

**FINAL REPORT FROM THE COUNCIL OF THE INNS OF COURT (COIC)
DISCIPLINARY TRIBUNALS AND HEARINGS REVIEW GROUP**

Foreword to the Review Group Report by the Chairman

1. When COIC appointed the Review Group (“the Group”) under my Chairmanship on 23 November 2011, I assumed that primarily we would be concerned with reviewing the extent to which COIC’s responsibility for disciplinary functions was not just (to coin a phrase) fit for purpose but also met with current standards for independence from the prosecutor in its tribunals, the Bar Standards Board (“BSB”). The issue of independence was then regarded as urgent for two reasons, firstly, there was an imminent hearing in front of the Visitors in Leathley v. BSB, in which a number of points were being raised as to the supposed lack of required independence. In the event, these were all dismissed by Burnett J on 20 January 2012. The second reason for urgency was the expectation that before long the Legal Services Board (the “LSB”) was likely to conduct a review of the disciplinary arrangements of approved regulators to ensure that they were fair, transparent and efficient.

2. Little did I expect that within a few days of starting work we would uncover what can only be described as systemic failures in the administration of the Tribunals Service. These failures went back some years and gave rise to a number of different issues concerning the eligibility of non-judicial members of tribunals. It rapidly became clear that far too much had been expected of the Tribunals Secretary, who had been neither adequately supervised nor supported. In particular, record-keeping in the small one-room office in a set of barristers’ chambers was such that the extraction of vital information was often very difficult, invariably time-consuming and sometimes quite impossible.

3. These discoveries turned the work of the Group into something very different and infinitely more extensive than what was initially envisaged. The need for reform was so great that we very quickly changed from a Review Group into what was effectively an Implementation Group so as to ensure that the Disciplinary Tribunals system could continue to operate.

4. Alongside the work implementing reforms (such as the creation of the new Tribunals Appointments Body), the Group has also had the task of investigating the extent to which tribunals have been sitting with ineligible members. This has been a colossal task, primarily because of the serious inadequacy of the existing record-keeping. It could not have been achieved without the gifted and assiduous work of a team of some four young barristers aided by an experienced law graduate. Their mastery of the whole history of this matter has been exemplary. The Group is very grateful to Adam Jacobs, David Lewis-Hall, Aidan Reay, Katie-Elizabeth Walmsley and Taji Beklik.

5. Another to whom I should pay tribute is Brigadier Tony Faith, the Under Treasurer of Gray's Inn. He has assumed day-to-day responsibility for the running of the Group. His unstinting labours and efficiency have kept the show on the road, even when the ditch seemed to beckon. The projected new premises for the service in Gray's Inn will be his monument. It is astonishing that he has managed this task at the same time as running an Inn of Court. Yet he has never missed a beat.

6. Finally, the work of the Review would never have come to fruition without Rachel O'Driscoll. Even at moments when she had other demanding calls on her time, she has continued to supervise the work of investigation. Most importantly of all, she has shouldered the burden of drafting the bulk of the Report at a time when the barrister members lacked the time to do so. The Group takes complete responsibility for the contents of the Report, but it would be utterly wrong to fail to acknowledge the debt of gratitude we owe to Rachel for all that she has done.

7. I am conscious that the early parts of the Group's Report deal at quite some length with the deficiencies which we discovered in the operation of the Tribunals Service. Sadly, this is inevitable in chronicling our work. However, all the members of the Group join with me in emphasising that our recommendations are not intended simply to remedy those shortcomings, although we very much hope that they will have that effect. At the end of the day, we have stuck to our original brief, namely to make recommendations which accord with what is now expected of a modern system of professional regulation. We very much hope that the Inns will be able to create for the future the disciplinary service which a fine profession deserves and the

public interest demands. In trying to reach that goal, we have been guided by what we believe should be the fundamental Statement of Purpose for the new service. It is to be found in paragraph 8.3 below. The Group's recommendations are summarised in Annex 15 to the Report.

DESMOND BROWNE QC

Thursday 12 July 2012

Post-script: Judgment of the Visitors in *Russell v. Bar Standards Board*:

1. On the very day that this report was finalised, the Visitors to the Inns of Court handed down their judgment in the case of *Carron Ann Russell v. BSB*. The ruling, if not subject to successful judicial review, will substantially reduce the adverse consequences of the irregularities described in our report.

