



Chairman's Report July 2010

1. As this is my last Chairman's report, I am treating much more briefly than usual the events of the last month in order to concentrate on the changes that are taking place in the profession and how I see the next 12 months or so developing.

The Lord Chancellor 's Speeches

2. On 30 June I attended the Lord Chancellor's first major policy speech at King's College, the text of which has already been widely circulated. On 5 July I attended a meeting of the APPG Group on Legal and Constitutional affairs addressed at which he gave a truncated version of the speech he had delivered at King's College.

Children & Vulnerable Witnesses

3. We are very keen to build on the work of this year's Spring Conference dealing with Children and Vulnerable Witnesses. We have established a working group jointly with the Nuffield Foundation and the NSPCC on the treatment of young defendants and witnesses in the criminal courts. The aim is to produce clear practical guidance to the profession on how to question young and vulnerable witnesses in a developmentally appropriate way. The first meeting was on 8th July and we are working to produce material for the profession in Spring of next year.
4. The group is chaired by Michael Bowes QC and I shall remain a member of it, as this is a topic that has become dear to my heart. I firmly believe that we must and can deal with young people in the criminal justice system, whether as defendants or witnesses, in an age appropriate way without compromising our professional obligations to prosecute fairly and defend fearlessly.
5. On 12 July, I met with the Children's Commissioner, Maggie Atkinson and her Deputy, Sue Berelowitz. They applaud and support the work the CBA is doing. The Commissioner would like to see the age of criminal responsibility raised. She has offered to address the CBA on the conditions of children's confinement.

The Next 12 Months

6. There is no doubt that the criminal Bar is now at one of the most critical times in its history. A perfect storm of **legislation, government policy** and **economic circumstances** is bringing a tidal wave of change to the publicly funded criminal Bar.
7. To stretch the metaphor perhaps beyond breaking point, we can either stay where we are on the beach and risk drowning or we can rapidly build some different structures and scramble to safety. I have little doubt that we have little choice but to roll up our sleeves and start building and what we must start building are procurement vehicles.

Legislation

8. The legislation is of course the Legal Services Act 2007 that has opened the profession to new business structures. In responding to BSB consultations in 2008, the CBA strongly supported the idea that chambers should be allowed to form limited companies that could procure legal services. In June 2008, a CBA working party headed by Chris Kinch and I expressly approved such a vehicle and contemplated that it might be used for contracting with the Legal Service Commission.

Government Policy

9. Government policy is the paper issued on 22nd March by the Ministry of Justice paper issued entitled the *Restructuring The Delivery Of Criminal Defence Services*, issued in the dog days of the last government. We have meetings with a senior official from the Ministry of Justice on 19 July, and with Jonathan Djanogly, the Legal Aid Minister, on 22 July, after which we will have a clearer idea of the government's intention but every indication we have had at ministerial and official level since the election is that it does represent the clear direction of travel.
10. The paper envisaged a radically consolidated market with a far smaller number of suppliers undertaking the full range of services from the first police station appearance to final disposal in the Crown Court. The paper envisaged that there might be as few 8 to 10 providers per criminal justice system area, with as few as 40 for the whole of London. This means a cull of solicitors of huge proportions, from 2,500 down to as few as 400, indeed, not so much a cull as a mass extinction.

11. At paragraph 18 the paper said:

“We expect this is likely to mean new ways of working and business tie ups between solicitors firms, barristers and their chambers and potentially other providers. We envisage that barristers’ chambers who can put the appropriate structures in place in order to provide the full range of services specified in the contracts will be free to tender if they wish. We have said separately that we are likely to undertake a consultation exercise on a single fee for litigation and advocacy services. If that consultation takes place and if we ultimately decide to introduce a single fee then it is likely to lead to further market restructure. However at this time there are no worked up proposals for consulting on a single fee”.

12. A single fee for litigation and advocacy is One Case One Fee or OCOF, which was recommended by Carter in 2006:

Recommendation 4.16: *DCA and the Legal Services Commission should consider harmonising the separate litigation and advocacy graduated fee schemes in to a single graduated fee for all defence services in the Crown Court, for implementation as soon as possible after 2009, when the market has stabilised and legal services reforms allow for the creation of alternative business structures.*

Economic Circumstances

13. There are a number of strands to the changed economic circumstances. Firstly, we have lost a significant part of our advocacy market share to solicitors because of the reduction in fees they suffered as a result of the Litigators’ Graduated Fees Scheme that came into effect in January 2008. There was a veritable explosion in the number of HCAs appearing in Crown Courts in 2008 and 2009 and although the numbers vary I have heard it said that there are many as 5,000 HCA’s in practice at the moment. Bear in mind that the CBA itself has just under 5,000 members and we begin to see the scale of the problem.

