ATC RESPONSE TO LETR QUESTIONS FOR INNS OF COURT

REGULATION AND EDUCATION

What issues of the regulation of business or the regulation of education and training are specific to advocacy practice*?*

1. The education and training of the advocates who are barristers is regulated by the Bar Training Regulations (BTRs). The BTRs and subordinate Handbooks set out the academic qualifications required for entry to the Bar Professional Training Course (BPTC), and then prescribe the amount of advocacy (and other) training which must be undertaken during the BPTC; by pupils during their twelve months' pupillage; and by new practitioners in their first three years of practice. After the BPTC advocacy training is arranged by the Inns of Court and the Circuits and is delivered *pro bono* by practitioners and sitting and retired judges in accordance with guidelines developed by the Advocacy Training Council (ATC), a council or committee established by the 4 Inns of Court. All trainers undergo training before they are invited to train pupils or new practitioners. Pupil supervisors (who also deliver informal advocacy training in chambers or other workplace) must undergo training before they are authorised to take pupils.

2. The profession's regulator, the Bar Standards Board (BSB), is responsible for the maintenance of the BTRs and keeps the education and training requirements under review. All those requirements have since 2008, including the requirements for CPD, been comprehensively reviewed. The content of advocacy training must continually be developed and change and adapt according to changes in the law and the practice of the courts. Adaptation to change is accordingly a persistent issue and the BSB, the ATC, the Inns and Circuits have committees and other education and training groups in place who carry responsibility for this work.

3. A new issue for these bodies is the prospective introduction of the quality assurance scheme for advocates in the criminal courts (QASA). This scheme will have some impact on education and training, at the very least because advocates seeking advancement under the scheme may demand (and may be required to undergo) formal advocacy training to enable them to progress through the various Levels. Training for progression under the

scheme will go beyond the level at which it is currently delivered (for pupils and new practitioners) and will raise issues of financial and human resources for the providers. These are essentially practical problems which will not be resolved by further regulation.

How does regulation safeguard quality of services to consumers?

4. The avowed purpose the Legal Services Act 2007 and the regulatory framework which it created are, among other things, to improve the provision of legal services to the consumer. The BSB has this as an important lodestar guiding its policies. There is however a limit as to the extent to which regulation itself can guarantee the provision of a high quality of service. The maintenance of high standards at the Bar is due to a variety of interconnected factors such as: the intensity of competition for work; peer group pressure; market forces; and, the support provided to practitioners by their professional bodies (Inns, ATC, SBA, circuits etc). Regulation is designed to lay down minimum standards; it is the responsibility of the profession itself to provide higher standards.

5. With specific regard to the Bar two overarching points need to be made.

6. First, as to the relationship between regulation *per se* and the interests of the Bar, high quality regulation is to be welcomed. Barristers should present themselves to the public as a profession that adheres to the very highest of professional standards and in whom trust can be safely reposed. A fundamental part of this lies in the fact that the Bar is subject to a rigorous Code of Conduct, in addition to the BTRs, enforced by an independent and very specialist regulator.

7. One very real reason why London is a forum for international commercial litigation is the fact that its professional rules are rigorous and its judges are impartial. It is therefore powerfully in the Bar's self-interest to be subject to tough regulation and this, in turn, safeguards the public. The two interests should be aligned and in harmony.

8. In this connection training in ethics at the Bar begins at the very beginning of the programme of education and training. It now forms a separately examined subject in the BPTC, and further training in ethics is required by the BTRs and the relevant Handbooks both during pupillage (when ethical training is delivered by pupil supervisors) and the new practitioners' programme. In practice both the Inns and the Circuits go beyond these requirements and run formal sessions for Bar students and pupils in ethics. The ATC is presently embarking upon a full scale research project into improving ethics training for the profession.

9. Secondly, and more generally, notwithstanding the importance of regulation there is no direct correlation between regulation and ***quality*** of provision of service.

10. Regulatory intervention has to date not focused upon quality save in one respect, the proposed QASA scheme for criminal practitioners. As to this regulation will mandate a ***minimum*** standard for criminal practitioners across different Levels. To this extent regulation will set a floor standard.