2. The Tribunal hearing challenged by the Appellant took place in May and June 2010. One of the two barrister members, John Smart, had been appointed a panel member for Disciplinary Tribunals in May 2001. Accordingly, under para.19(b) of the Tribunals Appointments Body's Terms of Reference, he should not have remained on the list¹ after 10 May 2009 (i.e. 3 years after the Terms of Reference were adopted). In handing down the unanimous judgment of the Visitors, Sir Rabinder Singh pointed out that a mistake had been made and "what should have happened, as a matter of good practice, did not happen". However, he then went on to consider whether that meant that there had been a breach of the Disciplinary Tribunals Regulations 2009.

¹ Under the 2006 Tribunals Appointments Body's Terms of Reference, appointment was to the COIC "lists". The 2012 Tribunals Appointments Body's Terms of Reference make appointments to the "COIC Disciplinary Pool"

3. In a nutshell, the Visitors concluded that:

a. There was no defect in Mr Smart's appointment to the Disciplinary Tribunal hearing Ms Russell's case, which was validly constituted under the 2009 Regulations, notwithstanding the irregularity in compliance with the Terms of Reference.

b. In any event, Mr Smart had *de facto* authority to sit as a member of that Tribunal, in accordance with the doctrine described in such cases as *Coppard v. Customs & Excise (2003) QB 1428*, and applied to the Visitors themselves in *R (Argles) v. Visitors to the Inns of Court and BSB [2008] EWHC 2068 (Admin)*.

The decision of the Visitors is much to be welcomed. At first sight it appears to indicate that some of the more alarmist predictions as to the extent of the consequences of the maladministration of the Tribunals' Service will prove unjustified and that mere non-compliance with the Tribunals Appointments Body's Terms of Reference will not invalidate a tribunal decision.

1. Introduction

1.1 Since its creation in 1986 and as a result of a Resolution of the Judges dated 26 November 1986, the Council of the Inns of Court (“COIC”) has been the body responsible for recruiting, appointing and administering Bar disciplinary panels.

1.2 Paragraph 1 (f) of the COIC Constitution (at [Annex 1](#)) states that one of its functions is to appoint Disciplinary Tribunals in accordance with the provisions of Annex M of the Code of Conduct². Paragraph 14 of the Constitution provides greater detail as to this function, including a requirement that no alteration shall be made in the powers or composition of Disciplinary Tribunals without the consent of the Lord Chief Justice and the Treasurers of the Inns.

1.3 The advent of the Legal Services Act 2007 (“the LSA”) fundamentally changed the landscape in which COIC operates, placing statutory responsibility on the Bar Standards Board (“the BSB”) to make appropriate disciplinary arrangements for authorised persons. COIC’s responsibility for recruiting, appointing and administering Bar disciplinary panels is now exercised in this context³.

1.4 In carrying out its work, the BSB is required to meet the eight regulatory objectives set out in the LSA 2007⁴ and to have regard to the principles of best regulatory practice. COIC also needs to take account of the requirements of the LSB’s Regulatory Standards Framework, which sets out its view of regulatory best practice. The four cornerstones of legal regulation to which the LSB refer in their framework are:

² The Constitution has not been updated to reflect the fact that the Disciplinary Tribunals Regulations are now Annex K of the Bar Code of Conduct. Amendments are required to both paragraphs 1 (f) and 14 of the COIC Constitution.

³ A (non-legally binding) Memorandum of Understanding on Disciplinary Matters between the BSB and COIC was agreed in September 2010 (attached at [Annex 2](#)). It is intended that, in the near future, arrangements should be formalised through either an instrument of delegation or a contract for services between the BSB and COIC. The BSB is seeking legal advice on the appropriate form of agreement to allow an adjudication service to be provided by a third party.

⁴ (1) Protecting and promoting the public interest; (2) Supporting the constitutional principle of the rule of law; (3) Improving access to justice; (4) Protecting and promoting the interests of consumers of legal services; (5) Promoting competition in the provision of legal services; (6) Encouraging an independent, strong, diverse and effective legal profession; (7) Increasing public understanding of the citizen’s legal rights and duties and (8) Promoting and maintaining adherence to the professional principles.

1. Outcomes focused regulation;
2. A risk identification framework;
3. Proportionate supervision; and,
4. An appropriate enforcement strategy.

1.5 Heed must also be taken of the current public expectations of transparency and accountability in the disciplinary arrangements governing those who deliver professional services.

1.6 A further driver of change is that in 2010, COIC decided in principle to extend the tribunals system to cover BSB-regulated entities and non-lawyers working within such entities.

2. Establishment of the Review

2.1 At the COIC meeting on 23 November 2011, it was agreed that a review of the Council's disciplinary and hearings responsibilities should be undertaken with the aim of providing a health check of the arrangements and ensuring that there was the proper degree of independence from the BSB, as prosecutor.

