

## **Thoughts on the Kentridge Report and the OFT investigation**

*Our comments on the Kentridge Report are based on our individual or collective experience of the bar. Although our comments are broadly directed to what we understand to be the OFT's remit and areas of interest, they are not exclusively so.*

*We would be happy to elaborate on the following, including through meeting, if it would assist. Please contact David Wolfe ([davidwolfe@matrixlaw.co.uk](mailto:davidwolfe@matrixlaw.co.uk), 020 7611 9330).*

*Quotes from the Kentridge Report are in bold with our comments following.*

### **The conduct of litigation is an activity requiring special skills in which solicitors are trained (and barristers are not) [para 2.4]**

1. The Report appears to assume (although it is not expressly stated) that, if barristers were to "undertake litigation", it would be at the expense of the work they currently undertake. We reject that assumption.
2. Firstly, conducting litigation is not an all or nothing activity (and we see no reason why barristers should not be able to take on some of the functions of conducting litigation without taking them all on). There certainly does not seem to be any reason why barristers should not conduct litigation (in many if not all cases) without holding client funds (an issue of particular concern raised by the Report).
3. Secondly, it need not be the barrister themselves who is spending significant time on the activity in question (they may be overseeing someone employed or sub-contracted directly to them, or they may be using someone employed or contracted to their "chambers").
4. Finally, we do not accept that the clear demarcation in skills as between barristers and solicitors which may have existed historically remains the position. We recall, for example, that – in its initial report (to the bar, for consultation purposes), the Kentridge committee identified "client care" as a skill needed by solicitors (conducting litigation) but not barristers. That is plainly not the case.

**By not undertaking those activities and concentrating instead on advocacy and advisory work, barristers are able to appear in and advise on very many more cases (coming from a much wider range of sources) than they otherwise could and develop their advocacy and other relevant professional skills to a much higher degree. [para 2.8]**

5. Firstly, the pattern of barrister practices varies enormously: some are in court every day but others undertake relatively little or no oral advocacy work as such (generally because of the practice area in which they specialise) and

some have an exclusively advisory practice; some undertake a lot of cases in a given period, others will have a small number of much larger cases. It appears to us that barristers and solicitors are distinct by reason of the different economic structures of the places where they work rather than by any rigid demarcation of the work that they do. The same applies to the distinction between employed barristers and solicitors and barristers in independent practice. Accordingly, although para 2.8 may state the general position, it is not universally the case.

6. Secondly, specialisation at the bar takes two forms (albeit with considerable overlap for some practitioners): specialisation in advocacy and/or specialisation in one or more particular areas of law. Some barristers are – in practice – relative generalists (in terms of areas of law) and, in many cases, less specialist in a particular area of law than many solicitors. The impression given by the Report that solicitors are invariably generalists and barristers are invariably specialists is misplaced.

**In addition, the fact that barristers do not have a direct and continuing relationship with clients and are not engaged in managing their affairs or preparing and conducting their case often enables a barrister to give a more objective and hence more valuable opinion to the client than would otherwise be the case. [para 2.9]**

7. Firstly, barristers in some areas of law may well develop a "continuing relationship" with a particular client (such as a Government Department, other public body, or corporate body such as a company). Large companies and public bodies frequently instruct counsel directly through their in-house legal departments.
8. Secondly, some barristers will be very involved in "preparing and conducting [a] case".
9. Accordingly, the claimed basis for the identified gain is not universal, contrary to the position implied by para 2.9. We do not think that it provides a satisfactory justification for any rigid rule against the conduct of litigation; indeed, outside the domestic jurisdiction, we have experience of the satisfactory conduct of substantial litigation without any solicitor support.
10. Further, we consider the suggested causal connection between having a "direct and continuing relationship" and the giving of "more objective" advice to be at best tenuous and at worst wrong: Most clients want objective advice; they maintain relationships with legal advisors who they perceive to give them such advice (rather than "telling them what they want to hear"). It

appears to us to betray a patronising approach to the solicitors' profession which is misplaced.

11. In our experience, the question of whether a client gets "a more objective and hence more valuable opinion" is much more to do with the personality, skills and experience of the legal advisor (solicitor or barrister), than the longevity (or closeness) of their "relationship" with their client.
12. Moreover, it is not unusual for a client to feel at least as "close to" their barrister, as to their solicitor.

