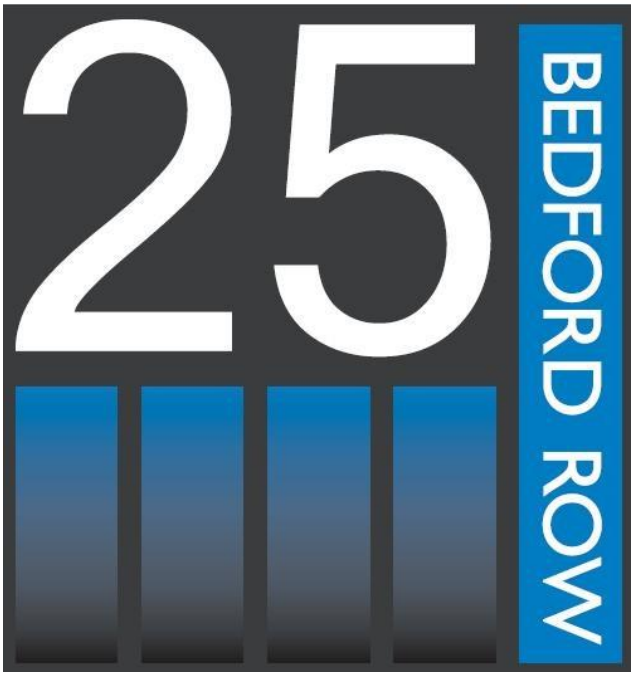

The Jeffrey Review

Who we are

1. 25 Bedford Row is considered to be one of the leading sets of criminal defence barristers in the country. We have 62 barristers of whom 18 are silks. We have a reputation for being progressive and forward thinking in our approach to the provision of advocacy services. For many years our members have been prominent in the Criminal Bar Association and the Bar Council and during this time we have had dealings with government at both official and ministerial level.

2. As part of our organic growth, we pride ourselves on a rigorous selection process for pupil barristers, an intensive education and training programme and a recruitment policy based upon equality of opportunity.

3. We make our submissions to this Review from the perspective of a set that has specialised in the provision of publicly-funded defence for nearly 40 years and we can thus draw on an immense amount of accumulated experience of the practical aspects of criminal advocacy. If this set has flourished and risen to its present position of preeminence it is for no other reason than the excellence of the advocacy services it provides to both its lay and professional clients.

A Word about Tone

4. Before we make our substantive submissions, it may assist to understand why you may think that the tone of our submissions appears rather testy.

5. Many of us at the criminal bar have been wearied by a seemingly unending series of consultations, reviews and reforms, both proposed and realised. As busy practitioners who have to respond to these various initiatives in what spare time we have (and at the criminal bar there is not very much of that) we feel as though we have no sooner dealt with one initiative before the next is hurtling down the tracks towards us. The Clementi Review about the regulation of the profession began in 2003 and a process occupying four years culminated in the Legal Services Act 2007 [LSA 2007], an act that made huge changes in the way legal services are provided and are to be provided.

6. In the midst of that process, in July 2005, the government published "A Fairer Deal for Legal Aid", setting out its long-term strategy for legal aid, and Lord Carter of Coles was commissioned to conduct an independent review into legal aid procurement. Lord Carter published his final report on 13 July 2006. The Government and the Legal Services Commission [LSC] simultaneously published a joint consultation paper on the proposals.

7. Since then, purporting to base itself on the Carter report, the Ministry of Justice/LSC [since renamed and currently called the Legal Aid Agency] have twice issued detailed consultation papers proposing to introduce competitive tendering for Lower Crime, once in 2009 and again most recently in 2013. On both occasions, what was proposed was widely and, in our view, rightly seen as posing an existential threat to the self-employed bar. On both occasions, the responses of the professions required

the investment of an enormous amount of time, energy and resources before the government abandoned its plans, not, be it noted for ever, but just for the moment.

8. Again, purporting to base itself on Carter, the three regulators formed a Joint Advocacy Group that issued no fewer than four consultation papers before recently introducing Quality Assurance Scheme for Advocates [QASA] a system of grading criminal advocates – note, not civil advocates whose standards are not demonstrably higher or in any less need of a quality assurance scheme - that has aroused near universal hostility at the Bar and no little antagonism from the Bench. It has been challenged by judicial review proceedings brought by the Criminal Bar Association and it is going to be boycotted by most of the Bar.