The Terms of Reference for the Disciplinary Tribunals and Hearings Review Group ("the Group") are provided at [Annex 3](#)⁵. In brief, the Group was to:

"conduct a 'root and branch' review of the entirety of COIC's functions and responsibilities for disciplinary and fitness to practise matters, to ensure that the system is fit for purpose, properly resourced, and meets with modern day practices and standards".

⁵ An additional term was added to the Group's Terms of Reference at the COIC meeting on 18 January 2012: "The structure and functions of the Inns of Court Conduct Committee ("the ICC") should be considered to determine if there is overlap or duplication and if so how efficiencies might be realised." The ICC is the body responsible for adjudicating on fitness to practise issues relating to admission to an Inn of Court and student conduct matters.

2.2 Details of the Group's membership are provided at [Annex 4](#). The Group is particularly grateful to its lay member, the former Parliamentary and Health Service Ombudsman, Sir Michael Buckley for giving his valuable time and expertise. The Group has also benefited from the expertise of its two barrister members, David Pittaway QC and Ian Stern QC, in professional discipline and regulatory law.

2.3 Since its first meeting on 11 December 2011, the Group has met on 7 further occasions and there have also been meetings with the Chair and Vice Chair of the Inns Conduct Committee ("the ICC") and BSB staff. Sue Carr QC⁶ attended the Group's 4th meeting and provided a most useful perspective.

3. Irregularities in appointments to panels

3.1 Shortly after commencing work, it became apparent to the Group that there were problems with the appointment of persons to the COIC lists. In particular, a number of panels included amongst their membership barrister and lay representatives whose appointments were time expired or who were ineligible for other reasons.

3.2 The Group uncovered the following deficiencies in appointments:

(1) Time Expiry

The COIC lists of barrister volunteers and lay representatives who sit as panel members had not been properly maintained. Persons appointed to the lists remained beyond the time at which they ought to have been re-appointed or removed.

The appointments can be grouped into cohorts as follows:

Group 1

Chronologically, the first members of the lists to become time expired were the lay representatives appointed in autumn 2005. These individuals were

⁶ Former Chair of the BSB Complaints Committee responsible for implementing the BSB's Strategic Review of Complaints and Disciplinary Processes. Appointed as Chair of Legal Ombudsman's Stakeholder Panel in 2011.

appointed for a 3-year term. The exact date of some of their appointments is unclear. Some who had, in effect, been transferred from the Bar Council to COIC received an appointment letter from the President of COIC⁷ dated 11 November 2005, whilst others who had been recruited by COIC during summer 2005 appear to have received a letter dated 19 September 2005⁸ from Colonel David Hills⁹ stating that “the President of COIC, has approved your placement” [sic]. This letter was then followed by a letter dated 11 November 2005 from Colonel Hills. This second letter is not entirely clear about the date of appointment, either when read on its own or together with the 19 September letter. In the absence of any clear appointment instrument for the summer 2005 COIC recruits, 19 September 2005 has been taken as their starting date.

All those who received a letter dated 11 November 2005 (whether from the President of COIC or Colonel Hills) were re-appointed by a letter from the President of COIC¹⁰. The hard-copies of this letter are dated 11 December 2005, but it is believed that this is a typographical error and the letter ought to have been dated 11 December 2008. This conclusion is consistent with the draft versions stored on the Tribunals Secretary’s hard-drive. Re-appointment on 11 December 2008 would mean that the Bar Council transferees were time expired for up to one month and the summer 2005 COIC recruits were time expired for just under two months immediately prior to their re-appointment.

There is no evidence that the re-appointments in December 2008 were ever considered by the Tribunals Appointments Body (“the TAB”)¹¹ and COIC is currently seeking advice on the consequences (if any) of this omission.

The re-appointments in December 2008 were for 3 years and, consequently, the lay representatives became time expired again on 11 December 2011. They were re-appointed for 12 months on 18 January 2012 by a resolution of COIC.

⁷ At that time, Lord Justice Waller.

⁸ Two copies of this letter have been provided to COIC by the recipients. It seems likely that other members of their cohort also received the letter.

⁹ The Under Treasurer responsible at the time for disciplinary matters.

¹⁰ Signed by the then President of COIC, Lady Justice Smith (as she then was).

¹¹ See paragraph 4 of the Report for further detail on the TAB.

Group 2

The next group to become time expired are those barrister volunteers appointed to the list prior to the adoption of the TAB Terms of Reference (“TOR”) on 10 May 2006. Prior to the formation of the TAB, it is believed that barrister volunteers were added to COIC’s list for an indefinite period and that there were no requirements for any particular appointment procedures to be followed. By virtue of clause 19(b) of the TOR, these barrister volunteers had their appointments made subject to a 3-year maximum term from that date and consequently became time expired on 10 May 2009.

