

BAR
STANDARDS
BOARD

REGULATING BARRISTERS

Meeting of the Bar Standards Board

Thursday 22 May 2014, 4.30 pm

**Room 1, First Floor, Bar Standards Board Offices,
289-293 High Holborn, London, WC1V 7HZ**

Agenda

Part 1 – Public

			Page
1. Welcome and introductions (4.30 pm)		Chair	
2. Apologies		Chair	
3. Members' interests and hospitality		Chair	
4. Approval of Part 1 (public) minutes:			
• 27 March 2014	Annex A		3-8
5. Matters Arising		Chair	
6. a) Action points and progress	Annex B	Chair	9-11
b) Forward agendas	Annex C	Chair	13
<u>Items for discussion</u>			
7. Proposed BSB Equality Objectives 2014-15 (4.40 pm)	BSB 028 (14)	Rolande Anderson / Jessica Bradford	15-30
8. Performance Report for Q4 and Year-End 2013-14 (April 2013 – March 2014) (4.50 pm)	BSB 029 (14)	Anne Wright / Andrew Cohen	31-50
9. Jeffrey Review on Advocacy preliminary discussion points (5.10 pm)	BSB 030 (14)	Chris Nichols	51-134
10. Standing Orders amendment (5.25 pm)	BSB 031 (14)	Amanda Thompson	135-158
11. Scheme of Delegations (5.30 pm)	BSB 032 (14)	Amanda Thompson	159-163
<u>Items for noting</u>			
12. Duty to promote economic growth (5.35 pm)	BSB 033 (14)	Amanda Thompson	165-182
13. Chair's Report on Visits and Meetings: Apr 14 – May 14	BSB 034 (14)	Chair	183-184
14. Director's Report (5.40 pm)	BSB 035 (14)	Vanessa Davies	185-196

15. **Any other business**

16. **Dates of next meeting**
Thursday 26 June 2014

17. **Private Session**

John Picken
Board & Committees Officer
JPicken@barstandardsboard.org.uk
15 May 2014

<p>BAR STANDARDS BOARD</p>

REGULATING BARRISTERS

Part 1 - Public**Minutes of the Bar Standards Board meeting**

Thursday 27 March 2014, Room 1, First Floor
289 – 293 High Holborn, London, WC1V 7HZ

Present	<p>Ruth Deech QC (Hon) (Chair) Rolande Anderson Rob Behrens – items 8-13 Sarah Clarke Malcolm Cohen Justine Davidge Simon Lofthouse QC Patricia Robertson QC Tim Robinson Andrew Sanders Sam Stein QC Richard Thompson Anne Wright</p>
Attending by invitation	<p>Sarah Brown (Special Adviser) – items 8-13 James Wakefield (COIC representative)</p>
BSB Executive in attendance	<p>Joseph Bailey (Policy & Projects Officer, Regulatory Policy Dept) Viki Calais (Business Manager) Andrew Cohen (Business Support Officer) Vanessa Davies (Director) Chloe Dickinson (Governance Support Officer) Eugene Grant (Communications & Press Officer) Suchitra Hammond (Senior Policy Officer, Regulatory Policy Dept) Oliver Hanmer (Head of Supervision) Ewen Macleod (Head of Regulatory Policy) Chris Nichols (Supervision Policy Manager) John Picken (Board & Committees Officer) Robert Pragnell, Senior Policy Officer, Regulatory Policy Dept Amanda Thompson (Head of Strategy & Communications) Simon Thornton-Wood (Head of Education & Training)</p>
Bar Council Executive in attendance	<p>Stephen Crowne (Chief Executive, Bar Council)</p>
Observer	<p>Tim Fry (Member, Governance, Risk & Audit Committee)</p>

Item 1 – Welcome and introductions

1. The Chair welcomed members and guests to the meeting.

Item 2 – Apologies

2.
 - Sam Stein QC;
 - Stephen Collier (BC Treasurer);
 - Nick Lavender QC (BC Chairman);
 - Mark Hatcher (Special Adviser to BC Chairman, Representation & Policy);
 - Joanne Dixon (Qualifications Manager).

Note: Emily Windsor (Special Adviser) and Ben Denison (Chief Information Officer) attended for items in Part 2 of the meeting only.

Item 3 – Members’ interests and hospitality

3. None.

Item 4 – Approval of Part 1 (public) minutes – 20 February 2014 (Annex A)

4. The Board approved Part 1 of the minutes of the meeting held on Thursday 20 February 2014.

Item 5 – Matters arising

5. Feedback about the Handbook – comments / queries from barristers (min 7 – 20/02/14)

The Chair asked about feedback from barristers on the new Handbook, in particular, as to whether there were any demonstrable patterns to enquiries. Ewen Macleod advised that:

- the Bar Council’s ethics helpline had been busy since the launch of the Handbook but that there had not been any stand-out issues. Many enquiries were from barristers still unused to the “permissive” nature of the Handbook who had largely sought reassurance as to the legitimacy of proposed courses of action;
- initial enquiries predominantly concerned authorisation to conduct litigation but these have since reduced in volume. Others either concerned entity regulation and alternative business models or have identified some typographical errors which have since been addressed;
- one particular line of enquiry concerned the management of confidential information when work is outsourced to junior staff. In response, the Bar Council will produce guidance on the data protection principles involved.

Item 6 – Action Points & Forward Agendas

6. Action points and progress (Annex B)

The Board noted the updates to the action list as set out in Annex B.

7. Forward agendas (Annex C)

The Chair commented as follows:

- there will be a further discussion on the implementation of the Legal Education and Training Review (LETR). The forward agenda list will therefore be amended to reflect this;
- the Board Away Day (30 April) will be held at The Hatton, 51-53 Hatton Garden, Holborn EC1N 8HN.

Item 7 – Governance Manual

BSB 019 (14)

8. The Board considered the Governance Manual. The following comments were made:
- the Manual has been subject to considerable revision and scrutiny by the Governance, Risk & Audit Committee but is now complete;
 - there is no direct reference to the management of conflicts of interest. This is covered in Standing Orders but it would be useful to include a reference in the Manual as well;
 - notwithstanding the annual review cycle and the embedding provisions set out in paragraph 9 of the report, the Manual needs to be actively used as a reference tool throughout the year. There may be scope for linking it with Board appraisals / skill requirements. This could be discussed at the Away Day.
9. The Board commended the thoroughness of the Manual and thanked Chloe Dickinson for her work in its production.
10. **AGREED**
- a) to approve the Governance Manual subject to inclusion of an additional paragraph on conflicts of interests with cross references to the Standing Orders. **CD**
 - b) to note the activities set out in paragraph 9 of the report concerning implementation of the Governance Manual.
 - c) to request that the Governance Manual features in discussion at the Board Away Day in April 2014. **VLD to note**

Item 8 – Supervision – programme of activity for 2014/15

BSB 020 (14)

11. Chris Nichols highlighted the following:
- the programme of activity includes specific supervision projects as well as general supervisory work. The projects planned are:
 - ❖ impact audit surveys to identify risk impact scores (April – May 2014);
 - ❖ supervision returns from the 400 chambers with the highest impact scores (June-September 2014);
 - ❖ thematic reviews targeted at specific high risk areas such as immigration, litigation and public access work (October 2014 – March 2015);
 - ongoing supervisory activity relates to working with chambers and entities to reduce risk ratings. Priority will be given to chambers / entities that have been assessed as high risk. Where necessary, it will also involve visits to chambers / entities;
 - the work of the Pupillage Sub-Committee has been subsumed by the Supervision Team. In consequence visits might also be made in response to specific issues concerning pupillage.
12. Members commented as follows:
- there may be insufficient time to undertake a large thematic review if a smaller scale undertaking is expected to take three weeks as indicated in paragraph 37 of the report;
 - the inclusion of barristers on visiting panels would add expertise and gravitas. This has been the case with those organised in the past by the Professional Conduct Department;
 - it would be useful to understand the future reporting mechanisms to the Board and the timetable for these;

- responsibility for compliance with the Handbook remains with barristers. We must avoid giving any impression that the momentum for this has transferred to the Supervision Team.
13. In response, the following comments were made:
- the original intention was that visits are staff led. The Supervision Team will increase its expertise with experience and it would also give a positive message about the Board's confidence in BSB staff if visits remain led by staff. A number of pilot visits are being arranged and the desirability of including barristers can be assessed from the feedback received;
 - notwithstanding the above, and as set out in paragraph 15 of the report, there will be a panel of advisers established with expertise in each area of regulatory activity;
 - the ongoing work of the Supervision Team will be summarised in the Director's report to the Board. There will also be an annual reporting cycle focusing on trends over time and the management of risk.
14. **AGREED**
to note the proposed supervision activity for 2014/15 and the arrangements contained therein.

Item 9 – Chair's Report on Visits and Meetings: Feb 14 – Mar 14

BSB 021 (14)

15. The Chair referred to her report on visits and meetings and highlighted the following:
- the high quality of the advocacy lecture she attended at Gresham College (5 March 2014) conducted by Sir Geoffrey Nice QC and Sarah Clarke;
 - her meeting with Paul Philip, the new Chief Executive of the Solicitors Regulation Authority (26 March 2014). She intends to meet the new Chair of the SRA, Sir Michael Pitt, in April.
16. **AGREED**
to note the report.

Item 10 – Director's Report

BSB 022 (14)

17. The Board considered the Director's report. The following comments were made:
- the fuller style of the report is welcome as it provides a good overview of activity for both the BSB and the support provided by Central Services;
 - cumulatively, the reports will be useful reference tools for compiling the BSB Annual Report as well as for new Member inductions;
 - PRP Committee members have already expressed an interest in receiving the Director's reports. Whilst they are already publicly available via the website, it would be helpful if they were mailed separately both to them and other non-Board members of BSB committees.
18. **AGREED**
- a) to note the report.
 - b) to request that the Director's report be routinely mailed to non-Board members of BSB Committees.

JP

Item 11 – Any Other Business

19. Strategy update, Business Plan 2014-15 & Budget 2014-15 – final version
The Board considered the above item in private session. This was because the relevant agenda paper was issued in advance of the Bar Council's Finance

Committee meeting held on 25 March 2014. This meeting considered the budget for 2014/15 and associated staffing changes. In consequence it was not possible for the Board to publicly commit to a schedule of activity without first having formal approval for its expenditure plans. This meant the item needed to be marked for consideration in private session.

20. On the day of the meeting, however, the Board did resolve to make these documents, and the debate relating to it, publicly available in line with previous practice. The minutes arising from discussion on that item are therefore given below.
21. The Director commented that:
 - the content of the strategic plan update and business plan reflect the guidance given by the Board at its meeting in February including amendments to the KPIs for equality and diversity;
 - the Finance Committee approved the budget pending agreement on the apportionment of costs between the Bar Council and BSB for shared services;
 - the Chief Executive is developing a longer-term planning initiative for the whole organisation which will impact on the BSB, eg in terms of the future office location. It would therefore be helpful if he attended the April Away Day to discuss this further.
22. Members commented as follows:
 - the Business Plan refers to setting out how Freedom of Information (FOI) compliance could operate within the BSB, were this to be necessary. Our default position should already be to disclose information where appropriate;
 - allied to the approach to FOI, further consideration of the amount and types of business taken in public and private sessions of the Board is merited to ensure transparency is appropriately addressed;
 - there is no benchmark figure to measure success for the number of reports of serious misconduct (Strategic Aim 3b);
 - in subsequent years, it would improve presentation if we could succinctly demonstrate how much of our resources are allocated to each strategic objective;
 - the Chief Executive should be invited to attend the Away Day (cf min 21 above) but this should be to simply to present his findings. The Board will discuss the points raised in private and provide feedback through the Chair and Director at the Bar Council meeting in June;
 - given their past input, it would be appropriate to forward the final version of the business plan to members of the PRP Committee.
23. In response the following comments were made:
 - at present, the BSB would face difficulties in achieving full FOI compliance. The Act gives specific requirements for response times, as well as data that must be published and maintained, all of which has resource implications;
 - the Senior Management Team does already address the issue of paper status at its pre-agenda meeting. Notwithstanding this, there would be some benefit if the Board could develop a set of principles at its Away Day on the extent to which items can be considered in public. This will need to address the Board's appetite for how much it wishes its policy development process to be disclosed to the public;
 - the duty for members to report instances of serious misconduct only came into effect from 6 January 2014. This explains the absence of a benchmark figure;

- we do not have sufficient cost activity analysis data to give information on resource allocation by objective. The pie chart on the BSB budget shows how the money is divided between Departments.

24. **AGREED**

- | | | |
|----|--|----------------------------|
| a) | to endorse the content of the business plan 2014/15. | AC to
note |
| b) | to note that these activities will be monitored quarterly by the PRP Committee and the Board during 2014/15. | |
| c) | to note the revised 2014/15 budget and staffing changes. | |
| d) | to endorse the newly proposed strategic KPIs and measures. | AC to
note |
| e) | to circulate the final business plan document to the PRP Committee. | AC |
| f) | to develop a set of principles on disclosure at the April Board Away Day to help guide which items should be included in either public or private session. | AT / JP to
note |

Item 12 – Dates of next meeting

25. Wednesday 30 April 2014 (Board Away Day).
Thursday 22 May 2014 (Board meeting).

Item 14 – Private Session

26. The following motion, proposed by the Chair and duly seconded, was agreed:

That the BSB will go into private session to consider the next items of business:

- (1) Discussion with the Bar Council Chief Executive and Chief Information Officer on IT;
- (2) Approval of Part 2 (private) minutes – 20 February 2014 (Annex A);
- (3) Matters Arising;
- (4) Action points and progress – Part 2 (Annex B);
- (5) Strategy update, Business Plan 2014-15 & Budget 2014-15 – final version;
- (6) Scheme of delegations;
- (7) Cab rank rule and public access;
- (8) Development of Education & Training Regulation in light of the Legal Education & Training Review;
- (9) Any other private business;
- (10) Note on appointment of Chair in succession to Baroness Deech QC (Hon) Jan 2015 and appointment of Board members for 2014 and 15 (*item was deferred from the February meeting*).

27. The Bar Council Chief Executive and the Chief Information Officer were invited to attend for item 1 of the Part 2 agenda (discussion on IT). This followed the Board's meeting on 20 February when it reviewed the corporate risk register and noted the critical dependencies on IT projects. In consequence the Board had asked to discuss IT governance with the Bar Council Chief Executive at the March meeting.
28. The Chief Executive outlined a number of steps to improve the governance and project management of IT. The Board asked the Senior Management Team to give this further consideration and requested an update report in July.
29. The meeting finished at 5.30 pm.

**BSB – List of Part 1 Actions
22 May 2014**

(This includes a summary of all actions from the previous meetings)

Min ref	Action required	Person(s) responsible	Date of action required	Progress report	
				Date	Summary of update
10a (27 Mar 14)	include an additional paragraph on conflicts of interests in the Governance Manual as well as relevant cross references to the Standing Orders and publish following Board approval in public session (May meeting)	Chloe Dickinson	amend text immediately; publish after May meeting		Completed - already approved in public session
18b (27 Mar 14)	arrange for the Director's report to be routinely mailed to non-Board members of BSB Committees	John Picken	immediate	14/04/14	Completed - Director's report mailed to non-Board Committee Members via Committee Secretaries
12c (21 Nov 13)	undertake a further review to the Standing Orders	Amanda Thompson / Chloe Dickinson	by end Sep 2014	13/5/14	New timeline needed to reflect decision to undertake fundamental review taken by the Board at the Awayday.
				11/02/14	Consideration to some principles to be given at April Awayday
				14/01/14	Work has commenced
16 (24 Oct 13)	continue with implementation of the regulatory risk framework as agreed by the Board	Amanda Thompson	before April 2014	13/5/14	Work underway but implementation slower than expected due to delay in recruitment of Regulatory Risk Manager. Workshops have taken place regarding risks related to entity regulation.
				11/03/14	Delays in recruitment mean first review will now be brought to June meeting. By the Board meeting training will have taken place for staff – first specialist session delivered on 13 March.

BSB – List of Part 1 Actions

22 May 2014

(This includes a summary of all actions from the previous meetings)

Min ref	Action required	Person(s) responsible	Date of action required	Progress report	
				Date	Summary of update
				11/02/14	First review to be brought to Board in March
				14/01/14	Discussed at Awayday in December; to be reviewed by SMT week of 20 Jan 2014 and by Board in February
				13/11/13	In progress. Updates in Director's report, performance report and corporate risk register. Key action for Board to note is need to schedule training dates for Board members in December.
24b / c (26 Sept 13)	extend amendments to the new Fitness to Practise Regulations and Guidance to cover the manager of the entity (irrespective of whether this person is a BSB authorised individual) and forward the application to the LSB for approval	Ewen Macleod / Sara Down	by 28 October 13	19/03/14	Completed. Incorporated into entity regulation application
				12/02/14	Ongoing – to be discussed at Handbook Working Group meeting w/c 24 February 2014
				11/11/13	Discussions ongoing with the LSB in relation to the draft entity application
16b (18 Jul 13)	gather feedback on accessibility of information on the BSB website about complaints	Amanda Thompson	before end March 14	13/05/14	Stakeholder session focused on understanding complaints system, reflecting stakeholder group's needs. Further activities being planned to complete this action.
				11/03/14	Feedback will be sought at stakeholder session on 28 March.
				14/01/14	On track

BSB – List of Part 1 Actions

22 May 2014

(This includes a summary of all actions from the previous meetings)

Min ref	Action required	Person(s) responsible	Date of action required	Progress report	
				Date	Summary of update
				13/11/13	Stakeholder workshop held on 13 November dealing with QASA. Next session will be as below. Early indications are that engagement will be productive.
				17/07/13	Stakeholder workshop/seminar being planned to deal with communicating the work of PCD. Anticipate will be held before end of March 2014 but depends on stakeholder availability. Date will be confirmed when available.
20a (16 Jun 11)	arrange for amended Memorandum of Understanding to be signed for BSB User Group and ensure disclosure of interests by members of the Group	Amanda Thompson	before 13 July 2011	13/05/14	Not finalised at meeting due to need to focus on topics needed by stakeholders. Due to staff changes, this is now unlikely to be finalised until July, following further relationship building.
				14/01/14	Expected to be finalised at March 28 stakeholder group meeting
				13/11/13	To be progressed with stakeholder group following analysis of feedback received from first session held on 13 November.
				8 Oct 13	as below
				9 May 13	To be progressed as part of overall stakeholder engagement strategy
				13 Mar 13	To be progressed now new staff in post
				12 Jul 12	Ongoing

Forward Agendas

Thursday 26 June 2014

- BSB Draft Annual Report for 2013-14
- Equality and Diversity Chambers Monitoring report
- Regulatory Risks
- Research Strategy – further detail (part 2)
- Changes to IT security policy – further detail (part 2)
- Office of Immigration Services Commission – barristers supervising immigration advisers

Thursday 24 July 2014

- Fees and Charges
- TRIP closure report
- Chair and Board member recruitment update
- Entity regulation (fees, insurance, interventions)
- Committee review update
- Policy framework
- Jeffrey review action plan

Thursday 11 September 2014 (Budget meeting)

- BSB draft Business Plan and Budget Bid for 2015-16

Thursday 18 September 2014

- BSB Q1 Performance Report (includes Business Plan update, KPIs, Management Accounts, Corporate Risk Register)
- PCD/PCC Annual Report
- Interim assessment against Regulatory Standards Framework
- CPD consultation (part 1)
- LETR – draft consultation on BPTC (part 2)

Thursday 23 October 2014

- Forward strategic overview

Thursday 27 November 2014

- BSB Q2 Performance Report (includes Business Plan update, KPIs, Management Accounts, Corporate Risk Register)

Thursday 11 December 2014 (Board Away Day)

Thursday 29 January 2015

Thursday 26 February 2015

- BSB Business Plan for 2015-16
- BSB Q3 Performance Report (includes Business Plan update, KPIs, Management Accounts, Corporate Risk Register)

Thursday 26 March 2015

Proposed BSB Equality Objectives 2014-15

Status

1. For approval.

Executive Summary

2. The Equality Act 2010 requires public bodies to publish equality objectives annually commencing on 6th April 2012. Objectives must be re-published at intervals of not greater than four years following the date of first publication.
3. Following Board approval in March 2012 the BSB published 10 equality objectives on 1st April 2012 comprising seven objectives aimed externally at the profession and three objectives aimed internally at BSB staff. In line with the approach outlined in the BSB Equality Strategy 2013-16, the objectives are reviewed annually each April and republished. In May 2013 the Board approved 19 equality objectives for publication, 7 of which were carried over from 2012-13 as they were incomplete.
4. The table at Annex A provides a progress update on the BSB's 2013-14 equality objectives. The majority of equality objectives are now complete. Three objectives (numbers 4, 9 and 10) are currently in progress and are on track to be completed by their respective deadlines. Two objectives (numbers 15 and 19) are incomplete and the ongoing work to progress these areas of activity is detailed at paragraph 11.
5. This paper recommends that all completed and ongoing objectives are transferred from the current published list to an archive list and that the BSB adopts five new equality objectives in five priority areas, as listed at paragraph 16 and set out in detail at Annex B. The work on formulating these new objectives has been led by the Equality and Diversity team and the Equality and Diversity Committee. The priority areas in which the objectives have been formulated have been identified through analysis of recent key pieces of BSB research the 2013 Bar Barometer and the 2013 Biennial Survey, and 2014 TRIP data on the BSB Board and Committees. The Board is asked to consider the proposed objectives and approve them for adoption and publication by the BSB for the period 2014-15.

Recommendations

6. That the Board:
 - **approves** the transferral of all completed and ongoing equality objectives from the current published list to an archive list;
 - **approves** the transferral of responsibility for existing objective 19 (to develop a workplace stress policy) to the Bar Council Head of Equality; and
 - **approves** the five new objectives at paragraph 16 for publication.

Summary of Legal Requirements

7. The Equality Act 2010 Specific Duties Regulations 2011 came into force in September 2011. The regulations require that listed public authorities prepare and publish one or more objectives which it thinks it should achieve to meet any of the arms of the general equality duty (s.149 Equality Act 2010). The general duty requires public bodies to pay due regard to the need to:
 - Eliminate unlawful discrimination, harassment and victimisation;
 - Advance equality of opportunity between different groups; and
 - Foster good relations between different groups.

8. The Act stipulates that the objectives must be published not later than 6th April 2012 and subsequently at intervals of not greater than four years beginning with the date of last publication. Objectives must be specific and measurable (SMART). The BSB will review and re-publish its objectives on an annual basis beginning in April 2013, as outlined in the BSB Equality Strategy.
9. The BSB Equality and Diversity Committee reviews progress against the objectives on a 6-monthly basis. In March 2014 the EDC were provided with a 12-month progress review of the 2013-14 objectives and were given the opportunity to consider, via email, the five new equality objectives for publication in 2014-15. A majority of EDC members responded and stated they were content with the progress made on the 2013-14 objectives and approved the new objectives for submission to the Board. The next progress review will take place at the November 2014 meeting.

Background

Current equality objectives 2013-14 (Annex A)

10. The majority of equality objectives (14 in total) are complete. Three objectives (numbers 4, 9 and 10) are in progress and are due to be completed by their respective deadlines. It is therefore recommended that these 17 objectives are transferred from the published list to an archive list.
11. Objective number 15 – to increase the number of BME members on the BSB Board and Committees - is incomplete. 2014 BSB data shows that the underrepresentation of BME members remains an issue, so in order to renew focus in this area there is a new proposed equality objective for adoption in 2014-15. In light of the proposed objective in this area, it is recommended that objective number 15 is removed from the current published list.
12. Objective number 19 – to develop a new workplace stress policy - is incomplete due to a high level of staff turnover in the HR department. All staff are employed by the Bar Council, and the Bar Council Equality and Diversity team has overarching responsibility for Bar Council staff-wide matters. Therefore it is recommended that the Bar Council's Head of Equality take responsibility for progressing this piece of work in conjunction with the newly appointed Head of HR.

Recommended new equality objectives for 2014-15 (paragraph 16)

13. It is recommended that five new equality objectives are published by the BSB for the period 2014-15. Three external objectives that sit within three priority areas are aimed at the barrister profession. Two internal objectives that sit within two priority areas are aimed at BSB Board and Committee members. Paragraph 16 below sets out a list of the recommended equality objectives.
14. The proposed objectives were presented to the BSB Senior Management Team (SMT) in March 2014. The SMT agreed that the five proposed objectives are achievable within the current agreed departmental budgets and work plans. The proposed objectives were discussed by the BSB Equality and Diversity Committee in March 2014 and the objectives were approved for submission to the Board.

Publication and promotion

15. Following approval by the Board the objectives for 2014-15 will be published in the Equality and Diversity section of the BSB website and replace the published list of equality objectives for 2013-14. The annex of the BSB Equality Strategy 2013-16 will be updated to reflect the new objectives; this will be done following every review of the objectives to ensure that the Strategy remains current and up to date. The Equality Strategy is aligned with the overarching BSB 3-year Strategic Plan. The objectives will be publicised to the profession and the public through the BSB Chair's monthly email newsletter, the BSB Twitter feed and the BSB section of Counsel magazine.

Recommended New BSB Equality Objectives for 2014-15 'At a Glance'

16. External Objectives

- **Objective 1:** Undertake qualitative research into the underrepresentation of women at the Bar in order to evaluate the effectiveness of the equality rules
- **Objective 2:** Monitor and review the number of reports of harassment and discrimination received by the BSB's Professional Conduct department following the introduction of the serious misconduct reporting requirement into the BSB Handbook, and formulate recommendations for further action as necessary.
- **Objective 3:** Increase diversity data disclosure from the profession to 30% across all protected characteristics collected.

17. Internal Objectives

- **Objective 4:** Achieve 100% return of diversity monitoring forms, including prefer not to say responses, from all current BSB Board and Committee members, and from all such members recruited in the future.
- **Objective 5:** To improve the diversity of the BSB Board and its Committees.

18. A detailed list of the recommended objectives, including a detailed explanation of the evidence base for each priority area, an action plan for each objective and timescales for completion can be found at Annex B.

Financial implications

19. The equality objectives will be included in the BSB Equality Strategy 2013-16 which is aligned with the BSB Strategic Plan 2013-16. The cost of undertaking each equality objective will be met by departmental budgets as the priority areas in which objectives have been developed have been agreed with the BSB Director and BSB Senior Management Team.

Equality Impact Assessment

20. It is not considered that the objectives will have any adverse impact on equality because the objectives have been designed to promote and advance equality and diversity. Therefore an Equality Impact Assessment is unnecessary.

Risk implications

21. Best practice dictates that public bodies should review and re-publish their equality objectives annually. Failure to do so could lead to reputational issues for the BSB.

Regulatory objectives

22. The equality objectives relate directly to the BSB’s regulatory objectives, as defined in Section 1 of the Legal Services Act 2007, namely objective 1 (f): “encouraging an independent, strong, diverse and effective legal profession”.

Annexes

23. Annex A: Table containing the BSB equality objectives 2013-14 and a 12 month progress update.
Annex B: Recommended new BSB equality objectives 2014-15 in detail.

Lead responsibility:

Rolande Anderson (Chair, BSB Equality & Diversity Committee)
Jessica Bradford (BSB Senior Policy Officer, Equality & Diversity)
May 2014

BSB Equality Objectives 2013-14 – Update on Progress as of May 2014

External equality objectives for the barrister profession

Priority Areas	Equality Objective(s)	Timescale	Progress Update May 2014
Overrepresentation, in comparison with the Bar as a whole, of BME and male barristers in the BSB complaints process	1. To ensure a review of the BSB complaints processes is undertaken in order to understand the reasons for the current overrepresentation of BME and male practitioners.	End April 2013	Complete – In February 2013 the BSB commissioned Inclusive Employers to review its complaints process. The review consisted of a mixture of face-to-face interviews and an examination of policy documentation. Following completion of the research a report ¹ was produced containing a number of recommendations which are currently in the process of being implemented.
	2. Consider the complaints review report and formulate recommendations for approval by the BSB Board.	End May 2013	Complete – The BSB Equality and Diversity Committee considered the review report in May 2013 and agreed a number of its recommendations relating to the way in which the BSB deals with complaints. These recommendations included changes to the E&D training received by Committee members and the anonymising of complaints before they are considered by the PCC.
	3. To present the review report and recommendations to the BSB Board	September 2013	Complete – The report and recommendations were approved by the Board at its September 2013 meeting.

¹ 'BSB publishes diversity review of complaints processes' <https://www.barstandardsboard.org.uk/media-centre/press-releases/bsb-publishes-diversity-review-of-complaints-processes/>

Priority Areas	Equality Objective(s)	Timescale	Progress Update May 2014
	<p>4. To ensure the recommendations of the review report are implemented as appropriate and progress against them is reported to the Board.</p>	Review position in April 2014	In progress – The majority of recommendations have been successfully implemented and an update on progress will be included in the Director’s Report to the May Board.
<p>Equality and diversity progress interviews with chambers</p>	<p>5. To undertake a programme of progress interviews in relation to the implementation of the equality rules of the Code of Conduct with a sample of 40 chambers and produce a final report with draft recommendations.</p> <p>6. To ensure the report and approved recommendations are presented to the BSB Board for final approval.</p> <p>7. To ensure that the approved recommendations are implemented and monitored effectively.</p>	<p>End April 2013</p> <p>June 2013</p> <p>Ongoing</p>	<p>Complete – During February and March 2013 the E&D team completed telephone interviews with 39 chambers. A report² of the findings was produced by the E&D team and recommendations were drafted. The exercise revealed that levels of compliance were generally good, but that the BSB could do more to assist chambers by, for example, holding an information event for chambers’ equality officers and including more case studies in the rules guidance document.</p> <p>Complete – The report was presented to the Board in June 2013 and the recommendations were approved.</p> <p>Complete – An action plan was developed and all recommendations were implemented by the end of 2013.</p>

² ‘Progress Check Report on the Equality Rules of the Code of Conduct’
https://www.barstandardsboard.org.uk/media/1518926/progress_checks_report_pdf.pdf

Priority Areas	Equality Objective(s)	Timescale	Progress Update May 2014
Bar Course Aptitude Test (BCAT)	8. To ensure that the BCAT is monitored in relation to equality and diversity.	Ongoing	Complete – equality and diversity considerations have been built into all aspects of the delivery and monitoring of the BCAT. For example, the test items themselves are monitored for equality impact by the E&D team and every candidate is asked to complete a monitoring form, covering all the protected characteristics, before sitting the test so that trends can be equality analysed.
	9. After the first year of implementation, ensure that the evaluation report produced by the independent contractor contains an analysis of the BCAT's impact on equality.	October 2013	In progress – The E&D SPO is part of the BCAT evaluation working group which contracted IFF Research and Work Psychology Group (WSG) to undertake the evaluation of the BCAT. Initial analysis of candidate diversity data at the end of 2013 did not show any significant over or underrepresentation of different groups, and a full evaluation report will be produced by IFF and WPG in December 2014 once the first BCAT cohort have sat the BPTC exams.
	10. Ensure the equality analysis section of the report is reviewed and areas for action are formulated. Ensure any actions are implemented effectively.	Ongoing	In progress – The E&D team will review the equality section of the report when it is produced in December 2014 and develop recommendations.

Internal equality objectives for BSB staff

Priority Areas	Equality Objective(s)	Timescale	Progress Update May 2014
BSB Change Programme (TRIP)	11. Ensure adequate equality and diversity analysis is embedded in the BSB change programme.	April 2014	Complete – The EDA produces regular reports analysing staff diversity data for consideration by the TRIP board. The reports highlight diversity issues across the workforce and at each pay band. They also benchmark the BSB with other similar organisations such as the SRA.
Bar Council staff survey	12. Review the results of the Bar Council staff survey and assist in the formulation of recommended actions.	Sept 2013	Complete – In May 2013 the E&D team analysed the results of the 2013 staff survey and formulated a number of recommendations relating to discrimination, bullying and harassment which are being considered by the HR team.

Ongoing external equality objectives (first published in April 2012)

Priority Areas	Equality Objective(s)	Timescale	Progress Update May 2014
Retention of women at the self-employed Bar	13. Ensure that the E&D provisions of the Code of Conduct are monitored effectively through the chambers monitoring scheme.	Starting from 2013	Complete – The E&D rules have been monitored both through the progress checks exercise (as mentioned above) and a chambers’ monitoring exercise conducted in late 2013/early 2014. A representative sample of chambers were chosen to take part in the exercise and were asked to provide evidence of their compliance with the E&D rules. A report of the findings will be presented to the Board in June 2014.
Overrepresentation - in comparison with the Bar as a whole - of women and BME practitioners in publicly funded, and therefore less well paid, areas of law	14. Commission research into why a disproportionate number of BME and female barristers practice in publicly funded work and whether this matches student aspirations.	May 2013	Complete, with further work ongoing – The BSB Research team produced a report that was considered by the EDC in January 2014. It was agreed the data contained within the report was insufficient to formulate a firm evidence base for action. The project has however helped to inform the development of a new BSB research strategy which will set out the way in which future research projects will be commissioned and undertaken, in order that valuable and relevant reports can be produced which meet the regulatory aims and objectives of the BSB. The original questions in relation to the aspirations of women and BMEs students and final areas of practice still remain a valid area for enquiry. Data from the report pertinent to the current LETR project will be shared with the education and training team.

Priority Areas	Equality Objective(s)	Timescale	Progress Update May 2014
<p>Underrepresentation on the BSB Board and Committees of BME barristers working in publicly funded areas of law.</p>	<p>15. Increase the number of BME members on the BSB Board and Committees</p>	<p>End 2013</p>	<p>Incomplete – The 2010 BSB statistics showed that there was an underrepresentation of BME people, in comparison to 11% of BME at the Bar, across all Committees and the Board. An analysis of 2012 data showed that BME people are still underrepresented on all BSB Committees. The Board currently has no BME members.</p>
	<p>16. Increase the number of barristers working in publicly funded areas of law on the BSB Board and Committees.</p>	<p>End 2013</p>	<p>Complete – The 2010 BSB committee diversity statistics showed that most Committees had only one barrister member working in a publicly funded area of law. The 2014 statistics show that the Board has three barrister members working in publicly funded areas of law and nearly all Committees have at least two barristers working in publicly funded areas of law. In 2014, 24% of the total Board and Committee barrister members practice in publicly funded areas, which is lower than at the Bar as a whole, so there is still some progress to be made</p>
<p>Meaningful review of the diversity of staff, the Board and Committees</p>	<p>17. Monitor and review the diversity of staff, Board and Committees of the BSB by all protected characteristics on an annual basis, taking action to address areas of underrepresentation as necessary.</p>	<p>Annually</p>	<p>Complete – The BSB monitors the diversity of staff, Board and Committee members by all protected characteristics. Three reports have been produced for the TRIP board (see objective 11) that analyse the data. The reports highlight diversity issues at staff, Committee and Board level and make recommendations on how to address the key areas of underrepresentation.</p>

Priority Areas	Equality Objective(s)	Timescale	Progress Update May 2014
	<p>18. Support for staff with protected characteristics and staff with mental health issues</p> <p>19. Update and develop the workplace stress policy aimed at addressing and alleviating workplace stress and mental health issues in the workplace.</p>	<p>Annually</p> <p>By end 2013</p>	<p>Complete – LawCare have been gathering summary data on Bar Council staff calls to the helpline, but to date the number of calls have been too low to produce a report due to the risk of individual staff being identified. Work in this area, including the promotion of the helpline, will now be passed to the Bar Council E&D team who have lead responsibility for general HR matters.</p> <p>Incomplete – Due to a high level of staff turnover in the HR team, this objective is incomplete. The E&D team produced an outline of a policy in mid-2013 that was passed to HR, and the Bar Council E&D team will be liaising with HR to ensure the full policy is drafted and published in the Staff Handbook.</p>

Recommended New BSB Equality Objectives 2014-15 in Detail

Objective 1: Undertake qualitative research into the underrepresentation of women at the Bar in order to evaluate the effectiveness of the equality rules

Evidence

1. The 2013 Bar Barometer and the 2013 Biennial Survey of the Bar¹ surveys show that women are well represented at BPTC and pupillage stages but comprise only one third of the practising Bar, with numbers of women decreasing sharply at around 12 years' call. This drop off may be due to a combination of factors including difficulties managing childcare and work/life balance, unfair work allocation within chambers, bullying and harassment. This is in comparison with the UK workforce which is 47% female.
2. In September 2012 the BSB introduced a number of equality rules aimed at supporting retention of women and carers in the profession. However the problem persists and it is clear that further work is required in order to evaluate the impact of the rules and ascertain whether there is more that the BSB could do to increase the percentage of women at the Bar and tackle attrition.
3. *Priority Area: Underrepresentation of women at the Bar in comparison to the number of women in the UK workforce.*

Action Plan and Timescale

4. The BSB E&D team will gather qualitative data by facilitating a range of focus groups in early 2015 which will aim to evaluate the impact of the equality rules and seek clarity on the reasons why women are underrepresented at the Bar. Suggestions will be gathered for regulatory action the BSB could take to address the issues raised (by May 2015).

Objective 2: Monitor and review the number of reports of harassment and discrimination received by the BSB's Professional Conduct department following the introduction of the serious misconduct reporting requirement into the BSB Handbook, and formulate recommendations for further action as necessary.

Evidence

5. The 2013 Biennial Survey of the Bar highlighted that bullying and harassment continues to be a problem at the Bar (the 2011 Biennial Survey found that 22% of employed barrister and 11% of self-employed barristers had observed bullying and harassment in the workplace). In 2013, 25% of BME barristers reported having personally experienced bullying and harassment.
6. The research also showed that bullying and harassment disproportionately affects female, BME and disabled barristers.
7. In January 2014 the BSB introduced a new requirement into the Handbook; a duty on all barristers to report serious misconduct, which includes harassment and discrimination. It is proposed that the BSB monitor the number of reports of harassment and

¹ *The 2013 Bar Barometer*, https://www.barstandardsboard.org.uk/media/1585709/bsb_barometer_report_112pp_a4_new.pdf.
The 2013 Biennial Survey – link to follow once published.

discrimination in relation to serious misconduct received by the Professional Conduct department in order to gauge the level of awareness about the rule.

8. *Priority area: Bullying and harassment of BME, female and disabled barristers*

Action Plan and Timescale

9. The Professional Conduct department will monitor the number of reports of serious misconduct received, and extract the statistics relating specifically to reports of harassment and discrimination. The E&D team will review the data and formulate recommendations for action, if necessary (by April 2015).

Objective 3: Increase diversity data disclosure from the profession to 30% across all protected characteristics collected.