9. The LSA 2007 presaged large scale structural changes to the way that legal services are delivered, particularly in relation to the entities that could provide legal service and their ownership by non-lawyers; competitive tendering would hasten those changes and now QASA will effect a major transformation of the relationship between Bench and Bar to the detriment of both and of the criminal justice system as a whole. And these by no means exhaust the challenges and threats facing the professions as a whole and the publicly –funded bar in particular.

10. It is no exaggeration to say that the publicly funded defence bar in particular is fed up to the back teeth with this perpetual interference with the profession which has been unable to enjoy a sustained period of calm for a decade and more.

11. It is important that you have this knowledge of what we have endured over the last decade so that you begin to understand why this constant fiddling and demand for change and re-organisation at one level or another is itself very damaging to the profession and why the most radical approach of all might well be to propose no further change at all until the system has enjoyed a long period of stability.

12. This resistance to further change is not based on the belief that the criminal bar has attained a state of near perfection; no institution is perfect, the bar included. It is based on the belief that further change, no matter how well intentioned or designed, will have serious harmful effects simply by virtue of the fragility of the Bar as a result of all the changes, threatened or actual, it has had to endure over the last decade.

13. It takes a brave person to say enough is enough and while it may be you could think of a dozen ways that the Bar could be improved, the process of change is itself a detriment and the accumulated detriment of a decade of change has left the Bar in a fragile and demoralised state. Save to justify slashing our fees, the government seems not to acknowledge that the world in which Carter reported in 2006 has altered out of all recognition. There has never been the market stability that Carter envisioned as the pre-requisite for his proposed changes and yet the MoJ/LSC [LAA] have sought to introduce them regardless.

14. And that brings us to another point; that the deep cuts to our fees threaten the very life of the profession. Unfortunately, lawyers in general and barristers in particular are generally not held in high esteem; those who choose to specialise in criminal law are regarded as the lowest of all, on the basis that we are paid to 'get criminals off'; the public appears not to understand that half of the work of criminal barristers involves securing the convictions of defendants and most barristers both prosecute and defend. One of the things that keeps the system honest and efficient is the use of independent counsel to both prosecute and defend as this creates a culture in which loyalty to the interests of justice and the court tends to ensure the highest standards of integrity: this is no idle boast. The cumulative effect of the cuts in remuneration at the publicly-funded criminal bar have been such that the supply of highly qualified barristers who want to specialise in this field is rapidly drying up as few who now practice at the bar can honestly advise those who want to enter the profession that there is a guaranteed viable long-term future.

15. The long-term harm this will cause is, literally, incalculable. Where will the criminal justice system find the senior barristers – or solicitors for that matter – to people the Bench and provide the judiciary in twenty years time? Who will be around to prosecute the most serious and complex crimes and offenders? Those responsible for these cuts will have long moved on from their current posts before the effects of this starvation of talent have seriously damaged the administration of justice, and once the damage has been caused it will be very difficult to repair and even if possible, it will take many, many years to do so.

16. Yet at a time when incomes at the bar are falling rapidly government has saddled us with the costs of an expensive oversight regulator to regulate our regulator (there is now a whole industry of regulators) and the regulators have devised an expensive and unnecessary scheme to regulate criminal advocacy.

17. The little we know of the terms of the Review comes from the website which states that the areas being considered by the review team into criminal advocacy in the courts of England and Wales include the following:

    - Experience, capabilities and skills needed for such services
    - Arrangements for training, having regard to the recommendations of the Legal Education and Training Review
    - Standards needed to maintain and improve the quality of advocacy
    - Future structure of the profession providing advocacy services

18. In view of what we have just told you, it is perhaps understandable that our hearts sink when we see these terms as they seem to traverse ground that has already been so well ploughed over the last decade.

Experience, capabilities and skills needed for criminal advocacy

19. It is axiomatic that criminal advocates will generally emphasise that skill in criminal advocacy is something that is difficult to instill in someone unless they have some aptitude for it. The common analogy is with other skilled professions in which the desired outcome is a satisfied audience; that is to say other performance based professions such as actors or musicians. It is not enough to say that the performer will be able to learn their lines on schedule, will turn up to rehearsals on time, will understand what the director wants to achieve, will behave with consideration and courtesy to the other members of the cast and be able to work with them and will behave professionally and manage their affairs competently and then deliver all the right lines or notes in the right order and at the right tempo. The resulting performance may be completely leaden and wholly unsatisfactory.