**Because they do not carry out the functions performed by solicitors, and in particular do not conduct litigation, barristers do not require the systems and support staff needed to run a solicitor's office. [para 2.10]**

13. That is correct. However, if barristers, directly or by employing (personally or through their "chambers") other professionals could offer some (if not all) elements of a litigation service, they could presumably charge for the extra service.
14. The issue then – and the real issue overall – is whether there would be a market detriment as a result. We certainly do not think that the case has been made out that the relaxation of the current position would inevitably harm either competition or the wider public interest. Indeed, it seems to us that there might be significant benefits in a less restrictive regime, promoting competition between the professions without undermining the benefits alluded to in the Report.

**As the dual structure of the profession enables barristers through specialisation in function to produce a higher quality of service at a lower cost to the consumer.... [para 2.12]**

15. This part of the Report does not appear to make sense. In particular, the Report makes much of the difference between the services offered by barristers and solicitors but then, in para 2.12, suggests that the barristers' service is of a higher quality and at a lower cost. If this assertion is correct, then it provides no basis for the current restriction, as the market would generate the same outcome. The Report does not satisfactorily explain how this present desirable state of affairs would be undermined by a less restrictive regime, taking account in particular of the freedom already enjoyed by solicitors to offer competing services to those provided by barristers.

**.... the market would operate extremely inefficiently without the involvement of solicitors as professional intermediaries. Through their own professional expertise and their frequent purchasing of advocacy services, solicitors are able to identify their clients' problems and needs and are also knowledgeable about the quality, prices and other relevant attributes of barristers. They are thus able to match the attributes of different barristers with the varied needs and resources of their clients and obtain appropriate specialist advice. Moreover, in their role as intermediaries solicitors perform the valuable function of monitoring the quality of barristers' performance as well as their remuneration, thus making the market more efficient. [para 2.14]**

16. There is no doubt that some solicitors are very well informed about the barristers in the particular areas in which they operate. However, that is by no means always the case: many solicitors appear to rely on very "soft" information in choosing barristers (including, for example, through asking relatively ill informed questions of law of barristers "clerks", who are rarely legally trained or qualified). This is particularly so in relation to those many generalist firms who occasionally require a specialist input (and whose needs are particularly promoted by the Report at its para 2.15, as to which see below).
17. In any event, there is no suggestion that this aspect of solicitors' work is to be abolished or restricted in any way, so the point is a bogus one. The real question is whether there may be some lawyers who would wish to use barristers directly and on the basis of their own assessment. It seems to us obvious that there is a substantial number of such clients and they are entitled to have a choice.

**The existence of the independent Bar means that the services of experienced barristers, including barristers who are experts in specialist branches of the law, are available to the clients of such small community-based firms of solicitors, just as they are to clients of the largest firms in the City of London. [para 2.15]**

18. Para 2.15 is correct, in theory.
19. However, in practice, the top specialists in any particular field may well not be available to small community based firms. This may be for apparently legitimate reasons (such as price). Or it may be through the non-operation of the cab-rank rule (as to which see further below). In particular, some barristers aspire to spend an ever-increasing amount of their professional time working for "blue chip" firms (and not just for price reasons) and may be reluctant to work for others.

20. In any event, this point is again irrelevant to the question of whether barristers should enjoy greater freedom to offer their services directly.

**Some of the rules under challenge, and in particular those which define the functions undertaken by independent barristers, go to the heart of the dual structure of the profession and the division of function between barrister and solicitor. Their abolition would undermine that structure and the public interest benefits which flow from it. [para 2.18]**

We consider this to be a non-sequitor or at least a substantial overstatement. See also our comments on paras 2.28 and 6.4, below

**Subject to the paramount duty owed to the court, the barrister owes an undivided loyalty to the client. His or her conduct of the client's case must not be influenced by any outside consideration. The barrister's conduct of the client's case may displease powerful interests, or other important potential clients, or bring the barrister personal or professional unpopularity. All such considerations must be firmly put aside. In the words of one of the Bar's rules of conduct, a practising barrister "must not permit his absolute independence, integrity and freedom from external pressures to be compromised". [para 2.21]**

21. Para 2.21 states the theoretical position, but is not our universal experience of what happens (or may happen) in practice. It seems to us that a similarly resounding statement could be made on behalf of the solicitors' profession. The suggestion that the solicitors' code of conduct is significantly more tolerant of unprofessional conduct than that of the Bar seems to us again, patronising and, in respect of the Bar, unrealistic.
22. We do not accept the assumption underpinning paragraph 2.21 that barristers are free from outside interference in relation to the cases/clients they take on, or the way in which they conduct them. Of course, the best will resist those pressures; but the pressures exist nonetheless. The pressures include, or are manifested by, the following:
- (1) pressures from a clerk or senior member of chambers to take on a particular case for a "chambers solicitor";
  - (2) strong pressure from other barristers/clerks to take on a case in order to "keep it in chambers" (because the barrister of first choice "in chambers" cannot do it, say through unavailability or conflict of interest);

