the criminal Bar into a position whereby it can contract with the LSC will apply more or less equally to the family Bar. I address the implications for the criminal Bar in greater detail at paragraph 123 et seq. below.

81. A very important implication of this is as follows. Most of the above assessment relates to the plight of the criminal Bar. However, the remedies to their problems, being largely structural and relating to rule changes, will impact upon the entirety of the Bar. Crime might be the driver of change but the resultant changes will be of universal application.

*The commoditisation of work / block contracting*

82. Unsurprisingly the need to prune budgets that applies across central Government is felt also in local government and in the private sector. This pressure is forcing large purchasers of legal services to review the way in
which they allocate work. In particular there is a trend towards block contracting.

83. Increasingly Chambers across the Bar are finding that in many areas of work clients are moving away from instructions upon a case by case basis and seeking to outsource work *en bloc*. There is no automatic nexus between complexity of case and individual instructions. Some local authorities for example have taken the view that they can outsource the entirety of their legal work howsoever complex. They issue a tender document and invite Chambers to bid. This bid might be for the right to be included upon a panel of barristers or Chambers to whom instructions might be sent, but it can also be for the immediate instruction to perform a fixed volume of work over a finite period for an agreed fee i.e. a block contract. The same applies to some large corporations. Some insurance companies in particular use this method of allocating legal work. In the past there has been a tendency for such work to be outsourced to solicitors so that if there was specialist advice or advocacy to be performed the solicitor then instructed counsel. But in principle, and in particular following the BSB’s relaxation of the rules on the conducting of litigation, the Bar is more than capable of participating in such tender processes and should represent a really attractive option to clients given the Bar’s low cost base and high intrinsic quality.

*Political pressures: Legal Services Act 2007*

84. Let me turn now to political pressures. The coming into force of the LSA has also posed its own pressures. It required the Bar Council to create an independent regulator. Under the Act the Bar Council is the “Approved Regulator” or “AR”. But also under the Act the AR must delegate the regulatory responsibility to an independent body. We have done so by delegating regulatory powers to the BSB. It has its own Constitution giving it real and effective independence in a variety of ways. It has its own Chair and Board. It has material budgetary autonomy. Yet it still operates as part of the Bar Council. The Officers of the Bar Council (Chair, Vice-Chairman, Treasurer and Chief Executive) now have a constitutional duty to preserve and protect the independence of the BSB.

85. Over and above constitutional change the LSA has set the BSB upon the task of rule review. This task the BSB performs by asking whether the present rules meet the regulatory objectives set out in the LSA. The net effect of this is that the Bar’s rules are being relaxed. The process which has been started will be a rolling process over a number of years. The first flush of changes
(analysed in section D below) have been radical but there is more to come including reviews of the all-important questions of entity regulation and further direct access. The pressure to change is hence not just economic it is political and regulatory.

86. The LSA also created the Legal Services Board (LSB) as an overarching regulator. It performs a secondary role overseeing the entire legal market but not engaging in front-line decision-making. It has a role in facilitating change and as a coagulant assisting the professions’ regulators to work cooperatively together. An illustration lies in the field of standard setting where under the Act the LSB has the duty to “assist in the maintenance and development of standards...”. The operative verb is “to assist” thus emphasising that some other party (the AR) has the primary duty. But the duty to assist can be a significant one and, where a project (such as the QAA project) involves multiple regulators “assistance” can be manifest in keeping the various parties working well together. Under the Act a body has also been set up to deal with service complaints (ie complaints that the work was not done to expectation or satisfactorily as opposed to professional complaints under the Code of Conduct). This is the Office for Legal Complaints (“OLC”). This body is in the first throes of operation but indications from the front line are that the BSB and the OLC are developing good and productive working relations.

87. The Bar now has the task of facing up to this new regulatory environment and the new rule changes adopted by the BSB and using them positively to help it through the present economic recession.

D) HOW IS THE BAR RESPONDING?

Summary of main points

88. The Bar in the broadest sense (principally the Bar Council, the BSB and the Inns) is responding to these pressures in a variety of different ways. In this section I have sought to identify the main changes which the Bar is presently implementing. Future changes are addressed in sections E and F. There are necessarily a host of other important policies and plans being worked upon in relation to everything from, pupillage, training and education, equality and diversity and the promotion of standards. These will continue but the

25 LSA section 4.
purpose of the discussion below is to focus the spotlight on major structural changes being implemented. Let me start by enumerating the main points.

89. First, the BSB has performed an initial review of the rules to see whether they are still justified and fit for their purpose. This has resulted in an outward spreading liberalisation and thereby a significant increase in the menu of options open to the Bar to use in conducting practice.

90. Secondly, the Bar Council has taken a series of initiatives designed to create a specific model for Chambers to use which will enable barristers to be much more flexible and adaptable to changes in the market place.

91. Thirdly, the Bar is working with major client groups of the Bar (such as the LSC and local authorities) on the details of direct contracting and procurement procedures.

92. Fourthly, the BSB (along with the SRA and ILEX) is in the process of pushing forward on quality standards for all criminal advocates. The Bar, along with the Inns, is preparing for an entirely new system for criminal practitioner accreditation. This will involve new training and education regimes.

93. Fifthly, the Inns are actively addressing how they must adapt to these new circumstances. They have always played an integral part in the evolution of the Bar. They are colleges of experience and excellence and these skills must be put to better use in the future. The present Inns do not shrink from this challenge but they are anxious to know where the Bar Council and BSB are taking the Bar before they fashion out their essentially subsidiary and supportive role.

**Rule liberalisation by the BSB**

94. It is true that at its inception the Bar was sceptical of the need for the LSA and indeed there remains healthy scepticism about a number of its developments which have added new levels of bureaucracy. However, it is also true that the LSA has come to be seen as a vehicle facilitating much-needed change. The Bar was sufficiently prescient to set up the BSB ahead of time (ie the statutory timetable for the creation of an independent regulatory arm). This has meant that the BSB has now had some few years in which to bed down and acquire momentum.
95. The BSB has in seminal decisions adopted in November 2009, and now approved by the LSB, already relaxed the rules in a series of ways. These may be summarised as follows.

96. First, the BSB now allows barristers to practise in mixed partnerships with solicitors (LDPs or Legal Disciplinary Practices). These are partnerships of barristers, solicitors and up to 25% of other individuals (eg practice or business managers). These bodies have to be regulated by the SRA since at the present time the BSB does not regulate entities. The utility of LDPs will be interesting to watch. Almost universally across the Bar there is no appetite at present for partnership. This is for the obvious reason that partnership brings forth the need to adhere to a much stricter version of the conflicts rule which applies to the business unit as a whole and not to the individual practitioner. In a set of Chambers the members do not share profits and losses so do not have a direct interest in the business success or failure of their colleagues. If the quantity of advocacy and specialist advisory work provided by the Bar today is valued at a notional 100 then if the Bar was routinely to go into partnership that 100 would reduce to a much lower figure i.e. the overall capacity of the Bar to provide even the services that it does today would be materially reduced. There are many specialist sets where members are frequently against each other. In non-specialist work outside of London where there tends to be a much higher concentration of practitioners than in London (i.e. choice is lower) then even for middle of the road work there are still many occasions where a stricter conflicts rule would result in work being lost. Informal soundings suggest that many sets could lose as much as 30-45% of their work if they went into partnership. The figure is less for London-based criminal defence sets where estimates suggest that partnership could result in a loss of 10-15% of work. Moreover Chambers realise that market pressures are moving them towards larger units in which case the conflicts risk increases. To avoid the conflicts rule many Chambers would have to break up into much smaller units in circumstances where as I have noted modern market conditions are suggesting larger not smaller units. Additionally, the asset base of a set of Chambers is its acquired skill set. This evolves over time and enables sets to become centres of excellence. Members learn from each other. It is one of the real strengths of the Bar that its practitioners are independent and do not owe duties to each other. Yet they learn together and share legal and professional skills. It is almost a truism that any member of Chambers can go into the room of another and discuss a problem. In more specialist sets it is frequently the case that a young barrister can simply approach a more senior colleague who was in the lead case, or who had argued the point in the
appeal court and get the “lowdown”. Indeed such is the collegiality of the Bar that barristers will also ring up barristers in other Chambers and ask them about a case they were in or get “tips”. This is an integral albeit unquantifiable part of the Bar and would be risk being materially undermined were partnerships the norm.

97. All of this is not to say that LDPs will not emerge since solicitors’ firms can now recruit barristers who can be employed not only as employees in the firms but also as partners. My point is that Chambers will not turn themselves into partnerships but that is a different issue to barristers joining pre-existing solicitors partnerships. It is predictable that partnerships that are presently solicitor dominated will rapidly include barristers and over time these could become barrister dominated. So, it is to be expected that new breeds of LDP units will arise with a much stronger barrister presence in them. However, they will be subject to the stricter conflicts rule and I do not expect these units to take over as the main vehicle from which the Bar operates. My principal point here is that few existing Chambers will perceive it to be rational to turn themselves into partnerships.

98. Secondly, the BSB has allowed barrister-only partnerships or “BOPs”. At present these are not viable because the BSB has not yet moved into entity regulation, so they would have to be regulated by the SRA. If and when the BSB does so then these will be a possibility. I do not expect these to be common for the reasons given above about the problems associated with conflicts and partnerships. However they might work for small groups of barristers engaged in work where the risk of conflicts is negligible. One practice manager, engaging in a spot of crystal ball gazing, suggested that some advocacy focused solicitors’ firms might not only recruit barristers but encourage all of the remaining HCA partners to switch to the Bar with the result that an LDP might evolve into a BOP. And, he speculated, to overcome conflicts the BOP might transmogrify into a Chambers with a ProcureCo. After all, he said, partners are often self-employed anyway. An interesting speculation.

99. Thirdly, the BSB has also allowed a substantial extension of the right of barristers to conduct litigation. Rule 401(b) of the Code has been relaxed so that now barristers can: conduct correspondence with an opposite party, investigate and collect evidence for use in court proceedings, take proofs of evidence in criminal proceedings, attend at a police station without the presence of a solicitor to advise a suspect or interviewee as to the handling and conduct of police interviews. In my view these rule changes will prove
to be very important. When it becomes more widely known that the Bar can conduct this sort of work then I foresee a growing demand for barristers to do this work. In the first instance it is likely to be juniors who accept instructions to do this type of work since it is they who, today, tend to be most closely involved in the day to day preparation a case and who work most closely with solicitors on these matters. Very large numbers of juniors doing both civil and criminal work have told me that they already draft correspondence and work on evidence. This is not unfamiliar territory for them.

100. Fourth, the BSB has further extended the existing schemes allowing direct access work to private crime, private family and private immigration work. This supplements the direct access work which has for a long time been allowed under the direct access scheme and licensed access scheme. The effect of these developments is to create substantial opportunities for the Bar to work directly with clients. One practice manager commented: “Since you have sold the pass for this why do you not go all the way and give complete direct access?” This was in relation to Chancery and property work where the Chambers regularly accepted instructions from professional non-lawyer clients and wanted to do much more.

101. Fifth, in addition the BSB has also relaxed the rules so that barristers can be both employed and self employed. For instance on Monday and Tuesday a barrister could work in the CPS, or the SFO or in a law firm as an employed barrister, but then on Wednesday, Thursday and Friday revert into Chambers as self-employed. Finally, the BSB has removed an anachronistic restriction upon the sharing of premises.

102. Sixth, the BSB is preparing consultations on two critical issues. These are entity regulation and further direct access. The former will entail the possibility that the BSB takes on the responsibility for the regulation of entities. These could be companies or partnerships. Precisely whether and if so which entities are taken under control will be the subject of a consultation to be launched during the course of 2010. As for direct access this is closely connected. The BSB has already enlarged the scope of direct access and the criminal Bar says that it is crucial that it is further enlarged. Again, it is a decision for the BSB to take but it is connected to entity regulation because the BSB must know what the activities of the entity are that it might be required to regulate. With greater direct access will follow additional tasks for entities to engage in which the BSB will have to factor into its thinking. I consider these issues in more detail in Section F on future steps to be taken.
Bar Council initiatives on new business models

103. The various pressures referred to above have highlighted a pressing need for the Bar to be more flexible and outward looking. The BSB rule changes facilitate this. But it is for the Bar Council, as the representative body, to seek to educate the Bar as to the possibilities open to them to move forward.

104. The Bar Council began to focus upon new models of practice for the Bar in early 2009. During a series of road shows in early 2010 on the implications of the BSB rule relaxations and the possibility of new models of practice, the issue of a specific Bar Council led project evolved. In the event the Bar Council, assisted by Field Fisher Waterhouse, solicitors, has promulgated a model of practice for the Bar which has been given the unglamorous but descriptive title “ProcureCo”.  

105. We published some 88 pages of draft agreements, articles of association and guidance notes in April 2010. We have since been conducting seminars, meetings, briefings and forums in which to explain how the model might be used.