20. It is therefore easier to enumerate the deficiencies that make for a poor advocate than it is to identify those qualities that define a good one. Any brief exposure to the multitude of differing styles of advocacy on display at, for example, the Central Criminal Court at the Old Bailey would, we suggest, confound anyone trying to

define a 'good' advocate. However it is not helpful to suggest that the qualities of a good advocate are all so elusive as to defy any attempt to list the basic requirements. They are, in the main, those identified by the LETR which itself draws upon the research of Epstein and Hundert, 2002.[1]

21. It is noteworthy that of those thirty-two qualities, none relate specifically and exclusively to criminal advocacy, although almost all are directly relevant. So what differentiates a good lawyer from a good criminal advocate?

22. There has been extraordinarily little research into how to define or measure a satisfactory outcome in the provision of advocacy services, let alone how to assess ability in advocacy.

23. It seems that current best practice in assessing quality is to review outcomes, but this has little relevance to the practice of criminal advocacy. You can not, for example, measure success by the acquittal or conviction rate of your lay clients, given that the 'input data' are so variable. In other words, an acquittal in a case where the evidence is weak says little about the quality of the defence advocate, just as a conviction in a case involving overwhelming evidence is no comment upon the effectiveness of the defence. To put this into more anecdotal terms, many a defence advocate's practice has benefitted from a convicted client telling those in prison with him that his 'brief' put up a fantastic performance against overwhelming odds.

24. So is 'consumer satisfaction' a good measure of quality? Regrettably not as for every satisfied client – convicted or not – there will be one whose expectations were, and remain, wholly unreasonable and irrational.

25. It is also important to note that the market in independent criminal advocacy is, or used to be, a very sophisticated one in that the solicitor is the client who seeks the services of a criminal advocate; the lay client usually has very little input into the process. Solicitors have a huge amount of experience in choosing the right advocate for the job and most will assert that there is no such thing as the best advocate but rather the <u>right</u> advocate for the particular case. Thus the qualities required in the advocate will vary from case to case and defendant to defendant. An advocate may

[1] Discussed in Chapter 4 of the Report and summarized in tabular form at Page 140

be the best for one particular type of case but not even worthy of serious consideration in a different case.

26. We suggest that there are basically three, and only three, guarantors of good advocacy; they are: -

    - sound training
    - a market in which the services are provided by independent advocates chosen by the professional clients
    - the only criterion influencing that choice is ability; the market is not distorted by economic factors influencing choice in favour of an advocate who may be of lesser quality but the employment of whom financially benefits the consumer

Arrangements for training, having regard to the recommendations of the Legal Education and Training Review

27. In its chapter on evidencing competence and quality the LETR Report notes that outcomes-based education and training [OBET] is increasingly the norm in all professions and the most highly developed approaches are in health and social care "where the risks from incompetent practice are particularly high".[2]

28. Whilst it is true that no one has been killed by poor advocacy – at least not since the abolition of the death penalty – the risks are still extraordinarily great. People do kill themselves as a result of poor 'outcomes' in legal proceedings, particularly if their liberty is at stake, and a conviction or term of imprisonment can have a catastrophic and lifelong effect upon an individual as well as their immediate family. The same may be true of other participants in the criminal justice system; there is an increasing focus upon the effect upon victims and other witnesses of court proceedings.

29. Yet, as noted above we are unaware of any proven method to measure ability in advocacy.

30. This is not to say that OBET is not a valid and sensible approach to *training* but simply to acknowledge that, as the Report itself says:

    "It is important to recognise that, despite their growing ubiquity, competency approaches have also been heavily criticised, particularly as to the value that competencies bring to the

[2] Paragraph 4.9

learning process, as opposed to quality assurance and accreditation. The basis of contention goes to the roots of OBET in competency-based models of training."[3]

31. Further, sound training and adequate regulation will only ever provide a 'the minimum level of competence the public is entitled to expect from a person licensed to carry out professional activities'. It will never be able to guarantee an individual consumer the best available legal representation.

32. The recommendations of the LETR with regard to training seem, with respect, eminently sensible. There are however none with regard to advocacy training! Indeed the entire report is remarkably light on any consideration of advocacy at all.

33. The Report really only reports upon the perceived deficiencies of the current arrangements.

> *"Advocacy is, of course, a critical and definitive legal skill. The risks flowing from poor quality advocacy and case preparation can be substantial. It is also an area of work where there is significant and growing competition: the BSB, the Costs Lawyer Standards Board (CLSB), Intellectual Property Regulation Board (IPReg), IPS and the SRA regulate advocacy; the Council for Licensed Conveyancers (CLC) applied to do so and paralegals are also operating in the field. Standards of specialist advocacy training on the BPTC and through the Inns of Court were generally very well regarded. The advocacy component of the Professional Skills Course (PSC) was not for the most part strongly endorsed, and was widely considered irrelevant to City practice*
> *The amount and quality of advocacy training on the LPC came in for the strongest criticism: '... advocacy is so poorly taught on the LPC it is almost irrelevant'; 'pretty rubbish'; 'very disappointing' are among the phrases used.*[4]

34. The Report makes no mention at all of pupillage and the training in criminal advocacy provided by the independent Bar.

