



The Council
of the Inns
of Court

Response to LSB's Paper

"Call for Evidence: Ongoing Competence"

I INTRODUCTION

1. This Response sets out the collective views of the four Inns of Court (Lincoln's Inn, Gray's Inn, Inner Temple and Middle Temple) on the issues raised in the LSB's Paper "*Call for Evidence: Ongoing Competence*" which are relevant to practice at the Bar.
2. The Response has been co-ordinated by the Council of the Inns of Court (COIC), a registered charity established and funded by the four Inns to represent and promote the Inns' policies and activities on matters which are of common concern to them. COIC's purposes (in summary) are (1) the advancement of education in the law and related disciplines; (2) the promotion of the sound administration of the law by promoting high standards of advocacy; and (3) overseeing and enforcing professional standards of conduct in relation to the provision of advocacy and related legal services. In this Response (1) and (2) above will be referred to as COIC's educational functions.
3. The Response was produced in draft by a Working Group established by COIC which was circulated and commented on by the relevant committees and officers of each of the Inns. After due consideration it has been approved by the Board of COIC. It is to be read as an agreed document endorsed by each of the Inns. In compiling this Response we have also had access to the factual evidence submitted to the LSB by the Bar Council ("the Bar Council Response"). Where appropriate we refer to that evidence without repeating it.
4. The structure of this Response broadly follows that of the LSB's Paper. Part II addresses the LSB's fundamental question of how to define competence. In Part III we discuss consumer expectations of the service provided by barristers. The many and varied arrangements for professional education and training for the Bar, aimed at maintaining and improving standards

of competence, are set out in Part IV. Part V discusses the current requirements for CPD at the Bar. In Part VI we refer to three important reviews of the standard of advocacy in the courts, including the paper *“Judicial Perceptions of the Quality of Criminal Advocacy”* (“the Birkbeck Report”) referred to in the LSB’s Paper. Part VII refers to the different routes through which complaints about the performance of barristers can be channelled and considers what evidence they reveal of client dissatisfaction.

5. The final part of this Response, Part VIII, contains a discussion of these various materials. It considers the strengths and weaknesses which the Inns identify under the current arrangements and shows how the quality of the service delivered by barristers will continue to be monitored and assured.
6. The Inns’ concluding comment is that, in the light of the many ways in which the Bar facilitates continuing training, and in the light of the regulatory regime laid down and enforced by the Bar Standards Board (BSB), an effective system of maintaining, regulating and monitoring standards of performance at the Bar is already in place. A further layer of formal re-certification would be difficult if not impossible to construct or implement, disproportionately burdensome, and unlikely to add value to existing arrangements.

II DEFINING COMPETENCE

7. The LSB rightly opens the discussion in its Paper by raising the fundamental question of how legal competence is defined. In Section 1 it refers to a number of generic definitions of competence offered by various commentators, finding particularly helpful for the purposes of this project a definition provided by its own Consumer Panel: *“combining up-to-date legal knowledge and skills with good client care, to deliver advice in a way that is useful.”*
8. The Inns agree with the LSB that it is logically correct to start out with a high level definition of legal competence. Without an acceptable definition it is impossible to state what competence and standard of competence consumers of legal services can fairly and legitimately expect, or what competence and standard of competence the providers of those services have to aim for. For a number of reasons the Inns believe that the definition suggested above does not accurately capture the characteristics of work carried out by barristers.
9. First it is focused on the delivery of “advice”. While the giving of legal advice forms an important part of a barrister’s practice the definition ignores the Bar’s main function, which is advocacy in courts and tribunals. It must also be recognised that, in so far as legal advice is given by barristers, much of that advice is itself given in the context of court proceedings, either current or in future contemplation. Advice of that kind is ancillary to the advocacy which is being delivered in court, or will or may have to be delivered in the future.
10. Secondly, the adjective “useful” does not describe the outcome which an advocate aims to achieve. The object of the advocate in an adversarial system is to ensure that the client’s case is conducted, and put to the court or tribunal in question, as effectively and persuasively as the evidence and the law permit. It must travel beyond what is simply useful.
11. The LSB will know that the Bar Standards Board (BSB), after extensive consultation with the profession, published in September 2016 its *“Professional Statement for Barristers¹*. COIC, acting on behalf of the Inns, can justly claim to have contributed in some measure to the final text of this document. It is suggested that, in so far as the LSB is looking for a good definition of competence for the Bar, this document should be its preferred source. It would be counter-productive, in the Inns’ view, to attempt another definition for the Bar after so much careful thought has been invested in this one.

