

Challenges and Choices: The Bar in Flux

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About this Report

'Challenges and Choices: The Bar in Flux' is the third in a series of reports on key issues facing the legal sector, published by Jomati Consultants LLP. The next report will focus on what will be the new practice trends of the future.

Previous reports include: 'Evolution or Revolution? – The New Lawyer-Client Relationship', published in June 2010, and 'The Next Wave: Globalisation after the Crisis', published in March, 2010. If you would like a copy of this or any other report please visit our website, www.Jomati.com.

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Disclaimer and Thanks

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Introduction

For the majority of the 15,000 barristers in England & Wales¹ life is changing. The Bar is witnessing a range of events that include: legal aid cuts and radical reform to how the State funds the justice system; the steady invasion of solicitors into the realms of Higher and Lower courts; plus a host of new permitted business structures and a variety of ways to use them. All this, and more, means the Bar is in flux and will remain so for a number of years to come.

The business practices of some barristers are changing rapidly too, with the Bar seeing consolidation of chambers to gain economies of scale and the increased use of marketing to develop business. These changes have clearly segmented the market. The top 30 sets in England & Wales by revenue now bring in £750 million in fees. Yet, among sets focussed on publicly funded work, there are barristers who are wondering if they should even continue down the road they are on. In this regard chambers have never been so far apart.

The Bar is faced with a complicated picture of success in some quarters and serious concern about earnings in others. The key theme that unites everyone is that the Bar is evolving. What had once seemed like areas where barristers didn't tread, such as marketing, branding, investment in IT or hiring practice managers, has now become *de rigueur* for many. From new practice rights, to new structures such as the procureco, there are also new possibilities for barristers today that could hardly have been imagined a few years ago.

Yet, many of the 340 chambers in England & Wales are still not making the most of the opportunities currently available to them. Moreover, as the world of the Bar is shaken by legal aid cuts, the sharing out of advocacy among solicitors, and the general economic effects of a State and lay client base that are looking everyday to cut costs, there are plenty of strategic choices to be made. Not making those decisions and focussing just on one's individual practice may work for those in solo practice, but for chambers as a whole inaction may prove costly in the future.

We spoke to barristers at all levels of the profession and despite the scare stories in the media, and despite too, the fact that many legal aid practitioners will face a very difficult few years ahead, we found there is a huge amount of positive energy in the Bar. Almost all the barristers we spoke to greatly loved their profession and took a high degree of satisfaction from their work. But, beyond that, barristers were very much of the opinion that they would find a way through the coming changes, that their independence would remain and such fundamentals as the cab rank rule, would never be compromised.

Many barristers were already considering the decisions they need to make. Our aim with this report is to help barristers and sets that are considering their options to come to the best conclusions they can. We believe the Bar is here to stay and it is not the purpose of this report to focus solely on the challenges, but also the choices all barristers can make to improve their situation now and in the years ahead.

¹ There are around 12,200 self-employed barristers in 'independent practice' and around 3,000 employed barristers, Bar Council data for 2009.

Chapter One: The Future of Legal Aid

1: The Challenge Ahead

For barristers to respond to the Coalition Government's planned cuts and reforms of the legal aid system it is necessary to gauge their impact. In June this year, the Secretary of State for Justice, Kenneth Clarke, stated: "I suppose in an ideal world we would have a national legal service, in the same way as we have a National Health Service. [But] we're actually in a position where we cannot even afford the system we've now got." We are now at a watershed moment, where a new approach to legal aid is beginning, and one where there will be clearly less funding than before.

The Ministry of Justice (MoJ) will soon have to find at least 25% in savings in its £9bn budget. A £500m reduction in the current £2.1bn legal aid budget has been already suggested, but not confirmed. The MoJ is also bringing the Legal Services Commission (LSC) under its direct control, making it an executive agency. This will ensure that any new MoJ policies on legal aid are fully implemented.

The expected cuts come after public legal funding had already been effectively frozen in 2004, not rising significantly above £2.1bn since that year. They also follow a recent cut of 4.5% on graduated advocacy fees, with two further cuts of 4.5% planned in the next two financial years to make a 13.5% reduction in total².

Consultations on how the MoJ should reduce costs have been launched and results should be published in October³. The MoJ will then pick its policies and launch a second consultation to conclude at the end of winter 2010-11. One can therefore expect 'the new regime' to be in place from the new financial year of 2011-12. On top of any new fee cuts or systemic reform, we may also see LSC contracts re-tendered before they have been completed.

What needs to be borne in mind is the MoJ is not just seeking to cut fees, it is looking at 'root-and-branch' reform of legal aid, examining procurement systems, delivery methods of legal advice, and seeking to reduce the number of people and case types where legal aid is applicable. This in turn will impact barristers; whether directly, or indirectly due to instructing law firms losing out on matters. Below are official and unofficial proposals that give a flavour of what may come:

- A levy on all criminal clients to help pay for trials, or making more people take private insurance to cover legal costs.
- The family consultation document⁴ suggested trying to move more cases out of court and into mediation and removing child custody cases from the courts.
- Using IT to permit the justice system to process cases without needing court appearances⁵.
- Solicitors receiving the same fee for attending the police station in person as for advising over the telephone.
- Limiting legal aid for immigration appeals, judicial reviews in relation to human rights and ancillary relief
- Shortening the length of trials by allowing judges to enforce a strict timetable.
- Increasing magistrates' sentencing powers up to 12 months in order to reduce the number of Crown Court cases, which would indirectly permit more solicitors to handle advocacy without needing Higher Court rights, or a barrister.

² The logic behind this was prosecutors were estimated to be paid 17.9% less than defence lawyers. The 13.5% cut was chosen on the basis that this would also mean that Very High Cost Cases (VHCC) rates in crime could not be claimed if the case ran between 40 and 60 days. The initial 4.5% cut was effective April 2010.

³ MoJ deadlines, Draft Structural Reform Plan, July 2010.

⁴ MoJ, Family Justice – Your views on its future, 30 June 2010.

⁵ MoJ Minister for courts and legal aid, Jonathan Djanogly: "I want to explore ways we can harness technology more effectively so people don't necessarily have to physically attend court." 23 June, 2010.

The idea of using interest on money held by solicitors on behalf of clients to fund legal aid has also been floated and would perhaps be welcome as it would help support legal aid spending. But this may be unlikely given the legal and banking complexities. The introduction of Best Value Tendering (BVT) for LSC contracts, as well as One Case One Fee (OCOF), or perhaps Block Pricing for a fixed number of cases⁶, may all also come in and are discussed below.

2: Impact of Legal Aid Cuts

Despite the Government promoting images of ‘fat cat lawyers’ by publishing how much the top 10 legal aid barristers make each year – the facts are that many junior barristers feel under-paid already. Nicholas Green QC, the Bar Council chairman, estimates that many self-employed barristers of four to five years’ call are earning gross fees around £50,000-£60,000 from which VAT, chambers dues, travel and other costs are deducted, leaving pre-tax earnings of £35,000-£42,000⁷. When deducting tax, and considering the hours worked with regard to case preparation, one is not left with what many barristers would expect to earn. If they had entered a City law firm they could be earning between a £80,000-£100,000 salary after five years’ practise⁸, with the security of having private health care, paternity/maternity leave, and paid holidays.

Another worry within the Bar is that the ‘reforms’ will lead to those barristers than can earn better fees elsewhere leaving legal aid work, resulting in an overall lowering of standards in court. Many barristers also believe that fee and procurement structures that promote the use of solicitors over barristers in court, will also be detrimental to the quality of justice. One barrister we spoke to added that a court system dominated by the least experienced advocates will lead to delays and hence mean greater costs to the MoJ.

The impact of cuts on solicitors also needs to be considered because legal aid law firms that exit this area due to lowered fees⁹, or no contracts, will diminish the pool of instructing firms for barristers. Many legal aid solicitors, who previously had relied on such work, have been denied LSC contracts already in this year’s erratic tender processes. For example, in the family tender only 54% of bidding firms won contracts¹⁰, while 73% of bidders won immigration work. In mental health some law firms have admitted they made speculative bids for work that they didn’t have the staff for – thereby severely reducing the number of matter starts for more qualified firms that did have the staff. However, in crime it is estimated that only 90 firms failed to receive any level of contract¹¹. Yet, MoJ reforms could still mean a re-tendering in crime with new criteria that will greatly diminish the number of contracts, (see below, Law Firm Cull).

3: How LSC Tendering Changes May Impact Barristers

There are four key, possible, structural changes to how LSC contracts operate that may be introduced that could have a major impact on barristers:

⁶ BVT and OCOF are examined in more detail below.

⁷ ‘The Future of the Bar’, Para 21, Nicholas Green QC, chairman of the Bar Council, June 2010.

⁸ Hughes Castell, Salary Survey 2009/2010.

⁹ Many legal aid law firms see profit margins of less than 20%, when it would be more usual for a law firm to operate on more than a 30% margin. Further cuts will therefore have a profound impact on their business model.

¹⁰ In this case the number of family firms with LSC contracts fell from 2,400 to just 1,300.

¹¹ All LSC references, Law Gazette, April-July 2010.

One Case One Fee (OCOF) - The LSC paying a single fee per court case, or for all legal elements of a court case from initial consultation to end.

Impact - Law firms with contracts will either keep all advocacy they can inhouse, or haggle down the prices they are willing to pay to barristers. In some cases barristers may still pick up work as it would be more cost-effective for them to spend a day at court, rather than send a solicitor from the firm.

Block Bidding – At present block bidding already takes place among law firms seeking contracts with the LSC, with firms asking for a fixed number of ‘matter starts’ in family matters, or police station ‘slots’ in crime. In theory, firms must prove their capability to handle the number of matters asked for, however, the bid does not concern price. The LSC could now add a price element in order to ‘sell’ blocks of work at a fixed price. For example, blocks of 100 matter starts for a fixed price of £x-thousand. This could also operate as a BVT system, (see below).

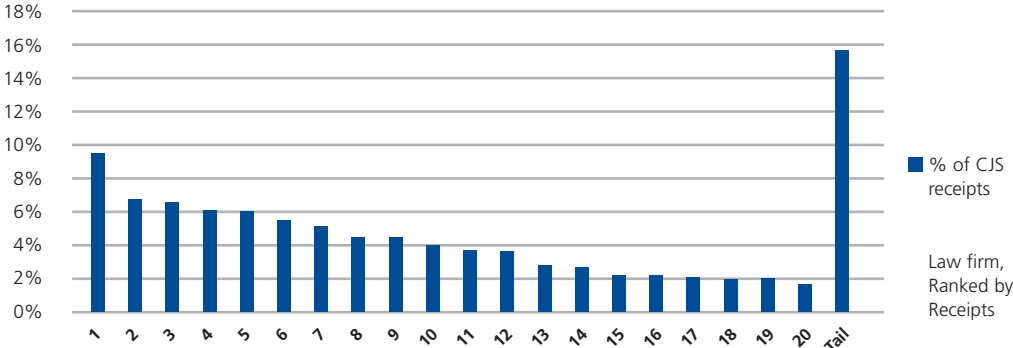
Impact – If a law firm holds the block contract and that just included litigation work, the contract holder could also seek to handle related advocacy work to boost their margins. If the block bid was also a OCOF system, then law firms would seek to reduce payments made to barristers for any advocacy work they could not handle inhouse.