106. It has been very well received indeed. It has been taken up by a growing number of different sets of Chambers who have used it for a variety of different civil and commercial projects in such areas as: corporate City compliance work, family ADR and mediation, international work, local authority work and employment work.

107. The basic idea is quite simple. Chambers incorporate a company, owned by the members of Chambers. This will act as an agent in contracting for work with clients on behalf of a “panel” of barristers. The ProcureCo vehicle will negotiate contracts with clients and if, and in so far as the clients need skills which the members of Chambers which own the company cannot provide, then ProcureCo will be tasked with locating and procuring the supplementary services of barristers from other sets. In particular since the ProcureCo will have entered a contract to provide the full range of legal services then it is entirely possible that it might have to also procure.

26 The ProcureCo documentation is available on the Bar Council website: www.barcouncil.org.uk
solicitors, or police station agents or indeed any other professional which is necessary to fulfil the contract.

108. For the Bar the beauty is that: first, it is a model of practice which enables the traditional Chambers to remain and thereby does not give rise to a partnership with its attendant problems of conflict of interest; secondly, it enables the Bar to make inroads into areas of work that it has not hitherto been effective at penetrating; thirdly, it reverses the traditional role of the solicitor as instructing lawyer since now the ProcureCo can set up its own panel of solicitors to instruct as and when required to assist in performing the contract; and fourth it provides a vehicle that once formed can be readily adapted to take account of future regulatory changes.

109. A limitation is that the ProcureCo must procure, it cannot supply. If it were to supply legal services (eg by employing lawyers) it would as of today be committing a criminal offence since it is a crime to provide reserved legal services if unregulated and until entity regulation comes in there is no one to regulate a barrister-dominated ProcureCo vehicle. As I explain later if and when entity regulation arises a Chambers could turn their ProcureCo very easily into a SupplyCo which has the ability now to provide reserved legal services.

Bar Council initiatives to expand the market

110. It is one thing to devise new models of practice for the Bar but the Bar must make itself accessible to its clients. As I have emphasised elsewhere the Bar has major advantages in the current market. To use marketing speak it has “USP” – unique selling points. All ad men seek to emphasise the “USP” of a product and often the public is deluded into perceiving USP that frankly do not exist. But the Bar has formidable USP. Not only is it a fantastic brand (as epitomised by the popularity of such programmes as “Crown Court”, “Rumpole”, “Kavanagh QC”, and “Judge John Deed”) but, critically, the Bar is high quality for low costs. It is also has the benefit of a powerful support mechanism providing continuing education and support via the Inns, Circuits and SBAs. The challenge is in getting this message across.

111. We are hence embarking upon deliberate strategies to approach client categories and engage in dialogue about how the Bar can better serve them.

112. Two examples of this are the LSC and local authorities. The LSC holds circa £2 billion of taxpayers’ money and which has hitherto been doled
out liberally primarily to solicitors who now have the incentive to hang on to more and more of this pot. The Bar Council is engaging with the MoJ and the LSC to negotiate how the Bar can directly contract. We are also reaching out to local authorities who are increasingly using outsourcing as a means of obtaining legal services. The Bar needs to compete for this work and should be able to do so very successfully. We need to explain to local authorities just what the benefits of using the Bar are, we need to assist local authorities to use the Bar and we need thereby to ensure that we can compete fairly for available work.

Development of standards and accreditation schemes

113. I have already mentioned (paragraph 66 above) developments in standard setting for criminal advocacy. This is an important issue. As legal aid contracts there will be an ever-increasing pressure on advocacy. This is an issue for all advocates; it is not an issue limited to HCAs. Initially the LSC pursued the objective of introducing quality control through the imposition of standards but its project came to grief at the end of 2009 with the publication of the Cardiff University Research Project which made suggestions which both the Bar and the judiciary considered to be unworkable. In the event the BSB, along with the SRA and ILEX, have taken up the torch and are committed to the creation of mandatory standards for criminal advocates by circa mid 2011. The logic behind this is irrefutable.

114. First, the introduction of an objective and uniformly applied system is undeniably in the public interest since it helps to avoid bad advocacy. The wheels of justice run smooth when lubricated by good advocacy. Any judge will tell you that bad advocacy is disruptive of the system. It causes delays and creates innumerable additional problems. Poor decision-making by inexperienced advocates either before (during preparation) or during a hearing cause wide-ranging costs to be sent rippling across the remainder of the justice system. This is most apparent in criminal proceedings where the number of parties dependent upon the advocate performing his or her job well is substantial. These include: judge, jury, victim, witnesses, probation services, social services, prison services, and of course, last but not least, the defendant. Good advocacy is hence inseparable from good justice.

115. Secondly, good advocacy is conducive to financial efficiency. The counterfactual is bad advocacy and this can be seen not only in criminal and family courts but in other civil courts also. Once again it is at its most clear cut in the criminal courts where the advocate walks a tightrope between, for
illustration, asking the right questions on the one hand and, on the other hand, asking the wrong questions or revealing information that can result in a trial being brought to a grinding halt and the jury discharged. In the criminal sphere the slightest actions of an advocate can have immediate cost repercussions. The unnecessary prolongation of a cross examination can for example mean that prison transportation has to be used to ferry the defendant back to prison and then back again to court the next day. This costs money. Bad advice can mean a defendant pleads not guilty thereby causing a trial, and once a guilty verdict is reached, a longer sentence in custody than would have been the case if there had been good advice, a guilty plea at an earlier stage, and the consequential granting of a larger discount on sentence.

116. Thirdly, proper advocacy standards ensures a level playing field. If it be the case that poor quality HCAs and CPS lawyers would be weeded out by a rigorous and objective standard, then the same applies to the Bar. It is not the case that the Bar is universally the domain of excellent advocates. Across the board barristers have complained to me that there is too much bad advocacy at the criminal Bar and that a system which weeded this out would improve the quality of justice overall. A properly applied standard will thus ensure a much fairer playing field. As matters presently stand important decisions are being taken about the future of the profession, about the future of solicitors, and about the distribution of CPS work and legal aid funds which are to varying degrees divorced from what should be a key issue, which is whether the instructed advocate is up to the job. The work of the BSB and the other regulators in this regard is hence, in my view, of signal importance.

Inns of Court

117. The fifth point concerns the Inns. This is very much work in progress. They will of necessity need to respond to changes introduced by the Bar Council and BSB because the changes themselves are not under their control. But, as is explained later in Section F, there is a great deal of work for the Inns to undertake in the future.

E) WHERE DO WE WANT TO BE IN THE FUTURE?

118. I turn now from the present to the future. In seeking to map out a route map for the Bar it is necessary to have at least some fixed idea of the architecture of the destination point. As I have sought to explain many of the
pressures operating upon the Bar are beyond our control. This does however mean that by analysing those pressures and projecting their effects into the future the landscape in the crystal ball does have some reasonable definition to it.

119. In my view the Bar of the future (in circa 5-10 years time) will have the following principal characteristics:-

Organisation

- Organisationally, Chambers of self-employed individuals will remain as the core unit from which the profession practices. This will preserve the profession from the adverse effects of the conflicts rules which would apply if the profession routinely adopted partnership. The Bar will however operate a range of additional corporate and commercial vehicles (such as the ProcureCo or SupplyCo model) as an adjunct or bolt-on to Chambers in order to be in a position to participate in new areas of work such as block contracting. With a new found commercial flexibility the Bar will appear to clients to be much more accessible and user-friendly.

- But even though Chambers of self-employed individuals will continue to form the core of the Bar there will emerge a significant grouping of LDPs. These will have started life as solicitors’ firms but will have evolved into being barrister/solicitor partnerships. The number of barristers in LDPs is likely to increase: barristers moving from self-employment no longer need to re-qualify as solicitors to become partners in such firms and solicitor HCAs are likely to wish to re-qualify to become barristers. It is quite possible that LDPs that become barrister dominated and grow in size will increasingly face conflicts problems. If so a solution would be to turn themselves into a traditional set of Chambers coupled to a ProcureCo type vehicle.

Scope of activities of the Bar: Advocacy, litigation and direct access

- The profession will still be focused upon advocacy and specialised advisory work.

- However, the profession will have a much longer litigation tail which will stretch back into direct access. The Bar will not engage in direct access for its own sake (ie only to conduct litigation) but as a necessary corollary to advocacy.
- The profession will not seek to represent and regulate practices which do only litigation but not advocacy.

- In publicly funded work the Bar will be a direct contractor with the Legal Services Commission and will provide all of the legal services needed to deal with clients which, in the case of criminal work for example, will extend from the police station to the sentence in the Crown Court.

- The expansion of the Bar into full direct access will operate in conjunction with very substantial continued referral work. The Cab rank rule will still apply. Both the market and public interest demands that the Bar remain available to solicitors to provide advocacy and advice.

- Outside of publicly funded work the amount of direct access work undertaken will grow but not to the same degree as in the publicly funded sector.

- More work from in-house lawyers will flow to the Bar.

**Standards**

- Quality assurance will apply to the publicly funded Bar. This will be based on universality i.e. application to all advocates. In time it will also be based on harmonisation with CPS standards. It will have strong judicial involvement.

- Quality assurance will not apply to privately funded work.

**One Bar**

- The distinction between employed and self-employed will disappear as an issue. There will emerge a significant number of Barristers employed in LDPs.

- The BSB will have to address whether a barrister who is called but who does not do pupillage in Chambers can do pupillage in an LDP alongside solicitors or other employed barristers. On one view this would seem logical.
The growth of strong independent and specialised regulation of advocates at the Bar / No fusion

- The BSB will remain independent of other regulators. It will continue to focus upon advocacy, litigation and specialist advice. It will not have extended its range of activities to cover traditional solicitor type activities.

- Barristers who wish to engage in such work can qualify as solicitors and be regulated by the SRA both personally and through their firms. The barriers to switching from the BSB to the SRA will remain low, as they are now.

- It will become increasingly recognised that there is a premium to be attached to strong and vigorous specialist regulation. The Bar will welcome solicitor HCAs to the Bar.

- The BSB will not however be seeking to regulate lawyers who conduct litigation as their main focus of work and who do not link this to the substantial performance of advocacy. The Bar will not seek to open its doors to litigation firms who at present perform essentially solicitors’ work without advocacy but who, for whatever reason, consider that it would be nice to be a firm of barristers, or to have a litigation department of barristers.

Regulation of entities by the BSB

- The BSB will at least regulate entities that are Bar dominated.

- It will remain an open question whether the Bar will (i) regulate entities that are not Bar dominated eg LDPs which are solicitor dominated with only a small portion of barristers or, (ii) regulate all advocates (whether barrister or solicitor).

Management of Chambers

- The Bar will appreciate the need for higher quality management. The Bar will be managed by managers (clerks, practice managers, and other with wider business experience) who are themselves regulated by the BSB. There will therefore evolve a cadre of professional managers who take
increasing amounts of responsibility for the commercial conduct of the Bar.

Size of bar; rationalisation

- The privately funded Bar will continue to grow as increasingly cost conscious purchasers and clients see the Bar as a lean, mean, source of high quality value for money. Sets will increasingly use commercial vehicles to offer a more accessible front to clients and as vehicles facilitating block contracting.

- The gap between the publicly and privately funded Bar will widen. This will cause some restructuring of sets with break ups along practice group lines.

- There will be some shrinkage of the publicly funded bar. QAA will (if applied rigorously) weed out some underperformers.

- System reforms brought about by the LSC to legal aid in the wake of the budgetary crisis will lead to mergers and restructuring amongst publicly funded criminal practitioners. There will be fewer but larger units and they will do a mix of direct access work and referral work.

The Inns of Court

- The Inns will play an expanded role in the provision of key services to the profession.

- In these areas the Inns will co-operate much more closely that they do now.

- There will be a new financial settlement between the Bar and the Inns to reflect the fact that the Inns are assuming a more active role in the profession.

- An enlarged and fully supported Advocacy Training Council (“ATC”) will form an integral part of the Inns’ activities.
F) FROM HERE TO THERE: A BLUEPRINT FOR THE FUTURE

What needs to be done

120. How does one get “from here to there”? If the picture painted above is a reasonably accurate approximation of the future shape of the Bar then there is a great deal of work to be undertaken to achieve that end. In this section I have endeavoured to identify the main steps that the Bar needs to take to modernise and adapt to present and future market conditions.

The modernisation of the structure of Chambers

121. The Bar will increasingly use ProcureCo type of vehicles over the next 2-3 years. The Bar Council’s ProcureCo initiative does not require regulation; it is permitted under the rules as they presently stand because the ProcureCo entity will not be providing reserved legal services. ProcureCos will be used in a wide range of circumstances. We will see Chambers-wide ProcureCo vehicles, but also ProcureCo vehicles to cater for different practice groups within a single set of Chambers. We will see ProcureCos which serve to bring together barristers from different sets of Chambers whether in the same city or across a region or the country or even internationally. These ProcureCos might be owned by one set of Chambers (with the managers of the company sending most work to their own Chambers but bringing in extra barristers from outside) or could equally be joint ventures between the members of different sets of Chambers. We will see ProcureCo type vehicles which bring in solicitors and other professional and related service providers through their panels.