- (3) recruitment strategies which aim to ensure that (2) above can be satisfied;
- (4) chambers-wide "complaints" or client feedback systems which implicitly recognise a degree of interdependence and that all members of a chambers are affected adversely by poor performance of another member (in relation to which, a solicitor/client who is let down by a barrister – say through slow service – will often feel aggrieved with that barrister's chambers as well as with the individual, and not be prepared for their case to be taken over by another member of that same chambers);
- (5) billing targets set by chambers for individual barristers in some chambers;
- (6) chambers-wide marketing of chambers as providing a service (with ever diminishing emphasis on the individuals involved);
- (7) clerking and administration practices (in most chambers) which cannot be guaranteed to ensure an independent approach to each case/client. Thus, for example, an advantage can sometimes be gained for a party in litigation through the process of "listing" (i.e. negotiating with the court as to the date when the case is heard in court). But, in many (if not – we suspect - most) chambers, barristers appearing on competing sides in the same case may be "clerked" by the same clerk, who cannot therefore seek to ensure that any potential "listing" advantage accrues to any particular client. We are aware of cases with as many as 5 parties, with separate interests and in which timing of a hearing was important, being "clerked" by the same individual clerk.
- (8) in "volume" areas of work, it is increasingly common for chambers to have a long term relationship (reflected, for example, in a "service level agreement") pursuant to which the chambers agrees (for example) to ensure that a suitable barrister is available to the solicitor or client and at a particular (pre-arranged) charge-out rate.

**The involvement of a barrister who is independent of the lawyer or law firm conducting the litigation often assists in ensuring, for example, that documents adverse to the client's case are not withheld. [para 2.22]**

23. See our comments on 2.9 above. In general, these points seem to us to reflect issues of professional ethics where the underlying suggestion is again the self-serving and doubtful general proposition that barristers have higher professional standards than solicitors.

**Closely allied to the duty of independence is the "cab-rank" rule. This rule expresses more than a duty to clients: it expresses a duty to the public at large and to the administration of justice. The rule is worth re-stating. It requires a barrister to accept instructions in any field in which he or she professes to practice, including instructions to appear in any court in which he or she professes to practise, on being offered a proper fee. [para 2.23]**

24. In our experience, the "cab rank" rule, while strictly honoured by some barristers, is so inherently flexible and open to subjective interpretation that others do not follow the "cab rank rule" as stated.

25. Generally, the reason given for not taking on a piece of work is lack of time. Being "too busy" is, often a flexible concept and any reasonably successful barrister will be able credibly to assert that his current professional and private commitments preclude him or her taking on a case that is unattractive to him or her – until the next interesting case comes along which they would rather do.

26. We are aware of instructions being given by practitioners (including the most senior practitioners) to their clerks to only take on work of a particular type (e.g. only high profile cases, or only cases in the appellate courts, or only for "claimants" or only for "respondents"). Such an instruction seems inconsistent with the cab-rank rule.

27. We are also aware of situations in which senior practitioners have declined to act for one party to litigation (by insisting on a price which that party is not prepared to pay), but then being instructed by an opposing party (say the Government) which will – inevitably – pay at a lower rate but which is regarded as a "preferable" client by the barrister (perhaps for perceived reasons of career advancement).

28. The term "cab-rank rule" is highly misleading: the prices of taxis are regulated, and the availability (or non-availability) of a taxi is clear. Not so barristers. Price is another variable which inevitably means that the services of a successful barrister are often in practice not available to many people in

society. At the Bar, it seems, some taxis are battered old bangers and others Rolls Royces: each, like the Ritz, is in theory open to everyone.

29. We also note that subsections 17(3)-17(5) of the Courts and Legal Services Act 1990 (17(3)(c) in particular) would appear to make provision for a rule similar to the cab-rank rule for anyone wishing to conduct "advocacy services" (i.e. regardless of whether they are barristers or solicitors). Our initial inquiries suggest that that, since 1993, solicitor advocates are subject to an Advocacy Code made by the Law Society under the Solicitors' Practice Rule (approved by the MR) which provides for a cab rank type rule (at its paras 2.4.2 and 2.5 we understand). But we have not checked or followed this up. Certainly, the Report does not appear to mention the fact that such rules can be made, or have been made, which is unfortunate.