Best Value Tendering (BVT) – Would force providers of legal services to bid for contracts on price, pushing lawyers to win tenders by ‘low-balling’. This would demand law firms – or chambers if operating a procureco¹² - to calculate the minimum possible margins they could operate on.

Impact - Law firms may seek to do more advocacy as this would be another source of income that would help compensate for the reduced fees on litigation. Key to BVT would be the expectation from the LSC that over time the prices could decrease as providers became more efficient at handling a high volume of work. In such a market only the largest contract holders could survive.

Law Firm Cull - the former Justice Minister, Jack Straw, set out in March 2010 to cull as many as 70% of legal aid crime firms from contracts in each LSC area¹³. The current Government has not confirmed this plan, but it remains a possibility. This would reduce the current 1,700 contracted crime firms to approximately 500. The idea was to force larger law firms to form that could better handle a higher volume of cases, and thereby be better placed to reduce rates. For example, in Kent today the top 20 contracted law firms handle 84% of all legal aid crime cases, with a number of smaller law firms, or a ‘tail’, covering the remaining 16% of the market. Reducing the contracts down to just 10 firms leaves at least 18 law firms without any criminal legal aid work. Sets instructed by these firms could then lose out on work.

Table 1: Kent Criminal Justice System (CJS) Area¹⁴, crime firms ranked by legal aid receipts.



‘Tail’ in the table above refers to firms with less than 1.8% of total receipts, in this case at least 8 and perhaps as many as 20, although firms in such a long tail would have a very small share.

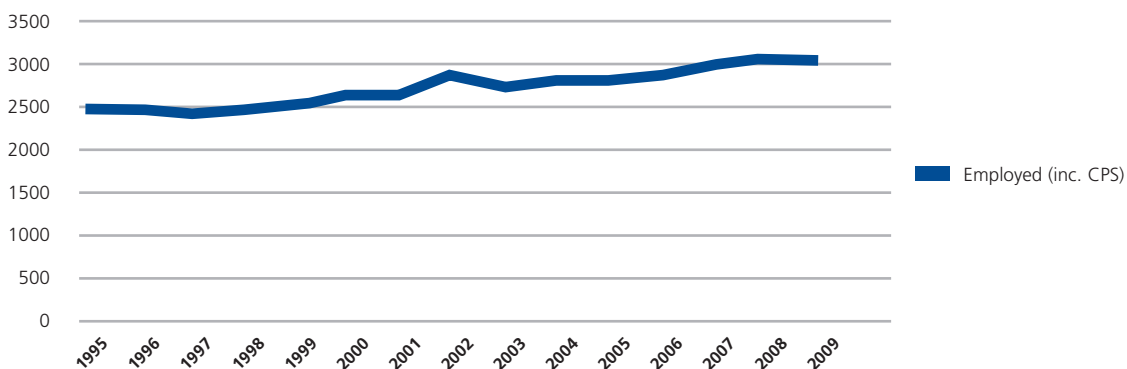
¹² See Chapter 3.
¹³ MoJ, 22 March 2010, ‘Restructuring the delivery of criminal defence services’. “We are clear that in future there are likely to be no more than eight to ten contracts per Criminal Justice System area.”
¹⁴ MoJ data.

Impact – Law firms tend to use the same sets, and the same barristers within those sets, again and again. The flipside is that loyalty can also preclude thinking about others. If a firm that instructed a set was folded into a larger firm with its own favourites there is no guarantee that instructions would continue.

4: Environmental Change that may Impact Barristers

There are also four environmental changes that may reduce the amount of work in court for independent barristers. The first is the rise in employed barristers, of which around 900 are in the Crown Prosecution Service (CPS)¹⁵. The CPS, in the belief that employed advocates are more cost-effective than the Crown instructing independent barristers, had increased its inhouse teams until recently. The Bar Council has pointed out how this harmed the self-employed Bar, and others have added that when one totals the cost of pensions, National Insurance, offices and other staff, employing barristers is not cost-effective for the CPS. The CPS has now put in place a hiring freeze¹⁶. Whether the CPS, and MoJ, can now be convinced they should reduce the number of inhouse advocates to save themselves money and also boost the self-employed Bar remains to be seen.

Table 2: Steady increase in the number of employed barristers, including CPS¹⁷.



The second issue is the closure of 157 Magistrates’ and County Courts – or around 30% of all courts in England & Wales. Less courts means longer travelling times, which means longer, less productive, days for barristers. Some chambers may also lose out on instructions if some provincial law firms give up due to the additional pain of increased costs of travelling to more distant courts. I.e. lawyer-free zones may open up in some rural areas, with all legal matters being sent to urban centres where larger providers already dominate. This closure programme may come hand-in-hand with the MoJ’s stated hope that better use of IT, such as video conferencing, telephone interviews and perhaps even court rulings sent by email, will reduce the need to appear in court.

Out of Court Disposals (OCD), whereby a policeman hands a person a caution or fixed notice fine, may also be having an impact. The Magistrates Association says that two years ago only 46% of offences led to ‘in-court convictions’¹⁸ down from a rate of 69% in 2001 - in part due to the rise of OCDs such as:

- Simple Caution and Conditional Cautions
- Street Warning for Cannabis use
- Fixed Penalty Notices (FPN)
- Penalty Notices for Disorder (PND)

¹⁵ ‘A critique of CPS’s Analysis’ July 2009, by Europe Economics, found there are 945 Crown Advocates, of which the majority are most likely barristers.

¹⁶ Since June 2010.

¹⁷ Bar Council data

¹⁸ Magistrates Association, ‘Out of Court Disposals’ report, 2008.

If the rate of offending stays roughly the same and more matters are concluded entirely out of court, then there is less opportunity for advocacy work. Many of these are minor offences and may not have led to the use of a barrister anyway, but the Association believes more serious crimes are also remaining unheard due to OCDs, including violence against the person.

Finally, there is the matter of more small law firms closing down, or being merged into larger businesses. As mentioned above, a possible cull of 70% of all crime firms from LSC contracts would have a major impact, and the halving of family legal aid contracts this year may already be causing serious financial problems for many instructing law firms. Other factors that will thin out the number of firms that provide sets with work include:

- Increased Professional Indemnity (PI) insurance costs and premiums – it is believed up to 750 law firms¹⁹ could enter the Assigned Risk Pool (ARP) in 2010 – i.e. those firms unable to find insurance any other way. The ARP premiums are huge and can often signal the end of the firm.
- Demographic change – the Baby Boomer generation²⁰, which led to many new, small law firms being formed, is now reaching retirement. Many firms may not be viable without the founder.
- Increased competition – new entrants such as Co-Op Legal, making use of structural and investment opportunities for non-lawyers set out in the Legal Services Act, may become serious competition for some High Street firms after October 2011. New entrants may also hire staff from smaller law firms, or in some cases take over whole firms to build their own capabilities.

Overall, around 2,000 mostly small law firms ceased trading last year, either due to closure or consolidation²¹. This figure may grow under the combination of the above factors.

5: Choices for Legal Aid Barristers

The market for legal aid barristers will be one marked by three key factors: less instructing law firms; law firms seeking to keep more advocacy work inhouse; and less fees for work carried out. Barristers in this market segment may have to accept they will have a lower level of income. But they may also be able to alter their working practices to increase their fee income in the following ways:

- Seek work in areas that draw upon a similar skill set. For example, a criminal barrister may attract work in other 'accusatory' scenarios, such as disciplinary hearings at professional tribunals, or move into regulatory work where individuals may have broken company or industry rules. For some, International Criminal Court work may also be possible.
- Seek work in entirely new areas, however this may be challenging at the beginning as the barrister will need to rapidly accumulate experience. Taking time to develop a 'side-line' while keeping legal aid work going for the time being may be a sensible compromise, although this will need close co-operation from the clerks.

¹⁹ The Law Gazette, 15 July 2010.

²⁰ Please see Chapter 8 for more details on demographic changes.

²¹ Based upon SRA data for closure rates: approximately 2,000 firm closures per year between 2006 and 2008.

- Reduce the cost base of chambers in order to compensate for the reduction in fees – although this may have negative repercussions if this lowers the level of service the set and its staff as a whole can provide (see Chapter 6). However, better use of IT, sharing desks and more remote working may help.
- Whether using a procureco, or by building closer relationships with instructing law firms, seek to secure a flow of legal aid work from those firms likely to retain their contracts. Although this cannot alter the fee levels the LSC is offering, it at least means sufficient volume of cases. (Procurecos are examined in detail in Chapter 3).
- Aim for higher value work, this may be helped by applying for Silk. The downside of gaining Silk is it can cut barristers off from lower value work that may still be needed (see Chapter 6).

Chapter Two: Solicitors versus Barristers

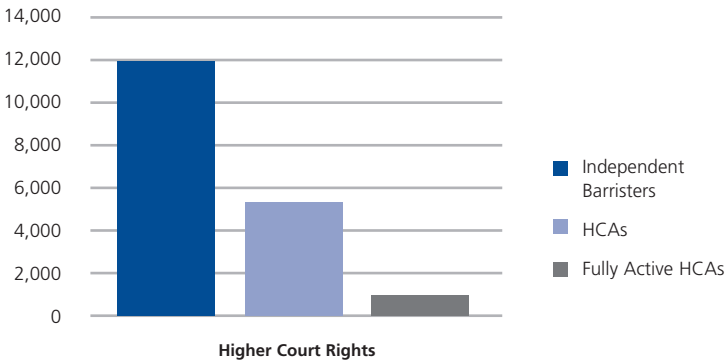
1: Impact of Solicitor Advocates

The Bar Council chairman, Nicholas Green QC, stated in his June 2010 report 'The Future of The Bar': "Higher Court Advocates (HCA) are increasingly...appearing in Crown Court in direct competition with the Bar and this has led to the reduction in the volume of work for the criminal Bar and the junior Bar in particular." Meanwhile magistrates are increasingly noticing the absence of barristers at the lower courts, again especially in crime. One senior magistrate we spoke to explained: "The change has been going on for some time, but previously we would see young barristers in court, now the Bar is less and less there."

