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"The Changing Face of the Bar of England and Wales"
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The threat of Government interference

In preparing this paper I have been told that I am (as the representative of Bar of England and Wales) responsible for the horrors of the Legal Services Act 2007. I therefore stand here in the dock. I have given this issue much consideration. It is well known that by pleading guilty one gets a lighter sentence. However my counsel has advised me to deploy a "cut-throat defence"... and blame Desmond Browne QC. He was, my predecessor in title and was more closely involved than I in advancing the Bar's position as the Legal Services Bill wended its way through Parliament.

The Legal Services Act 2007 was in many respects a classic piece of governmental interference. The legal market in England and Wales is hyper competitive. A very recent Government consumer survey demonstrated that over 90% of users were essentially content with the service they received. The UK legal market is internationally held in high esteem and is a major earner of foreign currency. One might wonder therefore what the pressing need was which justified this new piece of legislation. The Act came into being following the report of Sir David Clementi, a financier, who conducted a review on behalf of government. The Bar Council considered that the Bill, as drafted in its early form, presented a real threat to the independent Bar and to the values which the independent Bar considered to be important in the public interest. The Bar Council argued very strongly for change as the Bill evolved. In particular the Bar contended strongly that the objectives of the legislation should be explicitly set out and should include supporting the constitutional principle of the rule of law, improving access to justice, encouraging an independent strong diverse and effective legal profession, and promoting and maintaining adherence to professional principles. Ultimately, the Government accepted that these principles should be enshrined in the Act and in Section 1 (1)(a) – (h) a series of regulatory objectives were stipulated which include those already mentioned as well as the objectives of protecting and promoting the interests of consumers, and promoting competition in the provision of services. The net effect is that the Legal Services Act is not the slave of competition. The Bar accepts that competition is a perfectly legitimate objective to be served, but it must be balanced and counter-balanced against those values which any genuinely independent legal profession should hold dear.

The Legal Services Act 2007

The legislation is a long and complex instrument. The main points of interest may be summarised as follows.

First, the Act requires professional bodies to split their regulatory from their representative functions. The Act contemplates that there can be more than one regulator. There is no single monopoly regulator responsible for the legal profession. The key point is that within a profession, regulation must be properly independent. But that independent regulatory arm

still can sit within a single organisation. In arguing for regulation to remain within the profession the Bar Council won a major victory. Under the Act the primary duty to regulate is imposed upon the "Approved Regulator". In the case of barristers this is the Bar Council. However, the responsibility for regulation has been delegated to a ring-fenced independent regulatory arm. In the case of England and Wales this is now the Bar Standards Board ("BSB"). The independence of the BSB is substantial and real, but it is subject to certain logical limitations. In practical terms, the Bar Council and the BSB work well together. I will return to the relevance of the fact that the regulator is a body within the Bar Council at a later stage in this paper.

A second important feature of the Act is that it requires the removal of restrictions on "Alternative Business Structures" or "ABS". What is an ABS? It is, as it name suggests, something different from that which already exists. It will mean different things to solicitors and barristers. Traditionally barristers have operated exclusively out of chambers of self-employed individuals. But in recent years evolutions to the way in which the Bar operates have taken place and these changes have accelerated in very recent times. Following recent rule changes adopted by the BSB barristers may now operate in partnership with solicitors, and the Bar is presently working on a series of new business structures for the Bar known by the somewhat unglamorous title of ProcureCos. These methods of practice are "alternative" to the traditional method by which the Bar operates. But yet the mere fact that they are "alternative" does not mean to say that, by that fact alone, they are to be feared. A short point to make at this juncture is that "ABS" is a somewhat meaningless concept. It therefore requires the profession to add substance to it to make it meaningful.