Group 3

Barrister volunteers were appointed to the list in June or July 2007 and appear never to have received an appointment letter or any indication of their terms of office. In the absence of an appointment instrument, it is unclear whether they were validly appointed and, if so, whether they were appointed for 3 years, which would be consistent with the appointments of lay representatives in 2005 and non-judicial panel members in 2009, or whether they were appointed for five years in accordance with clause 19(b) of the TAB TOR. COIC is currently taking advice on both these issues.

Group 4

The final group of appointments to the lists is not affected by time expiry. These appointments were made on 30 July 2009 and these appointees, lay representatives, barrister volunteers and QC chairs alike, were given 3-year terms. These terms will expire on 30 July 2012, so no time expiry issues yet affect this group.

(2) Bar Council Appointees

Amongst the lay representatives used by COIC for approximately the last seven years are a number of lay representatives who were appointed by the Bar Council just prior to the decision in *Re P (A Barrister)*, [2005] 1 WLR 3019 (“the Bar Council Appointees”). The Bar Council Appointees attended a Professional Conduct and Complaints Committee (“the PCCC”) meeting for the purpose of training but due to *Re P* never sat on the PCCC.

Following judgment in *Re P* in January 2005, it appears that a decision was taken that the Bar Council Appointees would not be used by the Bar Council and they were transferred to COIC to sit on Disciplinary Tribunals. Defendants were asked to sign a waiver, as an interim measure, to guard against any challenge for apparent bias

stemming from the fact that the initial appointments had been made by the Bar Council.

In an attempt to regularise their position, the Bar Council Appointees were invited to attend a familiarisation session with the intention that this would serve to negate any apparent bias that may have attached itself to them by reason of the manner of their initial appointment.

Most of the Bar Council Appointees attended that familiarisation session on 31 October 2005 and received an appointment letter from the President of COIC dated 11 November 2005. Four of the Bar Council Appointees did not attend the familiarisation session and did not receive an appointment letter, but continued to sit as lay representatives and received the same re-appointment letter in December 2008 as the other Bar Council Appointees and the COIC recruits of 2005 (see Issue (1), group 1 above).

Difficult questions arise as to whether the Bar Council Appointees were tainted by bias and, if so, whether the familiarisation session was effective in negating that bias¹².

(3) Committee Membership

Prior to 10 October 2005, Disciplinary Tribunal panel members were prohibited by the Disciplinary Tribunals Regulations 2000 from sitting on the Bar Council's PCCC. Following *Re P*, this was extended by the Disciplinary Tribunals Regulations 2005 to prohibit membership of other Bar Council Committees and membership of the Bar Council itself. It was amended again following the creation of the BSB. Today, the Disciplinary Tribunals Regulations 2009 prohibit panel members from being members of the Bar Council, the BSB or any of those organisations' committees.

Two issues have arisen in connection with this:

1. Some members of COIC's lists were concurrently members of the Bar Council, the BSB and/or one or more of those organisations' committees, in breach of

¹² It is understood that the BSB is seeking advice on this issue.

the Disciplinary Tribunals Regulations. Arguably this could give rise to a claim of apparent bias.

2. Some members of COIC's lists joined the Bar Council, the BSB and/or one or more of those organisations' committees subsequent to their appointment to the lists. This would appear to have invalidated their appointment and as such may have affected their eligibility to sit as panellists even after they had resigned the conflicting membership.

We do not believe that this issue goes back beyond 10 October 2005, since that was the date that the Disciplinary Tribunals Regulations 2005 came into force. This was the first set of regulations which extended the prohibition on membership of the Bar Council and its committees beyond the PCCC. If the rule was broken in a case before 10 October 2005, it would seem that a line was drawn under it by *Re P*. *Re P* provided notice to anyone who might have been affected by a breach of this rule to challenge the validity of their panel. Accordingly, a pre-10 October 2005 defendant could not sensibly be heard to say that he/she ought now to be allowed to bring an appeal or seek a judicial review out-of-time.

If any pre-10 October 2005 defendant wished to assert that the Disciplinary Tribunals Regulations 2000 were in themselves deficient – i.e. that the exclusion ought to have applied to other committees and the Bar Council – it is again too late to do so since what would then be being challenged would not be the eligibility of the panel but the compliance of the Disciplinary Tribunals Regulations with the common law and Article 6 of the European Convention on Human Rights. The terms of the Disciplinary Tribunals Regulations were known to pre-10 October 2005 defendants and if a defendant desired to challenge them, he/she could and should have done so at the time of their hearing.

