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Review of the Provision of Independent Criminal Advocacy

The Council of the Inns of Court & The Advocacy Training Council Submission

Introduction

This paper is written by representatives of the Council of the Inns of Court and the Advocacy Training Council to assist the 'Review of the Provision of Independent Criminal Advocacy' currently being undertaken by Sir Bill Jeffrey at the request of the Secretary of State for Justice.

The Council of the Inns of Court

The Council of the Inns of Court ("COIC") is a body formed by the four Inns of Court and comprising senior members of the Bar and Judiciary who represent the Inns in making policy on matters referred to it by the Inns and Bar Council of England and Wales ("Bar Council"). It formulates and co-ordinates the policies of the Inns. The Inns individually have the statutory responsibility for calling (admitting) suitably qualified applicants to the Bar of England and Wales. COIC also serves as a forum in which matters of common interest can be discussed with the representatives of the Bar Council and the Bar Standards Board ("BSB").

COIC is also responsible for the Bar Tribunals and Adjudication Service ("BTAS"). BTAS appoints and administers the Bar's Disciplinary Tribunal, through which the BSB prosecutes Barristers for breaches of the Code of Conduct of the Bar of England and Wales. BTAS also administers the Inns' Conduct Committee which considers admission and disciplinary cases brought by the Inns of Court in respect of applicants for admission to an Inn of Court, or student members of an Inn.

The Advocacy Training Council

The Advocacy Training Council (“ATC”) is a Council established by COIC. The ATC comprises Barristers, members of the judiciary, others drawn from the Inns of Court, the Circuits, the Bar Council, Specialist Bar Associations (“SBAs”) and from other representative bodies and organisations such as the Crown Prosecution Service (“CPS”) and the Law Society.

Under its constitution, the main functions of the ATC are to provide leadership, guidance and coordination in relation to the pursuit of excellence in advocacy. This includes the co-ordination and monitoring of advocacy training, the dissemination of best practice in advocacy, the delivery of advocacy training both nationally and internationally and the organising of educational and training events. The ATC also conducts research into advocacy techniques, and best practice.

Current projects include “The Advocate’s Gateway¹”, a website which gives free access to practical, evidence-based guidance on the handling of vulnerable witnesses and defendants. The ATC is also at the forefront of developing and delivering advocacy training on the handling of vulnerable witnesses within the Court system, having pioneered, designed and implemented practical role-play based training on cross-examination of child witnesses as part of the world renowned South Eastern Circuit Advanced International Advocacy Course held annually at Keble College Oxford. Active research is also being carried out in other areas referred to at the end of this Submission.

As such, the ATC has a primary role in the development and delivery of advocacy training and specialist training in all forms of Courtroom techniques, including client handling and case management. Despite the fact that the ATC is principally funded by the four Inns of Court, its activities are not limited to the Bar, as many of the projects being undertaken by the ATC (for instance in relation to categories of vulnerable witnesses,) comprise not just members of the legal profession but also members of affected professions who come into contact with the criminal justice system, such as Registered Intermediaries and members of medical and allied professions.

Structure of the Paper

This paper broadly follows the review terms of reference:

- Section 1: The Experience, Capabilities and Skills needed of Advocates in the Criminal Courts
- Section 2: The Future Structure of the Profession Providing Advocacy Services in England and Wales
- Section 3: Current Arrangements for Training Advocates
- Section 4: Training of Advocates in the Future (having regard to the recommendations of the Legal Education and Training Review)

¹ <http://www.theadvocatesgateway.org>

Summary

The key points made in this paper are:

- 1) Skills – Advocacy is an important, difficult and specialist endeavour. To be competent, an advocate must develop the ability to prepare meticulously, think forensically, communicate and question effectively and act ethically. To be an effective advocate requires training, practise and experience. Good advocacy is fundamental to the fair and efficient administration of justice.
- 2) Structure of the Profession – There should continue to be a specialist advocacy branch of the legal profession. There should be specialist training which may be undertaken in a number of ways.
- 3) Current Arrangements for Training Advocates – Training is necessarily an intensive, multi-faceted and specialist process that takes time. The training of advocates works best when experienced practitioners, who have themselves been trained as trainers, are training other advocate practitioners.
- 4) Training Advocates in the Future – The provision of post graduate training (The Bar Professional Training Course (“BPTC”) for Bar students, the training of Barrister pupils and new practitioners at the Bar in advocacy and related skills) is constantly reviewed and improved. Current priorities include the need to make the BPTC more rigorous, flexible and less costly. The role of the ATC in promoting best practice at all levels of advocacy training is also under active discussion which may lead to its being expanded if not re-cast.

Introductory Comments on the Operation of the Market in Criminal Advocacy Services

Sir Bill Jeffrey, in his letter of 26 October 2013, invites comments on the operation of the market in criminal advocacy services, the linked issue of quality and training, and whether any shortcomings are attributable to the structure of the profession providing advocacy services.

By addressing the terms of reference, it is hoped that these points are considered in this paper. Nevertheless, what is written should be read in light of the following introductory comments.

In relation to the market for criminal advocacy it has to be recognised that the market is heavily distorted by the existence of a monopoly purchaser, the State, which has an incentive, particularly at the present time, to pay the lowest sums possible. Further, the pressures on the Ministry of Justice (“MOJ”) to reduce its expenditure are not based upon a logical assessment of what the country needs in order to fund a fair justice system; but are largely driven by the dictates of the Treasury. The MOJ is simply told to reduce its budget by x£ and

it thereafter has to comply. The net effect is a system whereby the Legal Aid Authority, acting on behalf of the MOJ, has an ever smaller fund with which to pay advocates.