122. The development of new business models will necessarily entail adding new costs in the form of administration, additional IT, and more intensive marketing, for example. But the difference in cost structures as between the Bar and solicitors is substantial and Chambers must manage the process of adding infrastructure so that additional costs will not erode the Bar’s competitive advantage. During my discussions with different Chambers I routinely asked about their ratio of overheads to total fee income. In specialist commercial and civil sets the percentage was circa 8-14%. In more middle of the road mixed common law sets the ratio was circa 15-22%. In family sets the ratio was 18-25%. In criminal sets the ratio was circa 18-30%. The figures exclude individual barristers’ expenses such as travel and professional insurance. Research undertaken by economic consultants, Europe Economics, suggests that the average ratio across the Bar
was 14% (which I suspect is slightly on the low side) but that equivalent solicitors’ firms have overheads of 60-70% of total revenues. So the cost differential being what it is Chambers can add costs but retain a strong competitive edge. In fact, ProcureCo type vehicles can be useful in controlling costs because they rely upon outsourcing which keeps costs down.

**Modernisation of the criminal Bar**

123. The criminal Bar will need to transform itself into fully functioning litigation units within 12-18 months.

124. The new business structures being considered by the Bar are in my view critical for the criminal Bar. The Bar Council’s task (along with the relevant SBAs), now that we have got the ProcureCo model up and running, is to assist the criminal Bar (and by extension the rest of the publicly funded Bar) to get from the here and now to a point where it can confidently contract directly with the LSC.

125. To do this we have three basic tasks to perform. First, we must help the Bar determine how to use the ProcureCo model to bring together the range of skill sets which the LSC will need to see lined up to be able to award a contract. This is now a task of working through with the Bar how ProcureCo can work in the publicly funded work sector. Secondly we must negotiate with the LSC a contract which will work for the Bar. The present LSC contacts are clunky and bureaucratic and tailored only to solicitors’ firms. Having examined them in detail it is plain that they contain a great deal of wholly unnecessary contractual baggage that lacks a clear policy justification and serves only to add to the costs of running a criminal outfit.27 The Bar Council therefore must participate fully in the negotiations over new contracts with the LSC. Thirdly, the Bar Council needs to engage with the MoJ and LSC over new procurement techniques. These must be non-discriminatory and apply even-handedly to solicitors. There must be created a genuine opportunity for the Bar to compete fairly and squarely. If this means that some existing eggs must be broken then so be it. The procurement system has in the past been geared towards solicitors and must now be formulated so that it is fair to both Bar and solicitors.

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27 A point made by Sir Ian Magee in his report on the LSC (supra) page 75, para 238.
126. In terms of whether this is all possible I have no real doubt that it is. In this I assume that Government will negotiate in good faith with the Bar.\(^{28}\) Provided this is so then the Bar will influence the landscape for future contracting with the LSC. The MoJ discussion paper of 22\(^{nd}\) March 2010 contains proposals which raised considerable hostility when published. But some of the underlying economics might be sound. One starts from the vantage point that the Government must save money and that in a legal aid review the MoJ will be seeking to improve the efficiency of the system. One way in which they are likely to do this is by allocating larger sums of money to a smaller number of units. The implications of the figures mooted in the MoJ paper are potentially eye wateringly brutal for solicitors. They suggest that huge numbers (up to 75\(^{\%}\)\(^{29}\)) of all criminal solicitors’ firms might be culled in this process. But even if one assumes that greater rationality prevails there is still likely to be some significant rationalisation of solicitors with whom the LSC will contract.

127. If the Bar participates how will we fare? Can we put together fully-functioning units of a sufficient size and scope to meet possible LSC size requirements?

128. An interesting statistic is to be found in Table 1 of the MoJ paper\(^{30}\) which sets out the proportion of criminal legal aid market share by largest providers in each CJS region. This is useful in that it gives an indication of how large the largest criminal firms in fact are. The data suggest that, taking average figures, the top 5 solicitors’ firms in each region are allocated 45\% of the legal aid budget for that region. In the average region total legal aid expenditure is £19,590,000. Accordingly each of the top 5 firms in any average region earns 45\% of £19.59m divided by five ie circa £1.7m each. A

\(^{28}\) During the early part of 2010 we discovered (through an off the cuff comment in an e-mail received by a member of the Bar from the LSC, which was forwarded to me) that the LSC had been consulting with the Law Society prospective changes to the legal aid system but that the Bar had been excluded. Indeed, certain members of the Bar who were at least theoretically on consultation groups were being omitted from meetings. When this was raised with the LSC we were told that it had been assumed that the Bar was not interested in these issues! This was notwithstanding the Bar having made clear to the LSC that it was in fact interested some months earlier. However, since then much water has passed under the bridge and it has been made clear to the Bar Council by the LSC that it will be a full participant in all consultations and discussions going forward. The importance for the Bar of being fully engaged is evident from the MoJ paper of 22 March 2010 which, in a foreword prepared by the then Secretary of State and Lord Chancellor, Jack Straw, the Law Society and a number of large solicitors firms were thanked for their “constructive input” (cf. MoJ, “Restructuring the delivery of criminal defence services” (22 March 2010) page2). The Bar Council knows from subsequent disclosures that in fact the MoJ consulted a range of large solicitors’ firms on their proposals. Yet, in that same report the MoJ accepted that the Bar wished and needed to participate in new contracting arrangements even though it had not been given the chance to make its views known.

\(^{29}\) A figure mooted by some members of the Law Society Council.

\(^{30}\) MoJ, “Restructuring the delivery of criminal defence services” (22 March 2010) page 12.
similar and consistent picture is painted by the National Audit Office in its analysis of legal aid provision by the LSC. The NAO report that: 2 firms in the country claim more than £4m from the LSC per annum; 2 firms claim £3-4m; 19 firms claim £2-3m; and, 378 firms claim £0.5-1m. The NAO report commented: “The supplier base from criminal legal aid at the police station and the magistrates’ court consists largely of small firms. On average, firms employ seven solicitors, of whom 3.4 full time equivalents work in criminal legal aid. Almost 10 per cent of firms have only one solicitor. In 2008-09 77% of solicitors’ firm’s offices (firms under contract to the Commission may have more than one office) made claims to the Commission for criminal legal aid totalling less than £500,000. In the same period, only six per cent of firm’s offices made criminal legal aid claims exceeding £1 million.”31 In short criminal solicitors’ firms are small. So large does not really mean large.

129. To obtain a handle on how the Bar compares in terms of size I asked a number of criminal sets what their income from legal aid was. The answers (given confidentially) made it very clear that in terms of size of organisation many sets indeed would rank in the very highest echelons of legal aid service providers both in terms of fee earners and revenues. Indeed, the Bar would dominate any league ranking of the very largest units in the entire country.32 The largest solicitors’ firm has revenues substantially lower than the top layer of criminal sets (who of course have more fee earners).33 Of course one has to exercise a degree of caution about the comparison since the solicitors’ revenues come from the full range of criminal work and the Bar’s revenues derive from advocacy. But even taking account of all due differences it is evident that the Bar has the basic size to be fully compatible with any reasonable size requirements which the MoJ and LSC might impose in any future restructuring of legal aid distribution.

130. Furthermore, if in any reorganisation solicitors’ firms are culled then the logical solution for them is to team up with barrister ProcureCos and re-enter the market that way. Clerks I have spoken to who have already been thinking through how to set up fully functioning units have been sounding out solicitors and it seems there will be plenty who will be only too pleased to team up with the Bar to provide litigation services. Plus ça change!

31 NAO Report para 1.12 page 16
32 The data published by the MoJ on 22 March relating to the highest earners from legal aid put the very highest paid firms earnings at £9.9m; the second largest earning firm at £5.7m; the third largest firm at £5.0m; and the fourth largest firm at £4.4m. The numbers eight, nine and ten all earned less than £3m.
33 Bar Council statistics indicate that 22% of all Chambers have more than 50 fee earners.
The Bar has quite a long way to go from here to there but the time frame over which change will need to be effected is likely to be 12-18 months from today. The LSC has (at the time of writing) signed up new contracts with solicitors which are of 3 years duration (and an option by the LSC to extend for a further two years). For the Bar this is wholly unacceptable. The present arrangements threaten to cut the Bar out of direct contracting for years to come. In practice the LSC has made clear to the Bar that it intends to introduce a new contracting round much earlier and the MoJ paper also contemplates that the present round will be cut short so solicitors who entered the most recent round of contracts have no expectations that they will not be terminated sooner rather than later. Before that contemplated new round starts there will have to be a legal aid review and a new system devised to increase the efficiency of the system. Some variant of the MoJ paper of 22nd March 2010 is likely. The Bar needs to be geared up to be ready, able and willing to participate when the new round starts. But, assuming for the sake of argument that it is 12-18 months away, I can see no reason why this is not adequate time for the Bar to negotiate a new contract with the LSC and restructure and be ready to participate. Once again when I ask clerks and practice managers whether this is feasible they express confidence that it is.

ProcureCo into SupplyCo

Once ProcureCo is operating some Chambers will wish to turn the company into a SupplyCo. This of course depends upon the BSB introducing entity regulation. But, assuming for the sake of argument that in due course this occurs, the Bar will then have the ability to evolve their ProcureCo vehicles into SupplyCo vehicles. I do not in fact foresee any particular problems in this. SupplyCo will apply to the BSB for authorisation. At this point in time Chambers companies can then supply legal services. In practice this means that the company can employ lawyers who provide reserved legal services. When this happens I would still not expect the SupplyCo to become the main vehicle for the provision of barristers’ legal services which will still be Chambers. It is likely to remain an adjunct or bolt-on to Chambers. But being a SupplyCo will provide greater flexibility to Chambers. A Chambers company can then choose a felicitous mix of providing legal services and procuring them via panels.

One possibility described to me by a senior criminal silk was that a SupplyCo might employ the pupils and the barrister for (say) three years post-pupillage. It might also employ some solicitors and possibly even a
police station agent or two. But, in order to keep costs down, it was still likely to maintain panels of solicitors and other professionals needed to service a contract (i.e. from the LSC). The SupplyCo would serve Chambers; it would provide management, support solicitorial services, it would provide secure employment for pupils and young barristers. Certain members of the Young Barristers’ Committee have queried whether this was a good thing. They commented that they did not come to the Bar to be employed. To which the answer is that the model described is not compulsory; anyone seeking to do pupillage in a Chambers which has such a model would do so from choice. Some more senior practitioners view this structure as a logical starting point for the young Bar. A new recruit might—whilst employed—do the full range of criminal work from the police station to the Crown Court. But after (say) three years that person would (or might) graduate to the Chambers and become self-employed and concentrate upon advocacy. I have no idea whether in the longer term this model would work but, at face value, it seems perfectly viable.

134. However, and the point is worth re-emphasising, ProcureCo and SupplyCo will not substitute for Chambers which will remain the core of the barrister’s world. This would only change if and when the Bar decided that conflicts were not a problem. The conflicts rule is designed for the protection of the client. Recent attempts by the SRA to relax the rule encountered hostility from in-house corporate clients and the proposals were quietly dropped. As matters stand I do not see the Bar wishing to relax the conflicts rule but even if it did it is a common law rule and it is simply not up to the regulators to modify the law of the land.

Direct Access and entity regulation

135. The criminal Bar needs full direct access, and by yesterday (and certainly by the time of the next round of LSC contracting). The family Bar does not need it immediately but to some degree is likely to in the future. The civil and commercial privately funded Bar does not need (in terms of it being a necessity) direct access but can nonetheless benefit from it significantly. Some specialist civil /Chancery sets already do a lot of direct access work (and accept instructions from a wide range of professional clients) and can see no reason why they should not have total direct access rights.

136. There are really no two ways about this for publicly funded practitioners. For the criminal Bar to survive it must be able to direct
contract with the LSC and this necessarily means being able to have direct access to clients. The working assumption is that where the criminal Bar now goes the family Bar follows but about two years down the line.

137. This is not as radical as it sounds. The Bar has for many years permitted direct access through a variety of direct access schemes and the BSB in its November 2009 decisions opened the way for direct access for private family, private crime and private immigration. Further, the relaxation of the rule on litigation also introduced by the November 2009 decisions have removed many prohibitions which existed in the Code of Conduct on conducting litigation. The present position therefore is that a barrister can engage in a wide range of direct access operations already. The point was put to me time and time again by those Chambers that do direct access work that with the most recent wave of liberalisation we have reached – ironically – an increasingly illogical position. The Bar can now perform advocacy and a big chunk of litigation and shake hands with the lay client to accept instructions. But for a client who wishes to use the Bar in other instances there has to be interjected into the relationship a solicitor simply to bridge the mandated gap between the barrister and the client. This adds cost and complexity.

