Changes at the Bar of England and Wales

The Fifth World Bar Conference was held in Sydney in April. One of the issues discussed at the conference was the recent approval by the Bar Standards Board of England and Wales of changes to the structure of the profession to permit barristers to form partnerships and other 'alternative business structures.' Barristers are now permitted to practise in Legal Disciplinary Practices under regulation by the Solicitor's Regulation Authority, without having to re-qualify as solicitors or surrender their independent practice at the bar.

Members and former members of the bar in England, Scotland, Northern Ireland, Ireland and Africa participated in a discussion of the changes, their application in England and Wales, and their potential application in other jurisdictions. Of concern to the English Bar, and to the bar in other countries, is the potential impact of the changes on the independence of the bar and the operation of the cab rank rule.

Nicholas Green QC provided an overview of the changes in England and Wales and a commentary on the current state of the English Bar and the need to balance the competitive pressures faced by the English legal profession against the traditional standards necessary to preserve an independent bar committed to the practice of advocacy and specialist advice.

Mr Justice Wallis offered a perspective from his time at the South African Bar, both before and after the time of apartheid, and discussed his concern that the opening of commercial avenues of practice such as partnership has the potential to interfere with the independent bar's role in preserving the rule of law, as commercial considerations and conflicts of interest associated with collective practice limit the operation of the cab rank rule and thereby access to justice for clients in need of representation in the hardest of cases.

The changing face of the Bar of England and Wales

Nicholas Green QC, Chairman, Bar Council of England and Wales

The threat of government interference

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 per cent of users were essentially content with the service they received. One might wonder therefore what the pressing need was which justified this new piece of legislation.

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 it considered to be in the public interest. 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. Section 1 (1)(a) – (h) stipulated a series of regulatory objectives, which include those already mentioned as well as those 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 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. 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. 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, 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.

A second important feature of the Act is that it requires the removal of restrictions on 'Alternative Business Structures' or 'ABS'. Traditionally barristers have operated exclusively out of chambers of self-employed individuals. 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 known by the somewhat unglamorous title of ProcureCos. [T]he mere fact that they are 'alternative' does not mean to say that, by that fact alone, they are to be feared.

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. 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 overarching 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

There are approximately 15,500 barristers in England and Wales. Of this total, roughly 12,200 are self-employed and just over 3,000 are 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. 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. 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. Clients are seeking to commoditise work and outsource it in ever-larger chunks. If the bar is to continue to gain work it has to be in a position to contract with large clients who have decreasing in-house capability to conduct legal work.

A third major pressure on the bar is increased competition. Solicitors have enjoyed rights of audience in the higher courts since 1990. Solicitors, as a profession, are 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. 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

The bar is changing in response to these pressures. 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; permission to act in a dual capacity (e.g. 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.

... the Bar Council has introduced a new model for the bar. It is called 'ProcureCo'. A ProcureCo is a corporate bolt-on or adjunct to chambers.

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. [I]t is not felt that partnership as a commercial or corporate vehicle offers sufficient practical advantages to the bar to make it more attractive than the present *modus operandi*. In any event, the bar wishes to retain the traditional chambers structure as its core organisation.

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.

In the light of this the Bar Council has introduced a new model for the bar. It is called 'ProcureCo'. 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, 'SupplyCos'. 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.

provided it is bold and imaginative.

Secondly, 'ABS' for the bar need not necessarily be feared. In bringing 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.

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.

The Future of the bar

In (say) five years time we expect to see a bar that is still very much advocacy-focussed. It will still largely, but not exclusively, be a referral profession and it will have a much larger litigation tail than 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.

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*.

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

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. It is clear that what may apply to the England and Wales Bar will not necessarily translate directly to 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. 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.

The Bar Council has very recently drafted an entirely new set of constitutional documents for the 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. 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 then an integral factor of preserving that trust will be the existence of effective and rigorous regulation.

The BSB and the structure of the profession

Mr Justice Malcolm Wallis, High Court, South Africa

[I]f it is so, as Nicholas [Green] has said, that after the current changes have been implemented the English Bar will 'look and smell and feel the same' I wonder why we are having this debate. However I fear that this may not be entirely so and I trust that friendly concern for what is about to happen to the barristers' profession in England and Wales will not be taken amiss.