**The cab-rank rule serves two vital purposes. First, it preserves the barrister's independence of his client, which is essential to the proper performance of a barrister's professional duties. [para 2.24]**

30. We agree that it is important that barristers are independent of their clients (in the sense that they are not perceived as being associated with the client's underlying conduct).
31. However, we do not consider that the "cab-rank rule" is necessary to achieve this purpose. This can be tested in two ways:
- (1) firstly, we are not aware that solicitors (who have no equivalent rule, except where providing "advocacy services"- see section 17 of the 1990 Act) are – in general – perceived to be associated with their client's conduct. Given that – as the Report emphasises – solicitors are more likely to have a continuing relationship with a client, the risk that they will be tainted with merits of their client's conduct must be greater, and yet this does not seem to happen in practice; and
  - (2) secondly, some barristers are indeed perceived as connected with a client's underlying cause (as are some solicitors) or a particular type of client, notwithstanding the "cab rank rule", but that is to do with the way they conduct themselves (i.e. as a matter of their choice) rather than through the existence/non-existence of the "rule".

**The second purpose of the rule is to facilitate access to justice. It is a fundamental principle that a person should not be placed at a disadvantage**

**in obtaining legal representation because he or she is unpopular or holds unpopular beliefs. [para 2.25]**

32. We agree with the principle as stated.
33. The issue here is not whether the cab rank rule should be maintained. The issue is whether it can be used – as the Report seeks to do - to justify the practices which the OFT is scrutinising.
34. However, we do not believe that a "cab rank rule" is needed to secure compliance with that principle (even though it no doubt was in the past).
35. In particular, the bar (and wider legal profession) is now diverse and – we believe - includes practitioners of the highest quality at all levels willing and able to act for the fullest possible range of clients. We consider it extremely unlikely that a client would be unable to obtain the representation they required.
36. As to the merits of the cab rank rule itself: we consider that there may be circumstances in which vigorous operation of the "cab rank rule" could operate to a client's disadvantage but without this being known to the client. In particular, there may be clients whose cases raises issues of conscience for some barristers of such severity that the client would be disadvantaged by having such a barrister act for them pursuant to a rigorous application of the cab rank rule.

**The cab-rank rule governs only barristers. [para 2.27]**

37. As above, there appears to be a "cab rank" rule (or at least the statutory scope for such a rule) for all advocates, so the Report overstates, or mis-states the true position.

**They [i.e. the barrister's duties to the court and their client, along with the cab rank rule] underline the fact that the barrister as advocate does not offer his services simply for his or her own financial gain, but also in fulfilment of a wider obligation to the public. [para 2.28]**

38. We consider this to be a non-sequitur. Again, these are matters of professional ethics where there is no obvious distinction with solicitors and which could continue to be applied in a less restrictive regulatory environment.
39. In any event, we consider that many barristers are motivated, by their own financial gain or advancement (albeit in a long term rather than necessarily an immediate sense). Of course, that need not be inconsistent with the

"fulfilment of a wider obligation to the public" (as per para 2.28). But, we believe that, for many barristers, the notion of a "wider obligation to the public" is a distant consideration, such that it cannot properly be relied on (as the Report does) to justify the rules being scrutinised by the OFT.

40. For example, we believe that very few barristers undertake significant amounts of work which is unpaid or paid at materially below their usual rates (and note, that even the bar "Pro Bono Unit" sets a target of only a very small number of free cases per barrister per year); and, even then, some barristers view "pro bono" work as "loss leading" (and thus ultimately in their financial interest) rather than as part of any concept of public service. We believe that rules such as the obligation to the court are generally perceived by many barristers as being simply the rules which regulate conduct, rather than being followed in order positively to give effect to some wider notion of public interest service.

41. We also note that two of the factors relied on (the duty of barrister *as advocate* to the court and the "cab rank rule") are equally present (or potentially present) for solicitors.

(1) Footnote 10 to paragraph 2.20 of the Report recognises this in part. It states: "*This duty [i.e. the paramount duty to act in the interests of justice] applies to all advocates and is embodied in statute: see section 28(2A) of the Courts and Legal Services Act 1990....*" [underlining added]. In fact, section 28(2A) applies the paramount duty in question to anyone "**conducting litigation**" and not just (and indeed not at all) to the provision of "**advocacy**" (as the footnote states); and

(2) as above, solicitor advocates are potentially subject to a "cab rank" type rule and the duty to the court in any event.