¹ <https://www.barstandardsboard.org.uk/uploads/assets/0279b209-dab6-40c9-a554af54994e2566/bsbprofessionalstatementandcompetences2016.pdf>

12. The BSB's document sets out under a series of headlines the various skills, attributes and standards which barristers must possess and attain in order to provide a high level of professional service. The headlines are: (1) Barristers' distinctive characteristics, which embrace Legal Knowledge and Skills; Practical Knowledge and Skills and Attributes; Advocacy; and Professional Standards; (2) Personal Values, which include high ethical standards; (3) Working with others, which includes working with lay individuals; and (4) Management of Practice.
13. One of the merits of the *Professional Statement* is that it highlights two points on which clients will require particular assurance: first, that the barrister they instruct has a knowledge and understanding of the law and procedure relevant to the area of law in which they are engaged (para. 1.3), and secondly that the barrister will only accept work which they believe they are competent to undertake (para.1.18).
14. These requirements reflect the mandatory Part 2 of the *BSB Handbook*, which sets out the rules and code of conduct for the Bar. The rules are intended to give the client the guarantee that the barrister they have instructed is an expert in the field in which the client's case or problem has arisen and has the right level of competence and experience to deal with it. These requirements should be expressly factored into any definition of professional competence.
15. In a more expanded version of the Professional Statement each of the headlines is supplemented by a statement of *Threshold Standards* which are intended by the BSB to set the standard of competence which newly-qualified barristers are expected to meet on "day one", ie. the day on which they are first qualified to practise. These standards can be re-stated without difficulty to reflect the standard of performance expected of established practitioners.
16. It is not however reasonable to expect many clients to read the *Professional Statement*, even in its shorter form, to find out what service, standard of service and professional conduct they can expect from their barrister. A more condensed statement, based on the *Professional Statement*, can be created, if required, which can be given to clients to guide them through the experience of having a barrister acting on their behalf, to tell them what service to expect and hopefully to reassure them that their needs and requirements will be conscientiously attended to.
17. A suggested form of statement is set out in the Annex to this Response.

III CONSUMER EXPECTATIONS OF COMPETENCE

18. Section 2 of the LSB's Paper states that "*understanding consumers' perspectives on, and expectations of, competence in the legal services sector is crucial to our work*"; and it requests evidence on ways in which competence can be demonstrated to consumers. A client's expectations of the standard of service they will receive from their barrister are influenced and mediated by the way in which barristers are appointed to act.
19. The Bar is in the main a referral profession. That is to say its work for the lay client is mostly derived from instructions from solicitors or other authorised professionals, acting on behalf of their lay client. Protocols have been developed which enable lay clients to instruct barristers directly, but barristers are not required to accept direct instructions and the majority choose not to do so. If they do they are bound by a separate set of rules as set out in the BSB Handbook, Part 2 - D2 'Barristers undertaking public access and licenced access work'.
20. It follows that, unless the client is sophisticated and experienced in using the services of barristers, the barrister is likely to be appointed on the recommendation of the client's solicitor or other professional representative. That recommendation may, in its turn, be based on professional past experience of the individual barrister or their chambers; on the experience and recommendation of co-professionals; market reputation; the information obtained from published guides to legal services such as *Chambers UK Bar* (see:2020 e-Edition); or what is held out in the website of the barrister's chambers or the barrister personally.
21. Freedom of choice in urgent matters is often more constrained. For example in bail applications or applications for interim relief in civil disputes, a solicitor may have to find a barrister at short notice who might not previously be known to them. In that situation solicitors will have to rely on the chambers and the chambers clerks that they know, in the relevant field of practice, or on one or more of the other sources referred to above.
22. In the case of the Bar therefore, for the reasons just stated, the client's perspectives on and expectations of the competence of their barrister will in the majority of cases be mediated by the information they are given by their solicitor or other adviser upon whose choice they will depend. In its turn, that choice may be based on any one or more of a multiplicity of different sources. In urgent cases the information may be limited.
23. It follows that both barristers and those who instruct them owe a duty to clients to ensure that the choice of counsel is as fully informed and justified as circumstances permit. The LSB

rightly refers, in its Call for Evidence under this head, to the high risk involved in entrusting a case to a barrister who lacks the knowledge and expertise to conduct it to the required standard. In cases involving serious criminal charges, the freedom of the individual, or their civil or human rights, or the welfare of children, for example, the consequences of an inappropriate appointment of counsel could be very serious.

24. However when the system is working properly, which the Inns believe it does, the client will, in the circumstances described, receive a double assurance that the barrister is competent to undertake the work in hand. The personal responsibility of the barrister to comply with the *BSB Handbook* and the *Professional Statement*, as discussed in Part II of this Response, will be underwritten by an informed appointment made by another professional.
25. The Bar devotes considerable resources to ensuring that its members maintain their competence at a high level. The next two Parts of this Response address that issue.

IV ASSURING COMPETENCE: EDUCATION AND TRAINING

26. The Bar is supported by a significant number of different bodies within the structure of the profession which provide a wide range of education and training in legal knowledge and the skills and ethics of the profession. It is delivered to students, pupils, new practitioners and established practitioners. This training is delivered in large measure by experienced members of the judiciary and the Bar without payment. Some of the training, including advocacy training at the early stages of study and practice, is mandated by the BSB. Much more is provided on an entirely voluntary basis. Advocacy training, which is at the core of much of this training, is delivered by trainers trained to deliver it. Additional training is delivered by outside bodies including university law schools and other professional organisations.
27. The focus of the LSB's Paper is on the maintenance of standards of performance among established practitioners, past their "day one" qualification. The Inns point out that, from the Bar's perspective, professional education is an integrated process in which the different stages of training – and the delivery of training – are interconnected. What is provided and achieved at "day one" forms the basis of what follows. "Day one" cannot be ignored.
28. In this Part of this Response the Inns accordingly give a snapshot of the education and training which the various agencies at the Bar provide, across a broad spectrum. It forms an essential part of the background to later discussion of quality assurance and opens up a discussion on the opportunities which exist for continuing improvement.