To exclude legal aid rates from the terms of reference is to ignore the elephant in the room. We have not addressed legal aid issues in this paper; but the impact of the cuts cannot be ignored in respect of its impact upon the quality of advocacy being performed in the Courts. It is a statement of the obvious that if less is paid then those providing the service being paid for will, of necessity, have to cut their cloth to meet their purse. The legal aid funding system is heavily slanted in favour of Solicitors' firms who then instruct Barristers. They are incentivised by the reduction in fees to instruct in-house advocates (or indeed employed Barristers) of lesser experience who are less costly to employ. They are also strongly incentivised to use those advocates in cases which increasingly may be beyond their actual level of experience. This is not to decry Solicitor advocates or employed Barristers, some of whom are extremely able. It is to point out the obvious, namely that legal aid cuts impact upon quality and, as we emphasize elsewhere in this report, that impacts directly upon the cost, efficiency and fairness of the administration of justice.

It has been suggested that there are too many advocates. There is no empirical evidence. In any case, supply at the Bar is readily and rapidly responsive to demand. Barristers are self employed; if there is no legally aided criminal work available they will seek to obtain instructions in other areas of law. And if this is not forthcoming they will leave the Bar. Solicitors' firms are not quite so flexible since many will have to pay their advocates their contractually due salary regardless of whether they are generating fee income.

An argument that the reduction in legal aid funding would be "no bad thing" because the Bar has to shrink anyway would be profoundly misguided. It would be a boot straps justification. There is always healthy natural attrition in any profession, but the brute reality is that the Bar is shrinking because the best are leaving or diversifying and recruitment is halted. The natural gene pool of the advocacy profession is being weakened. This has long term adverse effects upon the quality of advocacy in Court and – critically – upon the recruitment of the right people to the judiciary in due course.

Section 1

The Experience, Capabilities and Skills Needed of Advocates in the Criminal Courts

Capabilities and Skills

In order to assist the review, what follows are very broad descriptions of the skills and capabilities of criminal advocates.

“It is in the interests of the public, the Court and the profession that all [advocates] present their cases to the highest professional standards. They must prepare thoroughly and present their cases in a manner which is clear, well organised, efficient and persuasive.”

This statement appears as the introduction to the Dutton Criteria, adopted in 2004 by the ATC and Inns of Court as the basis of assessment of advocacy skills of pupils and new practitioners. The Dutton Criteria describe the qualities that we believe should underpin advocacy in all Courts and are set out in full at Annex 1.

In essence, advocacy is the means by which an advocate puts his or her client’s case to the Court and may be both written and oral. It is a specialist skill, and it is in the interests of the public, the Court and the profession, that advocates present their cases to the highest possible standards.

Oral advocacy is a performance skill. It requires the advocate to address the Court persuasively and concisely, presenting the case in a manner which is clear, well organised and efficient. In order to do this, the advocate must exercise the skills of case analysis, use of skeleton arguments, oral submissions, examination-in-chief and cross-examination, pleas in mitigation and legal submissions.

Advocacy is therefore more than just “speaking in Court”. Like many skills exercised at a competent (let alone excellent) level, it involves a combination of factors which need to be diligently studied, analysed and practised.

The following are essential skills for a modern advocate:

- Ability to Persuade Orally
- Ability to Persuade in Written Argument
- Cogent Legal and Factual Analysis
- Ability to Develop Reasoned Argument
- Forensic Skills with Evidence (both written and oral)
- All of the foregoing undertaken to high ethical standards

An effective criminal justice system is the cornerstone of a democratic society. The Ministry of Justice itself summarises its aims for the criminal justice system² as:

- reducing crime
- reducing reoffending
- punishing offenders
- protecting the public
- making reparation
- improving public confidence, and,
- ensuring that the system is fair and just.

In order to achieve these aims, the latter objective – ensuring fairness and justice – is the starting point. A fair and just system requires that cases are both effectively and robustly prosecuted and defended. The advocate plays a fundamental and critical part in achieving these overarching principles of quality and balance which in turn lead to a fair and just criminal justice system in which the public can have confidence.

An advocate in the criminal Courts performs in an environment in which the stakes for all parties are high. For the defendant and his or her family, conviction may lead to a loss of liberty and profound damage to reputation and livelihood. For the victims of crime, who may have suffered a terrible ordeal, fair treatment and effective participation in the Court room and in the prior proceedings, can be an important part of coming to terms with what has happened.

All advocates must be aware of, and able to address, serious social issues. Issues relating to socio-economic vulnerability, mental and physical health, drug and alcohol addiction, vulnerability on the grounds of youth or age, lack of education, and inadequate or absent parenting are commonplace amongst defendants, victims and witnesses. All advocates, whether prosecuting or defending, must be able to deal effectively and appropriately with these issues wherever they arise, to ensure that the evidence is properly tested, legal and procedural points are taken and argued, and the tribunal of fact is placed in a position enabling it to make a fair assessment of the case for both sides.

This is particularly important in cases where the tribunal of fact is composed of lay people (i.e. a jury), many of whom may have had little or no experience in analysing and weighing evidence and reaching logical (as opposed to instinctive) conclusions.

The following is a brief analysis of competencies which we believe are necessary for there to be effective and efficient advocacy in the criminal Courts. We have not sought, in this brief document, to set out a comprehensive analysis of the requisite capabilities of an advocate but we would be happy to work with the review team to set out a more definitive list should that be helpful.

Preparation & Planning

² See Ministry of Justice Website <http://www.justice.gov.uk/about/justice/criminal-justice-system-efficiency-programme2>

It is a common fallacy that competent advocacy can be achieved without much preparation. This is often based on the apparently effortless performances which such people have watched. The reality is different. Effective advocacy requires thorough and painstaking preparation.

Preparation is not just about reading the papers and mastering the facts. It is about analysing the law and evidence and identifying a strategic plan for the presentation of the case in Court.