35. This depressing picture of the inadequacy of advocacy training *at this level* is provided by the quoted observations of a group of district judges who, commenting on advocacy in general in the magistrates courts, highlighted a number of common failings by advocates:

- poor preparation;
- lack of familiarity with the papers;
- failure to understand law and procedure (eg, unable to tell the judge what his or her jurisdiction is for a particular action or order);

[3] Paragraph 4.46
[4] LETR Report Paragraph 2.88-89

- limited advocacy skills;
- lack of familiarity with courtroom etiquette;
- inability to learn from own errors.[5]

36. It would be dangerous to infer from this that, because an increasing amount of magistrates court advocacy is conducted by solicitors that members of the independent bar are immune from criticism. However, these criticisms of advocates in the lower courts are routinely echoed by pupil barristers in our Chambers who recount frequent stories of how, in their own experience of appearing in cases in these courts, they are appalled by the poor quality of the advocacy they witness.

37. In the LETR Report it was noted that solicitors in small legal aid firms devoted six times the amount of time to advocacy compared to the average across the profession. One has to ask why this is the case: is it because they are better qualified to do so than their counterparts in larger firms? This seems unlikely. Our experience is that solicitors in these types of firms are forced to undertake advocacy as a way to supplement the firm's income, regardless of whether the lay client is better served that way, rather than briefing the case out to a competent barrister. It is not changes in legal education that have resulted in this collapse in advocacy standards in the lower courts. It is the unintended consequence of the change in the structure of remuneration for litigation work, as well as the rates payable. The rates are the same for independent barristers as they are for employed solicitors, yet more work is kept 'in house' so that the firm can extract surplus profit from the work by paying their employees less than the amount of fees they earn. This is not illegal nor is it unethical, but it distorts the market.

38. In Chapter 2 of the Report the LETR notes that many of the key structures of legal services education and training [LSET] for barristers and solicitors have remained largely unchanged from the first review in the Ormrod Report in 1071 which:

- determined that the law degree should become the normal route of entry to the profession;
- proposed a 'Common Professional Examination' (now Graduate Diploma in Law or GDL) for non-law graduates;
- emphasised a linked but separate vocational stage of training and
- proposed the need to develop a system of structured 'continuing education' [6]

[5] Paragraph 2.91

39. We do not propose to review the current approach or the Report's recommendations; as we have already said, they appear to be mainly sensible and justified.

40. However there is one aspect of the Report which causes us some concern and it is in the area of regulation and training. As we go on to consider in the next section dealing with the future of the profession, we have serous concerns about the unintended consequences of changes in regulation, structure and remuneration which we believe are already, and will continue at an accelerating rate, to cause irreparable harm to the provision of criminal advocacy services.

41. The LETR report naturally focuses upon training and education but it has an unfortunate tendency to assume that training is a panacea for all ills; it fails to recognise that the workplace culture and the influence of overwhelming economic conditions will always trump any amount of training. For example, in its discussion of the role to be played by regulatory bodies it states that: -

> *"A number of responses to the LETR research focused on the perceived risks posed by those outside existing regulation, working in completely unregulated entities (discussed below). A greater proportion, however, focused on risks from unregulated groups working within or alongside regulated entities. A significant concern for the LETR is the impact of these developments on the competence and quality of the workforce."*[7]

42. So far so good and it goes on to say: -

> *"The core functions of regulation of education and training survive the LSA 2007. A central purpose of any regulatory system for professions must be to maintain the competence of the workforce. Competence is both an end in itself and a means by which the regulators advance consumer and public interest objectives."*[8]

43. However, it then concludes that as the move to a system of outcome focused regulation creates an obvious synergy with outcomes-led approaches to education and training: -

> *"outcomes-focused regulation will necessitate achievement of a proper balance between the regulatory requirements placed on entities and individuals, and raises questions as to whether* ***greater responsibility for quality assurance should be given to those involved in training. Regulators will need to focus their attention on ensuring***

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[6] Paragraph 2.5
[7] 3.55
[8] Paragraph 3.57

that necessary standards of competence are being achieved through LSET but in a manner that is proportionate to the risks.