The Inns of Court

29. The Inns have since early times been responsible for, and in more recent times have shared the responsibility for, the training of Bar students and new practitioners. Importantly for present purposes, the Inns now also engage extensively in activities designed to meet the needs of more established practitioners. They reach out to their members overseas as well as those practising in England and Wales. They are supported by outstanding law libraries which arrange lectures and training in legal research.
30. Current examples of training and support for members include:
 - ◆ Advocacy teacher training
 - ◆ Facilitator/teaching training
 - ◆ Advocacy & the Vulnerable training
 - ◆ Advocacy master classes

- ◆ Lectures on legal knowledge
- ◆ Social Context of the Law lectures
- ◆ In Focus events – topics have included ‘Being LGBTQ+ at the Bar’, ‘Disability at the Bar’
- ◆ Professional development events – topics have included ‘Social Media’, ‘How to train your memory’, ‘Relaxation’, ‘Managing difficult conversations’, ‘Voice and Presence’, ‘Digital Practice’, ‘Resilience’
- ◆ Core skills for the Bar refresher training
- ◆ Wellbeing events
- ◆ Academic Fellows Scheme – improving links between the profession and academia for the benefit of practice.
- ◆ Keble Advanced Advocacy Course scholarships
- ◆ Pegasus scholarships (work experience in other common law countries)
- ◆ Internship Awards
- ◆ Temple Women’s Forum (Inner and Middle jointly)
- ◆ Employed Bar events
- ◆ Equality, diversity and inclusion training and events
- ◆ Interviewing training
- ◆ Legal research skills training
- ◆ Talent Retention Scheme (return to practice support)
- ◆ Pupil Supervisor training

31. Each of the Inns has an Education Committee chaired by a senior lawyer member of the Inn; a designated Director or Master of Advocacy, who will also be a senior practising barrister or judge; and a full-time salaried Director of Education with oversight of the year’s training programme.

The Circuits

32. The administration of justice in England and Wales is allocated to six administrative Circuits: the South Eastern, Western, Wales and Chester, the Midlands, Northern and North-Eastern. The Bar has, over a long history, divided itself into Circuit organisations, centred round barristers' chambers in the region, which correspond to the regional divisions of the courts.
33. Each of the Bar's Circuits is formally organised, led by an elected Leader of the Circuit, and supported by other elected and appointed individuals. It has its own programme of professional training and education, overseen by a Director of Education or similar. Its programmes correspond to the work of the Inns in London. These activities are closely supported by judges sitting in courts on the Circuit. Appendices 2-7 inclusive attached to the Bar Council's Response give detailed examples of the education and training delivered to barristers at all levels on the Circuits.

The Inns of Court College of Advocacy (ICCA)

34. The educational functions of COIC, as defined in paragraph 2 of this Response, have been formally delegated to the ICCA, a semi-autonomous training and education department of COIC overseen by a separate Board of Governors, the majority of whom are legal practitioners appointed for their personal knowledge and experience in the law and legal training. Two non-legally-experienced Governors have corresponding experience in other fields. The ICCA is managed by a Dean and a professional body of tutors and trainers. It was established in 2016 as successor to the Inns' Advocacy Training Council, which performed similar but more limited functions.
35. The ICCA's activities can be divided into two main streams. It has just set up a new and radically improved Bar course for students. Relevant to this inquiry is the innovative and diverse support it provides to established practitioners. It organises seminars, training sessions and discussion groups on topics relevant to the profession, concentrating at present on advocacy training and professional ethics.
36. The ICCA's recent direct educational offerings have included ground-breaking and internationally recognised publications and courses in the handling of vulnerable witnesses and young persons in court; the management of foreign languages in court and the effective use of interpreters; and courses delivered in London and on the Circuits on the handling of expert witnesses. These latter courses are supplemented by its publications *Guidance on the*

*preparation, admission and examination of expert evidence*² and (published in collaboration with the Royal Statistical Society) *Statistics and Probability for Advocates*³. The ICCA has a substantial overseas training programme throughout the common law world. Training in the handling of vulnerable and expert witnesses is paralleled in courses delivered in the Inns, these bodies cross-referring to and supporting each other in its delivery.

37. In response to the recent pandemic crisis the ICCA has published its Principles of Remote Advocacy⁴, addressing the challenges of conducting cases remotely on-line and on-screen. It has also just completed on-line interactive advocacy training courses for current Bar pupils, who are experiencing a gap in court experience during the lockdown. Training has been provided by trainers from two of the Circuits.

Advanced Advocacy Course (“Keble”)

38. The South-Eastern Circuit has for many years organised an annual Advanced Advocacy Course, now in its 26th year. It takes place over a week in the summer at Keble College Oxford, culminating at the end of the week in criminal and civil mock trials. It was originally open to new and established barristers from the South-Eastern Circuit; but its reputation and the scope of its attendance have steadily grown. It is now attended by practitioners from overseas jurisdictions, as trainers and trainees, as well as barristers practising in all parts of England and Wales. In many respects it sets the benchmark for high standards in advocacy training in all types of court. The Inns and the ICCA provide funding and logistical support.

