



THE CRIMINAL BAR ASSOCIATION

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## **The Future for the Publicly-Funded Criminal Bar**

As Chairman and Vice Chairman, we are writing to update you about the latest important developments at the publicly-funded criminal Bar and how we see them affecting the future of our profession. We know it is not easy to keep abreast of all the printed material that comes out and so we are going to try and summarise the key points in this bulletin.

Anyone who is concerned about the future of the Criminal Bar should really try and find time to read the paper prepared by Nick Green QC Chairman of the Bar Council called "*The Future Of The Bar*". You can find it on the CBA and Bar Council websites at:

<http://www.criminalbar.com/86/records/372/the%20future%20of%20the%20bar.pdf>

<http://www.barcouncil.org.uk/news/FutureoftheBar/>

It is a comprehensive survey and repays careful reading.

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. We know that most of you are aware of the changes but since these are occurring at an ever-increasing rate, we thought it might be helpful to briefly recap.

### **The Legislation**

The legislation that is going to affect us most radically is the Legal Services Act 2007. It has opened the profession to new business structures. Barristers can now practice in partnerships with solicitors in Legal Disciplinary Practices, they can even practice in partnership with each other. In responding to Bar Standards Board consultation papers in 2008, the CBA strongly supported the idea that chambers should also be allowed to form limited companies that could procure legal services. In June 2008, a CBA working party expressly approved such vehicles and

contemplated that they might be used for contracting with the Legal Service Commission. Such procurement companies are not within the LSA as they do not themselves supply legal services but procure the provision of these services by others, namely, barristers. For any given set, the simplest way to think of the procurement company is as the corporate face of chambers

## **Government Policy**

The Bar Council and the CBA have always argued vigorously against government proposals that would damage the profession. Most of the time, the focus has been on opposition to cuts in fees. However we have previously opposed the concept of a single fee for the litigation and advocacy in criminal cases (“OCOF”) as it would concentrate legal aid funds in the hands of solicitors and give them control of the level of fees to be paid for the advocacy. There was general agreement that if that happened, that the criminal Bar would find itself at the mercy of solicitors.

At the time of the Carter Review in 2006, the Bar’s case on fees won a measure of acceptance and fees were increased but it is essential to understand that Carter did not reject OCOF; quite the opposite, he expressly recommended it:

***“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”.***

In other words, OCOF never went away, the plan was that it would be back on the agenda as the LSA 2007 began to be implemented. Sure enough, on 22 March 2010, in the dying days of the last government, the Ministry of Justice issued a paper entitled *“Restructuring The Delivery of Criminal Defence Services.”* The aim of the paper was to move towards a *“more consolidated market with a smaller number of more efficient suppliers required to undertake the full range of services we need.”*

You can find that paper here:

<http://www.justice.gov.uk/publications/restructuring-delivery-criminal-defence-services.htm>

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. It said 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. That would mean a massive reduction in the number of firms, estimated by some to be from 2,500 down to as few as 400, indeed, not so much a cull as a mass extermination.

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”.*

**Every indication the Bar Council and CBA have had at numerous meetings at ministerial and official level since the election is that this March paper represents the firm direction of travel, regardless of opposition from the professions.** It is right to say that the scale and speed of the consolidation may be neither as large nor as swift as the paper predicted but the latest contract rounds for mental health and family by the Legal Services Commission suggest the number of providers could easily be halved.

### **Economic Circumstances**

We are all very familiar with the changed economic circumstances. Firstly, we know 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 it has been said that there are as many as 5,000 HCAs in practice at the moment. The CBA itself has just under 5,000 members to give you some idea of the scale of the problem.

Secondly, we have suffered savage cuts to the RAGFS and VHCC schemes. Despite determined and powerfully-argued opposition by the CBA from August 2009, when the proposals were first announced, fees under RAGFS are being cut by 13.5% over the next three years, with the first 4½% cut having come into effect on 27th April. Again, despite a Herculean effort by the Bar Council/CBA team in developing GFS Plus, a graduated fee scheme for VHCC cases that enjoyed the overwhelming support of the criminal bar, the government ignored us and chose instead to extend RAGFS to all cases lasting up to 60 days, with effect from 14th July. The effect of this extension of RAGFS is that some cuts could be as high as 60%. It is highly likely that the introduction of OCOF will lead to the government reducing fees even further, since the March paper envisages bids at a discount on the present levels.

Thirdly, the advocacy fee that is presently paid under RAGFS is not in fact ring-fenced at all as the instructed advocate has to pay the substitute advocates who

appear during the course of the case. Neither the Legal Services Commission nor the Ministry of Justice object to this practice, it is regarded as legitimate fee-sharing; indeed, it is contained in the 2007 Funding Order. The argument that ring-fencing advocacy fees is an important safeguard to protect quality has also been urged upon the Ministry of Justice in the clearest terms but it is not gaining any traction. The constant demand is for proposals that will produce savings.