The magistrate goes on: "[We] have to recognise that legal aid has constrained the use of counsel. The issue is cost – it's now cheaper for the solicitor to be there." Although, it should also be noted that for Crown Court work it is a different argument – it is not that barristers are too expensive, but rather because law firms are now sending their own HCAs to handle more trials because they want the fees.

So, how much of a problem is the 'invasion' of solicitors? According to a request to the Solicitors Regulation Authority (SRA) there are now 5,449 "individuals on the Roll who hold higher rights of audience in either civil proceedings, criminal proceedings, or both". It does not mention just solicitors because Legal Executives may also gain HCA status.

Table 3: Independent Barristers vs non-barrister HCAs, (SRA and Bar Council data.)



Are there really 5,400 HCAs competing directly with barristers for work in the Crown Court on a daily basis? From interviews we have carried out we don't believe the situation is this dire. We estimate there are no more than 1,000 solicitor advocates who make continual use of their rights to appear in higher courts and have for all intents and purposes become fulltime advocates. This will still have an impact: 1,000 HCAs making a living from advocacy means less fees going to barristers. Numbers may grow, but they are not yet at an apocalyptic level.

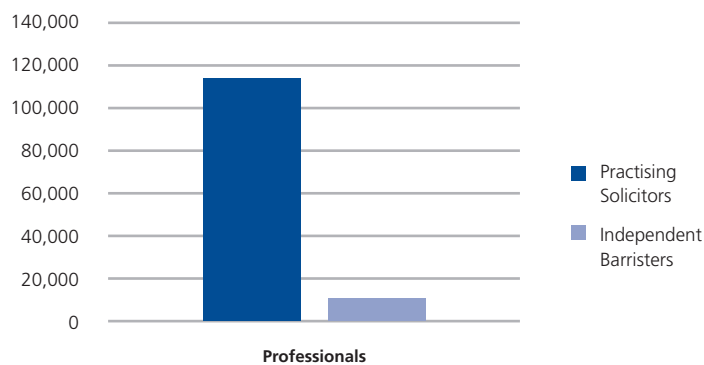
Also, commercial barristers should not fear their cousins the commercial HCAs, at least not yet. Barristers and solicitors in this area said it made little sense in sending a HCA to court as barristers with equivalent commercial experience would always be cheaper. There was also a sense that if there was a major commercial trial, perhaps with millions of pounds at stake, it was also better to have a truly expert barrister, who was a master of their niche. Some said it only made sense for a commercial law firm to send a HCA to court if it was a matter of speed and familiarity with the case. For example, if a law firm had been handling a case for some weeks, and there was suddenly the need to seek an injunction by sending a HCA staff member to court. But why are HCAs developing in crime?

- Solicitors handling crime are able to gain plenty of court experience as they progress in their careers, first appearing in Magistrates’ Court – where they have automatic rights already. Plenty of time in court naturally leads to familiarity with process and builds confidence. Taking the step into advocacy therefore is not so great.
- Because of a steady volume of criminal cases that go to court it can be economical to have dedicated HCAs within a law firm whose focus is publicly-funded court work. In other areas this may not make sense.
- The gradual decrease in legal aid has acted as a spur for HCAs to seek more regular appearances in court in order for their firm to gain both the litigation and advocacy fee. Cases in the Crown Court, which may last several days, also give more of an incentive for a law firm to dedicate resources to advocacy where in the past they would have instructed barristers.
- The leveraged structure of law firms, i.e. senior lawyers supported by multiple junior associates, enables, and perhaps encourages, some law firms to handle the entirety of a criminal case.

2: It’s Not Just HCAs

Solicitors are also increasingly handling simple advocacy matters in the County and Magistrates’ Courts. The vast majority of solicitors are not involved in such work, but solicitors massively outnumber barristers.

Table 4: Solicitors vs Independent Barristers 2010, (SRA and Bar Council data).



Around 40,000 solicitors are within the top 100 UK law firms by revenue and never handle legal aid work. Nevertheless, one would only need a small proportion of this remaining mass of 75,000-plus solicitors – mostly those at smaller law firms – to choose not to instruct barristers for lower court work so as to retain more fees and there would be an impact. We should therefore prepare for a steady increase in solicitor advocacy in the lower courts too.

Chapter Three: Procurecos Part One - Legal Aid

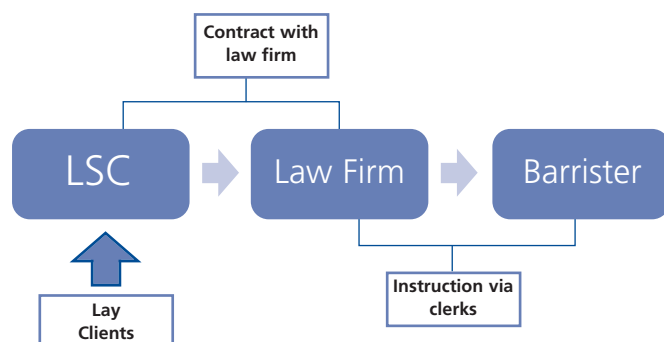
1: Introduction

A number of chambers have already set up holding companies in order to make it easier to handle matters such as banking facilities, or the management of premises. Most corporate bodies would prefer to do business with other corporate bodies, or a single legal entity, rather than an 'association of self-employed individuals' as most chambers are today. The procurement company (procureco) is simply taking this one step further, with its primary ability being that it can contract directly on behalf of the barristers. The Bar Council and Bar Standards Board (BSB) affirmed in November 2009 that procurecos were permissible and this March the Bar Council published a model structure²². However, the LSC contract process was set up with the aim of dealing primarily with law firms. How the LSC will view procurecos is not yet known, although the Bar Council is making representations to the LSC to ensure procureco vehicles are fully accommodated in future tenders.

2: Procurecos and Contracts

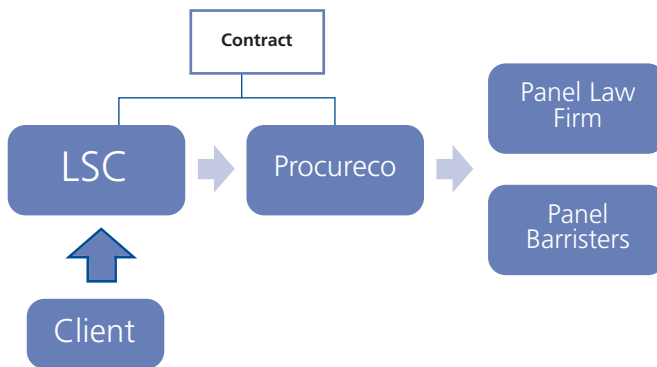
Procurecos are adaptable to all parts of the Bar, but much curiosity has come from publicly-funded sets. The structure appears to offer a means of securing the flow of work by dis-intermediating solicitors from the usual LSC contract process (see table 5). This is seen as especially important if OCOF, BVT or block bidding come in.

Table 5: The standard LSC contract system as it is today.



In the new model the procurement company is still linked to solicitors, but the law firm is placed on a 'panel' (see table 6). The panel, or panels, contain the legal service providers, including the barristers, that will service a specific LSC contract. Now the law firm sits in a parallel structure with the barristers. Solicitors are still needed to make many cases possible, as their litigation work cannot be carried out by barristers, but the law firm must share their previous close relationship with the LSC. Like this the barristers may now feel more in control of the work, but they have also created new challenges.

²² 'ProcureCo, Guidance Notes and Model Documents', Bar Council. March 2010.

Table 6: How an LSC Procureco might operate.

3: Key Challenges to Legal Aid Procurecos

The main issues of using legal aid procurecos are whether chambers will have the ability to operate one efficiently given the added bureaucracy and whether they will be able to find a suitable law firm to join their panel.

- The clerks, who may be running the procureco and managing the contract, will have to handle far more paperwork than ever before. Much of the LSC bureaucracy will be wholly new to chambers and time consuming.
- Successful law firms may have little incentive to join as a panel firm. As the MoJ and LSC cull the number of contracts with law firms and focus on just the largest, those that survive may seek to maintain their contract alone, as well as seeking to handle any advocacy where there is inhouse capability and sufficient profit. However, law firms that are not awarded LSC contracts may see such panel roles as a 'lifeline'.
- Chambers may be reluctant to compete for contracts against the law firms that have traditionally referred them work for fear that future referrals will cease.

There will also be the added complication of fee-sharing. The clerks will now have to consider how best to divide up fees between the panel barristers and the panel law firm. If OCOF was brought, in deciding which part of the procureco received what proportion of the fee could prove problematic.

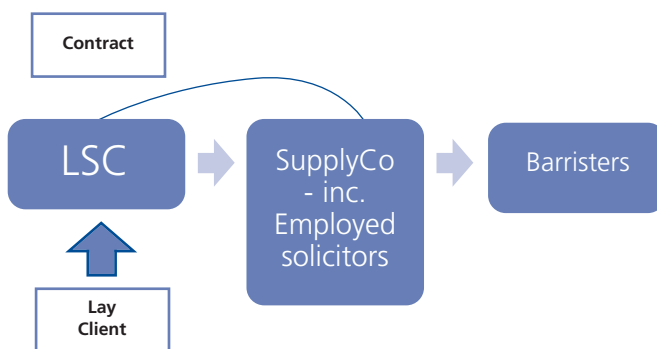
The LSC procureco is therefore not impossible to make work, but demands a far higher level of oversight and planning than the system currently used by chambers to obtain legal aid work. Barristers may find that by carefully identifying the right law firms to get close to, and developing strategies to build relationships with them, they may also secure a flow of legal aid work without the need for this type of procureco.

4: SupplyCo

The Bar Council has also outlined what is called a 'SupplyCo' – a supply company, or a procureco that can supply legal services itself²³. It could employ solicitors who would carry out litigation, removing the need for a panel law firm.

However, the BSB is not yet an entity regulator, and the supplyco would need some form of entity regulation. The BSB is looking at becoming an entity regulator, although it has reservations about doing so. A consultation was launched in April, 2010 to examine whether it should widen its remit²⁴.

Table 7: How a supplyco might work if it employed solicitors.



A fundamental issue with a supplyco is the need to employ solicitors who will be any good at their jobs, but who will not want to progress – as there may be no career ladder for them.

Extra costs are also an issue. A supplyco that handled litigation is a labour intensive operation that will require not just a number of solicitors, but additional secretaries and more investment in IT to handle the increased data management needs. Such an operation will also require careful management and there will be few people who are suited to such a multi-disciplinary role.

²³ 'The Future of the Bar', Nicholas Green QC, Bar Council, June 2010.