138. Direct access and entity regulation are closely connected. If barrister units are to be permitted to engage in activities such as holding clients’ money and serving court documents then these tasks are likely to fall upon the employees of chambers, essentially the clerks’ room. It is possible to make the Head of Chambers responsible for doing these tasks effectively and professionally. But in real and practical terms this might not prove to be very effective since this would make barristers responsible for money held for their colleagues’ cases and for the service of documents in cases in which they are not involved. The BSB might therefore conclude that this is the primary duty of the entity and hence to allow these activities requires the BSB to be able first to regulate entities. Entity regulation will trigger the ability for Bar vehicles to become much more flexible. A real problem for the BSB at present lies in seeking to predict the sorts of litigation related activities which the Bar will wish or need to engage in and then work out how to regulate those activities. Take for instance the holding of client funds. The extent to which a barrister unit might need to do this may be limited. Fees are generally paid after the event or as advance payments but not as sums hold on account for the client. There may be a need to hold client’s money for paying disbursements (for example, experts’ fees) but there may be ways around this. The BSB will consult on this issue and will take as a
starting point that holding clients’ funds increases the risk of misapplication and can hence require expensive regulation. If it can be avoided this might well be desirable. I do not underestimate the difficulties nor the complexities. I do however feel that we need to be brave and not scared of our own shadows. Setting up entity regulation will not be cheap but the Bar will have to bear the cost upon the basis that this is a real investment in its future. The process will be complex but the Bar will have to work with the BSB to make the system work. If the BSB entity regulates it will be seen by the Bar as an act of confidence in the future.

139. What does this mean for the Bar more generally? Let me pose two possible outcomes.

140. First, the Bar will, in my view, remain a predominantly referral profession. It will still be advocacy focused but with a longer litigation tail extending all the way into direct access. The civil and commercial Bar has traditionally thrived upon its referral model. It has grown over the past few years. And even during the period of recession, it has, for the most part, fared well. For entirely rational business reasons, save for publicly funded work, the Bar has proven its worth and there has been no rush of solicitor HCAs into core Bar work. The civil and commercial Bar will, as the rules permit, do more direct access work but this is likely to be in specialist niches or for particular types of professional clients.

141. Secondly, even where direct access is allowed new business models such as ProcureCo will still enable the Bar to work with solicitors. Models which enable a set of Chambers to bring in solicitors to assist in cases in which the Bar has been instructed directly mean that the Bar might consider it economically prudent to maintain the split of function between litigation and advocacy. This could well, for example, be the case with crime where a ProcureCo might allocate advocacy to its Chambers and litigation to its panel of solicitors. The growth of barrister entities does not therefore mean that the Bar will always compete with solicitors. On the contrary, it could very well prove to be a fruitful source of future collaboration.

Alternative Business Structures (“ABSs”)

142. The analysis of ABS should start against the context of a recent Government survey of consumer reactions to lawyer services. Possibly to the

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34 We must not confuse direct access with the right to hold client money on account. A barrister can have the right to enter an agreement with a client but still not hold client money on account.
considerable disappointment of the (last) Government it showed a remarkably widespread degree of satisfaction and contentment.35

143. The liberalisation of ABS under the LSA could occur in the relatively near future. It is being pushed for by the LSB although there is not qualitative or quantitative evidence demonstrating need and no analysis of possible risks. What should the approach of the Bar Council be? Liberalisation will open up the possibility of such developments as external investment in lawyers and multi-disciplinary partnerships. The impact will be felt most directly by solicitors and in relation to High Street work (such as conveyancing and consumer debt). There is talk that certain large solicitors’ firms might float. And stories abound in the press that some investors have eyed up law firms. For the Bar the effects may be less direct but that is not to say that they will not be felt. At one level the sorts of ABS the Bar might engage in would not be terribly radical or extreme. For example, it is possible that a Chambers with a ProcureCo or SupplyCo might wish to allocate shares in the company to a bank which puts up money to buy the building in which the Chambers operate. That is a form of external investment. Third party investment becomes a problem where there is a risk or a reality that the investor will use the investment interest to undermine the lawyer’s duties of independence and integrity. It should in my view be possible to devise rules to obviate this risk. And we must not forget that the Bar’s rules on LDPs already allow for 25% of non-lawyer participation in the partnership. That is also external investment. In broader terms it seems improbable (whether for solicitors or barristers) that lawyer partnerships will prove popular investments. Revenue streams depend upon hiring and retaining the best and most innovative lawyers and continuing to act for lucrative clients. However all such relationships are writ in sand. The law of employment and the doctrine of restraint of trade make the retention of unwilling high-rolling lawyers very difficult and clients increasingly are willing to “walk”. Client loyalty is not what it was. So investing in a currently profitable partnership can turn sour very quickly. Indeed clients who believe that the presence of an external investor risks creating a conflict might be even quicker to shift their allegiance and their money. As for multi-disciplinary partnerships, this is not likely to be widely attractive to the Bar in terms of wanting to bring (say) accountants into Chambers as full members or partners. On the other hand, it is entirely possible for a ProcureCo to maintain panels of third party non-lawyers who then work in teams with barristers. These third parties would

35 “Baseline survey to assess the impact of legal services Reform” (MoJ) March 2010. 93% of users felt they had received a good service; 92% felt that their service provider had acted in their best interest; and 92% were satisfied with the outcome of their matter; 86% believed providers behaved professionally.
not be in partnership with barristers but would nonetheless have an indirect relationship through the ProcureCo. In the criminal sphere it is quite possible that police station agents will be placed on panels. I have already been sounded out on the possibility of a Chambers ProcureCo in the family field employing an accountant who will not only assist with the administration of Chambers but would multi-task and help members of Chambers unravel, for example, the divorcing husband’s accounts.

144. So far as the Bar is concerned there is scant evidence of any real need for ABS at the present time. There is little scope for external investment in a set of Chambers and many ProcureCo type vehicles are likely to be structured to be non-profit making. Ultimately, there is no black and white stance to be adopted on ABS but in the foreseeable future this is more of an issue for solicitors and LDPs than it is for the mainstream Bar. My concern about undue haste in rolling out ABS is for the unknown. External ownership does create risks of conflicts and there has been a black hole when it comes to analysis of the consequences. In the absence of proven need, and in the absence of any solid evidence that the public will be benefited in a material way, caution is required.

*Improved decision-making within Chambers: The demise of Athenian democracy and attitudes to change*

145. Dare one say it but the notion of a Chambers’ meeting determining the future strategy of the set may not now be the best way for decisions to be taken.

146. Chambers with short and quick decision-making structures are inherently more likely to take the decisions needed to adapt to the market. This is a view expressed to me by many clerks and practice managers; some frustrated by the apparent inability of their Chambers to grapple with the issues that they see as obvious and in need of immediate attention. They say that if difficult, challenging, decisions are put to the vote of the entirety of Chambers then quite frankly they fear for the result. They say that older members will oppose because the, historical, *status quo ante* has been a comfortable world and they see no need to change; and they say that juniors will be nervous and look to protect their own backs; and they add that the publicly funded practitioners will oppose change because it might increase their Chambers’ contributions; and they say (this from some top end commercial and Chancery sets) that members are so comfortable in the work that they do, that they do not raise their eyes to the horizon to see what
changes are on foot. Sets which take their key decisions through a glorious exercise in Athenian democracy are far less likely to be brave and modern in their decisions. This is the point that has been made frequently to me.

147. These fears are all understandable and there is some force in the implicit criticisms. In fact I have found far less resistance to change than might be expected. Increasingly, many Chambers have already moved away from the hegemony of the Chambers meeting and adherence to Athenian democracy to the widespread use of executive committees, management committees and the like. As decisions become more complex so the need for much more professional decision-making structures has become apparent. The way in which this has been put to me by members of the Bar and clerks and practice managers has often been colourful. It has ranged from (pace a middle ranking junior) “we must keep this away from Diplodocus QC”, to (pace a silk): “I hate this, I am terrified, but I shall set up a group comprising youngsters, my brightest silk and the senior clerk and tell them to get on with it and then I shall close my eyes and simply say ‘yes’”. Both represent a positive response. Both recognise that there are constituents in Chambers (generally the finger of blame is pointed at older silks) who might oppose change from a desire to hold fast to an earlier golden era of the Bar. A young family law practitioner in Newcastle told me that her generation came to the Bar not expecting things to be easy; they came because they loved the work and the self-employed character of the profession. She said that her contemporaries knew that change could be difficult but felt optimistic that there were real opportunities to be had if the Bar was brave enough to grab them. The finger pointed at senior members of the Bar is in fact often unfair. Routinely silks and senior juniors have told me that in their view they have had 20 (and often many more) very good years at the Bar and their overriding concern now is to secure the future of the junior Bar and of aspirants to the Bar.

148. In terms of the Bar’s attitude to change I do not predict any real resistance. On the contrary I have detected a widespread belief that if change can be managed then there is cause to feel real optimism in the future of the Bar. It will be a Bar that is not exactly as it is today and certainly different to yesteryear, but it will still be focused upon Chambers and self-employment, it will still specialise in advocacy and specialist advice; it will still be collegiate and it will still live up to the very highest professional standards.

149. How does one bring about change assuming of course the willingness to change? Based upon my experience and discussion with members of the Bar there seems to be a finite number of practitioners in each set with the...
interest and enthusiasm to take modernisation projects forward and the rest of Chambers seem to rely upon this group for guidance. If that is so then the logical solution is to allow those with the energy and interest to lead the way. I sense strongly that since there is a real appetite for change that it will be led by the more progressive factions within Chambers and that the remainder will simply allow themselves to be led, albeit with varying degrees of trepidation.

150. So in terms of what needs to be done: For those sets that have not grappled with the need to adopt more up to date decision-making structures that is an urgent task to address. For the rest allow the decision-makers to get on with the task and have faith that they will get it right.

Management of Chambers: The creation of a cadre of professional managers for the Bar

151. Many of the more sophisticated and larger sets have now recruited practice managers and many of these individuals have originated from the world of business and provide complementary skills to the more traditionally home-grown skills of the clerks. Many sets seem to meld clerking and practice management relatively easily and effectively together.

152. This is however by no means a universal picture and there are significant numbers of smaller sets with minimalist clerking capacity where, if one is frank, there must be a real question mark over whether they have the know-how and skill sets to adapt and change successfully. And, to be equally frank, the simple fact that these clerks manage people who are lawyers is no guarantee that the lawyers are themselves able to take the necessary steps to modernise.

153. It seems to me that the importation into the Bar of experienced business skills will be increasingly important as time moves on. I am now regularly informed of sets who are actively recruiting practice and business managers from solicitors’ firms, or from accountants’ firms, or from other professional entities. Barristers themselves, in the main, have neither the time, inclination, nor the skills to devote to practice development. Moreover, being self-employed their instinctive focus is upon their own practices and not the unremunerated management of Chambers. In contrast a solicitor who assumes managerial responsibility within a partnership is paid for his or her time. It therefore makes sense for Chambers to employ the skills needed. Many clerks are perfectly capable of sophisticated business decision-
making, but this is by no means always the case and the skills that will increasingly be needed are likely to be acquired from outside of the Bar.

154. In the future, with the possibility of entity regulation, with the Bar deploying more sophisticated business models and entering more complex contracts to provide services, and with expanded direct access to non-lawyer clients, there will be a premium on good Chambers management. Managers will variously need to be familiar with corporate structures and decision-making, procurement and tendering processes, block contracting management, management of the financial aspects of contracts, client relations and marketing, quality control and regulatory compliance.

155. All of this begs a question which is whether the Bar, via the BSB, should seek to regulate managers of Chambers.

156. In my view there are many reasons suggesting that there should be regulation of such managers. In particular, practice managers and clerks will, it can be foreseen, increasingly take decisions as agents for their principals of mounting complexity which will expose the barristers to increased financial and professional risk. Equally, if, as may well be the case, the Bar moves into direct access and Bar entities engage in activities such as holding clients’ money and the service of court documents then these same managers may take decisions which impact also upon the public and the actual administration of justice. To protect the Bar, the public and the courts system the bringing into the professional fold of all managers could well be an important and necessary step.

157. In my discussions with practice managers and clerks it seems that such a development would not necessarily be unwelcome. Numerous clerks and practice managers have told me that being properly regulated would be a fitting recognition of the importance of their role and would assist them in maintaining standards. It would create a serious profession for a group of individuals who play a significant role in the Bar and in the justice system generally.

_Mergers, amalgamations, shrinkage in size of the self-employed Bar

158. Over the next few years the Bar will need to restructure. There already is shrinkage at the self-employed publicly funded criminal Bar and this will continue as legal aid reform imposes a survival of the fittest regime._
To cope with this there will be mergers and amalgamations of Chambers because size will increasingly matter. It will be appreciated that the new ProcureCo type model can actually facilitate co-operation between Chambers. The growth of block contracting with the LSC is likely to see a range of joint ventures and teaming arrangements between Chambers (or indeed between solicitors and Chambers) using ProcureCo or SupplyCo type vehicles. It is entirely possible (and indeed likely) that if these joint arrangements work well the logical next step will be merger or amalgamation. I would therefore not be at all surprised to see the model used as a vehicle which constitutes flirtation prior to marriage. Indeed a number of heads of Chambers have already sounded me out about how these models can help sets to “come to terms”.