Evidence

10. In August each year the E&D team extracts aggregated diversity data on the profession from the BSB's Core Database. The database is populated by individual barristers entering their diversity data via the online Barrister Connect portal.
11. In 2013 the BSB held very good levels of data in some areas (over 78% on age, gender and race) but had much lower levels of data (around 11-15%) in relation to the other protected characteristics. An interim snapshot of data on the Core Database taken in March 2014 – mid way through the 2014 Authorisation to Practise process - showed that disclosure rates were around 20% for all those categories where the levels had previously sat at around 11-15%
12. It is therefore proposed that in the first instance the BSB will aim for a 30% disclosure rate (including prefer not to say responses). The target of 30% has been selected as it approximates the number of barristers who responded to the BSB's 2013 Biennial Survey (25%).
13. *Priority area: Low levels of diversity data disclosure from the profession via Barrister Connect.*

Action Plan and Timescale

14. The BSB has implemented a number of actions in 2014 with the aim of improving the level of diversity disclosure, including changes to the Barrister Connect system to make the monitoring page easier to find and removing the ability of barristers to delegate responsibility for renewing their practising certificate. Communications will be sent to the profession highlighting the importance of completing the monitoring form. The BSB E&D team will also contact other regulators to enquire as to how they have attempted to increase diversity data disclosure levels from other professions (by August 2014).
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Objective 4: Achieve 100% return of diversity monitoring forms, including prefer not to say responses, from all current BSB Board and Committee members, and from all such members recruited in the future.

Evidence

15. The level of BSB Board and Committee diversity data is relatively low. The BSB will aim for a 100% return rate of new collection forms by the end of 2014, which will include “prefer not to say” responses.
16. Priority area: Low levels of diversity data disclosure from the BSB Board and Committees.

Action Plan and Timescale

17. HR to identify all those current Board and Committee members who have not returned their monitoring form and send reminders (by end 2014).
18. HR to ensure that all newly recruited Board and Committee members are sent a monitoring form when they join (by July 2014).
19. All Committee Chairs to explain the rationale behind diversity data collection and encourage responses from their Committee members (by end 2014).

Objective 5: To improve the diversity of the BSB Board and its Committees

Evidence

20. An analysis of 2014 data shows that the BSB Board and Committees are overwhelmingly white. On the basis of current disclosure, there are no BME Board members and BME people are underrepresented on all other BSB Committees in comparison to their representation in the profession (11%) and in the UK population (17%). There are no BME members on the Standards, Governance Risk and Audit (GRA) or Planning, Resources and Performance (PRP) committees.
21. On the basis of current disclosure, there is good gender diversity on the Board which is evenly split between men and women, but women are underrepresented on all BSB Committees. The committee with the highest number of women is PCC (37% women); the committees with the lowest numbers of women are PRP and E&T which both have 20% female membership.
22. The BSB Handbook requires all members of chambers’ selection panels to be trained in fair recruitment, a rule which may be satisfied through private study of the Bar Council’s Fair Recruitment Guide². The Guide covers key issues such as interviewing techniques, making fair decisions and subconscious bias. It is proposed that individuals involved in selection panels for BSB Board and Committee members should be required to undertake the same training as is required of the profession, and it is anticipated that such study may assist in increasing diversity.

² *The Fair Recruitment Guide*, <http://www.barcouncil.org.uk/for-the-bar/professional-practice-and-ethics/equality-and-diversity-guidance/fair-recruitment-guide/>

Part 1 – Public

23. An analysis of 2014 data shows that the proportion of disabled Board and Committee members is very low. There are no members of the Board who have stated that they are disabled. The Education and Training, GRA, PRP and Standards Committees have no disabled members. 19% of the working age population are disabled.
24. As an employer, the Bar Council is a member of the JobCentre Plus 'Two Ticks' scheme which means that all disabled applicants who meet the minimum person specification are guaranteed an interview. This scheme is currently used in the recruitment of Board members so it is suggested that the scheme is extended to those applying for Committee vacancies, and will be supplemented by a new equal opportunities strapline on vacancy adverts to encourage applications from underrepresented groups.
25. *Priority area: Increase the number of BME and disabled members on the BSB Board and increase the number of BME, female and disabled members on the BSB Committees.*

Action Plan and Timescale

26. HR to create, in conjunction with the E&D team, an equal opportunities strapline that will be added to all Board and Committee vacancy adverts (by June 2014).
 27. HR to contact all members of Board and Committee recruitment panels to inform them of a new requirement to undertake recruitment training and to provide a link to the Fair Recruitment Guide or a hard copy. Verification must be provided once the training has been undertaken (by end 2014).
 28. HR to include the 'Two Ticks' logo on all Board and Committee vacancy adverts so that every disabled applicant who meets the minimum criteria is offered an interview (by June 2014).
-

Performance Report for Q4 and Year-End 2013-14 (April 2013 – March 2014)

Status:

1. For discussion.

Executive Summary:

2. This paper provides an update to Board members on the BSB's performance against the aims and activities set out in its 2013-14 Business Plan. This information will feed into the 2013-14 Annual Report publication.
3. Overall, the BSB has progressed well against planned activities, the majority of which have been completed on-time and within budget. This has been achieved against the backdrop of significant change in the BSB. Most departments have implemented changes to the way they work as part of The Regulatory Improvement Programme (TRIP). The BSB has also played its role in delivering SPACE (reduced occupancy of 289-293 High Holborn), a project that had great uncertainty at the time of drafting the BSB's Business Plan, but has been successfully delivered.
4. The main areas highlighted in this report are:
 - a) The **dashboard** which has been updated for year-end, where the fees and charges review has moved from an amber to a red rating
 - b) Our **turnover** and **retention**, which show an underachievement against our year-end targets and the levels of 2012-13;
 - c) There has been an improvement in Q4 against our Professional Conduct department performance indicators, which broadly show we have met our year-end targets.
 - d) Our year-end income and expenditure¹:
 - i. **Expenditure**: £4,906k against a budget of £5,361k (+8%);
 - ii. **Income**: £1,605k against a budget of £1,755k (-9%);
 - e) In particular, the PRP Committee wanted to highlight the reduction in income received for fines and costs recovered (see point 19g)
 - f) We have also summarised in this paper the plans and risks for 2014-15 - the second year of the BSB's Strategic Plan.

Recommendations

5. Members of the Board are invited to:
 - a) **Scrutinise** the detail of the report;
 - b) **Discuss** the conclusions and lessons learnt (point 20);
 - c) **Discuss** the key areas highlighted for 2013-14;
 - d) **Note** the achievements in annex 5;
 - e) **Note** the plans and risks for 2014-15;

Background

¹ These figures differ slightly from those that were reported to the BC's Finance Committee on 29 April 2014 due to some last minute accruals

6. The 2013-16 Strategic Plan² seeks to enable us to become a more modern and efficient regulator operating at a high level of effectiveness against the regulatory standards framework laid down by the LSB.
7. The 2013-14 Business Plan outlined the 23 key activities to be completed in the first year of our Strategic Plan. An update on our performance against these activities was last seen by the Board on 20 February 2014.

Achievements

8. A vast amount of work has been completed by the organisation and this will be reflected in our Annual Report. A list has been compiled in annex 5 and the Board is asked to note these achievements and especially that they were accomplished in a time of extensive changes such as TRIP and SPACE (reduced occupancy of 289-293 High Holborn).

Activities

9. Below, we set out the areas of work where we have not progressed as had originally been planned. Areas for consideration include:
 - a) Implementation of new Handbook and (non-ABS) entity regulation
 - (i) The new BSB Handbook came into force on 6 January 2014. This was a significant achievement but was delivered differently to how it was originally planned. Originally, it was envisaged that the Handbook and non-ABS entity regulation would be delivered together. The non-ABS entity elements of the Handbook have now been decoupled and will be subject to a separate LSB application. In relation to non-ABS entity regulation, discussions with the LSB highlighted an issue with our powers to authorise and discipline entities.
 - (ii) In order to resolve this issue the BSB and LSB have jointly instructed leading Counsel on the interpretation of the Legal Services Act 2007, which we believe has resolved this matter (although the LSB Board will have to satisfy itself that the BSB has sufficient powers once we formally apply to the LSB for changes to our rules).
 - (iii) A draft application has been submitted to the LSB, and having considered it the LSB is content that we have addressed most of the points it had previously raised. The final submission of the application is now scheduled for around the end of May 2014. We will seek to obtain a s69 order to amend or buttress our powers in several areas, with a consent-based regime in respect of them as an interim measure. The LSB will have to decide whether this interim regime is sufficient to mitigate the risks we have identified – if not the final approval of our entity proposals may be delayed until the legislation is in place. Assuming approval is forthcoming, the entity regulation regime is scheduled to go live in October 2014.
 - (iv) We have spent more than expected on legal fees (see para 19h below). Additional expenditure in this area has been needed to cover cost of advice in relation to the issues arising.

² Published in April 2013

(https://www.barstandardsboard.org.uk/media/1465505/bsb_business_plan_2013-14.pdf)

b) (ABS) Entity Regulation

- (i) Many of the continuing delays are beyond our control. In relation to Alternative Business Structure (ABS) regulation, we intend to apply for designation as a Licensing Authority once the LSB has given approval to our entity regulation proposals (assuming the LSB agrees to our approach on non-ABS entities, this should happen by September 2014). The launch of an ABS regime will be dependent on LSB approval and Parliamentary time for the necessary designation orders, so this is likely to go live in 2015.

c) Waiver System review

- (i) The Board approved the overall approach and revised timetable for this activity at its January 2014 meeting. In line with this revised timetable we now expect to complete this activity by the end of May 2014.

d) Quality Assurance Scheme for Advocates (QASA)

- (i) The QASA Scheme was found to be lawful by the Court in January 2014. However, the appeal against the judicial review (JR) decision is not concluded. The claimants have been granted leave to appeal on all grounds against the decision of the Divisional Court. The hearing is likely to be listed for mid-July.
- (ii) In the light of the ongoing appeal, the BSB has reviewed the registration timetable, with the phasing having been suspended pending the outcome of the hearing. All advocates that wish to undertake criminal advocacy must still be QASA registered by 31 December 2014.
- (iii) The Youth Court work has been put on hold pending the outcome of the JR. A draft research specification is in place and work will progress once the JR is resolved.

e) IT Systems

- (i) Originally there had been plans to implement the DMS and the intranet together; however it became increasingly clear that the workload required meant that this was not feasible. As an integral part of SPACE and the reduced physical storage space on the floors, it was felt that the DMS should be prioritised.
- (ii) The intranet is in its first planning stage, and is an activity in our Business Plan for 2014-15. The intranet Business Case will be presented to the Senior Leadership Team in May 2014.
- (iii) All other IT projects listed in our Business Plan are on-track or completed. The enforcement database was implemented in August 2013 and the DMS has been implemented for both the BSB and Central Services.

f) Risk framework

- (i) The risk framework was approved at the Board meeting on 24 October 2013 subject to minor amends.
- (ii) Members of staff that need to understand or apply the risk framework in their specific functional areas were trained at the end of the 2013-14 year. Refinement of the framework commenced during an SMT risk workshop in January 2014 which focused on the grouping of risks. This was followed by a risk framework workshop which was held for the Regulatory Knowledge Group³ in March 2014.
- (iii) The overall rating remains amber because not all risk-related processes and procedures have been implemented, and some tasks remain outstanding such as the internal publication of the manual, documentation of how the framework will interact with the corporate risk register and the delivery of wider training.
- (iv) Recruitment for the permanent Regulatory Risk Manager has commenced, however an appointment has not yet been made.

g) Evidence base

- (v) The Research team has identified and begun assessing our existing evidence base, although this has not been circulated or discussed more widely.
- (vi) The resignation of both Research and Information Officers last year meant the team was short-staffed. While two appointments were made, one left at the beginning of Q4, and the work required for publication of the Biennial Survey and the Bar Barometer were prioritised. Work will continue throughout 2014-15.

h) Policy development framework

This has been significantly delayed as the approach to the evolution of the policy development framework changed following initial work and independent academic input. A different approach has now been taken, drawing on staff knowledge first to develop an embryonic framework. An RKG workshop to develop the framework was held on 27 February 2014, the outputs of which were considered at SMT on 10 March and OMT on 28 April 2014. A further RKG session is scheduled for early June. After final agreement on the framework the RKG and an academic will explore other tools to complement the framework, with further refinement to follow. We expect to complete this in the first half of 2014-15.

i) Fees and charges review

The Policy Statement was approved by the Board in July 2013 and all new activities are abiding by the principles agreed. Work is ongoing to cost out our services that generate direct income. The finalisation of the policy document and the cost modelling tool has been delayed due to staff illness and the reorganisation in the Finance team. This objective continues into the 2014-15 Business Plan, and will feed into the Business Planning process for 2015-16 (the last year of the BSB's Strategic Plan).

³ RKG is made up of Senior and Operational BSB staff trained in Regulatory Theory and Practice

Professional Conduct Department (PCD) Performance Indicators

10. In 2013-14 the PCD achieved its over-arching key performance indicator target (75%), as well as the target for two of their three operational indicators. As reported in February 2014 there was a dip in performance in Q3, which was mainly due to the unavailability of management reports which members of staff use to closely monitor their performance. Also, the additional work placed upon staff associated with the BSB Handbook implementation meant that the executive spent a significant amount of time on policy and guidance work as well as training. All of the measures show an improvement between performance in Q3 and Q4.

PDC Measure		Year-end		Q1	Q2	Q3	Q4
		Overall	Target				
Overarching KPI	The percentage of complaints concluded or referred to disciplinary action within service standards	77%	75%	82%	80%	68%	78%
OPI (Assessment)	The percentage of complaints concluded or referred to investigation within 8 weeks	74%	80%	80 %	69%	67%	81%
OPI (Investigation)	The percentage of external complaints concluded or referred to disciplinary action within 8 months following investigation	84%	70%	82 %	93%	79%	84%
OPI	The percentage of internal complaints concluded or referred to disciplinary action within 5 months following investigation	83%	80%	88%	94%	65%	68%

Operational Measures

11. Seven members of staff left the BSB during Q4 bringing the total number of leavers for 2013-14 to 27 (BSB total headcount 75). Turnover for the year was 36%. This compares to 24% in 2012-13 (17 leavers) and 19% in 2011-12 (11 leavers), so there has been a clear upwards trajectory in terms of the number of leavers. There has however been stability in the Senior Management Team as there have not been any changes throughout 2013-14.
12. Although staff retention⁴ has risen from 64% in Q3 to 71% at year-end, this is lower than the retention level of 80% achieved in 2012-13. As these figures are on a downward trend the PRP Committee has requested that further analysis be carried out on these figures over the next six months and requested and that the current downward trend be flagged to the Board.

⁴ Percentage of staff with >1 year of service

13. We lost 8.5 days per FTE due to sickness, against a target of 7.7. The Q4 figure of 159 days is a reduction on the 229 days lost during Q3, as there were a small number of staff members that returned from extended periods of sick leave.
14. At the February 2014 Board meeting, Board members expressed a desire to see long-term sickness occurrences separated from those that were short-term. 52% of the days lost during Q3 and Q4 were by staff that had been continuously absent for four weeks or longer.
15. The BSB's operational and senior management teams continue to monitor these indicators on a regular basis. For noting, there is a risk on the Corporate Risk Register entitled "Loss of key skills", which is being monitored by the GRA Committee.
16. With regard to IT measures, at the moment we are measuring help desk calls and responses to faults. Our Contract Management Officer will be reviewing the measures we use here to monitor and manage our internal requirements.

Budget

17. Overall, our performance against the budget broadly reflects delivery of the Business Plan ie where there have been delays to projects, our accounts show a delay in spend and receipt of income. The headlines are that for 2013-14 the BSB spent £4,906k against a budget of £5,361k (+8%), and we received £1,605k in income against our budgeted figure of £1,755k (-9%), as set out in annex 3.
18. For noting, we have attached a chart in annex 4, which shows our actuals⁵ for the last two years against this year's budget. It displays increases in direct income, staff costs and non-staff costs⁶. We are expecting to see that the total cost of regulation has remained steady because of the decreasing size of the Central Services budget, an amount of which is apportioned to the BSB.
19. The key variances against the 2013-14 budget have been summarised and are set out below:

- a) QASA

An update on the activity is provided above (see paragraph 12d). The judicial review and its subsequent appeals have significantly delayed implementation and meant we did not receive the budgeted income of £487k. The interruption to the Scheme timetable has also delayed some items of substantial expenditure, which will now take place in subsequent years (for example, costs relating to additional staff, judicial training and assessor panels). This has resulted in an overall underspend of £127k against the budget.

⁵ Unaudited actuals, before any corporate or staffing adjustments

⁶ Other costs

b) Entity regulation

An update on this activity is provided above (see para 9a). The delays have had quite an impact on both income and expenditure. The technical challenges relating to entity regulation meant that we overspent on legal fees (-£53k, also see para 19h below); however the delays also meant that we did not incur costs for the implementation (for example additional staff, training, IT, events and set-up) leading to an overall underspend of £141k. The underspend offsets our underachievement of income; we had projected that we would receive £120k in licensing and annual fees but nothing has yet been collected.

c) Supervision

The new Supervision regime has been launched, however the IT systems to support this new initiative are still to be implemented. IT costs had been phased to occur at the end of 2013-14 however they will now slip into the beginning of the new financial year; this also explains the unspent research budget in this area. The total 2013-14 budget for the Supervision department is underspent by £81k.

d) BCAT

The plans for some of the educational areas have been greatly improved meaning that we now have much more defined costings. We had originally underestimated both the costs and the revenue projections for the Bar Course Aptitude Test, which at the time was a novel activity for the BSB. This has led to an overspend of non-staff costs (£52k) which has been offset by an overachievement of income (£190k), which will go some way to the recouping of development costs in earlier years.

e) Qualifications income

Qualification applications brought in £90k more than budgeted, which was partially the result of a noticeable increase in applications from qualified foreign lawyers, up from 75 in 2012 to 211 in 2013.

f) CPD

Members will note from the dashboard that the BSB has commenced the implementation of new CPD regulations. We had anticipated that there might be some implementation costs for 2013-14 however this has not turned out to be the case, hence the non-staff budget is underspent (£10k). The current CPD regime continues and accreditation has generated £95k more than original projections. However, as the new CPD scheme is implemented over the next couple of years we expect this line of income to decrease considerably.

g) Income from fines and costs recovered

Because of the changes to CPD compliance processes there has been a notable decrease in the number of automatic fines that were issued hence the related income has decreased from the levels which the BSB has received in previous years. This has contributed towards a lower level of income from fines and recovered costs than in

previous years (£53k in 2013-14, compared to £108k in 2012-13, and £134k in 2011-12.)⁷

The reduction of this income is greatly exceeded by the lower costs incurred as a result of not manually checking the record cards of every barrister; this is a by-product of the move towards a more risk-based and outcomes-focused approach.

h) Legal advice & professional fees

2013-14 saw a substantial overspend in the amount the BSB spent on legal advice and professional fees, which was due to a number of reasons, mainly high level concerns that could have wide-spread impacts (for example QASA judicial review (see para 9d) and the *Hemming* case). The consolidated amount that the BSB spent in 2013-14 totalled £243k against a budget of £95k (previous years have recorded similar levels of spend – £243k in 2011-12, and £208k in 2012-13). We are not expecting to spend as much in this area 2014-15, however if we continue to be as risk-averse by seeking independent external advice with the same frequency, this could be an issue for the future as in the 2014-15 budget we have only allocated £77k for such costs.

Conclusion and lessons learnt

20. There have been a number of significant achievements which are set out in annex 5. One of the most notable of these is the successful and timely launch of the new BSB Handbook. Management of this project reflected how much the organisation has improved its project management processes and focus on delivering results.
21. At its meeting on 8 May 2014, the Planning Resources and Performance Committee discussed our overall performance during 2013-14. Some of the conclusions and lessons learnt are set out below:
 - a) the timelines for some of our activities were too ambitious, and for the future we must endeavor to be more realistic with timescales in our planning exercises;
 - b) the BSB must also continue to improve its recruitment processes and end-to-end times when working to fill staffing gaps, which have caused some project delays;
 - c) for those activities that experienced significant interruptions, it is worth considering how to strengthen our stakeholder management strategies, as if these had have been better we may (arguably) have been able to avoid some “external shocks” (for example QASA);
 - d) the BSB is continuing to improve the way in which we hold the Central Services directorate to account. From March this year CS departments report regularly into the Senior Leadership team⁸ on its progress against plans and how well the investment into infrastructure is progressing;
 - e) financial forecasting is another area that the executive will be refining this year.
22. The PRP Committee also discussed where the BSB’s performance in terms of what it means for our Strategic Plan. We need to ensure that delays in some activities do not fundamentally affect the achievement of our Strategic Plan for 2013-16.

⁷ We do not forecast or budget for income received from fines or costs recovered.

⁸ SLT is made up of the top level executives in the BC and BSB

Business Plan, budget and risks for 2014-15

23. The BSB published its 2014-15 Business Plan⁹ in April 2014. This sets out the activities and budget that the PRP Committee and the Board will be monitoring on a quarterly basis this year.
24. Our budget for 2014-15 is:
- a) Direct BSB expenditure: £5,287k
 - b) Direct BSB income¹⁰: £1,816k
25. A number of restructures have been made to the organisational set up, which has informed the configuration of the budget:
- a) In 2012-13, part of the Central Services Research Team move into the BSB's Strategy and Communications Department;
 - b) In 2013-14 the BPTC function has moved from the Assessments Team to the E&T Department;
 - c) The development of Entity Regulation is currently being carried out in the Regulatory Policy Department however the operational activities will later in the year be delivered by the Supervision Department;
 - d) Part of the Central Services Equality & Diversity team has been transferred to the BSB's Regulatory Policy Department;
 - e) The Supervision Department is now covering the work relating to CPD compliance and pupillage;
 - f) The Regulatory Risk post last year sat within the Strategy and Communications department however this position will now come under the Regulatory Policy Department.
26. There are a number of uncertainties that could impact the successful delivery of the Business Plan:
- a) QASA remains a challenge for the BSB and we must monitor our financial projections. The move towards a single date of enforcement at the end of 2014 will mean that we receive income at a later date than planned. Wide scale non-compliance may lead to the BSB carrying out major enforcement action.
 - b) Some research has been conducted on the expected take-up of Entity Regulation, however uncertainties still remain. Our predictions about receipts of applications could be wrong, meaning that our projected costs and income may not be achieved. This movement in the market would affect the BSB's market entry strategy and could have a negative impact upon our total entity related income.
 - c) A large number of changes to our Education & Training arrangements have commenced or will commence over the next few months. CPD and the Bar Professional Training Course (BPTC) are two areas that will undergo significant transformations. It is envisaged that there may be significant income implications.

⁹ https://www.barstandardsboard.org.uk/media/1586437/bsb_business_plan_2014-15.pdf

¹⁰ Not including PCD fines and cost recovery

Equality Analyses

27. The Strategic Plan and Business Plan have already been through an equality impact assessment. The Performance Indicators related to HR also monitor our performance against various measures.

Risk implications

28. Risks that may have an impact on the BSB achieving its objectives have been considered as part of compiling the business plan updates. Entity Regulation and QASA are high level risks and are being monitored by the executive the Governance Risk and Audit Committee in addition to the Board.

Impacts on other teams / departments or projects

29. The Business Plan, which is cross cutting, outlines the most significant projects being undertaken by the BSB and all Departments have provided updates which have been fed into this report.

Consultation

30. Due to the cross-cutting nature of the areas addressed in this report, wide consultation has been held with members of the SMT and OMT. For areas such as performance indicators which are relevant to Central Services, consultation has also occurred with the relevant departments. The BSB's Q4 Performance was scrutinised by the PRP Committee on 8 May 2014.

Regulatory objectives

31. The BSB's Strategic Plan and Business Plan were designed to ensure we meet our regulatory objectives.

Publicity

32. This report is in the public agenda of the board meeting and will be published on our website.

Annexes

33. Annex 1 – Dashboard
Annex 2 – Guidance notes on the dashboard
Annex 3 – Management Accounts summary
Annex 4 – Year to year comparison chart
Annex 5 – Summary of achievements

Lead responsibility

Dr Anne Wright – Chair of the PRP Committee
Vanessa Davies
Viki Calais
Andrew Cohen

Dashboard

Strategic Aim KPI's & success measures (2013-16)

Aim 1	Aim 2	Aim 3	Aim 4	Aim 5
Licensing Authority	Barristers view of the BSB	Supervising / enforcing new Handbook	DMS	Activity based costing
No. of entities / ABS's	User network established	No. of internal complaints	Intranet	Benchmark against regulators
Cost recovery level	Qual. feedback from network	No. of reports of serious misconduct	Risk Assessment framework	Waiver turn-around times
App. Turnaround	No. of consultation responses	No. of referrals to PCD from Supervision	Policy framework	Staff survey improving
	Pattern of website usage	Chambers data	Bar Barometer	Biennial Survey
	Research prog. outcomes	QASA proportion competent	RSF 'satisfactory'	Education providers' feedback
		BPTC outcomes / no. of trig. visits		User satisfaction surveys
		Diversity data - increased disclosure		Pupil survey

Business Plan Activities

Aim 1: Implement specialist regulatory regimes	Time	Bdgt	Staff	Aim 4: Evidence- and risk-based in all we do	Time	Bdgt	Staff
Handbook and (non-ABS) entity regs	✗	✗	⚠ (see 9a)	IT systems in place	✗	✓	⚠ (see 9e)
Entity regulation	✗	✗	⚠ (see 9b)	Risk assessment framework	⚠	✓	⚠ (see 9f)
Litigation	✓	✓	✓	Evidence base	⚠	✓	⚠ (see 9g)
Waivers System	⚠	✓	✓ (see 9c)	Policy development framework	✗	✓	✓ (see 9h)
QASA	✗	✗	✓ (see 9d)				
LSA 2007 review	✓	✓	✓	Aim 5: Best practice as an organisation			
				Contract management	✓	✓	✓
Aim 2: Public and professional understanding of our role and mission				TRIP	✓	✓	✓
Risk-based supervision	✓	✓	✓	Fees and charges review	✗	✓	⚠ (see 9i)
User-friendly information	✓	✓	✓				
Biennial Survey 2013	✓	✓	✓				

Aim 3: High standards of entry to and practice in a diverse profession	Time	Bdgt	Staff	Service Standards (Core activity)	Indicator	YE	Target	
LETR	✓	✓	✓		% of complaints concluded or referred to disciplinary action within service standards	77%	75%	✓
BCAT	✓	✓	✓		% of complaints concluded or referred to investigation within 8 weeks	74%	80%	✗
CPD	✓	✓	✓		% external complaints concluded or referred to disciplinary action within 8 months following investigation	84%	70%	✓
Will Writing	x	x	x		% of internal complaints concluded or referred to disciplinary action within 5 months following investigation	83%	80%	✓
Immigration	✓	✓	✓					
Special bodies	x	x	x					
Enforcement strategy	✓	✓	✓					

Resources (Budget / Staff)				Internal Processes			Corporate Risk Register			
Budget (actual vs budget)		£k var	% var	IT	YTD	11 Feb 14		14 May 14		
Total Expenditure		+455	+8	Response to high priority calls	100%	Likelihood: 1 1		Likelihood: 1 1		
Total Income		-150	-9	Response to medium priority calls	99%	Likelihood: 6		Likelihood: 7		
Staff	YE	Target	HR	Recruitment times (approval to start date)	13	Likelihood: 2 7		Likelihood: 2 7		
Sickness (days/FTE)	8.5	7.7	(weeks)			Likelihood: 1 3		Likelihood: 1 4		
Turnover (%)	36%	14%				Impact: 21		Impact: 23		
Retention (%)	71%	80%								

Guidance notes on the Dashboard

1. The purpose of the dashboard is to give the Board a one-page visual overview of how we are progressing against our strategic aims, business plan activities, our budget and our other performance indicators. It is intended to be viewed alongside the Quarterly Performance Reports which provide more details and explanations for the information the dashboard displays.
2. The dashboard displays different information and is a separate entity from the Corporate Risk Register. Activities can be rated as high risk in the Corporate Risk Register but green on the dashboard. This is because whilst there may be significant risks relating to an activity e.g. the judicial review of QASA or widespread non-compliance with the scheme, we are on track to meet our targets in terms of the implementation of the Scheme.

Strategic Aims KPIs

3. This section will show how we are performing against the KPIs set out in the BSB's 2013-16 Strategic Plan. As these cover the 3-year period of the plan, the majority of these are under development.

Business Plan Activities

4. This section shows the 23 activities listed in the 2013-14 Business Plan¹. Each activity has three different traffic lights associated with them, reflecting how we are performing in terms of time, budget and staff.
5. The 2013-14 Business Plan also lists quarterly milestones for each activity, e.g. for the "Biennial Survey 2013", we set out that we will commission the survey by the end of Q1, carry the survey out by the end of Q2, analyse the responses by the end of Q3 and publish the survey by the end of Q4. The 'time' indicator monitors performance against this quarterly timetable of work.
6. If we have not or do not expect to complete a task by more than three months after its due date the indicator will appear as red. It will appear as amber if some elements of the task are currently behind schedule by less than three months, or there are plans in place to ensure that it will be completed on-time. It will show as green if the task is completed or on-track.
7. For 'budget', a red indicator signals that there is a significant overspend against this activity. (-10%) Amber shows that this item is on budget but there are significant risks of overspend in this area. Green shows that the activity is broadly on-budget.
8. For 'staff', a red indicator signals that the activity is suffering from staffing issues that are having a significant and negative impact on the timeline for this activity, e.g. long term sickness or losses of multiple members of staff in a short space of time. Amber indicates that some staffing issues have temporarily affected parts of the timeline which may have presented operational issues, however these could be made up throughout the year. Green indicates that there are no staffing issues of consequence to this activity.

¹ https://www.barstandardsboard.org.uk/media/1465505/bsb_business_plan_2013-14.pdf

Part 1 – Public

9. Activities where the 'time' indicator has changed since the last quarterly report to the Board will show as highlighted, e.g. an activity which has changed from green to amber will be highlighted in amber. A reference to the relevant paragraph in the Performance Report will also be displayed explaining the reasons for the change.
10. If all of the indicators for an activity display an 'x', this means that the activity has been indefinitely delayed or is no longer necessary e.g. The Business Plan states that we will review the regulatory arrangements for probate and will writing, however, the Lord Chancellor refused the LSB recommendation to introduce a new reserved legal activity and as a result this piece of work will not now be completed.

Services Standards (Core Activity)

11. This area shows our key and operational performance indicators for the Professional Conduct Department (PCD). The data is provided by the PCD's Reports & Data Analysis Officer and the indicators show as green if we are meeting or exceeding our targets and as red if we are failing to achieve them. The targets are reviewed annually by the PRP Committee.

Resources

12. The 'budget' section displays the variance between our year-end forecast and our budget for both expenditure and income. For expenditure, if we are forecasting an overspend the indicator will show as red, and green if we are forecasting an underspend. Similarly, if our income forecast is lower than our budgeted income the indicator will display as red, and if not it will display as green.
13. Sickiness, turnover and retention data is provided by the HR Department. The figures shown are for the year-to-date. If we are not on-track to meet our targets the indicators will show as red, if we are on-track they will display as green.

Internal Processes

14. Data for our internal processes is provided by the HR and IT Departments. Similar to the internal processes, the figures shown are for the year-to-date. If we are not on-track to meet our targets the indicators will show as red, if we are on-track they will display as green.

Corporate Risk Register

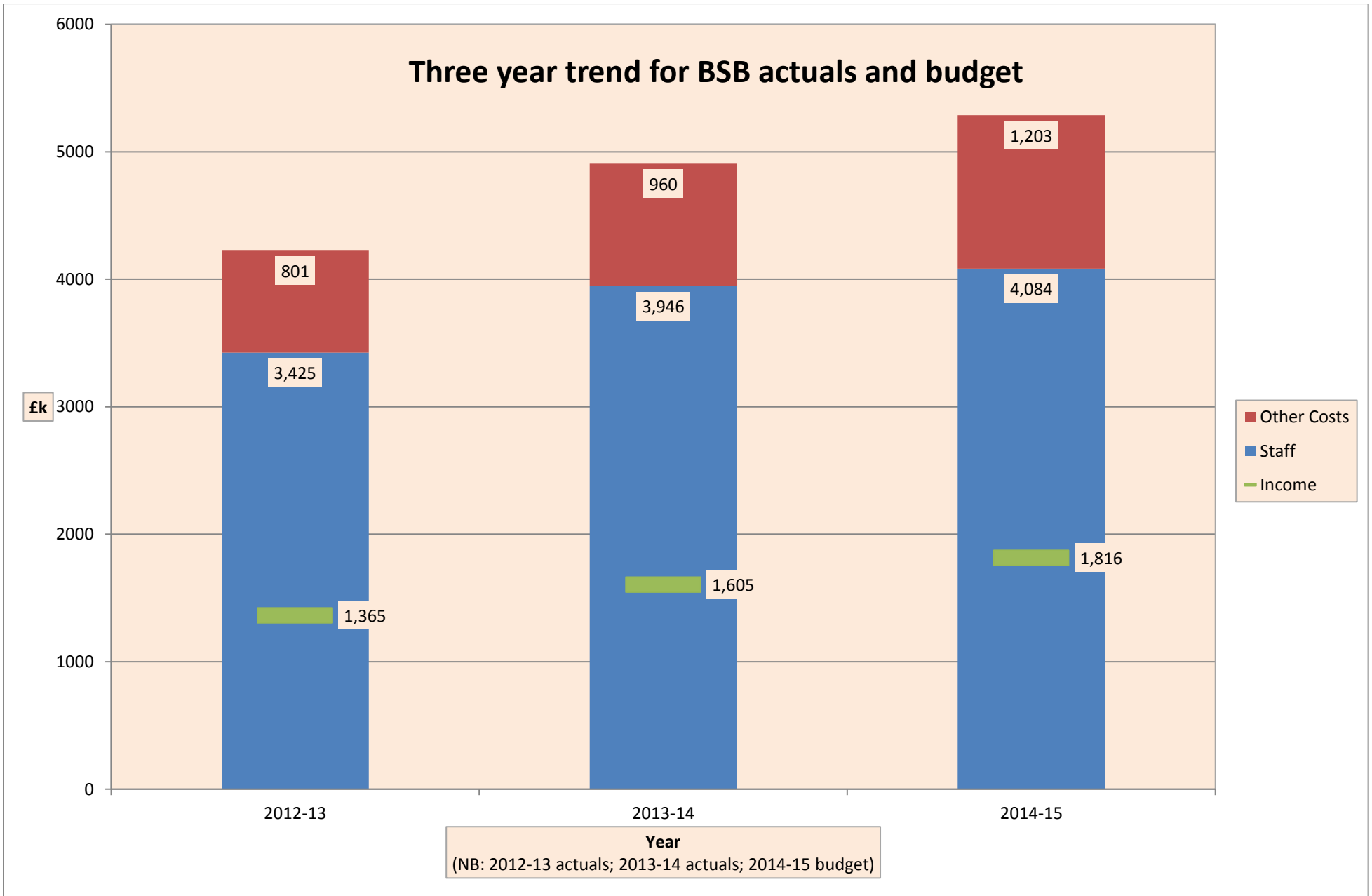
15. The heat-map (summary) of the BSB's Corporate Risk Register is displayed on the dashboard for reference. For further information and a more complete picture on the Corporate Risk Register please refer to the Corporate Risk Register reports which appear quarterly in Part 2 of the Board Papers.

BSB SUMMARY

2013-14

	YE Actual* 2012-13 £k	YE Actual* 2013-14 £k	Budget 2013-14 £k	YE Act / Bgt 2013-14 Variance		Budget 2014-15 £k	Reference
				£k	%		
Professional Conduct							
Income	108	53	0	53		0	19 f)
Expenses							
Staff	1,130	1,155	1,183	28	2%	1,104	
Other Costs	225	239	229	-10	-5%	162	19 h)
Contribution	-1,248	-1,341	-1,412			-1,266	
Education & Training							
Income	265	248	150	98	66%	1,061	19 h), 25
Expenses							
Staff	345	308	283	-25	-9%	348	24
Other Costs	90	10	44	34	78%	235	19 f)
Contribution	-171	-69	-177			478	
Exams & Assessments							
Income	747	990	760	230	30%	262	19 d)
Expenses							
Staff	300	350	379	29	8%	304	24
Other Costs	233	259	179	-80	-45%	131	19 d)
Contribution	214	381	203			-173	
Qualifications							
Income	246	314	237	77	32%	386	19 e)
Expenses							
Staff	244	189	192	2	1%	281	
Other Costs	24	41	50	8	17%	39	
Contribution	-22	83	-4			65	
Regulatory Policy							
Income	0	0	120	-120	-100%	0	19 b), 25
Expenses							
Staff	322	317	454	138	30%	346	19 b), 25
Other Costs	114	154	214	60	28%	15	19 b), 19 h)
Contribution	-437	-471	-548			-361	
QASA							
Income	0	0	487	-487	-100%	56	19 a)
Expenses							
Staff	78	85	115	30	26%	104	19 a)
Other Costs	38	1	98	97	99%	98	19 a)
Contribution	-116	-86	273			-145	
Entity Regulation							
Income	0			0		50	19 b)
Expenses							
Staff	0			0		88	19 b)
Other Costs	0			0		125	19 b), 19 h)
Contribution	0	0	0			-163	
Expenditure-only							
Director	507	644	645	1	0%	612	
Staff	480	581	574	-7	-1%	567	
Other Costs	28	63	71	8	11%	45	
Strategy & Comms	314	834	895	62	7%	792	24
Staff	271	648	653	4	1%	537	
Other Costs	43	185	243	57	24%	254	
Supervision	260	320	401	81	20%	383	
Staff	254	313	333	20	6%	299	21 c), 24
Other Costs	6	7	68	61	90%	84	21 c), 24
Equality and Diversity	0	0	0	0		121	
Staff	0	0	0	0		105	24
Other Costs	0	0	0	0		16	
Expenditure-only Sub-Total	821	1,478	1,540	63	4%	1,525	
Total Income Services	1,365	1,605	1,755	-150	-9%	1,816	
Total Expenditure							
Staff	3,425	3,946	4,166	220	5%	4,084	24
Other Costs	801	960	1,195	235	20%	1,203	
Contribution	-2,860	-3,301	-3,606			-3,472	

* Prior to year-end staffing/corporate adjustments



Performance Report for Year-End - Achievements

For noting

Strategic Aim 1 - Implement our specialist regulatory regimes for advocacy services which operate in the public interest and in support of the regulatory objectives of the LSA 2007

Date	Narrative
September 2013	The BSB published its contribution to the Legal Services Act 2007 Review, which was led by the Ministry of Justice ¹
December 2013	Judicial review of the QASA Scheme for which the BSB contributed significantly as an interested party – judgment in favour received January 2014.
January 2014	Plan agreed for the delivery of Waiver system changes
January 2014	The new Handbook was successfully launched
January 2014	Rules established and authorisation processes in place to allow barristers to conduct litigation

Strategic Aim 2 - Promote greater public and professional understanding of and support for our role and mission.