²⁴ Baroness Deech, chairman of the BSB, speech 'The Role of Regulation in Future of the Bar', June 2010.

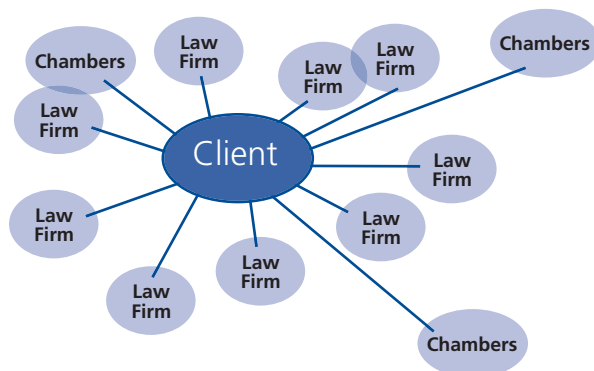
Chapter Four: Procurecos Part Two – Convergence

1: Use of Procurecos and the Panel System

While solicitors have been taking places on client panels for some years it is relatively new for barristers. The use of panels among chambers means barristers may advise the same lay client on a more regular basis, learning more about them and their overall legal needs as they do so. This proximity may also lead to specific pricing agreements, perhaps through a contract, such as agreeing to reduced fees in return for certain volumes of work. This in turn means chambers may need a vehicle with which to contract. Some chambers²⁵ already actively seek to develop alternative pricing structures with their clients, even without a panel agreement. However, moving these into formal and long-standing contracts may be helped by using a single legal entity such as a procureco.

It is worth considering what an important effect this ‘convergence’ trend has had on law firms. It was first pioneered by DuPont in 1992, which went from taking advice from 340 law firms to just 30, who became members of a closely monitored ‘panel’. Twenty years later, most General Counsel (GC) at large UK companies or public bodies see panels as standard practice. Many law firms also have fewer clients as a result, with partners seeking to deepen relationships with a small number of key clients with which they have a panel place. The same method is now being applied to barristers and the Bar will need to adapt to it. T-Mobile formed a panel of chambers to handle disputes work in 2008²⁶. While in 2009 one of London’s largest boroughs, Southwark, created its first panel of chambers.

Table 8: Standard unstructured procurement of legal services.



This year Southwark also created a joint panel of barristers with Lambeth, with the aim of cutting its advocacy costs by around £100,000 per year as a result. The councils are also understood²⁷ to be looking at how they can develop agreements for discounted rates via the panel system in return for ‘a certain level of work’.

The standard lay client/legal service provider relationship, (see table 8), i.e. without any panel or procurement system, sees many law firms and a handful of chambers each with their individual link to the client. Some links are close, some are distant. There is little or no relationship between the providers. It is an ad hoc structure, built up over time, but with limited ability to alter provider behaviour on fees or working practices.

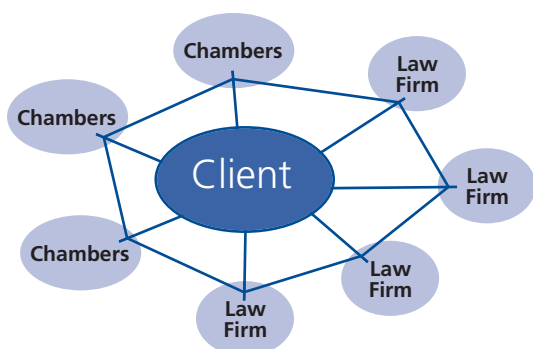
²⁵ Devereux Chambers, for example, states on its website they ‘discuss fee structures, packages, budgeting and conditional fee agreements’ and seek to build long relationships with clients that add greater value over time.

²⁶ The Lawyer, 26 May, 2008.

²⁷ The Lawyer, 9 August, 2010.

However, if the client creates a panel then the relationships between the company and its legal service providers can change significantly (see table 9).

Table 9: A structured, co-operative panel procurement model of legal services.



In the panel model there are far less firms and the 'distance' between client and provider is far shorter: the GC has really got to know the lawyers and vice versa. Also, the barristers and law firms are closer to each other. They are well aware of the role each plays for the client. The working relationship is 'co-operative', rather than transactional. GC may require the panel members to agree to service level agreements or different fee rates applying to different types of work.

Panel members may still be asked to pitch for a block of work or major job, competing against fellow panel members. Again, having a single legal entity to make such financially binding contracts may be useful. In other cases the roles of chambers are closely defined and may not require competitive tendering. One can see this with BAE, which has a Bar panel with three sets of chambers on it, each handling commercial, construction and public law respectively²⁸. The chambers know their roles and don't seek to overlap.

2: Procureco Challenges

Key points to consider when setting up a procureco, include:

Marketing – There is no point in having a procureco if the world does not know it exists. This may sound obvious, but without sufficient effort put into marketing the vehicle, applying for panel places, making bids and letting clients know what this vehicle can do – and what barristers in the set are willing to agree to in terms of fees and service agreements – then the entire project is of little value. This may require not just clerks, but members too, taking the time to go out and meet certain GC in order to spread the message.

Multiple Procurecos – A single procureco can bid and form contracts with a variety of clients. A single procureco can promote multiple practice areas too, via separately branded panels, and each panel containing certain barristers. For example, Star Chambers Family Panel and Star Chambers Commercial Panel, both of which are run through the single procureco, Star Procureco.

²⁸ Legal Week, 11 February, 2010.

Expectations - Barristers who have spent a lifetime working for themselves may find it hard to accept they are now held to a contract. The flow of contracted cases may on occasion prevent them from handling other, perhaps more profitable, matters. This may not suit all barristers and any set planning a procureco needs to be sure its members wish to adapt.

Liability – Whereas in the past an unhappy client may complain to the BSB about an individual barrister, there is now another dimension, a contract with the procureco. Barristers need to ensure details of any contract are amenable and consider what breach of that contract would mean.

Staffing – One area where chambers may well need more staff to get the most out of a procureco is on the marketing and business development side. This could add costs, although such costs should be recovered from the resulting additional work.

Chapter Five: Direct Access

1: The Rise of Direct Access

Given that lay clients, both corporate and public, are becoming more sophisticated in how they buy legal services we could expect direct access²⁹, which can reduce legal costs, to become increasingly popular. In terms of large businesses going directly to barristers via their inhouse legal teams there does seem to be growing interest. Clients with inhouse solicitors can make great use of direct access as they can instruct without the need for 'external' solicitors to intervene. This is seen, for example, where GC operate barrister panels and instruct them without a solicitor intermediary. Certain professionals, such as surveyors, engineers or accountants, can also directly instruct barristers, and this has seen a healthy interest too.

However, in terms of the two officially sanctioned schemes: public access and licensed access, it is less clear whether interest is growing. The number of permitted public access barristers, who have completed the brief training course required, is around 1,000³⁰ – or just 8% of the independent Bar. The list of licensed access clients is not very long either (see below). But this might change. The Bar Council and BSB have recently approved measures³¹ to allow barristers to carry out a number of traditional solicitor services that may improve the direct handling of lay clients' legal needs. Barristers can now:

- investigate, and collect evidence and witness statements
- attend police stations
- conduct correspondence between parties (although the conduct of litigation remains forbidden)

The BSB has also expanded the range of areas where direct access is permitted, to include family, crime and immigration. Despite these positive steps there still several hurdles:

- Direct access cannot be used by lay clients funded by legal aid – which constitutes a significant part of the Bar's activity.
- Even if a member of the public selects a set which has direct access trained barristers, and one of them is suitable for the job, their unpredictable schedules may still make it impossible to take on the client.
- Some barristers don't want to be directly available to the public, due to fears over making the right judgment on whether to take the case. The added paper work does not help either. One senior barrister added: "I don't want the 'wrong type' of client." That is to say someone seeking to use the barrister to unwittingly help support a crime. Many would prefer to be instructed by a solicitor who is managing the case and has already vetted the client.

Interestingly, a recent survey³² carried out by the BSB asked the question: "Do you agree or disagree that lay clients should be able to have direct access to barristers in all fields, subject to relevant provisions regarding training?" Around one third disagreed or strongly disagreed and 13% were neutral about the idea. Only 22% of barristers strongly agreed, hardly resounding support for more direct access.

²⁹ Direct access is divided into two parts, 1) public access whereby an individual seeks representation from a barrister and the barrister must attain the right training, and 2) licensed access whereby a corporate or public body applies for the right to instruct a barrister directly. The onus is upon the lay client to gain a licence.

³⁰ directaccessbarristers.org.

³¹ BSB April 2010.

³² BSB Structure Survey July 2010.

2: Licensed Access

Licensed direct access does not normally have the challenge of members of the public seeking to use barristers, but it can sometimes appear to be irrelevant. Large businesses and public bodies often have inhouse legal teams and, as noted above, can instruct barristers directly.

For example, there are very few local authorities that have felt it necessary to seek a licence, one of the few is Northamptonshire County Council. The licensing list is therefore quite slim. It includes: 15 regional probation services, 14 housing associations and 15 local fire services. On the positive side there are over 40 licence holders in the employment area. Overall, the licence system is unlikely to have a significant impact on the Bar.

3: Direct Access Agencies

There has been some growth among direct access agencies – businesses that attract and redirect lay client work to public access barristers without needing solicitor intermediaries. An example of a direct access agency is Contact Law³³, which allows the public to call a central telephone number, have their matter filtered by staff working for the agency and then, if appropriate, their case is sent on to barristers who have signed up to that agency.

Alternatively the lay client can search through the index of barristers on an agency website and contact them directly. Other agencies include: Find a Barrister and Barristers Access Direct³⁴. There have also been some entrepreneurial individual barristers who have set up their own websites with the intention of publicising that they are available for public access. One example is 'www.barrister-direct.com', which displays the talents of a barrister at a chambers in London, rather than an entire network of barristers. The challenge for such systems is letting the public, or businesses, know the barrister or the agency exists.

Solicitors have also experimented with a similar model in order to compete with large new entrants, such as Co-Op Legal, that will enter the market after October 2011 under the Legal Services Act. Knowing they cannot attract sufficient work individually nor build a major brand the public will recognise, small firms around the country have banded together to launch 'QualitySolicitors.com'. A potential client types in their post code on the website and chooses from a menu of broad practice areas. The client is then directed to the appropriate solicitors. They can also phone a central number or send in a query email. The concept is simple, but far more effective than any small firm could ever be in terms of marketing.

³³ Contact Law (www.contactlaw.co.uk).