(4) Practising Status

Under the terms of the Disciplinary Tribunals Regulations, barristers sitting on Disciplinary Tribunals have always been required to be practising, although not necessarily in self-employed practice. However, prior to the coming into force of the Disciplinary Tribunals Regulations 2009, if a non-practising barrister was being

prosecuted, reg. 2(1)(c)(i) of the Disciplinary Tribunals Regulations 2000 and 2005 provided for a non-practising barrister to sit on the panel.

It has not been practical to discover whether the defendant in all the cases involving non-practising panel members was a non-practising barrister. Accordingly, it has been decided to identify all those cases involving non-practising panel members and alert the defendant barristers in those cases to the non-practising status of the panel member and, where the case was heard prior to the coming into force of the Disciplinary Tribunals Regulations 2009, also to alert the defendant barristers to the exception in reg. 2(1)(c)(i).

(5) Honorary Silks

Those barristers who are honorary Queen's Counsel do not hold a working rank. It therefore seems more than likely that they are not eligible to sit as chairs of 3-person panels. This affects two Queen's Counsel who were members of the COIC lists.

(6) Tribunal Appointments Body Irregularities

Two issues have come to light regarding the original membership of the TAB.

The first is that one of the barrister members of the TAB, Desiree Artesi, was concurrently a member of the BSB's Conduct Committee. Although this was not specifically prohibited by the TOR adopted in 2006, it is possible that this dual membership could give rise to a charge of apparent bias and hence that appointments made following approval by the TAB were invalid.

The second issue is that the original members of the TAB were due to expire in rotation over the first 3 years of the TAB¹³. This never took place and the original members of the TAB were only stood down by the President of COIC in February 2012. This could give rise to an argument concerning the eligibility of those panel members approved by members of the TAB who should have stepped down and been replaced during those first 3 years.

¹³ Under clause 4, one barrister was meant to leave the TAB after one year, the other barrister and the lay representative after two years and the chairman after 3 years.

(7) Prosecutors Sitting as Panel Members

Amongst those appointed to COIC's lists are two barristers who are, or have been, members of the BSB's Prosecutors' Panel. Research in this area has been limited as the BSB has not been able to provide records of the membership of its Prosecutors' Panel before 2009. However, it is known that both barristers have been BSB prosecutors since before their appointment to COIC lists.¹⁴

(8) Sufficient Standing

Under the Disciplinary Tribunals Regulations 2009, rr.2(2)(b) & 2(3)(c), barrister members of Disciplinary Tribunal Panels must be of at least seven years' standing¹⁵. Upon completing the initial assessment in March 2012, it was found that 3 barristers fell foul of this rule. However, these sittings all occurred prior to 2009 and the Disciplinary Tribunals Regulations of that time only required barrister members to be of five years' standing. The 3 individuals concerned were all of five years' standing at the relevant time. It is therefore hoped that this issue will disappear after completion of the final assessment, but some uncertainty remains because the initial assessment looked at the date of call, rather than the date of commencing practice.

(9) Unilateral Appointment

Another discovery was that one of the Queen's Counsel members of the lists was unilaterally appointed by the Tribunals Secretary in October 2006. The correspondence which evidences the unilateral appointment also reveals that this

¹⁴ See 3.2 (9) below.

¹⁵ Standing is defined in Part II of the Code of Conduct (203.2):

For the purpose of paragraphs 203.1(b) and 204(c)(i) a barrister shall be treated as being of a particular number of years' standing if he:

(a) has been entitled to practise and has practised as a barrister (other than as a pupil who has not completed pupillage in accordance with the Bar Training Regulations) or has been authorised to practise by another approved regulator;

(b) has made such practice his primary occupation; and

(c) has been entitled to exercise a right of audience before every Court in relation to all proceedings for a period (which need not be continuous and need not have been as a member of the same authorised body) of at least that number of years.

individual was a BSB prosecutor at the time. The individual concerned remains a member of the BSB Prosecutors' Panel.

(10) Clerks

Under the terms of the job description annexed to the 2006 TAB TOR, clerks were expected to be in independent practice and of at least five years' call. They also needed to hold a practising certificate. One of the current clerks never completed pupillage, whilst others were not of five years' call. This is far from satisfactory but it is not thought to be capable of threatening the validity of any decisions, since clerks are not responsible for making decisions.

3.3 Of the above issues, only the failure properly to maintain the list of clerks is considered not to give rise to the possibility of invalidity. In some instances, COIC is seeking further advice from counsel.