Date	Narrative
September 2013	The Board approved the new Supervision Strategy and implementation commenced
January 2014	Updated all of our enforcement / professional conduct leaflets and guidance to align with the new Handbook.
March 2014	Compiled the Bar Barometer (which was published 1 April 2014), and the Biennial Survey of the Bar which is due to be published imminently.

Strategic Aim 3 - Set and maintain high standards of entry to and practice in a diverse profession

Date	Narrative
July 2013	We responded to the LSB's consultation on the regulation of immigration advice and services ²
August 2013	The delivery of the first cycle of the Bar Course Aptitude Test (BCAT) was completed
December 2013	A new enforcement strategy was published to align with the new Handbook
January 2014	Development commenced on the implementation of new Continuing Professional Development (CPD) regulations

¹ https://www.barstandardsboard.org.uk/media/1536787/bsb_submission_final_170913.pdf

² http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/20120727_reg_if_imm_advice_to_publish.pdf

Part 1 - Public

Date	Narrative
February	We responded to the LSB's consultation on issuing statutory guidance for education regulation.
March 2014	We established a plan to implement the recommendations of the Legal Education and Training Review (LETR)

Strategic Aim 4 - Become more evidence-and risk-based in all we do, taking into account also the globalised legal services market.

Date	Narrative
August 2013	Implementation of a new enforcement database was completed
November 2013	A new document management system was set up
December 2013	A new risk framework was developed

Strategic Aim 5 - Strive for "best practice" as an organisation for those who work for us and those whom we serve.

Date	Narrative
July 2013	Skills audit and process mapping exercises completed
July 2013	New fees and charges policy statement approved
October 2013	New Bar Tribunal and Adjudication Service (BTAS) contract implemented
October 2013	Learning and Development plan produced and commenced.
November 2013	Centralised Contract Register set up
December 2013	Organisational restructure and new 'Ways of Working' in place
March 2014	Competency Framework and revised Appraisal process in place

Jeffrey Review on Advocacy preliminary discussion points

Status

For discussion

Executive summary

1. On 7 May Sir Bill Jeffrey published his report into the provision of independent advocacy (Annex A).
2. Sir Bill was commissioned by the Justice Secretary on 5 September 2013 to look at the provision of independent criminal advocacy services.
3. Representatives from the BSB met with Sir Bill a number of times whilst he was gathering evidence to compile his report. The BSB also provided a written submission to assist the review (Annex B).
4. The report makes 12 recommendations and also makes some additional suggestions to stimulate discussion on the future of the criminal Bar. The main points are summarised below.
5. Most of the recommendations are consistent with the proposals made by the BSB in its written submission. The recommendations include suggested actions for the Government, the Crown Prosecution Service and the Legal Aid Agency as well as the professional bodies and the regulators.
6. There are a number of actions for the BSB to consider in order to support and advance some of the recommendations.
7. A proposed full response to the report and more detailed action plan will be presented to the Board in July

Recommendations

8. At this stage, the Board is asked to:
 - (a) Discuss the recommendations in the report;
 - (b) Note the preliminary policy implications for the BSB;
 - (c) Agree that a public response should be drafted; and
 - (d) Nominate two Board members to advise upon this area.

Background

9. The terms of reference for the Jeffrey review included the following:
 - the experience, capabilities and skills needed for such services;
 - the arrangements for training, having regard to the recommendations of the Legal Education and Training Review;
 - the standards needed to maintain and improve the quality of advocacy; and
 - the future structure of the profession providing advocacy services
10. The Review's remit did not include consideration of remuneration rates for criminal advocacy or the requirements for public funding.

11. Representatives from the BSB met with Sir Bill twice whilst he was gathering evidence to compile his report. The BSB also provided a written submission to assist the review (Annex B). In this written submission the BSB made the following points:

- The Bar sets the benchmark in terms of high quality criminal advocacy;
- Recent market changes are increasing the risks to standards and quality;
- To mitigate these risks there needs to be greater consistency in four key areas:
 - (i) Education and Training;
 - (ii) Standards and expectations around competency;
 - (iii) Regulatory obligations; and
 - (iv) Regulation.
- As a minimum, this will require greater cooperation between the regulators. An alternative that merits consideration would be a move to activity based regulation.

Comment

12. The review is largely consistent with the representations made by the BSB when meeting with Sir Bill and in its written submission. In general terms the report recognises the importance of specialist advocates, expresses concern at how the market is currently operating and examines measures that the Government, regulators and the profession could take to maintain quality. The report places an onus on the Bar to adapt to meet the challenges ahead.

13. The Executive Summary briefly covers the main areas that are considered in the report and Board members are encouraged to review this at Annex A.

14. The twelve recommendations that are made in the report are as follows:

Recommendations

1. *The implications for the legal profession of the trends in advocacy described in this report are potentially profound, and - notwithstanding the strong feelings that they arouse - I would urge the profession to seek consensus on how best to address them (Conclusion).*
2. *There should, over time, be developed a common training expectation of all those practising as advocates in the Crown Court, which need not be as demanding as the Bar's, but should substantially exceed the current requirement on solicitors seeking higher court rights (paragraph 4.6).*
3. *In following up the Legal Education and Training Review, the profession and the regulators should consider taking the limited advocacy element out of the existing Legal Practice Course and instead develop a more substantial elective advocacy course for trainee (or indeed qualified) solicitors minded to pursue a career in advocacy, completion of which could in future be mandatory for those seeking higher court accreditation (paragraph 4.7).*

Part 1 – Public

4. *The SRA and the Law Society should consider proportionate ways of replicating for higher court solicitor advocates the supervised experience which pupillage provides for barristers, including early exposure and practice (paragraph 4.8).*
5. *The profession should work together, with the regulators, to develop common minimum expectations for continuous professional development training (CPD) for advocates in the Crown Court. A common approach could build on the excellent work already being done by the Advocacy Training Council (ATC), including the ATC's Advocacy Gateway, the Solicitors Association of Higher Court Advocates (SAHCA) and the Law Society's Advocacy Section (paragraph 4.9).*
6. *The profession should consider the early adoption for defence advocates of a "ticketing" system, of the kind already in place for the judiciary and the CPS, under which those appearing in rape and sexual abuse cases must demonstrate that they have undertaken relevant training. To go further by extending such a requirement to the generality of cases involving vulnerable witnesses would have wider implications, but would make sense in principle, and is something the judges, the CPS and the profession might wish to consider (paragraph 4.11).*
7. *The SRA and the Law Society should consider what further regulatory or other steps could be taken to clarify and reinforce the professional responsibilities of solicitors in the assignment of advocates and in giving advice on plea (paragraph 5.29).*
8. *The Government should consider whether the LAA should maintain a list of approved defence advocates in publicly funded cases, on the model of the CPS's panel of barristers briefed to represent the prosecution (paragraph 5.30).*
9. *The Government should reflect on the implications for the legal aid system of contracting directly with the Bar for defence representation, including the weight given to capability in advocacy, and consider the desirability and feasibility, in future contracting rounds, of separating police station advice and post-charge representational work (paragraph 5.43).*
10. *In his review of practice and procedures in the criminal courts, Sir Brian Leveson may wish to consider whether there are changes in Court Rules or judicial direction which would help to ensure the timely assignment of advocates, and the impact of the "warned list" system of scheduling trials on the consistency and quality of advocacy (paragraph 7.12).*
11. *The Government, the regulators and the representative bodies should consider whether more could be done, without over-elaboration, to develop relevant data on criminal advocates and advocacy (paragraph 10.2).*
12. *They should also look kindly on the case for research in this area, both on the working of the advocacy market – which would repay rigorous economic analysis – and on the vexed question of quality (paragraph 10.3).*

Policy implications

15. The report and its recommendations have a number of policy implications for the BSB. This includes direct actions for the BSB as well as recommendations on other regulators and on the profession that have ramifications for the BSB. The main policy implications are summarised below.

QASA

16. Sir Bill sets out the arguments for and against QASA that were made to him during his evidence gathering. Whilst he laments the lack of evidence in all areas relating to quality he records clearly the consistency and strength with which judges expressed concerns about quality. He states that it would be a mistake to discount these views and goes on to conclude that:

“I do not doubt the strength of the case for some kind of quality assurance scheme, both to reassure the public that there is a means by which advocates can be denied the opportunity to act beyond their competence, and to encourage continuous professional development.”

17. The report does not express strong views on the design of QASA although Sir Bill raises a number of issues that the BSB and JAG should consider as relevant to the scheme:

- (i) Sir Bill states that he is “more inclined than some to have confidence that judges will in practice be able to distinguish between poor advocacy from the carrying out of wrong-headed client instructions.”
- (ii) He supports the changes suggested by the High Court in the judicial review judgement and encourages the regulators to adopt these.
- (iii) He considers risks in relation to non-trial advocates. Again the report does not come down firmly on either side of the debate although recommendation 7 is for the Law Society and SRA to consider what further regulatory steps could be taken to clarify and reinforce the professional responsibilities of solicitors in the assignment of advocates and in giving advice on plea. In this regard Sir Bill goes on to note: “In doing so they will no doubt give due attention to the model proposed by the Bar Council, and in particular the suggestion that there should be a record of advice given.”
- (iv) The report considers the threat to quality that arises from poor preparation. In this regards Sir Bill urges Sir Brian Leveson to consider (through his report) whether changes are required to the Court Rules or judicial direction to ensure timely assignment of advocates.

18. The report also makes two recommendations (5 and 6) which could be potential add-ons to QASA. These are:

- (i) Developing common minimum expectations for CPD for advocates in the Crown Court.
- (ii) Consideration of a ticketing system for rape and sexual abuse cases and possibly in time for all cases with vulnerable witnesses.

19. Whilst it is not appropriate at the moment to be considering extending QASA, these are issues that should be considered once the scheme has been operational for a period of time and more evidence is available. JAG will shortly be undertaking some targeted research into advocacy in the youth courts which will be of relevance to consideration of both of these recommendations.

20. Recommendation 11 also states that the regulators should be considering whether more could be done to develop relevant data on criminal advocates and advocacy. This should be picked up by the QASA two year review and also in work being done on data collection on the profession more widely.

Education and Training / LETR

21. The report expresses deep concern about the apparent disparity between advocacy training for barristers and solicitor advocates: “The disparity in mandatory training requirements expected of barristers and solicitors reflects historic differences in the main focus of the two sides of the profession. But it is no reflection on the many highly capable solicitor advocates to observe that it is so marked as to be almost impossible to defend.”
22. The report therefore considers a number of measures for addressing this. This includes consideration of later specialisation which is explained further below. The three more concrete recommendations that require immediate consideration through the Legal Education and Training Review are 2, 3 and 4. These relate to the development of a common training expectation of all those practising in the Crown Court which should substantially exceed the current requirement for solicitors to gain higher rights. To achieve this Sir Bill states that the regulators should consider, as a follow up to LETR, taking the limited advocacy training out of the LPC and replacing it with a more substantial elective advocacy course for trainee or qualified solicitors.
23. Sir Bill’s proposal here is in principle consistent with our intended path following the LETR. These issues will be considered more closely and taken forward by the Education and Training Department and in discussions with the SRA through the appropriate fora.

Structure of the profession

24. The report accepts that the market is not currently operating competitively, as: “The group of providers who are manifestly better trained as specialist advocates are taking a diminishing share of the work, and are being beaten neither on price nor on quality.”
25. Sir Bill expresses the view that the tide away from the self-employed criminal bar is capable of being turned. However, in his opinion, “if the Bar lacks confidence in future criminal work or the willingness to adjust how they conduct their business to compete on a level playing field, the continuation of recent trends will become a self-fulfilling prophecy.”
26. The report makes it clear that seeking to turn back the clock would not be realistic and that solicitor advocates are a valuable and established part of the scene. It broadly considers two main options for how the Bar could adapt to compete in the evolving market:
- (i) Adjustments to business models to compete for legal aid work on a level playing field. This essentially relates to using entity regulation to contract with the Legal Aid Agency. In this regard Sir Bill has set out in recommendation 9 what the Government should consider in terms of making this option viable and attractive to solicitors. These issues will be considered by the Regulatory Policy team as it finalises the entity regulation application.

- (ii) The second option that is discussed is the more radical and is based upon some examples from other jurisdictions where advocates specialise later in their careers. Sir Bill suggests that the profession should consider whether a model could be adopted whereby the Bar constitutes a smaller and more specialised resource. This might require aspiring barristers to obtain more general litigation and advocacy experience in employment and then seek to be called to the Bar later in their careers if they wish to specialise. One of the particular benefits that is envisaged with this model is that it might help to tackle concerns about training and development opportunities for junior barristers within the current market.

27. In the light of the Ministry of Justice's recent consideration of the future of legal services regulation the report did not consider the case for moving to activity based regulation. However, the recommendation made in the report could be linked to the development of our education and training change programme following LETR.

Evidence and research

28. The final two recommendations seek to address the evidence gap in this area. As set out above, recommendation 11 should be covered by both the QASA two year review and work on wider data collection. The call in recommendation 12 appears to be for a more general piece of research on the working of the advocacy market and quality. This should be properly scoped by the BSB's research team, which would include consideration of whether it would require cooperation between the regulators, so that a business case can be considered.

Next steps

- 29. As the report and its recommendations are largely in line with the representations made by the BSB, it is proposed that the BSB should publish a formal response to the report. This should include an explanation of what the BSB intends to do in relation to each of the recommendations that are relevant to the BSB's work as a regulator. In the interim we should make public our intention to do this.
- 30. The Board is asked to nominate 2 Board members to advise on this and work with the executive to identify and work through all of the policy implications and to establish what actions the BSB should take forward.
- 31. A proposed full response and action plan will be presented to the Board at its meeting in July. This will include analysis of the equality and risk implications and the impact on other teams.

Lead responsibility

Oliver Hanmer
Chris Nichols

Independent criminal advocacy in England and Wales

Review by Sir Bill Jeffrey

This information is also available at : www.justice.gov.uk

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Introduction

Effective advocacy is at the heart of our adversarial system of criminal justice. If prosecution and defence cases are not clearly made and skilfully challenged, injustice can and does result. Effective advocates simplify rather than complicate; can see the wood from the trees and enable others to do so; and thereby can contribute to just outcomes, and save court time and public money.

This review reflects concerns about the quality of advocacy in the English and Welsh criminal courts and the longer term implications of current trends in the way advocacy services are provided. These are matters of legitimate interest to the Government and the public at large, but they also have a strong bearing on the future structure and professional standards of the legal profession. Although this report was commissioned by the Justice Secretary, such conclusions as I have been able to reach are addressed as much to the profession and its regulators as to the Government.

I have had meetings with, and received submissions from, the Council of Circuit Judges, the bodies representing barristers, solicitors and legal executives, the main regulators and the Legal Services Consumer Panel. I have visited Crown Court centres and magistrates' courts in five cities, spent time observing proceedings and had meetings with judges, groups of advocates (including younger practitioners), solicitors' firms, barristers' chambers and several businesses providing advocacy services in less conventional ways. I have taken the views of academics and educators in the legal field, and some who provide continuing professional training for advocates. I have also had helpful meetings in Scotland and New Zealand, and am particularly indebted to those who took time and trouble to explain to me the system in these countries. Finally, I have been much assisted by a small Reference Group, comprising representatives of the judiciary, the Bar Council, the Law Society, and the Chartered Institute of Legal Executives, who have given freely of their views and experience. None bear any responsibility for my conclusions.

There is a full list of those whose views I have taken in annex A. I offer warm thanks to all of them. I also offer a pre-emptive apology to the Chartered Legal Executives. They are an increasingly significant part of the scene, particularly in the magistrates' courts. As yet they provide very few advocates, although those whom I met were distinguished by their enthusiasm. It would have been cumbersome to have mentioned them at every stage of

the analysis, and I hope they will forgive phrases such as "the two sides of the profession" where they appear in this report.

My approach has been to attempt to describe the "landscape" of criminal advocacy as it is now and the forces which have moulded it in recent years (particularly those which have a bearing on quality), and to offer a view on the longer term implications. Inevitably, this involves an element of speculation, both because the future is unknowable and because hard facts about the present and the recent past are not easy to come by. I also offer some thoughts on measures that could be taken to improve things in the shorter term, if there were sufficient consensus to do so.

My terms of reference (which can be found at annex B) explicitly excluded consideration of legal aid remuneration rates and the requirement for public funding. These are currently matters of public debate and controversy, and many of those in the profession to whom I have spoken in the last few months have found it difficult to get beyond the legal aid cuts as an explanation for poor advocacy quality and indeed any other shortcomings in the system. My own view is that legal aid fee rates are neither the whole story nor none of it. The income to be derived from doing publicly funded work clearly affects behaviour, but there are, I believe, other factors at work which deserve attention. In a system which is still largely publicly funded, the significance of legal aid fee levels cannot be ignored; but it is to these other factors that this report pays most attention

I have been splendidly supported by a small team comprising Farah Ziaulla, who has led the team ably, Terry Davies and Bridget Doherty. They have been intelligent contributors as well as arrangers of meetings and gatherers of information, and I am very much in their debt. At the beginning of the review, before the team had been assembled, Jenny Pickrell and Judith Evers were a great help in getting me started, and I am grateful to them too.



Summary and Main Conclusions

The landscape of criminal advocacy has altered substantially in recent years. Recorded and reported crime are down. Fewer cases reach the criminal courts. More defendants plead guilty, and earlier than in the past. Court procedures are simpler. There is substantially less work for advocates to do. Its character is different, with more straightforward cases and fewer contested trials. In the publicly funded sector (86%¹ of the total), it pays less well (paragraphs 1.3 to 1.6).

There has been a marked shift in the distribution of advocacy work in the Crown Court between the two sides of the profession. There are many more solicitor advocates than there were in the years following the liberalisation of rights of audience. Between 2005-06 and 2012-13, the percentage of publicly funded cases in which the defence was conducted by a solicitor advocate rose from 4% to 24% of contested trials and from 6% to 40% of guilty pleas². Both figures are on a rising trend. In 2012-2013, Crown Prosecution Service (CPS) in-house lawyers led the prosecution in approximately 45% of Crown Court trials³ (paragraphs 1.8 to 1.10).

Standards, quality and training

There is no hard research evidence on the quality of advocacy, but I found a level of disquiet about current standards among judges (including some with long experience as solicitors) which was remarkable for its consistency and the strength with which it was expressed. It would be a mistake to discount these views (paragraphs 2.1 to 2.9, 4.1 and 4.2).

The disparity in mandatory training requirements expected of barristers and solicitor advocates reflects historic differences in the main focus of the two sides of the profession. But it is no reflection on the many highly capable solicitor advocates to observe that it is so marked as to be almost impossible to defend. To be called to the Bar, a barrister needs to have completed 120 days of specific advocacy training. A qualified solicitor can practise in the Crown Court (subject to

¹ MoJ/LAA Data – Defendants committed or sent for trial in the Crown Court in 2012 who were represented under legal aid.

² MoJ/LAA Data

accreditation) with as few as 22 hours such training. There are also different expectations of continuous professional development training (CPD) for advocates in the Crown Court, for which there is no rational basis. High quality CPD training has been developed by both sides of the profession. There would be a good deal to be gained from a common approach (Section 3 and paragraphs 4.3 to 4.9).

The Quality Assurance Scheme for Advocates (QASA) has divided the legal profession and its regulators. I find it hard to assess how well-founded the professional concern about judicial assessment in live trials will prove to be. I am more inclined than some to have confidence that judges will in practice be able to distinguish poor advocacy from the carrying out of wrong-headed client instructions. The High Court has suggested some changes to the scheme to help mitigate any risk. I hope these are implemented. I do not doubt the strength of the case for some kind of quality assurance scheme, both to reassure the public that there is a means by which advocates can be denied the opportunity to act beyond their competence, and to encourage continuous professional development (paragraphs 2.10 to 2.15 and 4.15 to 4.17).

The market in defence criminal advocacy

The key decision on the choice of advocate is made, if not directly by the solicitor representing the defendant, then at a point when that solicitor is effectively in charge of the case. Solicitors are under a professional duty to ensure their clients are in a position to take informed decisions about the services they need. In the past this was done by recommending a suitable member of the self-employed Bar. This ensured a strong measure of competition, based on barristers' reputations.

Today, the competitive dividing line is between in-house providers and outsourced specialists. The legal aid system provides a fixed fee for the litigation and advocacy elements of defence representation. It is widely believed that solicitors have a commercial incentive to assign a solicitor advocate to retain the combined value of the fee in-house, especially if a guilty plea is likely. The Bar considers that this creates a potential conflict of interest, which needs to be addressed. Solicitors say that they assign advocates on a judgement of what will be in the best interests of

³ CPS Data

the client. Many clients prefer continuity of representation (paragraphs 5.8 to 5.12).

As it exists now, the market could scarcely be argued to be operating competitively or in such a way as to optimise quality. The group of providers who are manifestly better trained as specialist advocates are taking a diminishing share of the work, and are being beaten neither on price nor on quality (paragraphs 5.22 to 5.24).

Solicitors are bound, for good reason, to be influential in the choice of advocate. The fact that there are now internal commercial interests at stake makes it even more important that the process by which an advocate is assigned should be above reproach. This suggests that there would be advantage in reinforcing and clarifying solicitors' professional responsibilities in this area (paragraphs 5.27 to 5.29).

An alternative, more radical approach would be for the Legal Aid Agency (LAA) to take a more assertive role in the acquisition of advocacy services and act more as a guarantor of quality than they do at the moment. Where public money is being spent - as it is both on legal aid and on avoidably protracted trials - the public has a legitimate interest in advocacy quality. An option would be for the LAA to maintain a list or panel of approved advocates for legally aided defence, on the model of that kept by the CPS. This would need to include both barristers and solicitor advocates, but might be a means by which concerns about over-supply and diversity could be addressed (paragraph 5.30).

It is possible to overstate the argument that advocates who only appear in guilty pleas in the Crown Court cannot effectively give advice on plea. Someone who has experience of defending trials in that jurisdiction will no doubt have a better sense of their dynamics, the likely reaction of juries, and the legal issues likely to arise. But legal advice which amounts to advice on plea is given by solicitors from the earliest stage in the process, based on the facts and the inherent strength of the defence case.

Where it is known that a defendant will plead guilty, I can see no objection in principle to him being represented by a less accomplished advocate than would represent him if he pleaded not guilty. Of more concern are the practical consequences for case management where there is doubt about how the defendant will plead, and the assignment of an advocate is deferred until very late in the day, to keep the advocacy task in-house for an advocate who only appears in pleas

(paragraphs 5.13 to 5.17, 5.25 and 5.26).

In principle, there is nothing to prevent the Bar from competing now for criminal legal aid contracts. To do so a set of chambers would need to form a legal entity with whom the LAA could do business. They would also need to be able to provide other elements of representation, including (at present) duty advice at police stations and magistrates' courts and case preparation. There are already a few "alternative business structures" led by barristers, but the overwhelming majority of criminal representation is provided in the traditional way.

Even those barristers who are open to the idea of changing the model to compete for legal aid contracts object that they would have to employ so many people to do the non-advocacy elements of the work as to lose the essential independent character of the self-employed Bar. If the LAA were able to contract separately for duty advice and post-charge work, and if, in more straightforward cases, junior barristers were able to operate as a "single pair of eyes" undertaking case preparation as well as advocacy, this objection would have less force. It might be possible for the Bar to compete effectively without changing their current business model out of all recognition. Their high reputation and low overheads could put them in a strong position. Adjusting the legal aid system as I suggest would not be straightforward, and much would depend on whether there were any signs that the Bar was interested (paragraphs 5.31 to 5.43).

Supply of criminal advocates

The number of practising advocates in all courts appears to have increased over a period when magistrates' courts business reduced substantially and Crown Court business fluctuated in volume, but reduced in complexity. There are now many more criminal advocates than there is work for them to do. Under-utilisation depresses average earnings, and makes it even harder to manage reductions in legal aid fees (paragraphs 6.1 to 6.4).

There are no reliable figures for new entrants to the criminal Bar, but strong signs that it is an ageing profession, with fewer younger members than in the past. It is not well-equipped to undertake work-force planning of the kind undertaken by managed businesses in the public and private sectors (paragraphs 6.5 to 6.8).

There are many more graduates of the Bar Professional Training Course (BPTC) than there are pupillages on offer. I cannot fault the logic on which the Wood Working Group dismissed the idea of a cap on numbers taking the BPTC. But the problem of high levels of debt and disappointed hopes of pupillage persists, and is probably most acute in relation to crime (paragraphs 6.10 to 6.15).

Some of these trends seem likely to tell against progress on diversity. There is a realistic fear that the good work which has been done in this area in the relatively recent past is in danger of being undone, with a reversion to a more socially advantaged, less ethnically diverse profession. This is one of the issues which any radical change in the structure of the profession should seek to address (paragraphs 6.18 to 6.20).

How the system works and its impact on quality

Inadequate preparation is the enemy of good advocacy. A combination of delay in assigning advocates (both prosecution and defence) and uncertainty over trial dates makes the system more hand to mouth than is conducive to good quality advocacy. What is badly needed is the timely assignment in as many cases as possible of an advocate who has a good prospect of actually conducting the trial. There was some consensus among the defence practitioners I consulted that advocates on both sides should be assigned about two weeks before the Plea and Case Management Hearing. This would work only if the CPS played its part, and if there was greater certainty over trial dates. To make best use of court time, some flexibility over the scheduling of trials is inevitable, but the "warned list" system as it operates in most parts of the country makes it very hard for advocates to plan their diaries, and increases the likelihood of changes of representative at the last minute. Sir Brian Leveson's review of practice and procedures in the criminal courts provides an opportunity to consider these issues more fully (section 7).

The longer term

There are longer term trends and forces at work which could have profound implications for the future of criminal practice in the legal profession.

The solicitor side of the profession faces a period of upheaval following the legal aid changes, which will probably involve substantial consolidation and the

emergence of fewer, larger criminal practices. This will not be easy, but the general character of the change is reasonably well understood (paragraphs 9.2 and 9.3).

The future of the self-employed Bar is less clear. If the trends described here continue unabated, the Bar will undertake a diminishing share of the available work. The intake of younger barristers will decline further, and they will find it even harder to get the early experience of simpler work necessary to build skills. Against that, there are some signs that the tide away from the self-employed Bar may be turning, or be capable of being turned. But this is by no means assured, and if - as appears to be the case - the Bar itself lacks confidence in the future of criminal work, or willingness to adjust to compete for it, the continuation of recent trends will become a self-fulfilling prophecy. In that case, as the present generation of experienced criminal barristers moves towards retirement, concerns about the future "talent pipeline" for criminal QCs and judges are not, in my view, fanciful (paragraphs 9.4 to 9.11).

This matters, because the particular strengths of the English and Welsh criminal Bar are a substantial national asset, which could not easily be replicated. There is also a distinct national interest in having sufficient top-end advocates to undertake the most complex and serious trials, and senior judges with deep criminal experience.

Attempting to turn the clock back, for example by restoring exclusive rights of audience in the Crown Court, would be neither feasible nor desirable. Solicitor advocates are a valuable and established part of the scene. The sensible approach is to invest in their skills and professionalism (paragraphs 9.12 and 9.13).

It may, however, be worth looking more radically at the future structure of this part of the legal profession. In paragraph 9.18, in the hope that it will stimulate debate within the profession and with its regulators, I describe a possible model in which the decision to become a specialist advocate would be taken later in a lawyer's career; a smaller criminal Bar would concentrate on cases where specialist advocacy skills were most evidently required; and early advocacy experience would be obtained elsewhere.

The potential advantages of such a model are that the distribution of work between the two branches of the profession would be clearer and less contested; young criminal practitioners would be called to the Bar with some previous advocacy

experience; and the problem of over-provision on the BPTC and indebtedness among its disappointed graduates might be reduced if not removed altogether.

The Lord Chief Justice has encouraged the criminal Bar to consider where it wishes to be in ten years time. Such a reappraisal of the future of the criminal Bar is, in my view, urgently needed. The two broad avenues of development described in this report - adjustment of the business model to compete for legal aid work on a more level playing field, and restructuring as a smaller, more specialist resource - may not be the only possibilities. But simply carrying on as at present, in an effort to keep intact, in radically changed conditions, every aspect of the model as it existed many years ago, does not seem to me to be a viable option (paragraphs 9.14 to 9.22).

Recommendations

1. The implications for the legal profession of the trends in advocacy described in this report are potentially profound, and - notwithstanding the strong feelings that they arouse - I would urge the profession to seek consensus on how best to address them (Conclusion).
2. There should, over time, be developed a common training expectation of all those practising as advocates in the Crown Court, which need not be as demanding as the Bar's, but should substantially exceed the current requirement on solicitors seeking higher court rights (paragraph 4.6).
3. In following up the Legal Education and Training Review, the profession and the regulators should consider taking the limited advocacy element out of the existing Legal Practice Course and instead develop a more substantial elective advocacy course for trainee (or indeed qualified) solicitors minded to pursue a career in advocacy, completion of which could in future be mandatory for those seeking higher court accreditation (paragraph 4.7).
4. The SRA and the Law Society should consider proportionate ways of replicating for higher court solicitor advocates the supervised experience which pupillage provides for barristers, including early exposure and practice (paragraph 4.8).

5. The profession should work together, with the regulators, to develop common minimum expectations for continuous professional development training (CPD) for advocates in the Crown Court. A common approach could build on the excellent work already being done by the Advocacy Training Council (ATC), including the ATC's Advocacy Gateway, the Solicitors Association of Higher Court Advocates (SAHCA) and the Law Society's Advocacy Section (paragraph 4.9).
6. The profession should consider the early adoption for defence advocates of a "ticketing" system, of the kind already in place for the judiciary and the CPS, under which those appearing in rape and sexual abuse cases must demonstrate that they have undertaken relevant training. To go further by extending such a requirement to the generality of cases involving vulnerable witnesses would have wider implications, but would make sense in principle, and is something the judges, the CPS and the profession might wish to consider (paragraph 4.11).
7. The SRA and the Law Society should consider what further regulatory or other steps could be taken to clarify and reinforce the professional responsibilities of solicitors in the assignment of advocates and in giving advice on plea (paragraph 5.29).
8. The Government should consider whether the LAA should maintain a list of approved defence advocates in publicly funded cases, on the model of the CPS's panel of barristers briefed to represent the prosecution (paragraph 5.30).
9. The Government should reflect on the implications for the legal aid system of contracting directly with the Bar for defence representation, including the weight given to capability in advocacy, and consider the desirability and feasibility, in future contracting rounds, of separating police station advice and post-charge representational work (paragraph 5.43).
10. In his review of practice and procedures in the criminal courts, Sir Brian Leveson may wish to consider whether there are changes in Court Rules or judicial direction which would help to ensure the timely assignment of advocates, and the impact of the "warned list" system of scheduling trials on the consistency and quality of advocacy (paragraph 7.12).

- 11. The Government, the regulators and the representative bodies should consider whether more could be done, without over-elaboration, to develop relevant data on criminal advocates and advocacy (paragraph 10.2).**
- 12. They should also look kindly on the case for research in this area, both on the working of the advocacy market – which would repay rigorous economic analysis – and on the vexed question of quality (paragraph 10.3).**

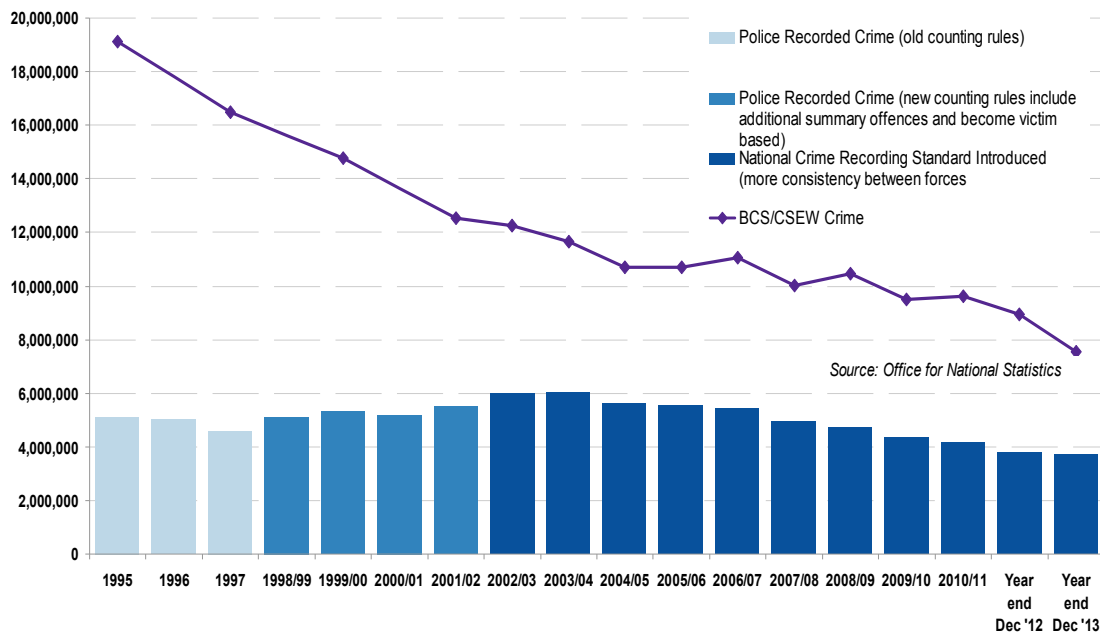
1. The landscape of criminal advocacy

- 1.1 Until solicitors first gained the right to appear in the Crown Court in 1994, all prosecution and defence advocacy in the higher criminal courts was undertaken by members of the Bar. In the magistrates' courts and the predecessors of the Youth Court solicitors could and did represent the majority of defendants, but it was not uncommon for barristers to appear, particularly in cases which were triable in the Crown Court and which could at that time be the subject of substantial committal proceedings in which much of the evidence was heard by magistrates. Many of the most senior members of today's criminal Bar gained their early experience in the magistrates' courts. Most of the work was, as now, publicly funded, but legal aid fee rates were significantly higher.
- 1.2 The extension of Crown Court rights of audience to solicitors following the Courts and Legal Services Act 1990 does not appear to have had much immediate impact on the distribution of advocacy work between the two sides of the profession. A number of the most experienced and capable solicitor advocates were able to carry on representing their clients after committal to the Crown Court, and to develop their advocacy skills in that rather different environment. But as recently as 2006-07, barely 5% of publicly funded Crown Court advocacy was undertaken by solicitors (see figure 4 below).
- 1.3 There have however been other trends at work over the period. Crime has fallen, both as recorded by the police and as estimated by the Crime Survey for England and Wales. Between 2003 - 04 and 2013 recorded crime fell by 38%. The most recent Crime Survey for England and Wales suggests that crime fell by 60% between 1995 and 2013 to the lowest level since the survey began in 1981. The proportion of crimes resulting in prosecutions and court appearances has also been falling, in part because of the development of more informal ways of dealing with offenders. The number of defendants proceeded against for indictable offences in the magistrates' courts fell by 23% between 1995 and 2013. In the Crown Court, as

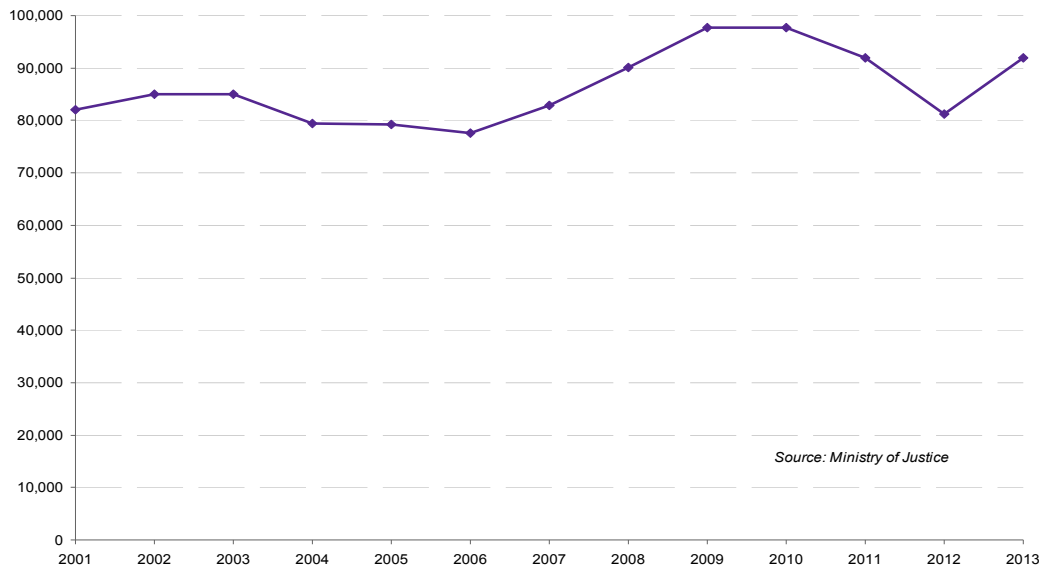
will be seen from figure 2, the position is more complicated, but there are signs of a reduction in business since 2010⁴.

Figure 1: Crime as recorded by the Crime Survey of England and Wales, and Police Recorded Crime

1995 to year end December 2013



⁴ 2013 wasn't a typical year because of the abolition of committal hearings in 'either way' cases which commenced on 28th May 2013. This may have led to a significant, one-off increase in receipts as cases reached the Crown Court quicker than would otherwise have been the case, and could account for most of the 2013 increase.