44. If this means that there should be more attention paid to quality assurance during training that is to be welcomed. If it means – as it appears to - that more responsibility for quality assurance should be transferred from those regulating the professions on to those training , thus reducing the attention paid to regulation of competence after qualification, this can only lead to a decline in standards. Furthermore, quite what is meant by 'in a manner that is proportionate to risk' is left unclear.

Standards needed to maintain and improve the quality of advocacy

45. It is interesting to note that at various points in the Report the authors note that it is the high standards of professionalism and ethics in the English legal services industry that are both its greatest source of pride and its unique selling point internationally, yet they are perceived as under threat. It is ironic that the changes in regulation over the past decade or two were supposed to safeguard standards but their unintended consequences have been precisely the opposite.

46. The report notes that on the one hand: -

> *The quality and international standing of English and Welsh lawyers were widely declared by participants in focus groups and interviews and respondents to discussion papers, ….. Many of these also emphasised that the LETR should not do anything that would diminish that reputation, and the international competitiveness of the law of England and Wales. In terms of isolating those features that contribute to the standing of the English and Welsh professions, a number of respondents emphasised the commitment to maintaining what was often referred to as a 'gold standard' of qualification. This could mean something different for different professions. For some, ….it was the basic rigour of the qualification and its assessment, … Others, across a range of occupations, highlighted the significance of good quality work-based learning.*[9]

47. On the other hand the Report also issues a stark warning: -

> *"Professional ethics, and its regulation, are seen as a critical defining feature of professional service. For many practitioners, the growing commercialisation of practice, including the advent of ABSs,38 threatens, as one solicitor put it, the profession's 'moral compass'. These concerns were expressed across most of the sector, and not just by practitioners: …..they need high ethical standards. And I think again the way it is becoming a business and not a profession is meaning that those matters are being neglected.* **Academic**

[9] Paragraph 2.111

The principal change is that all lawyers (including the self employed) now seem to be regarded as running a business, rather than conducting a profession. Chancery Bar Association response to Discussion Paper 01/2012
Our concern, I think, is with commercial providers coming into the legal market that they will adopt a very business attitude to the delivery of legal services, just like any other commodity and will lose the professional ethos of really putting your client first. **Solicitor**[10]

48. There is an obvious tension and contrast in the views of those surveyed for the LETR Report between students and practitioners. Students – who would have already invested huge sums in obtaining their basic qualifications - complained of the barriers restricting their ability to practise; for example the difficulty in getting pupillage.

49. This outcome is the direct result of liberalising the market in the provision of these qualifications. That liberalisation was intended to increase competition, thus reducing the costs to students and improve standards. The opposite seems to have happened with a huge increases in the costs of fees. Added to that is the unintended consequence that there are now huge numbers of dissatisfied graduates who feel they have been misled into incurring huge financial liabilities with little prospect of their investment translating into a worthwhile employment opportunity.

50. This is how the Report describes the situation and dissatisfaction: -

The largest concerns among those who were critical of the system related to growing student numbers and the escalating cost of qualification. ….. despite excess capacity and contraction of the market, there are still currently more LPC graduates than training contracts, creating a further bottleneck in the system. Numbers seeking access to the BPTC, despite the enormous difficulties of obtaining pupillage, continue to grow (Bar Council/BSB, 2012).
It is clear from analysis of the data that there is a significant level of concern, if not anger, among those who have invested much time and money in the initial stages of education and then been unable to find qualifying employment within the regulated sector. [11]

51. Practitioners on the other hand were worried that lowering these barriers would simply dilute the quality of the profession and lead to more, and more poorly qualified, advocates competing for work and prepared to accept lower remuneration for the same job, simply in order to recoup their investment in education.

[10] LETR Report Page 34
[11] Paragraph 132-134

52. As far as entry to the Bar is concerned there is growing concern over the disparity between the numbers of students that the providers of qualifications are prepared to accept and from whom they collect very high fees, and the number of actual job opportunities on offer once they qualify. As the Report says: -

"Options, beyond paralegal work, for those seeking entry to the Bar are, if anything, more narrow given the number of BPTC graduates chasing a very small number of pupillages. It is unlikely that, if implemented, proposals in the Burton Report (COIC, 2012) to create additional pupil numbers will make a significant difference. The likelihood of further attrition in the wake of changes to both legal aid and personal injury funding also cannot be ruled out.[12]

53. This conflict is not explicitly addressed in the report although the validity of the practitioners' concerns is implicitly recognised by passages such as the one quoted above concerning maintaining the gold standard of qualification.