And if one is honest restructuring generally produces casualties. Every barrister (and certainly every judge) will tell you that there is some poor quality advocacy at the Bar. It is one of those truths that sometimes one feels it is inappropriate to speak of. But it is certainly a commonplace that has been mentioned to me across the breadth of the Bar.

If the net effect of restructuring is a decline in numbers with the least able simply leaving the profession - this will not be a tragedy. In my view if the QAA scheme operates as it should do then some barristers will in any event fail. And this is exactly how it should be. If less able practitioners leave creating space and opportunities for younger more able practitioners then a useful spot of Darwinian improvement of the gene pool might occur. A real concern at present is the fact that talented juniors which the Bar should be nurturing are leaving for lack of work. The Bar trades on excellence and it should not be Bar Council policy to encourage a dilution of this excellence simply to keep numbers up. Elsewhere I expect the civil and commercial Bar to grow, not shrink, but this could well be accompanied by mergers and amalgamations as well.

Whilst there is likely to be some shrinkage amongst the self-employed Bar there will be growth in employed barristers, and in particular those employed in LDPs. This will be because LDPs will hire barristers and HCAs will convert to the Bar but remain employed within their firms.

36 See paragraphs 33 and 34 above.
163. So far I have considered what the Bar needs to do in terms of the organisation of Chambers and what the impact of change will be on numbers. I turn now to consider the structural steps that in my view need to be taken in the future. This necessarily brings regulation squarely into the equation. The first task of the Bar here is to avoid fusion with solicitors and for this to happen the BSB needs to avoid merging with the SRA. To ensure that this step is not taken the BSB needs to map out its long term future as a regulator.

164. In my view there is a strong public interest in the preservation of a discrete cadre of specialist advocates and advisors. Fusion is to be avoided. The “f” word crops up in numerous conversations I have had with the profession; it is a “hot topic”. The old Bar but also the new and Young Bar wish to remain discrete and independent. They do not wish to be regulated by the SRA. It has frequently been put to me that we must at all costs avoid fusion. Yet there is a great deal of misunderstanding about the meaning of the phrase.

165. In one sense the legal profession is already fused and has been for a considerable period of time. Any barrister who has wished to work with solicitors has long been able to be employed by a firm. That is fusion: barristers and solicitors working together in the same partnership albeit that until very recently the barrister has been an employee not a partner. Since the decision the BSB took in November 2009 to permit barristers to go into partnership in solicitors’ firms the oddity that a barrister could be employed but not a partner has disappeared so even that lingering asymmetry has now gone. Secondly, if by fusion what is meant is that barristers and solicitors do the same thing – functional fusion – then again that has been more or less true for a considerable period of time. Solicitors have had higher rights of audience since 1990 and barristers have had (limited) public access since 2004. There has been licensed access to the Bar by professionals for 20 years and licensed access for other organisations and individuals for the last 10 years. So although there are some functional differences they are not as great as is first supposed.

166. In the past the Bar could define itself by reference to its rules and in particular by a felicitous combination of what it and solicitors could not do. Barristers had a higher rights monopoly (solicitors could not appear); barristers did not have direct access (solicitors did that); barristers could not
practise save from Chambers and certainly not in anything so downright commercial and mercantile as a firm (solicitors did that); barristers could not engage in “litigation” because it brought one perilously close to a client (solicitors did that). In short the rules were rigid, demarcation was everything, and the functional differences between solicitors and barristers were strong.

167. Today almost all of that has gone, diluted and whittled down over more than two decades of change. Today the rules themselves cannot serve to define the Bar. It is true that the Rules still set the outer limits of a barrister’s field of activity. Paragraph 401(b)(i) of the Code of Conduct still stipulates that in the course of practice a barrister must not “undertake the management administration or general conduct of a lay client’s affairs”. That prohibition differentiates us generally from solicitors. The Bar does not conduct transactional work on behalf of a lay client. If the Bar is involved in that sort of work it is upon the instruction of a person entitled to instruct the Bar. But within the field of advocacy and litigation the boundaries have crumbled since solicitors can do what we do.

168. So we now have to look for a new way to define ourselves which will enable us to single ourselves out as discrete. There is no neat solution to this task. Yet, it is clear that the Bar is still different from the solicitor’s profession and to find the answer we must start by recognising that we are different because we belong to a profession that deliberately specialises upon one aspect of the provision of legal service namely, advocacy. Specialist advice is a natural corollary to that since all advocates who appear in court “argue the law” and must hone forensic skills in this area. The ability to argue the law or persuade a judge of the force of an argument is a real skill honed over years. It is entirely natural that clients should value this skill and seek the advice of the person whose job it is to assist the judges to formulate legal principle.

169. There are still numerous features of the Bar which differentiate it: We still (predominantly) are self-employed; we still (predominantly) operate from Chambers; we still (predominantly) do not do direct access work; we still perform only advocacy and specialist advice and do not conduct a lay client’s affairs. We all belong to an Inn of Court. And – increasingly critically – we are regulated by a specialist regulator which is legally discrete and different from the regulator of solicitors.

170. Accordingly, when the “f” word arises it now requires us to justify our existence and we do so by reference to our specialist function and the
fact that there is a compelling case for the continuation and strengthening of that specialist function in an increasingly complex legal market. The continued existence of discrete regulation is hence extremely important to avoiding complete fusion. The existence of separate regulation constitutes a guarantor against fusion. If the BSB and the SRA were to merge then the centripetal forces which would come to bear upon the two sides of the profession would be strong.

171. So it might come down to this question - What is the case for the continued separate existence of the BSB?37

172. The Bar Council established the Bar Standards Board in January 2006. It did this as a result of the Bar Council separating its regulatory and representative functions in anticipation of legislative change ultimately brought about under the LSA. In 2010 the Bar Council approved a fundamental constitutional change which, \textit{inter alia}, conferred upon the BSB its own constitution and independent rule-making powers. The BSB is a genuinely independent regulator albeit that it operates under delegated authority from the Bar Council. When originally established in 2006 there was uncertainty and scepticism about the venture we were then embarking upon. However, as the BSB has evolved and grown in sophistication and confidence so its relationship with the Bar Council has also matured. We have learned that a specialised regulator dedicated to advocacy and high quality specialist advice can provide a focus and intensity which improves the quality of decision-making in this important area. We are also beginning to learn that there are other, and equally important, benefits for the existence of an independent and vibrant Bar.

173. The BSB is a specialist regulator. Its entire staff have their minds focused upon advocacy and related services. There is no risk that staff will be diverted to work upon non-advocacy related issues if resources are scarce and need to be prioritised. The BSB committee membership is comprised of barristers who, naturally enough, specialise in advocacy and related services. They sit alongside lay members who, as they serve their time, acquire knowledge and experience in advocacy and the work of the Bar. And advocacy is indeed a very specialised practice.

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37 In a recent article in the New Law Journal, Sir Geoffrey Bindman (“All Bar None”, 21 May 2010, page 711) concludes that there should be fusion. He has a somewhat old-fashioned view of the Bar (that it is class-ridden, full of pink ribbon) and says fusion is the answer. Presumably, in his conception, the SRA would be the monopoly regulator, although he does not say so explicitly.
A profession of advocates needs specialist regulation. Unlike the provision of almost all other legal services a barrister treads the most delicate of tightropes. Paragraph 302 of the Bar’s Code of Conduct states that a barrister has “an overriding duty to the Court to act with independence in the interests of justice: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.” Yet, at exactly the same time the self-same barrister must “promote and protect fearlessly and by all proper and lawful means the lay client’s best interest” (Paragraph 303).

These two duties regularly collide. Having one’s “overriding” duty owed to “the Court” and not to one’s client is not an economically optimal or rational position. Yet it is at the very core of the professional ethics of the Bar. The Bar Council operates a telephone helpline staffed by four full-time and one part-time member of the permanent Bar Council staff. It receives circa 600 calls per month from practising barristers seeking guidance as to the Code and its application to everyday situations. Assisting barristers to reconcile the tension between these opposing duties to the Court and to clients is the everyday fare of the operators of the helpline. It is hard to conceive of any other profession where the client’s interest is secondary to that of the public interest. The risk of collision is most acute where the client is at odds with the State as often occurs in the criminal or the family courts. But, albeit in less extreme forms, it occurs also in the civil and commercial courts where the court’s requirement for candour and fair play may grate with a client who sees advantage in “playing the system” by withholding adverse disclosure, for example. It is in this context that a specialist regulator, dedicating 100% of its effort to advocacy, is of such importance. In my discussions with members of the profession, and indeed with the Inns and with the judiciary, the point has often been made that maintaining a free-standing specialist regulator for advocacy is a powerful protector of standards and is unequivocally in the public interest. And whilst this remains the pressure for fusion can be resisted.

An analysis of the LSA demonstrates the complexities of regulation when it comes to advocacy. The Act stipulates, in section 1, a series of eight discrete regulatory objectives. The first three concern protecting and promoting the public interest, supporting the constitutional principle of the rule of law, and improving access to justice. The sixth objective enshrines as a regulatory aim encouraging an independent, strong, diverse and effective legal profession. These are all principles the Bar strongly supports. Indeed

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38 The word “overriding” is not underlined in the original, but it is critical to the analysis.
during the passage of the Legal Services Bill through Parliament it was the Bar that repeatedly made submissions about the importance of principles such as these. However, far too often when Ministers have in the past talked about legal reform they have referred to the interest of “consumers” and the need to increase “competition”. These are of course laudable objectives but they are by no means imperatives or trump the rule of law, the importance of upholding the principle of access to justice, or the need to encourage an independent, strong, diverse and effective legal profession. Indeed when the European Court of Justice came to apply the competition rules of the European Community to the legal profession it recognised that competition itself could not be the single or most important lodestar to govern the rules and regulations adopted by the legal profession. In Wouters39 the European Court of Justice said that even if the rules of the legal profession did distort or restrict competition this would not be sufficient to render them prohibited. On the contrary the need to preserve and promote competition would need to be balanced against other legitimate objectives such as supervisory, ethical or other legitimate objectives of the profession.

177. Section 1(3) LSA 2007 identifies “professional principles” which constitute one of the “regulatory objectives” which the Act seeks to achieve (see Section 1(1)(h)). These professional principles refer to the fact that lawyers should act with “independence and integrity”. But more particularly when it comes to court proceedings a person exercising a right of audience or conducting litigation “should comply with their duty to the court to act with independence in the interests of justice”. In this regard it is of signal importance that the Bar has a specialist regulator. In recent times the BSB has demonstrated increasing confidence and a willingness to engage with the profession and its clients on the difficult issues. In finding solutions it must balance the often inconsistent regulatory objectives and secure adherence to

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39 (Case C-309/99) C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap, 19 February 2002. The case concerned a prohibition in the rules of the Dutch Bar against multi-disciplinary partnerships and the issue was whether they were prohibited because they restricted competition. Paragraph 97 of the judgment of the European Court states: “However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.”
the professional principles. In all of this considerable balance and judgment are called for. The skill set required is unashamedly specialised. All of its resources are devoted to acquiring and refining those skills and applying them appropriately. The work is specialised, the skill set is specialised, the regulator’s constituency is specialised, the clients have specialised needs.

178. My perspective on this is conditioned by having been involved over many years (by virtue of having been on the Bar Council, a member of the General Management Committee (“GMC”) and a member and chair of various committees concerned with the evolution of the LSA) with the setting up of the BSB. I am now wholly convinced that in principle specialised regulation is not just desirable in the public interest but a key to the continued to preservation of a discrete identity for the Bar. I do not see a generic regulator such as the SRA having the resources to focus with equivalent intensity upon the intricacies of advocacy. Advocates form circa 2% of the membership of the SRA and since most do publicly funded work they are economically even less representative. If and when it comes to competition for limited resources, whether human or financial, a generic regulator might of necessity have to divert resources from one area and one issue to another. A specialised regulator might face similar pressures to prioritise but will always do this within the single sphere of advocacy.

179. So, the BSB must not merge with the SRA. It must act as the Bar’s bulwark against “fusion” as that term must now be understood and its continued separate existence is powerfully in the public interest.

Tough love: The imperative for the vigorous maintenance of high professional standards

180. There is a second aspect to regulation which warrants mention. For good or for ill the Bar is being forced, some would say at indecent haste, down more commercial lines. The genesis and evolution of ProcureCo, partnerships and other models which will surely follow in their wake and the advent of ABS under the LSA creates new situations where pressure is exerted upon barristers to act in a more commercial manner. External investment in Chambers or in an LDP or ProcureCo could create pressures on barristers not to accept instructions because the “profit margin” is not good enough or because the client is not good for the “reputation” of the Chambers or for some other reason which would threaten the “return” to an investor. The cherished cab rank rule might come under threat. Pressures such as these will mount and as they do it is regulation which must serve to ensure that the Bar’s reputation for high standards is not prejudiced. In crude
terms barristers benefit hugely from belonging to a profession with a reputation for the highest standards of professionalism. The services of barristers are valued internationally in part because of its reputation as a whole. We damage that reputation at our extreme peril. So as the Bar moves into new and more commercial waters, regulation must keep apace and remain vigilant. Whatever may have been the Bar’s perception in the past of the creation of a fully-fledged independent regulatory arm (nervous, sceptical, cautious) that perception must change. We must view fearless and principled specialist regulation as a guarantor of our reputation.