[T]here are important differences between the organisation of the bar in South Africa and that in England and Wales. In South Africa numbers are about 2000, based in 13 centres in an area roughly the size of mainland Europe. In each centre there is a separate bar and the General Council of the Bar is a federal body. The South African Bar, like many European jurisdictions, only covers advocates in private practice and does not include advocates in employment, even those in the service of the National Prosecuting Authority. Nor is membership compulsory. Whilst advocates form groups for administrative reasons and share administrative facilities, the system of clerks is unknown and relationships between advocate and attorney are direct, not mediated through a clerk. Lastly the bar is not as yet subject to regulation or oversight by any governmental body although that is under debate with a proposed Legal Practice Bill.

Having said that, however, the similarities are far greater than the differences. In both countries individual practice, collegial relationships, the operation of the cab rank rule, and the rules of client confidentiality and the avoidance of conflicts of interest are recognisably similar. In both the focus is on the representation of clients in courts and tribunals and the furnishing of expert legal advice. In both the practitioner is required to be independent and owes a fundamental duty to the court. We train young advocates in the same way. We share a common heritage.

Inevitably ... fundamental alterations to the manner in which the profession operates in England and Wales will be felt in jurisdictions such as our own where politicians, legislators and competition authorities will look to what has happened there for guidance.

Inevitably, therefore, fundamental alterations to the manner in which the profession operates in England and Wales will be felt in jurisdictions such as our own where politicians, legislators and competition authorities will look to what has happened there for guidance. And once those changes occur in England and Wales they will, as the BSB recognises, be irreversible.

My overwhelming impression as an outsider is that two commercial considerations are central. First there are the perceived interests of consumers and second there is the concern of the bar at the prospect of being excluded from various types of legal work. The

perspective was a commercial one and a belief that the proposed changes would benefit consumers by making it simpler and cheaper for them to obtain access to legal services. Whether that occurs in practice I take leave to doubt, but that is the theory.

My second point emerges from the discussion of ProcureCos in the road show handout. Again viewing matters as an outsider and stripping away the oddity of creating a company to 'procure legal services' when what you mean is procuring legal work for lawyers, this is about enabling barristers to compete for work. Similarly the creation of different practice structures is for the benefit of practising barristers to facilitate their being in practice. The bar is being subjected to substantial commercial pressures and so the drivers of change are commercial as Nicholas has freely conceded in his remarks.

I find this focus on the commercial troubling because it does not start with a concern for the function of the legal profession in a democracy.

I find this focus on the commercial troubling because it does not start with a concern for the function of the legal profession in a democracy. Is it part of – indeed an essential part of – the ongoing pursuit of justice under the rule of law, or have we finally achieved the doom, stated by Marx and Engels in The Communist Manifesto, of converting the lawyer into a paid wage labourer? It poses a challenge to the notion that apart from their commercial worth there are broader and more important values that should enjoy priority in assessing the lawyer's role. When it is proposed to tamper with the structure of the legal profession these questions need to be answered.

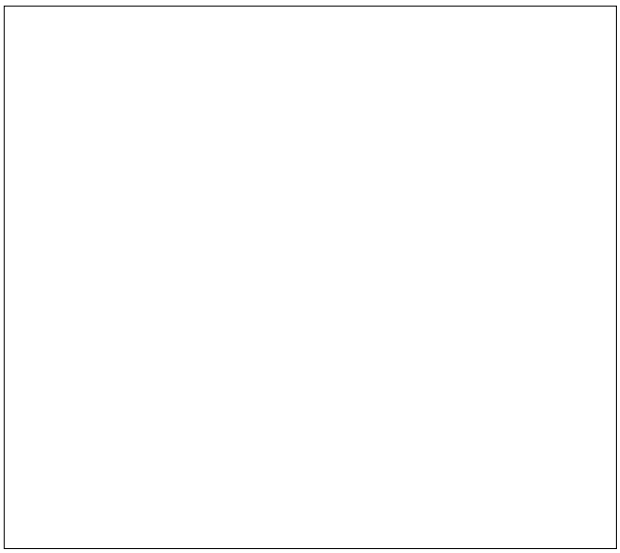
Three changes are pertinent to the bar as an institution. They are barristers practising in legal disciplinary practices regulated by the Solicitors Regulation Authority without re-qualifying as solicitors; the possibility of barristers practising in barrister-only partnerships and the operation of the cab rank rule.

Barristers practising in LDPs will in effect become solicitors. The fact that the SRA is the regulator signals that clearly, but I can speak from our own experience. This is what has happened with the Legal Resources Centre that was established in 1979 as a public interest law firm involving advocates and attorneys committed to the protection of civil liberties. It is now to all intents and purposes a firm of attorneys and I predict that the same will happen with LDPs.