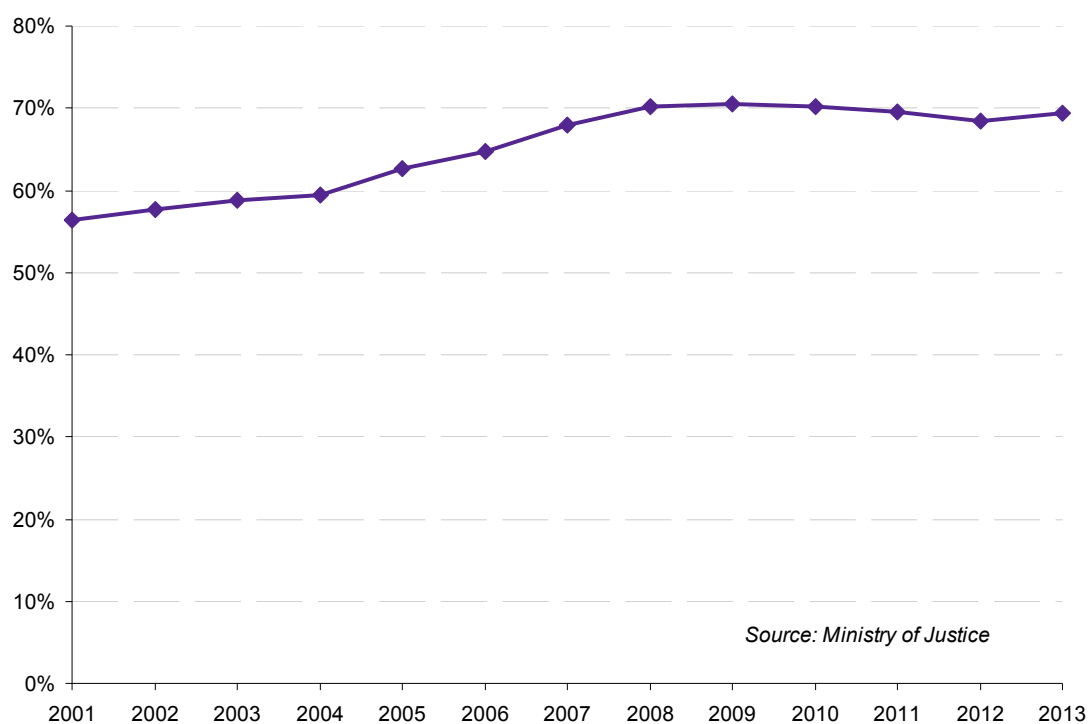
Figure 2: Crown Court receipts for cases committed or sent for trial*-2001 to 2013*

1.4 The court system has become more efficient at discharging its business. Although by no means perfect, the system is appreciably less beset by delay and repeated adjournments than when I was familiar with it in the 1980s. Procedures have been simplified, notably by streamlining the process for delivering indictable cases to the Crown Court. Judges and magistrates have been ready to assume a more assertive role in ensuring that cases are ready for trial. Some progress has been made in encouraging early guilty pleas and reducing the incidence of cracked trials. Guilty plea rates⁵ in the Crown Court increased from 56% in 2001 to 69% in 2013.

⁵ The guilty plea rate is the number of defendants pleading guilty to all counts as a proportion of all defendants with a plea. It includes those who change their plea from not guilty to guilty during a case

Figure 3: The guilty plea rate in trial cases in the Crown Court, for England and Wales

2001 to 2013



- 1.5 These are all welcome developments, but they have combined to reduce the pool of work available to advocates.
- 1.6 Over the same period the legal aid system has developed in ways which have had an impact on advocacy. In the Crown Court, following Lord Carter's report in 2006 on his review of legal aid procurement⁶, the introduction of the Litigator Graduated Fee Scheme (LGFS) and amendments made to the Advocates Graduated Fee Scheme (AGFS), and of contracts with providers of duty solicitor and litigation services, mean that, for most cases, there is a fixed fee payable to the solicitor to cover all defence costs, including advocacy. Under pressure to reduce public expenditure, successive Governments have significantly reduced legal aid fees. AGFS fees for criminal work have, broadly speaking, fallen by 21% (37% in real terms) since 2007⁷, with a further

⁶ Legal Aid a market-based approach to reform – Lord Carter Review of Legal Aid Procurement July 2006

⁷ Prof Martin Chalkley – Bar Council Response to Transforming Legal Aid: Next steps Consultation Oct 2013

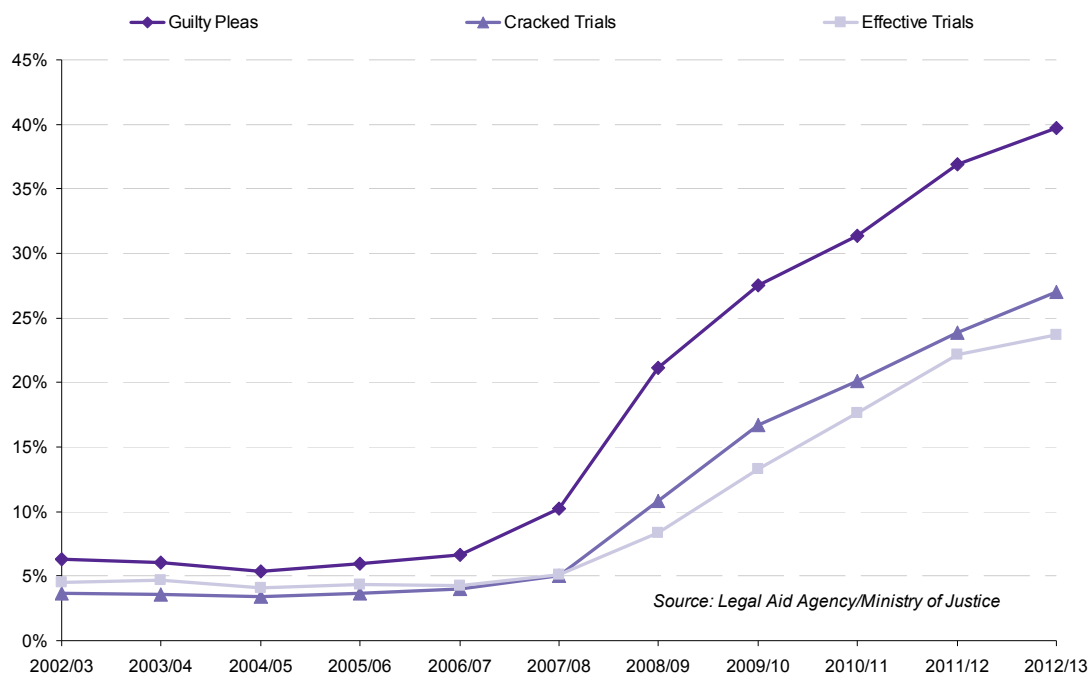
5-6% now in the pipeline, although this further cut is not due to be implemented until 2015.

- 1.7 I shall explore in more detail in sections 5 and 6 the impact of these changes on the provider market, which varies in different parts of the country. In brief summary, there has been substantial growth in the number and scale of in-house advocacy departments within solicitors' firms, beyond anything experienced in the years immediately after the liberalisation of rights of audience, employing solicitor advocates and in some cases employed barristers. Of around 11,000 solicitors providing criminal advocacy services, the number of solicitor advocates with higher court rights in crime was 4,815 in February 2014, of whom 3,284 worked exclusively in crime. This compares with 1,303 and 913 respectively in 2003⁸. The number of self-employed barristers may have fallen, but not by nearly as much as the increase in solicitor advocates.
- 1.8 Reflecting this, there has been a marked shift in the distribution of defence advocacy work in the Crown Court between the two sides of the profession.

Figure 4: The proportion of publicly funded Crown Court defence advocacy undertaken by solicitor advocates, for effective trials, cracked trials and guilty pleas

2002/03 to 2012/13

⁸ Data SRA



From 2006-07 onwards, there has been steady growth in the proportion of publicly funded defence work conducted by solicitor advocates. In 2012-13, they undertook about 24% of contested trials in the Crown Court, and about 40% of those in which the accused pleaded guilty. Both of these statistics are on a marked upward trend which shows no sign of flattening. In the magistrates' courts, the great bulk of advocacy work is undertaken by solicitor advocates, and in some parts of the country barristers in effect represent only those who have the means to fund their own defence.

- 1.9 The only other provider in the market is the Public Defender Service (PDS), which was established in 2001 and is a department of the Legal Aid Agency (LAA). It works alongside private providers in four locations, providing a full range of defence services including advocacy and employs police station representatives, solicitors and barristers. Nationally, it only accounts for approximately 4% of publicly funded advocacy work in the magistrates' court, but its location within the LAA gives Government a particular perspective on how the market is working.
- 1.10 On the prosecution side, there has been a similar trend towards the use of in-house advocates. In the early days after its establishment in 1986, and even after the grant of Crown Court rights of audience to solicitors, the Crown Prosecution Service (CPS), generally looked to the self employed Bar to undertake Crown Court

advocacy. From about 2005, CPS management built internal in-house Crown Court advocacy capacity, both to achieve financial savings and as a means of controlling quality. The CPS now has 2,607 employed prosecutors, of whom about 500 are Crown Advocates, including a number of barristers, and - although there has been some recent reduction in in-house strength and signs of a move back towards the self-employed Bar and independent agents - in 2012-13 in-house CPS advocates prosecuted in approximately 45% of Crown Court hearings. Self employed advocates continue to retain 71% of the value of the work available, reflecting the fact that they are generally still the first choice for more complex cases.

- 1.11 The landscape is therefore one which has been changing rapidly in recent years and is still very fluid. There is substantially less advocacy work to be done. Its character is different, with more straightforward cases and fewer contested trials. In the publicly funded sector, it is less well paid than in the past. There are many more qualified people available than there is work for them to do. The question is how much that matters, and in particular how it impacts on the quality of advocacy and, therefore, the quality of justice.

2. Quality

- 2.1 If hard facts about advocacy in the criminal justice system are difficult to come by, reliable information about its quality is even more elusive. There is remarkably little research evidence.
- 2.2 In 2009, the Quality Assurance Scheme for Advocates research pilot undertaken by Professors Richard Moorhead and Ed Cape⁹ found that there were high failure rates in the advocacy skills of those practitioners assessed in certain types of cases. However these findings were based on a relatively small number of practitioner assessments, and it would be a mistake to over-rely on them.
- 2.3 The only other relevant study relates to the quality of prosecution advocacy and case presentation, and is therefore outside my terms of reference. In a thematic review in 2012¹⁰ which is again based on a small sample, the Crown Prosecution Service Inspectorate found that although there was no evidence of significant advocacy failings and improvements had been made in areas such as cross-examination there was evidence of a decline in the quality of some elements of in-house CPS advocacy, with failures by Crown advocates to challenge inadmissible and prejudicial evidence, a lack of preparation and over-reliance on case notes.
- 2.4 In 2011, the Bar Standards Board (BSB) commissioned ORC International¹¹ to undertake a perceptions study of the standards of criminal advocacy. It included over 750 online surveys completed by criminal barristers, legal executives and lay justices and 16 in depth interviews. The conclusions were at a relatively high level of generality and might be argued to reflect the particular perspectives of those completing the survey, who do not appear to have included any solicitors. Over half of respondents felt that existing levels of underperformance in criminal advocacy were having an impact on the fair and proper administration of justice, with 31% rating the impact as "very high", while a quarter felt that criminals advocates "very frequently" acted beyond their competence.

⁹ Legal Services Commission – Quality Assurance for Advocates – Moorhead and Cape Cardiff University Nov 2009

¹⁰ HMCPSI – Follow up report of the thematic review of the quality of prosecution advocacy and case presentation

¹¹ Perceptions of Criminal Advocacy March 2012- BSB and ORC International

- 2.5 Those who submitted evidence to this review offered a wide variety of views on the question of quality. The Council of Her Majesty's Circuit Judges reported a widespread view among their members that the level of basic competence displayed by an increasing number of advocates in the Crown Court had diminished in recent years, which was, they said, a matter of "serious concern to the judiciary". There was, in particular, a risk that in smaller solicitor practices the employed in-house advocate would for commercial reasons retain cases that were beyond his or her expertise. They believed there was evidence that this was currently happening. The Bar Council concentrated on the strengths of the self-employed Bar, but observed that some in-house [solicitor] advocates are "pushed by their employers to take on cases which are far beyond their experience and of a difficulty in excess of their talents".
- 2.6 The Law Society, on the other hand, pointed out that complaints to the Legal Ombudsman relating to crime are a small minority of the total and rarely lead to significant disciplinary action. They concluded that "there may well be scope for improvements in quality standards and support for advocates, but these should be based on evidence and should be proportionate to the problem and the means of practitioners".
- 2.7 In the course of my visits to Crown Court centres, I met groups of circuit judges and took the opportunity to ask about the quality of advocacy. With the exception of one court centre (where the view was more positive), there was a strong and consistent view that, although the best was still very good indeed, among both barristers and solicitor advocates standards had in general declined; that it was not uncommon for advocates (for both the prosecution and the defence) to be operating beyond their level of competence; and that judges frequently felt concern about "inequality of arms" between prosecution and defence if one side or the other was inadequately represented. Most of those to whom I spoke were at pains to stress that there were some very capable solicitor advocates, and some very poor barristers; but the main area of concern was that identified above - relatively inexperienced solicitor advocates being fielded by their firms (for what were presumed to be commercial reasons) in cases beyond their capability. I met fewer district judges but they made similar points about an overall reduction in quality. They noted that this was true of both barristers and solicitor advocates, observing that in many instances advocates were being fielded in cases for which they lacked the necessary experience. They also made the point (which was re-iterated in several of my discussions with

practitioners) that the functioning of the criminal justice system as a whole depended on the dedication and good will of those operating within it. The Magistrates' Association also commented on the overall decline in quality as they saw it, attributing some of this to remuneration rates, limited funding for training and also an overall lack of preparedness.

- 2.8 Among those I consulted within the profession, there was also a distinct view, strongly held by some, that reductions in legal aid fees were in themselves driving down quality, by disincentivising the more capable advocates, who were turning to other areas of the law, and exacerbating the other trends noted above.
- 2.9 Among the regulators, there were different views. The Legal Services Board (LSB) commented that "whilst assertions have been made that solicitor firms, particularly in response to legal aid cuts, may cut corners to use the cheapest, rather than necessarily the most suitable, advocate and that the referral Bar is more skilled at advocacy than solicitors, including solicitors with higher rights, these at present rest on little more than generalisation from individual cases at best or self interest at worst". The BSB drew attention to their survey quoted above, and remarked that it was clear "that the risks in relation to standards are in fact manifesting in underperformance in criminal advocacy". In my discussions with the Solicitors Regulation Authority (SRA) they recognised the existence of concerns about the quality of advocacy across the criminal market as reflected in the studies referred to above and in judicial feedback. However, the SRA felt the evidence base stopped well short of indicating that solicitor advocates were of poorer quality than the self-employed Bar.

Quality Assurance Scheme for Advocates (QASA)

- 2.10 The regulators all acknowledged the absence of hard evidence about advocacy quality. To address this, they pin their hopes on the Quality Assurance Scheme for Advocates (QASA), now being introduced. This had its origins in Lord Carter's report cited above, in which he noted that, while there were quality assurance mechanisms in place for legal advice and litigation, there was limited or no requirement for advocacy other than reactive, complaints based mechanisms and traditional professional training and entry regimes. The Carter report recommended the development, for all advocates working in the criminal, civil and family courts, of a

"proportionate system of quality monitoring based on the principles of peer review and a rounded appraisal system".

- 2.11 The QASA scheme was developed by the three 'hands on' regulators (the BSB, the SRA and ILEX Professional Standards (IPS)) under the supervision of the LSB. It is, in essence, a means of continuously accrediting advocates at levels of competence (1 to 4), which they themselves initially assess, subject (in relation to level 1, practice in magistrates' courts) to completion of the education and training qualifications to enter their respective professions, and (in relation to solicitors wishing to practise in the Crown Court - levels 2-4) to their having been granted higher rights of audience. The conduct of trials in the Crown Court at level 2 and progression to the more complex cases (levels 3 and 4) is then subject to judicial evaluation by observation in live cases in the Crown Court. The scheme is not designed or intended to assess quality in any absolute way, simply to confirm (or not) the accreditation of advocates as having met the minimum standards for the level at which they are practising.
- 2.12 The QASA scheme is favoured by all the regulators, as providing for the first time a relatively objective means of assessing quality, providing commonality of standards as between advocates, and informing the debate with some hard information. Despite the fact that they were consulted extensively during its preparation, it is however unpopular with the profession. The Criminal Bar Association (CBA) supported an application for judicial review against the LSB's decision to approve the scheme, arguing *inter alia* that the use of judicial evaluation during live criminal trials to assess advocates created a "clear and irreconcilable conflict of interest" for those advocates, was inconsistent with judicial independence and exposed individual judges to the possibility of civil suit.
- 2.13 There were echoes of these concerns in many of the conversations I had with individual criminal barristers (and indeed some solicitor advocates), who expressed fears that they would be caught between, on the one hand, the instructions of the client, and on the other, the risk that the assessing judge would form an adverse impression of their advocacy skills if they followed those instructions to the letter. The point was also made that an independent advocate sometimes needs, in the interests of his or her client, to conduct the case in a way that might not please the judge.

- 2.14 The High Court rejected the CBA-supported application for judicial review, finding that the scheme was lawful and fell well within the legitimate exercise of the powers of the LSB and the regulators. The Court also offered several suggestions for improving the scheme. The plaintiffs have applied for leave to appeal to the Court of Appeal, and at the time of writing this report the case is therefore still *sub judice*.
- 2.15 In their submission to this review, the Law Society described the QASA scheme as flawed, pointing to the fact that judges are not always well placed to judge an advocate's performance and to practical difficulties in advocates obtaining the number of assessments they need. They were "not opposed to a proportionate, evidence based accreditation scheme for advocates ", but were not convinced that QASA matched that description. The Bar Council made the different point that QASA is only designed to ensure that advocacy is adequate and not that it is of a high standard, which by implication they regarded as a more important test.

3. Training

- 3.1 One proposition on which respondents to my Review could agree was that advocacy is a specialist skill, and that good advocates require both training and regular exposure to advocacy practice in court. Many made a distinction between the nature and level of skills required in the magistrates' courts and in the Crown Court, although others felt that this might be overstated. The general view was well captured by the Council of the Inns of Court ('COIC') in their submission to me, which observed that in order to be effective, an advocate needs to be articulate, persuasive and concise, well organised and efficient. They need to be able to undertake cogent legal and factual analysis, using skeleton arguments, oral examinations, examination-in-chief and cross examination in order to develop reasoned arguments. The importance of preparation to the quality of advocacy in court was also heavily underlined by practitioners, the judiciary and those involved in advocacy training.
- 3.2 Current arrangements for training advocates across the respective branches of the profession are described in annex C. The core training experience for barristers is the Bar Professional Training Course (BPTC), a 30 week postgraduate course of around 1200 hours of learning which focuses entirely on the core skills that an advocate would require and devotes at least 25% of the time to formal advocacy assessment¹². Those successfully completing the course must then, with few exceptions, undertake 12 months pupillage under the supervision of an experienced barrister. The first six months is non-practising and is spent shadowing the supervisor and undertaking the Pupils' Advocacy Course. Subject to the acquisition of a provisional qualifying certificate, the second six months can involve the exercise of rights of audience in the lower courts, leading - if successful - to the award of a full qualifying certificate.
- 3.3 For solicitors, the Legal Practice Course, which is a 12 month postgraduate course covering the full range of skills and knowledge to practise as a solicitor, includes a compulsory advocacy module which - depending on the provider - runs to between

¹² The BPTC – Course Specification & Guidance Handbook 2013-14 – Bar Standards Board

four and fifteen hours. The Professional Skills Course undertaken as part of the training contract also includes an advocacy element of eighteen hours¹³. Those successfully completing both courses automatically have rights of audience in the magistrates' courts. To be accredited for higher court rights of audience, solicitor advocates must undergo an assessment comprising a two and a half hour examination, the writing of a trial strategy plan, and 40 minutes practical advocacy. There is a related training course, offered by a range of providers, of two to four days' duration, but this is not compulsory.

- 3.4 The requirements for continuous professional development (CPD) vary between the different branches of the profession. For barristers, there is 9 hours of compulsory advocacy skills training and 36 hours of accredited CPD focusing on advocacy and ethics, to be completed over the first 3 years after qualifying. Thereafter, barristers are expected to undertake 12 hours CPD a year. For solicitors with higher court rights, there is a requirement to complete at least 5 hours of CPD related to advocacy in each of the first 5 years after accreditation, as part of the compulsory 16 hour CPD requirement.
- 3.5 There is also relevant training - a six day training and assessment module - provided by CILEX for Chartered Legal Executives who wish to practise advocacy in the magistrates' courts. Legal Executive advocates in the lower courts are still relatively few in number (56 nationally¹⁴) but the numbers are rising.
- 3.6 Post-qualification training is provided in a number of different ways. The Inns of Court have been active, through the ATC, in developing training courses for pupils and practitioners, involving judges and experienced advocates on a *pro bono* basis. The President of the Inns of Court and the Chairman of the ATC described to me an impressive programme of such courses, which in the criminal field includes important areas of current concern, such as the handling of vulnerable witnesses. My team had the opportunity to observe a training session on the latter, which as with other structured advocacy training of this kind followed the Hampel method. This requires advocates to perform advocacy in a simulated courtroom environment in small groups in front of their peers. Experienced trainers, some of whom are

¹³ SRA Professional Skills Course – Course Structure, provider authorisation and course accreditation

¹⁴ Figures – Chartered Institute of Legal Executives April 2014

members of the judiciary, will observe a participant's performance and then use a 6 step procedure to identify and remedy a particular issue or concern with the performance. This approach of identifying a specific issue, demonstrating how it can be addressed and providing the individual with an opportunity to practise a second time having reflected on this feedback is widely recognised - and appeared to my team – to be a very successful approach.

- 3.7 My team also had the benefit of attending an impressive training session delivered by the Solicitors Association of Higher Court Advocates (SAHCA) which focused on essential criminal advocacy training. This also utilised the Hampel method. When I met them, SAHCA told me that they now run eight such sessions a year, at weekends, throughout England and Wales. The recently established Law Society Advocacy Section told me that they too were aiming to provide a range of training opportunities for solicitor advocates. I sense that, despite these welcome developments, there is an underlying need for more CPD training for solicitor advocates than is currently available, and will return to this later.
- 3.8 Legal education and training have been the subject of a succession of reviews in recent years. The Legal Education and Training Review (LETR)¹⁵, which reported last year, was undertaken jointly by the SRA, the BSB, and IPS. It covered the whole range of legal education and training requirements, and was an attempt to develop an evidence based set of principles which would inform a more substantial redesign by the individual regulators. It concerned such generic issues as transferability of qualifications and new ways of training. With guidance from the LSB, the "front - line" regulators are now following up on the report.
- 3.9 The LETR report touched on advocacy training and - in part because of doubts which had been expressed about the quality of advocacy training for solicitors - recommended that "the structure of the Legal Practice Course stage 1 [for intending solicitors] should be modified with a view to increasing flexibility of delivery and the development of specialist pathways". The report also observed that "the adequacy of advocacy training needs to be addressed".

¹⁵ <http://letr.org.uk/>

- 3.10 There have also been substantial reviews in recent years on access and training for the Bar by Working Groups under Lord Neuberger of Abbotsbury (in 2007)¹⁶ and Derek Wood QC (in 2008¹⁷ and 2010¹⁸). The Neuberger Review examined all aspects of entry to the Bar from promotional activity in schools through to selection for pupillage and tenancy, with a particular focus on diversity and ensuring access from all social backgrounds. The 2008 Wood Review (discussed in more detail in section 6 below) focussed on access to the then Bar Vocational Course (now the BPTC), entry standards and whether there were ways in which numbers taking the course could be better matched to likely availability of pupillages. It broadly endorsed the course content, as it then stood, and the quality of teaching.
- 3.11 In 2010, the Law Society commissioned a report from an independent consultant, Nick Smedley, on the arrangements for training solicitor advocates¹⁹. Although unpersuaded that standards of advocacy by solicitors were consistently lower than those of barristers, Mr Smedley found that there was a strong case for significantly strengthening the training and methods of qualification for solicitors wishing to exercise higher rights as well as improving arrangements for post-qualification CPD. His recommendations for mandatory CPD for advocacy skills of a given number of hours a year and for the setting up of a new section within the Law Society to represent Higher Court Advocates have been adopted but other, more radical, recommendations, to bring HCA training more into line with the BPTC and to replicate for newly qualified solicitor advocates the mentoring arrangements inherent in pupillage, have not been pursued.

¹⁶ Entry to the Bar – Working Group – Lord Neuberger 2007

¹⁷ Review of the Bar Vocational Course – BSB D Wood QC 2008

¹⁸ Review of Pupillage – Working Group Report- D Wood QC 2010

¹⁹ Solicitor advocates: Raising the Bar – Law Society – Nick Smedley 2010

4. Reflections on quality and training

Quality of advocacy

- 4.1 I have set out in the two preceding sections - quite sparsely but with supporting detail in the annexes - what I believe I have heard in the last six months about the closely related issues of quality and training. Assessing from this what is actually going on, and why, is complicated by three things. The first is that many criminal practitioners are so enraged by reductions in legal aid fees that they are inclined to attribute any reduction in quality to that source. The second is that there is undeniably an element of inter-professional rivalry at play, which at the very least makes solicitors suspicious of criticism from the Bar and (given the background of most judges) of judicial dissatisfaction with solicitor advocates. And the third is that there is genuinely no empirical evidence on which to base a confident assessment.
- 4.2 On the other hand, **the preponderant view in discussions throughout my programme of meetings and visits, with few exceptions, has been that there are grounds for concern about quality. The views expressed by circuit judges (including some with long experience as solicitors) and district judges, which I have summarised in paragraph 2.7, were remarkably consistent and strongly expressed. It would in my view be a mistake to discount them.**

Mandatory training

- 4.3 I am also struck, as others have been, by the disparity between the mandatory training expected of solicitors and barristers. To practise as an advocate in any criminal court, a barrister will need to have undertaken around 120 days of specific advocacy training pre-qualification, plus pupillage. A qualified solicitor can practise in the magistrates' courts, and (subject to obtaining higher court rights accreditation) in the Crown Court with as few as 22 hours such training. The CPD requirements also expect more of barristers.
- 4.4 There is of course more to competent advocacy than training. Many solicitor advocates in the Crown Court have extensive experience at the lower level, and the Bar themselves emphasise the importance of constant practice to build skills. Also, solicitors' training tends to be funded by employers and in the current economic

climate there is an understandable reluctance to add to business costs by adding to the training requirements.

- 4.5 On the other hand, **in a professional specialism of this kind it is no reflection on the many highly capable solicitor advocates to observe that the disparity in training requirements is almost impossible to defend.** Nor is it ultimately in the interests of solicitor advocates, many of whom told me that they would welcome a more rewarding and demanding training experience. The Bar gains in reputation as much from the acknowledged excellence of its training as from the quality of its practitioners.
- 4.6 **My main recommendation in this area is therefore that there should, over time, be developed a common training expectation of all those practising as advocates in the Crown Court, which need not be as demanding as the Bar's, but should substantially exceed the current requirement on solicitors seeking higher court rights. Ultimately, these are matters for the profession and its regulators to address in following up the LETR, but I offer below a possible approach for their consideration.**
- 4.7 **First, in following up the LETR's recommendation about the development of specialist pathways, the opportunity should be taken to take the limited advocacy element out of the Legal Practice Course and instead develop a more substantial elective advocacy course for trainee (or indeed qualified) solicitors minded to pursue a career in advocacy, completion of which could in future be mandatory for those seeking higher court accreditation.**
- 4.8 **Second, the SRA and the Law Society should consider proportionate ways of replicating for higher court solicitor advocates the supervised experience which pupillage provides for barristers, including early exposure and practice.**
- 4.9 **Third, the profession should work together, with the regulators, to develop common minimum expectations for CPD for advocates in the Crown Court. There is no rational basis for different requirements for the two sides of the profession once they are practising alongside each other in the higher courts, and a good deal to be gained, in terms of mutual understanding, from a common approach. This could build on the excellent work already being done by the ATC, SAHCA and the Law Society's Advocacy Section, including the**

ATC's Advocacy Gateway.

- 4.10 One issue that has been raised by many of those to whom I have spoken is the handling of vulnerable witnesses and defendants. Questioning vulnerable people in court calls for specific skills. The advocate needs to handle the witness in a sensitive and appropriate manner, while still seeking to elicit the information necessary to advance the client's case. This is true whether the client is the prosecution or the defence. Some of the best CPD training we heard of or observed was in this area. The ATC is playing a leading part, through cross-professional training events, in which judges are involved (including as participants), and by providing easy access to practical advice, guidance, toolkits and training opportunities through the online Advocacy Gateway.
- 4.11 A question which arises is whether such training should be obligatory for those acting in trials involving vulnerable witnesses. The CPS already operates a "ticketing" system under which those appearing in rape and sexual abuse cases must demonstrate that they have undertaken relevant training. The judiciary are introducing a similar system for trial judges in such cases. **I can see no reason why such a requirement should extend to the judiciary and the prosecution but not to the defence, and recommend that the profession consider its early adoption. To go further by extending such a requirement to the generality of cases involving vulnerable witnesses would have wider implications, but would make sense in principle, and is something the judges, the CPS and the profession might wish to consider.**

Regulation

- 4.12 A number of those from whom I have heard have commented that it makes no sense for the practice of advocacy in the courts to be regulated by two different regulators. The BSB argued that the training, infrastructure and dedicated regulation that have fostered the Bar's high standards should be applied to all criminal advocates. This might be achievable by cooperation between regulators, but the alternative of activity-based regulation by the BSB should, they said, also be considered.

4.13 Since then, the Government has announced that, in the light of its recent review²⁰, it does not intend to bring forward proposals for change in the regulatory landscape. This means that, for the time being, the present structure of regulation, based largely on the two traditional branches of the profession, will continue. Within that structure, the implications for individual advocates (and in particular solicitor advocates if the decision were taken to put the task in the hands of the BSB) of a single regulator for advocacy are complex, and would warrant more thorough analysis than has been possible in the course of this review. Many solicitor advocates do much more than advocacy, and for as long as there was an SRA it would be logical for their professional conduct to be regulated by it.

4.14 **The fact that the training and accreditation regimes for advocates have developed separately and in completely different ways in the various branches of the profession is, however, a real weakness. There is already a growing level of consultation between the BSB and the SRA. In the absence of any more radical reorganisation of regulatory functions, there is in my view a strong case for deepening this cooperation, and for developing, over time, a more consistent training and accreditation framework for criminal advocates, irrespective of their professional origins.**

QASA

4.15 On the debate on QASA, it is difficult for me to comment on a partially implemented scheme which is still the subject of outstanding legal proceedings. I respect the concerns about the potentially false position in which judicial assessment in live trials might put both judges and advocates. **I find it hard to assess how well-founded these concerns will prove to be, and am more inclined than some to have confidence that judges will in practice be able to distinguish poor advocacy from the carrying out of wrong-headed client instructions. The suggestions made by the High Court in the judicial review hearing would help mitigate any risk, and I hope they will be adopted.**

²⁰ <https://consult.justice.gov.uk/digital-communications/legal-services-review>

- 4.16 Some of the opposition is, I sense, to the very idea of assessment, and is reminiscent of the line taken by the teaching profession on the same issue. **I have no doubt of the strength of the case for some kind of quality assurance scheme, both to reassure the public that there is a means by which advocates can be denied the opportunity to act beyond their competence, and to encourage continuous professional development.** Nor have I found any evidence to support the suspicion that Government sees the regulators' QASA scheme as a route to competitive tendering for criminal legal aid work by price, as originally envisaged by Lord Carter.
- 4.17 **If, as I recommend, a common framework and set of expectations for CPD training for advocates in the Crown Court can be developed, there could be built into the CPD programme an element of independent expert assessment (perhaps by serving or retired judges), which I could imagine in time supporting a form of accreditation different from QASA.** Some of those to whom I have spoken have argued for a scheme on these lines, and I can see its attractions; but **it would be a matter for the profession and the regulators to consider at the time, and in the light of whether practitioners' fears about QASA have been borne out by experience.**

5. The market in defence criminal advocacy

- 5.1 I deal in this section with the core issues of how the defence advocacy market works; the relevance of legal aid structures; whether the market is truly competitive; and whether there are steps that could be taken to make it more so. The prosecution is, of course, also relevant, to the extent that the CPS employs self-employed barristers as agents. I touch on this in paragraph 1.10 above. Section 6 looks more directly at the supply side of the equation - at movements in the number of people choosing to be advocates, or to undertake training with a view to becoming an advocate.
- 5.2 Although fewer people than in the past qualify for legal aid, it still dominates the market in defence criminal advocacy. In 2012, only 14% of defendants sent or committed for trial in the Crown Court employed their own legal representatives or represented themselves²¹. The way in which the legal aid system is structured and operates - as well as the absolute level of fees payable - therefore has a very significant impact on the advocacy market.
- 5.3 The criminal legal aid system in its current form is described below and by reference to the diagram in annex D. The LAA has contracts with about 1,600 providers, who provide duty solicitors at police stations and magistrates' courts. Hitherto, the number of duty slots has been allocated to firms on the basis of the number of accredited duty solicitors they employ. Under the plans recently confirmed by the Justice Secretary, the next round of LAA contracts will involve a smaller number of providers for duty solicitor contracts (about 525), and duty slots will be shared among contracted providers in each area, without reference to how many duty solicitors they employ.
- 5.4 In addition, if someone arrested for or charged with a criminal offence wishes to consult a legal representative of their choice, provided that representative has a contract with the LAA and they themselves meet the qualifying criteria, the advice will be covered by legal aid. (Under the new proposals, this principle will be

²¹ MoJ Data

preserved, but on the basis of a list of LAA-approved "client's choice" solicitors, who won't necessarily have LAA duty contracts.)

- 5.5 Depending on the part of the country, between 15% and 60% of those needing legal advice at police stations opt for the duty solicitor. The national average is 37%²². Others who have not engaged a legal representative before their first court appearance may opt to use the duty solicitor at the magistrates' court. The duty solicitor schemes are therefore a major determinant of choice of legal representative, and ultimately therefore of choice of advocate.
- 5.6 Once the case is in the magistrates' court, an application can be made (currently to the magistrates' court but in future to the LAA) for a Representation Order, to qualify for which a defendant has to satisfy the interests of justice test and the means test. If an Order is granted, legal aid will cover, on a fixed fee basis, a range of representative work, including advocacy. The solicitor will be able to instruct an advocate, provided the overall cost will not increase as a result. In practice, most solicitors represent their own clients in the lower court.
- 5.7 In the Crown Court, there are three main legal aid fee schemes: the Litigators Graduated Fee Scheme (LGFS), the Advocates Graduated Fee Scheme (AGFS), and the scheme for Very High Cost Cases (VHCC). Fewer than 1% of defendants²³ change their solicitor between magistrates' court and Crown Court, and very few arrive in the Crown Court without representation. Legal aid cover will normally carry over, in which case the solicitor can instruct an advocate forthwith if he or she chooses to do so. The choice of advocate has no bearing on the fee payable under the LGFS or the AGFS, which is fixed on a graduated basis related to the weight of the case and whether it involves a contested trial, a guilty plea or a "cracked" trial, that is one which has been listed for hearing but does not proceed because the defendant pleads guilty at the last minute or the prosecution presents no evidence.

²² Table 2 LAA - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238115/legal-aid-statistics-090913.pdf

²³ LAA Data

Advice on choice of advocate

- 5.8 The key decision on the choice of advocate is therefore made, if not directly by the solicitor representing the defendant, then at a point when that solicitor is effectively in charge of the conduct of the case. He or she is under a professional duty to act in the best interests of the client, and choose the advocate best able to represent those interests. The section of the SRA's Code of Conduct for solicitors, entitled "You and Your Client" includes as an outcome to be sought: "Clients are in a position to make informed decisions about the services they need, how their matter will be handled, and the options available to them". This implies at least a conversation between solicitor and client about the advocacy options available and their respective merits.
- 5.9 In their submission to this review, the Law Society said that there was no evidence of solicitors failing to meet these obligations. There was no "single right advocate" in every case. Some evidently required the specialist skills of an experienced barrister. But for the client, a solicitor advocate for all or part of the proceedings had the advantage that he or she was likely to have been involved from the start of the case, be familiar with it, and have the trust of the client. There was also less risk of double-booking, which caused barristers frequently to return cases to another barrister (usually less experienced) at the last minute, when another case took priority.
- 5.10 Many of the solicitors to whom I spoke confirmed that this was consistent with their own practice. Several acknowledged that there was commercial pressure to keep advocacy in-house if possible. Some firms were more responsive to this pressure than others. One said that the decision on choice of advocate was driven by a combination of the complexity of the case, its likely length, and the management of his own time. Although higher rights accredited, he would be reluctant to be away from his practice for a trial likely to last longer than about two weeks. Another commented that many clients found it unsettling to have a break in legal representation, and preferred the continuity that a solicitor advocate could provide.
- 5.11 The Bar takes a different view. In their submission to my review, the Bar Council noted that the choice of advocate properly lay with the client, and argued that "one of the litigator's/solicitor's roles is to advise the client as to the choice of advocate. Where the solicitor's firm also has in-house advocates, there is the potential for a conflict of interest between the solicitor's firm and its client. The solicitor's firm will

have a financial incentive to obtain work for its in-house advocate but the client's interest is to obtain the best advocate for the case." Almost all of the barristers to whom I spoke in the course of the review believed strongly that the commercial pressures to keep advocacy in-house and thereby retain the combined value of LGFS and AGFS fees for the case was a major factor in the assignment of advocates in the Crown Court.

- 5.12 Where the solicitor does conclude that external counsel should be instructed, the choice will be informed, as it always has been, by the reputation of barristers practising locally. Since it is now much less common for solicitors to attend trials, it is harder for them to make an informed choice.

"Plea only" advocates

- 5.13 The aspect of the matter which has excited strongest feelings is the emergence of the "plea only" advocate. To gain higher court accreditation a solicitor has to demonstrate experience and aptitude in conducting trials; but once accredited he or she may decide to limit themselves to pre-trial hearings and the representation of those who plead guilty. This is, in the Crown Court, by no means straightforward work. A well-judged plea in mitigation calls for skill and good knowledge of the relevant sentencing law, but is generally regarded as being less demanding than the conduct of a contested trial. Some solicitors limit themselves in this way because they doubt their ability to conduct the defence in a Crown Court trial; others, as noted above, because the balance of their professional lives makes them reluctant to devote several days at a time (or even longer) to trial advocacy. To enable such practitioners to be reaccredited, QASA includes (as level 2(a), the lowest level for Crown Court advocates), a self-designated category for those who do not intend to undertake trials. They will not be subject to judicial assessment, but will be able to be re-accredited following attendance at an approved assessment centre.
- 5.14 This aspect of QASA (which in fact simply reflects the reality of practice as it has developed in recent years) has polarised views within the profession. Most of the judges and almost all of the barristers to whom I spoke were strongly of the view that all advocates in the Crown Court should be willing and able to undertake a contested trial. The BSB expressed concern that "it is difficult for an advocate to properly advise upon the merits of contesting a charge if they have never appeared in a trial".