14. Secondly, we have suffered dramatic cuts to the RAGFS and VHCC payment schemes under which we are paid for Crown court work. Our fees under RAGFS have been cut by 13.5% over the next three years with the first 4½% cut coming into effect from 27th April. With effect from 14th July, the RAGFS has been extended to all cases lasting up to 60 days, so VHCCs will be confined to the very few cases that last more than 60 days. The effect of extending RAGFS to 60 days has been that the cuts could be as high as 60%. It is likely that the introduction of OCOF will lead to the

government reducing fees even further as the March paper envisages bids at a discount on the present levels.

15. Thirdly, the advocacy fee that is presently paid under RAGFS is not in fact ring-fenced at all. In order to simplify its administration and to encourage what Carter called case ownership, the Legal Services Commission pays the entire advocate's fee for a case to the instructed advocate who is responsible for paying all substitute advocates who appear during the course of the case. Solicitors are not bound by the Bar Council protocol governing fee splitting and the practice has begun, and will no doubt increase, of employed advocates becoming the instructed advocate and taking a large slice of the fee perhaps 30% for covering no more than the PCMH and leaving the balance of the fee of 70% to be paid to counsel for the whole of the rest of the conduct of the case. It doesn't take too much imagination to see that this downward pressure might result in solicitors taking 35, 40 or even 50% of the fee for the preliminary stages leaving counsel with half the fee to conduct the trial. Indeed, I have heard of one set that has approached a large firm and offered to do all its Crown Court advocacy in return for the firm being the Instructed Advocate in all its cases and taking a cut of the advocacy fee.
16. Fourthly, there is the economic crisis and this government's determination to cut public expenditure by about 25% and, we have heard, in some cases by up to 40%. To put this in some kind of context. Under the last government the Ministry of Justice was required to save a £1 billion from its £10 billion budget. Now it has to save a further £2 billion from its £9 billion pound budget. The present legal aid spend is around £2.1 billion of which criminal legal aid accounts for just over a £1 billion.

A Way Forward

17. For all the years since Carter, the Bar Council and the CBA have been implacably opposed to the introduction of OCOF on the entirely sensible and rational basis that if the whole of the fee for a case were paid to the solicitor, then inevitably and inexorably the price for the advocacy element would be driven downwards. However, the consequence of these legislative, political and economic changes means it may no longer be sensible for the Bar Council and the CBA **merely** to resist the introduction of OCOF. If we do that, we run the risk we will be ignored by government; they will introduce a single fee and the whole of it will be paid to solicitors, putting us at their complete mercy. The obvious solution is for the Bar to **plan** to gain control of the single fee by the establishment of procurement companies that can obtain the work from the Legal Services Commission.

18. Of course, to bid successfully for a contract that requires legal services to be provided from police station to the conclusion of the Crown Court means that the procurement company will have to make arrangements to subcontract the non-advocacy elements such as police station attendance and litigation support. Analytically, this is no different from solicitors who have historically subcontracted the non-litigation i.e. advocacy. When we saw the Legal Service Commission late last year it was very hostile to the idea that we could subcontract litigation but that has completely changed now and so far from being opposed to it the Ministry of Justice and the Legal Services Commission are encouraging the Bar to do so.

Five Work Groups

19. Under Nick Green and Peter Lodder, the Bar Council have set up five work groups whose practical task it is to put chambers in a position to be able bid for work by this time next year, the time frame that is being imposed upon us by government. The CBA is well represented on all the groups.
20. Three of the five groups are designed to deal with a specific aspect of the direct contracting, namely:

The **LSC Contracting Group** whose purpose is to draft a simple Bar-friendly criminal contract which we can submit to the LSC as a working draft for discussion.

The **Business Models Group** whose purpose is to devise in more detail the business models required (based on the ProcureCo model) to suit the needs of the publicly-funded criminal Bar for direct contracting.