If barristers continue to provide a highly skilled litigation service they will survive as a separate group within the legal profession. If they do not, then they do not deserve to survive.

The other two changes, which I view as linked, are more significant than one that enables people to change sides in the profession. The latter has always happened and if it is thought desirable to facilitate it then so be it. I am also not concerned about the spectre of fusion. If barristers continue to provide a highly skilled litigation service they will survive as a separate group within the legal profession. If they do not, then they do not deserve to survive. More important are the reasons that underpin the prohibition on partnerships and the cab rank rule.

Identifying those values is not always easy. Broadly they fall under the rubrics of access to justice and independence. [W]here there is a substantial body of barristers, as there is in England and Wales it is easier to discount them because numbers mask the issue of access to justice. The attractions of partnership seem to me obvious in terms of greater security; ease of commencement of practice; the ability to manage work within the practice and the ability to cover for one another when a barrister is unavailable. Perhaps it relieves some of the pressures of administration and the stress of individual practice. Whilst Nicholas tells us that



An apartheid notice near Cape Town. Photo: Getty Images

in his discussions there is no interest in partnerships that does not surprise me because he is speaking to people who enjoy the advantages of individual practice in reasonably secure circumstances.

For me the people it will attract will come from the frightening figures he gave us this morning – 1800 calls a year and only 500 pupillages and a like number of tenancies in chambers. What happens to the balance? I predict that the attractions of barrister-only partnerships will initially come from this group as they strive to obtain access to the profession, and its attractions will grow from there. I am afraid therefore that I cannot share the view that the Bar of England and Wales will continue to 'look and smell and feel the same'. I view barrister partnerships as a danger there and even more so in countries that are smaller or where there needs to be an emphasis on resisting government overreach. Let me explain briefly why I say that.

First, partnership limits the availability and accessibility of counsel with particular skills. There is a natural tendency in advocates' groups or sets of chambers to bring together people with common practice areas. At present that does not limit availability but a partnership will, certainly in smaller countries where those skills are in short supply. It will do so directly, because rules against conflicts of interest will prevent members of the same partnership from acting on opposite sides in a case, but also I think in other more subtle ways. It will I predict increase costs because the costs of attorneys and solicitors are always higher than those of the independent bar. It subjects the barrister to constraints that infringe independence of thought and action because the partnership relationship will demand it. There will be a reluctance to represent unpopular clients that is characteristic of larger law firms. The point is that partnerships inevitably undercut the independence of the practitioner by making her or him subject to the discipline of the group in a way that cannot happen at present. In a partnership obligations are owed to one's partners that necessarily constrain the ability of the barrister to act independently.

South African lawyers know what it is like to practise law in a society where the rule of law is ignored; where law is an instrument of oppression not a guarantor of freedom.

Lastly I fear that the time will arrive when the ProcureCo tail will wag the barrister dog. I doubt whether the cab rank rule can prevent this. I would be interested to know when last in any of the jurisdictions represented at this conference there was a complaint that the cab rank rule had been breached. The 'rule' is less a rule than an ethos that barristers understand and follow and it provides a protection for them in taking on unpopular cases, which are the ones that matter. No-one gives a jot about a barrister representing a client accepted by society. The rule exists for outlaws and unpopular causes.

The cab rank rule can only be enforced against an individual not a firm, and in a firm its impact will be diluted because conflict of interest rules mean that it can only apply to one member of the firm at a time. And once the rule is confined, as it will be in practice, to individual practitioners some enterprising specialist in competition law will point out that it is discriminatory

and anti-competitive and that will be its quietus. And when that happens who will represent the truly unpopular people and causes in society? These rules exist for times of stress and crisis and once lost they will not be recoverable. As the BSB has said the change is irreversible.

South African lawyers know what it is like to practise law in a society where the rule of law is ignored; where law is an instrument of oppression not a guarantor of freedom, and where the legal profession's independence – not only instrumental independence but independence in mindset and approach to the practice of law – is essential in order to protect ordinary members of society from an over-powerful government.

It was that independence, nurtured by the fact that every advocate was bound by the cab rank rule; that every advocate was available in every case to high and low; that every advocate was free from the commercial restraints that partnerships and corporate structures impose upon their members, that enabled many advocates in South Africa to fight for the rule of law, to resist apartheid and to use the courts creatively to bring about change.

It is largely because of those traditions of independence that we were able to reconstruct our legal system after apartheid and create legal institutions that function in a democratic society under the rule of law. Tampering with these fundamentals places the ability of the profession to play that role at risk. And we should remind ourselves that it is when societies are at risk that we need lawyers to play that role.