- 5.15 The Law Society found it "hard to see the rational basis" for this concern. "A plea or sentencing hearing does not require the same skills, and it is hard to see why a solicitor, familiar with the case and the client, should not appear in that hearing, particularly if the alternative is likely to be a less experienced member of the Bar. In other professions it is rare for experienced professionals to undertake work which can reasonably be delegated". Some of the solicitors I met saw it as no more than a sensible way to manage their practice. A solicitor who has been advising his client on plea from the outset is well-placed to see the case through in the event of a guilty plea. The SRA made the point that, as the number of contested trials decreases, for many solicitors and barristers this type of work already dominates their practice. Plea only work simply reflects a growing reality.
- 5.16 A somewhat different concern which has been put to me is a variant on the Bar's point about solicitor advocates being conflicted when they advise on choice of advocate. On this argument, the solicitor advocate advising on plea might be perceived to be influenced by the fact that, if the defendant pleads guilty, he or she will act as advocate, but not if they plead not guilty.
- 5.17 For the purposes of understanding how the defence advocacy market works, perhaps the greater significance of the "plea only" advocate lies in the rapidly increasing proportion of guilty pleas in which the defendant is represented by a solicitor advocate. As indicated in section 1 of this report, this stood at 40% nationally in 2012-13, compared with 6% in 2005-06, and is on a rising trend. Taking into account the increase in the guilty plea rate (from 63% in 2005 to 69% in 2013), this means that solicitor advocates are undertaking a greater proportion of a growing area of the advocacy market. Precisely how much depends, in part, on the guilty plea rate, which varies from region to region, with Durham having the highest at 80% and London the lowest at 54%²⁴. In Staffordshire, for example, where the guilty plea rate is high (77% in 2012), solicitor advocates undertook 49% of all Crown Court defence advocacy, whereas in London the figure is 37%²⁵.

²⁴ LAA/MoJ Data 2012

²⁵ LAA/MoJ Data 2012/13

- 5.18 Another area of practice in which solicitor advocates have become more prominent is as second counsel in cases which are sufficiently serious and complex for two counsel to be authorised. Between 2007-08 and 2012-13, the proportion of "double-handed" cases in which a solicitor acted as second counsel increased from 8% to 26%²⁶. These are cases in which in the past young aspirant barristers had an opportunity to develop their skills by working closely with a QC or other senior member of the profession, and seeing them in action. One young barrister told me that until relatively recently there might have been two or three such opportunities in the course of a year, but several years could now pass without one. (This in part reflects the reduction in the number of cases in which two counsel are authorised.)
- 5.19 Again, there are concerns about quality which it is hard to gauge confidently without detailed research. Many of the circuit judges from whom I heard said that in their recent experience the test that should be applied in assigning second counsel - that they should be capable if necessary of continuing the conduct of the trial if the senior was unavoidably unable to do so - was, in their judgement, a long way from being met.
- 5.20 The other noteworthy aspect of the market is the emergence of newer business structures for providing advocacy services. Annex E contains brief descriptions of such models, examples of which we have encountered in the course of the review. These include legal aid contracted firms owned and managed jointly by solicitors and barristers, and groups of solicitor advocates operating independently on the chambers model. These are interesting developments. Those involved in them whom we met are invariably enthusiastic and keen to break new ground. But the overwhelming majority of criminal representation is still undertaken on the traditional model.

Consumer perspective

- 5.21 For most practical purposes, the consumers of advocacy services are defendants in criminal trials, although victims and witnesses are also affected in important ways by the quality of advocacy. In their submission to my review, the Legal Services Consumer Panel (LSCP) noted the absence of research evidence on the consumer experience, and that robust data were difficult to extract from general surveys of

²⁶ LAA/MoJ Data

legal consumers due to sample size. The LSCP also observed that there is a lack of information on the performance of advocates to allow consumers to make an informed choice, which means demand side competition is weak. Competition is undoubtedly strongest where the defendant has previous experience of the criminal courts.

How competitive is the market?

5.22 The market in criminal advocacy has several characteristics which distinguish it from others:

- As the LSB pointed out in their submission, neither the providers of criminal advocacy nor their regulators can influence the aggregate demand for services, which is largely set by the volume and character of criminal proceedings in the courts.
- Legal aid advocacy fees are fixed, and for the 86%²⁷ of the work that is publicly funded, there is therefore no competition on price.
- As the market has evolved, the main competitive dividing line is between in-house providers who hold the funds and outsourced specialists.
- As noted in paragraph 5.21 above, informed consumer choice is limited.

The LSB's main conclusion on the current state of the market is that "continued market liberalisation to promote competition within and between each branch of the profession and allow new business structures are the interventions most likely to result in better value and better quality services. Access to justice in this area is most likely to be preserved and enhanced through liberalisation rather than protection for certain types of historical business models".

5.23 I don't disagree with the LSB's anti-protectionist sentiment. I also see the case for exploring whether in a further liberalised market the Bar could compete more effectively for legal aid contracts by changing its way of working without losing its distinctive character. That is the subject matter of paragraphs 5.31 to 5.42 below.

²⁷ Defendants committed or sent to trial in the Crown Court in 2012 who were represented under legal aid.

- 5.24 Nevertheless, my main conclusion from this part of the analysis is that, **as it exists now, the market could scarcely be argued to be operating competitively or in such a way as to optimise quality. The group of providers who are manifestly better trained (if not always more experienced) as specialist advocates are taking a diminishing share of the work, and are being beaten neither on price (in a system where fee rates are fixed) nor on quality. As I shall suggest in section 6 below, the fact that there are almost certainly more advocates than there is work for them to do depresses average income and makes the reduction in legal aid fees even harder to manage than it would otherwise be.**
- 5.25 On "plea only" advocates, my own view is that **it is possible to overstate the argument about advice on plea. Someone who has experience of defending trials in the Crown Court will no doubt have a better sense of their dynamics, the likely reactions of juries, and the legal issues that are likely to arise. But legal advice which amounts to advice on plea is given by solicitors from the earliest stage of the process, based on the facts and the inherent strength of the defence case. On the point touched on in paragraph 5.16, although I don't doubt that solicitor advocates advising on plea generally frame their advice scrupulously in the interests of their client, there may be an issue of perceptions if they are thought to have a commercial interest in a not guilty plea, and I return to this in paragraph 5.29 below.**
- 5.26 The more fundamental question is whether it is acceptable to have accredited advocates in the Crown Court who are not prepared to appear for the defence in a contested trial. The Bar and most of the judges regard this as an issue of principle. On the basis of "horses for courses", **where it is known that a defendant will plead guilty, I can myself see no objection in principle to his being represented in court by a less accomplished advocate than would represent him if he pleaded not guilty. What concerns me more are the practical consequences for case management where there is doubt about how the defendant will plead. In such cases, I was told that some solicitors firms were so keen to keep the advocacy task in-house for an advocate who only appeared in pleas that they were deferring the assignment of an advocate until very late in the day, with obvious implications for case preparation and quality. I return to that issue in paragraph 7.6 below.**

Implications for solicitors' professional obligations

- 5.27 Solicitors are bound, for good reason, to be influential in the choice of advocate. In the past, this was normally a choice among external providers. The fact that there are now at stake commercial interests internal to the firm makes it even more important that the process of assigning an advocate should be above reproach, and suggests that there would be advantage in reinforcing and clarifying solicitors' professional responsibilities in this area. The passage in the SRA's Code of Conduct quoted in paragraph 5.8 above is strongly suggestive of where these responsibilities lie, but it makes no explicit mention of advice on choice of advocate. It is perhaps significant that the LSB's submission to my review is drafted on the assumption that the choice is entirely a decision for the solicitor.
- 5.28 The Bar Council suggested to me that, to address any possible conflict of interest, there should be a requirement that, where an in-house advocate has been retained, the firm should have advised the client in writing (or at least have retained a written record of any advice) as to the choice of advocate and the client's right to instruct advocates independent of the firm. Such a requirement could, they suggested, be included in the litigator's contract with the LAA, and be available to audit.
- 5.29 The detail of any measures to entrench or clarify through guidance the solicitor's obligation to ensure that clients are in a position to make an informed decision about the choice of advocate is a matter for the solicitors' profession, and it would be unwise for me to offer any blueprint. Against the background I have described, **I would, however, encourage the SRA and the Law Society to consider what further regulatory or other steps could be taken to clarify the professional responsibilities of solicitors in the assignment of advocates, and provide reassurance that they are being observed. In doing so they will no doubt give due attention to the model proposed by the Bar Council, and in particular the suggestion that there should be a record of advice given. The same consideration could cover the issues on advice on plea identified in paragraph 5.25 above.**
- 5.30 An alternative approach to addressing the problems of quality and fair competition would be for the LAA to take a more assertive role in the advocacy services market than they do at the moment. The Agency acts as customer for the "end to end" contracts for defence representation, and through the award of the contracts

exercises a measure of quality control; but it has little direct involvement in advocacy quality. **An option which the Government could consider would be for the LAA to maintain a list of approved advocates, on the model of the CPS's panel of barristers briefed to represent the prosecution.** This would not be straightforward. The analogy with the prosecution does not completely hold. In particular, a list of defence advocates approved for legal aid purposes would need to include employed solicitor advocates as well as barristers. An acceptable means of assessing quality would need to be found, although the CPS appears to have done so. But if a workable system could be devised, it would bring a degree of quality control, and could also deal with the problem of over-supply. In doing the latter, it would, of course, reduce the choice of advocates available to legally aided defendants; but in a publicly funded system client choice has, in my view at least, to be tempered with a recognition of the taxpayer's interest in value for money.

Criminal Bar competing for legal aid contracts

- 5.31 Whether the Bar could compete more effectively for work within the present system depends in part on their willingness within the emerging regulatory framework to adopt new business practices and in part on the future structure of criminal legal aid. The submission I have had from the LSB puts emphasis on the first of these. It makes the point that there is nothing in statute or regulation that disallows barristers directly competing with solicitors for clients. Consumers may now directly instruct barristers who are members of the BSB's public access scheme, but there has so far been little take-up.
- 5.32 The main regulatory impediment to barristers competing with solicitors for legal aid contracts has been the fact that the LAA will contract only with legal entities, and the BSB has hitherto been unable to regulate such entities (although the SRA could). In 2010 the Bar developed a corporate vehicle ("ProcureCo") which would have enabled the establishment of legal entities capable of contracting for work while not themselves providing legal services, and passing it to self-employed barristers. This has not in practice been taken up to any great extent, but the LSB is currently considering an application from the BSB to be allowed to act as a regulator for entities. If this is granted, which seems likely, it will make it easier for such entities to be set up within the barrister world.

- 5.33 There are however two other, related, obstacles to do with the legal aid system. The first is that, as it currently stands, the system operates through contracts with entities (principally firms of solicitors) which assume that contractors will have conduct of a case from start to finish, even if they don't do every aspect of the work themselves. For barristers to compete for legal aid contracts they would need to develop both means of accessing clients and the capability (not necessarily in-house) to do other aspects of the representation task. All of the self-employed barristers to whom I have spoken attach huge importance to self-employed status, and to the chambers model, as a guarantor, as they see it, of independence. Many are most comfortable with the traditional instructing solicitor/barrister relationship, even though it may appear to be operating to their disadvantage at the moment. Some heads of chambers would be ready to consider developing a practice that could compete for legal aid contracts, but fear that to do so the new entity would need to employ such numbers of solicitors and paralegals to generate the business and prepare the cases as to change the nature of the enterprise and lose the essential character of the self-employed Bar.
- 5.34 The second obstacle is that, as I have observed in paragraph 5.30, our legal aid system holds advocacy quality at arm's length. Contractors are assessed, broadly, on their competence as litigators, and not on their in-house or externally provided advocacy capability.
- 5.35 It may be instructive to consider for a moment how case-handling for the majority of Crown Court cases may be developing. Some of the solicitors' firms to whom I have spoken essentially replicate internally the traditional instructing solicitor/advocate relationship in which the case statement is prepared by a solicitor or legal executive, witnesses proofed etc, and the case is delivered to the solicitor advocate as it would be to a barrister. Others operate on more of a "single caseworker" model in which the solicitor in charge of the case prepares the defence statement of case and then acts as advocate.
- 5.36 These are two distinct models for case working recognisable from other walks of life. The virtue of the first is that it allows more specialisation and more of a "production line" approach. In the legal field there is also the distinct advantage that the second pair of eyes can bring a different perspective to bear and can question assumptions which may have been made by the first.

- 5.37 The virtue of the "single caseworker" model is that there is an individual who feels accountable and can be held accountable for the successful resolution of the case. Where there are voluminous papers, there are also economies to be had from only one individual having to read them. The downside, of course, is the loss of an independent second pair of eyes.
- 5.38 In New Zealand, I found that, in all but the most serious cases, defence representation is handled on the "single caseworker" model, with barristers undertaking most of the preparatory tasks which would be undertaken by a solicitor in the UK. If there are a significant number of witnesses to be interviewed, the Legal Services Commissioner will authorise the employment of an agent for that purpose.
- 5.39 If, as I suspect may be the case, the system in England and Wales is moving in that direction, if only because legal aid fees are becoming insufficient to support the traditional "two pairs of eyes" model, it will be unwelcome to the Bar, attached as they are to that model; but it may represent an opportunity. I was struck by how often barristers told me that they received cases which were so ill prepared that they ended up doing most of the work themselves. I have no way of confirming whether that is the case or how frequently it occurs. **But if barrister-led entities were able to have control of cases from the outset, possibly on the basis that in more straightforward cases their junior members would act as the single principal legal representative, their reputation for competence and relatively low overheads could put them in a strong competitive position.**
- 5.40 It would still, I suspect, be necessary to employ some solicitors or legal executives, and possibly to engage solicitors to do litigation in more complex cases - in a reversal of the normal relationship; and a legal entity of the "ProcureCo" kind would need to be established alongside the chambers to preserve the principle of self-employment. But it would be a more level playing field than the one on which the Bar are operating now. It would also meet some of the concerns about younger members of the Bar getting the experience necessary to build their advocacy skills early in their careers.
- 5.41 Whether something on these lines would work would depend crucially on the appetite of the criminal Bar for changes in their business model, and on the ability of the LAA to contract directly with barristers on a basis that did not require them to change that model out of all recognition. **One possibility would be to have**

separate contracts for duty police station work and post-charge work, with barrister-led entities competing for the latter. This would significantly reduce the proportion of cases taken on by barrister-led entities that ended up with no requirement for an advocate, and therefore the scale of the non-barrister staff requirement; but it would have other significant implications for the legal aid system which the Government would need to consider.

5.42 I have discussed these issues with the LAA. They are open to the idea of contracting directly with the Bar, provided there is a legal entity capable of delivering the provider's side of the contract. They believe there is nothing to prevent barrister-led entities competing for the next round of contracts now in the early stages of being put out to tender. It is, however, already too late to consider changing the basic structure of the contract in the manner I suggest on this round.

5.43 **I recommend that the Government reflect on the implications for the legal aid system of the LAA contracting directly with the Bar for defence representation, including the weight given to capability in advocacy, and that they consider the desirability and feasibility, in future contracting rounds, of separating police station advice and post-charge representational work. The Bar itself will want to consider its appetite for development of this kind. Adjusting the legal aid system in the way I have suggested would not be straightforward, and the Government's willingness to do so might well depend on whether there were any signs that the Bar was interested.**

6. The supply of criminal advocates

- 6.1 As with other aspects of this review, reliable information about the numbers of barristers and solicitors who are criminal advocates and the numbers entering and leaving that part of the profession is not readily available. The most reliable figures are held by the Law Society, which estimates that there are currently about 11,000 solicitors providing criminal advocacy services, many of whom will only appear in the magistrates' court. This is up from just over 3,000 in 2004 and just under 7,000 in 2010. Of these about 4,800 have higher court rights, of whom about 3,300 practice only in crime.
- 6.2 The number of barristers who practise wholly or mainly in crime, both employed and self employed, is estimated to be about 5,000 or a third of the total number of barristers in practice (15,600²⁸) in England and Wales. Of these, the number who are self-employed is estimated to be about 4,000. Whether the number of barristers practising wholly or mainly in crime has reduced in recent years, or has increased as the Bar itself has increased in size, cannot be established from the available figures, since the BSB does not collect reliable annual figures by practice area.
- 6.3 Even if the number of barristers in criminal practice has reduced in recent years, as many believe to be the case, the reduction is unlikely to have matched the increase in the number of solicitor advocates with higher court rights. **One can therefore safely assume that, in total, there are significantly more advocates practising in the Crown Court than there were in 2010, when Crown Court business was higher than it is now. Taking a longer view, the number of practising advocates in all courts appears to have increased over a period when magistrates' courts business reduced substantially (by 23% between 1995 and 2013²⁹) and Crown Court business fluctuated in volume but reduced in complexity. Despite the limitations of the data, the only conclusion one can reach is that there are many more advocates than there is work for them to do.**

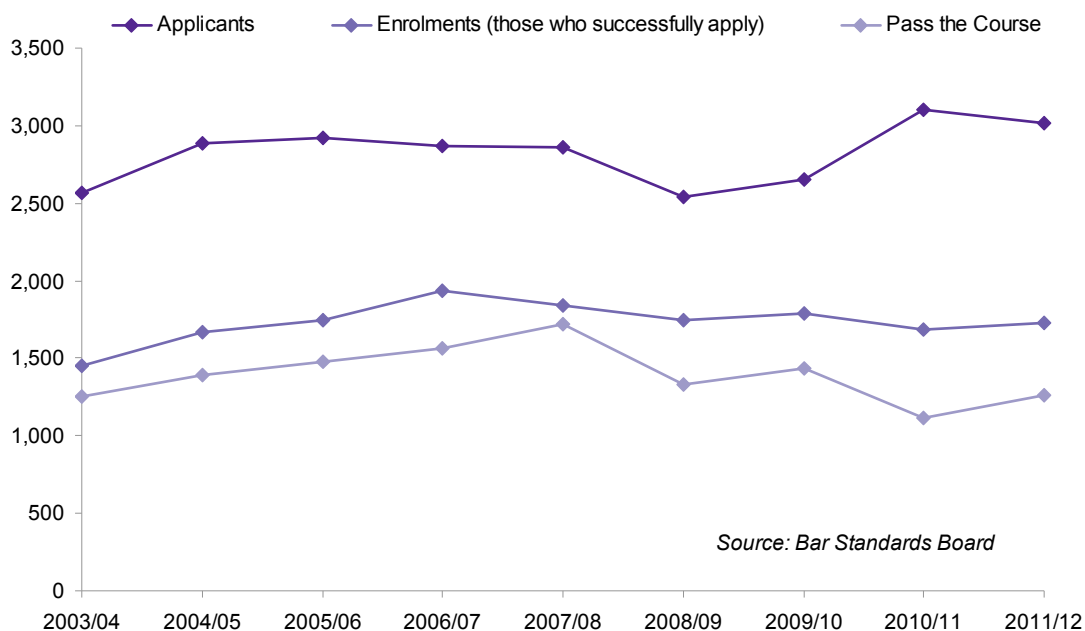
²⁸ Bar Standard Board Figures Feb 2012

²⁹ MoJ Data Year ending September 2013

- 6.4 As a direct consequence, the amount of work done by individuals has, on average, no doubt reduced. I met many advocates who are fully employed, and solicitors in particular will often have other elements to their practice. But for barristers work is harder to come by. The MoJ told me that, in 2012-13, 1,761 barristers were involved in seven or fewer legally aided AGFS cases. Some of these will also have prosecution and privately funded work, but this nevertheless suggests **a significant degree of under-utilisation.**
- 6.5 The impact of this on the inflow of new criminal advocates is, if anything, even harder to assess confidently. The BSB publishes the number of pupillages available each year, but these figures cover the whole profession and are not broken down into practice area. Based on an estimate of the percentage of pupillages in crime, the LSB estimate there were around 136 pupillages in 2010-11 where the main area of practice was crime compared to 131 in 2009-10, but these figures assume that the percentage of pupillages in crime has remained constant, which may not be the case.
- 6.6 Indeed, they may well be an overestimate. Most of the criminal sets of chambers I visited or which were represented in my meetings reported very few recent pupillages and very few tenants with less than 5 years' call. I was told there had been no pupillages offered in one large city in the last 5 years. One head of a substantial chambers in the north of England said that her set had continued to offer two pupillages a year in crime, but it was becoming harder to do so. A CBA survey of 24 chambers undertaken in response to my inquiry suggested that many chambers have reduced the number of criminal pupillages they offer by one or two over the last couple of years, although some have managed to keep the number on offer at the same level over the last 5 years. In a number of instances this has been achieved through the support of the Pupillage Matched Funding Scheme run by the Council of the Inns of Court.
- 6.7 The typical age structure in the chambers I visited was an inverted triangle, with the majority of practitioners in their 40s and 50s with only a handful with fewer than five years call.
- 6.8 To an extent, this reflects the way in which the barrister labour market works. Although forward-looking chambers of the kind I have cited above will look to the future and carry on offering pupillages where they can, they are in the end loose associations of self-employed people in which the longer-established, who

contribute more, are bound to have a substantial say. Where instructing solicitors or the CPS have a particular barrister in mind for a high profile case, it is likely to be a senior figure with a high reputation. More routine cases will usually be allocated by clerks, who will tend to allocate work within the chambers broadly on the basis of seniority. And **when the available work reduces, the devices available to managed businesses in the private and public sectors - and in particular the shedding of longer-established people to make way for new talent - are not readily available.**

- 6.9 The other perceptible trend is that some sets of chambers - and some of their most talented younger members - are said to be diversifying away from legally-aided crime and into more financially rewarding areas of the law.
- 6.10 Despite the poor prospects for pupillage, both under-graduate and post-graduate legal studies remain popular. The number of under-graduates studying law peaked at 72,140 in 2009-10, and in 2012-13 was 68,540 compared with 53,865 10 years earlier. Law is, of course, a good preparation for careers in other walks of life, and many of these students will be from overseas; but a proportion will be seeking legal careers in this country.
- 6.11 For those aspiring to practise at the Bar, the BPTC is the gateway.

Figure 5: Bar Vocational Course / Bar Professional Training Course statistics*BVC for 2003/04 to 2009/10, BPTC for 2010/11 and 2011/12*

As can be seen from the chart above, the numbers completing the course have been running at over 1,100 a year for the last 10 years. A proportion of these (estimated to be about a third) will intend to practise overseas, but most of the rest will have set their sights on a career at the Bar. In the three years up to 2010 - 2011 (incredibly, the latest period for which published figures are available), the number of applications for pupillage for the Bar as a whole was running at 2,800 to 2,900 a year, reflecting the fact that multiple applications can be made and disappointed candidates in one year will often apply again the following year. This is about six times the number of pupillages on offer and some chambers can receive over a hundred applicants for each pupillage placement. How many of the applicants seek pupillage in criminal practice is not known, but the ratio of unsuccessful to successful could well be even higher.

6.12 The cost of legal training is high, and can be as much as £27,000 to £36,000 in course fees alone for a qualifying law degree, £12,000 to £18,000 for the BPTC. It is not uncommon for aspirant barristers to emerge from the BPTC seeking pupillage with debts of around £50,000. Student debt is not, of course, an issue confined to the law, and even within the legal profession young solicitors frequently face similar challenges. But the higher cost of the BPTC, and the fact that so few of those

completing it can expect to obtain pupillage, gives an added twist, and has obvious implications for diversity, to which I return in paragraph 6.18 below.

- 6.13 The problem of the gap between the number of students taking the BPTC and the number of pupillages on offer is not a new one, nor one confined to crime, though if I am right in my suspicion that recent pupillage figures in crime are over-stated it may now be even more acute in that area. It has been a source of concern to thoughtful figures in the legal profession for some years. The Working Group under Derek Wood QC to which I have already alluded considered the matter in some detail in 2008.
- 6.14 They concluded that, within the present construct, in which the course is provided by eight academic providers under franchises awarded by the BSB, there was no fair or acceptable way of cutting numbers. To cap numbers would create a situation in which providers would become the gatekeepers to entry to the Bar, which the Working Group regarded as unacceptable. A straight cut in numbers would give rise to complaints that able students were being prevented from competing for entry to the profession. The Working Group did, however, recommend that the Inns of Court and the providers should develop a short joint document warning prospective students of the shortage of pupillage compared with the numbers on the course. (This has been done, but doesn't appear so far to have had much impact.) They also recommended the introduction of an aptitude test covering analytical and critical reasoning skills and fluency in the English language, to be taken by all those seeking to take the BPTC, which they thought would have the effect of reducing numbers. This was introduced in 2013 following a successful pilot.
- 6.15 **Because their whole focus was on what is now the BPTC, the Wood Working Group gave this issue much closer attention than it has been possible for me to devote to it within the scope of this review. I cannot fault the logic on which they dismissed the idea of a cap on numbers, and would not myself argue for such a cap. I highlight the issue because the problem of high levels of debt, disappointed hopes of pupillage and the associated human cost has clearly not been resolved in the years since the Wood Working Group reported. It remains to be seen whether the aptitude test will have the effect of reducing numbers and improving the quality on the BPTC. It will be important for the profession to keep this under review, and to ensure in particular that the test is sufficiently demanding.**

6.16 In relation to the Bar, the main conclusions I draw from this part of the analysis are that:

- the supply of aspirant criminal barristers appears to be as strong as ever;
- despite the paucity of pupillages, the number of practising criminal barristers has probably not reduced by much, if at all, but it is an ageing profession; and
- the problem of over- supply from the BPTC appears to be as serious as ever and is among the issues which any radical review of the structure of the profession should address. I return to this in section 9 below.

Diversity

6.17 There is a clear public interest in the legal profession being as reflective as possible of society at large. This applies generally, but is particularly true of advocacy, which is in many ways the public face of the profession, and perhaps most of all in the criminal courts, impinging as they do on such a diverse range of victims, defendants and witnesses. I heard from the Equality and Diversity Committees of the Law Society and the Bar Council, both of whom clearly take the diversity of the profession extremely seriously.

6.18 **Some of the trends described in this report seem likely to tell against progress on diversity. There is a (to mind realistic) fear that the good work which has been done in the relatively recent past will be undone, with a reversion to a more socially advantaged, less ethnically diverse profession.** Both Committees expressed concern that the high cost of legal education and slimmer prospects of remunerative work in today's market would deter all but those with independent means and limited (if any) caring responsibilities. One straw in the wind is that, of those obtaining pupillage at the Bar in 2011, high percentages had parents with a degree and had attended fee-paying schools³⁰. The Bar has always been a more precarious existence than most, but in earlier generations it seems to have been easier for those from less advantaged backgrounds to prosper.

³⁰ Sauboorah, J. and Carney, C. (2012) Pupillage Survey 2010/11: An analysis of the backgrounds of pupils registered in 2010/11

- 6.19 In the short term, it is difficult to see how best to address these trends towards a less diverse advocacy profession. One interesting suggestion, which was put to me by a practising politician with wide experience of advocacy, is that a number of training course places, pupillages and training contracts for advocates might be funded pro bono by some combination of Government, business and the profession for candidates of limited means, on the understanding that they would commit to a number of years in publicly funded practice. The Inns of Court already provide scholarships for such candidates to enable them to undertake the BPTC, but those who benefit will still find it difficult in the current climate to obtain pupillage.
- 6.20 Longer term, changes in the point at which the decision is made to become a specialist criminal advocate, on the lines described in section 9 below, would reduce the early up-front costs and arguably lead to better-informed decisions to specialise. This might make the specialist profession more accessible to those of limited means than it is in danger of becoming now, though deferring the decision to specialise might discourage those who may have accumulated caring responsibilities in the meantime. It would certainly be important to design any changes in the structure of the profession with an eye to improving diversity.

7. How the system works and its impact on quality

- 7.1 I have dealt with advocacy quality "in the round" in sections 2 and 4, in terms of the training and inherent capabilities of those practising as advocates in the criminal courts. But factors which cannot be ignored are the point in the process at which an advocate is assigned and the way in which courts list cases for hearing. Both have a bearing on the time available to the advocate to prepare the case, and therefore directly on quality.
- 7.2 This is particularly relevant in the Crown Court. In the magistrates' courts, the business is fast-moving and the process summary. The prosecution will often field a single representative to handle all the cases listed for a particular courtroom on a particular day. The same practice will sometimes be adopted by firms of solicitors representing a number of clients at the same centre. Some defendants will use the facilities of the duty solicitor scheme. Although case preparation is still important, the process has always put a premium on advocates quickly grasping the issues involved in cases where the facts are often straightforward and not in dispute.
- 7.3 In the Crown Court, there should in principle be more opportunity for advocates to be better prepared. Although practice varies in different parts of the country, there are normally one or more pre-trial hearings to enable a degree of judicial control over the management of cases. In defined categories of cases, there is a preliminary hearing about two weeks after the case arrives in the Crown Court. This enables early consideration to be given to the management of the case. Within 14 to 17 weeks, depending on whether the defendant is in custody or on bail, there will normally be a plea and case management hearing (PCMH), at which a plea will be entered by the defendant. If the plea is "guilty", sentencing may take place immediately, or the case be adjourned for reports. If it is "not guilty" on any of the charges, the court will expect to be informed of issues likely to arise in the trial, including points of law, and how long it is expected to last, and be given a list of witnesses, exhibits and prosecution papers and the defence statement of case. In some circuits, the practice is to have an additional early hearing where there is thought to be a good prospect that the defendant will plead guilty to all charges. In others, the case will be listed for a "mention", to give the judge an opportunity to

assess its readiness or address any particular issue, e.g. disclosure of documents between prosecution and defence that needs to be addressed before the trial.

- 7.4 Crown Court pre-trial procedures are beyond my terms of reference. As it happens, they are currently the subject of two significant reviews. The Senior Presiding Judge is known to be considering reducing the number of pre-trial court hearings in order to streamline the process, with more reliance on electronic exchanges involving the trial judge and the parties; and the Lord Chief Justice has recently asked Sir Brian Leveson to review current practice and procedures from charge to conviction or acquittal with a particular focus on pre-trial hearings, and recommend how these procedures could be further reduced or streamlined³¹.
- 7.5 I mention the matter here because, in my visits to Crown Court centres, I was struck by how frequently the advocate representing either prosecution or defence had only very recently picked up the case, and - often despite best endeavours - was barely familiar with it. This impression was confirmed in conversations with judges and advocates. This is not a new issue, but my sense was that, if anything, it had become more of a problem than in the past. Poor preparation is the enemy of good advocacy.
- 7.6 There appear to be four contributing factors. The first has been noted above, and is the tendency of some defence solicitors to defer the assignment of an advocate until there is greater clarity about the defendant's intentions in relation to plea, in order that an in-house advocate can be used in the event of a guilty plea. The second is that, although I heard from some that it is less of an issue than in the past, it is still by no means unknown for barristers to return briefs or pass them to a colleague when there is a clash of commitments. The third is the fact that, while in complex, high profile cases the CPS will normally instruct counsel at an early stage, their general practice is to wait until after the PCMH. This is on the view that it is often only at the PCMH that the character of the case, including the likely defence, becomes clear, and a judgement can be made about advocacy requirements.

³¹ <http://www.judiciary.gov.uk/media/media-releases/2014/review-of-efficiency-of-criminal-proceedings-announced>

- 7.7 The fourth, which exacerbates the other three, is that Crown Court listing practice gives certainty about trial dates in only a minority of cases. In most centres, listing officers use the device of a "warned list", in effect to allocate cases to whole weeks, or even fortnights, with no certainty that they will be heard then. There is an inevitable trade-off between certainty over the timing of trials and court efficiency. Without such a device the courts would get through much less business than they do. Even in the best-managed system, cases will sometimes over or under-run. Building some room for manoeuvre into court listing therefore makes sense, but the effect is to make it much harder for advocates to plan their diaries.
- 7.8 The fact that trial hearing dates are often fixed at very short notice has implications not only for the quality of advocacy, but for the diversity of the advocacy profession. The Bar's Equality and Diversity Committee highlighted this as one of a number of features of criminal practice which made it unattractive to those who have to juggle professional and family commitments.
- 7.9 There is no simple answer to this. The management of Crown Court business is complex, with a variety of players (including witnesses) required to be in the same place at the same time for a trial to take place. But even allowing for these constraints, **I was struck by how hand to mouth the system seemed (both in my own observation and as reported by others), and by how often it appeared to throw up an under-prepared advocate, particularly at the pre-trial stages. I would hazard that this systemic weakness has as much impact on advocacy quality as anything else.**
- 7.10 My main conclusion is the obvious one that **the system would result in better advocacy if it secured the timely assignment in as many cases as possible of an advocate who had a good prospect of actually conducting the trial.**
- 7.11 **What constitutes "timely" is a matter for debate. The consensus among defence practitioners to whom I have spoken about this is that, if the PCMH continues to be the main pre-trial event with broadly its current purposes, the point at which one should expect advocates to have been assigned, on both sides, is about two weeks earlier.** But the same practitioners warn that this would only work if the CPS consistently delivered its case summary to the defence about two weeks earlier than that (which it is said they frequently fail to achieve) and if the courts provided greater certainty about listing dates.

7.12 **Whether there are changes in Court Rules or judicial direction that would help to secure the timely assignment of advocates is a matter Sir Brian Leveson may wish to consider, and I respectfully invite him to do so. I would also encourage him to consider the impact of the "warned list" system on consistency and quality of advocacy. I don't doubt that something like it is necessary for effective court administration. But the balance I mentioned above between efficiency and certainty about trial dates appears to be struck in different ways in different parts of the country. I understand that some court centres, including Sheffield, provide much more confidence about the dates on which cases are likely to be heard than others. If that is so, it would suggest that greater consistency of practice could produce dividends in terms of the quality of case preparation and advocacy.**

8. International comparisons

- 8.1 The review included discussions in Scotland and New Zealand of how criminal advocacy is arranged in these jurisdictions. The team also gathered information about other comparable jurisdictions with similar legal traditions to our own. A summary of this information can be found in Annex F.
- 8.2 In some of these jurisdictions, the legal profession is split into barristers and solicitors as it is in England and Wales. In others, the profession is fused or partly fused. This review has not considered in any detail the merits and demerits of a fused profession, which are reasonably well-known. But among its underlying themes have been whether the sharp distinction between instructing solicitor and advocate is sustainable these days in publicly funded criminal defence, and whether it still makes sense - even in a split profession - for aspiring lawyers to decide at the point of graduation which branch of the profession they wish to enter.
- 8.3 The other systems are instructive in illuminating these issues. In most, there is a degree of fusion, reflected in common post-graduate professional training. In some, there is no separation of roles after qualification. Others have a progressive qualifying system, in which all first qualify as solicitors, with those who wish to become barristers taking additional qualifications, often after several years in legal practice. Even in fully fused systems, many practitioners choose either to specialise as advocates or to focus on litigation in the more traditional solicitor role.

9. Implications for the future structure of the legal profession

- 9.1 The previous sections of this report have attempted to describe the changing landscape of criminal advocacy, how the publicly funded market works, and the related questions of quality and training. There are also longer-term trends and forces at work which many of those to whom I have spoken believe could have profound implications for the future of criminal practice in the legal profession.
- 9.2 These affect both sides of the profession. The new legal aid contracting arrangements, as amended, will allow a significant number of solicitors to continue to represent existing clients on legal aid, but the contracts for the bulk of the work will be with a much smaller number of providers than in the past - around 525 compared with 1600 now. The Law Society told me that it was likely that the number of firms undertaking criminal legal aid work would reduce significantly through merger and some leaving the market altogether. Firms would have significant problems adjusting to the new environment, and many questioned whether they would be able to maintain standards at the likely rates available.
- 9.3 **The solicitor side of the profession therefore faces a period of upheaval, which will probably involve substantial consolidation and the emergence of fewer, larger criminal legal practices. It will not be easy, and it is hard to predict exactly how it will fall out, but the general character of the change is reasonably well understood.**
- 9.4 The future of the self-employed criminal Bar is much less clear, and is the aspect of this review which has excited most comment. Some of those to whom I have spoken regard the early demise of an independent criminal Bar as virtually a foregone conclusion. Others may be less apocalyptic, but fear that the diminishing amount of the kind of work on which junior barristers have traditionally gained their early experience puts in serious doubt the system's ability to produce the criminal QCs and judges of the future. More sceptical voices question whether the threat to the Bar is as serious as it has been represented, or how much it matters if it is. Other countries, such as the USA, succeed in producing high quality advocates from within criminal firms, without a tradition of self-employed specialists.

9.5 I have therefore addressed the following questions:

- what are the prospects for the self employed criminal Bar;

and more tentatively;

- if these prospects are poor, how much does it matter; and
- what could be done about it.

Prospects for the self-employed Bar

9.6 If the trends described in this report continue unabated, the Bar will undertake a diminishing amount of work in future years, which on the publicly funded side will be less remunerative than in the past. Whether that is in fact what happens will depend on how the market in criminal advocacy now evolves.

9.7 Some of the measures offered for consideration earlier in this report - on solicitors' training and practice in assigning advocates, and on opening up legal aid contracts to barrister-led entities - might, if adopted by the profession, lead to a more level playing field than exists now. The growth in the proportion of defendants ineligible for legal aid and therefore potentially funding their own defence offers opportunities for the Bar. The CPS is instructing the Bar more than in the recent past.

9.8 Although far from unanimous, some well-informed solicitor practitioners also believe that the planned legal aid changes will have the (probably unintended) consequence that solicitors will reduce rather than increase their in-house advocacy capability, and therefore bring more business to the Bar. The reasoning is that some of that capability exists largely because the individuals concerned are accredited duty solicitors and attract valued police station "slots". The linkage between slots and accredited individuals is not a feature of the new scheme.

9.9 So it may not be all one way, and it should be borne in mind that the Bar still represents 75% of defendants in contested Crown Court trials and 60% of those who plead guilty. **But business prospects turn in large part on business confidence. Although the criminal Bar is confident in its competence and in the virtues of its way of doing business, its confidence about the future struck me as being at a remarkably low ebb.**

- 9.10 As noted in section 6, part of the problem is the absence of what the rest of the business world would recognise as work-force planning. The Bar Professional Training Course is still popular, and produces many more candidates for pupillage than the market needs. There are many more barristers practising in crime than there is work for them to do. In a profession whose main operating unit is a mutually supportive loose association of the self-employed, where work tends to be assigned on the basis of seniority, it is hard to react to a downturn in business as well-run operations would in other walks of life - by looking actively at ways of generating new business, laying off less capable senior staff, and protecting the future by continuing to recruit as many able youngsters as the available work will support.
- 9.11 The conclusion I draw from all this is that **the tide away from the self-employed criminal Bar may be turning, or be capable of being turned. But this is by no means assured, and if the Bar lacks the confidence in the future of criminal work, or the willingness to adjust how they conduct their business to compete on a more level playing field, the continuation of recent trends will become a self-fulfilling prophecy. In that case, as the present generation of experienced criminal barristers moves towards retirement, concerns about the future "talent pipeline" for criminal QCs and judges are not, in my view, fanciful.**

How much does this matter?