This is the hallmark of effective “case analysis”; in common parlance the early development of a strategy which, in due course leads to case management decisions. If done properly it will invariably lead to a narrowing of, and focus upon, the key issues in a case. This leads to shorter and more effective questioning of witnesses, focussed legal argument, and persuasive factual submissions. Proper preparation saves Court time; poor preparation leads to lengthier and more complex hearings, and a greater risk of the trial “going wrong” and leading to adjournments and appeals.

Plainly, the more complex, serious and/or difficult the case, the more preparation, case analysis and case management is required. Making such decisions in these sorts of cases requires the exercise of skill, judgement and experience which will only be acquired after years of practise of the essential Dutton Criteria core skills.

Legal Analysis / Skeleton Arguments

A good advocate must be a competent lawyer. The rules governing criminal trials are now very complex. Many of the rules have sanctions applied for non-compliance. The trial advocate has an ongoing responsibility to advise the Solicitor preparing the case about those rules and must be able to explain clearly to a Court when and why there has been a failure.

In this context, submissions of law deserve special mention. Taking bad legal points wastes time but by the same token failing to take points that ought properly to be taken risks causing injustice. Criminal law is a very complex subject involving numerous Acts of Parliament and a substantial body of relevant case law. Often, points arising need time consuming research. Written skeleton arguments may be required by a Court in order to assist the Court in understanding and digesting the issues. A skeleton argument needs to be prepared at a time when the advocate has undertaken sufficient case analysis to have developed a strategy consistent with his or her instructions, so as to understand the significance of the points in issue.

Even the most straightforward jury trials can demand many hours and sometimes days of preparation. Those who seek to be criminal advocates recognise that it is a specialist occupation rather than something that can be fitted in around other case management or litigation functions. Surgeons performing complex operations do not spend their time acting as GPs.

Ability to communicate appropriately and effectively

Court room advocacy requires an ability to speak to the judge, jury and witnesses in a clear and comprehensible manner.

It requires an ability to use simple words and sentences to construct questions and to communicate often very large and complex ideas. The skills must be flexible. It is never possible to predict the condition of a witness when he or she enters the witness box or what the response will be to questions. As well as appropriate language, appropriate demeanour must be demonstrated.

The following bear closer examination:

First, the ability to formulate questions which obey the various rules of evidence is of vital importance. An adversarial system depends on obtaining and testing the evidence of witnesses. Questions must be clear, precise, fair and relevant. A poor advocate has a script and sticks to it, which involves lengthy questioning, missed points and often witnesses being required to return; a good advocate is flexible and can adapt as circumstances change.

Secondly, the advocate must also have the ability to make speeches and submissions which are concise, accurate and persuasive. If a judge has a busy list then he or she needs to have advocates before him or her who can get to the point quickly and assist the judge to achieve the right answer. If it is a speech to a jury, an advocate has the responsibility of summarising facts and putting arguments (some of which may be very complex,) in a way which is understandable to each member of the jury.

Ability to think forensically

Trials are dynamic; witnesses may give unexpected information or evidence or make concessions. New material may emerge shortly before or even during the trial. Legal issues can arise at any time. It is essential to the smooth running of any trial that the advocate is able to assimilate information quickly and appreciate the effect it has on his or her case. Being able to identify the relevance of any material and apply it to the issues is an important skill but, again, one which eludes those who are not committed and competent advocates.

Integrity

Justice in this jurisdiction depends upon a system whereby advocates act upon the fundamental principle that their duty is first and foremost to the Court and to the proper administration of justice. So far as the Bar is concerned, this principle is clearly set out at the very beginning of the latest version of the Bar's Code of Conduct, recently published by the Bar Standards Board. Subject to that overriding duty a Barrister's duty is to protect and promote the interests of his or her client. Barristers are also expected to show each other mutual respect and Courtesy.

The very smooth running of the Court system, and accordingly its cost effectiveness, depends critically upon all advocates understanding and adhering to this common ethos.

Much time (and money) is saved by a system where the advocates have a common understanding of what is and is not acceptable behaviour (something which cannot be set down in rules). There is a strong tradition in this jurisdiction of advocates behaving towards each other and to the Court with respect and dignity. The importance of this to swift, efficient and effective justice cannot be overstated. The point is put well in the "The Inns of Court Role in Provision of Education and Training" (Annex 2) which states that:

“The proper administration of justice by judges and the contribution which is made by the Bar depend very much on the integrity of advocates. Judges need to be able to rely on advocates to put their cases effectively and honestly and to draw attention to both supporting and opposing arguments as appropriate. Both judges and practitioners appreciate that, unless this duty to the Court is respected, the administration of justice will suffer.

Judges and the public must also be able to have the confidence that advocates will observe the highest professional standards. The Inns have an important role in promoting and protecting these high ethical standards among members of the Bar from the very start of their careers when they join an Inn. A correct understanding of the various duties by which advocates are bound is central to their professional role and is at the core of discussion and teaching at the Inns.”

These requirements should apply not just to the Bar but to all advocates appearing in the Courts.

Continuing Development

The skills of any advocate require practise and honing. Advocacy is a full-time study for anyone who takes it seriously. The profession, through the ATC, Inns, Circuits and some 18 SBAs provide training on a range of specialist and non-specialist issues e.g. cases involving vulnerable witnesses, questioning of experts, questioning through interpreters and the ethical dilemmas thrown up by Courtroom advocacy.

A competent advocate must have the ability to analyse his or her performance as it is happening, to understand why a line of questioning is or isn't effective and to make swift changes. He or she will see the fine honing of skill as essential (hence the substantial amount of CPD available for advocacy skills).

The result is that judges, magistrates, witnesses and jurors can expect a quality of advocacy which is clear, relevant and helpful. If it is not, then the advocate can expect to be criticised.