Accordingly, the existence of those rules for barristers cannot properly be relied on (as the Report does) to justify the rules in question. Identical professional rules could in principle be applied to both branches of the profession.

**.... each individual barrister accepts instructions and supplies his or her services to clients as an individual, and not on behalf of the other members of the chambers. Thus every barrister is individually responsible for all work that he or she does, and the fees for the barrister's work are payable to the individual barrister. Other members of the barrister's chambers are**

**not responsible for the performance of the work, nor entitled to payment for it; nor are they liable if the work is performed negligently. [para 3.5]**

42. See our comments in relation to 2.21, as above.
43. In particular, barristers are under various pressures which may conflict with their duty to their client and the court; and, increasingly, a corporate (and sometimes potentially conflicting) imperative arises through or from their chambers. Moreover, the widespread practice known as "devilling" means that, in practice, other members of the chambers may well be involved in producing the work, receive payment for it, etc (with all the consequences of multiple barristers being involved in the same case) but without the client even knowing it is happening.
44. In general, we think that this is indeed the true distinction between barristers and solicitors, reflected in different financial arrangements and different professional rules. However, we do not think that the economic and professional advantages and disadvantages of these two methods of delivering legal services has any necessary connection with the rules at issue here.

**A barrister may also appear as an advocate before another member of the same chambers who is sitting as a recorder or part-time judge. [para 3.6]**

Paragraph 3.6 correctly states the presently-accepted position. However, given what we say in relation to para 2.21 and 3.5 above, we consider that the position set out in paragraph 3.6 cannot be universally justified.

**It follows that every partnership of barristers, if partnerships were permitted, would automatically reduce the choice available to the client. [para 3.8]**

45. While this is theoretically the position, it need not make a material difference in practice. In particular, it seems unlikely that barristers in highly specialist areas (about which the Report expresses particular concern) would form partnerships (precisely to avoid the problem identified in para 3.8).
46. More generally, it does not seem to us that the pro- and anti-competitive effects of a "merging" of individual service-suppliers into a large organisation through partnerships can be decided on a crude numerical basis, if other considerations suggest that the new entity will provide a service desired by consumers.
47. See also our comments on para 3.10, below.

**Concern was expressed that, if partnerships were formed, insurers and major defendants would establish relationships with leading chambers that would effectively preclude those chambers from acting for claimants. [para 3.10]**

48. As noted in our comments on para 2.21, above, various organisations (such as local authorities, solicitors firms and, we imagine, insurers (directly or through insurers)) are already establishing relationships with sets of chambers which have the potential to preclude members of those chambers from acting for competing parties. Our current view is that it is highly unrealistic to suggest that the supply of barristers' services is currently anywhere near the levels of "concentration" that would be of concern in other markets, or that the Report provides any adequate explanation of why advocacy and advisory services are unique in this respect.

**Partnerships would reduce the number of separate competing undertakings and therefore, other things being equal, reduce the effectiveness of competition and permit higher levels of fees to be charged. Such higher charges would also be likely to result from the ability of senior barristers to delegate work to junior partners or employees of the barristers' firm. [para 3.14]**

49. We do not fully understand the second quoted sentence. If it means that more than one barrister (i.e. a "team") might work on a given piece of work, then:

- (1) that happens anyway (through the practice of "devilling"), although the solicitor and client often are not aware that it has happened and do not see (as they should) a commensurate reduction in the fee; we think it is unrealistic to suggest that there is currently a high level of price transparency in such cases, particularly for the highest profile barristers; and
- (2) if done transparently (i.e. so that the solicitor and client know it is happening and are charged at the appropriate rates for the different people working in the team on the case), then we regard it as a good thing (rather than a bad thing, as the Report seems to imply).

50. In any event, as a manifestation of (1) above, we are aware of situations in which a more senior barrister delegates (generally behind the scenes so that solicitor/client do not know it has happened) work to a much more junior barrister. Indeed, we are aware of the senior and publicly-acclaimed

practitioners signing off the work of pupils - as theirs - without even having read it. (Of course, those pupils could, and perhaps should, have resisted such a practice; but the power of "chambers" and the patronage of the senior barrister militates against it.)