³⁴ Find a Barrister (www.findabarrister.co.uk), 'Barristers Access Direct' (www.barristersaccessdirect.co.uk)

Chapter Six: New Principles for Chambers

1: The Business of Chambers

Barristers do not operate with a profit share and this has limited group thinking about economic issues. Heads of chambers also remain self-employed and therefore cannot spend significant time managing when these duties are unpaid. Some chambers have practice managers with business-focused duties, and this is a great step forward, but their power is limited as they are not a 'member' and do not occupy the same position as a managing partner would in a law firm who can impose executive decisions on those that pay their wages.

It is therefore no accident solicitors, with their tradition for partnership, shared costs and high investment in staff and overheads have been first to grasp the economic nettle. But, even for solicitors it has not been easy. Legal industry experts who were around in the 1980s explain that what today are huge businesses, were then unfocussed, sometimes dysfunctional groups, with little idea about budgeting, marketing or how to make investment work. Profits per partner then were also very much lower, and that is not just because City lawyers have raised their prices: these firms are now far better run. Fundamentally, law firms today operate far more as a team, rather than an aggregation of individual partners' practices. Most barristers would not want to operate like a law firm, but there may be significant benefits to operating more as a team.

But, as one barrister explains, team-based thinking does not come easily: "There is a strong sense of independence in chambers. We appear on opposing sides against each other. [Also] we are not responsible for the others in the set. There is no boss and we are not accountable to anyone in chambers." However, another barrister added: "I'm really jealous when I see other sets where they have really good administrative support, great management and do marketing to help promote the different practices." That is to say, those sets where there is team investment, business focus and leadership.

The views expressed above are typical of where the Bar is in terms of its development. Most barristers do not want to change the way their profession works and independence is key to that. But, many we spoke to also feel there is more that could be done in terms of how chambers are run, and some regret that their chambers does not pull together as a team. Independence and management are not mutually exclusive, but rather complimentary, in that a well-managed, and well-funded, chambers supports the success of each of its individual members. The key is not to assume that because an advocate stands alone in court their operational 'base' must function the same way. Barristers may want to consider:

A Chambers is a Single Entity – a set may be made of individuals, but it is still a single entity and a single brand in the eyes of clients. As barrister panels, procurecos or other structures develop the idea of a set as a single, marketable entity will increase. Clients will still, and always will, look for certain barristers who have the expertise for the job in hand. But clients will also increasingly buy the support team that goes with their favourite individuals. They may also buy into the idea that certain sets will have other good barristers to fall back on if they cannot instruct their favourite barrister.

Group Issues Impact Individuals – If chambers are performing badly barristers will eventually find a new home and its brand will weaken. Performance of the chambers as a whole impacts the individuals and vice versa. Poor earnings of the group affect the ability to invest, which affects the individuals. In turn, poor staffing and poor management undermine the offering to clients too.

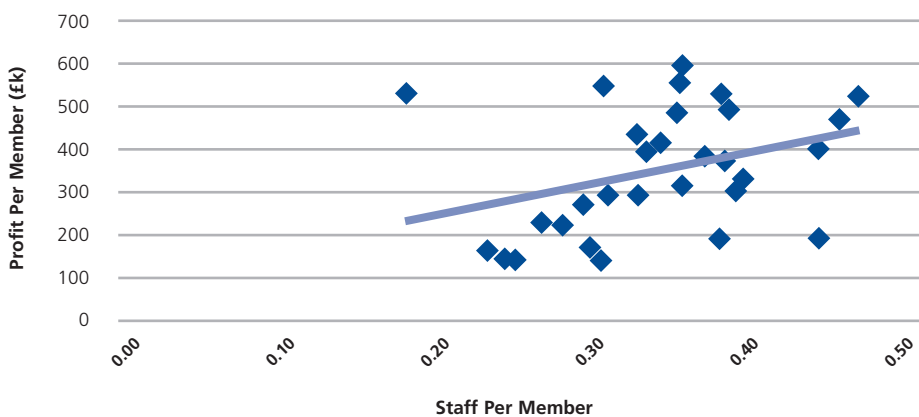
Client Relationships Count – Many barristers prefer to focus on their brief and their court performance than how the client feels. The Bar’s ethos is that by being independent and very good at your job, you attract quality work. This is true, but has its limits. If clients feel ignored, or your clerks are poor at communicating or responding, then winning a trial to the exclusion of all else could mean Pyrrhic victories, especially for more institutional clients like local councils. Weak client support and case management can undo the best of advocates in the long term, because although large clients want to win, they also want barristers and clerks they can work efficiently with.

2: More Investment May Return as More Profit Per Member (PPM)³⁵

Understandably, barristers do not want to increase chambers dues. At the same time many would like to see their set do more for them, whether this is marketing, or better clerking, or providing better office, library or IT facilities. If investing more in chambers improved the revenue one received over a period of time then spending more may be more appealing.

There does seem to be some evidence that sets that invest more in chambers appear to be increasingly profitable. The top 30 barristers chambers in England & Wales³⁶ bring in revenues of £750m a year, with 2,124 independent barristers billing these gross fees. These 2,100 make up around 17% of all self-employed barristers. On average the members in each set earn gross profits or PPM, after chambers dues, of £350,000³⁷.

Table 10: Staff per member vs gross profit per member (PPM), blue line denotes trend.



The most profitable sets appear to invest more in staff (see table 10). Those sets whose members earn the most also have the highest number of staff per member. There may therefore be a positive relationship between investment in chambers and members’ profits. However, profitability will also be impacted by the type and value of work undertaken by chambers.

Such investment may also form a virtuous circle, with higher profits then enabling further investment in support, marketing or facilities that will help each individual member. The opposite can also be true in certain circumstances. Reducing dues if fees have been seriously diminished is sensible, or cutting fixed costs where possible makes sense too.

³⁵ Profit Per Member (PPM) is a measure of the gross revenue per member, minus average chambers fees, giving an average pre-tax profit.

³⁶ See Appendix A, Top 30 Chambers, for the financial year 2009-2010.

³⁷ This is an approximate figure and not all chambers costs have necessarily been included.

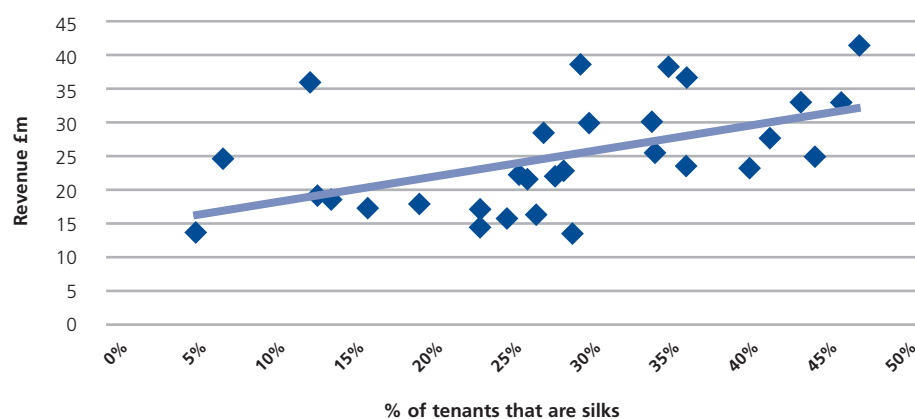
But, cutting key support functions when they do not need to be just to save money, for example cutting the number of clerks or closing down the marketing team, could erode the potential performance of a set³⁸, leading to lower revenues per individual.

3: Team Dynamics

Barristers may also wish to consider the following aspects to members operating as a team:

- The Balance of Work Type – the work members undertake determines fees, which will set the level of dues chambers may demand. Strongly divergent fee levels make setting chambers dues and common investment goals difficult, the opposite is also true.
- Marketing – although it is tempting to expect clerks to do the marketing, many clients, especially sophisticated ones, such as GC, like to meet ‘their lawyers’ face to face. Nothing can supplant personal client contact. Events, such as seminars headed by members, build stronger client links for the set as a whole.
- Training – some barristers enjoy training pupils and they are a great credit to the Bar, especially given the financial and time constraints today. However, bringing up juniors to the highest possible standard, not just after pupillage, but all the way up to a senior level, is valuable too. If all senior members can ensure that all junior members are on the right track it benefits the chambers and the brand as a whole.
- Silks – unsurprisingly, the top sets by revenue are also the sets with the highest proportion of Silks (see table 11). In some cases encouraging members to take Silk can benefit the set. Such a ‘Silk-heavy’ system is not possible for all as it can naturally cut barristers off from lower value work.

Table 11: Proportion of Silks in each Set vs Total Revenue, blue line denotes trend.



But, when one looks at the number of sets spread over the entire market of 340 sets in England & Wales one sees a heavy concentration of Silks among the top 30. In 2009 there were 1,318 Silks in independent practice. Yet, 528 of those Silks, or 40% of the country’s QCs, worked in the top 30 sets by revenue. If one excludes the Silks in provincial sets and just considers London, then the proportion rises to 47%. The other 310 sets in England & Wales may not wish to build such a high-priced group of barristers – nor may it always be sensible for them to try to - but it is clear that some that have done so have gained a significant revenue advantage which can in turn be used to fund pupillages at higher rates to attract the best talent and pay for better support.

³⁸ Instructing firms mentioned that poor clerking, perhaps due to lack of investment or weak management, was undermining their relationship with some barristers, and encouraging solicitors to consider sending work elsewhere.

4: Performance Reviews

Examining in detail certain performance metrics may help steer chambers' decisions about how best to grow or how best to market certain practice areas. If it has not already been carried out, it may be useful to consider the following:

- Break down all billable activity into definable practice groups and consider which are the most efficient at delivering revenues per member. Consider which are growing and which are shrinking.
- Examine the marketing budget and compare where money has been invested that covers certain practice areas and where there has been a quantifiable increase in activity or increase in fees. Do this too for areas where you have invested in extra clerks, or other support staff to see 'return on investment'.

One may also want to consider:

- Examining receipts and invoices to discover whether all the clerks are ensuring the maximum collection of fees and that bills are not dropping through the cracks. Consider what impact lock-up has on members.

5: Added Value and Business Development

Aside from conferences and press releases, there is a whole strata of 'added value' strategies a set can employ to develop business and improve client relationships.

This has applications for all barristers, however legal aid sets may want to consider this as an alternative method to attempting to win an LSC contract via a procureco. Rather than seek to control the contract, the strategy would be to improve and strengthen links with those law firms that were likely to win – and keep – those contracts. This strategy could also apply to large corporates or public bodies. Possible methods include:

- Secondment – A junior barrister spends time at a law firm or inhouse legal team. An inhouse legal department secondment could be part of a panel deal.
- Surgery/Training – This could have two sides to it, first: a barrister visiting a law firm or inhouse team to answer any questions that came up about certain matters, in effect offering a free training session, possibly that would be worth CPD points too. Second: attending a law firm to offer lay clients advice on what would be the best course of action to take in relation to a court case.
- Shared IT/Communications Services – The primary system here would be for chambers to have a video link with which to connect to law firms. This could significantly cut travels times for all parties. It may develop in conjunction with planned MoJ reforms to reduce court appearances by using IT.
- Shared Know-How and Library Services – Smaller law firms, or clients with minimal library resources, may find this attractive.
- Office Sharing – This could range from allowing a professional client to make use of office space for meetings, right up to having a permanent, or semi-permanent presence in the office. (Barristers may now share office space with other professionals.)