The third major development brought around by the Act was the categorisation of standards as regulatory. Under the Legal Services Act a "regulatory arrangement" includes what are termed "qualification regulations" (see Section 21). Qualification regulations includes any rules or regulations relating to requirements which must be met by any person in order for them to be authorised by the regulator to carry on an activity which is reserved legal activity. Under this somewhat tortuous definition would fall the responsibility for regulators to set standards of advocacy. The Government has for some time been seeking to encourage standards of advocacy in criminal defence work. Initial responsibility for this project lay with the Legal Services Commission ("LSC"), the government agency responsibility for the allocation of legal aid. However, in December 2009 efforts by the LSC to institute a standards regime largely failed and the responsibility was taken on by the BSB and the equivalent regulatory bodies for solicitors and legal executives. The present object is to produce a scheme for criminal defence advocates within approximately 12 to 18 months. The net effect would be that if you wanted, for example, to appear as counsel in a complex murder or terrorist trial you would have to be accredited to be able and competent to take on a case of that complexity. The ramifications of an accreditation process for criminal defence are wide ranging.

A fourth major development under the Act was that responsibility for service (as opposed to professional) complaints are to be addressed by a new body independent of the profession altogether called the Office of Legal Complaints.

A fifth major development is the institution of a new over arching regulator, the Legal Services Board ("LSB"). This added a layer of administrative bureaucracy to the legal market such that the LSB sits at the apex of the pyramid with, below it, the Approved Regulators for each discreet profession within the legal market.

The Bar and the pressures upon it

With that introduction to the structure of the Legal Services Act may I now turn to identify the pressures which are presently being exerted upon the Bar and which have generated a need for the Bar to change. In doing this I want, first, to give you some data about the size and nature of the Bar and then secondly, to describe the economic and other pressures which exist.

The total size of the England and Wales is approximately 15,500. In addition there are about 6,000 non-practising barristers and this includes a substantial number of individuals called to the Bar in England and Wales by the Inns of Court but who, thereafter, go abroad to practice. Of this total there are approximately 12,200 self-employed barristers and just over 3,000 employed barristers. Many of these employed barristers work in the Government legal services. There are approximately 1,450 QCs. At the last count there were 734 sets of chambers of which about 350 were in London and just short of 400 outside of London. So far as gender split is concerned in 2009 851 men were recruited to the profession and 921 women. There are approximately 1,700-1,800 new recruits called to the Bar per annum but only about 500 pupillages and new tenancies. With regard to the split of publicly funded and private work, about 5,000 barristers do publicly funded work mainly or exclusively in the fields of crime and family law. The importance of this is that the publicly funded sector is a large segment of the Bar and therefore Government and legal aid policy has a major impact on the strategic thinking of the Bar Council.

Turning to the pressures upon the Bar these include, for obvious reasons, the changing economic climate. The existence of a substantial and deep rooted recession has exerted great pressure upon legal aid. A striking feature of the recession is the creation of huge debt on the part of Government which has to be amortized. In the United Kingdom the legal aid budget is presently set at about 2.1 billion pounds. But this is for a population approaching 60 million. The present Government has introduced literally thousands of new criminal offenses. Demand for legal aid has substantially increased but the present budget has been frozen to 2006 levels and all Governments will, in the future, be under pressure to reduce the scope and extent of legal aid in order to contribute to Government policies to reduce the national debt. One consequence of this is that the Government has been ruthless in seeking to extract efficiencies out of the system and sees one way of doing this as allocating more money to fewer and larger units who can extract greater economies of scale and thereby (they hope) give better "value for money" to Government. In short, size matters.

A second pressure lies in the fact that there are rapid changes in the purchasing habits and practices of purchasers of legal services who, as with Government, seek better value for money. We have seen, for instance, increases in the extent to which local authorities will outsource legal work. Similar developments in the market place are found in relation to the manner in which insurers and banks seek to procure legal services. Clients are seeking to

commoditise work and outsource it in ever larger chunks. The consequence for the Bar is that major clients are seeking to allocate block contracts and reduce case by case instructions. If the Bar is to continue to gain work it has to be in a position to contract with large clients who have increasingly minimal in-house capability to conduct legal work and require out-house lawyers to assume the total burden on their behalf.