3.4 The policy adopted as to notifying barristers convicted in disciplinary proceedings is that they will be contacted by COIC whenever it is arguable that one of the issues identified could have affected the eligibility of the members of the panels which heard their cases and thus potentially undermine the validity of the verdict. The initial assessment conducted between 30 March and 4 April 2012 revealed:

- 516 time expired hearings
- 51 hearings conflicted by committee membership
- 105 hearings with unregistered barristers
- 12 hearings where a barrister panellist was not seven years call

These were preliminary figures subject to final verification.

4. Appointments to Panels and the Tribunals Appointments Body

4.1 Following the decision in *Re P* in January 2005, COIC took over the responsibility for convening all hearings in relation to the regulation of barristers. As part of the process of discharging this responsibility, TOR were drafted dated 6 April 2006 for a new body, the TAB. COIC approved these TOR at its meeting in May 2006.

4.2 Clause 1 of the TAB TOR laid down COIC's objective in establishing the TAB:

"It is established to vet the applications of those people desirous of being members of the panel of persons to sit and decide on issues of misconduct and inadequate professional service and fitness to practise brought by the BSB and certify that those they select to the panels are fit and properly qualified to conduct the business for which they have been selected."

4.3. The TAB was to consist of a Chairman (a bencher of one of the four Inns), two barristers (one of them in silk) and a lay representative drawn from the list maintained by the Tribunals Secretary.

4.4 The members of the TAB were:

Chairman: Mr Justice Stanley Burnton (as he then was)

QC member: David Phillips QC

Barrister member: Desiree Artesi

Lay member: Sophia Lambert

4.5 Part of the difficulty for the Group in investigating the issues of ineligibility of non-judicial panel members lies in the fact that no minutes of meetings of the TAB have been located. The Chairman of TAB has stated that he believes that minutes were kept, but this is not confirmed by the Tribunals Secretary and, despite an intensive search, no minutes have ever been found. The TAB and its Chairman relied for administrative support on the Tribunals Secretary and the Under Treasurer

responsible for disciplinary matters¹⁶, who called meetings of the TAB when it was considered that action needed to be taken in relation to new appointments. The Chairman has indicated that, unless so informed, he had no reason to know when Tribunals were being convened for disciplinary hearings.

4.6 In the course of our investigations, we discovered that Desiree Artesi had been on the BSB Professional Conduct Committee between 1 January 2006 and 31 December 2011. No thought appears to have been given to whether it was appropriate for someone in her position to be a member of the TAB. Under the new TOR for the TAB, that would not be possible.

4.7 In a number of respects the TAB failed to comply with its TOR:

(1) Clause 4 of the TOR provided that “Persons appointed to the [TAB] will normally serve 3 years, save that in the first 3 years of operation one barrister will change after one year, the lay representative and the other barrister member after two years and the chairman after 3 years.”. No such changes ever took place.

(2) Clause 9 obliged the TAB to “review the entire lists [of panel members] at least once each calendar year.” There is no evidence that this annual process ever took place.

(3) Under clause 19(a) it was provided that lay representatives should each be appointed for 5 years, renewable once. For some reason we cannot discover, lay representatives were appointed for 3 years in 2009 (in common with the other appointments made in that year). It is probable that this was because COIC had resolved on 16 November 2005 that lay representatives should be appointed for 3 years, renewable once, and the change in the TOR to 5 years was overlooked.

(4) Under clause 19(b), “existing panel members [were] permitted to remain on the panel for up to a further 3 years”, with the aim being “to have completely vetted panels by October 2009.” No steps appear to have been taken to put this into effect, and members of the lists who had been appointed prior to 2006 continued to serve after 2009, even though the TOR stated that the intention was that “up to 50 new

¹⁶ From January 2007 - December 2009, the Under Treasurer responsible for disciplinary matters was Air Commodore Peter Hilling.

barristers will be recruited each year in the first 3 years to replace those who have taken no active part in the recent past”.

(5) As with lay representatives, so with barrister members, clause 19(b) provided that once appointed, barristers were to serve on the panel for 5 years, renewable once. Where appointments were made with a term stipulated, it was always 3 years. However, when COIC advertised for barrister members in 2006, the advertisement said nothing about the length of appointment. Worse, we have seen e-mails in which barristers who responded to the advertisement were simply told by the Tribunals Secretary the following year that they had been appointed, but without any term of appointment being stipulated.