- 9.12 It is true that in other countries highly skilled advocates emerge from a unified professional background in which employment is the norm. But legal systems are the product of history, evolved in most cases over centuries. **The particular strengths of the English and Welsh criminal Bar - intellect, expertise, independence, ability to represent both prosecution and defence - may not be unique; but they are a substantial national asset which could not easily (or perhaps at all) be replicated, and they contribute significantly to the high international reputation of our legal system. There is also a distinct national interest in having available sufficient top-end advocates to undertake the most complex and serious criminal trials. Although senior judges have traditionally been drawn from all areas of legal practice, and ability is the main criterion, there is a persuasive argument that criminal law is an increasingly specialist area and that the High Court benefits from having on the Bench judges with deep criminal experience.**

- 9.13 If current trends for the criminal Bar persist and worsen, to the point where the supply of capable junior barristers reduces further and there is even less of the more routine work for them to do, is there anything that could or should be done about it? **Attempting to turn back the clock, for example by restoring exclusive rights of audience for the generality of work in the Crown Court, seems to me neither feasible nor desirable. Solicitor advocates are a valuable and established part of the scene. In system terms, the sensible approach is to invest in their skills and professionalism, as I recommend elsewhere in this report.**

Careers in criminal advocacy: possible structural change

- 9.14 It may, however, be worth looking more radically at the structure of this part of the legal profession. In other countries with similar legal traditions to our own, the decision to become a specialist criminal advocate is typically taken somewhat later in life than is the case in England and Wales. In Scotland, all law graduates are expected to spend up to 24 months training in a solicitor's firm before practising, but most aspiring advocates choose to stay longer, and defer a decision to go to the Bar until their late 20s or even later. This allows them both to build contacts among instructing solicitors, and to gain experience of advocacy in the Sheriff Court.
- 9.15 In New Zealand, publicly funded defence representation is divided between a Public Defender Service, law firms and "barristers sole" - self-employed barristers who contract direct with the LAA. The barristers sole are required to have had at least three years' experience of practice before being admitted to that branch of the profession. The three year requirement is of relatively recent origin, and reflects past concerns about quality when barristers could take on legal aid work immediately after qualifying.
- 9.16 Although annex F contains fuller descriptions of what we found in Scotland and New Zealand and of what we understand about other comparable systems, I am not offering any of these as a blueprint. But they do illustrate a more general point that, **in functioning systems not unlike our own, there is more than one way for the aspirant criminal barrister to get early experience of advocacy.** Legal careers on the Scottish or New Zealand model are in fact already feasible in England and Wales. There is nothing to prevent someone joining a solicitor's firm after graduation, building a few years' experience as a solicitor advocate, and then opting to read for the Bar at that stage. But the strong expectation at the moment is that, at the point of graduation, people will nail their colours definitively to the mast marked "solicitor" or "barrister".

9.17 There are strengths in this approach. It is probably more diversity-friendly (at least in relation to women) than one in which the decision to become a specialist advocate is deferred. It also, if the work is available, gives the ablest a chance to practise earlier at the higher level en route to becoming a QC and/or a judge - though whether a few years at the beginning of a 40+ year career is material from that point of view is open to question.

9.18 **In the criminal sphere, an operating model in which the Bar concentrated on cases where specialist advocacy skills were most evidently required, with early advocacy experience obtained elsewhere, may be more sustainable than what we have at the moment. The main features of such a model might be:**

- **a two-tier approach to training, with the first level on the lines of the elective advocacy course for solicitors described in section 4 above, but taken by all recent graduates aspiring to be advocates; and the second level bringing those who seek to be specialist advocates up to the Bar's current standard. If prospective criminal barristers were expected to complete the first of these, the Bar would need to have substantial input to its content;**
- **an expectation, which could develop over time and need not be an absolute requirement, that in pursuing their careers those aiming for the Bar would gain several years' experience of advocacy in a legal firm (or the CPS) before undertaking the second tier and being called to the Bar;**
- **a smaller, more specialist criminal Bar, available for the privately funded but concentrating largely on trial advocacy, particularly in the more serious and complex cases, perhaps with exclusive rights of audience in relation to the most serious.**

9.19 **I offer this as a possible direction of travel, in the hope that it might stimulate debate within the profession and with its regulators.** With an over-populated criminal Bar and the solicitor side of the profession in turmoil as it absorbs the legal aid changes, it would not be easy to migrate from where we are now to something on these lines. Traditionalists would fear that it would further blur the boundary between the two sides of the profession. The implication for advocates in other areas other than crime would need to be considered. To succeed, it would require the criminal Bar to be ready to accommodate to being in a smaller but more sustainable niche, and solicitors to play their part, by acknowledging that they too

could build reputation by providing early experience for the future stars of the criminal advocacy profession. It would also put at an even greater premium than it is already the ability of the legal profession and its regulators to work across traditional boundaries to develop high quality advocacy training for all.

- 9.20 For all that, **there are potential benefits. The distribution of work between the two branches of the profession would be clearer and less contested. Young criminal practitioners would be called to the Bar with some previous advocacy experience. The two tier approach to training might mitigate, if not remove altogether, the problems of over-provision on the BPTC and of indebtedness among those graduates of the BPTC who fail to get pupillage or tenancy. The first tier course would probably be a good deal cheaper than the second, and those opting for the second probably do so with a better appreciation of their prospects at the Bar, and perhaps with pupillage and tenancy already arranged. The profession might become more socially diverse than it is in danger of becoming at the moment.**
- 9.21 In his speech at the Bar Conference on 2 November³², the Lord Chief Justice encouraged the criminal Bar to "look forward and see where it wishes to be in ten years' time". **My over-riding impression, having undertaken this review, is that such a reappraisal of the future of the criminal Bar is urgently needed. As will be clear from this report, my own view is that there are two possible avenues of development. The Bar could adjust its way of working sufficiently to compete effectively for legal aid contracts of broadly the existing kind. If there was a real appetite to do so, the state should in my view be ready to look imaginatively at the way in which these contracts are structured, to make it easier for the Bar to compete without changing its business model out of all recognition.**
- 9.22 **But if there is no such appetite, or so little as to make no practical difference, the other approach would be to explore more rigorously options of the kind described here for a smaller, more specialist criminal Bar, whose members acquired their early experience of advocacy elsewhere. Simply carrying on as at present, in an effort to keep intact every aspect of the model as it existed many years ago, does not seem to me to be a viable option.**

³² <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-bar-conference-02112013.pdf>

10. Research and information

10.1 At various points in this report, I have commented on the absence of data or relevant research evidence. I decided early on that there would not be time for original research or substantial data collection, and have relied on existing information held by the Ministry of Justice, the regulators and the professional representative bodies. All have been willing to share what they have (and I have particularly appreciated the LAA's willingness to provide information from their database), but the data on advocacy quality, consumer perspectives and the make-up of the profession were remarkably limited. The last of these is perhaps the most surprising. The fact that the numbers of practising criminal barristers and of criminal pupillages awarded each year exist only as estimates, on which, I was warned, no great weight could be put, suggests to me that both the regulator and the professional body are flying blind in this area. The Government also has an interest in this, since good policy development depends as much as anything on reliable data and insights into how the system is actually working.

10.2 **I would encourage the Government, the regulators and the representative bodies to consider whether more could be done, without over-elaboration, to develop relevant data on criminal advocates and advocacy.**

10.3 **I would also encourage them to look kindly on the case for research in this area, both on the working of the advocacy market – which would in my view repay rigorous economic analysis – and on the vexed question of quality.** The QASA scheme, when implemented, should provide basic data on those meeting and not meeting the requisite standards, but by its very nature it will be focussed largely on minimum standards.

11 Costs

11.1 The total cost of the review is estimated to have been approximately £30,000.

Conclusion

My intention in writing this report as I have has been to produce as dispassionate an account as I could of how the criminal advocacy market is working as a basis for debate and discussion within the legal profession and between the profession and the Government. I am conscious of the strong feelings that surround these issues, and have been dismayed both at the unhealthy extent to which they divide the profession, both within itself and from the Government, and at the low level of confidence I have found in the future of criminal advocacy. Neither is in the public interest.

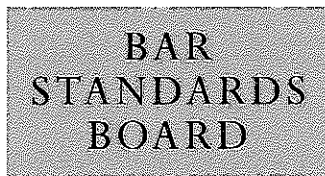
It may well be difficult for the main protagonists to find consensus about the way forward but I would urge them to do so. The quality of advocacy in our criminal justice system is a precious national asset, in which the public has as much of a stake as the legal profession.

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REGULATING BARRISTERS

Sir Bill Jeffrey
Review of the Provision of Criminal Advocacy Secretariat
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10 November 2013

Dear Sir Bill,

Review of the Provision of Independent Criminal Advocacy

We are grateful for the opportunity to provide written submissions to assist you with your review.

Below we have set out an overview of our position, followed by responses to the three areas that you have specifically requested information on.

Overview

1. We believe that the criminal Bar sets the benchmark in terms of high quality criminal advocacy. We are concerned that increasing competition from solicitors and legal aid reform are putting significant pressure on the independent criminal Bar. As matters stand, in this particular segment of the legal services market, competition cannot be relied upon to ensure that those offering the best combination of value and quality thrive. The legal aid system tends to encourage the use by solicitors' firms of in-house advocates, whether or not that is in the client's best interests; clients all too often lack the understanding or means to exercise choice; and the pressure of successive cuts in fees poses a risk to quality and is liable to drive out of this type of work those who are most highly skilled and best able to attract privately funded work in other fields. These factors are increasing the risks of inconsistent standards and incompetent representation. This in turn emphasises the need for greater consistency in training, standards and regulation to ensure that criminal advocacy standards are maintained, in the interests of justice and the public.
2. At a minimum, this will require ever closer cooperation between the different regulators involved. An alternative, which should be evaluated but would require amendments to the current statutory framework, would be to move to activity based regulation whereby advocacy was subject to a single regulator, code of conduct and training regime, whether the advocate is self-employed or practising within an entity (which might be regulated by a different regulator).

Setting the benchmark

3. There are a number of reasons for our contention that the criminal Bar sets the benchmark in terms of high quality criminal advocacy. These include:

- a) **Training:** Barristers are specifically trained in advocacy from the Bar Professional Training Course, through pupillage and thereafter. To be called to the Bar, an individual must have passed a minimum of two modules during the Bar Professional Training Course in which their performance of advocacy is continuously assessed. During pupillage barristers will spend six months observing advocacy and up to six months also performing advocacy under the supervision of a trained pupil supervisor. There is further advocacy training and assessment within the first three years of practice as all new barristers must complete the New Practitioners Programme, which involves nine hours of dedicated advocacy training and assessment. Therefore junior barristers receive a significant amount of targeted advocacy training and assessment.
- b) **Infrastructure:** Even after the first three years of practice, barristers benefit from the training and support infrastructure that the Bar has established. Notably, this includes the Advocacy Training Council, which coordinates a range of high level advocacy training courses across the Inns of Court (including the renowned Keble course). Vulnerable witness handling provides a recent example of the very real benefits of this infrastructure. In 2009, the Advocacy Training Council responded to emerging concerns about the handling of vulnerable witnesses in criminal trials by setting up a working group to investigate the matter. This group was responsible for the “Raising the Bar” report in 2011 which has since resulted in the development of specialist training as well as a toolkit for advocates to assist them to develop their skills. This toolkit is available through the Advocate’s Gateway website, which is managed by a Committee which includes representatives for the Ministry of Justice, the Judiciary and the CPS. Concerns over vulnerable witness handling have gathered force again in the last year and the Bar has therefore demonstrated that it is ahead of the curve in having already developed and delivered (through the ATC) high quality training and guidance on this high risk area.
- c) **Specialist criminal advocates:** The criminal Bar provides a pool of dedicated and specialist criminal advocates, many of whom have experience of both prosecuting and defending criminal cases. Crucially, almost all criminal barristers practise advocacy in trials as well as non-trial hearings. In addition to allowing them to develop and improve their advocacy skills, we believe that this has a significant impact on their ability to properly advise clients on what to expect if a case goes to trial. The pattern of practice amongst solicitor advocates is significantly different, with many not undertaking trials. In general, it is likely to be in a client’s best interests to be advised and represented by a specialist criminal advocate (whether barrister or solicitor) whose experience and skill enables them to provide reliable advice on the prospects of defending a case, and who can continue to represent them if a case does proceed to trial. Where an individual’s experience does not include trial advocacy, it is important that the client understands this and is able to exercise an informed choice as to their representation. We return to this point, below.
- d) **Dedicated regulation:** The criminal Bar also benefits from the dedicated, specialist regulation of the Bar Standards Board. This helps to ensure that there are well informed standards and regulatory obligations placed upon barristers and that appropriate action is taken to respond to individual or wider risks in relation to this.

Risks to standards and competence

4. We are therefore concerned that a number of changes to the market are threatening the independent criminal bar and the high standards that it has fostered. Most notable amongst these changes are:
 - a) **Increasing competition from solicitor advocates:** The criminal advocacy market has evolved significantly since solicitors gained higher rights in 1990. The traditional model whereby specialist litigators would instruct a specialist advocate for all courtroom hearings has developed into a situation whereby many solicitors firms include in-house advocates who also appear in some hearings. Many firms will seek to keep as much advocacy in-house as possible, often through in-house advocates who only undertake non-trial hearings (pleas, mitigation, sentencing and pre-trial hearings). As a result, the Bar has increasingly focussed on the more complex trial hearings and has a reduced presence in the Magistrates Court (including Youth Courts) and in non-trial hearings in the Crown Court.
 - b) **Legal aid reform:** Consistent and sustained legal aid funding cuts are having an impact on the number of barristers who specialise in criminal work. This can be seen from the following statistics:
5. In the last five years, the number of criminal barristers has decreased from 5,858 to 5,625. This represents a drop from 42.7% to 36.1% of the entire Bar. This trend has been gathering pace for some years; 15 years ago criminal barristers made up 47.8% of all barristers.¹
6. The decreases in specialism appears to be more acute at the top levels. Whilst criminal barristers still make up 36.1% of the overall bar, they comprise a smaller proportion of applicants for silk; criminal advocates comprised between 26-27% of the total applicants for silk in the last three rounds².
7. Moreover, legal aid rates incentivise early guilty pleas (and are likely to do so even more so under the proposed reforms), which is fuelling an increasing market of in-house advocates who never conduct trials but only appear in non-trial hearings. It is understood that the SRA estimate that as many as 50% of solicitors with higher rights do not conduct trials.
8. These changes do not just threaten the sustainability of the independent criminal Bar; crucially, they increase the risk of lower or inconsistent standards of criminal advocacy across the whole market. This has many aspects, including:
 - Contributing to decreases in experience and specialisation in criminal advocates;
 - Contributing to increases in special purpose non-trial advocates who may not have experience of contesting trials;
 - Reducing opportunities for advocates to develop their skills in complex cases
Creating disparities in the level of experience of advocates for different categories of defendant; and
 - Establishing a two tier system

¹ These figures have been extracted from the BSB's records, which record barristers' practice areas.

² <http://www.qcappointments.org/>. These figures includes solicitor advocate applicants, although they only comprise between 1-3% of all applicants.

9. We have expanded on these points under (A) below.
10. This is not just a theoretical concern; there is significant evidence that the risk of lower and less consistent standards is indeed materialising in criminal work. This includes:
- The Carter Report (2006);
 - The LSC's Cardiff research project (2007);
 - A number of high profile judicial pronouncements
 - CPS Thematic Reviews (2009 and 2012)
11. In addition, in 2011 the BSB commissioned ORC International to undertake a perceptions study of the standards of criminal advocacy. This can be found on our website at: https://www.barstandardsboard.org.uk/media/1402386/orc_international_-_perceptions_of_advocacy_report.pdf. This study included over 750 online surveys completed by criminal barristers, legal executives and lay justices as well as 16 in depth telephone interviews with key parties. Its conclusions included the following:
- a) Over half of all respondents feel that existing levels of underperformance in criminal advocacy are having an impact on the fair and proper administration of justice, with 31% rating the impact as "very high";
 - b) A quarter of all respondents feel that criminal advocates "very frequently" act beyond their competence;
 - c) Most qualitative respondents feel that standards are generally lower for solicitors and CPS advocates than they are for the self-employed Bar. The main reasons suggested for this are that barristers receive training which is more focussed on advocacy and gain more experience before moving on to complex cases;
 - d) Over three quarters of respondents feel that standards of advocacy have declined over the past five years. Two main reasons are given for this; the increasing involvement of solicitor advocates, and the impact of public funding;
 - e) Three quarters of respondents feel that standards of criminal advocacy will decline in the coming years in the absence of any regulatory measures to address this;
 - f) Public funding is having a very large impact on the provision of good quality advocacy, according to over three quarters of respondents. Some feel that this factor is driving the decline in standards to such an extent that it will be hard for any regulatory intervention to have a significant impact.
12. It is clear therefore that the risks in relation to standards are in fact manifesting in underperformance in criminal advocacy.
13. The implications of incompetent advocacy are significant; it impacts upon the consistent and fair administration of justice and the interests of individual consumers. It is also likely to result in less efficient criminal trials and hearings, more retrials or appeals and therefore increases in the costs associated with criminal justice.

The need for greater consistency

14. Whilst the risks highlighted above are real, they are not insurmountable and it is imperative that they are addressed. We believe that to mitigate these risks effectively we need to strive for greater consistency in four main areas:

- Education and training
- Standards and expectations around competency
- Regulatory obligations
- Regulation

15. The BSB currently has a number of projects in hand which seek to address these areas. The most notable are the Legal Education and Training Review and the Quality Assurance Scheme for Advocates, both of which involve cooperation between the main regulators of advocates.

16. Even greater consistency and consolidation is required in the future, so that all criminal advocates can benefit from the training, infrastructure and dedicated regulation that have fostered the high standards at the Bar and that any additional quality assurance mechanisms apply equally across the professions. This should ensure consistent and high standards of criminal advocacy and representation at all levels, which is in the public interest and in the interests of justice.

(A) The market for criminal advocacy

17. As set out above, since solicitors gained higher rights in 1990 the criminal advocacy market has been evolving. In more recent years some significant reforms to legal aid have accelerated these changes. This has exposed some pressure points in the criminal justice system and created a number of risks to consistently high advocacy standards. These include:

- a) **Contributing to decreases in experience and specialisation in criminal advocates:** The combination of a decrease in the number of QC certificates issued, significant decreases in criminal legal aid rates and reductions in the number of criminal trials have meant that there is less trial advocacy work available for criminal advocates and specifically fewer of the most complex and challenging cases. This has led many criminal barristers to attempt to diversify their practices in order to remain busy and maintain earnings. As a result, we have noticed a decrease in the number of specialist criminal barristers (criminal barristers now make up just 36.1% of all barristers compared to 42.7% 5 years ago and 48.8% 15 years ago) and we expect this trend to continue in the coming years. This is particularly noticeable at the senior end, with criminal advocates accounting for 26-27% of applicants for silk.

If criminal work decreases it is to be expected that the market for criminal advocates will also constrict. However, as competition in this particular market cannot be relied upon to ensure that those offering the best combination of value and quality thrive, we are concerned that the market might be losing some of the more experienced and competent criminal advocates and that this could contribute to greater inconsistencies in standards.

- b) **Contributing to increases in special purpose non-trial advocates who may not have experience of contesting trials:** Legal aid rates are fuelling an increasing market of advocates who never conduct trials but only appear in non-trial hearings. It is understood that the Solicitors Regulation Authority estimates that around half of solicitor advocates with higher rights do not undertake trials.

The BSB is concerned that it is difficult for an advocate to properly advise upon the merits of contesting a charge if they have never appeared in a trial; such non-trial

advocates mean that some defendants might proceed through the whole process without ever having been accurately advised on the prospects of success if they plead not guilty. In order to address this risk, we believe that as a minimum, clients should be informed if they are being advised and represented by an advocate who has never undertaken a criminal trial before and does not intend to do so.

- c) **Reducing opportunities for advocates to develop their skills in complex cases:** A decrease in available work for more senior advocates means that many are taking on less complex work as a matter of necessity. This in turn means that there are less challenging cases for more junior advocates to appear in, which reduces the opportunities for developing their skills. This is further exacerbated by the decreases in trial opportunities flowing from the growing market for plea work. This increases the importance of ongoing training opportunities and requirements for advocates to assist them to develop the skills required to undertake more complex cases when appropriate opportunities do arise.
- d) **Creating disparities in the level of experience of advocates for different categories of defendant:** The Youth Courts provide a tangible example of one of the other consequences of frustrated career progression. Legal aid rates in the Youth Courts are much lower than the adult courts, even for comparable very serious cases (such as sexual assault). This means that more experienced advocates are often not prepared to appear in the Youth Courts, even on challenging cases. It therefore provides opportunities for more junior advocates to gain experience of serious and complex cases which are increasingly scarce in the adult courts. As a result, youth defendants may receive less experienced advocates for a comparable case than an adult defendant would. Youth Courts are likely to have many vulnerable defendants and witnesses, which makes the quality of advocacy particular important.

The BSB, SRA and IPS are currently undertaking a research project to establish what competences are required for effective Youth Court advocacy. This will provide the basis for decisions as to whether any specific quality assurance mechanisms can be implemented to address the risks.

- e) **Establishing a two tier system:** In the BSB's response to the Ministry of Justice's recent Transforming Legal Aid consultation we highlighted the risk of legal aid reforms creating a two tier system whereby those who can afford to pay privately for criminal defence work will have access to a greater choice of specialist advocates than those who rely on criminal legal aid.

(B) Quality and training

18. There is an inherent risk within the criminal advocacy market that flows from the fact that criminal advocates could be solicitors, barristers or legal executives. Each path has very different education and training routes. In particular, barristers are trained specifically in advocacy whereas solicitors can obtain higher rights with less focussed advocacy training, experience and assessment. Concerns about the quality of training for solicitor Higher Court Advocates was highlighted in a report that Nick Smedley's provided for the Law Society in 2010.
19. This inherent risk has become increasingly relevant given the pressures flowing from legal aid reforms that were detailed above.
20. It is for these reasons that we believe that it is imperative that we strive for greater consistency in four key areas:

- Education and training
 - Standards and expectations around competency
 - Regulatory obligations
 - Regulation
21. There are currently two particularly notable projects that are being undertaken across the regulators that should contribute to greater consistency in these areas:
- a) **The Legal Education and Training Review:** Through the LETR the BSB and SRA are, amongst other things, attempting to agree a general competency framework. This will help to ensure comparable competences at entry to the profession. Further, LETR provides an opportunity for regulators to review routes to enter the legal profession and to consider whether or not there are other approaches to qualification ie – requiring specialism at a later stage.
- b) **The Quality Assurance Scheme for Advocates:** Through QASA the BSB, SRA and IPS have developed a competence framework against which all criminal advocates will be assessed, regardless of their route to qualification or prior experience. The competence framework covers four levels of competence. In order to progress to a higher level and undertake more complex work an advocate will need to demonstrate competence against this framework.
22. Whilst these projects should help to encourage consistency, there are many other areas for improvement. It is particularly important that all advocates receive an equivalent quantity and quality of training and assessment in advocacy, as highlighted in the Smedley Report. We are concerned about the disparities in advocacy training and assessment between solicitors and barristers; this applies to qualification, the process for gaining higher rights and the first three years of practice.
23. Disparities are relevant not only in the early years of practice but also through available training and support thereafter. For example, the BSB is currently assessing whether it should require criminal barristers to undertake training (such as that developed by the ATC) in handling vulnerable witnesses. Such measures could be incorporated into the CPD requirements for barristers. However, it would clearly be contrary to the public interest if such training was available or indeed mandatory for barristers but not solicitor advocates. This demonstrates that whilst the BSB and SRA are working together on issues such as LETR and QASA it is difficult for all regulatory requirements to be developed jointly across regulators. It is therefore not possible to fully mitigate the inherent risk of different types of advocates receiving different levels of training and quality assurance. This is particularly concerning given the risks that have been set out in relation to consistent standards of criminal advocacy, both within and across the professions.

(C) Structure of profession

24. It is clear that even in jurisdictions that do not have separate professions, specialist advocates are normally present and identified in one way or another. Whilst specialisation is no longer so clearly demarcated by title in England and Wales, it is important that it continues to be recognised through practice and regulation. It is in the public interest that those needing representation can readily identify specialist advocates and are assured of a high level of consistency, in terms of quality and ethics, whatever the professional title of the individual advocate.

25. It has been stated above that we believe that the criminal bar sets the benchmark in terms of high quality criminal advocacy. We believe that the training, infrastructure and dedicated regulation that have fostered these high standards at the Bar should be available and applied to all criminal advocates in order to ensure consistently high standards and to mitigate the risks of inconsistent standards and incompetence. This may be achievable by cooperation between regulators; but the alternative of moving to activity based regulation of advocacy by the BSB should also be evaluated, in the context of an overall review of the regulatory framework created by the Legal Services Act 2007.

Conclusion

Recent reforms are increasing risks in relation to poor advocacy performance and it is crucial that these risks are effectively mitigated so that standards of criminal advocacy are maintained. We believe that the blueprint for training and regulation of the Bar provides a solid foundation for mitigating this risk and that greater consistency in training and regulation will be key to ensuring consistently high standards.

Please let us know if there is anything further that we can provide to assist with the review. We would also be happy to meet again to discuss any of the matters sets out in this response or any proposals that you may have.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Vanessa Davies', written in a cursive style.

Dr Vanessa Davies
Director, Bar Standards Board

Standing Orders amendment

Status:

1. For discussion and decision.

Executive Summary:

2. The Board discussed its structure, including its use of committees, at its Awayday in April 2014. In anticipation of the possibility of making significant changes to committees, arrangements need to be made to allow business as usual to continue by ensuring sufficient membership of committees. Unnecessary recruitment is to be avoided. Amendments are needed to the Standing Orders to enable extensions of office to be offered beyond the normal limits on terms of appointment. This paper puts forward the proposed amendments.

Recommendations

3. It is recommended to the Board that it:
 - a. **Agrees** to amend the Standing Orders by inserting a new paragraph 12 (g) and, in Annex 3, a new paragraph 9,
 - b. **Agrees** that all committee members, regardless of current term of office expiry, must be advised of the review and that it may result in an earlier termination of their term of office than previously stated,
 - c. **Agrees** that the committee appraisal process be suspended for all committees for the duration of the review, and
 - d. **Resolves** that following its decision to review its committee structure and functions, all BSB committee and sub-committee members coming to the end of a period of office (whether first or second) may be offered an extension of office until 31 December 2015 to allow for that review to be completed.

Comment

4. Following discussions at the Board Awayday in April, the Board has agreed to undertake a wholesale review of its activities. The outcomes of its deliberations and discussions over the coming months may mean that committees change their terms of reference quite significantly and could extend as far as disestablishing some committees.
5. The review will take some time to complete and will only be finalised when the new Chair of the BSB takes up their appointment. We must continue to get our work done within the existing structure in the meantime.
6. Several committees have members who come to the end of their maximum 6 year permitted term of office during 2014. Others have committee members who are due for consideration for reappointment during this year. It is not prudent, in all the circumstances, to embark upon recruitment of new committee members who would be appointed for three year terms, with a possibility of renewal. Nor is it prudent to renew people for three years when the committee they are appointed to may change quite significantly during that timeframe.

Part 1 – Public

7. The proposal is to offer an extension to all committee members whose terms of appointment end during 2014 an extension until the end of 2015. This would apply to people who have reached the end of their maximum 6 year term of appointment as well as those who would be contemplating renewal. An amendment to Paragraph 9 of Annex 3 of the standing orders is proposed to enable this, as shown in Annex 1 in track changes. The additional clause is:

In exceptional circumstances, the BSB may resolve to offer an extension of an individual person's or group of persons' appointment beyond the maximum six year period of appointment permitted above. Any resolution to make a limited offer of extension must

- a. *Allow for an extension of no more than 18 months in duration,*
 - b. *Be made by offer in writing,*
 - c. *Be made for a specific reason that is articulated in the offer of extension, and*
 - d. *not be done more than once in any five year period.*
8. If the Board agrees to the insertion of this clause, it then needs to resolve that such an extension be made. The suggested resolution is

The Bar Standards Board resolves that, following its decision to review its committee structure and functions, all BSB committee and sub-committee members coming to the end of a period of office (whether first or second) may be offered an extension of office until 31 December 2015 to allow for that review to be completed.

9. Adopting these changes will still allow for recruitment to be undertaken where there are vacancies that must be filled. This would be either because we have existing vacancies or where insufficient offers of extension are accepted to allow for a committee to function effectively. Any recruitment will be a much smaller exercise, but would be conducted in accordance with the usual requirements of Annex 3 to the Standing Orders.
10. It may be that committee reviews are completed earlier than the end of 2015 and changes are made prior to that date. In order to allow for that possibility, a further amendment to paragraph 12 in the main body of the Standing Orders is proposed, again as shown in track changes in Annex 1. A new 12 (g) could be inserted to the effect that:

12. A person shall cease to be a BSB committee, sub-committee or working group member if:

(a) to (f); or

(f) the BSB resolves to disestablish or substantively restructure a committee, sub-committee or working group of which a person is a member so as to be inconsistent with continued office by that person, upon three months' notice.

11. It is proposed that these amendments take effect immediately.

Resource implications

12. Adopting these recommended changes to the standing orders will have a positive effect on the deployment of resources, allowing efforts to be concentrated on supporting the review rather than carrying out a large recruitment exercise. No additional funds are necessary to support these changes.

Equality Impact Assessment

13. Taking a blanket reappointment approach will not improve the diversity of the BSB's Committees as it will effectively preserve the status quo in terms of committee composition. However, given the opportunity to improve committee operation presented by the review, including recruitment and retention overall, it is considered that the lack of improvement in the immediate short term is likely to be offset by future improvement in diversity brought about by the review. It should be noted that the HR team has committed to undertake a diversity survey of the Board and its committees in September 2014 in order to update data currently held. The results of this exercise will feed into the overall review and assist in the development of activity aimed at improving numbers of currently underrepresented or absent groups.

Risk implications

14. By making an open resolution of this nature and restricting the circumstances in which a blanket extension may be offered, any risk in terms of lack of transparency is mitigated.

Impacts on other teams / departments or projects

15. All teams are involved in the review of the committee.

Consultation

16. No consultation has been undertaken prior to suggesting this amendment, other than the discussions by the Board itself. It is not a regulatory arrangement requiring Legal Services Board approval. No consultation is proposed.

Regulatory objectives

17. These proposals are not relevant to the regulatory objectives as they relate to the Board's mode of operating rather than any regulated person but by making this resolution in public session, the Board is operating in a transparent manner.

Publicity

18. No publicity is planned. All people affected by the proposed approach to extension will be written to in order to implement this proposal.

Annexes

19. Annex 1 – annotated version of Standing Orders showing new clauses.

Lead responsibility

Amanda Thompson



**STANDING ORDERS
FOR THE BAR STANDARDS BOARD**

FOREWORD

The following Standing Orders are issued under the Authority of paragraph 14(1) of the Bar Standards Board Constitution.

This edition of the Standing Orders came into effect on 06 January 2014

PART 1 – INTRODUCTION

Definitions

1. In these Standing Orders, unless the context requires otherwise:

“The Bar Council” means the Council of the General Council of the Bar of England and Wales.

“The Bar Standards Board” and “BSB” mean the Board established by the Bar Council to exercise and oversee the regulatory functions of the Bar Council and includes BSB staff.

“BSB staff” means the Bar Council staff appointed by the BSB in accordance with paragraph 59.

“BTAS” means the Bar Tribunals and Adjudication Service, an independent body set up by the Council of the Inns of Court to appoint and administer Disciplinary Tribunals and other relevant panels on behalf of the BSB

“CPA” means the Commissioner for Public Appointments

“The Inns’ Council” and “COIC” means the Council of the Inns of Court.

“Internal Governance Rules” means the Internal Governance Rules made by the Legal Services Board.

“Lay person” has the meaning given in paragraph 2(4) of Schedule 1 to the Legal Services Act 2007 and “lay member” has a corresponding meaning.

“Matrix” and “matrix approach” means the method by which the BSB may approach issues that affect several committees or aspects of its work, as set out in paragraphs 19-22.

“Practising barrister” means a barrister holding a current practising certificate issued by the Bar Council.

“Regulatory arrangements” has the meaning given in section 21 of the Legal Services Act 2007.

“Regulatory functions” has the meaning given in section 27(1) of the Legal Services Act 2007.

“Representative functions” has the meaning given in section 27(1) of the Legal Services Act 2007.

“Seven Principles of Public Life” means the principles, also known as the “Nolan Principles”, as laid down in the Committee on Standards in Public Life’s thirteenth report “Standards Matter” and referred to in paragraph B4 of the Constitution and reproduced in Annex 1.

Any terms used in the Legal Services Act 2007 have the same meaning as in that Act.

PART 2 – THE BAR STANDARDS BOARD

General

2. The BSB is committed to
 - a. providing regulation of advocacy and expert legal advice in the public interest,
 - b. acting in a way that is compatible with the regulatory objectives, having regard to the regulatory principles as required by section 28 of the Legal Services Act 2007,
 - c. conducting its business in harmony with the Seven Principles of Public Life,
 - d. making its regulatory decisions independently of the Bar Council,
 - e. consulting with the Bar Council as required by the Legal Services Act 2007 and the Internal Governance Rules,
 - f. undertaking regulatory functions only and not undertaking any representative functions, and
 - g. working cooperatively with the Inns of Court, the Inns' Council and BTAS.

Consultation on exercise of regulatory functions

3. When proposing to make or alter the regulatory arrangements, and in other cases, where it considers it appropriate the BSB will normally consult, in the way it considers appropriate:
 - a. The regulated community (including its representative body and sections of the Bar), and
 - b. Other interested parties (including, for example the public, other approved regulators, the judiciary, barristers' clerks, academic providers and other education providers) as it considers appropriate.
4. In relation to proposals to make or alter the regulatory arrangements, the BSB will normally allow a period of 3 months for consultation before a decision is taken.

Saving for defects etc

5. All acts done in good faith by the BSB or any Committee or sub-committee shall (so far as is lawful), notwithstanding any defect in the appointment of any of its members or any error in its composition, be as valid as if there were no such defect or error.

PART 3 – OBLIGATIONS TO THE BAR COUNCIL

6. The BSB will make information and papers available to the Bar Council but reserves the right exceptionally to refuse requests where it has good cause to do so.

PART 4 – COMMITTEES

Committees of the BSB

7. The BSB establishes the following Committees whose terms of reference and membership are set out in Annex 2
 - a. The Education and Training Committee,
 - b. The Equality and Diversity Committee,
 - c. The Governance, Risk and Audit Committee,
 - d. The Planning, Resources and Performance Committee,
 - e. The Professional Conduct Committee,
 - f. The Qualifications Committee,
 - g. The Standards Committee, and
 - h. The Supervision Committee
8. The Chair and Vice Chair of the BSB have the right to receive papers and to attend meetings of all Committees.
9. Without prejudice to the power of the BSB to amend Annex 2 on its own initiative, a Committee may at any time propose an amendment to its terms of reference or membership for consideration by the BSB.
10. Each Committee may determine its own composition and procedure subject to the provisions of Part 5 and the following general requirements:
 - a. Each Committee is to have minimum of a Chair and a Vice Chair. Wherever possible, at least one of these two office holders should be a member of the BSB;
 - b. At least a third of the Committee's membership must be lay persons;
 - c. At least a third of the Committee's membership must be practising barristers,

- d. The requirements of subparagraphs b and c shall not apply to the Professional Conduct Committee, the Qualifications Committee, Governance Risk and Audit Committee or the Planning Resources and Performance Committee;
 - e. Each Committee must adopt and maintain rules of procedure on an annual basis addressing meeting arrangements (including frequency of meetings and arrangements for urgent business outside regular meetings); and
 - f. The Chair of each Committee or, in that person's absence, a Vice Chair, shall take the chair at every meeting of the Committee. In the absence of the Chair and any Vice Chair, or where an interest has been declared by them for a specific item only, the members present may proceed to elect a chair from among their number for the purposes of that meeting or that item.
11. Members of a Committee shall be appointed and reappointed in accordance with the Procedures set out in Annex 3. A member of the Bar Council or any of its representative committees may not hold office as Chair, Vice –Chair or a member of
- a. the BSB,
 - b. any of the BSB's committees,
 - c. any of the BSB's sub-committees,
 - d. any of the BSB's permanent working groups, or
 - e. any of the BSB's committees or the BSB as a special advisor or Independent Observer
12. A person shall cease to be a BSB committee, sub-committee or working group member if:
- a. the period for which he was appointed expires (and his appointment is not renewed);
 - b. he resigns his membership by notice in writing;
 - c. he was appointed as a lay person and ceases to be a lay person;
 - d. he was appointed as a practising barrister and ceases to be a practising barrister or becomes a member of the Bar Council or one of its representative committees;
 - e. he fails to attend four or more meetings in any rolling 12 month period and the Committee or BSB resolves that he should cease to be a member;
 - f. the BSB resolves that he is unfit to remain a member (whether by reason of misconduct or otherwise); or
 - f.g. the BSB resolves to disestablish or substantively restructure a committee, sub-committee or working group of which a person is a member so as to be inconsistent with continued office by that person, upon three months' notice.

Sub-committees and working groups

13. The BSB may appoint:
 - a. a sub-committee of the BSB or of a Committee, or
 - b. a permanent or temporary working group of the BSB or of a Committee for a specific purpose.
14. A Committee may appoint:
 - a. a temporary sub-committee,
 - b. with the approval of the BSB, a permanent sub-committee,
 - c. a temporary working group, or
 - d. with the approval of the BSB, a permanent working group for a specific purpose.
15. Regard should be had to the Procedures in Annex 3 when making appointments and reappointments to any sub-committee or working group.
16. Committees may act only in matters within their terms of reference and within the agreed budget and shall promote such policies as are adopted by the BSB. All Committees must consider the practicality, affordability and proportionality of all decisions taken by them, except that this does not apply to the Professional Conduct Committee when it is considering complaints and deciding whether to proceed with disciplinary action. If any of the objectives conflict then the matter must be referred to the Board itself.
17. The BSB recognises that the work of its committees is interrelated. Each Committee should decide which other Committees (linked committees) carry out activities which may have a bearing on its responsibilities. Where possible, each Committee should include members who are also members of the linked committees. People who are members of two such linked committees need not be board members.
18. A Committee must report to the BSB at least annually but as often as required by the BSB. A sub-committee or working group must make periodic reports to the Board or the Committee to which it reports.