Equality and Diversity

Finally, any advocate must have a full understanding and appreciation of equality and diversity principles. The criminal law above almost any other area of law encounters people of all beliefs and origins. Ensuring that all who come into contact with the criminal justice system are treated equally and fairly is fundamental to fairness but also to the rule of law in a democratic society. This is not merely an abstract principle; this is relevant to the everyday working life of the advocate.

Equality and diversity issues manifest themselves in numerous practical ways to which an advocate has to respond: a defendant or witness who does not speak English; a witness who wishes to wear the veil whilst being questioned; a female witness whose culture makes it difficult to speak or be seen in the presence of unknown men are but a few examples.

An advocate must be able to adjust the presentation of his or her case taking into account any religious or cultural characteristics of witnesses, defendants and / or jurors.

Section 2

Future Structure of the Profession

In the terms of reference, the review is asked to consider: ‘the future structure of the profession providing advocacy services in England and Wales.’ In summary it is our view that there is a strong need in the public interest for:

- the maintenance and strengthening of the Bar as a specialist advocacy branch of the profession;
- the establishment of high common standards applicable to all advocates;
- substantial specialist training both pre-qualification and post-qualification.

Specialist Advocacy Profession

A specialist advocacy branch of the profession must continue to exist in criminal proceedings as it must in all other areas of litigation.

It is important for the maintenance of the rule of law that there should be individuals who devote themselves to the skill of advocacy from a very early stage. This is a difficult and complex craft. To create a cadre of practitioners who are able, as their practices develop, to take on the weightiest and most complex cases, necessitates a system which enables those inclined and skilled in advocacy to start early and to continue to hone and practise their skills over many years. Until recently it has always been possible to take for granted that advocates would learn and acquire skills in the course of their practices which would equip them to handle ever more complex cases with efficiency and skill.

Good advocacy before the criminal Courts is fundamental to the due administration of justice and the rule of law. Judges do not have legal assistants or law clerks; they rely upon the advocates before them to research and to guide them on the law and to ensure that trials proceed expeditiously and efficiently. Maintaining high standards is therefore critical. Almost any judge will report that the quality of the advocates appearing has a direct bearing upon the efficiency of the trial or hearing. Poor advocacy leads to delays, errors and miscarriages of justice. Good advocacy means that justice is delivered in the shortest time and with the least burden, financially, on the state.

The maintenance of a strong cadre of specialist advocates is also critical to the future strength of the judiciary. The future of a high quality judiciary depends upon its ability to recruit from amongst those, whether Barristers or Solicitors, who have acquired during their careers real experience of a range of cases spanning the straightforward to the very difficult. There is, at present, a real concern amongst the senior judiciary that the problems besetting the professions at this time, including the pressures upon both the Bar and the Solicitors, are creating an environment in which the long term viability of specialised advocates is under threat.

Harmonisation of Standards

The inquiry will be aware that advocates in the criminal Courts, meaning here, principally, the Crown Court, can be qualified in accordance with one of two separate education and training regimes, and are bound by different rules and codes of conduct, according to the route by which they acquire their rights of audience.

Barristers are educated and trained in advocacy and ethics in accordance with the Bar Training Regulations, issued by the Bar Standards Board (“BSB”), at each stage in their development. The Regulations are supplemented by detailed guidance set out in the BSB’s Handbooks. The training after initial qualification (call to the Bar) is delivered by senior Barristers and sitting and retired judges in the Inns and on the Circuits, acting on a purely voluntary basis, in accordance with long-established and internationally recognised methods, accredited by the ATC. A more detailed description of the training which Barristers are required to undergo is set out later in this Submission.

The route by which Solicitors acquire the same rights is quite different and, with due respect to them, much less rigorous. The education and training of Solicitor advocates was the subject of a detailed and critical Report commissioned by the Law Society, written by its consultant Nick Smedley and published in 2010. The inquiry will be familiar with this succinct and trenchant Report and will find that it covers many of the points discussed in this Submission. The Report, in its conclusions, refers to the views expressed by a number of Respondents “that the best and most immediate solution would be for the Solicitors’ profession to learn from the Bar model”.

COIC does not argue that all Barrister advocates are superior to all Solicitor advocates. It recognises that there are poor advocates, as well as highly effective advocates, within both groups. This point is also made in the conclusions in the Smedley Report. In extreme cases of poor advocacy disciplinary procedures may be invoked. We do however argue that the education and training regimes to which advocates are subjected, both at the point of qualification and in the years following qualification, should meet the same high standards, irrespective of whether the advocate qualifies as a Barrister or a Solicitor. The regimes laid down by the regulators of each side of the profession should be harmonised and common standards set, the bar being placed at a high level consistent with the public interest. There is no room for a lowest common denominator in a profession whose work engages the public interest as much as ours.

All parties to proceedings, the client (be that an individual or the state), the Judge, the jury and the advocates themselves should have the same expectations of all advocates. All parties should, in the event that things go wrong, expect common standards and disciplinary procedures to apply.

Given the extreme financial pressures to which the criminal justice system is now subject, and the fact that advocates are also under acute financial pressure, there increasingly exist systemic pressures and perverse incentives on advocates to conduct cases in the quickest and

least burdensome way. Many advocates will resist this pressure but the pressure is now inherent in the system and it simply has to be accepted that the quality of the advocacy being performed in the Courts is under serious pressure and threat.

The need for strong and uniform standards of education and training, and the consistent enforcement of those standards by the relevant regulators has therefore never been greater, if the quality of advocacy is to be maintained and enhanced.