The Specialist Bar Associations (SBAs)

39. The Bar Council’s website lists 24 SBAs. As their name reveals, they are formally constituted associations of barristers specialising in a field of shared practice – criminal, family, commercial, personal injury, employment, chancery practice, property or public law, to give some examples.
40. The SBAs provide a regular discussion forum for recent developments in their field of interest, conducted through the medium of lectures and seminars, and usually led by senior practitioners or judges engaged in that area of work. Many hold annual conferences, devoting one or two days to specialist discussion and training. Many also organise training sessions

² <https://www.icca.ac.uk/wp-content/uploads/2020/07/ICCA-Expert-Evidence-Guide-2020.pdf>

³ <https://www.icca.ac.uk/wp-content/uploads/2019/11/RSS-Guide-to-Statistics-and-Probability-for-Advocates.pdf>

⁴ <https://www.icca.ac.uk/principles-for-remote-advocacy-2/>

targeted on new practitioners. Appendices 8-16 attached to the Bar Council's Response give a detailed account of the education and training programmes delivered by some nine SBAs.

In-house training

41. It is increasingly customary for barristers' chambers, and law offices which employ practising barristers, to provide training to their own members. In the case of chambers this is sometimes combined with seminars offered to clients, mainly solicitors, in the interests of marketing the organisation's services; but it nevertheless keeps participants up-to-date in their area of practice.

Universities

42. Before 1 January 2017, when the changes were made to the regime for CPD at the Bar which are discussed in Part V below, university law faculties routinely obtained certification from the BSB for organised CPD events, in the form of lectures and seminars, which were of interest to the profession. This enabled the practitioners who attended them to complete their formal annual record of authorised CPD activities; and the universities' records of the names and numbers of practitioners who came to these events made it possible to quantify the significant contribution which these institutions made. As described below, the new regime has dispensed with the keeping of these formal records; but the universities, especially those located near to the major centres of practice, maintain their close contacts with the profession and continue to provide a stream of educational events of high quality.

V ASSURING COMPETENCE: CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

43. After their first three years of practice (which are subject to mandatory training in advocacy and professional ethics) established barristers are required by the BSB Handbook⁵ to undertake and keep available for inspection by the BSB a record of their CPD activities. The many and varied educational programmes described in Part IV above provide a rich source of CPD activities for practitioners, participating as teachers as well as learners. The linkage is obvious; but it would be wrong to conclude that a barrister's CPD activities are exclusively dependent on or derived from those programmes.
44. The rules for CPD for established barristers are set out in Rules rQ 133-135 in the *BSB Handbook*. Rule rQ 137 gives the BSB the power to make changes. These rules came into force on 1 January 2017. Their publication was accompanied by a Guidance pamphlet explaining how the system is intended to work, and Guidance Notes are attached to the rules.
45. In summary, the rules require each barrister to draw up a written plan of their own CPD activities for each calendar year. They are given a wide discretion over the contents of their plan, within very broad limits. They must then keep a record of what they have done over the past three years, and reflect in writing on the value of what they have done, recording and justifying any deviations from their original plan and setting out plans for the future. Finally they must declare to the BSB that these tasks have been completed. The process is described as "Review, Record, Reflect, Report."
46. This scheme followed a formal review in 2016 and replaced an earlier hours-based system which required barristers to complete 12 hours of CPD each year, based on a narrower and in many respects arbitrary - and arbitrarily measured - set of admissible activities.
47. The review proposed an increase in the number of hours from 12 to 24, and a major redefinition of CPD activities. In contrast with the review's recommendation that the number of hours should be increased, it is an essential feature of the present scheme that, in addition to giving practitioners a wide discretion in drawing up their plans, it does not prescribe a minimum number of CPD hours. It leaves practitioners to decide for themselves how much time they wish to or can devote to CPD in any year. The aim of the requirement that records

⁵ <https://www.barstandardsboard.org.uk/uploads/assets/de77ead9-9400-4c9d-bef91353ca9e5345/f6f48be1-f625-4484-8aa329dc67056e67/second-edition-test31072019104713.pdf>

must be kept for three years, and must be open to checking by the BSB, is to ensure that barristers will conscientiously and responsibly maintain a regular programme.

48. In December 2019 the BSB published its first review of its new scheme⁶. The review, based on interviews with a representative sample of practitioners, showed that they welcomed the greater flexibility inherent in the new arrangements, and that both sides – the regulator and the profession - were satisfied with the outcome of the changes. The review commented that barristers still needed to improve their handling of the “Reflect” part of the process.
49. Within the profession two matters are still debated: first, whether too much latitude is now permitted in what may count as CPD activities, and in the amount of time which barristers may choose to devote to them; and secondly whether the scheme should be amended to prescribe any type of training as a mandatory component.
50. On the first point, the Inns are confident that the BSB is aware of this criticism and that it will continue to consider its response to it. Comment from the LSB on consumer expectations, following this current process of consultation, may contribute to the discussion.
51. On the second point, the current CPD rules do not prescribe mandatory training in any activity. The remarks made by judges on the quality of advocacy in the criminal courts, as recorded in the Birkbeck Report⁷, might prompt the question whether the BSB should introduce mandatory training in advocacy. This is discussed in Part VI of this Response below.

⁶ <https://www.barstandardsboard.org.uk/resources/bsb-publishes-research-into-barristers-attitudes-to-the-revised-cpd-scheme-.html>

⁷ Hunter, Gillian and Jacobson, Jessica and Kirby, Amy (2018) Judicial perceptions of the quality of criminal advocacy: report of research commissioned by the Solicitors Regulation Authority and the Bar Standards Board. Project Report. Solicitors Regulation Authority, London, UK.