Matrix Approach

19. The BSB may decide that an issue should be addressed by the formation of a matrix.
20. A matrix may be formed of appropriate members of the Board, existing committees, existing sub-committees and working groups. Other individuals with knowledge or experience relevant to the matrix's purpose may be invited to attend.
21. The matrix may utilise technology or physically meet in order to conduct its business.
22. Members of a matrix will have a dual responsibility for participation in the matrix and in the Board, committee, sub-committee or working group of which they are ordinarily a member.

Payments to members

23. The BSB may decide to pay fees and expenses to members of the BSB or to members of Committees, sub-committees and their working groups on terms it may set.

Obligations of members

24. All BSB, Committee, Sub-committee and working group members are subject to continuing satisfactory performance and compliance with the Standing Orders and Governance Manual. Members may be removed from office for failing to meet these obligations, based on the reviews outlined in paragraph 25 or any other ad hoc reviews of individual members that the Board or the Chair of the Committee determines are required.
25. All Committee and sub-committee members are subject to a minimum of a review of performance within one year of appointment and a review of performance preceding any reappointment decision. Working group members will be subject to ad hoc reviews in accordance with paragraph 24 above.

PART 5 – PROCEEDINGS OF THE BSB AND ITS COMMITTEES

Meetings

26. The Board must meet at least six times in a 12 month period; usually monthly except for August, unless it decides otherwise.
27. If the need arises, the Chair or Vice Chair may convene additional meetings, which may take place by telephone or email if necessary.
28. Each BSB meeting may be separated into public and private sessions.
29. Committee, sub-committee and working group meetings are held in private and the frequency of such meetings is to be determined by the relevant Chair.

Attendance at meetings

30. The Chairman of the Bar Council and a person nominated by the President of the Inns' Council are entitled to attend and speak (but not vote) at any public session of a meeting of the BSB. The Chair of the BSB may also agree that any other person or persons nominated by the Chairman of the Bar Council may attend and speak (but not vote) at any public session of a meeting of the BSB.
31. The BSB may invite the Chairman of the Bar Council and any person or persons nominated by the Chairman of the Bar Council, and a person nominated by the President of the Inns' Council, to attend all or part of the BSB's private sessions.
32. If a Committee Chair is not a BSB member, the Committee Chair has ex-officio rights to attend and speak (but not vote) at any public session of a meeting of the BSB and, at the invitation of the Chair, at all or part of any private session.
33. The BSB, a Committee, sub-committee or working group may at any time invite any person to attend their meetings in an advisory or consultative capacity.

Quorum

34. The quorum for a BSB meeting is five members of whom at least two must be lay members and at least two must be barrister members.
35. No business may be transacted at any meeting of a BSB Committee or sub-committee unless one third of its members are present, in person or by telephone or videoconference (subject to paragraph 38)
36. If a vote is required, decisions must be made by simple majority. The Chair will have a casting vote in the event of a tie.
37. Either the Chair or the Vice Chair must be present at each meeting of the BSB unless the BSB resolves to dispense with that requirement for a particular meeting.
38. In the case of the Professional Conduct Committee, no business may be transacted at any meeting unless one sixth of the members are present of whom at least 2 must be practising barristers and at least 2 must be lay members.

Minutes

39. Decisions made by the Board and Committees must be recorded in writing.
40. Minutes of the decisions taken and where the appropriate the proceedings of each meeting of the Board and its Committees, sub-committees and working groups shall be drawn up and, when agreed, shall be approved either electronically or in writing at the appropriate meeting or as soon as practicable if the former is not appropriate, by the person chairing that meeting.

Agenda papers

41. The agenda and papers for any meeting of the Board, a Committee, a sub-committee, or a working group shall be sent to its members at least 4 working days before a meeting. With the consent of the Chair or Vice Chair shorter notice may be given.

Publication of agendas, papers and minutes by the BSB

42. The BSB may decide which of the papers considered at its meetings should be made public after each Board meeting.
43. The BSB may also publish its agenda and minutes of its meetings.
44. There is a presumption in favour of publication of Board papers unless the Board considers there is good reason not to do so.

PART 6 – MEMBERS’ INTERESTS

45. The BSB must establish and maintain policies on declarations of interest and on offers and receipt of gifts or hospitality by members of the BSB and Committees.
46. With regard to conflicts of interest, a member of the BSB or a Committee must:
 - a. Where he has an interest in an item of business to be transacted at a meeting of the BSB or a Committee, declare that interest;
 - b. Where the Policy so requires, absent himself from the meeting while that item is under consideration.
47. A member of the BSB or a Committee must, in accordance with the Gifts and Hospitality Policy, declare any reportable hospitality offered or received in that capacity.

PART 7 – DELEGATION

48. Pursuant to paragraph 14(4) of the Constitution, the following arrangements are made for delegation of the functions of the BSB.
49. The functions of the BSB in relation to the matters within the terms of reference of a Committee stand delegated to the relevant Committee as set out under paragraph 7 and Annex 2 and in accordance with paragraph 10 and Part 5.
50. The BSB may, to the extent it considers appropriate, delegate in writing any function subject to paragraph 51 to the Chair of the BSB, a Committee, the Chair of a Committee, a sub-committee, a Chair of a sub-committee or a member of BSB staff, and shall establish and maintain a scheme of delegation identifying each function so delegated including details of the body or person (designated by office or name) to whom it is delegated, and the conditions (if any) on which it is delegated.
51. The following functions must be exercised by the BSB itself and may not be delegated:
 - a. adoption and amendment of the Standing Orders of the BSB,
 - b. adoption of the Declaration of Interests Policy and the Gifts and Hospitality Policy required by paragraph 45,
 - c. appointment of members of the Recruitment Panel,
 - d. approval of the budget bid,
 - e. making of rules forming part of the regulatory arrangements, or
 - f. decisions about payment of fees or expenses under paragraph 23.
52. A Committee may delegate any function within its terms of reference to a sub-committee. Any such delegation must be recorded in writing and notified to the BSB.
53. A working group has no decision-making power and must report back recommendations to the BSB or Committee as required.

54. Routine and administrative matters in relation to the business of the BSB or any Committee, sub-committee or working group shall normally be undertaken by a member of the BSB staff without formal delegation.
55. Nothing in paragraphs 48-54 prevents the BSB or a Committee whose function has been delegated from exercising that function itself.

PART 8 – RESOURCES

General

56. In making decisions the BSB and its Committees and sub-committees must have regard to the regulatory objectives and regulatory principles in the Legal Services Act 2007 as well as the requirements of probity, economy, efficiency and effectiveness.
57. The Bar Council's financial management controls are set out in the Finance Manual produced by its Finance and Audit Committee. The BSB will abide by the Finance Manual.

The Annual Budget

58. The BSB will prepare an annual budget in accordance with the procedures set out in the Finance Manual. The Planning, Resources and Performance Committee will scrutinise the BSB budget proposals before the BSB considers its budget for submission in accordance with the Finance Manual procedures.

Staff

59. The BSB appoints its own officers and support staff and determines their remuneration. Persons so appointed shall be employees of the Bar Council and the BSB shall consult fully with the Bar Council in matters relating to that employment.

Annex 1

THE SEVEN PRINCIPLES OF PUBLIC LIFE (NOLAN PRINCIPLES)

Selflessness

Holders of public office should act solely in terms of the public interest.

Integrity

Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships.

Objectivity

Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.

Accountability

Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.

Openness

Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.

Honesty

Holders of public office should be truthful.

Leadership

Holders of public office should exhibit these principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occurs.

Annex 2 – TERMS OF REFERENCE OF BSB COMMITTEES

Annex 2a - Education and Training

The terms of reference of the Education and Training Committee are:

1. to formulate policy for approval by the BSB on all matters relating to the setting of standards for:
 - a. entry to the Bar;
 - b. education and training for barristers, including CPD;
2. in consultation with the Qualifications Committee, to keep under review and propose changes to the Bar Training Regulations and any regulations replacing them in respect of entry and training;
3. to supervise the development of effective processes and procedures for monitoring standards in relation to
 - a. entry to the profession;
 - b. provision and the quality of education and training for the profession including the validation and revalidation of courses of training and of organisations offering training, advocacy training and CPD;
4. to issue guidance on the interpretation of the relevant rules and regulations;
5. to liaise, where appropriate, with other organisations on matters related to education and training for the profession;
6. to liaise and consult with the other BSB committees, the Inns' Council and the judges as appropriate in exercising its functions;
7. to take responsibility for the consideration and approval of Public Access Training Courses. The Education and Training Committee may seek advice from any other BSB committees when considering applications, if deemed appropriate.
8. to undertake such other tasks as the BSB may from time to time require; and
9. to report to the Board on its work as and when required.

The membership of the Education and Training Committee shall be:

10. A chair and a vice-chair of whom one must be a lay member and one must be a practising barristers.
11. Between three and five lay members, provided that the total number of lay members shall not be less than half the number of barristers appointed to the Committee.
12. Not fewer than 6 and not more than 12 practising barristers.
13. At least two members who are senior legal academics with experience of vocational training (in addition to the lay members above).

Quorum

14. One third, at least two barristers and two lay members

Annex 2b - Equality and Diversity

The terms of reference for the BSB Equality and Diversity Committee are:

1. to promote equality and diversity in the profession so that the profession is open to all on merit and reflects the diversity of society;
2. to ensure that the BSB acts in accordance with its statutory duties to eliminate unlawful discrimination, advance equality of opportunity and foster good relations between persons who share a protected characteristic and persons who do not share it, and in particular to:
 - a. make strategic recommendations for equality policy development and implementation and, where necessary, submit proposals for policy changes or initiatives to the Board or relevant committee,
 - b. monitor, revise and update the BSB's Equality and Diversity Strategy and Action Plan,
 - c. scrutinise equality assessments to ensure that the BSB's functions have given due consideration to eliminating discrimination and promoting equality, and
 - d. identify and report regularly to the Board on areas of risk in relation to equality and diversity issues and compliance with relevant equalities legislation;
3. to champion equality and diversity issues with the Board, its committees and within the BSB generally;
4. to provide appropriate expert advice and guidance to the Board and its committees on equality issues where requested;
5. to liaise and consult with the other regulatory committees, the Inns' Council and the judges as appropriate in exercising its functions;
6. to undertake such other tasks as the BSB may from time to time require; and
7. to report to the Board on its work as and when required.

The membership of the Equality and Diversity Committee shall be:

8. A chair;
9. A vice-chair;
10. Up to five lay members; and
11. Up to five practising barristers.

Quorum

12. No business may be transacted at any meeting of the Equality and Diversity Committee unless one third of the members are present of whom at least 2 must be barristers and at least 2 must be lay members.

Annex 2c - Governance, Risk and Audit Committee

The Terms of Reference of the Governance, Risk and Audit Committee are:

1. to advise the Board on the effectiveness of the corporate governance structures, and to monitor and recommend to the Board action in respect of the effectiveness of the strategic arrangements for governance, risk management and audit. This includes agreeing a programme of Board member training and development to satisfy corporate governance guidelines;
2. to monitor and recommend to the Board action in respect of the Board's management of risks, including arrangements for business continuity and disaster recovery;
3. to agree action in respect of the effectiveness of the Board's financial management and control systems, and internal business processes, including accounting policies, anti-fraud and whistle-blowing arrangements;
4. to develop the BSB's internal audit function including the appointment of the Board's Internal Auditors. To agree the annual audit plan and include any audit reviews that the Board wishes to see conducted. To monitor and recommend to the Board the results of the Board's internal audit arrangements and the effectiveness of the response to issues identified by audit activity; and
5. to review relevant assessment reports and assurance reports (including the Independent Observer) to secure an understanding of improvements that could be made and best practice revealed by such reports. To provide necessary assurances to the Board, that in turn provides assurances to the Bar Council's Audit Committee.

The membership of the Governance Risk and Audit Committee shall be:

6. A lay chair who must also be a Board member,
7. A lay or barrister vice chair ,
8. Three other members who must not be Board members

Annex 2d - Planning, Resources and Performance Committee

The Terms of Reference of the Planning, Resources and Performance Committee are:

1. to consider, and support the Board and the executive in formulating, the overall strategy for the BSB, with particular emphasis on horizon scanning, vision, mission statement, priorities, activities and outcomes. To scrutinise the BSB's three-year strategic plan and annual business plan before the Board's signoff is sought. Agree actions to ensure that the BSB's associated strategies (Communications, IT, HR and research) are aligned to the corporate strategy;
2. to oversee operational and programme delivery (without duplicating the detailed oversight provided by any other committee or programme/project governance structure) as well as financial performance against the objectives and targets set out in the Business Plan. To support the Board and executive with finalising the BSB's Annual Report publications;
3. to consider the annual budget and revenue, in the context of the strategic and business plans, to question whether proposed funding is adequate and properly and effectively allocated across the business, and agree certain levels of virement between programmes (as anticipated in the Finance Manual with levels set by the Committee from time to time);
4. to consider how the BSB presents financial information to best effect and with appropriate transparency and comprehensiveness. To consider the reliability of forecasting and how the pursuit and achievement of efficiency savings are reported;
5. to review and agree actions on the effectiveness of service level agreements within the organisation;
6. to consider how the BSB undertakes planning activity to best effect and in a timely and consistent manner, as well as to review the robustness of programme and project plans. To support the Board and the executive with the planning and monitoring of the implementation of the Regulatory Standards Framework; and
7. to agree how the BSB monitors, measures and reports performance to best effect, with appropriate transparency and in a timely and consistent manner. To consider the quarterly performance reports prior to submission to the Board.

The membership of the Planning Resources and Performance Committee shall be:

8. A chair and vice chair who are members of the Board. Subject to temporary exceptions which may be agreed by the Board, one will be a lay member and one a practising barrister,
9. Two lay members, and
10. One barrister member (who may be practising or non-practising).

Annex 2e - Professional Conduct

The terms of reference of the Professional Conduct Committee are:

1. to carry out the functions and exercise the powers under Part 5 of the BSB Handbook
2. to respond to and, where appropriate, defend appeals against and other challenges to actions and decisions of the Committee and of disciplinary tribunals and panels constituted under the regulations rules referred to at (1) above;
3. to make recommendations to other committees or to the Board about matters of professional conduct, including changes to rules referred to at (1) above when the Committee considers it appropriate to do so;
4. to liaise, where appropriate, with other BSB Committees, the Bar Tribunals and Adjudication Service, the Legal Ombudsman and any other bodies relevant to the work of the Committee in exercising its functions;
5. to undertake such other tasks as the Board may require; and
6. to report to the Board on its work as and when required.

The membership of the Professional Conduct Committee shall be:

7. A chair and 4 vice chairs. There must be 2 lay and 2 barrister vice chairs. The chair can be either a lay or barrister member;
8. A minimum of 10 lay members and a maximum of 24 lay members; and
9. Subject to a minimum of 10, a number of barristers to enable the Committee in the judgment of the Chair to carry out its business expeditiously.

Annex 2f - Qualifications

The terms of reference of the Qualifications Committee are:

1. to consider and determine:
 - a. applications for exemption from any requirement of the Bar Training Rules (Section 4B of the Handbook); and
 - b. any request for review made under 4B10, 3C6 or 3E11 of the Handbook
2. to consider and determine all applications for authorisation under the following (including dispensations from and waivers):
 - a. waivers from the requirement to work with a “qualified person” (rS20 & rS21);
 - b. authorisation to conduct litigation (rS49)
 - c. waivers from the requirement to undertake Public Access work (rC120)
 - d. waivers or extensions of time in relation to the Continuing Professional Development Regulations (section 4C)
 - e. waivers from the pupillage funding and advertising requirements (rC113);
 - f. authorisation of Approved Training Organisations (rQ39);
 - g. approval for licensed access; and
 - h. any other rule or regulation as may be delegated to it by the Board.
3. to discharge the functions of the Bar Council and the Inns in respect of the recognition of European lawyers conferred upon them pursuant to the European Communities (Recognition of Professional Qualifications) Regulations 2007 and the European Communities (Lawyers’ Practice) Regulations (2000).
4. to exercise the powers of the Board to designate Legal Advice Centres;
5. to supervise and, where necessary, decide questions concerning the issue of practising certificates and the registration of pupil supervisors;
6. to liaise, where appropriate, with other BSB Committees, representative committees of the Bar Council, the Inns’ Council and any other body on any matters of concern or common interest;
7. to undertake such other tasks as the Board may require; and
8. to report to the Board on its work as and when required.

The membership of the Qualifications Committee shall be:

9. A chair and three vice-chairs, of whom two must be lay persons and two must be practising barristers;
10. At least three lay persons; and
11. At least six practising barristers.

Annex 2g - Standards

The Terms of Reference of the Standards Committee are:

1. to formulate policy for approval by the Bar Standards Board on all matters relating to the setting of standards for:
 - a. professional practice and conduct of students; and
 - b. administration of practice by BSB regulated persons .
2. to keep under review and propose changes as necessary to:
 - a. the Handbook ; and
 - b. the rules relating to the ways in which barristers conduct their practices and to the conduct of students;
3. to issue guidance on the interpretation of rules and regulations;
4. to grant waivers from requirements of the Handbook where appropriate, except those which are the responsibility of the Qualifications Committee;
5. to liaise and consult with the representative committees, the Inns' Council and the judges as appropriate in exercising its functions;
6. to undertake such other tasks as the BSB may from time to time require; and
7. to report to the Board on its work as and when required.

The membership of the Standards Committee shall be:

8. A chair and 3 vice-chairs of whom 2 must be lay members and two must be practising barristers.
9. Between three and five lay members, provided that the total number of lay members shall not be less than half the number of barristers appointed to the Committee.
10. Not fewer than 6 and not more than 12 barristers.

Annex 2h - Supervision

The Terms of Reference of the Supervision Committee are:

1. To provide assurance to the Board on the supervision of barristers, chambers and entities.
2. To review and challenge proposals brought by the executive relating to the supervision of barristers, chambers and entities, including:
 - a. the application of the risk assessment framework to supervision activity;
 - b. the application of the supervision strategy;
 - c. authorisation of entities;
 - d. future priorities for supervision.
3. To have strategic oversight of, and to provide guidance and advice on the operational delivery of the supervision of barristers, chambers and entities, including:
 - a. The monitoring of chambers and entities;
 - b. The monitoring of individuals;
 - c. Thematic reviews;
 - d. The authorisation of entities.
4. To receive from the executive:
 - a. Reports on general supervision activity;
 - b. Data analysis reports on identified themes and trends arising from all supervision activity;
 - c. Reports on the authorisation of entities.

and to reach agreement with the executive on recommendations to the Board resulting from these reports.
5. To provide an independent perspective on proposals by the executive for thematic reviews.
6. To undertake such other tasks as the Board may from time to time require; and
7. To report to the Board on its work as and when required

Membership

8. A chair who must also be a Board member;
9. One vice chair, who will be a lay member if the chair is a barrister and vice versa;
10. One other practising barrister (excluding chair and vice chairs);
11. Three other lay members (excluding chair and vice chairs);

Quorum

12. No business may be transacted at any meeting of the Supervision Committee unless one third of the members are present of whom one must be a chair or vice chair

Meetings

13. Meetings to be held six times a year. If the need arises, the Chair or Vice Chair may convene additional meetings, which may take place by telephone if appropriate.

Annex 3 – APPOINTMENTS PROCESS FOR BSB COMMITTEES

1. The BSB appoints and reappoints all Chairs, Vice Chairs and members of its Committees on merit.
2. The BSB appoints a Recruitment Panel annually to oversee the selection of new members of its Committees. Unless this proves impractical, all Recruitment Panels constituted for members of the Professional Conduct Committee shall contain a Board member who also sits on the Professional Conduct Committee.
3. Appointments of BSB Committee Chairs and BSB members of Committees are made by the BSB Chair in consultation with the BSB Vice Chair and BSB Director.
4. The Recruitment Panel is responsible for:
 - a. appointing a selection panel for each committee where there is a vacancy;
 - b. ensuring that each selection panel consists of:
 - i. two members of the recruitment panel, preferably being a lay member and a practising barrister member of the BSB,
 - ii. an independent person with knowledge of the CPA Code of Practice or similar skills and experience in good recruitment procedures.
5. The Recruitment Panel must consider the recommendations of each selection panel before deciding on an appointment.
6. Appraisals must inform retention and reappointment recommendations and decisions. The BSB Chair or their nominees must carry out the appraisals.
7. All appointments made by the selection panel shall be for a fixed period of up to three years. Appointments may be renewed for a further fixed period of up to three years without holding a competition, if the Chair of the Committee concerned is satisfied that:
 - a. the person has performed to the standard to be expected of the office held, and
 - b. it is in the interests of the BSB to renew the appointment.
8. For the avoidance of doubt, the Recruitment Panel must exercise its functions under this Annex itself and has no power to appoint a sub-committee or working group. However, with the consent of the Board, the Chair may appoint former members of the Board or former members of the Committees to carry out such tasks as the Board may agree
9. In exceptional circumstances, the BSB may resolve to offer an extension of an individual person's or group of persons' appointment beyond the maximum six year period of appointment permitted above. -Any resolution to make a limited offer of extension must:
 - a. Allow for an extension of no more than 18 months in duration,
 - b. Be made by offer in writing,
 - c. Be made for a specific reason that is articulated in the offer of extension, and
 - a-d. not be done more than once in any five year period.-

Scheme of Delegations

Status

1. For noting.

Executive Summary

2. The Board is asked to note the Scheme of Delegations, appended, which was brought to the private session of the Board in March 2014, paper reference 025(14). It forms an annex to the Governance Manual, which was approved at the March Board meeting, paper reference 019(14). The Governance Manual is not appended to this paper.
3. The Scheme brings together, in a single coherent schematic, the regulatory functions undertaken by the entire BSB structure to operationalise the strategy agreed by the Board.
4. This strategy supports the Board's aim to increase the operational decision-making responsibilities of the executive and realigns the committees as expert advisory groups, as recommended by the LSB in its response to the BSB's self-assessment against the Regulatory Standards Framework¹. A delegation structure is recommended that separates regulatory decision making and management oversight. This means the regulatory rules set by the Board and enacted by its committees and executive will be kept separate from the management chain involving the Director.
5. In order to implement this, the Board must formalise the delegated decisions to the executive that already exist, and some which are new but have been agreed to in principle such as the QASA Handbook and development of the Qualifications Committee (paper 006(14) at the January Board meeting). The Standing Orders do not allow the committees to delegate decision-making activities to the executive.
6. As agreed at the March meeting, powers are to be delegated using a formal letter as the mechanism, and the scheme of delegations is purely a descriptive device. The scheme as presented has been set out in delegation letters, signed by the Chair of the BSB, with additional delegations from the Qualifications Committee to its Panel sub-committees signed by the Chair of the Committee.

Recommendations

7. The Board is asked to:
 - a. **Formally note** the scheme of delegations, as presented to the last meeting, which will now form the annex to the Governance Manual, published on the website

The approach

8. As previously discussed, different delegation and oversight lines are maintained in this scheme of delegations. To preserve the lines of appeal, regulatory functions and decisions are to be delegated and managed by the Board and overseen by the committees, and management functions are to be managed by the Director.
9. The Board, as the rule making body, does not make decisions on individual cases. Historically the committees made the bulk of the day-to-day decisions required to regulate, eg to take disciplinary action. Increasingly, this task is being undertaken by staff. Appeal routes (usually the High Court) are established and used to test the validity of decisions. This acts as a proper check and balance on the BSB's decision making, in the same way that government

¹ LSB Response to BSB Self-Assessment: http://www.legalservicesboard.org.uk/Projects/pdf/bsb_regulatory_standards_final.pdf
 Para 7.3 "the LSB considers that more should be done to empower the executive staff to make decisions and to use the committee and other experts only for more complex matters"

departments are held to account. There is no desire to disturb this approach. It is well established in many parts of the organisation and well recognised as a principle generally.

10. Day-to-day resourcing decisions should be undertaken by the Director, who is in control of how the executive teams are deployed in order to undertake the work. The Board can then hold the Director to account regarding the use of resources by the BSB.

How the principles are applied in each regulatory decision area

Regulatory Rule changes, and implementation

11. The Board reserves the function of approving regulatory rule changes within the Standing Orders. However, “exempt changes”, as defined by the LSB, with reference to their “significance, impact and risk” test, can be left to the executive to undertake once they have identified that they are necessary. In the case of “exempt” changes the relevant Committee would normally decide what changes were necessary and if a policy decision were needed, unless very minor such as corrections, typos, cross-references etc.
12. Beyond rule changes, a substantial amount of our regulatory activity is covered by guidance on the rules, the delivery of which is not reserved to the Board. Some of this need not be reserved to committees other than taking an appropriate oversight role. Most departments create and publish guidance on the regulatory rules, including formal guidance on implementation such as the QASA Handbook, Pupillage Handbook and BPTC Handbook. It is proposed that the Board, relevant committees and Heads of Department are all authorised to create and approve these, but that the appropriate level for sign off should be dictated by its significance and complexity.

Enforcement

13. The power to delegate from the Professional Conduct Committee has been explicitly detailed within the BSB Handbook under section 5A. This enacts the separation of powers principle, as effectively the Board has devolved responsibility, if not full accountability, for the handling of complaints to the PCC, and allowed it to authorise the executive to undertake operational duties on terms it has set, and published.

Authorisations

14. Authorisations

QASA

- a. The QASA Handbook for Criminal Advocates and QASA Rules (BSB) detail how decisions are made within the BSB, and are published on the website. These give responsibility for undertaking the decisions necessary to the executive, and not to a committee. To implement this, the Head of Supervision has described in annex 4 how the decisions are to be operationalised. An expert panel will provide oversight and review decisions where necessary. Appeals from accreditation decisions will be heard by an independent adjudicator.

Qualifications

- b. The Qualifications Committee undertakes most work by convening sub-committees of its members, known as Panels. A review, presented to the Board in January, has been undertaken and greater executive decision-making will be implemented over the next two months.
- c. Historically, the panels have asked the executive to take a small number of decisions, using procedures agreed by the committee. These need to be formalised by the Board.

- d. Looking forward, the current plan for devolution in the Qualifications Committee will require explicit authority from the Board, in preparation for the scheme and associated guidance that will be required and is being developed by the Committee and executive team. This work has been completed and is now being implemented.
- e. The power to authorise a barrister to conduct litigation is used here as a case study to demonstrate the level of detailed controls being developed in the new scheme. The published guidance for applicants is given in annex 3a and the internal decision criteria are given in annex 3b. The Qualifications Committee will maintain oversight of these decisions.
- f. The business of the Qualifications Committee is expected to be significantly affected by planned changes to the Qualification Rules, which will align this part of the BSB Handbook with the Regulatory Standards Framework, the requirements of the LSB and the recommendations from LETR (the subject of another paper considered by the Board at the March meeting).

Entities

- g. Decisions on the authorisation of entities will be taken by the executive within the Supervision Department with reference to the risk framework established for considering entity applications and the parameters for entities as set out within the Handbook. The authorisation process is currently being developed by the implementation project, led by the Head of Supervision alongside the application to the LSB. More detailed implementation plans, including proposed delegations required to implement the processes, will be brought back to the Board in due course.

Others

- 15. A few other authorisation decisions exist, including the removal of pupil supervisors by the Education and Training Committee, and the granting of waivers not captured by the above, which belongs to the Standards Committee. Under similarly controlled conditions, the executive will be authorised to take decisions necessary to undertake these aspects of Committees' work where they are best placed to do so, following any procedures laid down by the Committee.

The scheme and its management

- 16. The Board must formalise in writing any delegated functions, as required by its Standing Orders. This is most simply manifest in the terms of reference for the committees. Functions delegated to the executive, project boards, working groups or otherwise, must also be in written form. The scheme of delegations displays these, and must be underpinned by a set of simple signed forms to formalise the decision-making authorities and make their management straightforward and traceable.
- 17. The scheme describes the functions delegated, by which power, to which party and whether there are limitations to those delegations; cross-referencing to guidance setting out decision-making criteria. It is of paramount importance that the controls exist to ensure any regulatory decisions are being taken at the right level and referred up to oversight bodies where necessary. It is intended that, unless it agrees otherwise, where the Board delegates powers to the executive, the appropriate committee has control of whether these are enacted, based on guidance and decision-making criteria it may set.
- 18. The Board agreed at the March meeting to authorise the Chair to sign the delegation documents to bring them into effect.
- 19. The regulatory scheme of delegations includes (on the right hand side) details of published guidance and decision-making criteria existing on the website. Internal decision-making guidance detailing the executive levels, such as those in annex 3b and 4, is not intended to be

published in this detail, but is listed on the scheme on the far right hand side by responsibility level.

20. It is further proposed that the GRA Committee should use its assurance remit to oversee the effectiveness of each committee's oversight. Assurance mapping techniques may be of use.
21. The scheme should be reviewed annually by the Business Management Team and maintained in light of any ad-hoc changes. Original copies of the underpinning forms will be retained.

Ad hoc or project delegations

22. The Board may wish from time to time to delegate ad hoc, discrete pieces of work to any person or group. This may include project boards, working groups and members of the executive or members of committees. An example of this would be the delegation to the Handbook Working Group of authority to make drafting amendments to the Handbook whilst it was being discussed with and approved by the LSB. This must be controlled and formalised, but remain pragmatic and flexible to suit the needs of the organisation. These regulatory decisions should be recorded within minutes of the Board meetings, and for more complex, risky or long-term work, written into the scheme of delegations, and a formal authorisation form may also be required. This should be kept with other forms to ensure the delegations are rescinded when necessary.

Supporting work

23. Work to support the scheme of delegations includes:
 - a. A complementary delegation scheme relating to the Director's management functions, which will be drafted over the next few months. This will be fully integrated with supra-organisational policies such as the Finance Manual. Should the Board require further assurance that management processes are being sufficiently controlled, the GRA Committee might be best placed to provide that oversight.
 - b. A review of the presentation of governance information on the website to increase usability and transparency is being undertaken.
 - c. Board and committee member induction materials, as well as the Governance Manual (of which this Scheme is part) have been developed and are being embedded.

Outlook

24. The upcoming Standing Orders review, driven by the GRA Committee, creates an opportunity to review what is presented here, as the *as is* state, and identify any opportunities to become more agile, improve the BSB's use of resources and further empower the executive. Changes already on the horizon include the ability for Committees to delegate regulatory decision-making powers within their terms of reference to the executive directly in future.
25. Our current agreement with the LSB is that we will submit an annual assessment against the RSF for agreement by the LSB in March 2015 and March 2016. In March 2015 we anticipate their agreement that we have achieved the rating of "Undertaking improvement and work is well underway" and in 2016 that we will have achieved "Satisfactory". The last review attracted a recommendation to increase executive decision-making and realign the committees' role to focus on providing strategic-level advice. In order for the LSB to accept that we have delegated the necessary powers, the BSB Board need to approve these schemes of delegation.

Equality Analysis

26. Although the scheme of delegations is simply codifying arrangements that have previously been agreed, it will be important to ensure the Board's or Committees' oversight of delegated decisions takes account of the impact of decision making on protected characteristics and that staff and committee members taking decisions have undertaken equality training including on unconscious bias. The Governance Manual, of which the scheme is part, has been assessed; and the scheme is designed to be published on the website.

Risk implications

27. There is a risk that the profession or public will challenge the authority of the decisions being made if the formal paperwork is not completed for the structure required to implement the strategy and business plan decided-on by the Board and its committees.
28. There is a risk that by not mapping out delegated decision-making in a coherent and simple way to inform governance decisions by the Board and resourcing and project management decisions by the executive; resources and expertise is not used in an efficient and effective way. This would compromise the organisational value of *value for money*, decision consistency, undermine the empowerment of the executive, contradict the LSB's recommendations from the RSF assessment, and create confusion among those designing changes in the organisation.
29. There is a risk that those who are invested with making regulatory decisions are either unclear or unaware of their responsibilities and extent of their powers. Not having a clear demarcation of decision-making responsibility creates confusion, especially considering the more collaborative nature of working that is increasingly being introduced across departments and committees.

Consultation

30. The creation of the scheme of delegations has been overseen by the GRA Committee, and undertaken by the Senior Management Team (SMT) and the Business Support Team. This paper has been reviewed by the Director of the BSB, the Head of Strategy and Communications and members of the SMT.

Publicity

31. The scheme of delegations will be published on the website within the Governance Manual.

Annexes

- Annex 1: Regulatory scheme of delegation
- Annex 2: Management scheme of delegation
- Annex 3a: Underpinning procedural guidelines for Litigation Authorisation
- Annex 3b: Underpinning decision-making criteria for Litigation Authorisation
- Annex 4: Underpinning decision-making criteria for QASA

NOTE: The above annexes are available to Members on request. These were presented to the March meeting, and were approved by the Board at the time in private session. The paper is presented here for noting within the public section only. The annexes will be published with the papers on the BSB website.

Lead responsibility:

Vanessa Davies, Director, BSB
 Amanda Thompson, Head of Strategy and Communications
 Chloe Dickinson, Governance Support Officer

Duty to promote economic growth

Status

1. For noting.

Executive Summary

2. The paper provides an update on the Department for Business, Innovation and Skills timetable for implementing the duty for non-economic regulators to have regard to the economic consequences of their actions – the “growth duty”.

Recommendations

3. It is recommended that the Board
 - a. **Notes** the timetable for implementation of the growth duty requirement.

Comment

4. We have recently received an update from the Department for Business, Innovation and Skills (BIS) regarding the bringing into force of the “growth duty” in relation to non-economic regulators.
5. The duty is at clauses 70 - 73 of the Deregulation Bill <http://services.parliament.uk/bills/2013-14/deregulation.html>. BIS has also published draft guidance which provides detail as to how the duty is intended to work in practice, which is attached at Annex 1 (and available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274552/14-554-growth-duty-draft-guidance.pdf).
6. While the Bill is still making its way through Parliament, BIS is beginning to prepare the Listing Order - secondary legislation which will set out the functions to which the duty will apply.
7. BIS’ aim is to consult on applying the duty to any regulators not previously mentioned specifically as in scope, then lay the Listing Order after the Deregulation Bill receives Royal Assent and the Government response to that consultation has been published. Indicative timescales are:

Consultation on applying the duty to any regulators not mentioned in previous consultation	September 2014
Deregulation Bill receives Royal Assent	October/November 2014
Government response to consultation	November 2014
Listing Order laid in Parliament	January 2015
Order comes into force	April 2015

8. The intention is to make the duty apply to all legal regulators and will be done by a general provision rather than naming all regulators specifically. So something along the lines of “the growth duty would apply to all the regulatory functions of bodies designated as approved regulators under Part 1 or Part 2 of Schedule 4 of the Legal Services Act 2007” will appear.
9. The purpose of the duty is set out in section 2 of the guidance and is “for economic growth to be a factor in regulators’ decision making and for regulators to be transparent and accountable for this”. There are three primary ways in which it is perceived that regulators can positively influence growth:
 - a. Keeping the burden on business productivity to a minimum;
 - b. Being proportionate in decision-making;
 - c. Understanding the business environment.
10. Section 7 of the guidance gives an indication of how we can demonstrate compliance with the duty. Key amongst those is the inclusion of the growth duty in policy frameworks and procedures. There is a policy framework under development within the BSB at present and we will incorporate the growth duty requirements into that. The policy framework will be coming to the Board for discussion in July 2014.

Resource implications

11. It is not perceived that there is an immediate need for additional resources to enable us to observe the growth duty. The Legal Services Act 2007 requires us to have regard to the principle of proportionality in our regulatory activities. We already have a stated aim of becoming more evidence based – ie understanding the market (or business environment better). Keeping the burden to a minimum can be incorporated into our assessment of options during policy development. We do not anticipate any particular issues in complying with the duty.

Equality Impact Assessment

12. The paper does not give rise to any particular equality issues. The policy framework will also require that all policy development considers equality issues.

Risk implications

13. There is a risk of criticism or censure if we do not observe the growth duty when it comes into force. The intention is to incorporate consideration of the growth duty into our processes to mitigate the risk.

Impacts on other teams / departments or projects

14. All departments will have to be aware of the duty and incorporate it into their work.

Consultation

15. No consultation is required. We will respond in due course to the BIS consultation expected in September 2014.

Regulatory objectives

16. Arguably the growth duty is complementary to the regulatory objectives. It will in any event be an additional statutory requirement that must be observed.

Publicity

17. No publicity is required.

Annexes

18. Annex 1 – BIS Draft Guidance: Non-economic Regulators: Duty to Have Regard to Growth

Lead responsibility:

Amanda Thompson



Department
for Business
Innovation & Skills

Better
Regulation
Delivery Office

Draft Guidance:

**Non-economic Regulators:
Duty to Have Regard to Growth**

January 2014

BSB 220514

Purpose of this document

The duty to have regard to the desirability of promoting economic growth (the “growth duty”) is accompanied by a power enabling the Secretary of State to issue statutory guidance to those exercising non-economic regulatory functions (“regulators”) as to how the duty may be discharged. The Deregulation Bill provides that those who are subject to the growth duty must have regard to the guidance when carrying out their regulatory functions.

This draft guidance has been produced at this early stage to assist Parliament and stakeholders in understanding how the growth duty is intended to operate. The guidance is principles-based to enable a wide range of regulators to incorporate the duty into their policies and operations as appropriate as there is no one size that fits all.

The draft guidance was developed through workshops with regulators during autumn 2013 and through engagement with business representative groups. It will be further tested with regulators and businesses during Parliamentary passage of the Bill.