Specialist Training

For the purposes of considering the structure of the profession, a specialist advocate's training could follow one of two patterns. An advocate might train from the beginning as a specialist advocate, focusing time and resource to the skill of advocacy and all the attendant skills and knowledge. However it is fully recognised that some very able advocates start life as non-advocacy practitioners and come to advocacy over time (or at the outset wish only to appear periodically and infrequently). The profession of advocate must not be barred to such practitioners. Indeed there are many very able higher Court advocates in practice who have come to advocacy by this route. In these cases the training that must be made available should be such as to bring the individual up to the common level. In other words, flexibility in how a person becomes an advocate should be encouraged, but that should not lead to different standards being ultimately required of advocates depending upon their route of entry.

In accordance with these principles, the Bar Training Regulations allow a Solicitor with higher Court advocacy rights to transfer fairly readily to the Bar, subject to joining an Inn of Court by which the advocate will be called, but a period of pupillage and /or supervised practice may be required.

Other sections of this Submission deal with training in more detail. While, as we shall point out, the oversight and regulation of education and training for the Bar is in the hands of the Bar's regulator, the BSB, the delivery and methodology of training rests with the Inns and the Circuits.

COIC, on behalf of the Inns, assists and facilitates the discharge of this function through the ATC which has, in the past 24 months, been restructured in order to embark upon a more ambitious process of making training for the profession responsive to the rapidly changing political and economic environment. Its programmes include but are not limited to the practice of advocacy in the criminal Courts.

Section 3

Current Arrangements for Training Advocates

Advocacy training for new Barristers principally occurs in four phases:

1. Bar Professional Training Course (BPTC) & Inns Qualifying Sessions;
2. Pupillage;
3. New Practitioners Programme (NPP);
4. Further Training/ Continuing Professional Development.

Each of these stages is regulated by the BSB under its Bar Training Regulations³, which are approved by the Legal Standards Board under the Legal Services Act 2007. The Regulations, as previously noted, are supplemented by the Bar's Code of Conduct and detailed Handbooks published by the BSB.

Phase 1: The BPTC & Inns Qualifying Sessions

Advocacy training on the BPTC

This is the first stage of professional study for the potential Barrister, who will possess either a university degree in law or a degree in another subject and will then have passed a one-year intensive diploma course (Graduate Diploma in Law) in the core legal subjects. The BPTC is provided at twelve locations across England & Wales, accredited by the BSB.

The BPTC Handbook sets out the intended module learning outcomes⁴:

By the end of this unit, following the study of Advocacy, the student will be able to:

- i. prepare a case effectively, understanding the relevant law, facts and principles, observing the rules of professional conduct and planning the advocacy task in question*
- ii. demonstrate basic advocacy skills in a range of civil and criminal scenarios, in applications and in trial(s), and before a range of tribunals*
- iii. prepare and deliver each of the following:*
 - a. an opening speech;*

³ Bar Standards Board Bar Training Regulations 2013 accessed via:
<https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/>

⁴ Bar Standards Board Bar Professional Training Course Handbook (September 2013)
https://www.barstandardsboard.org.uk/media/1542061/bptc_handbook_2013-14.pdf

- b. a closing speech;*
 - c. an unopposed submission; and*
 - d. an opposed submission.*
- iv. *examine, cross-examine and re-examine witnesses*
 - iv. *meet the minimum required competency standards set forth for Level 1 Advocates under QASA.*

The marks awarded for the advocacy examinations during the BPTC count for 25% of the student's overall BPTC grade.

The structure of the BPTC advocacy course

Although there are variations between the advocacy programmes, all meet the same requirements. A convenient example is the course offered by BPP, a provider with has schools in Leeds, London and Manchester. Students attend advocacy classes each week. There are 4 students in each class and each student has 12 minutes to 'perform'. The structure of the advocacy course in 2011-2012 was as follows:

Term 1 Week 1- plea in mitigation, week 2- bail application. There was one class when students made a submission of no case to answer. The remainder of the first term (end of October – December) covered civil applications (injunctions, default judgment and interim payments) and the use of skeleton arguments in such applications. End of term 1: examination on civil interim applications. The exam was a 12 minute application for which a skeleton argument was prepared in advance. It is not expected that submissions will be completed in 12 minutes; it is simply to ensure each student performs for the same amount of time.

Term 2 Dealt exclusively with examination in chief and cross-examination, in a mixture of civil and criminal cases. Students were examined on both in April (usually two criminal briefs). Again, for 12 minutes, on each topic.

Grading criteria: not yet competent (<50%), competent (60%), very competent (70%) or outstanding (85%). Some mistakes are regarded as 'fatal flaws' (usually an error of law or practice) that will cause the student to fail the exam, regardless of the overall quality of their advocacy. The most common are 'leading' witnesses in examination in chief or failing to put one's case in cross-examination.

Optional BPTC modules: There are optional advocacy modules which may be taken in the final term of the BPTC, such as advanced criminal litigation or family law.

Inns' Qualifying Sessions

In addition to the BPTC students must complete 12 qualifying sessions at their chosen Inn before they can be Called to the Bar.

The Inns deliver some 331 individual Qualifying Sessions each year at residential weekends or in the evenings. They are designed to present students with a wide choice to enable them to learn about the law and more broadly about the legal profession, as well as to develop their advocacy and public speaking skills. Examples of the sessions are lectures, voice projection workshops, debates, moots and advocacy workshops. There are approximately 575 Barristers who volunteer to provide the training in their own time and without charge. These advocacy tutors have themselves been trained by senior tutors (also members of the Bar), also free of charge. An outline of the training is set out at Annex 2.

The Inns also carry out additional activities in support of their students with a view to increasing the educational opportunities open to them, but which are not necessarily Qualifying Sessions. For example, students can be linked with Barristers who act as their sponsors during the period of the course to act as advisers and mentors; there are organised trips to European legal institutions; students can spend time sitting with a judge to obtain a judicial perspective on Court proceedings.