VI ASSURING AND ASSESSING COMPETENCE: EXTERNAL REVIEW

52. The Inns are not aware of the existence of any systematic independent survey of competence at the Bar as a whole. This Part of the Response refers to materials from which some conclusions may be drawn.

The LETR and the Future of Bar Training

53. A comprehensive survey of legal education and training – the Legal Education and Training Review (LETR) – was commissioned jointly by the Solicitors’ Regulation Authority (SRA), the BSB and ILEX Professional Standards (the body responsible for the training of legal executives), and published in 2013⁸. The LETR records and describes extensive research conducted over the entire landscape of legal education and training – academic, vocational, professional and post-qualification. It contains a long list of recommendations for the reform of that training, with regard to its substantive content, the development of professional, personal and management skills, career structure and improvements in the diversity of the profession. Although it addresses post-qualification continuing training its principal focus is on the composition of the profession, and the knowledge and skills acquired by practitioners, at “day one”.
54. The LETR does not express any direct opinions on the performance in practice of any of the branches of the profession and it does not, at any rate in its published evidence, record consumer attitudes or experiences. It is possible to infer, by a process of deduction from the proposed reforms, the views which the review team might have reached.
55. With regard to the Bar its comments and recommendations are limited to the making of adjustments to the content of the Bar Course for students (then known as the Bar Professional Training Course (BPTC)) and emphasising the importance of CPD. In paragraph 4.75 it compares the advocacy training delivered to Bar students favourably with the training delivered to solicitor advocates.
56. Following the publication of the LETR the BSB carried out its own comprehensive review of the Future of Bar Training. The published recommendations of the LETR, and the many responses to further extensive consultation carried out by the BSB, were fully digested and taken into account. The BSB’s conclusions are now embodied in the current *BSB Handbook*. The BSB continues to review and lay down standards of education, training and performance. It does

⁸ <http://www.lettr.org.uk>

not however claim to have any evidence that the profession as a whole is failing in the performance of its professional work.

57. The one area of work which has been the subject of independent studies is advocacy, principally if not exclusively in the criminal courts. Three important Reports are referred to in the next paragraphs.

The Smedley Report⁹

58. Mr. Nick Smedley was commissioned by the Law Society to review the performance of solicitor advocates in the higher courts, both civil and criminal. The focus of the Report is on the content and standard of advocacy training for solicitors, and their performance in court, as recorded at the time of his survey. It recommends a list of reforms. Additionally in his Report Mr. Smedley makes some observations about advocacy training for the Bar.
59. The thrust of his comments on the Bar's advocacy training is that it is systematically designed and delivered in a form which the Law Society should aim to reproduce for solicitors: see for example paras. 37 and 38. In paras. 43-50 ("*A new approach to training*"), paras. 51 and 52 ("*Developing a syllabus*") and paras. 53-59 ("*Post-qualification*") he proposes models which clearly replicate the schemes of training already in place at the Bar. These models have themselves been enhanced since 2010 in the light of, among other things, the BSB's FBT review. He recommends that solicitor-advocates should undergo mandatory training in advocacy as part of their CPD (para.54).
60. Mr. Smedley also has some very perceptive remarks about the effect which reductions in legal aid funding in the criminal courts will have on the distribution of case-work and the quality of advocacy. Since 2010 the cuts in funding, as is well-known, have been even more severe. He foresees (para.40, second bullet point) that funding cuts will undermine the economics of practice in criminal law both in law firms and at the Bar, and that one likely outcome will be that practitioners, in order to keep financially afloat, "*will take on work beyond their competence, rather than have no work at all.*" This topic recurs in the later Reports.

⁹ Published by the Law Society November 2020.

The Jeffrey Review: 2014¹⁰.

61. Sir Bill Jeffrey's Review is entitled "*Independent criminal advocacy in England and Wales.*" It was commissioned by the Secretary of State for Justice. Its wide-ranging review includes a survey of training and recruitment to practice in criminal law. It picks up and elaborates many of the points made by Smedley. It examines the market for work, how it is allocated to barristers and solicitor advocates, and the challenging economics of practice. Of particular interest to the LSB's current inquiry are chapters 2, 3 and 4: Quality, Training, and Reflections on Quality and Training; but it is clear from the Review that quality and training cannot be seen in isolation from market and economic factors.
62. In chapter 2 Sir Bill notes the absence of any systematic research-based evidence on the quality of advocacy in the criminal courts but he records (in para.2.5) the view of The Council of Her Majesty's Circuit Judges that "*the basic level of competence displayed by an increasing number of advocates in the Crown Court had diminished in recent years*", giving rise to serious concern. He found during his meetings with judges that, except in one court centre, "*there was a strong and consistent view that, although the best was still very good indeed, among both barristers and solicitor advocates standards had in general declined*" and that it was not uncommon for prosecuting and defence advocates to be operating beyond their level of competence: see para.2.7.
63. In chapter 3 he follows Smedley in pointing to the significant differences in the training delivered to barristers and solicitors, but states that he had observed high standards at training sessions on both sides. He follows this brief survey of training in chapter 4 by recommending a different training regime for solicitor advocates up to the level of "day one" (para.s 4.3-4.6), approaching the training delivered to the Bar. With regard to post-qualification training, for all advocates, he recommends in para.4.9 that:
- "the profession should work together, with the regulators. to develop common minimum expectations for CPD for advocates in the Crown Court."*
64. This last point might be taken as a hint that advocacy training, at least for advocates practising criminal law, should form a mandatory element in CPD, for barristers as well as solicitors.