54. The LETR Report is of course focussed upon education and training in all areas of law but it appears to us remarkable that it devotes one paragraph in 371 pages to the question of advocacy training and not even a whole sentence to criminal advocacy training[13]. This is the paragraph in full: -

"Longstanding concerns about the variability of the quality of advocacy quality have already led to the development of the Quality Assurance Scheme for Advocates (QASA). It is also acknowledged that there have been significant advances in the development of advocacy on the BVC and BPTC, and through the Bar's New Practitioners' Programme which have made a significant difference to the level of initial advocacy training. The quality of advocacy training was strongly endorsed by pupils and first year tenants surveyed by the Bell Working Party in 2004, and this finding was largely replicated by the student survey undertaken for the Wood Review (BSB, 2008), though this indicated that the standard of criminal advocacy teaching was generally rated more highly than that for civil advocacy. By contrast, the quality of advocacy training for LPC students and trainees has not been so highly regarded by either the students or third parties. This problem is exacerbated by doubts as to the quality of the advocacy training on the Professional Skills Course taken during the training contract."

[12] Paragraph 2.137

[13] This is not to ignore the brief references to the current system in Chapter 2 at Paragraphs 2.88 to 2.92, although these mostly focus upon current deficiencies

55. Leaving aside for the moment that the Bar believes that QASA is worse than useless as a means of assuring quality, the Report makes no distinction between the contribution to advocacy training made by these providers and that made by the Bar: this is astonishing. It is important to note that advocacy training by the Bar is, in contrast to the BVC, BPTC or the LPC, non-profit making. Indeed the Report does refer to the fact that "the high cost of vocational training, combined with the number of available places on vocational courses, was a particular issue of contention among LETR research respondents. Many were critical of a system which, with LPC fees rising to over £13,000, and BPTC fees as high as £16,000, they saw as operating to the benefit of course providers more than the trainees or employers."

56. This highly important and contentious issue is left largely unaddressed but that omission is aggravated by the fact that nowhere in the Report is it acknowledged that, by contrast advocacy training provided by the Bar is provided by self-employed members of the Bar donating their time and expertise for free, simply to help maintain the high standards of advocacy that are the hall mark of the independent Bar. It should be appreciated that not only are criminal barristers' incomes declining in absolute terms but we are also having to work longer and longer hours as well, meaning that there are fewer hours in the day to devote to the many pro bono services that we have traditionally provided. Just as with the provision of pupillage, this advocacy training is under threat from the decline in criminal barristers' incomes and in the long term will suffer permanent damage as the quality of criminal barristers declines as a result of fewer and fewer entrants to the profession choosing criminal law as their chosen specialism. Training in criminal law advocacy thus faces a vicious and spiralling circle of decline.

Future structure of the profession providing advocacy services

57. In the light of the brief history we set out at the start of our submission, this phrase, *"Future structure of the profession providing advocacy services"* is one to chill the heart of any self-employed criminal barrister.

58. We note the terms of reference of the review do not include consideration of the remuneration rates for criminal advocacy and we do not intend to address that issue in any detail. However, given that the vast majority of criminal defence work in this country is publicly-funded and all criminal law advocates are effectively trained by, and at the expense of, members of the profession themselves, the level and structure of funding has a direct effect upon the supply of criminal advocacy and the provision of training in criminal advocacy and thus can not be ignored when considering the four key areas of the review.

59. The Legal Education and Training Review [LETR] announcing its report this year states in its first paragraph: -

> *"The review was established at a time of unprecedented change for the legal profession - caused by economic and technological change, market liberalisation and dramatic funding reforms - to survey the current state and future requirements of legal services education and training"*

60. The Report itself refers several times to the impact upon the future provision of publicly legal services of the cuts in Legal Aid. In Chapter 3 it deals with this issue directly[14]:

> *Having noted that the National Audit Office in 2009 recorded over 50% of criminal legal aid firms doubted that they would still be undertaking legally aided work five years hence and that 60% of criminal barristers have seen their work decline over the last year, and 50% had also seen a decline in fee income, the Report states that 40% of criminal law practitioners stated they would not choose the Bar if they could start their careers again.*

61. Is there a danger to the quality of criminal legal services resulting from this decline? The high cost of legal training and the relatively low return on publicly funded work were seen by respondents to the Report as creating real risks to the quality of legal aid services and the diversity and representative nature of the professions in this field:

> *At the publicly funded bar the government prizes ability far lower than it prizes affordability. For this reason the general level of candidates' competence and potential is reducing every year and the ability of those from a lower socio-economic background to even study for the bar is being damaged; the low remuneration at the criminal bar combine with the massive training costs to make the career increasingly unviable for all but the wealthiest. Barrister (online survey)*