11. Otherwise it has been the profession itself which has pursued excellence in advocacy and it will continue to do so. This means going far beyond providing training only to meet the QASA or any other minimum standard. While regulation has an important role to play in preserving quality it is a limited one.

12. It follows that responsibility for providing training and education in advocacy to the profession is not something that is closely connected with regulation. It is and always has been in very large measure a task for the profession itself outside of the regulatory framework. In practice the task is performed (as we have shown) by the Inns of Court and the Circuits, in chambers and other workplaces, and by the specialist bar associations. A review of the content of the courses presently run by the Inns demonstrates how regulation has little or no part to play in ensuring very high standards. The Inns call upon experienced practitioners (judges and barristers) to provide training services pro bono, and in the drafting of case material used in advocacy exercises. Such practitioners offer their services because of the ethos of the profession which highlights collegiality and professional duty. The passing on of "know how" and best practice from experienced practitioners to the inexperienced is fundamental to the

maintenance of high standards of education and training. Best practice cannot be regulated. The ATC monitors courses provided by the Inns. Again regulation cannot instil a collegiate atmosphere which breeds a willingness on the part of senior practitioners to devote their time to educating and training other practitioners. Improvement in advocacy and the maintenance of standards in advocacy is achieved by practice and hands on training, not by regulation.

13. The restructured ATC intends to perform the pivotal role of intensifying this effort and will develop a faculty of advocacy embracing the various providers of training. The activities of the ATC will not be materially affected by regulation; the efforts of the ATC to promote quality will go way beyond the more limited requirements regulation.

What regulatory risks are there in the field of advocacy?

14. There are at least four important risks which regulators must bear in mind.

15. The first is that the effective limits of regulation, which have been described above, may be overlooked. There is always a temptation for regulators to intervene when no regulation is required.

16. Secondly, the practical consequences of further regulation must be thought through. It is the regulated, not the regulators, who have to carry regulations into effect. That always carries a cost, both financial and in terms of human resources, as has already been pointed out. The providers of education and training for the Bar have an extensive programme which is very fully resourced. The impact of any further regulation must be fully assessed before it is introduced.

17. Thirdly, there is a substantial risk that the wrong kind of regulation will affect consumer choice. The QASA proposed regulation will require advocates to apply for a specific level assessment. Clients will be

restricted to choosing advocates within a specific case level complimentary to the level of the advocate.

18. Fourthly, QASA raises further regulatory hurdles for advocates to clear before they can undertake cases in court at stated levels. This derogates from the right of barristers and solicitors with higher rights of audience to appear in any court, for any client who is content to instruct them. It is believed that the present regime is proportionate and sufficient.

The Legal Services Act 2007 includes the regulatory objective of promoting competition in the provision of services: do you see scope for competition between regulators? Do you see scope for sector wide regulation by activity (i.e. of advocacy practice) rather than by title?

19. Competition between regulators was mandated by the Legal Services Act which reflected the fact that non-barristers had been granted higher rights of audience in earlier legislation. It is not however a development which has worked well.

20. Advocacy is a delicate art in which the performer's primary duty is to the Court, not to the client. In many sectors of the economy the idea that one did not put one's client first would be seen as irrational and counterintuitive. But the existence of the barrister's duty to the Court is the reflection of a powerful public interest in the proper administration of justice. This is a principle that the Bar strongly adheres to.

21. Competition (generally and between regulators) therefore has to be tempered with public interest in the case of advocacy. Pure competition would mean that to increase business the advocate would act in the client's best interests, regardless of whether that conflicted with the overarching duty to the Court.

22. The function of a regulator is to balance competition with the public interest. The balancing exercise can be difficult and require considerable expertise and judgment. There are often no absolutely clear cut or right answers.

23. The existence of two regulators both seeking to balance these competing and potentially conflicting tensions and pressures risks creating a situation where advocates in the same case are subject to different rules and regulations. The Court of Appeal Criminal Division has already highlighted the unacceptability of advocates being subject to potentially different rules of conduct.

24. The BSB is a regulator devoted specifically to the advocacy sector; it has and develops ever increasing specialist knowledge and expertise in the regulation of that sector. It does not have to split its resources and efforts across a range of different sectors. In contrast for the SRA advocacy is a minority activity conducted by a small portion of its members who account for a small portion of its annual revenues.