A third major pressure on the Bar is increased competition. Solicitors have enjoyed rights of audience in the Higher Courts since 1990. Solicitors made relatively modest in roads until the last few years when there has been a rapid increase in solicitor advocacy in particular in crime and family law. Solicitors, as a profession, are therefore seeking to reduce the amount of work they allocate by way of instructions to the Bar. This is especially acute in criminal defence work because of the way in which legal aid is structured whereby a preponderance of Government funds are allocated, in the first instance, to solicitors who thereafter have the choice of whether to keep the advocacy element of the work in-house or instruct external counsel.

Changes at the Bar

In response to these pressures the Bar is in the process of changing. In November 2009 the BSB adopted a series of rule changes: allowing legal disciplinary partnerships i.e mixed partnerships between solicitors and barristers; allowing Bar only partnerships (but only in principle because at present no entity regulation powers exist within the BSB); an increased right to conduct litigation so that barristers in the future may collect evidence, prepare statements, conduct correspondence, attend police stations; increased direct access into private family, private family and private immigration; permission to act in a dual capacity (eg. as an employed barrister for part of the week and a self-employed barrister for the rest of the week); and, removal of the restrictions on sharing a premises. The BSB is presently preparing consultations on entity regulation and wider direct access.

What we want and what we don't want

With regard to what the Bar really wants, or does not want, it is clear the Bar does not want fusion with solicitors. It does want to maintain its predominantly self-employed, referral, status. It does not want partnership. Rules governing conflicts of interest mean that were the Bar routinely to go into partnership they would not be able, as they do now, to appear regularly against each other. Routine partnership would therefore have the negative and prejudicial effect of reducing the overall capacity of the Bar to serve the needs of the public and it is not felt that partnership as a commercial or corporate vehicles offers sufficient practical advantages to the Bar to make it more attractive than the present *modus operandi* of the Bar. In any event, the Bar wishes to retain the traditional chambers structure as its core organisation. It is interesting to note that the Solicitors' Regulatory Authority ("SRA") has recently investigated the desirability of relaxing the rule on conflicts but, even more recently, has abandoned such attempts in the face of hostility from in-house corporate counsel.

At the same time the Bar needs increased flexibility and increased direct access. It wants greater flexibility to address a very rapidly changing market. It wants to "fight back" at solicitors who are encroaching into advocacy traditionally performed by the Bar. It needs

(regardless of want) to become direct contractors with the LSC for criminal defence legal aid. In the light of this the Bar Council has introduced a new model for the Bar. It is called "ProcureCo". This is an unglamorous but essentially descriptive name. A ProcureCo is a corporate bolt-on or adjunct to Chambers. It will enable chambers to contract directly with block contractors such as local authorities, the LSC or other financial bodies such as banks or insurance companies who are seeking to commoditise work and move from a system of case by case instruction to block contracted outsourced legal work. For regulatory reasons a ProcureCo can only procure i.e. it can only facilitate provision of legal services by others. It cannot provide legal services itself. This might occur in the fullness of time if the BSB engages in "entity regulation". At that point the BSB will regulate such ProcureCo vehicles and they will become, in effect, "SupplyCo's". In other words they will be able to employ lawyers. Even if and when this is permitted it will remain highly unlikely that the Bar will move away from its traditional chambers structure due to the conflicts rule. However, a ProcureCo or SupplyCo will give to the Bar a greater flexibility to engage in new activities and to compete more vigorously with solicitors in all areas of work. The Bar Council has produced model documentation prepared by a firm of city solicitors. That documentation is now on the Bar Council's website.

The Future of the Bar

So far as a vision of the Bar in the future is concerned we have been giving a great deal of thought to the changes that are needed or desirable to ensure that the Bar is fit for purpose in the future and, moreover, can thrive and not just survive.

In (say) five years time we expect to see a Bar that is still very much advocacy focused. It will still largely, but not exclusively, be a referral profession and it will have a much larger litigation tail that at present, probably incorporating direct access to clients. The Chambers of the future will be much more flexible than it is at present. It will have a range of corporate and commercial vehicles which orbit the traditional sets of chambers but which the Chambers use for contracting with a wide variety of corporate and governmental purchasers of legal services. Critically the Bar will not be characterised by partnership, even though its rules will allow it.

The Bar will also be much more outward looking. I would like to see the Bar as the natural home for all top flight advocates. We will say to solicitor advocates that if you wish to be an advocate for the future the - "Join the Bar".