The **Tendering Process Group** whose purpose is to analyse current LSC tendering criteria in order to be able to influence MoJ and LSC policy when developing the next round of tenders.

21. Two of the groups have slightly different functions:

The **Government Savings Group** is to continue the work of identifying savings in criminal and civil justice with a view to making further and better worked-up suggestions to Government.

The **PR/Education Group** is to organise a campaign to educate the Bar as to key practical aspects of contracting. Further, it is to raise awareness and understanding among the Bar of relevant issues and to advise and assist on all communications matters.

22. There is a small **Supervisory Group** whose task it is to supervise the work of these four groups, to drive the project forward and ensure that timetables are met. Chris Kinch and I are both members of this group.
23. The object of the exercise is to produce clear, practicable guidance for the profession to help it adapt to the new ways of working that are going to be imposed on us. No-one involved in this process underestimates the huge practical difficulties entailed. There are not many objections to the re-organisation that have not have been ventilated and that these groups will not seek to solve. If it should turn out that some of these problems are genuinely insuperable then we would have no hesitation in going back to government and telling it so but this is a far better strategy than simply arguing for the preservation of a ring-fenced fee on the basis that it has always been done that way, particularly when we can already see that it is no longer working in our favour.

How Members Feel

24. The BSB has this month published the results of its survey of the profession on the *Regulation of New Business Structures*. It is available at <http://m1e.net/c?111614088-Bxr/SjEhA1ajE%405509016-HKm8GymhNfHDc>
25. This shows that a great many at the criminal Bar are aware of and welcome the changes that are taking place but it follows that there are still significant numbers that are either ignorant of or hostile to them. None of us has the gift of perfect foresight but if we have read the runes correctly then OCOF is heading our way whether we like it or not. If it is, then it is our job to make it work as well as we can in the interests of the Bar. It is thus vital that we continue to educate our members as to why we are pursuing this course.

The Future?

26. These changes will not prevent some sets remaining as pure referral sets if they choose to do so and some will thrive that way. On the other hand, there will inevitably be a reduction in the number of practitioners at the publicly-funded criminal Bar. This is not merely a consequence of the government proposals but one of its objectives. We have pointed out on numerous occasions that achieving a reduction in this way runs the risk that the best will leave and the worst remain so that there will be an overall reduction in the quality of advocacy and thus in the smooth running of the criminal justice system. That is undoubtedly correct, it is

already happening and will continue to happen but it seems that will not deflect the government from its proposed course of action. It is for us to try to ensure that quality stays in the system.

27. We must encourage new entrants to the criminal bar and support the young bar, because they are the lifeblood of the profession. Without new entrants and a thriving young bar, the bar will die from the bottom. A system that just looks after those at the top has no long-term future. I believe the changes to our practicing structures are necessary in order that all of us, including the young bar, have the best chance to secure the future of the profession.

Now is the time to say goodbye.....

28. Even in this difficult and depressing year for the profession, with cuts to our incomes and a seemingly more to come, it has been a privilege and pleasure to lead our Association. I have tried to raise its profile on issues, such as prison policy, the law on self defence, questioning young witnesses, the age of criminal responsibility, anonymity for defendants and, of course, fees for barristers.
29. The job is time-consuming but the burden has been eased by the enormous assistance I have received from my officers and this committee. I am very grateful to Adrian Chaplin, Lesley Bates and Nathaniel Rudolf, who have been work horses as Secretaries, to our Treasurer Jonathan Mann who has crucially updated our banking and accounting arrangements, to Jeremy Dein and the Education Committee who have organised so many immensely valuable lectures and conferences, and to John Cooper has laboured hard with CBQ.
30. Most of the CBA work goes on behind the scenes and between meetings and Aaron Dolan, our administrator, has been cheerfully helpful and efficient in everything he has been asked to do, from emailing members to organising events. It is thanks to him and Lesley we now have a brighter more functional and user-friendly web site.
31. I want to thank everyone who has contributed to the working parties we are forced to respond to by the constant deluge of consultation papers.
32. Finally, special thanks to Chris Kinch, my Vice Chair. I have benefited greatly from his calm, considered views and from first to last this year, his thoughtful input and judgment have been invaluable. I step down knowing the Association in excellent hands for the coming year.

Paul Mendelle QC
18 July 2010