



Introduction

1. The Criminal Bar Association (“CBA”) represents about 3,600 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. They also appear in other proceedings, including inquests, regulatory proceedings, parole board hearings and control order proceedings. The CBA is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy of members of the CBA guarantee the delivery of justice in our courts.
2. We welcome the opportunity to respond to the Triennial Review by the Ministry of Justice of the Legal Services Board (“LSB”).

The Regulatory Objectives

3. The LSB’s principal function is to ensure effective regulation in key areas as defined under section 1 of the Legal Services Act 2007. It is the CBA’s position that all those objectives have traditionally been met by the criminal Bar. The suggestion that the LSB has created a “change in mind-set” as stated in the Draft Strategic and Business Plans is rejected.
4. The Bar Council (“BC”) has long sought to further the aims now enshrined in the objectives. The CBA supports the BC’s assertion that the BSB has “demonstrably been acting effectively” and has, contrary to parliamentary intention, been micro-managed by the LSB. To choose a single example, the LSB’s approach to the proposal to introduce new Contractual Terms of Work paints a picture of clumsy, disproportionate and unnecessary processes.
5. The CBA are further concerned that forthcoming changes in the regulatory and legal spheres will impact negatively on the provision of services that meet the objectives.

Protect and promote the public interest

6. Barristers have dual responsibility to the court and their client. It is a fundamental strength of the independent Bar that barristers both defend and prosecute, ensuring a wealth of expertise to better protect the victims of crime. Conversely, it is just this independence that provides a vital bulwark against the State to ensure convictions are only secured when a case can be properly proved.
7. The CBA is confident that the LSB is aware that the independent Bar performs important functions for society. In that context, where changes in regulatory structure are proposed, the CBA advocates the requirement for clear evidence that change is necessary lest irreparable damage is caused.

Access to justice

8. The Bar is available to all that request its service, both lay and professional clients. The self-employed Bar functions on the principle of access to justice for all; we are less convinced that the Government practices what it preaches, placing pounds ahead of principle. Recent amendments to the Legal Aid, Sentencing and Punishment of Offenders Bill regarding representation at the police demonstrate that the Bar has a principle based attitude to regulation.
9. The BSB's rules pertaining to public access prohibit a barrister from taking on a public access case when that individual would be eligible for public funding. The CBA views this is an unnecessary limitation on an individual's access to justice. The BSB proposed a relaxation of this rule in a consultation paper, with that relaxation requiring the individual to be made aware of their entitlement to public funding, but without thereafter restricting choice.
10. Choice is similarly restricted in the current rule limiting public access to those with at least 3 years experience. The BSB proposed relaxing this rule.
11. The BSB are considering response to the consultation, yet the LSB decided, in the CBA's view unnecessarily, to dictate to the BSB a number of expectations. The CBA urges the LSB to consider its remit and limit interventions based solely on the principle of oversight.

Independent, strong, diverse and effective legal profession

12. The hallmark of the Bar is its independence. The CBA will oppose any interference of that core principle, in whatever guise it takes. The CBA is concerned that introduction of any of block contracting, "OCOF" and price competition will have a detrimental effect upon the Bar's independence.
13. As the LSB is no doubt aware, many pupils at the criminal Bar receive an income less than half the national average. With debts from university and the BPTC, the CBA remains concerned that issues of equality and diversity are not being considered sufficiently.
14. Difficulties in attracting a diverse profession are already clear, notwithstanding vigorous efforts to the contrary. It is proving increasingly difficult to retain a diverse profession as many are forced out of the self-employed Bar by cuts in income unparalleled in any other profession in the UK. If the best and the brightest no longer aspire to a career at the Criminal Bar, or alternatively decide to leave the profession, it will become unrepresentative and standards will demonstrably decline. Victims and those accused of crime will be denied justice.
15. The CBA calls upon the LSB to ensure that any proposal that affects the criminal justice system be scrutinised to ensure that this fundamentally important regulatory objective is met. It is the opinion of the CBA that the LSB has an obligation to draw to the LSC's and Parliament's attention matters that will negatively impact on the regulatory objectives.
16. The presence on the board of the LSB of a member who is also a commissioner with the LSC should be no barrier to the LSB to take on a more vocal campaigning role.

Protect and promote the interests of consumers and the promotion of competition

17. The criminal Bar places excellence at the heart of its business model which thrives upon healthy competition. The well-used saying that one is “only as good as the last case” is a truism that ensures the maintenance of high standards. A member of the criminal Bar can only survive if they “earn” their practise and continue to service each and every case. Competition is appropriate where it ensures standards; competition at the expense of quality is anathema to the principle of protecting the interests of consumers.
18. It is clearly in the best interests of clients to have a full range of services available at all stages of the criminal justice process. Early high quality representation will increase efficiency and ultimately reduce costs. This will not happen if numbers within the pool of advocates at this early stage are reduced, with the very best being driven out by high levels of debt and significant reduction in income. Poor representation, with the risk of increased costs would be the result, and are clearly the exact opposite of what proper competition should achieve.
19. There is no evidence that there is a significant lack of quality in the current provision of criminal advocacy by the independent Bar. The LSB recognises that the evidence regarding quality is “thin”. The low level of upheld complaints to the OLC is, the CBA suggests, testimony to the quality of service notwithstanding the difficult market conditions.
20. It is troubling that the LSB are still considering regulatory changes despite the lack of evidence for the requirement for change, and the LSB’s own stated principle that it wants “robust evidence to inform our regulatory decision-making”. It is noteworthy that the LSB’s response to restrictions on referral fees was as follows:

“The Board continues to hold the view that the purely regulatory case for a general ban in the legal services market has not been made out. This is because sufficient evidence of consumer detriment, which would have been needed to merit a ban, has not been found.” – Referral fees, referral arrangements and fee sharing, May 2011
21. The CBA remains sceptical of any restriction placed on the right of lay and professional clients to have access to the full range of legal services. The CBA opposes any definition of competition which does not achieve improvements in quality and choice. Competition which is defined by “cheapest wins” is no competition at all and importantly, is contrary to the principles enshrined in the Act.
22. A clear example of the LSB stepping outside its role as oversight regulator, entering into detail that it did not properly understand, is the introduction of client care letters by barrister at first instruction. Knowing one’s right to complain is proper, but process must reflect sensible practice. The LSB’s failure to understand practice led to unnecessary work and costs.]

GENERAL ISSUES

Who is the consumer?

23. In most businesses, this question would be easy to answer. For the publically funded Bar, the consumer can be the one accused of a crime, the solicitor, the victim, the Government and the court. Each can have different and at times conflicting interests.

24. For an individual accused of a crime, where the case is publically funded, it is of little or no interest how much the representation costs. The interested body is the general public, represented by the Government.
25. The Bar recognises that it must enact all cost efficiencies in order to protect the public purse, ensuring at the same time, that the quality of service is maintained. The CBA positively welcomes greater efficiency. It is embracing new technologies and ways of working that speed processes. Objection is taken to cuts that reduce quality.
26. It is the CBA's position that the LSB's primary concern must be the protection of the interests of the direct consumer, namely the lay client. The LSB must act against any initiative that will impact on quality of service. In the case of the criminal Bar, that means ensuring the independence of the Bar and the retention and recruitment of a diverse and able profession.

Consumer empowerment

27. The desire for "empowered consumers" (in the lay client sense of the term) fails to recognise the nature of the market. Standard commercial considerations do not apply, namely obtaining the highest quality at a price which can be afforded. For justice to be fair, representation for the poor should be the same as for the rich.
28. With many on legal aid, price is not a significant factor in choosing representation. Indeed, for many, the duty solicitor scheme cuts out the need to make a choice. Such a scheme, while appropriate and needed, does nothing to drive competition and improve quality. Reputation of course is important for solicitors, with client retention and recommendation a key aspect of their business model. For the Bar, reputation is essential. It is the CBA's position that consumer choice is enhanced by the maintenance of a strong independent Bar, where quality is the driving consideration in obtaining instructions. The CBA will scrutinise any proposal that undermines this principle.
29. Where funds are available to the lay client, consumer empowerment is enhanced directly, and it is submitted this will increase competition and therefore be a benefit to all, privately paying or otherwise.
30. The CBA asks the LSB to consider the regulatory consequences of allowing restrained assets to be used to fund defence fees. It is notable that often the most expensive, complex and lengthy cases involve very wealthy individuals prohibited from funding their own defence. It is these cases that occupy a disproportionate portion of the legal aid bill. [Where such assets can be used for school fees but not legal fees, the regulatory objectives of the Act are undermined.]

QASA

31. The regulators are responsible for setting and maintaining standards within their respective professions. This includes the provision of a quality assurance scheme, known as QASA. Such provision follows Lord Carter's report in 2006 which recommended that a proactive rather than reactive mechanism ought to be in place to ensure advocacy is of the required standard.
32. Recognising the regulatory context, the BSB, supported by the CBA, have sought a rigorous, Judge-led scheme that is principled and effective.

33. The Joint Advocacy Group in various publications has sought to highlight the need for a scheme founded on a single set of standards which will apply to all advocates and which identify the skills and behaviours expected of a criminal advocate. It would be farcical to have different rules from different regulators applying to those performing exactly the same job.
34. The layers of regulation have, in the opinion of the CBA, proved ineffective. The LSB has proven often proved itself unable to provide a clear and unified direction. This creates uncertainty in a profession already rocked by changes and cuts.
35. The CBA resists the position that any quality assurance scheme can be used as a stepping stone to price competition. That fundamentally misstates the purpose of QASA. It also fundamentally underestimates the parlous state of the criminal Bar.

Referral fees

36. The May 2010 Charles Rivers Associates report comments that “banning referral fees would not have any effect since they are not currently used in criminal advocacy.” It is the CBA’s anecdotal experience that this conclusion is at best naive. In any event, due to bar protocol, it creates an uneven playing field with solicitor advocates.
37. QASA does not address the problem of the large range of quality within in each band. Cost cutting will once again be put ahead of quality, with firms driven towards practices that require one’s primary focus to be profit, not consumer interest. It is the Bar’s fundamental position that the value of core representation cannot be bartered down.

Bar Standards Board

38. It is appropriate to make brief comments regarding the BSB. The CBA supports the hard work being undertaken by the BSB, in the face of an extremely difficult market. We note that the BSB already has a lay majority as required by the BSB. In taking a principled approach, the CBA will continue to support its work.
39. The timing of the review is welcomed. The CBA hopes it will lead to a realignment of the relationships between the approved regulators and the LSB. The BSB must be allowed to use properly its expertise to fulfil its requirements without the drag of micro-management and mission creep one sees from the LSB.