**A further consequence of permitting barristers to form partnerships would be to undermine the cab-rank rule. Two of the necessary exceptions to the rule are that a barrister must decline to accept instructions if (i) there is or appears to be a conflict (or a risk of conflict) either between the interests of the barrister and some other person or between the interests of one or more clients, or (ii) there is a risk that information confidential to another client or former client might be communicated or used without their consent. If a barrister belonged to a partnership, the clients to whom these rules applied would not be limited to the barrister's own clients - indeed the barrister would no longer have any clients of his or her own - but would include all the clients of the barrister's firm. Hence partnership would multiply by a large factor the number of situations in which a barrister would be prevented by conflict of interest or knowledge of confidential information from accepting instructions, and would correspondingly limit the scope for the operation of the cab-rank rule.[para 3.15]**

51. Clearly, if barristers were to form partnerships then the boundaries of any "cab-rank rule" would have to be drawn around the partnership with consequent modifications to the rule. However, as noted above, we have real doubts about the modern utility of the "cab rank rule". It is even arguable that a "cab rank rule" applied to a partnership (or indeed to current chambers) would exert a greater professional pressure than currently exists.
52. We consider that the real issue is one of (avoiding) conflicts of interest. In that respect, members of a partnership plainly could not act for competing parties to litigation otherwise than in wholly exceptional circumstances and with the informed consent of both parties. However, as noted in our comments on para 2.21 above, we consider some of the current practices at the bar already have the potential to create real conflicts of interest (such that the attempt to justify the present bar/solicitor regime based on a claimed absence of such a problem is weakened).
53. Some barristers' chambers have in place practices and procedures (known in Matrix as a "conflicts policy") which ensure that the practice management function for competing parties in litigation is carried out by different staff. Some also offer practical arrangements (such as confidential fax lines) which seek to ensure absolute confidentiality. However, we believe that such arrangements are rare.

**The observance of the cab-rank rule may require an individual barrister to accept a brief from an unpopular or unattractive client. His partners may object to this. Even if they could not directly dictate the barrister's decision, the pressures upon the individual, particularly if he or she occupies a junior position in the firm, will be obvious. Comparable pressures do not exist under the present chambers system in which barristers conduct their own individual practices and are not responsible for each other's work. [para 3.16]**

54. We do not accept that the last sentence quoted correctly reflects the position. We do not see why professional rules could not be imposed on partnerships as well as on barristers or barristers' chambers.

55. See our comments on para 2.21 above.

56. There are also economic considerations that place considerable constraints on barristers to limit the amount of unpaid or low paid work that they do, including in particular "room rent" payable without reference to earnings and/or minimum levels of contribution to chambers' expenses, both of which necessarily impose a strong pressure on the individual and the chambers for work to be distributed in a similar way to all members. We are aware of barristers – especially more junior barristers - being put under pressure by other members of their chambers not to take on particular cases, or clients, or types of case, or types of client. Sometimes this is informed by money (for example, a pressure not to accept "legally aided", low paid, or unpaid work); sometimes it is more direct: a pressure not to act for clients who (for example) are scruffy and otherwise "undesirable" and who might put off respectable "blue chip" clients when waiting in the chambers waiting room.

**There is no evidence, however, that the rule against partnerships deters people from a career as a barrister in independent practice. There is heavy demand for pupillages and tenancies at the Bar, just as there is for entry to the solicitors' profession. Few applicants come with the security of private financial resources and most are dependent upon funding provided by chambers. [para 3.26]**

57. The absence of evidence is not evidence of absence.

58. Particularly against the background of students often graduating with "student loans", we would be surprised if the absence of starting salaries does not act as something of a deterrent (if not barrier) to entry for some (if not many) potential barristers. [CHECK WITH ANNA??] In any event, the more credible restriction is on the manner in which specialist advocacy and advisory services are delivered by qualified barristers. As solicitors in partnerships now provide such services in competition with barristers, it must

be an open question whether the existing restriction on such supply by barristers is justified.

**..... we do not accept that the inability of barristers to conduct litigation has any significant restrictive effect on competition. [para 6.3]**

59. We are aware of clients (of various sorts) asking barristers (or their staff) to undertake functions which amount to "conducting litigation". Lodging papers is a simple example. Those clients presumably see advantage in the barrister, or barrister's chambers, doing that. At present, it is not allowed. There is an obvious risk, particularly in legal fields where litigation involves (i) little evidence and (ii) substantial legal argument, that clients are incurring unnecessary duplication of costs as a result of the current rules.