[14] At Page 84

...there's certainly going to be fewer trainees in the legal aid subjects ... they will use paralegals where they can which means that in ten, twenty years time the qualified solicitors are not going to be there to do that sort of work. Solicitor

62. One of the issues that the Report considers is the need to ensure diversity of the professions and devotes considerable attention to how this might be achieved. However, these well-intentioned aims will come to naught as the Report itself highlights the risk that the changes will negatively impact upon the diversity of the professions There are very different demographic profiles for self-employed barristers across different categories of work, with BME and female barristers working in areas associated with public funding. Twice as many women work in family as in any other practice. BME barristers are most likely to work in civil law (14%) and family (10%). Publicly funded work dominates crime (87%) and family (58%). LSB analysis of SRA data suggests that a greater proportion of BME firms undertake work in immigration, crime, and family compared to non-BME firms. Furthermore, 23% of all BME firms derive more than 50% of their income from public funding compared to just 7% of non-BME firms (LSB, 2012:35). [15]

"Which means that people that require the best representation ... are not necessarily going to get it because many chambers are saying well let's look at disciplinary work, let's look at branching into other areas of work. I think that is a threat to the Bar in the sense that the Bar should be seen as providing the best representation for the most vulnerable members of society. It should be able to say to the public: that's what we are here for. And unfortunately there are only certain sets with a particular ideological view that are actually willing to say we'll take the hit and just do publicly funded work." [16]

63. As the Report succinctly puts it:

"These reforms have implications for access to justice, consumer choice and the quality of the legal system in England and Wales, all matters of concern to the approved regulators and likely to have consequences for LSET in the future."[17]

64. It is ironic that the LSA 2007's regulatory objectives, addressed as they are to the approved regulators, are supposed to shape the context within and principles by which all legal services providers operate. They are:

- _protecting and promoting the public interest;
- _supporting the constitutional principle of the rule of law;

[15] Paragraph 3.3"2
[16] Paragraph 3.34
[17] Paragraph 3.35

- _improving access to justice;
- _protecting and promoting the interests of consumers;
- _promoting competition in the provision of services;
- _encouraging an independent, strong, diverse and effective legal profession;
- increasing public understanding of the citizen's legal rights and duties;
- _promoting and maintaining adherence to the professional principles.

65. It can reasonably be argued that all of these are adversely affected by the change in the system of remuneration for publicly funded criminal defence work. In particular, the growth of the in-house employed advocate, instructed instead of the best available independent advocate directly contradicts and frustrates all these objectives and in particular the protection of the interests of consumers, the promotion of competition, and the encouragement of an independent, strong, diverse and effective legal profession.

> *"Responses in the research data indicated widespread concerns about the future impact of the funding changes in degree education and increased levels of indebtedness amongst trainees. The prospect of the total debt for English students who have completed a degree and vocational training climbing to £50,000 to £60,000 or even more, could have a disproportionate impact on non-traditional and disadvantaged entrants, who may be more likely to come from social and cultural origins that are more debt-averse. This was thought to create particular challenges for the Bar, given the risks of self-employment, and the increased financial pressures on publicly funded work"*[18]

66. We began by observing that the changes in the structure and level of remuneration in publicly funded work, together with well-intentioned changes in regulation, will have an effect both upon the future of the independent Bar and, by extension, the provision of legal education and training. In turn, the future structure of the profession will have a profound effect upon the provision of advocacy services.

67. As the LETR Report noted time and again, professional ethics are at the heart of the provision of legal services and nowhere more importantly than in criminal advocacy.

68. The Bar has always provided an invaluable – in the truest sense of that word – service in providing the finest advocacy training to would-be criminal advocates and at no cost to them or to the State. This has been paid for out of their own pockets by members of the independent Bar as we have always acknowledged a responsibility to the criminal justice system and to the wider public to do so. We recognised the

[18] Paragraph 6.14

need to have objectives such as protecting and promoting the public interest, supporting the constitutional principle of the rule of law, protecting and promoting the interests of consumers, promoting competition in the provision of services, encouraging an independent, strong, diverse and effective legal profession and promoting and maintaining adherence to the professional principles long before these were enshrined in the Legal Services Act 2007.

69. Whatever reforms are undertaken in the provision of legal education and training we urge this review to recognise that contribution and, more importantly, the threats to it that are implicit in the reform of legal aid.