Advocacy Standards

181. The joint regulators’ consultation on standards has in its sights criminal work. But it is foreseeable that once the scheme is put in place it will examine the need to extend it to other areas of work and in particular family law publicly funded work.

182. As I have explained above the BSB, SRA and ILEX are working on a quality assurance scheme for criminal advocates. It is work very much in progress and is likely to come into force in 2011, though of course time can be elastic. The joint regulators, along with the LSB, are at present working on the principles to be applied. Having debated this issue at length with the Bar (both prosecuting and defending) and with considerable numbers of the judiciary it seems to me that certain principles can be identified, which can be summarised as follows:

- Universality: The scheme must apply to all advocates performing criminal work regardless of whether employed or self-employed and regardless of whether prosecution or defence.
- Harmonisation: The new scheme should build on existing schemes. The CPS has a workable and accepted grading system. Any new system should not dilute the basic structure of the CPS system which classifies cases upon a logical basis according to complexity. It is proving a suitable system of thresholds with which to protect the public. Level 1 roughly equates to entry level work in the Magistrates’ Court. Level 2 roughly covers higher end Magistrates and lower level Crown Court work. Level 3 covers the vast majority of Crown Court work. Level 4 covers complex Crown Court cases. The transition from levels 2 to 3 will see an
advocate take on more jury trials. That from 3 to 4 elevates the advocate into complex and sensitive cases.

- **Independence**: The system of accreditation must be transparent, objective and independent of representative interest.
- **Standards must be minima**: The standards are not gold-plated; they are objective minima to protect the public interest. This does **not** however mean low standards. The justice system is lubricated by **good** advocacy. Surgeons’ minimum standards are demanding; so should those of an advocate. This is not trade unionism speaking. Poor advocacy is found across the Bar, just as it is amongst other advocates and the standards should be set at a level to weed this out.
- **Compulsion**: The system should be mandatory. Any exceptions would need to be narrowly prescribed and convincingly justified in the public interest.
- **Maintenance of standards**: All advocates should be subject to periodic reappraisal.
- **Proportionality of operation**: Advocates failing accreditation risk loss of livelihood. Some system of warning traffic lights and/or mentoring and/or mandatory training might be proportionate prior to exclusion.
- **Judicial involvement**: Judges are the dominant consumers of advocacy. They see the good and the bad on a rolling basis. They should be at the core of the appraisal system. Self-assessment should be eschewed as subjective and self-serving. In cases of difficulty (for example an advocate appearing mainly in a single court centre confronting the same irascible judge) some form of additional independent assessment based on third party expert review of performance might be needed.
- **Scope**: It should start with crime. Consideration should then be given to family and other publicly funded work. The case for extending accreditation beyond publicly funded work seems to me to be very weak.
- **Timing**: The transitional arrangements for total roll out are likely to span a number of years. In the first instance roll out to entry level seems sensible with subsequent phases covering additional levels.
- **Cost**: The professions are introducing quality assurance and as such the LSC and CPS will be spared considerable expenditure. A powerful case could be made for public funding. However, to
assist Government in these difficult times the profession might well swallow the cost.

183. I wish to dwell on one additional point viz, scope. The joint consultation paper floats, albeit tentatively the possibility of standards being applied to all areas of advocacy work. I suspect that this is over ambitious both in terms of need and in execution. First, in the privately funded market there are a vast number of solicitors who know their markets; they know who they like to instruct and they monitor developments. The taxpayer is not involved. The market determines who wins and who loses in the chase for work. The notion that a solicitor cannot instruct the barrister of choice is unrealistic. A solicitor might spot in a young practitioner real brilliance and on behalf of a willing and informed client wish to instruct that barrister (at very modest cost) in a complex case. Who is to say that the barrister should not be able to take on the case because he or she has not yet managed to climb the accreditation ladder to reach the level at which a case of the complexity in question would normally be allocated. And how would the regulators be able to implement such a scheme? The sheer variety of specialisations and work at the Bar is vast. It is possible to introduce standardisation into crime because the cases can be categorised into fairly predictable classes based upon a degree of foreseeable complexity and that grading can be done in advance by a regulatory body. Each year over 1 million prosecutions are brought. About 93% are tried before Magistrates with only about 7% in the Crown Court. In 2008 there were 143,000 cases in the Crown Court of which circa 12-15% would have involved full trials. Vast numbers of these cases are very similar in nature as any Recorder or Judge will tell you who sits even for a few weeks each year and has a day in day out diet of “ABH”, “GBH”, theft, possession of a bladed article, and possession with intent to supply. There is a sameness about the cases. But it is very difficult to see how this can be applied outside of areas such as crime or possibly family. I do not expect, at least in the foreseeable future, accreditation to be extended beyond publicly funded work.

The Inns of Court

184. The Inns are an integral part of the DNA of the Bar. They are much more than mere convivial private clubs or beneficent property owners. They formalise, through the process of call, a person’s entry to the Bar. They facilitate the performance of disciplinary tasks. They train pupil supervisors. They carry out mandatory training for young barristers. They provide
extensive scholarship money to students. They are crucial in that they represent a means through which the judiciary can express views about practice. In the LSA Parliament seemingly assumed that what happens in practice is of no significance to judges. This is of course absurd. The debate over standards and quality, for example, shows how critical judicial input will be. Under the Act however it is the task of the Approved Regulator to take account of such issues as promoting the public interest, supporting the rule of law and improving access to justice, even though these are matters of great importance to the judiciary. The Inns are not a formal method of communicating a judicial view but they are a critical source of guidance and advice from judges on matters of practice.

185. Debate is now occurring within the Inns and the Council of the Inns of Court (“COIC”) as to the role of the Inns in the future. The Bar needs the Inns. It is not suggested that the Inns will cease to perform their traditional functions but the question of how the Inns will fit into the new and emerging regulatory and commercial structure is being posed.

186. In my view the following points need to be taken on board.

187. First, in relation to those activities which are of real importance to the profession closer co-ordination between the Inns and the BSB and the Bar Council to ensure consistency of approach and to ensure the optimal use of scarce resources is to be desired. This has implications for the Bar Council which I refer to below. The Inns need to ensure that in relation to those matters where they are acting in a regulatory or quasi-regulatory function there is proper coordination with the BSB. The Inns have no jurisdiction to take independent regulatory decisions and can only act under the delegated authority of the BSB. A more co-ordinated approach is therefore needed.

188. Secondly, the Inns need to gear themselves up for a more prominent role in providing training and mentoring for advocacy across the entire Bar. This will be in response to the mandatory accreditation and quality control standards which are in the process of being introduced. The ATC should play a major role in this but this has financial implications and is something that the Bar and the Inns need jointly to address.

189. Thirdly, the Inns need to consider how they are to approach new membership. For reasons given elsewhere it is predictable that, over time,

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40 The only area of Inns' activities referred to in the LSA is call to the Bar.
there will be significant growth in applications to join the Inns and this might necessitate a fresh approach to membership.

190. Fourth, there is the international dimension of the Inns’ work. This fits very well with the international work which the Bar Council undertakes in its representative capacity and enhanced co-ordination is desirable.

191. Fifth, the Inns and the Bar Council together need to review methods of funding for matters which the Inns perform which are of importance generally to the profession.

192. Let me now make some brief observations about each of these points.

193. Co-ordination in areas of professional importance to the Inns: In areas of importance to the professions greater co-ordination between the Inns is important to achieve swift joined up decision-making. There is a distinction to be drawn here between the Inns’ traditional, collegiate, activities over which they compete and the professional activities which they perform for the well being of the Bar where competition might be conducive to inefficient decision-making. Indeed, where the professional activities of the Inns are regulatory or partially regulatory then they must act under the delegated authority of the BSB which has an exclusive statutory power delegated to it by the Bar Council qua Approved Regulator. No other body has the power under the LSA to take decisions which are properly defined as regulatory. The definition of what is regulatory under the Act (see section 21) is broad and encompasses the governance of, inter alia, training, standards, and education. It is hard to see how regulatory decisions can or should be taken by the Executive Committees of the Inns or their benchers. I do not see this as a major problem. The Inns need to work with the BSB in order to identify relevant regulatory activities and ensure these occur under BSB delegated authority and supervision. In large measure this is already happening.

194. One illustration of the difficulties created by uncoordinated action was thrown up by the Wood Report in its analysis and conclusions on pupillage and the training of supervisors. The training delivered to

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41 The Inns engage in a range of activities that could wholly or in part fall within the statutory definition: admission of students to an Inn; provision of qualifying sessions and decisions on the requirements for credit for attendance at qualifying sessions; waivers; disciplinary matters relating to a student member of an Inn; call to the Bar; approval of student supervisors; approval of Disciplinary Tribunal Regulations; recruitment of members and clerks to tribunals and training of such persons; provision of training for BPTC students, pupils, new practitioners.
supervisors has been traditionally left to the Inns. The Wood Working Group conducted research into the variety of types of training provided by the Inns. The conclusions arrived at led the Wood Report to describe the resultant “state of affairs” as “unsatisfactory”. The Working Group has made a series of recommendations for a co-ordinated approach overseen by the BSB. Ultimately this is a regulatory matter and the BSB is entitled to require full co-ordination under its supervision with the Inns exercising power delegated to them from the BSB.

195. The combined work of the Inns would be much facilitated by a joint annual report to the Bar on the activities in which they are engaged for the professional benefit of the Bar as a whole. This will no doubt be controversial. A reporting obligation would however, in so far as the activities have a tinge of the regulatory about them, assist in satisfying the statutory obligation to ensure transparency and accountability.

196. Development of training and continuing education / the ATC: As to training and advocacy all present developments point to an increased demand for training both in advocacy and in substantive law issues. So far as advocacy is concerned, the Inns are uniquely placed to lead by virtue of their role as the home for all called members of the Bar and through the fact that they combine practitioners and judges. In particular they are uniquely placed to lead through their joint body, the ATC. The Inns have, via the ATC, already emerged as one of the, and possibly ‘the’, leading sources of training for advocacy worldwide. Wherever I have travelled both at home and internationally the work of the ATC is lauded. The ATC provides training both domestically and internationally for persons who themselves seek to train advocates. Under its Constitution it is a body with membership from the Inns, the Circuits of the Bar of England and Wales, the Bar Council, the Specialist Bar Associations and the Employed Bar. It has a seat on COIC.

197. Its core functions include: to be responsible for co-ordinating delivery and monitoring of advocacy teacher training; to set standards and guidelines for approving and grading advocacy trainers; to provide a forum for development and dissemination of good practice in relation to advocacy. A yet further, but very important, function is to liaise with and assist other jurisdictions “...in respect of advocacy training when requested to do so”. And the ATC is indeed frequently so requested. As of May 2010 it has, outstanding

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42 See Wood Report, para 360, page 124.
43 See LSA section 28(3)(a).
requests from Afghanistan, Australia, Bermuda, Colombia, Croatia, Hong Kong, India, Kenya, Malaysia, Mauritius, Pakistan, Rwanda, Sri Lanka, and South Africa. In some instances the requests have emanated from the very highest levels of Government and the judiciary. It also has outstanding requests for assistance from the international Criminal Court and from the United Nations.

198. The remarkable progress made by the ATC has been achieved on the back of an immense pro bono contribution from a large number of senior QCs, judges, academics and other leading members of the legal fraternity. In contrast, in administrative and logistical terms the ATC operates upon the proverbial shoe string. It has only one part-time member of staff to serve it. In the foreseeable future quality assurance for 7000-8000 criminal advocates will be upon us. This could in due course be rolled out to other publicly funded practitioners. In all of this the ATC, and through it the Inns, have an opportunity to make an enormous additional contribution to the Bar.

199. It will do this by influencing the creation and operation of objective advocacy and accreditation standards and in providing training for advocacy trainers. As a focal point around which the Inns can congregate the ATC could hardly be better. To achieve this there are, however, a certain number of prerequisites.