**On the other hand, to allow independent barristers to conduct litigation would undermine the division of functions between barristers and solicitors and benefits to the public interest discussed in section 2 above. We have earlier observed that conducting litigation on behalf of clients – with all the associated activities such as collecting evidence, carrying on correspondence and dealing with disclosure of documents that this entails – is extremely time-consuming. A lawyer who performs these activities must inevitably spend only a fraction of the time appearing as an advocate and giving advice that would otherwise be possible. Thus if barristers were to undertake the conduct of litigation, they would substantially dilute their specialist skills. [para 6.4]**

60. As noted in our comments on paras 2.4 and 2.10 above, we consider it wrong to treat "conducting litigation" as an indivisible activity; and also consider it over simplistic to assume that a barrister "conducting litigation" would necessarily do so to the material expense of their traditional work as a barrister. The most obvious reason is that barristers' could collectively employ solicitors or legal executives to do the traditional solicitors' role for them, just as barristers increasingly pay for specialist IT or research assistance on a collective basis.

61. Moreover, as outlined above, many of the distinctions between barristers and solicitors which the Report implies as being clear in practice and effect, have either become blurred, or no longer really exist at all, or no longer have practical utility.

62. In addition, as noted in our comments on para 2.8 above, some barristers are, in any event, generalists (in terms of legal subject matter) who may prefer to provide a fuller service (i.e. conducting litigation) across a narrow range of subject areas, but who are presently precluded from doing so in

circumstances in which the public/market interest may be well served if they were permitted to do so.

63. Finally, we do not consider it correct to say that that allowing barristers to conduct litigation would materially undermine the public interest benefits referred to in section 2 of the Report if for no other reason that, the public interest benefits include (1) the "cab rank rule" (which, as above, potentially applies equally to solicitor advocates) could be modified to apply to partnerships more generally, and (2) the paramount duty to the court/interests of justice (which, as above, applies equally to anyone conducting litigation).

**It has also been noted that barristers at present have low overheads and relatively low charges. That could not remain the case if barristers had to maintain the systems and staff necessary for the efficient conduct of litigation. As important, the conduct of litigation would oblige barristers to handle clients' money, whether in the form of fees on account, money to be paid into court, or payments due to or received from the other party in the case. [para 6.5]**

64. See various comments on "conducting litigation", above. The obvious point is that deregulation would have no dangers for a group of undertakings that is currently capable of providing an exceptionally high level of service at an exceptionally low price.
65. In any event, it is not clear that the public/market interest is universally served by having what are (in theory) highly differentiated services and highly differentiated rates. A degree of vertical integration and/or merger may be in the interest of some clients.

**For such barristers to conduct litigation would also undermine the competitive and other public interest benefits that accrue from selection by professional clients. A barrister who provided litigation as well as advocacy services would necessarily be providing that service direct to members of the public. [para 6.6]**

66. We do not agree with the second sentence of the quote. As above, we are aware of existing demand for barristers (and/or their chambers) to undertake (at least some) litigation functions. The requesting clients involved are generally corporate bodies (such as local authorities) or the request is being made by an out-of-London solicitor who presumably considers it preferable to use the barrister/chambers as London "agent" than a London-based solicitor.

**As well as representing an honour, the rank of QC is a good indication, even if not a guarantee, to a client with an important and difficult case that an**

**advocate who practises in the relevant field of law can be trusted to handle such a case. [para 7.7]**

67. Although some barristers practice entirely in a single field and gain a reputation, and recognition, in that field, many do not. Certainly, the label "QC" is not tied (implicitly or expressly) to any particular field of expertise. Accordingly, it is not correct to simply to say (as does para 7.7) that the rank of QC is an indication that an individual "*in the relevant field of law...*". There is no "relevant field of law".
68. Indeed, in marketing terms (and certainly in the eyes of most clerks who are "selling" their barristers on the 'phone) it is often assumed that a QC will inevitably be preferable to a "junior barrister", which is a total non-sequitur. In particular, a considerably more "junior" barrister may well be much more experienced and expert in a particular area than a given QC. Indeed, we are aware of junior barristers who have been encouraged to apply for silk by solicitors, who regard them as better than QCs, because lay clients feel pressure to have a silk.