Solicitors are not bound by the Bar Council protocol governing this fee sharing 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, leaving the balance of the fee of 70% to be paid to counsel for the rest 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.

Fourthly, the coalition has committed itself to finding enormous savings in public spending, not less than about 25% and, we have heard, in some cases, of up to 40%. To put this into context, under the last government the Ministry of Justice was required to save a £1 billion from its £10 billion budget. Now it is talking about saving a further £2 billion from its £9 billion budget. The present legal aid spend is around £2.1 billion of which criminal legal aid accounts for just over a £1 billion. There will be further cuts to criminal legal aid.

## **A Way Forward**

For all the years leading to and since Carter, the profession, through the Bar Council and the CBA, has implacably opposed 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.

The combination of these legislative, political and economic changes demands a change of response. We could wait and prepare the barricades but we know that there are enough firms of solicitors prepared to work with the government to make OCOF happen. The juggernaut is no longer parked, it is back on track and heading straight for us.

It may no longer be in our best interests 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 the 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. The Bar Council and the CBA have to take action to help those sets of chambers that want to bid in the next contracting round.

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 the CBA and Bar Council saw the Legal Services Commission late last year it was very hostile to the idea that we could sub-contract litigation but that has completely changed; now, so far from being opposed to it, the Ministry of Justice, which now determines policy, is actively encouraging the Bar to do so.

None of us has the gift of perfect foresight but if the Bar Council and CBA 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 criminal Bar.

### **How The Bar Council And CBA are Planning For Change**

The Bar Council has set up five work groups whose practical task it is to put the Bar in a position to be able bid for work by about this time next year, the time frame that is being imposed upon us by government. The CBA is strongly represented on all the groups.

Three of the five groups are designed to deal with specific aspects of 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.

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 Training & Education Group** is to organise a campaign to educate the Bar about the 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. 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](#) This shows that a great many at the criminal Bar are aware of and welcome the changes that are taking place. However, it follows that there are still significant numbers that are either unaware of or hostile to them.

There is a **small Supervisory Group** whose task it is to supervise the work of these five groups, to drive the project forward and ensure that timetables are met. Both Christopher Kinch and I are members of this group, as is Peter Lodder, so you may sure the CBA voice will be heard and will be influential.

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. It is planned that material will be issued at around the time of the government's consultation paper on legal aid that is due to be published in Autumn.

No one involved in this process underestimates the huge practical difficulties entailed. There are not many objections to the re-organisation that are not being ventilated and that these groups will not seek to solve. If it should turn out that some of these problems are genuinely insuperable then the Bar Council and CBA would have no hesitation in going back to government and telling it so. However, 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.

## **The Future**

The prospect of bidding for a contract with the Legal Services Commission is one many people will find daunting, even unpleasant. Many will view the idea of competing with solicitors as fraught with difficulties. However, the brave new world envisaged by the Ministry of Justice is likely to mean that very many small and medium-sized firms will lose contracts in the next bidding round. In the most recent family tender, almost half the firms lost their existing contracts.

By contrast, sets of chambers (or groupings of sets) are relatively big players in legal aid terms. Co-operation with the Bar in panel arrangements is likely to be a much more attractive option for many solicitors than getting swallowed up by mega firms. It is clearly a highly sensitive area and one that needs very careful handling. There are already discussions happening in some parts of the country. The reaction from solicitors is far from universally hostile.

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. We 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.

We are sure all of you have real anxieties about the future, and it may be that some of you feel this is the wrong direction for the Bar. We do understand those concerns and the CBA has more than once expressed these views forcefully to the Ministry of Justice so please do not think that the CBA has simply given up the fight. This Association has battled and battled for criminal barristers and will continue to do so. Things have been moving very fast in the last few months and if you have read this far you will understand there are hugely significant decisions to be taken by all of us in the course of the next year or so. No one is going to be forced to pursue a contract but the new system is heading down the track towards us and as far as anyone can see it is going to go ahead with us or without us. There may be a chance for sets of chambers to get ahead of the game and steer the juggernaut – a better option than standing in its path.

### **Comments Please**

In the meantime, please do not sit back and wait. Make sure you and your chambers have studied the material that is available so that you can consider the vital issues that are in play. Then let us know what you think. Please remember we face a remorseless drive to make savings. Any ideas that are to influence the government's thinking before the consultation paper comes out will need to be put forward by early September. Please send individual or Chambers' responses to the CBA as soon as possible via Aaron Dolan ([ADolan@BarCouncil.org.uk](mailto:ADolan@BarCouncil.org.uk))



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