With standards for criminal defence work in the process of being instituted there will be a premium on high quality continuing education. The Inns of Courts and the Circuits will provide this *par excellence*. There are already signs that the better solicitor advocates wish to join the Bar. The numbers applying to transfer to the Bar are increasing year on year.

In all of this the role of regulation is important. Having a separate regulator specialising in advocacy is a real selling point. It operates as a brake on any movement towards fusion which might otherwise occur.

Lessons both generally and for other Bars?

Finally, some lessons.

First, contrary to initial expectations the 2007 Act has actually created an opportunity for the Bar to strengthen its position in the face of an extremely challenging and difficult economic climate. The Bar can, notwithstanding the climate, improve its position provided it is bold and imaginative. In this regard the Bar needs to perform surgery (which some might consider feels painfully radical) in order to reinvigorate the body corporeal.

Secondly, "ABS" for the Bar need not necessarily be feared. As a term "ABS" is virtually meaningless. It is up to the Bar to add content and substance to the concept and turn it to account. In brining about change the BSB is moving steadily and upon the basis of detailed research and evidence. The Bar Council also is prepared to move incrementally and creatively as the ProcureCo project demonstrates.

Thirdly, the profession will change. It has no choice. And it is up to us to ensure that as the recession recedes the Bar is stronger, not weaker. It is also up to us to fight to preserve our traditional strengths and standards since we believe, fervently, that these are powerfully in the public interest

Fourthly, as to lessons for *other* referral Bars the starting point for you is to challenge any assumption made by your Governments that there is a need for intervention. If it be the case, as it is in the United Kingdom, that consumers are essentially content with the legal services they receive, and the market is competitive, and the profession is held in high esteem domestically and abroad, then one must pose the question – why intervene at all? Furthermore, when considering whether the regulatory position in England and Wales can be transplanted elsewhere remember that the Bar of England and Wales is a large Bar. A significant percentage is focused around London and other large industrial centres. There is a high degree of specialisation and a well developed Chambers structure. It is clear that what may apply to the England and Wales Bar will not necessarily translate directly to the Bars of other jurisdictions which have different economic and cultural defining parameters.

Fifthly, and perhaps one of the most important points - so far as regulation is concerned the key here is to bring regulation *within* the profession. To my mind there is a very real danger of permitting regulation to be detached from the profession. A detached regulator is likely to be dominated by non-lawyers and there is no guarantee it will be in-touch with practitioners or with clients of practitioners. Conversely, a regulator which operates from *within* the profession will, by definition, be made up in substantial part of practitioners (though in all probability with a strong lay leavening), and it will be in touch with its regulated constituency and its client base. A regulator from within is, in my firmly held belief, far more likely to operate in the best interests of the profession and the public interest. It will, by definition, be a much more sophisticated and nuanced organisation than a regulator that sits externally from the profession and thereby distant from the consumers the profession serves. In saying this I am not suggesting that a regulator from within is incapable of acting with genuine independence. The Bar Council has very recently drafted a entirely new set of constitutional documents for te profession which gives the BSB its own constitution and

entrenches its independence. If a regulator is "within" a profession can with considerable confidence leave that body to do its job. If, therefore, you are constrained to adopt new regulatory structures make the regulator your friend and rely upon the fact that the Parliament of the United Kingdom accepted that this was the optimal way to proceed. As the Bar evolves, and necessarily becomes more commercial in its outlook, there is a commensurate need to be vigilant to preserve its key strengths of independence, integrity and collegiality. Do not be scared of tough regulation. If the public is to continue to trust the Bar than an integral factor of preserving that trust will be the existence of effective and rigorous regulation.

Bon Voyage

In conclusion, the Legal Services Act 2007 is being looked upon with enormous interest by Governments worldwide. This interest is not confined to common law jurisdictions. For example, in Europe there are numerous regulatory developments which seek to follow, to some degree at least, the model laid down in the 2007 legislation.

Where the legal profession in England and Wales goes, the rest of the world is beginning to follow. We can only wish you *bon voyage*.

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