Chapter Seven: New Structures

1: Barrister Only Partnerships

A Barrister only Partnership, or BOP, is an entity that cannot yet be regulated by the BSB, but which may be as it enlarges its role. Despite the future possibility of such a structure, many barristers will be put off partnership because of conflicts caused by shared financial interests, as well as potential clashes with the cab rank rule. Key issues to consider include:

- A client would not instruct a barrister partner at the same 'firm' that is providing advice for the claimant in the same case, or had just advised a claimant in an earlier case. However, that may still leave a large area in which a BOP can operate.
- The cab rank rule demands a barrister take on a matter unless there is good reason not to. A financial structure that prevented them from taking on matters, as opposed to them simply being occupied on other work, may cause problems.
- To function a BOP may need to focus on either claimant or defence work. This would make the model more streamlined and less likely to create perceived commercial conflicts, however it could still clash with the cab rank rule.

Even if BOPs are workable, one may still wonder why a group of barristers would want to limit their independence by forming one. There may be positive aspects such as the mutual security gained from shared profits, however significant advantages of a BOP, given the obvious conflict issues involved, are still unclear at this point.

2: Legal Disciplinary Practices

Legal disciplinary practices (LDPs) could combine many skill sets together in one place: barristers and solicitors primarily, but also accountants, surveyors, or other professionals. Solicitors who started in an LDP as employees would have the opportunity to advance to partnership – something that may not be possible in a supplyco. But, as with a BOP, barristers that are in partnership with other barristers, or other professionals, in the LDP, risk limiting their independence and could rule themselves out from certain matters.

If such an entity were developed then cross-selling would be vital, as there is no use in having an LDP if it cannot promote all the different services. Also, regulation is not simple. For now the BSB is not an entity regulator, but individual barristers can own a stake in an LDP, and be members of it, as well as continue to work part-time in chambers. This would allow an LDP law firm with barrister members, plus the chambers where these barristers were members, to work closely together. Such a scenario may increase the flow of advocacy work to the members. The handful of barrister members of the LDP would also not compromise the independence of their self-employed peers in chambers who did not own an interest in the LDP.

Another alternative is for barristers to move into a solicitor-led LDP fulltime. Some barristers have already done so. One of the more recent examples noted in the press involved US firm Kobre & Kim's London base becoming an LDP. The firm hired Serle Court barrister James Corbett QC and Enterprise Chambers barrister Tim Prudhoe in April, 2010³⁹. Such a move only makes sense for those firms with a strong focus on litigation, but Kobre & Kim is what US lawyers would call a 'trial firm'.

Working with new entrants under Alternative Business Structure (ABS) licensed after October 2011, via the Legal Services Act, may also appeal to some barristers. In this case the LDP would not necessarily be a partnership, but could be an entity primarily owned by non-lawyers, operating either a captive law firm, or a employing group of lawyers including barristers. This may be of most interest to juniors seeking secure work.

Although many 'new entrants' such as Co-Op Legal will be mainly handling matters such as wills or conveyancing, there is room for some to develop advocacy. For matters such as contested divorces, PI claims and property disputes, building a small team of employed barristers may be efficient. The benefit for the barristers could be regular work and a guaranteed salary. There may be limitations however in that those barristers would be restricted to the matters their new entrant employer wished to handle. However, there may evolve more sophisticated structures, whereby a set formed a contracted relationship with a new entrant – perhaps through a procureco - to handle a certain volume of matters. This would also allow the barristers to handle other work and remain self-employed.

3: External Investment is Unlikely

Licences may be granted to permit external investment, via the Legal Services Act, from October 2011. It is highly unlikely barristers in chambers would want to take external investment from a private equity fund, primarily because of a clear loss of independence. From a private equity fund's point of view investing in an 'association' of barristers, any of which could leave at any time, would also be unlikely. We do not expect rapid developments here.

4: Networks and Preferred Provider Agreements

A number of chambers have already experimented with actively attracting work from outside England & Wales. Clerks at some sets spend significant time abroad developing ties with potential lay and professional clients. One chambers is also understood⁴⁰ to have set up a procureco to act as a marketing vehicle abroad.

Such moves make sense. The Bar is well-respected abroad and English law is used in many legal matters around the world. English barristers may also gain audience rights abroad, and this may be especially useful in Common Law jurisdictions. English barristers therefore have a number of opportunities to both seek work in courts abroad and to handle cases that migrate to the UK. Aside from using procurecos to market a set's abilities in this area, barristers may also look to forming loose, non-financially linked working agreements with foreign law firms.

These could be founded on non-exclusive 'preferred provider' agreements between these foreign law firms and the set in question, in order to help steer work in a certain direction. Such a strategy would have to be carefully developed in order not to alienate other instructing law firms.

³⁹ Legal Week 2 June, 2010. 'New York Trial Specialist Firm Converts City Arm to LDP status.'

⁴⁰ Outer Temple Chambers and 'Outer Temple International' , The Lawyer, 22 February, 2010.

Law firms have experimented with such 'network' or 'best friends' strategies, in some cases taking them to the point of a branded alliance. However, branding may be a step too far for barristers where such a relationship could be an impediment to instructions from outside the network.

Closer to home, preferred provider agreements could also work within the UK. But again, there are risks of alienating law firms that do not join the grouping.

4: Virtual Chambers

Another option is the virtual chambers where barristers, operating perhaps out of their own homes in 'solo practice', contract with a central service that offers clerking, IT support and perhaps some very limited office space. This allows the barrister to carry out their work, but without the higher costs of a full-scale chambers. The virtual chambers dues are less than the average set. The model relies heavily upon the visibility of the virtual chambers' brand. It should be noted that this is not necessarily a direct access service, as law firms could also approach the virtual chambers' clerking service.

An example of this model was developed by 'BarFutures'⁴¹, which offered members clerking and practice management services, with office premises available in London and Manchester. The members of Bar Futures were spread out across England & Wales and covered a wide range of practice areas. Clients called the central office to see who was best suited, or placed, to handle a case. Given the rise in 'solo' chambers⁴² and their common need to attract lay and professional clients, whether via direct access or through normal instruction, there are likely to be other attempts at developing virtual chambers in the future. Also, given that the incomes of some barristers may fall due to legal aid reforms, there may be an added number of practitioners in the future who may benefit from such a model.

⁴¹ BarFutures is understood to be experiencing funding constraints, but was understood to have been successful in building a significant income and attracted many barristers to its service.

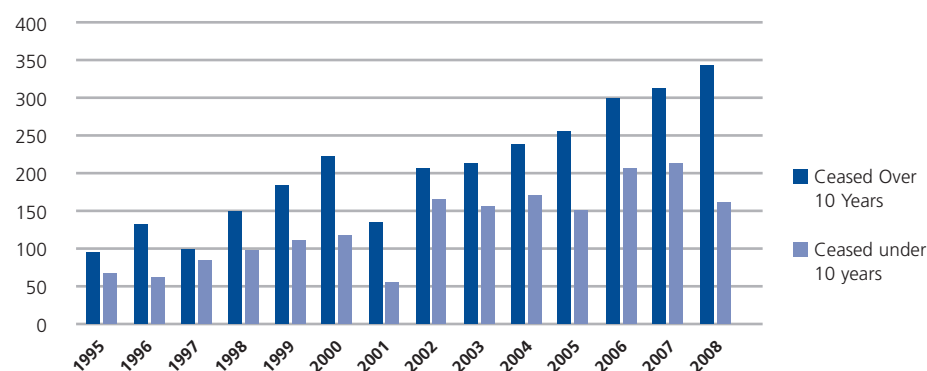
⁴² See Chapter 8, Demographic Change at the Bar.

Chapter Eight: Demographic Change at The Bar

1: Baby Boomers Retire

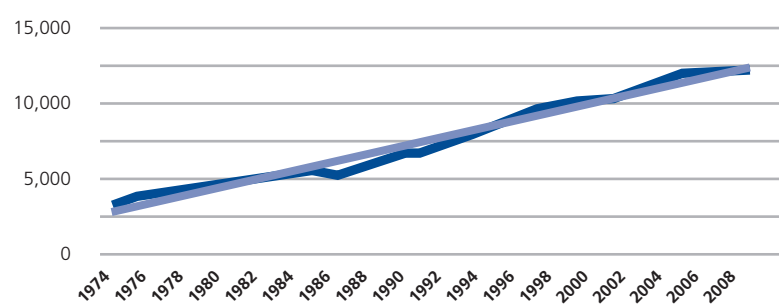
Increasing numbers of juniors and seniors are leaving the independent Bar, yet the overall trend is still one of growth in total numbers – primarily due to the high number of pupils seeking tenancy. The table below shows the number of self-employed barristers leaving the Bar between 1995 and 2008 before ten years’ call, and also those who left after that point.

Table 12: Barristers in independent practice leaving the Bar.



After ten years’ call the trend is clear, aside from 2001, there has been a steady increase in the number of senior barristers leaving practice. Some of these are part of the ‘Baby Boom’ generation⁴³ who will be retiring over the next two decades. The only major break in the trend came in 2001 – a year of significant financial turmoil that may have deterred many from taking retirement. What is most significant though is that in 2008 – another, and arguably far worse economic dip – the number leaving increased again. Yet, as seen below, the Bar has expanded for many years, replenished by those young barristers more than willing to take up tenancy. Although with less tenancy places and more departures this trend may slow, flatten, or perhaps even go into decline.

Table 13: Growth of self-employed Bar from 1974 to 2010. Light blue line denotes trend.



Although not a major trend yet, there are also more juniors leaving the Bar. As with the over ten years’ call, 2001 saw a big dip in departure rates, and in 2008 less left too. Some of these departures may be those looking for more secure incomes and seeking employment.

⁴³ Those born from between 1946 to 1964 when birth rates were far higher than the immediate previous generation. We are now at the beginning of the retirement of the ‘Baby Boomers’, with those born in 1946 reaching 65 in 2011. There may therefore be a period of higher levels of retirement among the UK population in general, as well as in the Bar. N.B. Not all barristers wait until 65 to retire, while others work far past that point.

2: Family Friendly Bar?