Phase 2: Pupillage

Over the past 20 years the Bar has developed and conducted advocacy training which is taught using developed methodologies, in a structured way. At the time of its introduction in the early 1990s, this training was seen as a necessary and overdue requirement in order for the Bar to train its young recruits. Training of pupils and new practitioners remains a core part of the profession's commitment to standards and quality. This training is provided, pro bono, by experienced and talented practitioner trainers.

In more recent years, the concept of advocacy training as an ongoing professional need has evolved, with the development of specialist advocacy training in such fields as the handling of young and vulnerable witnesses, expert witnesses and appellate advocacy.

Training during pupillage

A pupil (trainee Barrister) must undertake pupillage for twelve months, under the supervision of a Pupil Supervisor (accredited by the BSB,) at an Approved Training Organisation (chambers or an employed organisation accredited by the BSB). It is divided into two six-month terms.

The 'First Six'

During the first six months of pupillage pupils are required to undertake monitored training under the direct supervision of the Pupil Supervisor, which includes shadowing practitioners in Court to observe advocacy and Court conduct, preparing written advice and attending conferences (meetings) with clients. At this stage the pupil cannot represent clients in Court.

In addition to receiving training from their pupil supervisors, pupils are required to undertake an external, assessed, compulsory advocacy training course. This is required by the Bar Training Regulations. It is provided to pupils, depending on where they are based, by the Inns

of Court and Circuits. Instruction is delivered by trained, accredited trainers, who are senior Barristers and sitting and retired judges. Again, their services are delivered without payment.

The structure and delivery of each course may vary from Inn to Circuit, but all the courses include compulsory elements, including 12 hours of structured advocacy training. Pupils must successfully complete the advocacy training course before commencing the second six months of pupillage. The compulsory Practice Management course can be undertaken during the first or second six.

The Practice Management course covers everything necessary to consider and respond to in self-employed and employed practice. It includes ethics, equality and diversity, discipline and complaints, record keeping, tax accounting and financial management, and relationships with clients, witnesses, Solicitors, clerks and the Courts.

The advocacy training portion of the course focuses on four target areas: skeleton arguments, oral submissions, examination-in-chief and cross-examination. The cost of attendance for pupils ranges from £0 to £60 maximum which is highly subsidised by the Inns.

Pupils are assessed on their performance in the advocacy portion of the course. To assess pupils' oral advocacy, the Inns and Circuits apply the Dutton Criteria. Pupils are required to pass the course and, if they do not, they are not entitled to obtain a Provisional Qualification Certificate issued by the BSB which is the pre-condition to obtaining a full practising certificate issued by the Bar Council.

The 'Second Six'

Possession of a 'Provisional Qualification Certificate' allows the pupil to enter the second six months of training with rights of audience and the ability to represent clients in Court. The second six is fully supervised by the Pupil Supervisor who is required to assess competence, mentor and provide feedback. He/she is responsible for endorsing the BSB checklist to ensure pupils undertake all areas of training and development, and is required to sign a certificate at the end of the second six, as a condition precedent to the pupil receiving a full practising certificate from the Bar Council.

In addition to the courses offered by the Inns of Court and the Circuits, many sets of chambers also offer in-house advocacy courses to their own pupils. Again, the members and former members of chambers offer their time and expertise without charge.

Phase 3: The New Practitioners' Programme (NPP)

All Barristers are required to complete a certain number of hours of Continuing Professional Development (CPD). In the first three years newly qualified practitioners are required to complete 45 hours of Continuing Professional Development, including at least 9 hours of Advocacy Training and 3 hours of Ethics (the "New Practitioners' Programme").

All the Inns and Circuits run specially-designed programmes for new practitioners, focusing on the requirements for training in advocacy and ethics. The advocacy training is split into case preparation/case analysis, written submissions, and workshop-based practical training.

Two of the Inns also run courses for the Employed Bar, which deal with issues which arise in both the public and private sector. Typically, there will be one or two experienced trainers and one judge per group, providing a more intensive training environment than at the pupillage stage.

Ethics training consists of interactive, seminar-type discussion of possibly contentious scenarios, led by several trainers. These programmes might typically also include a session on client care.

Phase 4: Further Training/ Continuing Professional Development

Established Barristers are currently required to complete 12 hours of Continuing Professional Development (“CPD”) per year. The Inns of Court, Circuits and Specialist Bar Associations offer a rich variety of inexpensive, accredited CPD events. As the Inns are places of learning and debate for the whole profession, the topics offered in CPD events cover a wide range of the issues facing the profession today. The events include lectures, master classes in advocacy, and seminars.

Further examples of such events/training are set out below.

The Criminal Bar Association (“CBA”)

Most Barristers join the specialist Bar association relevant to his/her practice area. The CBA is the largest of these associations and has a wide-ranging programme of lectures, seminars and an annual conference, available across the jurisdiction, often in liaison with the Circuits. The programme has a particular focus on advocacy in the criminal Courts, at all levels of the profession.

All day seminars focus on specific topics such as Sexual Offences (June 2013) and Fraud (November 2013). These seminars focus on all aspects of advocacy in such cases including preparation and case management, advocacy and the law. In addition, the CBA provides evening seminars on a broad spectrum of topics relevant to its members. The quality of these is consistently high, given that the CBA is able to draw on its membership for the leading practitioners and experts in the particular field. Practitioners give up their time pro bono to provide training at these events.

The South Eastern Circuit International Advanced Advocacy Course (“Keble”)

Keble is a six day residential course held annually at Keble College, Oxford and widely regarded as one of the leading advocacy training courses in the world. Started in 1993, its purpose was to provide advanced advocacy training to members of the Bar from 3-6 years call. The course focuses on all aspects of trial advocacy, including case analysis, witness handling, opening and closing speeches and submissions of law.