70. This is a government that believes in the supremacy of the free market and that regulation of such markets should be kept to a minimum save where it is shown that that market is for some reason or other defective. It is our view that legal services market is not all defective, quite the contrary, it has over time evolved a mechanism for ensuring that specialised trial lawyers are freely available to a range of litigants rich and poor. The impoverished litigant in Leeds or Luton is no less able to instruct leading counsel of her choice than her well-heeled London counterpart. The reason for this is the way the Bar is organised and has been for centuries. In this context it is instructive to reflect upon how the free market in lawyers has evolved over time.

71. At a very early stage in its history, the English legal system developed a specialised cadre of *advocates* whose job it was to plead cases in court. English law then, as now, had a strong belief in oral proceedings and advocates were the first specialised lawyers, predating the rather more numerous solicitors by several centuries.

72. But while trials needed trial lawyers, not every legal dispute needed a trial. As the legal system matured, there was more to law than dispute resolution and more to dispute resolution than trials. English common law was forged in the courts and as the corpus of authoritative decisions grew, the need to conduct trials in every dispute was reduced. Over time, the proportion of legal matters that needed to be resolved in court naturally fell and so there were fewer trial advocates than lawyers.

73. And while solicitors gradually organised themselves into firms, it was uneconomic for these firms to employ advocates because trials themselves were occasional and unpredictable. Advocates remained self-employed sole practitioners, perhaps one of the earliest examples of the modern fashion for outsourcing. In order to share the rather rudimentary administrative services they required, advocates would often share premises and staff, organising themselves into small groups called 'chambers' or 'sets'.

74. This division into firms of solicitors and sets of chambers evolved in the free market many years before the introduction of Legal Aid. It's crucial to bear in mind that this was how the free market organised itself to deal with the two key aspects noted above, namely, that advocacy is a specialised skill; and that only a minority of legal matters ends up in court. In other words, the division of lawyers into advocates and solicitors was not a structure imposed in the interests of one or other group (e.g. consumers) but one that grew out of the demands of the free market. Form followed function as in every well-designed structure it should.

75. Over time, both firms and sets have grown in size, so that whereas a set a hundred years ago might have had as few as four members, the average sets today are about 60 strong and several are two or three times the average. But this growth has not altered the fundamentals of function and form.

76. And neither has the introduction of Legal Aid in 1949. Of course, a very significant minority of criminal cases do end up in court and require the services of an advocate (still a minority; most criminal cases are dealt with in the magistrates' court and most of those are driving matters where no advocates are required). As a result of the availability of Legal Aid in crime, a specialised criminal bar evolved that is now the most numerous specialised sector of the whole bar. There are now sets that specialise in crime and that derive most of their income from Legal Aid. One reason for this is that criminal matters are, compared to civil matters, 'litigation light' and 'advocacy heavy'. The reason is simple: most civil matters can be, and are, resolved without going to court, almost all criminal matters end up in court. The opportunities to resolve a criminal charge by arbitration or negotiation are pretty limited.

77. The benefits of specialism and expertise are too obvious to need spelling out, despite the fashion for devaluing and denigrating them as self-serving elitism. So long as there are trials in this country, there will be a need for trial lawyers. This division and these structures that the free market evolved have worked very well for centuries and the onus is surely on those who advocate change to identify why they need to be changed and how change will improve things.

78. The unstated implication of this term "*Future structure of the profession providing advocacy services"* is that the future structure of the profession will be different from the existing, but why should that be so? The existing structures have evolved in a functioning free market, why should they change?

79. But we do not rely on a simple appeal to history, this is not an argument that we should not change because we have always done it this way. It so happens that this is the most efficient way because it ensures that the best use of resources at the lowest cost. It ensures that the client is given the best and most suitable advocate for her case. It ensures that all of the money for advocacy goes to the advocate. It avoids conflicts of interest between the client and the advocate. It ensures there is real independence for the advocate. No other structure that we have examined will do this.

80. Any firm of solicitors, no matter how small, is able to obtain the very best advocacy on offer by utilising the self-employed bar, there is complete freedom of choice.

81. If a firm employs its own advocates then considerations of whether they have the right experience and skill for a case will vie with concerns for the firm's bottom line and those advocates will tend to be instructed for obvious economic reasons. There will always be a conflict between the interest of the client and the interest of the firm.

Conclusion

82. This paper is, in part, a summary of the many and varied arguments we have advanced over the years as various governments and bodies have examined the structure of the legal system and the way in which it is funded. We have always been open to arguments as to how and why the system could change, but have more often than not concluded that the desire for change often seems motivated by a forgone conclusion that change is a desirable end in itself – and the failure to recognise the value of what already exists. When this is coupled with the illusion that 'cheaper' is synonymous with 'more efficient', then a potent and dangerous threat to the future provision of legal services is created.

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