While the demographics of barristers have changed (see table 14), the self-employed structure of chambers has not helped those female barristers who choose to have a family. Long working hours and never-ending unpredictability make life as a lawyer and mother a challenge. The same problems are faced by solicitors, where there is a high number of women leaving ahead of partnership. Barristers in chambers may be faced with worse conditions too as when they stop work they stop being paid⁴⁴.

Barristers we spoke to explained that having children while working in chambers was a challenge. Key concerns were:

- Having to pay chambers dues even though they were on ‘maternity leave’, the latter of course being unpaid. Dues were reduced from normal rates, but when there is no income coming in even these can be a challenge.
- On return from maternity leave some barristers said clerks were sometimes not appreciative of their new commitments, or conversely cut them off from better work.
- Crime work was especially tricky due to the constant demand to be in court, unpredictable schedules and frequent, long trips to court.
- A culture of not discussing these issues in the open, when perhaps a sit down ‘practice management meeting’ could quickly resolve issues.
- That working part-time, or with ‘flexi-time’ was simply not an option for many barristers because of the nature of the work, and the need to pay chambers dues.

Table 14: Growth in female barristers, self-employed and employed.

Year	Male Self-Employed	Female Self-Employed	Male Employed	Female Employed
1995	6598	1900	1547	948
2009	8381	3860	1630	1399

The number of female barristers in chambers has doubled since 1995, while in employment it has risen less, but was already high as a proportion. Looked at in proportional terms, female barristers are now around 30% of the independent Bar, and around 45% of the employed Bar. This may perhaps indicate that employment, such as in the CPS, offers a better working culture for those barristers who have young families and need less erratic hours. Maternity pay may also be a practical factor here.

It is not just the Bar that can make life difficult for those female lawyers who seek to have children. Even though 45% of solicitors are female⁴⁵, the proportion of partners is very small, as low as 15% in some larger City law firms. Some firms, such as Allen & Overy have introduced flexi-time⁴⁶ to make it easier for talent to stay on at equity partner level and have a family too. Other, often smaller, City firms see female partner levels of over 30%.

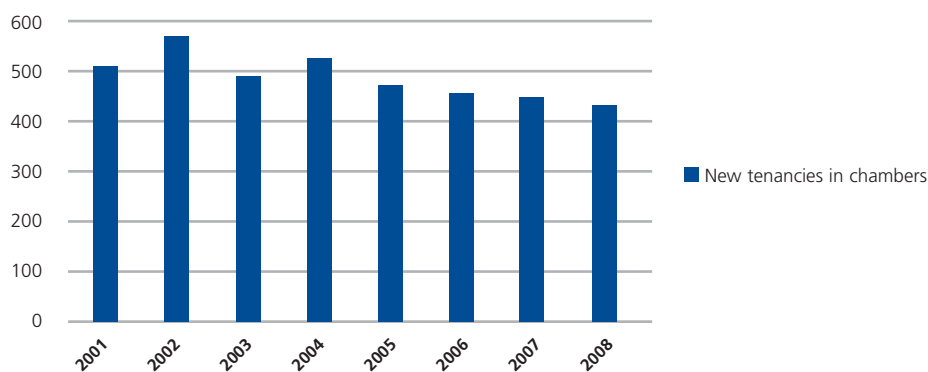
⁴⁴ The self-employed barrister naturally cannot claim maternity benefits from chambers, but the Government does offer limited benefits for self-employed mothers in such circumstances.
⁴⁵ SRA data.
⁴⁶ Legal Week 21 January 2010. The system works by capping the number of points an equity partner can attain and awarding compensation on a pro rata basis. Clearly, this cannot work in a self-employed chambers. But permitting barristers simply to reduce hours worked without being penalised by the clerks may be an answer.

3: When the Going Gets Tough - the Students Keep Coming

Life has never been tougher for junior barristers, yet graduates are queuing up to enter the Bar Professional Training Course (BPTC), formerly the Bar Vocational Course (BVC), despite the slim odds of gaining tenancy. For example, for the 2008/9 year 2,657 students applied for the course, however just 1,793 were taken on. The pass rate is generally very high, and the ‘call’ in 2009 for those students intending to practise in England & Wales stood at around 1,250, with around 500 others called but returning overseas after their study.

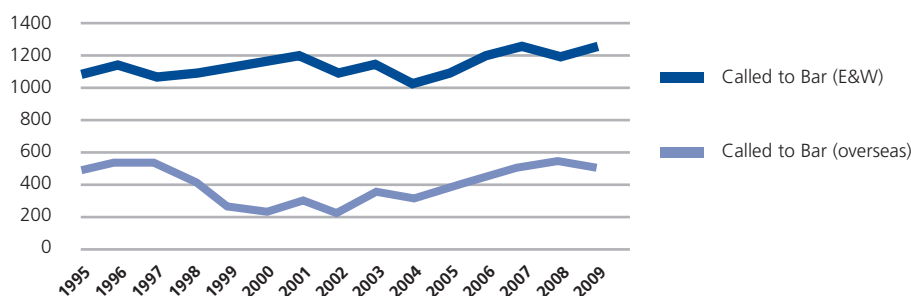
However, from 2004 to 2009 only between 600 and 520 second six pupillages were recorded by the Bar Council. In recent years only between 550 and 450 tenancy places have been available⁴⁷, giving those called around a 40% chance of gaining tenancy. Although it appears the number of places available are now decreasing too, both for pupillage and tenancy⁴⁸, so this percentage chance will certainly diminish if the trend continues.

Table 15: Number starting a tenancy in chambers each year, 2001 to 2008. Bar Council Data.



A key issue is not how much BPTC intake has grown – as it has not changed dramatically - but rather the difficulty in gaining pupillage and then tenancy. Many barristers we spoke to complained the constant over-supply of students was unfair to them and even ‘immoral’. BPTC course providers could respond that if chambers took on more tenants then there would not be a problem. The facts are though that a major expansion to absorb all those called is not possible, and may not be desirable in quality terms either. Therefore, there is little chance of this bottle neck ending. Even so, it is likely the Bar will remain a desirable career for many.

Table 16: Barristers called to the Bar, England & Wales (E&W) and Overseas BVC/BPTC students.



⁴⁷ Bar Council Gain/Loss Data, average ‘starting number’ in chambers each year between 2001 and 2008 was 489.

⁴⁸ This trend may reverse and the number of new starts may increase again as more senior ‘Baby Boomer’ barristers retire from chambers. However, if this trend continues and retirement speeds up, then the Bar may actually shrink for first time in many years.

One side effect of over-supply and increased pressure to find tenancy is the use of 'squatters' or 'third sixes' in chambers, whereby practising barristers who have completed their 12 months' worth of training are given work to do – usually on lower end crime and family work. They get paid for this, but not everyone gets tenancy at the end. Some sets use one or two 'third sixes' at any one time, others as many as four. Squatting could be viewed as a great opportunity to learn, get court time and strengthen the chances of finding a real tenancy place. Such positions allow the barrister to earn money, so they cannot be seen as unpaid 'internships' – although they are hardly ideal.

One final issue is the level of debt taken on by BPTC students who may not ever achieve a permanent tenancy in chambers. The funding available for pupils varies greatly between sets. For some it can be as high as £60,000, and funding can be available for the BPTC year too. However, for many pupil funding is severely limited and it is around just £10,000. This is hardly enough money to live on in central London, for example, and then one has to consider the undergraduate and then BPTC debts. However, the four Inns of Court also provide £4.5m of funding awards for student barristers and this can be a significant help⁴⁹.

As called barristers have up to five years to gain the requisite 12 months' of training needed to be a practising barrister, many will be tempted to accrue more debt, keep looking and not seek another career. One possible result of this is that only those young people with wealthy families will be able to keep going through a period of very little income. The end result may well be decreased diversity of background within the Bar – despite the Bar Council's continued efforts to widen the social spectrum of young barristers.

Another aspect to this is that law firms, which in general pay far better rates for their trainees, could increasingly attract the best and brightest young people that are considering a career in the law – but who fear the very real possible financial hardship of attempting to become a barrister. This is highlighted by the fact many firms also pay for a potential recruit's legal education, offer two years of intensive training and then, based on today's average hiring rate, offer an 80% chance of being hired by the firm where they trained. Therefore, the Bar not only faces limiting its pool of talent, but seeing much of that talent seeking a career within law firms. As more firms develop advocacy practices, there is a risk those attracted to court work start to see a career path to advocacy via a law firm as safer than via the Bar.

⁴⁹ Recent funding figures for the Inns of Court, covering different awards for BPTC to pupillage support, include: Gray's Inn - £795,000, Lincoln's Inn - £1,492,500, Middle Temple 'over £1m in cash or accommodation', Inner Temple - £1,260,00 (planned awards for 2011). Approximate awards total of: £4.5m.

Chapter Nine: Future Trends

1: Increased Segmentation

Barristers often talk about 'One Bar', and with good reason. There is a sense of interconnectivity and mutual pride among barristers that is stronger than in many other professions. Even the most successful commercial barristers we spoke to said they felt real sympathy for the plight of the criminal Bar.

But, on an everyday working level there is no single Bar anymore. Like most other professional services, it has segmented. Over the last 20 years barristers have grouped into sets that occupy specific parts of the legal market. These segments have different levels of income, expenditure on staff, management, offices and marketing. The most obvious segmentation, as seen from previous chapters above, is publicly funded crime and family sets, that are now, and will increasingly become, even more distant from other sets unless they can rapidly change their business model. Sets that handle mainly privately-funded work will also segment, with those handling lower value work drifting apart from those focussed on high value City work.

Individual barristers' roles now are very different too. While some crime barristers are in court every day, some commercial barristers told us they are almost never in court and carry out mainly advisory work. Some work as solicitors do, examining what may or may not happen at a trial. Some added they had little interest in carrying out advocacy themselves.

This segmentation will continue and what today appear as large groups of sets working in similar areas will in turn segment further. Whether it is by revenue, structure, the balance of practices, the location or the different client focus, or all of the above, sets will increasingly differentiate themselves from each other. Whether the client is aware of this difference will be mainly down to the set itself and how much it wants to promote its distinctive brand and its particular capabilities. No set's future segment is inevitable either, it can be steered to some extent, within reasonable limits. But it requires a clear strategy and the continued focus of management to execute the plan.