Participants are taught in either “criminal” or “civil” groups of approximately 6 participants. Each has its own case study which is used for all aspects of the trial process, and culminates in a mock trial on the last day of the course. In the criminal course, “real” jurors are recruited from members of the Oxford public to participate in the trials and deliver a verdict. The

course uses a combination of review in the teaching room, followed by a further DVD review, in which the participant is able to watch his or her performance on film in private with a trainer in a separate room, which gives the advocate the dual benefit of watching themselves, and the opportunity to discuss their performance with the trainer in depth. The course also provides 3 hours of training in ethics.

From its inception, the course has also provided training in the handling of expert witnesses using two case studies – medical and accountancy, each of which was written by experienced practitioners and experts. Experts from the medical and accountancy professions attend Keble for the day to act as the expert witnesses and the participants are trained in conducting conferences, case preparation and the examination and cross examination of expert witnesses.

In 2011, Keble was the first course to introduce training in the handling of vulnerable witnesses using a specially created case study involving a teenage witness suffering from Attention Deficit Hyperactivity Disorder. The course has developed a relationship with a drama school who provides young actors to play the witness – thereby ensuring that the exercise is both valuable and realistic. The trainers are also required to undertake special training and preparation in order to train this aspect of the course.

Participants are for the most part members of the Bar – either in employed or self employed practice, although the course has welcomed a small number of Solicitor advocates as participants over the years. In addition, every year, the course traditionally welcomes International practitioners as both trainers and participants from jurisdictions such as the USA, Australia, South Africa, Hong Kong, Singapore, India, Pakistan, the West Indies and lawyers from the International War Crimes Tribunals.

A total of 20 scholarships are offered each year, funded by the four Inns of Court, for members of the Inns who practice in publicly funded work. The scholarships cover the course fees in full.

Vulnerable Witnesses

In 2011, the Advocacy Training Council published its seminal report: *Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court*. This was the first major research project in England & Wales specifically directed to consider the training Barristers need to develop the right skills and understanding in how to interview, examine and cross-examine those in our Court system - whether witness, victim or defendant – who are most vulnerable by reason particularly of their young age, learning difficulties, or state of mental health.

The Report recommended training of advocates in the handling of vulnerable witnesses in Court. This was taken up by the Keble Advocacy Course which developed enlisted the help of senior practitioners from the publicly funded Bar to design and deliver practical training on the appropriate handling of vulnerable witnesses.

The ATC's next project – “The Advocate's Gateway” and Criminal Bar Association training film ‘A Question of Practice’ was launched by the Attorney General the Rt Hon Dominic Grieve QC on 26 April 2013. Of note, is that this is a project in which there has been

significant collaboration between the Bar, the legal profession and renowned experts and academics in the field, including representatives of the ATC, Judicial College, Law Society of England and Wales, Solicitors Association of Higher Court Advocates, CBA, CPS, Chartered Institute of Legal Executives and the Ministry of Justice.

The Advocate's Gateway

The Advocate's Gateway provides free and open access to a range of information on the handling of vulnerable witnesses and defendants in Court. This includes the ATC's Raising the Bar Report and Toolkits for advocates and judges to use in preparing the questioning of witnesses with a range of vulnerabilities, together with further information provided by partners including charities, educational institutions and policy groups such as the NSPCC and the Prison Reform Trust. The Advocate's Gateway aims to ensure that all advocates are effectively equipped to handle vulnerable people in Court, whether they are witnesses or defendants, and whether they are vulnerable owing to youth, a mental health diagnosis or special educational needs or because of the nature of the offence.

In addition to the Gateway, the ATC, the Inns and the CBA also run training courses for practitioners in the handling of vulnerable witnesses. The courses follow the "Keble" model, using a case study and actors as vulnerable witnesses to provide practitioners with practical experience in appropriate questioning techniques.

Section 4

Training Advocates in the Future

The development of education and training for Barristers never stands still. It is constantly being revised, improved and adapted to meet changes in the social and economic condition of society as well as more technical changes in the law of the land and in the practice and procedures of the Courts. All the various bodies concerned with the governance and regulation of the profession, and its education and training – the Bar Council, the BSB, COIC, the Circuits and the SBAs – keep these matters under constant discussion. Recommendations made to the Bar in the course of this current Review will be carefully debated and considered.

Issues with which COIC is presently concerned include the BPTC and the future role of the ATC.

The Bar Professional Training Course

The content of the BPTC is valuable and necessary for the promotion of the consumer's interests. However, the regulatory requirements around the delivery of the BPTC may be overly prescriptive and make qualifying for the Bar unduly inflexible, expensive and risk laden, thereby inhibiting access to qualification..

In the wake of the overarching Legal Education and Training Review recently carried out on behalf of the three front-line regulators of the profession (the BSB, the Solicitors' Regulation Authority and the Institute of Legal Executives), COIC is developing and proposing to the BSB, changes in the structure of the BPTC which might introduce more flexibility in the way in which some parts of the course are delivered, thereby reducing the expense of the course overall.

The Future of the Advocacy Training Council.

Historically the Inns of Court have existed to accommodate and educate “students and practitioners of laws of the realm. The role of the Inns in modern times in educating and training students and practitioners alike is central to their *raison d’etre*. The paper “The Inns of Courts’ Role in the Provision Education and Training for the Bar” sets out in some detail how the modern day Inns undertake this important function.

We have referred to the fact that, as a result of the collective and determined effort of the Inns, acting through COIC, over the past three years the ATC has been re-constituted and the scope of its activities has been greatly enlarged. It will be appreciated that the ATC is concerned not exclusively with the practice of advocacy in the criminal Courts, although that does form a large part of its work; and that it does not carry out the research and development of the practice of advocacy exclusively for the Bar. Its working groups routinely

include representatives of other branches of the legal profession and other professions whose work brings them into the justice system.