200. The first is that the ATC needs to be placed on a secure financial and organisational footing. This is a task the Bar Council and the Inns need to grapple with. At present the Inns make a subvention to the Bar Council of £1.4m. In future discussions over the subvention and indeed more generally the role played by the Inns in providing services of importance to the professional development of the Bar will need to be taken account of. But it seems clear enough that the structural reform of the ATC should be a matter of priority. An asset such as the ATC needs to be nurtured and cannot be left to wither on the vine. If the ATC is not accorded a proper financial and structural base there is a discernible risk that it will suffer as a direct consequence of being unable to meet expectations and demand. In a letter sent to be me by the then Attorney General, Baroness Scotland, on 16 April 2010, the Attorney also referred to the extraordinary reputation of the ATC in Commonwealth and other jurisdictions. She described it as “...remarkable and a tribute” to the Bar of England and Wales that so many Commonwealth countries and international bodies looked to the ATC for assistance. She is correct. As a creature of the Inns the ATC can be a pivot for future Inns’ work in the field of advocacy training and education.
The second is (to reiterate a point made already above) that in particular in relation to training the Inns need to co-ordinate their activities to ensure uniformity of standards and to maximise scarce physical and financial resources. If they do this then a great deal more can be done than is presently being done. To take one example, which has somewhat tentatively been mooted by a number of persons, it would be an immense achievement if the Inns could develop a state of the art mock courtroom dedicated to advocacy training. A facility shared between the Inns, and possibly the Bar Council, is far easier to fund than individual facilities. I have now visited a number of law schools and professional qualification providers who have superb mock court rooms for training. I can see no reason why a first class facility should not be jointly owned by the profession, probably located in the Inns. The Inns thrive on friendly competition but as an integral part of a single profession there are areas where co-ordination will lead to improved facilities and a better shared service to the Bar. One knows from experience that the Inns do not always see eye-to-eye on issues. But the natural, and generally healthy, desire to preserve individuality as between the Inns should not be allowed to hinder the evolution of common agendas which are important to the profession as a whole.

Membership of the Inns: As to new membership this is interlinked with the incidence of HCAs seeking to qualify as barristers. They are likely to want to do this in some measure because of the attractions of joining an Inn and thereby obtaining access to such matters as advocacy training. If these lawyers can join the Bar they can hardly be turned away from an Inn. The Inns do not seem to resist this notion. Indeed, some are beginning to consider whether in order to facilitate new membership of the Bar they should provide inducements to HCAs such as associate membership as a precursor to full transfer to the Bar. On the face of it this has attractions. A fear has been expressed that a wave of new applicants would absorb scarce resources. However, I rather doubt this is a major problem since (as one Sub-Treasurer explained to me) a very high percentage of the Inns’ resources are deployed providing services and funds to students. The new members will not be students but active practitioners who will wish to avail themselves of the Inns’ other services and I have the impression that the Inns do have capacity to provide these services. Indeed, the discussion above about the capacity of the ATC is part and parcel of the Inns actually planning so that

[^44]: For example, Northumbria University Law School has 5 courtrooms in an ultra modern building and one of its mock court rooms is decked out from an old magistrates’ court.
they do have capacity to meet future demand for their services. Viewed in this light a growth in Bar membership could see a burgeoning opportunity for the Inns.

203. The question has been posed whether HCAs should be able to join the Inns but without being required to become members of the Bar. This is a difficult question and not one which should be dismissed out of hand. This raises, indirectly, a broader question: Should the Bar (via the BSB) assume a role as a regulator of all advocates, irrespective of whether they are barristers, solicitors or legal executives? In some respects, this is no more than a continuation of the present and predicted route of travel.\(^{45}\) If many of the active HCAs become barristers, the Bar Council and BSB do become, over time, de facto representatives and regulators of all advocates. So ‘what is in a name?’ There may well be force in the existence of a single specialist regulator (i.e. the BSB) for all advocates working to single standards with a single conception of the public interest. Competition between regulators may serve to water down or dilute standards. Indeed the tension between some HCAs and the SRA over quality assurance (i.e. standards) is a reflection of a fear that standards might be set at a level (i.e. overly high) which discriminates against the HCA. There is no justification for these fears but the simple fact that it exists is evidence of pressure to drive regulatory standards down. Under the LSA competition is not, by any means, the only, or on some occasions the most important, benchmark of regulatory activity. The undesirability of advocates subject to different Codes of Conduct has already been commented upon by the senior judiciary. That undesirability when advocates entertain different notions of their duty to the Court. In one criminal appeal the Court was confronted with an issue relating to the ability of counsel and solicitors to withdraw. Counsel, following the Bar Council Code, argued position A whereas the solicitor following the Law Society rules argued position B. The Court expressed considerable concern at the operation of different rules.\(^{46}\)

204. The present Bar view is that an open and inclusive Bar that welcomes advocates is the best option and, if this is successful, there will be no need for the Bar to admit and regulate all advocates.

\(^{45}\) Indeed Inner Temple has also invited the former senior partner of a magic circle law firm to participate in its Executive Board as a non-executive member. Further if a set of Chambers were to become an LDP with solicitors and take a lease from the Inns qua LDP would the Inn deny the solicitor partners dining rights?

\(^{46}\) See R v Erdogan Ulcay [2007] EWCA Crim 2379
However, as for the broader idea at present it should not be cursorily rejected but, instead, we should keep it somewhere at the back of our minds to see if it ever becomes an idea whose time has come. We will have to see how the growth of LDPs pans out. If LDPs grow and employ increasing numbers of barristers then a logistical issue does arise for the BSB, the SRA and ultimately the Inns. At present LDPs can only be regulated by the SRA because the BSB does not engage in entity regulation. But that could well change and if so then both the SRA and BSB will become potential regulators for LDPs. In such circumstances will the BSB wish to regulate all LDPs which have any combination of barristers and solicitors? Or will it leave it to the SRA to regulate these. If the LDP is or becomes barrister or advocacy dominated then it is in my view probable that the Bar will wish, at the least, these to be regulated by the BSB. In all my discussions with the Bar barristers have invariably expressed the view that they wished to be regulated by the specialist BSB, not the generalist SRA. In either scenario there is then a complication which is that some of the members of the LDP will be regulated by the BSB and SRA respectively but the entity will be regulated by only one of them i.e. some members of the LDP will be personally regulated by one regulator but their entity will be regulated by another. This might or might not cause practical problems but it has an air of messiness about it. In the fullness of time it seems to me that this will be something which falls on the agenda of the BSB because if, as I think likely, it remains and increases its position as the dominant regulator of advocates then the real question is whether it should not simply open its doors to all advocates so that there can be consistency between the entity regulator and the regulator of the individual. I have to admit that at present I do not know the answer to this conundrum and it is too early really to know which way the membership wind will blow. It is however an issue which must be kept for another day’s consideration. And to bring the issue back to the position of the Inns if the Bar admitted all advocates there would then be pressure on the Inns to do the same.

The International dimension: Over and above training and education lies another facet of the Inns’ activities which has real and lasting benefits to the Bar and to the public interest. Approximately 20% of those called to the Bar each year are from other jurisdictions. These return to their home countries to practise. They take with them a palpable pride in their membership of the Inns and in their call to the Bar of England and Wales. They acquire training in the Common Law. Many such lawyers rise rapidly to become chief justices, attorneys general, or otherwise play a significant role in politics. All
of this assists substantially in the dissemination worldwide of the principles of the rule of law and this is a valuable export. It also creates links with the Bar in England and Wales which can be useful for trade development in the future. The work of the ATC complements these benefits and the work of the Inns in fostering international links also serves a legitimate public interest. The Bar Council through its International Committee pursues the same twin objectives of business development and dissemination of the rule of law. A greater co-ordination of the work of the Inns and of the Bar Council would be mutually beneficial. A recent example shows this. As Chairman of the Bar Council I recently spoke about regulatory change at the World Referral Bar Conference in Sydney, Australia. Co-ordination between the Inns (essentially via Inner Temple) and the Bar Council has meant that the 2012 Conference will be hosted in London in Inner Temple.

Controlling Membership of the Bar: An outward-facing Bar

207. The issue of increasing Bar membership has already been touched upon. As I have already emphasised the Bar must welcome solicitor HCAs who wish to join the Bar. In the first 3 months of 2010 the number of HCAs seeking to join the Bar has increased by 200+%. The reasons for this include: a desire by solicitors who initially were called to the Bar but who did not obtain pupillage and re-qualified as solicitors to return to the Bar; a desire by HCAs doing advocacy to increase their status which, since BSB rule changes, they can do without having to give up their position as partners or employees in an LDP; a realisation that in a future where accreditation and mandatory standards are operative, access to top class training and mentoring through the Inns (and Circuits and SBAs) might be essential.

208. Comparisons can be invidious but when measured either in revenue generation terms or numbers HCAs form a very small part of the overall interests of the Law Society and the SRA. If you are a solicitor advocate and that is your life you pay subscriptions and practising fees which go to subsidise a wide range of activities from which you do not benefit. The same might be said of other specialist solicitors. But the difference here is that the HCA now has an option. He or she can qualify to join the Bar and then pay a professional fee, 100% of which is devoted to advocacy and related services.

209. Moreover the Bar Council and BSB as specialist bodies have a collectively powerful voice in Parliament and we maintain an important dialogue on professional matters with the judiciary. We devote our entire attention to advocates and related services. All our resources are devoted to
these activities. So are the activities and resources of the Inns, Circuits and SBAs. It is not being in any way derogatory or critical to say that the Law Society and SRA simply cannot compete in intensity of focus.

210. A piece of flattery (cum insult), which I enjoyed but which reflects the point I have just made, is recorded in “The Justice Gap, Whatever happened to legal aid” by Steve Hynes and Jon Robins47 where the authors cite a Civil Servant in the LSC who spoke in the following terms: “The Bar might be smooth gentlemen. But when it comes to a punch up they are much better than the Law Society”.

211. In a recent article48 in the Law Gazette the same complaint was made that solicitor advocates are a tiny fraction of the SRA’s concern. It was also complained that HCAs suffered from low self-esteem and that they felt the lack of a proper collegiate training, mentoring and support mechanism. The author, a former chair of the SAHCA, complained that the SRA did not ‘know a great deal about advocacy’. It is not a part of this paper to analyse these criticisms but they might help explain why active HCAs engaged in real advocacy have encouraged the Law Society to set-up a ‘fifth Inn’. It may also help explain why joining the Bar might be a real career choice for HCAs who wish to have access to the collegiality, mentoring and support mechanisms provided by the Bar Council, the Inns, the Circuits and the SBAs.

212. So we must welcome those advocates who wish to specialise in advocacy and who can benefit from the extensive facilities provided by the infrastructure of the Bar. Becoming a member of the Bar does not prevent a person leaving their partnership, or for the partnership entity necessarily leaving the regulatory hands of the SRA. There is no need to create a ‘fifth Inn’ and, in any event, for such a body to be anything other than the palest of reflections of its four elder brethren would take not just a huge capital investment but decades or, more likely, centuries of patient activity.

213. There is one word of caution that needs to be sounded. The prospect of a more outward-facing and welcoming Bar has both potential and risk. The latter lies in the possibility that solicitors who have acquired the purely nominal title of HCA but who do not, in fact, practise advocacy seek to join the Bar. To be blunt, the Bar is not interested in non-advocates. The BSB is a specialist in advocacy regulation. The Inns cater for advocates and advocacy.

47 LAG (2009) page 120.
48 By Tim Lawson-Cruttenden, former Chairman of the Solicitors Association of Higher Court Advocates (SAHCA), The Law Gazette, 24 March 2010.
The work of a solicitor’s litigation department is not the bread and butter of the Bar and this will not change even if, as is quite possible, the Bar embraces increased direct access and litigation. If the Bar does this it will be to support its advocacy function, not because the Bar wishes to become litigation units per se. As it has been put, ‘many City firms have bred advocates but not enabled them to develop because they have been starved of court experience’. These practitioners have litigation practices or mix litigation with other solicitors’ work. To allow these lawyers to join the Bar and be regulated by the BSB would risk creating an inappropriate mismatch between the regulator’s natural scope of action and the practitioner’s wider field of practice. But as for those solicitors who truly wish to perform advocacy the Bar and the Inns should throw open their doors.

The Circuits

214. There are 6 Circuits in England and Wales (Western, North Eastern, Northern, South Eastern, Wales and Chester and Midland) and there is a 7th which is not focused on England and Wales (European). All but the seventh are of ancient lineage. In the 10th century King Edgar administered justice by travelling the Circuits. Information collected for the Doomsday Book was collected along similar geographical lines which bear at least some resemblance to the later, more formal, judicial Circuits. By the accession of Henry VII in 1485 there were 7 main Circuits which bear a significant resemblance to the modern-day Circuits of England and Wales. From then onwards successive monarchs and Lord Chancellors tinkered with the number and geographic boundaries of the Circuits. The make-up of the modern Circuits emanates from the Beeching Commission conclusions in 1969 with some modifications (for example, Oxford has been moved from the Midland Circuit to the South Eastern Circuit). The Circuits play an important role not only in the administration of justice but also in the life of the Bar. The vast majority of Circuit Judges and a good many High Court Judges have been active Circuit members and Circuit Leaders. The Judiciary and other Government agencies liaise frequently on common issues with the Circuits. Closer to home the Circuits provide a conduit for the Bar Council with the Circuit Leaders and other Circuit representatives feeding information in and out. Circuit Leaders play an integral role in the Bar Council, on the GMC and in advising and working with each successive Chairman. The Circuits participate in the ATC.