25. The existence of two competing regulators risks creating polarised decision-making. The BSB is subject to pressure from the Bar. The SRA is subject to pressure from the Law Society. Regulatory solutions risk becoming subject to horse-trading in order to keep two constituencies happy. The lengthy delays and problems associated with the introduction of the QASA scheme reflect this. We are presently on the fourth consultation document.

26. In the future these tensions will increase as rule changes allow market forces to exert ever increasing pressures on all sectors of the legal profession, including pressures on advocates. We discuss below the problem in relation to Alternative Business Structures (ABSs).

27. A move towards activity-based regulation and away from title-based regulation is to be welcomed as being in the public interest. It goes without saying that the BSB should be that regulator.

What aspects of regulation or of education and training developed by the Bar in relation to advocacy practice do you feel could be of wider application to other parts of the legal services sector?

28. The question focuses upon training performed by the profession which could be of wider benefit. However, there is an important underlying issue which is that advocates appearing in the courts to do precisely the same job are not trained in a single and consistent manner or to a uniform standard. There is a powerful case to be made out that all advocates should receive equivalent training. It is difficult to conceive of sound public interest arguments justifying a situation where advocates performing identical tasks could be subject to two competing training regimes.

29. Outside the confines of regulation the Inns and the ATC on their behalf are rapidly moving towards a new approach to the training of the profession. In the course of 2012 the Inns (through COIC) have agreed to a restructuring of the Advocacy Training Council (ATC). The ATC is now actively considering a range of new educational and training projects for the Bar. Indeed, some of its projects will be profession wide. The vulnerable witness project is one such illustration. In 2010 the ATC produced a piece of research based upon the treatment of vulnerable witnesses in Court. Subsequently, work was undertaken by the profession and by interested academics and others to produce toolkits which could be used in court by advocates who were expected to question vulnerable witnesses. A joint project is also underway to produce training videos in this field.

30. The ATC has now embarked upon a further joint project with the Criminal Bar Association and others including the Judicial College, the MoJ, the judiciary and with the Law Society and with representative bodies acting for HCAs (such as SAHCA) to create an interactive web facility which will be hosted by the ATC and which will constitute a repository and educational facility for all those whose work involves dealing with vulnerable witnesses.

31. The ATC is now also about to embark upon a series of new research projects of a similar ilk. The expectation is that in due course new pieces of cutting edge research into advocacy and advocacy techniques will be generated. If the on-going project into vulnerable witnesses is a success then that could serve as a model for the way in which research into advocacy is disseminated in the future.

32. Over and above new research the ATC and the Inns are actively reviewing all of their extant advocacy training. The ATC is seeking a substantial

expansion over the next few years of training in all aspects of advocacy and hopes to roll out courses, seminars and one-off classes which will cover all levels of experience from pupillage through to senior practitioners and cover a wide range of both general and specialised issues.

33. The remit of the Inns and the ATC of course lies in advocacy and advocacy training. But the modus operandi of its work and its multidisciplinary nature is, we suggest, an approach that could be replicated and emulated. This sort of work is possible because the Bar is specialist and not based upon competition between firms. It is a collegiate profession where exchanges of information and skills are routine. A remarkable feature of the work of the Inns and the ATC is that they can call upon experienced practitioners (judges and barristers) to provide their services as trainers pro bono. These practitioners offer their services because of the collegiality of the profession and because they see it as their professional duty not just to put something back into the profession but to also assist in maintaining advocacy standards.

THE FUTURE

How if at all will the knowledge, skills and attitudes needed for effective practice as an advocate change in the next 5 years

34. Over the next 5 years the Bar expects to see very considerable change. Some of the more significant changes that can be predicted would include the following:

    - New rules whereby the Legal Services Commission (LSC) introduce best value tendering for the allocation of publicly funded criminal and (possibly) family law work.

    - New rules on the accreditation of publicly funded advocates through QASA schemes. In the first instance this will cover criminal practitioners and might in due course be extended to other publicly funded practitioners and in particular family law practitioners.