It is the aim of the Inns to continue this work. The Advocate's Gateway is already a widely recognised point of reference for practitioners undertaking work in sensitive criminal cases involving children and other vulnerable witnesses. In parallel with the publication of the toolkits on the Gateway website the ATC has developed a series of challenging advocacy exercises involving simulated Court proceedings in such cases. Research is also being undertaken in the field of questioning witnesses who give evidence in foreign languages, expert evidence, and the very wide question of professional ethics. All of this work will result in the development of further and more complex training exercises for the benefit of civil as well as criminal practitioners, and it will further enhance the range of subject-matter on The Advocate's Gateway.

The next question which COIC will then wish to consider will be whether the ATC should undergo further institutional change, to recognise its status as the centre of learning for the discipline of the practice of advocacy. We are satisfied that the unique contribution which the ATC makes to the profession will not diminish under any set of circumstances in which Barristers and other advocates have to conduct their practices.

ANNEX 1

The Dutton Criteria

ASSESSMENT CRITERIA

Introduction

It is in the interests of the public, the Court and the profession that all Barristers present their cases to the highest professional standards. They must prepare thoroughly and present their cases in a manner which is clear, well organised, efficient and persuasive. The criteria which are set out below, which you and your advocacy trainers will be working with, are intended to achieve these objectives.

It is expected that most pupils, with the training that they have already undergone, will achieve more than a minimum level of competence in their advocacy and it is the intention of your Course Provider that you should do so. If during your training your trainers are concerned that you may not be achieving the minimum level of competence in any of the core areas set out in the attached advocacy certificate, they will refer you to the Course Director and you will be given the opportunity of further training. If after such further training you still have not achieved a minimum level of competence in any of the core areas, you will be offered an assessment conducted independently of the Provider.

This system is being piloted for pupils commencing pupillage in October 2004 and will, after review and any adjustments required, become fully operational for the pupillage intake from September 2005. From September 2005, in order for you to acquire a Provisional Qualification Certificate, you will need to have your certificate signed by the relevant responsible person (being either the person designated by your Provider or the Bar Council following a referral for assessment).

1 Principles

- *Criteria need to be few in number, so that both advocate and trainer concentrate on the absolute essentials.*
- *Substantive teaching objectives (e.g. use of short questions) should be given primacy over style (e.g. Courtesy).*
- *Assessment of performance should take into account the presence or absence of evidence of preparation.*
- *The assessment of skeleton arguments should be separate and distinct from their use in oral submissions.*
- *The Advocacy Training Council and the Bar Council will review this scheme and the assessment criteria at the end of the pilot period and on a regular basis thereafter.*

Skeleton Arguments

- Clarity of purpose.

- Logical structure and organisation.
- Identification of issues.
- Clarity of expression.
- Appropriate length.
- Appropriate documentary references to external materials.
- Appropriate references to authorities.

Oral Submissions

(1) Organisation

- Clear Aim (Sets out clearly what the judge is being asked to do and the source of the power to do it).
- Coherence (structured, logical, with clarity of expression).
- Logical structure (beginning, middle and end).
- Appropriate use of materials and appropriate use of authorities.

(2) Delivery

- Audibility.
- Pace.
- Clarity of expression.
- Use of appropriate language (language adapted to the tribunal).
- Appropriate eye contact.

(3) Inter-action with tribunal/ dealing with opponent's arguments

- Anticipating points.
- Dealing with Court's questions/concerns (i.e. answering questions, not avoiding them; not being thrown by questions; having an honest, and coherent, approach).
- Relating submissions to skeleton arguments.
- Appropriate use of authorities.
- Adapting to opponent's points.

Examination in Chief

(1) Organisation:

- Clear and logical structure (telling the story through the witness).
- Relevance (avoiding the irrelevant and eliciting substance whilst avoiding the irrelevant).

(2) Form of Questions

- Avoiding leading questions (except where appropriate e.g.: facts not in dispute).

(3) **Delivery**

- Audibility.
- Pace.
- Awareness of the tribunal.

(4) **Inter-action with the witness**

- Audibility.
- Appropriate control of the witness (use of appropriate language, apt and focused questions).
- Short, simple questions, one point at a time.
- Listening to answers.
- Appropriate conduct towards the witness.

Cross-Examination

(1) **Organisation**

- Clarity of purpose.
- Logical structure and organisation.
- Identification of issues.
- Clarity of expression.
- Demonstrates knowledge of the facts.
- Relevance.

(2) **Form of Questions**

- Closed and concise.

(3) **Delivery**

- Audibility.
- Pace.
- Knowing when to stop.

(4) **Inter-action with the witness**

- Controlling questions.
- Listening to answers.
- Flexibility.
- Form of questions (fact not argument).
- Courtesy

(5) **Putting your case/Support for closing submission**

- Eliciting necessary facts.
- Making challenges necessary to put your case.
- Laying the factual foundation of your case.

Language

These assessment criteria are used for those intending to practise at the Bar of England and Wales, where the official language of the Court, and hence teaching and assessment, will be English. Where the official language of the Court is not confined to English, such as in Wales under the Welsh Language Act 1993, the pupil is entitled, if he or she wishes, to be taught and assessed in Welsh.

Disability

The criteria, their application and this scheme in general may be modified (where appropriate) in relation to any pupil who has a disability, within the meaning of the Disability Discrimination Act 1995. Anyone who requires such a modification to be made should make this known to the Course Provider as early as possible, and normally before the start of the course, so that full consideration can be given to any modifications that may be appropriate.

ANNEX 2

‘The Inns of Court Role of Education and Training for the Bar’

Provided as a separate attachment.

Note: This document was prepared to assist the Legal Education and Training Review. Given the shortness of time, the document has not been updated with the latest statistics. Nevertheless, this remains a fair description of Inns activity.