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1. Guidance summary

1. The duty obliges those exercising regulatory functions to have regard to economic growth when making decisions – Section 2
2. Those exercising regulatory functions should consider the economic impact that their actions are likely to have on individual businesses, and where appropriate, industry sectors – Section 2
3. The growth duty does not automatically take precedence over or supplant existing duties held by regulators – Section 2
4. The duty applies to those exercising specified regulatory functions (“regulators”) – Section 3
5. Regulators that work with local authorities to co-deliver regulatory activity should develop a common understanding of shared outcomes, including growth, and their contributions to these – Section 3
6. Regulators can demonstrate regard for economic growth in a number of ways – Section 5

For example they can:

- a. Ensure that regulatory activities are as time and cost efficient as possible to ensure business productivity is not hampered unnecessarily.
 - b. Ensure that interactions with businesses are necessary and proportionate to the risks posed by non-compliance and ability of the business to incorporate change.
 - c. Tailor their regulatory activities based on an understanding of the business environment and the business lifecycle.
7. Regard for the growth duty will demonstrate regard for Part 1 of the Regulators’ Code – Section 5
 8. The growth duty does not diminish the responsibility of business to comply with the law – Section 6
 9. Regulators can evidence their adherence to the duty in a number of ways, for example their published service standards and annual reports or operational record keeping – Section 7

2. Purpose of the duty

1. Regulators exist primarily to protect people or achieve other social or environmental outcomes. The growth duty serves to remove uncertainty about whether regulators are able to respond to economic concerns. It clarifies that growth is an important factor to be taken into account in the delivery of protections.
2. The duty requires that economic growth is a factor to be taken into account alongside regulators' other statutory duties.
 - *The duty does not set out how economic growth ranks against existing duties as this is a judgment only a regulator can and should make.*
 - *The duty does not oblige the regulator to place a particular weight on growth.*
3. The purpose of the duty is for economic growth to be a factor in regulators' decision-making and for regulators to be transparent and accountable for this. A regulator may want to set out publicly for the benefit of its stakeholders how the growth duty might be applied in different scenarios, relevant to the extent of flexibility that it has.
4. In the context of achieving compliance, the growth duty does not legitimise non-compliant or illegal economic activity as this undermines markets to the detriment of consumers, the environment and legitimate businesses.
5. In instances where immediate enforcement action is required to prevent or respond to a breach, the growth duty would still apply but would not preclude immediate action.
6. The Regulators' Code¹ sets out the key principles guiding regulatory delivery including that regulators should carry out their activities in a way that supports those they regulate to comply and grow. The growth duty is supported by the framework provided by the Regulators' Code, such as the publication by regulators of their service standards. This guidance stands alone, but cross-refers to the Regulators' Code where relevant.

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262915/13-1016-regulators-code.pdf

3. Scope of the duty

1. The duty applies to those exercising regulatory functions which are specified by Order by a Minister of the Crown.
2. Economic regulatory functions will not be specified. Economic regulators are bodies that are set up to correct the market failure of natural monopoly and carry out economic functions including promoting competition in markets. They typically regulate the main infrastructure sectors for energy, water, communications and transport.
3. There are some regulators that conduct a mixture of both economic and non-economic regulatory functions. Where a regulator performs both economic and non-economic regulatory functions, only their non-economic functions will be specified.
4. Local authority delivered regulatory functions will also not be specified. In many circumstances local authorities are also responsible for enforcing regulation on behalf of, or in conjunction with a national regulator. Regulatory functions of local authorities are covered by the requirements of the Regulators' Code, in particular Section 1. In that context regulators that work with local authorities should develop a common understanding of the shared outcomes that they and their delivery partners are working towards, including growth, and their contributions to these.
5. The growth duty applies to "regulatory functions". These are statutory functions of 'regulating' and 'enforcing'. Functions of 'regulating' are those functions of imposing requirements, restrictions or conditions, or setting standards or giving guidance in relation to an activity. This would include for example licensing, data requests, issuing advice and guidance and changing operational policy.
6. Functions of 'enforcing' are those functions which relate to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards or guidance which relate to an activity. It would, for example, apply to serving notices, licence restrictions, and in the context of prosecution decisions it includes all functions up to and including the decision to refer the case to a prosecutor to review whether criminal proceedings should be instigated².

² The instigation and conduct of prosecution proceedings are excluded from the growth duty.

4. Links between regulation and economic growth

1. Regulation is one of the factors which shape the environment within which business decisions are made.
2. The duty to have regard to economic growth requires those exercising regulatory functions to consider the economic impact that their actions are likely to have on individual businesses, and where appropriate, industry sectors. For example, when developing policy and guidance a regulator could consider the impact on growth in the sector. Alternatively, when taking enforcement decisions, the regulator could consider the impact of action on the individual business in question and on businesses which have suffered as a result of the non-compliant action.
3. The growth duty requires regulators to consider and understand the scale and nature of that economic impact, within the bounds of what they can be expected to understand and what is proportionate in the circumstances. It does not require regulators to conduct in-depth economic analysis or to achieve economic growth. Direct economic impacts of enforcement functions should be understood. In some circumstances it might be appropriate for regulators to engage with business to understand whether there are any significant indirect impacts which should also be taken into consideration.
4. At the level of an individual business, regulators should consider the economic impact their actions are likely to have by understanding how their actions will affect indicators of business growth. Actions that a business might take which are indicative of growth include³:
 - starting the business;
 - taking on additional new employees;
 - entering new markets;
 - offering new product or services;
 - starting or increasing exporting; and
 - investing in capital equipment or land or buildings.
5. The impact that regulators can have on sector-level economic growth will depend on the context and / or sector(s) within which they operate. In order to understand sector level impacts, where possible regulators should consider how their actions impact on indicators such as consumer confidence and fair competition.
6. The duty indicates that economic growth is desirable. Where regulators have choices in how they exercise their functions the duty gives rise to two possibilities:
 - Where the economic impact of a regulator's activity is likely to be adverse or negative, the regulator should consider how they might minimise that negative impact by adapting the way they carry out that activity.
 - Where the economic impact of their activity is likely to be positive, the duty points them to adapt the way they carry out that activity in order to maximise that positive impact.
7. To assist regulators in making these assessments, further illustration is provided in Section 9.

³ List not exhaustive

5. Regulators' influence on growth

1. Regulators can positively influence economic growth in three primary ways⁴:
 - **Keeping the burden on business productivity to a minimum.** Regulators can directly influence a business' growth prospects by avoiding unnecessarily diverting resources away from core operational or strategic activity.
 - **Being proportionate in their decision-making.** This means ensuring that interactions with businesses are necessary and proportionate to the risks posed by non-compliance and ability of the business to incorporate change. This applies to both the provision of advice and guidance and enforcement action. Proportionality also means that regulatory action should only be taken when needed.
 - **Understanding the business environment.** This means tailoring regulatory activities according to an understanding of the business environment and stages in the business lifecycle, and applying this understanding when dealing with businesses on the ground.
2. Regulators should consider how they can incorporate growth into their decision-making. To assist regulators in making this assessment, further illustration is provided in Section 8.

⁴ Supports Regulators' Code section 1. Regulators can demonstrate regard for growth in a number of ways and the three ways highlighted here are for illustrative purposes and are not exhaustive.

6. Accountability

1. The growth duty means that regulators are responsible for factoring economic growth into their decision-making. In practice this clarifies the principle that regulators are accountable to business as a client⁵ in demonstrating that they have had regard to economic growth in the undertaking of their regulatory activity.
2. The duty does not compromise the independence of regulators, nor does it supplant or replace a regulator's existing duties. Regulators have decision making autonomy – they can decide how best to incorporate the duty into the decisions they make. However, regulators must be able to demonstrate they have factored economic growth into their decision-making.
3. The Regulators' Code specifies that regulators should provide an impartial and clearly explained route to appeal against a regulatory decision. These appeal mechanisms could be used to challenge failures to act in accordance with the growth duty, subject to any legislative requirements governing the appeal process.
4. The growth duty does not restrict regulators in recovering legitimate costs from those it regulates. Regulators are bound by the Regulators' Code which requires that this information is transparent.
5. The growth duty does not remove or diminish in any way the responsibility of business to comply with the law.

⁵ Client as used in public service delivery settings such as health, social services and public sector audit. It is not intended to imply that businesses acquire rights of action such as they would have against a supplier of goods and services.

7. Demonstrating regard for the duty

1. To give effect to the growth duty, regulators should ensure that the principles of the duty inform and permeate their regulatory practices at all levels – both policy and operational. Regard for the growth duty may be demonstrated in, for example:
 - strategic aims and objectives of the organisation;
 - training and objectives of frontline regulatory staff;
 - leadership objectives;
 - operational policy frameworks and procedures;
 - operational record keeping, in line with existing procedures; and
 - provision of tailored advice to individual businesses.
2. More publicly, regulators should transparently demonstrate regard to the duty where they already do so in relation to their existing duties. Transparency can be provided through, for example:
 - publication of service standards, including enforcement policies (as required by the Regulators' Code);
 - summarising their approach and achievements in their annual reports;
 - publicising how and where they take economic growth into account with businesses and / or sectors; and
 - publishing assessments of impact associated with changes in policy or practice and results of engagement with businesses.

8. Influencing economic growth

Minimising burdens on business productivity

1. The most immediate connection between regulatory activity and business growth is in the imposition of administrative burdens, and specifically the direct costs associated with interacting with the regulator and reporting to oversight bodies. Businesses also incur compliance costs (time and money) to conform with regulation, for example in designing appropriate compliance solutions and monitoring existing processes. Significant costs can also be incurred by the frequent amendment of regulatory requirements. There is also an opportunity cost when a business owner is focused on regulation and not growing the business.
2. Inflexible or inefficient regulatory regimes increase the costs imposed on businesses and undermine the benefits that such activity might otherwise bring in terms of good management practices. At extremes, this can undermine confidence in regulatory systems and affect levels of compliance. Where possible regulators should look to maximise the efficiency of their regulatory regimes through streamlining the process and operation of these regimes and minimising the transactional costs of engagement. In addition, where possible regulators can assist businesses in finding the most cost-effective route to compliance.
3. Multiple or uncoordinated inspection activity or duplicate data requests can impose significant burdens on businesses and minimise the value of regulatory interactions. By working closely with other regulators and developing ways to enable greater data sharing, regulators can save businesses both time and money which can be invested more productively.

Being proportionate in decision-making

4. Proportionality is a principle of good regulation, as set out in s.21 of the Legislative and Regulatory Reform Act 2006. It means the costs of regulatory intervention to business must be appropriate to the risk posed. In seeking compliance, regulators have a range of tools at their disposal including those that can impose costs and limit or stop a business from trading. Businesses differ in their ability to absorb compliance costs or implement changes, particularly smaller businesses which can be disproportionately affected. Taking these factors into consideration alongside consideration of the risks posed will drive a fully transparent, proportionate approach. This does not assume that a smaller sized business poses a lower risk.
5. At the sector level, regulators perform an important function in delivering a level-playing field in terms of enforcing the law in order to prevent non-compliant businesses from undercutting compliant ones. Competitive, well-functioning markets give consumers choice on the price and quality of the goods they buy and stimulate businesses to innovate and become more efficient to meet changing consumer needs. This process drives long-term productivity gains and supports stronger economic growth. Support for the level playing field is a key way regulators support growth.

Understanding the business environment

6. Regulatory compliance is complex and ongoing, and may not be just a single decision made at a point in the business lifecycle. Some businesses need assurance that the compliance decision they are making will apply across all of their premises, or will continue to meet current compliance requirements, to enable them to invest in an appropriate solution. Others need clarity on how the requirements apply in their business context to ensure that they make effective use of available resources.
7. Businesses face multiple challenges and exist in a broader context. By displaying knowledge and understanding of these challenges when interacting with businesses, regulators will support a more productive dialogue and will support businesses in feeling confident that they can approach a regulator for advice. By recognising good compliance practice, regulators will be able to target interventions to achieve compliance to best effect
8. Regulatory activity builds business and consumer trust in open and fair markets by ensuring that goods and products are safely and fairly traded and providing businesses with the tools to identify illegally traded goods in their supply chain. In addition, incidents of non-compliance result in significant direct costs for compliant businesses. They may also impose secondary costs through their impact on consumer perspectives of a company or brand, staff turnover or employee productivity. By developing approaches that bear these reputational drivers in mind, regulators can work with the grain of business activity and support longer term compliance.

9. Practical interpretation of the duty

1. In practice the expectation is that regulators should think about how to support businesses to be compliant at every stage in the regulatory process so that businesses can focus on their core operations as far as possible. To achieve this, regulators should consider what interventions they can make at a strategic level to support growth at the level of business sectors, as well as how operational decision-making can impact on individual businesses ability to grow. The following sets out some practical examples of how this could be achieved.
2. When thinking about their organisational strategy, regulators should think about reducing the impact they have on productivity, how they promote proportionate decision making and respond to and understand the business environment. At a strategic level they may consider for example:
 - Reducing administrative burdens by streamlining application processes and minimising data requirements.
 - Engaging with business groups to understand the issues facing businesses and sectors.
 - Ensuring guidance is provided in clear and accessible language, making a clear distinction between what is required by law and what is good practice.
3. Interactions regulators have with individual businesses are guided by their policies and procedures. At an operational level, regulators should ensure that enforcement policies consider for example:
 - Using a robust risk assessment framework to determine inspection timing and format.
 - Collaborating or sharing information with other regulators to make inspections more efficient, and using other data that is available.
 - Discussing any cases of non-compliance that are identified during visits and being clear about what is required to achieve compliance and discuss reasonable timescales.
 - Employing the best intervention to achieve compliance, taking into account the businesses type and size, as well as their attitude towards compliance.
 - Communicating decisions clearly and promptly to the business when taking formal action.
 - Using inspection visits to signpost advice about upcoming changes to legal requirements or other timely information which may be of use to the business.

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This publication is also available on our website at:

<https://www.gov.uk/government/publications/growth-duty-draft-guidance>

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Chair's Report on Visits and Meetings Feb - Mar 2014**Status:**

1. For noting

Executive Summary:

2. In the interests of good governance, openness and transparency, this paper sets out the Chair's visits and meetings since the last board meeting.

List of Visits and Meetings:

- | | |
|----------|---|
| 28 March | Meeting with Heidrick & Struggles re Chair appointment

Lunch with Marilyn Stowe, family lawyer |
| 30 March | Lunch with Joshua Rozenberg, journalist |
| 1 April | Attended Communications Select Committee

Annual Appraisal with BSB Board member |
| 2 April | Met with Gordon Nardell QC re drafting Bill on prenuptial agreements and financial provision on divorce

Annual Appraisal with BSB Board member x 2 |
| 3 April | Annual Appraisal with BSB Board member

Annual Appraisal with BSB Director

Dinner with Brian Doctor QC |
| 8 April | Attended Communications Select Committee |
| 9 April | Spoke in Higher Education debate in the House of Lords

Attended COIC meeting |
| 18 April | Dinner with Lord Wilson of Culworth |
| 20 April | Lunch with solicitors at Berwin Leighton Paisner |
| 22 April | Met with Sir Michael Pitt |
| 23 April | 4-way meeting with LSB Chair/CEO + Sir Michael Pitt

Attended open evening for recruitment of new Board members |
| 26 April | Attended Bar Council meeting |
| 28 April | Met with new LEO Chair & Adam Sampson

Attended open evening for recruitment of new Board members |
| 29 April | Participated in panel discussion at Modern Law magazine conference |

- 30 April Annual Appraisal with BSB Board member
Attended Board Away Day
- 1 May Met with Lord Chief Justice together with Charles Plant
Attended BSB Education and Training reform Bar briefing meeting
- 2 May Interview with Michael Holdsworth, University of Birmingham for project on Virtues and Values in the Professions
- 3 May Dinner with Lord Wilson of Culworth and Sir David Keene, retired judge
- 6 May Attended Communications Select Committee
- 7 May Participated in debate on cuts to Judicial Review in House of Lords
Attended Chairmen's Committee meeting
- 8 May Chaired interview panel for appointments to HFEA Appeals Panel
Attended PRP Committee
Attended Grand Day Dinner at Lincoln's Inn
- 9 May Attended QASA permission hearing
- 13 May Communications Select Committee trip to see Google offices
- 20 May Chairing interview panel for appointments to HFEA Appeals Panel
Attending Finance Committee meeting
- 21 May Pre-Board briefing meeting

Equality Impact Assessment

3. No Impact

Risk implications

4. These reports address the risk of poor governance by improving openness and transparency.

Consultation

5. None

Regulatory objectives

6. None

Publicity

7. None

Lead responsibility:

Baroness Ruth Deech QC (Hon)

Director's Report

Status

For consideration and noting.

Director

1. The usual comprehensive update is set out below. In addition to oversight of and involvement in activity described, I have been especially engaged in working on the arrangements with Heidrick and Struggles for the recruitment of a new Chair and Board members, including organising and hosting two open evenings to provide information for prospective applicants. I am especially grateful to Tim Robinson and Malcolm Cohen for their assistance with those.
2. I organised the first meeting of the Bar briefing group in support of the development our education and training plans. Two further meetings are planned before the summer break. I was also closely involved in the initial handling of Kaplan's decision to discontinue involvement in the BPTC, which became public on the same day I attended the annual dinner of the Nottingham Law School BPTC course. This was a useful opportunity to listen to concerns of current students and talk to members of the Nottingham Bar about issues concerning them.
3. I attended the inaugural meeting of the BTAS Strategic Advisory Board, the note of which appears on the BTAS website. We are represented by myself and Malcolm Cohen on the SAB. Terms of reference and a forward work plan were agreed.
4. I prepared for and attended the QASA JR renewal hearing and agreed with other regulators the Order which followed. I have also been reviewing the work being done on QASA level 2 assessment centres, which is led by the SRA.
5. We delivered a successful Board Awayday in close collaboration with lay members in particular; this is now being followed up to maintain momentum, especially on the governance review. Work on the new performance management system has involved opening staff training sessions and ensuring the annual appraisal process is on track. Initial consideration has also been given to a revised employee reward structure, on which the Board will be consulted in due course.
6. Finally, I have been monitoring closely progress on (as well as contributing to) the final stages of the preparation of our entity regulation application, and overseeing the roll-out project planning.

The Regulatory Improvement Programme (TRIP)

7. The risks to TRIP have now largely dissipated as the programme nears completion.
8. The BSB budget for 2014-15 has been held at a similar level to the previous year and analysis through TRIP suggests that efficiency improvements have been made, through more targeted regulatory processes being adopted.
9. We have also identified a methodology for monitoring the regulatory costs of the BSB through benchmarking our internal functions and this is under consideration by the relevant committees, for implementation later in the year.

Part 1 – Public

10. Although the 2013-14 BSB budget was underspent overall, some of the allocations to TRIP were overspent. The two particular reasons for overspend were i) the costs of taking extended legal advice to support our ongoing entity regulation authorisation application, and ii) the higher costs of employing various specialists to support the change programme. The extended legal advice may continue for a few more months, however the additional costs of specialists recruited for TRIP is reducing as the resources are released with the impending conclusion of the programme in June.
11. Looking forward, the recruitment market for staff with specialist and regulatory experience is currently highly competitive, which in turn may increase the cost of those engaged, for instance, in regulatory risk.
12. The development of the Board's capacity and capability, seen as integral to the change of regulatory approach, has also progressed and will continue with the forthcoming selection of new members of the board. The staff- TRIP related Learning and development programme has now largely concluded, with a new cycle of training and development expected to get underway in September.
13. At a recent meeting with executives of the LSB, agreement was reached on the approach to self-assessment in 2014 and 2015. The BSB aspires to achieving a satisfactory rating across all strands of the regulatory standards framework by March 2016, marking the end of its current strategic business cycle.
14. TRIP will be reviewed at its closure meeting in June and a full report made to the Board in July.

Regulatory Policy

15. The Regulatory Policy team have been focusing on the application to the LSB for approval of Handbook amendments to enable us to regulate entities. We have had positive discussions in relation to our draft application and expect to be in a position to finalise the application at the end of May.
16. The team has also been reviewing responses to the recent consultation on Guidance on returning instructions. We have received over 200 responses to this consultation. The Standards Committee began its consideration of some of the key issues raised at its 13 May meeting. Following further analysis, the Committee expects to make a recommendation to the Board after its June meeting.
17. Whilst we are recruiting a Regulatory Risk Manager, we have engaged the services of Influence Inc to assess the maturity of our approach to risk-based regulation and to adapt a self-assessment tool to enable us to monitor our progress over time in this important area.

Supervision

18. The Supervision Team is now at full strength with Julia Witting (Chambers and Entity Supervisor), Bernard MacGregor (Supervision Officer) and Ruby Newton (Supervision and Authorisation Officer) all having joined in the last two months. Alongside a comprehensive induction programme - including a number of visits to friendly chambers - all three have already been involved in substantive work:
 - Julia has been planning a programme of pilot supervision visits to test the process and materials. Four will have been undertaken by the time the Board meets. Early indications are positive and chambers have seemed relatively welcoming and open to working with the BSB. A report on the pilot will be available by the end of June.

Part 1 – Public

- Bernard has been finalising the CPD spot check process for 2013/14 and a small pilot of 10 barristers is currently underway. The main spot check should be launched by the end of the month. In total around 650 barristers will be included.
 - Ruby will be planning the supervision return process, which is scheduled to begin by the end of June. She has also been developing information sharing procedures and protocols.
19. The Impact Audit Survey is still in progress, with over 700 responses received so far. Second reminders have been issued to the 200 or so chambers that have still not responded.
 20. A small review of public access barristers of under 3 years call was also launched to check log books and what access and use was being made of qualified persons. Fifty barristers were selected to take part and so far around half have responded.
 21. A number of chambers briefings have also been undertaken for those who have requested them including a few on circuit.

Education and Training***Post-LETR plan***

22. Following approval of the Plan in March, a briefing meeting was held on 1 May with key representatives of the Bar. The meeting was hosted by Ruth Deech, Andrew Sanders and Vanessa Davies, and received a positive, if cautious response. Further meetings with this group are planned.
23. Following initial work to identify commonalities of interest with the SRA on our respective competency frameworks, a plan is in preparation for consideration by the Education & Training Committee for research and consultation on the Bar's own framework, with a focus on the required proficiency on first entering practice.
24. A workshop was held with BPTC Providers in March to gather their ideas for the future of the BPTC in light of LETR.
25. The Chair of the Education & Training Committee and Head of Department met with the Quality Assurance Agency and SRA to discuss the QAA's review of the Law Benchmark Statement, which is initiated in May.

Operational updates***Vocational Training***

26. On 2 May, Kaplan UK announced its plan to close its BPTC at the end of this academic year, and the Vocational Training team has been focused on the development and delivery of an effective response, to protect the interests of students, and those candidates who had committed to Kaplan for the new academic year. Good progress has been made in securing places for this group at a late stage of the overall admissions process.
27. BPTC Providers have made further progress in developing a replacement for BPTC Online, transferring responsibility for course admissions from the BSB to a provider consortium. A supplier has been selected and development commenced.
28. The report of a Triggered Visit to BPP Manchester, following their over-recruitment of candidates to the BPTC, has been published and a number of quality assurance issues resolved that had arisen.

Pupillage

29. A new Pupillage Subcommittee is planned, focused on policy development in light of our Post LETR Plan, and with Justine Davidge as Chair. The subcommittee will be convened in the next few weeks. Early considerations for the Subcommittee will be review of a redrafted Pupillage Handbook and quality assurance of Approved Training Organisations, alongside contributions to the Post LETR Plan.
30. Work continues to streamline the process of Pupil and Pupil Supervisor Registration.

CPD

31. The Education & Training Committee reviewed an initial analysis of the introduction of Public Access training from November 2013 at their April meeting.

Authorisation & Waivers

32. At its meeting on 8 April 2014, the Committee approved amended Criteria and Guidelines and proposals for delegation of decision-making in respect of three of its Panels. The remaining areas of delegation will be considered at the May meeting of the Committee.
33. Since the last Board meeting, four appeals to the Visitors against decisions of the Qualifications Committee have been heard. The Visitors dismissed three of these appeals - one relating to the Qualifications Committee's refusal to grant exemption on the basis of being a legal academic and two relating to decisions of the Inns Conduct Committee to refuse admission to an Inn of Court. However, they allowed an appeal relating to an application for full exemption from pupillage for experience gained at the Crown Prosecution Service.

Staffing

34. Marion Huckle has been appointed to the role of Policy & Quality Assurance Manager, with an initial focus on key operational developments relating to the BPTC.
35. Recruitment is in progress for a Change Programme Manager to support delivery of the Post LETR Plan.
36. Claire Hogg (Education Administrator) has resigned and leaves the BSB in June for a new opportunity in local government.

External liaison

37. Advocacy Training Council Discussions are progressing with the ATC on the standards of advocacy training on the BPTC.
38. Solicitors Regulation Authority Aside from the Law Benchmark Statement interests referenced above, a meeting has been held to identify commonalities of interest in data to inform our understanding of the education and training market, which is an important strand of the Post LETR Plan.
39. BACFI The Head of Education & Training joined other BSB representatives at a Q&A session hosted by BACFI on 28 April.

40. Bar Council Further discussions were held with Bar Council staff on 15 April, on developing effective liaison on training-related matters, within the framework of the joint Protocol on regulatory independence.

Equality and Diversity

BSB Equality Objectives 2014-15

41. The E&D team have developed a set of draft equality objectives for the period 2014-15 which are before the Board for approval on May 22nd.

E&D Chambers Monitoring

42. The E&D chambers monitoring exercise concluded in March, with a total of 32 chambers providing valid responses to the BSB questionnaire. Each Chambers in the representative sample was asked to demonstrate compliance with all the equality rules of the BSB Handbook, and provide documentary evidence in some cases e.g to provide copies of their equality policy and action plan.
43. The EDA has drafted a report containing a summary of the findings of the exercise; overall 16 out of 32 chambers were found to be either fully or broadly compliant with the equality rules, a compliance rate of 50%. The 16 chambers found to be non-compliant with the rules were given guidance to support them in meeting the requirements. Tailored feedback was provided and the BSB is satisfied that those 16 chambers are now in compliance with the rules. The draft report makes six recommendations and it will be considered by the Equality and Diversity Committee at their May meeting. The report will be presented to the Board in June for approval and publication.

BSB and Bar Council E&D Memorandum of Understanding

44. To sit alongside the Protocol for Ensuring Regulatory Independence, the BSB and Bar Council E&D teams have jointly developed a MoU which seeks to clarify - for the profession as well as internal information - the respective roles and responsibilities of the Bar Council and the BSB with regard to equality and diversity. The document contains examples of how this works in practice in respect of the Public Sector Equality Duty, giving advice to the profession, developing guides and supporting chambers' Equality and Diversity Officers. The MoU was approved by both BSB and Bar Council E&D Committees in March and the document is published in the Committees section of the BSB website.

Subconscious Bias in the Workplace

45. In April the E&D SPO delivered a training workshop on subconscious bias in the workplace at the BSB Operational Management Team away day. The interactive workshop provided an introduction to how subconscious bias can affect management decisions in the workplace, particularly in relation to recruitment and staff appraisals. Members of the OMT were offered some practical suggestions on how to tackle the negative effects of subconscious bias and a selection of real-life case studies were discussed to highlight the types of issues that BSB managers should be considering when using the new Performance Management System.

Professional Conduct

General

46. With four months having passed since the launch of the new BSB Handbook, staff have largely familiarised themselves with the new enforcement processes. As some cases currently being handled in the Department relate to the behaviour of barristers' prior to 6

January 2014, PCD staff are continuing to operate in a transitional period. However, in the last two months the majority of newly opened cases have been cases for assessment under the new Handbook.

KPIs

47. Performance against KPI statistics for the fourth quarter finished at 11% above those in the third quarter. As previously reported, the dip in Q3 has been attributed to a previous lack of management reports which impacted significantly on the ability of staff to manage their caseloads. Overall, performance against the KPI statistics for 2013/14 was 77.9%, a higher-than-anticipated rise of nearly 13% compared with 2012/13.

Project Work

48. The PCD are beginning to prepare for the regulation of entities later in 2014. All enforcement process maps are currently being reviewed in light of changes and the PCD are working in conjunction with the wider BSB Entity Regulation Project to ensure readiness to regulate entities.
49. In accordance with the objectives set out in the PCD business plan 2014/15, the PCD are launching an internal review of the role of the complainant in the enforcement system. The initial documentation is in the process of being prepared with the first stage of the project likely to be a comparative research exercise on the role of the complainant in other regulatory bodies.

Judicial Reviews

50. The PCD is still subject to four applications for Judicial Review. Two of these remain at the permission stage with the other two listed for full hearings.
51. With reference to those JRs arising from COIC appointment issues, the timeframe for the decision on the outcome of the claimants' applications for permission to appeal to the Court of Appeal has been extended until the end of May 2014.

Strategy and Communications

Press relations

52. This month the BSB secured widespread coverage across the legal press, including The Lawyer, The Law Gazette, Legal Futures, Legal Business, and other outlets. We were also mentioned in the national press (The Daily Express).

External communications

53. Following the decision by Kaplan Law School to discontinue the BPTC, the communications team worked closely with our own Education & Training Department and Kaplan to ensure that affected prospective students were fully supported in making the switch to an alternative provider. This action included a range of activities across a number of communications channels. Other current projects include handling the appeal of the QASA judicial review decision, alerting the profession to the commencement of CPD record card spot checks, and drafting a communications plan for changes to education and training.

Online and social media

54. During the last month we published news stories about our Chair and Board vacancies on our website. The Board member news story has received 607 unique page views since it has been published and the Chair recruitment news story has received 358 unique page views since it has been published.
55. Overall we receive around 48,000 visits to the BSB website per month. At the time of writing, we have over 8,400 followers on Twitter (up from the almost 8,000 we had two months ago).

Publications

56. Our external designers will continue to make final amendments to the Bar Barometer and Biennial survey once we have finalised the documents internally. Both research publications are jointly published with the Bar Council. Additional clarifications have been required in relation to the Bar Barometer, delaying publication further. The final version of the Biennial Survey is going through its final proof to enable publication, which is hoped to be in the week commencing 19 May.
57. We had published a version of the Bar Barometer online at the start of last month but we had to subsequently edit an interim version for the website and issue a joint statement as a result of an inaccurate statistic in the original report.
58. The 2014-15 business plan has been published on our website.
59. We are currently drafting the 2013-14 Annual Report under the direction of the Planning, Resources & Performance Committee and Board members will be able to comment on this at their next meeting.

Bar conference

60. Planning is underway for our workshop at ‘*The Annual Bar Conference 2014: Celebrating Excellence*’, which will be held on Saturday 8 November at the Westminster Park Plaza. The session will focus on authorisation to conduct litigation.
61. We have secured self-employed barrister Amanda de Winter as a guest speaker for our Bar Conference workshop entitled “Conducting litigation: expanding opportunities for the Bar”. Amanda de Winter will be joined on the panel by Dr Vanessa Davies, Director BSB and Joanne Dixon, Qualification Regulations Manager, BSB.

Consumer stakeholder event

62. A second consumer stakeholder event was held on 28 March. In preparing for the event, we found that the consumer organisations we have been developing a relationship with did not understand how the whole complaints system worked so we focused our session on improving their understanding. The Legal Ombudsman contributed, as well as BSB staff explaining the system in relation to barristers. Feedback from the participants was very positive – from both BSB and the stakeholder groups. Now we have a clear shared understanding of the system, we are working with them on other topics of mutual interest, including reviewing the complaints information we make publicly available. In the first of those follow up sessions, on 13 May staff from the Communications, Regulatory Policy and Education & Training teams met with representatives from Victim Support to discuss training for barristers on handling vulnerable witnesses in court.

Staff recruitment

63. A new Communications Manager has been appointed. Andrew Lamberti will be joining us at the end of June from his current post at the University of Law. Recruitment is underway for the Research Officer post.

Business management***Scheme of Delegations***

64. The Governance Manual was presented to the Board at its last meeting. The scheme of delegations is before the Board at this meeting.

Standing Orders

65. The review of the Standing Orders is on hold pending the outcome of the Board's Awayday and its desire to look at the whole committee structure in some depth. An intermediate amendment to allow for continuation of business while the review is undertaken is before the Board at this meeting.

Budget and business planning

66. The Business Plan has been agreed and published. The Finance Committee agreed the BSB's revised budget in March. Preparatory work has commenced on planning for the 2015-16 business year which is the final year of the BSB's current Strategic Plan.

Contracts Management

67. A review of the Service Level Agreements we have in place with our Central Services colleagues is well underway with the Planning, Resources and Performance Committee confirming the approach being taken at its 8 May meeting.

Regulatory knowledge and information***Research***

68. In addition to dealing with issues arising on the Bar Barometer and Biennial Survey of the Bar, the Research team has been making progress on the Research Strategy which is before the Board for the first time in private session.
69. A number of projects at different stages are being progressed. A few opportunities have arisen to engage in research which will help progress the research agenda priorities identified as part of the research projects review and strategy development.
70. Closer collaboration has been developed with both the IT and Records team to implement aspects of the research strategy.

Central Services Report - Updates on Key Business Projects***Document Management System***

71. The transition from the G Drive is effectively complete, and the G: and H: drives have been made read-only to support the transition to the new environment.

Part 1 – Public

72. Further technical work has been completed to integrate the DMS with our scanning facilities, content management system and the core database. These are now being rolled out over the next couple of weeks. Access points are being clarified to ensure that the DMS is accessible remotely through tablets, IPADs, laptops and home PCs
73. A repository of best practice guidance has been developed and stored on the DMS to help users across the business.
74. Two case study workflows have been created with the BSB Committees and the Board Officer and the Fees Collection team in R&P, to look at automating processes and creating some efficiencies. Both will be in full operation in the next two weeks.
75. Internal training will be taking place in the next two weeks to equip the IT team to develop further workflows across the business.
76. The information security manager is taking the lead on developing a starter pack for use of Objective Connect as an extranet platform to securely share information externally. Initial communications with the BSB Board will take place in May.

Authorisation to Practise

77. The 2014 process closed on 30 April with significantly more barristers completing the process earlier than in previous years. Fewer barristers were surcharged (68 in April 2014 against 239 in April 2013) and only 8 (10, 2013) barristers were reported to BSB for failing to meet the requirements.
78. The Bar Council Senior Leadership Team (SLT) have reviewed the Lessons Learned report produced by the PMO. The PMO is developing a programme plan to embed these lessons in the 2015 ATP programme. Priorities are to ensure there is better understanding of the responsibilities of the different stakeholders within the process and to ensure that the good communications between the BC and the profession that led to high early engagement levels are replicated.

Pension Auto Enrolment

79. Sixty-four employees were successfully enrolled in April.

Upcoming projects***Intranet***

80. A business case including a proposition to develop the technical infrastructure and initial content this year, as the first stage of a three stage development, will be brought to SLT for consideration in May.

CPD Regulation Implementation

81. This project remains at the initiation stage with the programme plan and scope being reviewed prior to a business case being made, expected in May.

Corporate Management Information

82. This is being considered as a programme of activity focused on improving the quality of the output from the existing systems (including HR and Finance applications) and in the way this data is currently handled by and made available within the business. An integrated business reporting tool will be included in the subsequent stages of the intranet project.

Entity regulation

83. The PMO is providing assurance to the BSB project manager for entity regulation together with business analyst skills to the project team to support process and systems design.

Barrister Connect

84. A review of the current web-based platform Barrister Connect has begun to explore where we need to make improvements and whether the current supplier can deliver our business requirements.

Process efficiency project

85. The PMO have initiated a project to review and implement process efficiency and use of the Core Database across the organisation to build on the implementation of DMS and on the BSB's TRIP programme. This will take forward those proposals identified in the 2013 process efficiency workshops that are not being dealt with by the intranet project.

Authorisation to Practise Programme 2015

86. We have launched a programme to address the 2015 PCF renewal process to coordinate the process, policy and system changes identified during the 2014 ATP process and to identify and specify the changes necessary to implement the income based PCF model.

Bar Course Aptitude Test

87. The PMO continues to support the BSB Education and Training team to deliver the first year evaluation of the BCAT and continually review operations.

Team & Function Updates***Project Management Office***

88. The Project Management Office is now fully staffed. As well as new projects, this expansion will enable a focus on the wider remit of the PMO beyond direct project management to embed better and more consistent standards of project management across the business and develop the capabilities of project staff embedded in divisional teams.
89. A new project gateway process has been documented to enable centralised tracking and scrutiny of project activity and allocation and management of central resources. The PMO will work on widening awareness of this process the next few months following a short trial.

Finance

90. The 2013-14 accounts are now under final preparation.
91. A number of process and procedure changes are being developed in order to identify changes necessary to strengthen our controls and to ensure that they meet the organisation's needs.

Human Resources

92. Erika Edwards's contract has been extended to the end of May to ensure that all BSB committee recruitment can be supported. Sue Edwards has now joined as an HR Coordinator and will undertake all initial recruitment, admin and a sickness absence administration.
93. The HR team are now managing seven active recruitment vacancies across the whole organisation. We anticipate continued shortening of recruitment time and lowering of costs over the coming months.
94. Additional training is being provided to support the Performance Review process, specifically focusing on setting SMART objectives.

Facilities

95. The final commissioning works to the heating/ventilation system are due to be completed mid-May following which a final account will be received for the construction costs on the SPACE project.
96. The Rent Review is proceeding. Our agent does not have any details relating to the marketing of the vacant 5th-8th floors at present. The refurbishment of the 5th-8th floors should be completed by August/September 2014.
97. The landlord has commenced the stripping out of the upper floors vacated by the Bar Council at the beginning of May. The programme will last four weeks and take place daily between the hours of 16:00 and midnight. The impact on the organisation will be minimal. Tender for main works to the upper floors and common areas have been distributed to potential contractors and main works are due to commence in June.
98. We intend to produce an energy efficiency policy and establish a cross divisional team to support its implementation.
99. An invitation to tender for a new cleaning contract is due to be distributed before the end of May.
100. The Print Room have capacity to take on additional print production work at a lower rate than that which can be achieved externally and we are seeking to bring in-house work normally undertaken externally where it is cost effective.

Records

101. The team are now focusing on addressing lessons learned from the 2014 ATP process, including improving the core database, Barrister Connect portal, data capturing, cleansing and auditing.
102. General housekeeping on the database will recommence shortly.
103. BMIF will not be in a position to support the audit of insurance records until late June.
104. Plans are being prepared with BSB staff to address the knowledge building, appreciation and understanding of regulatory activities that were identified as needing improving during the ATP process.

Part 1 – Public

105. The Records Manager met with the Research team to share knowledge of the core database and how the database has developed over the years. A list of fields has been provided so that initial ownership and workflows can be established.
106. The Records Service Level Agreement is currently being reviewed following the Authorisation to Practise renewal to ensure that the aims and objectives for the Bar Standards Board are met.

Information Technology

107. Our three month trial period with an additional 1st line support analyst is going well, and the benefits of having this additional resource in place are starting to become apparent based on feedback from staff. We are in the process of evaluating whether we can make this a permanent position, based on the enhanced level of service we are able to provide to our users.
108. Our new Information Security Manager, Amit Bhatt, joined us in April and leads on our ISO27001 implementation project along with a number of other information governance and security initiatives.
109. We have appointed an IT Business Analyst on a six month contract to assist with our review of the Barrister Connect portal and the functionality it provides. Steve Scott joined on 23 April, and has extensive experience of working with membership systems based on his previous roles at Kew Gardens and RIBA.
110. The new meeting room booking solution go-live date has been delayed, this has been mainly due to infrastructure issues which have taken a priority over project work – including the final stage of the new Wi-Fi solution - until it was resolved. The plan is to commence with the configuration phase and we estimate a go-live date by the end of May.

Dr Vanessa Davies
Director, Bar Standards Board
15 May 2014