4.8 There is no doubt in the Group’s mind that a substantial cause of the extensive problems which have been revealed by its work has been the failure of TAB to comply with its TOR. This has been aggravated by the fact that the TAB last met in November 2008. After that time, the appointments of all its members lapsed, and nothing was done to revive the working of the body until after the Group’s Interim Report to COIC of 16th February 2012 [attached at [Annex 5](#)].

4.9 A particular problem stemming from the failure to adhere to the TOR has been difficulty in assessing when members of the lists’ terms of office expired, and which are not and were not capable of valid renewal. It would have been natural to assume that the TAB TOR providing for five year terms superseded the COIC resolution of November 2005 which had provided for 3 year terms for lay members. However, in December 2008, the then President of COIC renewed the appointment of lay members for a further 3 years, and in July the following year she appointed barristers as members of the lists for a 3 year term, said to be renewable for another 3 years. We have proceeded on the basis that all appointments made by the TAB were for 3-year periods, rather than the 5-years laid down in the TOR. This has had important ramifications for the number of resulting cases of apparent ineligibility by reason of time expiry.

4.10 The deficiencies in the running of the TAB are not by any means the sole cause of the problems that have been uncovered. As will subsequently be described, there were also administrative problems in the Tribunals’ Secretariat and failures of

proper supervision on the part of those in the Inns responsible for disciplinary matters.

5. The Memorandum of Understanding between COIC and the BSB

5.1 At the end of September 2010, COIC and the BSB entered into a Memorandum of Understanding on disciplinary matters (“the MOU”)¹⁷. Clause 7.2 of that Memorandum provides that in order to determine the size of the pool of clerks, barristers and lay representatives required, COIC should liaise with the BSB on an annual basis early in the second half of each calendar year. Prior to the advertising for Pool members carried out by the new TAB under the chairmanship of Lord Justice McFarlane, discussion took place between COIC and the BSB as to the number of future hearings anticipated with a view to making an estimate of the numbers of Pool members needing to be recruited.

5.2. Clause 21.1 of the MOU provides that the MOU itself should be reviewed in the last quarter of the year. Given COIC’s decision in November 2011 to establish the Review Group, it is not surprising that this did not occur in the last quarter of 2011.

5.3 Under clause 8.1 of the Memorandum, the content, timing and delivery of training of clerks, barristers and lay representatives is the full responsibility of COIC. Apart from equality and diversity training in February 2011, no such training has recently taken place. The need for it emphasises the urgency of the appointment of a senior responsible member of the profession and an Interim Manager (see paragraphs 18.2 and 30.6 below) to take the whole system in hand.

¹⁷ MOU attached at [Annex 2](#).

6. Addressing the problems

6.1 In order to address the problems of time expiry and allow the system to continue to run, COIC passed the following resolution at its meeting on 18 January 2012:

“All time expired barrister and lay representatives appointed to the COIC Disciplinary Tribunal Panel should have their terms of office extended from 18 January 2012 for a 12-month period only”.

6.2 COIC will be asked to approve the following two-part resolution at its meeting on 18 July 2012:

The President and COIC RESOLVE that (i) the appointments of the following members of the Tribunals Appointments Body: Lord Justice Stanley Burnton, David Phillips QC, Desiree Artesi and Sophia Lambert, if otherwise invalid to any extent, be treated with retrospective effect as having commenced on 6 February 2007 and lasted till 2 February 2012 and (ii) any barrister or lay representatives appointed by such former members during the said period have their own appointments, if otherwise invalid, approved with retrospective effect.

The President and COIC FURTHER RESOLVE that those barristers and lay representatives appointed by a letter of the President of COIC dated 30 July 2009 have their appointments renewed for a further 12 months, effective from 30 July 2012.

6.3 Five temporary staff members have been engaged by COIC full-time since the end of February 2012 to undertake the very considerable investigatory work necessary to identify potential flaws in the appointments of members of the lists and the disciplinary cases to which those flaws may be relevant. This work will conclude with the President of COIC writing to those defendant barristers potentially affected by the Review’s findings and providing them with all relevant factual information concerning those on the panel for their disciplinary hearing.

7. Underlying difficulties

7.1 The problems with the eligibility of persons sitting on disciplinary tribunals and adjudicating at other hearings have revealed a number of underlying weaknesses which must be swiftly addressed if COIC is to run a properly functioning Service:

- inadequate record keeping (the lack of records has hampered investigative work and a lack of systematic record keeping has been revealed);
- administrative inefficiency;
- inadequate staff supervision, support and appraisal by those responsible within the Inns;
- an absence of arrangements for accountability and reporting by those responsible in the Inns;
- rules and written procedures, where available, being overlooked; and,
- an absence of written procedures/guidance with regard to administration.