    - No relaxation in the pressures on the public purse and a general contraction of public funding and investment in the legal system.

- New rules introduced by the BSB permitting a wider range of business structures for the Bar, including greatly increased direct access.
- A growth in opportunities for the privately funded Bar which exploit newly granted freedoms to acquire work.
- A potentially widening financial divide between publicly funded and privately funded practitioners.
- An increased use by the Bar of paralegals to provide unreserved legal services to the Bar, acting on direct instructions (in both publicly and privately funded work).
- Increasing pressure from solicitors to reduce instructions to the Bar.
- A resultant need for the Bar to improve its organisation efficiently at the chambers level in order to attract new sources of work in substitution for work no longer been seen by solicitors.
- A resultant need for the profession as a whole to assume a much greater role in providing tailor-made and ongoing training and education to its members.

35. Despite these imminent changes the Bar firmly believes that the set of skills and qualities which form the make-up of every excellent advocate will not fundamentally change. They may be listed as: adherence to a high standard of integrity, probity and ethics; the ability to maintain professional independence; the ability to recognise and deal with conflicts of interest; knowledge of the law and skill in conducting legal research; analytical skills; the ability to use appropriate language; the ability to see both (or all) sides of an argument; the ability to communicate effectively, and in language which is appropriate to context, both orally and in writing; the ability to understand and empathise effectively with all clients; and the ability to maintain a proper and effective relationship with the court, witnesses and other advocates involved in the case. The challenge for the Bar, which it is confident it can meet, is to retain and develop these various attributes and specialist skills in changing circumstances. The ATC and the Inns intend to be very active in supporting the profession to maintain the highest possible standards.

36. The Bar thrives upon being a low cost specialist profession; but it is likely that barristers' chambers will need to become more managerially

proficient. This can be done through modernisation of the way in which chambers operate and the recruitment of staff with requisite skills. The current requirement that pupils must be trained in practice management will have to be expanded.

37. If this can be achieved then the barristers themselves will be able to concentrate, as now, upon their practices and not become subsumed into management, as often is the case for solicitors. It is imperative that the Bar should maintain its specialist role and that barristers should be free to devote the necessary time to their case-work.

38. A key to the continued success of those who specialise in advocacy skills will be the provision of more training in actual advocacy. The Inns of Court have recognised this need and have maintained their role as a leading provider of advocacy training and advocacy trainers. The ATC itself has been restructured to reflect these anticipated changes. It will facilitate and promote an increasingly more intensive provision of advocacy training and education to the profession.

39. The ATC has two committees which will examine the training needed for barristers over the coming years. The real strength of both committees is that their membership is made up of very experienced advocacy trainers and the education and training directors of all four Inns. New projects will include: advanced advocacy master classes; development of training in ethics; the handling of vulnerable witnesses; senior practitioners courses; and others.

40. The ATC, on behalf of the Inns will facilitate and encourage this training. It will seek to maintain the current *pro bono* basis so far as that is possible, or alternatively secure that it is provided at the lowest cost possible. It will work closely with the specialist bar associations and the Circuits to encourage a jurisdiction-wide implementation of this training and education.

If there is such a change, how could, or should, the education and training of advocates change to address it?

41. The paragraphs set out above answer this question.

ABSs

42. The advent of ABSs for the Bar will take a different form to those for solicitors. Under the Legal Services Act, ABS generally means: firms taking on external investors; multi disciplinary partnerships.

43. For the Bar the advent of ABSs will most likely be manifest in different ways. For the Bar it will remain important to prevent ABSs from turning chambers into partnerships. This is because traditional chambers are comprised of self employed practitioners who are not in a position of a conflict of interest when they appear against each other in court. This means that chambers can develop concentrated knots and pools of real expertise in particular areas, which is of immense value to the public. ABSs which the Bar evolves will therefore be based around models which do not imply partnership and which preserve self-employed status. Were this not to be the case then the overall capacity of the Bar to provide services would diminish significantly since barristers would be conflicted merely because another member of chambers was acting for the other side or another affected party (such as a co-defendant).