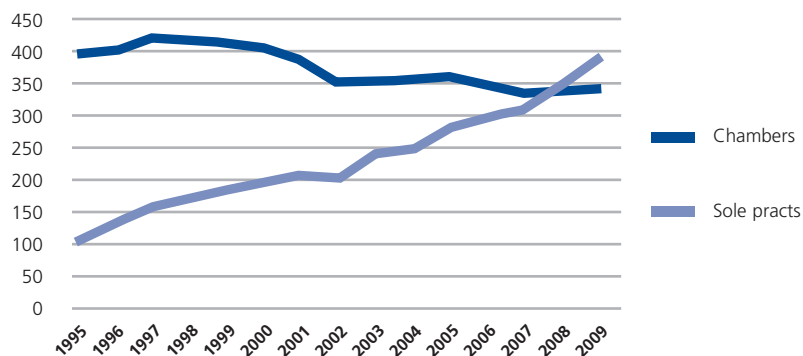
2: Consolidation and Chambers Growth

There are 343 sets in England & Wales. In 1995 there were just under 400 sets. This has meant the end or consolidation of 50 sets in 15 years. Today there are on average 35 barristers per set, compared to 21 per set in 1995 – or a 67% increase in size. The overall driver of this consolidation has been economies of scale. Although some of the growth has also come from barristers moving individually to sets that provide a better platform for their practice. One other key message is that there are now more barristers than ever before, but less chambers for them to find a tenancy within.

At the same time the number of solo practitioners has quadrupled in 15 years to 400 barristers. Why this is happening is unclear. However, there are a number of possible reasons:

- Barristers that seek a more flexible working culture are leaving chambers to operate as 'free agents'. This might include those who are semi-retired.
- A steady decrease in fee income in some practice areas may have led some barristers to find a cheaper way of practising, i.e. without chambers dues.
- More barristers may be relying on structures such as direct access referral agencies and virtual chambers to gain instructions.

Table 17: Number of chambers and the number of sole practitioners, Bar Council Data.



There may also be a ceiling to the barristers per set. Despite the consolidation of so many sets few of the largest chambers, with some notable exceptions, have more than 70 members. This has remained the case for some years. That may indicate that after consolidation the largest sets are not seeking further rapid growth via chambers mergers.

2: Global Market

As highlighted above in relation to networks and alliances, the English Bar is highly respected and English law is widely used around the world. As UK businesses increasingly move abroad and try to traverse the complex lattice of foreign laws and regulations, barristers that can offer their assistance on contentious cross-border matters or are able to work easily with foreign clients seeking representation in England & Wales, may see growing demand⁵⁰. That may mean a barrister seeking rights of audience at a Common Law court in, for example, a Commonwealth country such as Singapore. Or it may mean working on an international arbitration in London where English law may play an element in the dispute.

One recent growth area of demand for English barristers has been disputes related to cross-border commercial matters, such as those involving banking transactions, hedge funds, family trusts and construction disputes. International arbitration has also seen a steady increase in activity in recent years, mainly via the International Chamber of Commerce (ICC) and International Centre for Dispute Resolution (ICDR). The London Maritime Arbitrators Association (LMAA) has also seen a growing number of arbitrations and mediation, many of which will have involved international elements. The total maritime arbitrations the LMAA handled in 2009 was 4,445, up from 3,400 in 1996. There may also be opportunities in relation to the International Criminal Court, hearing related to human rights at the European Court for Human Rights and other non-UK venues.

One drawback is that lay and professional clients abroad may not know of an English set's expertise on such matters, or that their members are willing to travel abroad. Marketing these capabilities may therefore become increasingly important for some sets.

⁵⁰ Solicitors have been quick to exploit this trend, please see the Jomati report, 'The Next Wave: Globalisation After The Crisis' published March 2010.

3: Technology

The MoJ has said it wants to see better use of IT to permit more cases to be handled, at least partly, out of court. That could require legal aid firms to have the capability to host video/computer-based conferencing if handling crime or family matters.

Improved communications such as video conferencing may also be useful in building value added capabilities to improve links to instructing firms and clients, no matter what kind of practices a set focuses on.

Technology may also help a set to differentiate itself from rivals by offering a better, easier to use service, in particular in relation to case management and the flow of documents and correspondence. For example, systems such as 'Case Record'⁵¹ offer multiple parties in litigation access to all documents and emails. Many law firms also operate an intranet and an extranet system that allow permitted parties – with the requisite firewalls - to access all the paper work and files for a particular case, allowing them to see how a case is progressing without the need to call in, or visit in person. Barristers may wish to examine such options too, not just because it may improve service to clients, it may also make the set more efficient and better able to put time into fee earning work, rather than bureaucracy.

Many of the fixed costs that barristers pay for may be avoided by more creative uses of IT, for example via remote working. Whether operating through a chambers, or solo, not all barristers need to be in an office setting when preparing cases. For those that are often in court, but only come into chambers to pick up papers, it may even be sensible to reduce costs by not having anything more than a shared computer terminal. Those barristers that are willing to downsize their office presence, could see reduced dues, as well as spending time more productively at home, rather than travelling in and out to chambers.

Finally, there is the issue of knowledge management, or KM, as it is termed. These systems bring together all the working knowledge of the members. Rather than just having access to case law with annotated notes, such systems show barristers how past cases developed and can include extensive digitalised notes from other members. The result is a knowledge bank that helps the set as a whole and grows over time, becoming more valuable in the process. Again, this not only helps the client, by providing a hopefully better service, but also allows the barrister to avoid wasting non-billable time on slower forms of desk research.

⁵¹ www.caserecord.eu

Conclusion

The future development of the Bar is complex. There is no single picture. Barristers are now a diverse profession spread throughout many market segments. Equally, the world of advocacy is hardly uniform either, with non-barristers playing an increasingly important role, while some barristers hardly ever appear in court. Little can be taken for granted anymore. But, does this mean there are no principles that can be made use of by all? No. From new structures, to new ways of looking at life in chambers, there are many possibilities for the profession that are open to all its participants. The key is knowing how each sort of chambers, and each kind of barrister, can best make use of these opportunities. These positive steps, such as the liberalisation of structures, extension of what a barrister may do, the growing awareness of the need for professional management, marketing and treating chambers as a business, are all major developments for the Bar. But, they will not remove all problems. MoJ cuts and the forceful 'reshaping' of the legal aid market will no doubt drive some barristers out of practice. Some sets may fall apart. Others will seek to break into new areas – although not all will be able to do so, amid even more fierce competition.

The other vital aspect to any analysis of where the Bar is going is that this is not just about 'the future'. The future is already here. The BSB has already made more changes to how barristers can work than have been made for decades. Solicitor advocates are already making inroads into advocacy. Legal aid fees are already decreasing. This is no longer a theoretical discussion, this is about making decisions today. Luckily, and based on conversations we have had at all levels of the Bar, many barristers are well down the road to examining what they can do with the new tools available to them. The Bar Council and BSB also deserve credit for pushing many difficult issues about the evolution of the Bar to the fore. This is a very positive sign. The issue now is going beyond reading the 'brief' and taking action. Herein lies a great challenge. A head of chambers, or practice manager, may have good ideas, but – as an association of members – the set must pull together to make any strategic decisions work.

What will be needed in the coming months and years will be the conviction that the strategies decided upon are right and that the members can be convinced this is the right thing to do. Moving from a group of individuals to a team that pulls together will not be easy for a profession that has independence in its genes. Yet, pull together is exactly what many sets must do. For change cannot be achieved by just 'a good idea', but rather by each member, each clerk, committing to that goal in order that each may benefit. Whether this means setting up a procureco, joining a client panel, developing added value services, merging with another set, or simply putting more time and energy into marketing, there are many things that all sets, with a public or private focus, can do to change the course they are on.

All barristers have the chance to adapt to the changing conditions of today. No-one has to be left behind. Fundamentally, the Bar has an enormous amount in its favour. It is independent and provides a very high quality service at relatively low cost. We strongly believe in its value proposition. However, this great value must continue to be proven and developed as the world changes. The relevance of the Bar must be communicated to not just lay and professional clients, but those considering a future at the Bar too. It is by proving this message, by showing this value, as well as improving upon already high levels of service, that barristers will ensure their future. Understanding the strategic decisions that must be taken to achieve this outcome may not guarantee success, but it is a very good place to start.

Appendix A

The Top 30 Sets, from 'The Lawyer', Ranked by Turnover 2008-9

Rank	Chambers	PPM*	Turnover (m)	No. of Tenants	Dues
1	Brick Court Chambers	£546,213	£41.5	68	10%-11%
2	Essex Court Chambers	£460,427	£38.8	75	11%
3	One Essex Court	£519,167	£38.5	66	11%
4	Fountain Court Chambers	£518,820	£36.8	61	14%
5	No5 Chambers	£184,511	£36.1	180	0.5%-15%
6	Wilberforce Chambers	£584,375	£33.0	48	15%-17%
7	Blackstone Chambers	£364,737	£33.0	76	16%-17%
8	39 Essex Street	£320,432	£30.4	74	22%
9	3 Verulam Buildings	£477,351	£29.9	57	9% + Rent
10	Maitland Chambers	£391,310	£28.5	63	13.50%
11	7 King's Bench Walk	£537,870	£27.8	46	10%-12%
12	20 Essex Street	£483,926	£25.7	47	11%-12%
13	3-4 South Square	£514,535	£25.0	43	11%-12%
14	St Philips Chambers	£135,121	£24.5	165	6%-11%
15	4 Pump Court	£407,640	£23.7	50	14%
16	Keating Chambers	£394,800	£23.5	50	16%
17	Serle Court	£376,820	£22.7	50	17%
18	Four New Square	£297,552	£22.4	67	11%
19	Landmark Chambers	£286,892	£22.2	65	16%
20	Quadrant Chambers	£427,814	£21.9	43	16%
21	Kings Chambers	£215,903	£19.1	79	11%
22	Exchange Chambers	£137,397	£18.8	120	12%
23	Outer Temple Chambers	£221,691	£18.0	68	16.25%
24	One Crown Office Row	£155,684	£17.4	95	15%
25	Monckton Chambers	£308,167	£17.2	48	14%
26	11KBW	£286,082	£16.3	49	14%
27	7 Bedford Row	£163,852	£15.8	81	16%
28	4-5 Gray's Inn Square	£267,667	£14.6	48	12%
29	Hardwicke Building	£138,183	£13.9	83	17%
30	Matrix Chambers	£184,814	£13.6	59	20%
Total:		NA	£750.59m	2,124	NA

We have calculated Profits Per Member (PPM)* using the revenue figures provided, minus average chambers dues, leaving a 'ball-park' before tax, mean average. Clearly such figures are indicative and cannot describe any specific individual's earnings, also we cannot be sure all the elements of each chambers' dues are accounted for here.

It is interesting to note that some of the top 30 sets with relatively lower PPM also have higher dues. However, this is because to achieve the level of investment these sets need to compete with wealthier sets they must charge more to pay for staff, marketing and facilities.

(All data is based on original research from The Lawyer, please see Disclaimer.)

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