¹⁰ criminaladvocacyreview@justice.gsi.gov.uk

Judicial Perceptions of the Quality of Criminal Advocacy (2018)

65. The research set out in the Birkbeck Report was commissioned by the SRA and the BSB. It was carried out by researchers (Hunter, Jacobson and Kirby) at the Institute for Criminal Policy Research, Birkbeck, University of London.
66. The Birkbeck Report presents conclusions on the quality of advocacy in the criminal courts, principally the Crown Court, based on in-depth interviews of a carefully selected sample of 46 Circuit Judges and 4 High Court judges. The judges give an illuminating definition of what constitutes good advocacy – good communication skills, a focus on essential points, and thorough preparation – which echoes the lessons handed down at the advocacy training sessions delivered to the Inns’ and Circuits’ trainees. (It is likely that some of the judges interviewed participate in those training sessions themselves.)
67. There are perceptions among the judges that there is a wide gap between top performers and those at the lower end of the scale; that, overall, standards of advocacy in the criminal courts have declined; and that the standards of performance of barristers generally may be higher than those of many solicitor-advocates, although there are good and poor practitioners in each category. It is reassuring to read (para.6.2, page 54) that the handling of vulnerable court users has strikingly improved in recent times, for this is an area of training in which the ICCA has invested much time and resources.
68. Some of the causes of this apparent decline, as perceived by the judges, were foreshadowed in Smedley and Jeffery: low remuneration in the publicly-funded sector (which forms the bulk of the work), resulting in the diminishing attraction of criminal advocacy as a career, compared with other areas of practice; fewer opportunities for new practitioners, particularly newly-called barristers, to learn essential skills in smaller cases in, for example, the magistrates’ courts; and, because of funding difficulties, fewer opportunities to work as a member of a team with a more experienced advocate. Some advocates appear in cases above their standard of competence. Poor preparation is attributed partly to the speed at which cases are expected to be dealt with, and the corresponding receipt of late instructions. The Birkbeck Report states (para. 6.1, page 52) that *“Most of these [causes] lie far outside the influence of the regulators”*.
69. The majority of the judges in the study did not support formal external accreditation or appraisal, which might perhaps be modelled on the now abandoned Quality Assurance Scheme for Advocates (“QASA”), but would not involve judges in the process. A majority also favoured the inclusion of mandatory advocacy training for established practitioners as part of

their CPD. Other remedies suggested include a greater willingness on the part of judges to report poor advocacy to the regulators and a greater willingness on the part of the regulators to follow such cases up, by for example mandating remedial training: see para. 6.2, page 54 *passim*.

Discussion

70. Some conclusions can be drawn from these materials. First, the content, quality and amount of training delivered at all stages of a barrister's career command wide respect. This is reinforced by the strong international demand for training to be delivered by our trainers, especially advocacy training. As mentioned in Part IV above, all four Inns and the ICCA have active international training programmes. The Keble course also has an established international reputation. Secondly, while much poor performance in the Crown Court is caused by the economic problems which beset criminal practice, there are some barristers practising in the criminal courts who need and would benefit from further advocacy training. They should be more closely monitored by the judges and be actively encouraged to undertake such training. Thirdly, no corresponding survey of the quality of advocacy in other courts has been carried out. It is roughly estimated that some 4,000 barristers practise in the criminal courts, out of a total of approximately 16,000 holders of practising certificates. No conclusions can therefore be drawn from these studies about other areas where advocacy is practised.
71. The Inns nevertheless point out that there is known to be a strong market for the services of barristers both nationally and internationally in numerous types of court and tribunal, as well as in overseas criminal jurisdictions. That may afford some evidence that the standard of service provided is satisfactory, at least at the top of the profession. On the evidence mandatory advocacy training is not needed for all 16,000 practising barristers.
72. Moreover, the proposal that advocacy training should become a mandatory component of a barrister's CPD, even if it were thought to be necessary, would be of immediate concern to the Inns, the Circuits, the ICCA, the SBAs and chambers, for they would be responsible for assembling an effective system for delivery. The resources required to effect such a change, and the amount of design and planning required, would call for detailed study outside the scope of this Response.

VII: COMPLAINTS

Existing mechanisms for answering complaints

73. There are various routes through which complaints about a barrister's performance can be made. An examination of the available evidence does not show that complaints are widespread.

Barristers and barristers' chambers

74. Part 2-D of the *BSB Handbook* requires all barristers to have an established system for receiving and handling complaints from clients. Whether they instruct a barrister by direct access or on referral from a solicitor all clients must be informed in writing of the right to complain and the right to forward complaints on to the Legal Ombudsman. Complaints do not have to be made through the medium of an instructing solicitor. Barristers must have in place an effective procedure for promptly processing complaints. Details must be published on the chambers' or barrister's website. Complaints must be carefully documented.
75. Many chambers enhance these rules with a system for gathering feedback from clients, both positive and negative. They will typically appoint a member of staff with responsibility for collecting the responses of clients on a standard form. The feedback, both positive and negative, will then be used, if appropriate, to improve the training or professional awareness of other members. The negative feedback will also be taken up internally with the barrister concerned, whether or not it is followed up by a formal complaint.
76. Inevitably there are no statistics on the volume of complaints received in this way, much less how many are considered justified. Subject to certain exceptions complaints are confidential and chambers are unlikely to publish even raw figures. It is suspected that some areas of practice attract more complaints than others, not necessarily because of incompetence on the part of the barrister, but because the adverse outcomes of some types of cases in court create more resentment against the advocate than others.