44. Notwithstanding the above the BSB now does permit mixed partnerships between solicitors and barristers. In broad terms the following sorts of ABS are likely to emerge:-

- **Barristers going into partnerships with solicitors in LDPs:** This development has now been occurring for about 2 years. If the LSC mandates new best-value tendering processes for legal aid work it is likely to accelerate at the publicly-funded bar for criminal and possibly in due course family law work.

- **ProcureCo and SupplyCO**: As the BSB relaxes the rules on the way in which the Bar conducts business a range of new commercial vehicles are likely to emergence based around the ProcureCo and SupplyCo model which the Bar Council introduced in 2010. These vehicles permit chambers to remain as groups of self employed practitioners who are not in partnership whilst at the same time having the flexibility to use corporate vehicles which will improve the efficiently of their operation and, critically, permit much easier contracting with clients who seek legal services. These developments are already being seen in the field of local authority work (where local authorities have developed contracts for use by ProcureCos acting for chambers).

45. It must nevertheless be emphasised that, once the advocate is in court, or is preparing litigation of any type, the skills and attributes which are traditionally and correctly associated with the Bar, and have been listed above, will be no less in demand in the case of advocates employed in different professional structures. Clients and the public will demand no less, and the courts will be vigilant to ensure that common standards of integrity and competence are maintained, irrespective of the business environment in which the advocate is operating.

46. It follows that the fundamentals of education and training, which have been described in this paper, will not change. But in the case of ABSs there are clear and real potential risks, which have to be recognised and faced. They include; conflicts of interest between the client and the business or its owners which can more easily arise than in the case of the self-employed advocate; a temptation to keep the client's business in-house when it may be clearly in the client's interest that outside assistance, such as specialist advocacy or expert advice, should be procured; considerations of cost-effectiveness may prevail over a proper service. These are matters which will have to be addressed in ethical training in the future.

Changes in funding of higher education

47. One of the chief concerns of the Bar is to maintain the momentum it has built up in addressing the important issue of social mobility from different sectors of society to the Bar in addition to the increase in the diversity of its intake. The LETR has been provided separately with detailed statistics on the allocation of pupillages in recent years, in a climate of intense competition between applicants. It considers that very considerable efforts have been made, which pre-date the publication of Lord Neuberger's seminal report on Access to the Bar, to secure a more balanced intake of recruits. That work has been intensified since the publication of that report, and it has placed the Bar, in terms of the diversity of its intake, in the forefront of graduate professions.

48. For this reason it is regrettable that, just as this work has been bearing fruit, the cost of higher education to students has soared; and there is real concern that the pool from which able recruits can be drawn will diminish. Saddled with an apparent debt of £50,000 and upwards many may no longer wish to take the risk of embarking on a self-employed career. The diversity and number of new recruits will accordingly suffer. The issues which are regularly raised in criminal trials demands a diverse pool of advocates. The public will be deprived of such a pool of advocates if fresh recruits go to other areas of law which are better remunerated. It is however too early to judge the full impact of this.

49. There is a further effect of cuts in the funding of higher education on which the Bar is not qualified to comment but must nevertheless be borne in mind. Cuts in the funding of universities themselves, especially in the social sciences and humanities, may harm the ability of law schools to deliver the amount and quality of academic legal training which students currently enjoy. This too may have an effect on both recruitment and the content of professional training which is delivered at the post-graduate stage. Again, its effect is yet to be calculated.

Changes in public funding for legal services

50. For similar reasons the Bar is concerned about the relentless drive to cut the funding of legal services. This will have two clearly foreseeable consequences. First, it will deprive many members of the public of access

to justice. It will increase the number of litigants in person (whose interests also raise ethical questions for practitioners) and accordingly slow down the business of the courts. Secondly, it will render a career in publicly-funded work – chiefly in crime, much family work and asylum and immigration work - so unprofitable that it will be difficult for any practitioner to conduct a sustainable practice. The long-term effect of this on the senior ranks of the profession, where this work is conducted at a high level, and on recruitment to the bench, will be disastrous. Education and training cannot touch upon this fundamental problem.