49 Ibid.
215. The non-London Bar is numerically very strong. It does not have the range or depth of specialisations that are found in London but in many of the larger cities there are growing specialist Chancery and commercial groups which do very well and provide an effective service, essentially to local business. The development of the regional Mercantile Courts has certainly assisted this process. Provincial sets have also benefited from the development of specialist work arising from the opening of regional Administrative Courts in Birmingham, Cardiff, Leeds and Manchester. Practitioners in those cities see them as a real opportunity to develop knots of expertise away from London. When first mooted it was projected that these courts might absorb about 7% of total Administrative Court work. In fact the courts have exceeded this projection and account for 9% of total Administrative Court work. This augurs well. There is scope for a great deal of additional work to be channelled into those courts including in relation to challenges to immigration and education decisions, decisions of regulatory bodies about prisoners’ rights and welfare disputes and other public law challenges. Many sets in these cities sets are large and flexible and can and should evolve into areas of real specialisation.

216. A future Bar will retain a need for strong Circuits. There is a need to ensure that Bar policy does not become London-centric. The Circuits are important in this. The non-London Bar has a higher percentage of publicly funded practitioners and they are clearly profoundly affected by the structural changes that the Bar Council is working upon. In particular I would expect an enhanced ATC to establish stronger links with the Circuits to ensure that advocacy training is properly disseminated outside London. I would also expect the Circuits to assume greater responsibility for professional development matters such as the training of pupil supervisors, a point made in the Wood Report.50

Evolution of broader Bar Council policy

217. A lot of what I have already referred to describes the representative role of the Bar Council. At this juncture I wish to refer only to four large themes which are of importance to the work we will do in the future. The work of the Bar Council is sometimes (indeed frequently) perceived to be exclusively that of defending the rates of pay of the publicly funded Bar. But this is very wide of the mark indeed. It is certainly true that the Bar Council is active in addressing legal aid issues but not only does the Bar Council have

50 Wood Report, para 370.
a much broader agenda than that but, increasingly, even when publicly funded issues do arise they do so now in the context of a debate which resonates across the entire Bar.

It is therefore worth dwelling briefly upon the role of the Bar Council in the future. In early 2009 the Bar Council was described by the Chairman of the LSC, Sir Bill Callaghan (a former chief economist to the TUC) as the most effective trade union in Parliament.\(^5\) No doubt there was an element of tongue in cheek but the flattery (or perhaps insult) was intended to be serious. The Bar comprises some very clever and articulate individuals and it has in my experience been almost universally the case that the Bar Council can call upon the help of virtually anyone at the Bar and without demur assistance is given. So when briefing papers are needed to fight a battle in Parliament the leading experts lend their aid; when responses to consultations are being prepared we can call upon diverse skills of a very high quality indeed. When Ministers in office, or as shadows in opposition, want expert assistance from outside Whitehall it can be given. In practice one does not see the City law firms giving of their time so generously to the Law Society or the SRA. As already mentioned, when the Legal Services Bill was being debated in Parliament the Bar Council undertook an analysis of the number of hours provided gratis by members of the Bar to the Bar Council. It totalled 25,000 hours per annum.

So what are we to do in the future? Let me identify some key issues. First, there is the way in which the Bar Council adapts its policy stance to the impending budgetary fire storm. Secondly, there is how we assist the profession through the period to come. Thirdly, there is how we deal with the rest of the world. Fourth, we need to continue the process of reviewing the structure and operation of the representative side of the Bar Council to ensure it remains focused on providing an effective, best value service for its members.

Addressing fiscal austerity and working with the Government: The task of the Bar Council over the next few years will be overhung by the existence of a vast national debt and a Government with a priority to mitigate it. In macroeconomic terms we can hardly oppose this objective. At the broadest level we must therefore re-set our sights and adapt to austerity politics. This means that when we engage in discussions with Ministers we must ask how we can assist in the saving of money but in ways which minimise to the

\(^{5}\) At a meeting of the Bar Council which he attended in 2009.
greatest possible degree harm to the justice system, which includes to the legal aid budget which funds front-line service providers who are critical to the administration of that justice system. These are not at all easy to reconcile. But we simply have no choice. We must therefore work with Government on projects which reduce costs but we must use our undoubted skills to ensure that painful decisions are made wisely and at lowest possible cost to the profession and the system as a whole. If we can do this we can, with political and moral force, say that a fair share of the resultant savings made across the system should be allocated to legal aid and that when times improve there should be a promise to restore legal aid rates.

221. **Positive assistance to the Bar**: The second issue is how we assist the Bar through the next few years. As I have pointed out elsewhere the privately funded Bar has actually weathered the recession well to date. Extreme austerity across public spending will impact upon private finance and the markets generally. But there is no automatic linkage between an upturn in the economy and the period over which fiscal discipline must be maintained. There are already indications that the worst of the recession is over and the markets are likely to respond well to a Government which indicates a clear will to get to grips with public spending. I do not foresee that the privately funded Bar will fare too badly over the next few years. The real brunt of public spending cuts will inevitably be borne by the publicly funded Bar. The developments and projects that we have set in train focus upon modernising the structure of the Bar and expanding the Bar’s client base. We are planning to engage with the MoJ and LSC on direct contracting, the work we are doing to make the Bar more accessible to domestic clients and the work we are doing to stimulate international work should all play a part in keeping up and increasing the flow of good work to the Bar.

222. **International work**: As for international work, the third area, this is of enormous importance. We should not forget that more than 20% of the intake of each year’s vocational courses arrive from abroad intending to return home upon call and move into practice. Some years later these same individuals become political and professional leaders. The Bar Council has a broad two-pronged approach to international work. The first object is trade development. It is important that the Bar Council continues to develop international relations. Barristers appear regularly in the domestic courts on behalf non-UK litigants. A very high percentage of litigants before the Commercial Court are non-UK based. But we also appear frequently in

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52 Wood Report (supra) para 244.
courts and tribunals elsewhere in the world. We mediate around the world and we arbitrate internationally. And we give a great deal of advice to non-UK clients. The Bar Council has over the years been instrumental in fostering good relations with jurisdictions which use the Bar. We liaise with local Bar administrations; we speak to their judges and to Ministries of Justice, and we lobby for trade and services liberalisation. We maintain a highly effective office in Brussels which ensures that the Bar’s voice is treated with great respect throughout the European institutions. This has in the past proven of great value on a range of legal developments close to the Bar’s heart. The Bar Council is usually welcomed abroad and it can open doors. The Bar is popular because of its high quality and low relative costs but also because of its reputation for strong independent advocacy. We are supported in this by the fact that the solicitors also enjoy a phenomenally strong position in the international legal market. Four out of the top six law firms in the world are based in London. When it comes to international litigation and arbitration the Bar and solicitors make powerful allies. Our joint strength is enhanced by the renowned independence of our judiciary so that, for example, when the Russian oligarchs seek lawyers and jurisdictions to determine their disputes English lawyers and English courts and judges are very popular. An additional and important strand to our international work is the promulgation of the rule of law. The Bar Human Rights Committee (BHRC) is an active yet independent voice in these matters. The Bar Council takes an interest in jurisdictions where there is a threat to the rule of law. The ATC provides assistance and training for advocates and judges and this is sometimes sought in areas where the rule of law is fragile. We see it as an important part of our job to be supportive and to spread were possible best judicial and legal practice.

223. The importance of developing a strong and coherent international policy cannot be understated. At a superficial level it is a demonstration that the Bar Council works for the entire Bar, and not just for the publicly funded Bar. The work of every Chairman can become dominated by public funding issues and it is critical that the Bar Council keeps a proper balance in its representative work. Let me give four examples of international work.

224. First, trade and business development. Very few sets maintain Chambers outside the jurisdiction, though the numbers are steadily increasing. The Bar, and in particular the senior ranks, performs a lot of international work. We do a great deal of international arbitration both as counsel and as arbitrators. For example, there are 10 QCs on the list of
approved foreign arbitrators of the China International Economic and Trade Arbitration Commission (“CIETAC”) which is a body which supervises some 2000 arbitrations per annum highlighting the importance of China as a growing economic power. A significant portion of these arbitrations have a foreign (i.e. non-Chinese) element to them. The UK is Europe’s largest investor in China (with investment levels presently circa £50 billion). The Bar and Law Society have long-standing links with the rapidly emerging Chinese legal profession. Some 300 of the top practitioners in China’s newly evolved legal profession have spent a year in the UK under the Lord Chancellor’s Training Scheme for young lawyers. The alumni of this scheme increasingly hold important positions in the Chinese profession and exhibit great warmth and friendship towards the UK profession which arranged the scheme. There is real scope for the Bar to play a part in Chinese arbitral work as arbitrators and as counsel in cases involving English or American or common law jurisdiction parties.

225. Secondly, closer to home, the legal profession (solicitors and barristers) benefits hugely from the fact that English contract law is virtually an international currency for denominated choice of law for international business. But this is under threat. In the European Union proposals have been advanced to harmonise contract law. The UK has profound doubts about this. The proposals have been watered down and now turn upon a suggested “optional instrument” perhaps limited to cross border transactions and possibly only cross border internet sales. The Bar has a position to take on this to protect English law. We can do this rationally and persuasively. But we must engage in the lobbying and legislative exercise to ensure that our voice is heard. The Bar Council’s Brussels office has this as a key issue to pursue. If English law retains its value as a prime choice of law for international business the beneficial ripple effects for the civil and commercial Bar are obvious.

226. Thirdly, there is the benefit of supporting and promoting the rule of law. Positive and constructive dialogue with the legal profession and Governments of foreign jurisdictions can generate significant advances. The Bar’s reputation for integrity and independence assists it in this respect. A recent joint Bar Council and Law Society delegation to China met with Supreme Court Judges, Ministers and senior members of the National People’s Congress (“NPC”). The hosts were prepared to discuss sensitive issues such as the evolution of the rule of law and the role of lawyers with considerable candour. Sensitive, pragmatic engagement can lend support to
such developments and these can create business opportunities in due course.

227. Fourth, on the regulatory front the Bar Council has recently taken to inviting BSB representatives to join on overseas missions. This enables the Bar to explain to the outside world (which is sometimes bemused and even hostile to the rapid and enforced liberalisation hustled in by the LSA which is being copied and adopted in various guises by Governments all over the world) what legal reform means to the Bar and how, with determination, a profession can make reform work to its advantage without risk to professional standards. It also enables the BSB to pick up a wider range of ideas from foreign jurisdictions which will then help guide its thinking.

228. *Improving decision-making within the Bar Council:* A fourth important task is to ensure that the Bar Council in its work remains effective. We have introduced further constitutional change to ensure that elections of officers are brought forward. So many Bar Council projects have a gestation period of multiples of years that we need to avoid the risk that the fact that the Chair is a 12-month job does not lead to discontinuity or fragmentation in policy making. Bringing the election of the Vice-Chairman forward will mean that the Vice-Chairman elect, Vice-Chairman and Chairman can work, along with the Treasurer and senior staff within the Bar Council itself, as a team on projects.

229. To facilitate this, the creation of a three year strategy plan should be undertaken so that the Bar Council leadership team (which comprises not just barristers but also senior staff within the Bar Council itself) can ensure that they are constantly having an eye to future developments. This will be important for many reasons one of which is that the pursuit of Bar Council policies can be costly. We increasingly need to instruct outside accountants, economists and statisticians to help with work. On occasion we need to instruct outside solicitors to draft documents or advise. To ensure that resources are available needs pre-planning and discussion with the Treasurer and the Finance and Audit Committee of the Bar (a joint committee of the BSB and the Bar Council). A properly formulated 3-year strategic plan would improve our ability to budget for future work.

**G) Conclusions**

230. We are currently in an acute recession. This will result in increasingly severe pressures being exerted upon publicly funded practitioners but also
upon the judiciary and the courts system, yet when seeking to map out a future for an entire profession and when attempting to gauge our overall health it would be a mistake to become obsessed with the present problems and ignore the bigger picture and the fact that changes we introduce now will be as applicable in good times to come as they are in bad times.

231. In broad terms the Bar is in surprisingly robust good health. This is certainly true of the privately funded Bar which in the main has withstood the recession well and exudes confidence and optimism about the future. The publicly funded Bar feels under the cosh. It is resentful of the shabby treatment that it feels it has received from Government. The problem is that the pressure on legal aid is not going to get better for some years to come. This sector, and in particular criminal practitioners, also worry about the impact of competition that is driven by a Government policy which historically has prejudiced the Bar and encouraged HCA penetration in the face of ordinary market forces. Yet, even though there are Cassandras of doom, there are still very many publicly funded barristers who look to the future with tentative or cautious confidence and to the present work being undertaken by the Bar Council and the BSB as giving a real opportunity.

232. This must be our lodestar. Our task is to modernise the Bar and to ensure that it emerges from the recession all the stronger. I have no doubt that we can do this.

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Chairman of the Bar Council