The Legal Ombudsman

77. The Office for Legal Complaints, which oversees the work of the Legal Ombudsman, has some limited statistics on complaints which reach that level, but – apart from the smallness of the numbers - it is impossible to draw any conclusions from the figures it publishes. It records that in the year 2018-2019 it received some 270 complaints about barristers. Grouping the

complaints under various categories of work the largest volumes of complaint were connected with “Crime” (28.25%) “Family” (22.59%) and “Litigation” (20.74%)¹¹.

78. These figures suggest that complaints arise mainly in what can broadly be described as court work. Beyond these bare figures the tables are sorely lacking in any useful detail. They do not indicate the nature of the complaints received, nor from whom they were received. They could have emanated from clients, and many probably did. Others could have been made by someone about a barrister appearing on the opposing side, by a judge or by a member of the public. As to the nature of the complaints, we do not know whether they arose from alleged incompetence or other deficient behaviour. In the case of “Crime” it can fairly be pointed out that, in the case of a criminal trial which results in a sentence of imprisonment, there may be an increased incentive for making a complaint. The outcome of some “Family” cases might also generate strong feelings of resentment.
79. Most importantly, however, we do not know how many complaints were held to be justified. A request for further information has been submitted but has not yet been answered. The only evidential value to be derived from these tables is that the incidence of complaints, justified or not, is very small.

Complaints to the BSB: BTAS

80. Where the BSB receives a complaint that a barrister is guilty of professional misconduct, ie. has breached the code of conduct contained in the *BSB Handbook*, it may refer the complaint to the Bar Tribunal and Adjudication Service (BTAS) for a formal hearing and adjudication. BTAS is administered by a separate branch of COIC. Cases are determined by tribunals which are independent of the BSB and COIC.
81. Incompetence, including in particular taking on work which is beyond the barrister’s level of competence, would be a breach of the rules in the *Handbook*. In the past two years the BTAS has not had any such cases referred to it by the BSB.

Claims for damages for professional negligence

82. An important source of information about the quality of work and the level of competence at the Bar is the record of claims for compensation made by clients against the Bar Mutual Insurance Fund (BMIF) for the alleged shortcomings of their barrister. Detailed evidence

¹¹ <https://www.legalombudsman.org.uk/raising-standards/data-and-decisions/>

relevant to this issue has been provided by the BMIF to the Bar Council. It is attached as Appendix 1 to the Bar Council Response and is not repeated here.

83. The evidence is fully analysed in paragraphs 9-21 inclusive of the Bar Council Response. The Inns endorse that analysis. Among the many points which emerge are (1) that the number of successful claims, leading to a payment of compensation, is very small; (2) that successful claims appear mainly to result from “one-off” mistakes by individual barristers; (3) that there is no particular area of practice or age group which disproportionately attracts successful claims; and (4) that the data provide no evidence of general incompetence within the profession at any level.

Appeals to the Court of Appeal (Criminal Division).

84. While incompetence on the part of counsel will provide a ground of appeal against conviction in a criminal case, the cases in which that ground has been advanced are rare. Research of the record of appeals to the Court of Appeal (Criminal Division) for the period 2010-2020 shows that this ground was relied on in no more than 8 cases. In 5 of these cases the Court found some errors by counsel which did not affect the outcome and that ground of appeal was dismissed. In 2 cases no errors were found at all. In only one case did the Court conclude that the conviction of the defendant was unsafe.

Appointments

85. There is one further influence on the conduct of barristers which may be mentioned at this point. Over the course of their working life, and as their careers develop, many barristers will be motivated to apply for higher appointments in the law. They may wish to be appointed for example as QCs, recorders, part-time deputy judges or deputy masters of the High Court, chairs of tribunals, or coroners. In due course they may wish to apply for permanent appointment to the bench.
86. It is known that, in the making of any of these appointments, very searching investigations are carried out into the background and character of the applicant. The desire for career advancement will, as in many other workplaces, consciously or unconsciously affect the ethics and standard of their performance.