**First, although it is correct that appointment as a QC is made on the advice of a Government minister there is no perception, let alone evidence, so far as we are aware, that political considerations play any part in the selection process. [para 7.11]**

69. We are aware of Government law officers (i.e. individuals who are the "client" when the Government is a party to litigation, or in some cases may even be the advocate representing the Government) who are also consultees in the silk system and who are thus able to comment (and do comment) adversely on the merit of aspirant silks who are litigating against the Government.
70. There is also a widespread perception that serving as a member of a "Treasury Panel" (which implies spending a significant amount of one's time as a barrister acting for the Government in civil cases) is a major advantage in a silk application. Our experience would suggest that membership of the 'A Panel' (formerly the 'main panel') virtually guarantees appointment to silk as a matter of practice. This also has a distorting effect on price competition: since the rates for junior counsel are simply set at a fixed rate for each panel by the Government, irrespective of the individual circumstances of the case or the skills/experience of a particular barrister, such barristers in practice charge non-Government clients much more than they are able to charge the Government. One kind of client (the state) therefore has access to a barrister when a private client will not: this is another example of how the

“cab rank” rule does not operate in the simplistic way the Report might suggest.

71. We also understand that, in practice, membership of the panel of criminal Treasury Counsel (appointed by the Attorney General) is a near guarantee of success in a subsequent silk application.

**....the selection of QCs involves an intense and wide-ranging process of peer review. It is not clear on what ground the OFT considers such peer review to be inadequate. So far as the absence of examinations is concerned, the qualities required of a QC are related heavily to experience and advocacy skills and professional qualities demonstrated in practice, and are not measurable by formal examinations [para 7.13]**

72. Firstly, the peer review in question is very random. In particular, it appears to be assumed that the appointed consultees will be aware of the merits of an aspirant silk in their professional area; and that, if they are not, then the aspirant lacks merit. But that need not follow.

73. Secondly, although it may be that not all of the skills and quality of a "QC" can be measured by examination, that does not mean that examination could not measure some of them.

**With regard to continuous assessment, we are not aware of a problem concerning QCs who maintain a practice with the aid of their title which their abilities no longer justify. [para 7.14]**

74. We find this comment extraordinary. We are all aware of people in the position described. We find it surprising that the members of the Kentridge Committee (and others who have – presumably – been involved in endorsing that Report as the Bar Council's response) have not come across such people. Indeed, our experience is that this is one reason why some solicitors – exasperated by the limited choice of high quality silks on offer – encourage junior barristers to apply for silk, in the hope that this will give lay clients more choice.

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### **Price collusion**

75. The OFT's initial report on the professions reported that the OFT had found no evidence of price collusion. It is, perhaps, worth recalling the cliché: absence of evidence is not evidence of absence.

76. In any event, we are not absolutely clear what is meant by "price collusion" for these purposes but note the following, which we believe to be not uncommon practices:

- (1) in a criminal case involving a number of co-defendants (whether "legally aided" or not) the "clerks" involved will often "ring round" to discuss the fee which each is going to put forward for their barrister(s) so that no one "queers the pitch" of the others (by putting in a lower fee which becomes a new negotiating benchmark);
- (2) where a QC and junior are involved in a case, the clerks for the junior and silk will often discuss in advance the fees they are going to quote; at the very least, the junior's clerk will often contact the QC's clerk to find out the fee that has been negotiated for the QC (with the intention of using the 50% figure (or, in some cases a 2/3 figure) as the benchmark for negotiations, regardless of the relative amounts of work which will be undertaken by the QC and junior respectively);
- (3) we have even heard of clerks in different chambers which are bidding for work (in a competitive tender) discussing the fees that they are proposing to quote.
- (4) Finally, within a chambers there is of course a great deal of exchange of information about the availability, suitability and price of "competing" barristers; where those barristers collectively or individually have significant reputations in the field, that may have a material distorting effect on price competition and/or lead to a restriction on output. We are even aware of chambers where the clerk for two QCs (apparently in competition with each other) will insist to a solicitor that the minimum (very high) fee for both is the same.

### **Fees generally**

77. The OFT asks about whether there is a "step change" in fees when barristers are appointed as QCs.

78. Such a step change in charge-out rates may not be the universal practice, but we believe it is commonplace. We are aware of barristers instructing their

"clerks" to increase their charge out rates on new cases by close to 100% on their appointment to silk.

79. It seems to be an accepted practice that charge-out rates on cases started before the barrister took silk will increase if the case is still going a year later. However, we are aware of barristers' clerks seeking to negotiate a higher rate as soon as their barrister becomes a QC part way through a long case (which straddles the appointment) and then, when the client is resistant to the increase, seeking to arrange for a junior barrister (at a lower rate) to replace the newly-appointed silk in the case.

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