Increasing divergence between English and Welsh law

51. There is no issue to be addressed under this heading. The only "divergence" between English and Welsh law is that the Welsh Assembly now has devolved powers to promulgate subordinate legislation in certain areas of domestic policy in which, previously, subordinate legislation was promulgated by the Westminster Parliament. In all other respects the law of England and Wales – both the common law and the overwhelming bulk of statute law, in every conceivable field – is uniform.

52. Subordinate legislation is rarely if ever taught at law school. Practitioners address subordinate legislation, whatever its source or content, as part of their case-work, according to its relevance to the case in hand. The rules of interpretation do not change according to subject-matter, and the power of the Welsh Assembly to legislate for itself on a limited number of devolved matters does not raise issues for education and training.

Competition from abroad (Eg EU lawyers in the UK; outsourcing of legal services)

53. The Bar is not generally afraid or concerned about competition from abroad. In fact it is more likely that the Bar benefits from international

competition and can take advantage of the growing number of places where the Bar's services are required. It is not uncommon in EU law for instance for the Bar of England &Wales to be instructed in cases before the European Court or before the European administrative bodies which have no connection with this jurisdiction. This is simply because the Bar is seen as a source of real expertise in this form of advocacy.

54. The same may be said about advocacy in other international contexts. The Bar is regarded as a principal source of advocacy in international arbitrations, conducted in London or anywhere else in the world. It is a sign of international confidence in English lawyers that many commercial contracts, having no connection with the United Kingdom, are written in English, have an English law clause, and provide for arbitration in London. Admission to foreign Bars on a case-by-case basis is another well-recognised feature of international advocacy. Barristers who undertake this work frequently find themselves in competition with advocates from other jurisdictions and are well-acclimatised to this type of exposure.

55. Equally outsourcing should prove no real threat. In fact over the next few years as direct access work increases it is likely that clients will instruct the Bar first and ask the Bar (through its administration) to procure other services needed to enable the advocate to do his/her job. This might mean that the Bar will instruct solicitors or paralegals to support them.

Development of IT

56. A feature of the work of the courts and other tribunals over the past decade has been an increasing emphasis on written as opposed to oral advocacy. Civil appeals to the Court of Appeal led the way with the development of skeleton arguments. Practice directions under the Civil Procedure Rules now lay great stress on the early submission of written material for the court to study in advance of a hearing; but they equally state that written materials submitted in advance do not replace (and in practice enhance) oral argument.

57. The extensive use of written materials in the criminal courts is more problematic, because of the central role of the jury; but here too written outlines, written questions agreed between judge and advocates, and skeleton arguments supporting legal submissions to the judge alone are becoming the norm. White-collar fraud cases involve the effective handling of large quantities of written material.

58. These developments alone have furnished an enhanced role for IT. Communications between advocates and the court in the examples given above are now routinely made electronically. In very complex cases much of what has traditionally appeared in hard copy is now and can continue to be stored and presented electronically. Some experiments have been carried out with "paperless trials." Accordingly advocates must have at their disposal the IT skills which will enable them to work in this fashion. The practice is likely to develop at an accelerated rate and professional training must reflect this trend.

59. It may however be doubted whether this process will continue without limit. IT cannot replace the oral examination of witnesses, and is unlikely to displace oral argument in public in court. The extensive use of IT also raises questions of security and the maintenance of legal confidentiality, which, with increasing usage, will have to be addressed.

Hopes and fears for future development of the sector

60. The Bar's principal hope is that we have now reached the high-water mark of regulation. More regulation will not achieve better advocates. The principal regulatory pressure on barristers has always been peer-pressure, the pressure brought to bear on conduct in court by the judges, and – the most important pressure of all - the desire to do the very best for the client. Barristers are concerned for their reputation and standing among their colleagues and with the judges whom they are seeking to persuade. No regulator can tell them that they have to go the extra mile to put their client's case as persuasively and attractively as they are able to do. The principal fear is that economic pressures, whether from partners or directors in a new business structure, or from the steady under-funding of legal services in the public sector, will undermine those aims. QASA will

have the undesirable effect of requiring an advocate to be concerned about his/her performance and communications with a judge who is carrying out a formal judicial assessment. The risk here is that a client may have a legitimate complaint that the advocate's concerns for his assessment was of greater concern than the client's case.