VIII: DISCUSSION

87. One of the themes of this Response is that education and training at the Bar, including CPD, is systematically organised and aims to assure very high standards of skills and learning. It has recently been reviewed in detail by the BSB after wide consultation with the profession. Much of this activity goes beyond the elements formally required in the *BSB Handbook* and *Professional Statement*, important though they are. The Bar has been self-motivated to uphold and improve standards of professional performance since the inception of the Inns of Court. The agencies within the Bar which now deliver education and training are more active than ever before. They are all afforded by senior practitioners and judges on a purely voluntary basis, motivated to uphold the standards and reputation of the profession.
88. The concern of the individual barrister to maintain high standards, through the medium of continuous training, is based on three main grounds. First, after the paramount duty which barristers owe to the court and the administration of justice, barristers are professionally committed to the best interests of the client, just as a doctor is committed to the welfare of the patient. Secondly, there is the fact that advocacy is conducted in plain sight, before a court or tribunal, usually in the presence of an instructing solicitor and client and usually under the gaze and scrutiny of an opposing advocate. If it is to be and is seen to be properly performed, the work cannot be taken casually. It requires careful planning and preparation. Staying on top of the facts and up-to-date with the law are at a premium. Private conferences with clients exert similar pressures. Expectations are high.
89. Thirdly, finally and bluntly a self-employed barrister's livelihood is dependent on a high standard of performance. Consistently poor performance in a competitive market will result in a loss of work.
90. For these various reasons the incidence of complaints about barristers is very small. The Bar as a profession continues to enjoy a high reputation nationally and internationally. The services of barristers as advocates and teachers of advocacy are widely deployed. They are frequently appointed to chair tribunals, committees and inquiries of many different descriptions.
91. It is of course accepted that some practitioners do not perform to the required level of competence. Many others may perform adequately when they could do better. Moreover there is no reason to suppose that poor or merely adequate performance is limited to the criminal courts, as reported in Part VI above.

92. The Inns of Court and the ICCA are not complacent and acknowledge that the quest for improvement must be continuous. Two areas for possible improvement have been highlighted by this inquiry.
93. In respect of poor or merely adequate advocacy there is a case for encouraging the judges, in all jurisdictions, to become more willing to take positive action when below-standard advocacy is detected. This may be achieved by building better bridges between the judiciary and the BSB and could lead to the BSB prescribing further advocacy training for those who are seen to need it. It touches upon the sensitive question of the role of the judge in court, and is a matter for discussion between the judiciary and the regulator.
94. Secondly the BSB might wish to exercise its existing powers to scrutinise more rigorously the reports which practitioners return for their CPD activities so that it can be sure that continuous education and training are securely focused on the client's principal expectations. In this Response they have been identified as renewal and refurbishment of the basic skills of the advocate, coupled with keeping fully abreast of all new developments in the law and procedure relevant to the chosen area of practice. Whether the requirement of an annual minimum number of CPD hours should be restored is also worthy of further debate.
95. In concluding this Response the Inns address the final question raised in the LSB's Paper, namely whether barristers should be subjected to a further type of process of re-accreditation. They disagree with the proposal. There are various reasons for this answer.
96. First, the Bar is a small profession, and it is already well regulated and overseen. There are many existing procedures for dealing with complaints, including allegations of incompetence. Its front-line regulator the BSB, in its new regulatory regime, has very recently revisited and dealt with all the issues raised by the LSB. There is no need for further regulation. The BSB already has the powers necessary to enforce high standards of competence.
97. Secondly, a system of formal re-accreditation would be beset with administrative and legal difficulties. Comparisons with other professions, as outlined in Part 4 of the LSB's Paper, are not helpful. Unlike doctors, barristers work in plain sight, under the gaze of the court or tribunal, the client, the professional who is instructing them, and the opposition. Doctors work in an organised workplace, overseen by their peers and managers, but never under that kind of spotlight. The analogy with Ofsted's function is even more remote, because Ofsted primarily assesses and accredits schools, not teachers.

98. Investigating a barrister's performance in greater depth, beyond checking their CPD Report, and recording whether they have been the subject of some criticism or complaint which is in the public domain (which are already in the hands of the BSB) would inevitably lead to an inquiry into their actual casework. But whether it is the giving of a legal opinion, or a tactical decision taken during a trial, or any other type of decision, all the relevant information will be protected by legal professional privilege, inaccessible to the inquirer. For this reason alone it is difficult to see how any additional process of appraisal could be implemented. Equally difficult is to identify the person who would be capable of carrying out such a process.
99. The Inns believe that the existing system of education, training and oversight at the Bar, as described in this Response, more than adequately achieves the objects of the type of reaccreditation outlined in the LSB's Paper. Any further scheme of oversight, even if it could be effectively implemented, would seem to be quite superfluous to addressing the problems of performance which are currently seen to exist. It would add extra bureaucracy and cost to the conduct of the profession without adding any extra value.

ANNEX

Instructing a Barrister: A Guide to Clients

You have instructed a barrister to assist you. You may have asked your barrister to represent you at a hearing in a court or tribunal, to give advice in connection with those proceedings, or just to give you legal advice. You are entitled to expect that the barrister, acting within the scope to the instructions you have given,

- ◆ *Is knowledgeable and competent in the area of law and practice which applies to your circumstances.*
- ◆ *Is thoroughly familiar with the information you have provided in your instructions.*
- ◆ *Will carry out any further study of the evidence, law and practice which may be necessary after receiving your instructions.*
- ◆ *Has a sufficient level of experience to undertake the work you have asked them to do.*
- ◆ *Will wish to have a clear understanding of the way in which you personally are affected by the facts and the legal issues in the case and the outcome you wish to achieve.*
- ◆ *Will explain their assessment of your case or problem, including any difficulties which can occur, fairly, impartially and in clear non-technical language.*
- ◆ *Will treat you courteously and proceed with all reasonable speed to give the service you have asked for.*
- ◆ *If representing you in a court or tribunal will argue your case as persuasively as the evidence and law permit.*
- ◆ *Will try to keep the costs of employing them as low as reasonably possible.*