7.2 The recommendations made by the Group in the following sections of the Report seek to address the weaknesses in the operation of the Service and are intended to ensure that in the future, problems do not recur and that the profession and the public are provided with the high-quality service they deserve. We emphasise that we have regarded our task not simply as rectifying the deficiencies of the past but also, in accordance with our original brief, more importantly ensuring that for the future the Bar has a Tribunals Service in line with modern practice and one in which the public and profession can have full confidence.

8. COIC Tribunals Service: purpose and principles

8.1 It is suggested that the service is named the COIC Tribunals Service. This name would indicate COIC's commitment to move to an improved level of formality and efficiency. The new service should cover both COIC Disciplinary Tribunals and

the ICC¹⁸, with the focus on separate processes but common aims and principles, unified administration and co-location.

8.2 The Group considers that it is important for COIC to articulate the role to be performed by the Tribunals Service via a Statement of Purpose. For the service to be a success, it must understand its primary purpose and have it in mind at all times.

8.3 To meet the needs set out in paragraph 1.4 of the report, it is suggested that the aim of the COIC Tribunals Service should be:

COIC Tribunals Service: Statement of Purpose

- a) to provide a hearings service that is efficient, effective, timely, professional and transparent and one that uses up-to-date practices and processes;*
- b) to facilitate high quality decision-making in the public interest; and,*
- c) to be independent, providing clear separation of the adjudicatory function from the Bar Standards Board, as the prosecuting body for the Bar.*

8.4 In each area of activity, the COIC Tribunals Service should work to its Statement of Purpose.

8.5 It is recommended that the COIC Tribunals Service, having regard to its purpose, should develop a set of publicly available principles under which it should operate (the development of a Tribunals Service website is dealt with at paragraph 23).

8.6 In considering the future form of the COIC Tribunals Service and the principles which should govern it, assistance can be found in the Council for Healthcare Regulatory Excellence (CHRE) Report on Modern and Efficient Fitness to Practise Adjudication (August 2011) which sets out the CHRE’s vision for modern

¹⁸ The Chairman of the ICC wrote to the Group as follows “Having considered this very carefully, I do not wish to make any representations or raise any objections. I understand the rationale for collocation and the employment of a Registrar. I would be happy to sit on any recruitment panel if you thought that appropriate..... My only concern is to ensure that the physical working conditions for the staff, and particularly Linda de Klerk, are satisfactory.”

and efficient adjudication (attached at [Annex 6](#)). Nonetheless, it is recognised that the principles advanced by the CHRE are intended for bodies with a wider remit than the disciplinary role performed by COIC and that any principles agreed by COIC will need to be tailored to the special role it performs.

9. Review of Systems and Procedures

9.1 The investigatory work undertaken by the Group in relation to appointments has revealed a general absence, or lack of adequate articulation, of systems and procedures. The dangers of this have been exposed by the panel membership issues. It is therefore recommended that:

- current process and procedure in relation to every aspect of the work of the Tribunals Secretary/ICC Hearings Administrator should be set out in detail via interview, observation and questioning (any gaps or need for change or improvement being clearly identified and addressed);
- on the basis of this review, systems and procedures should be developed; and,
- an internal Standard Operating Procedure Manual (SOPM) for use by Tribunals Service staff should be produced so that systems are consistently communicated and implemented. This manual should also cover objectives and the expected service standards.

This will have the benefit of ensuring that COIC Tribunals Service staff have the necessary direction and rules for performing assigned tasks, as well as providing COIC with some assurance that errors will be avoided by means of accurate, clearly-written procedures. It will also assist in the event of staff turn-over or absence.

9.2 As part of this process, it is recommended that all standard letters and pro-forma be reviewed.

9.3 Based on the SOPM, written information for Service users on systems and procedures should be produced (in Plain English and other formats, such as large print) and made publicly available.

9.4 The Group noted the absence of the sort of documentation and policies that one would expect to see in a modern adjudicatory body e.g.: risk policy; equality impact policy; freedom of information; disclosure policy and information retention and disposal policy. It is recommended that such policies be developed, with advice being sought from the BSB on ways in which the Tribunals Service could ensure compliance with the LSB's Regulatory Standards Framework. Given developments over the last 6 months, priority should be given to developing a risk policy, side by side with putting in place systems for identifying risks and means of responding to risk.

10. Development of a case management system

10.1 The inadequacy of record keeping and its consequences have already been described in this Report. Investigatory work by the Review Team has revealed that lists of Tribunals and other hearings with details of panel membership, where available, are retained in list form as Word documents, alongside individual hard copy case files (generally retained for 3 years¹⁹). This is an inadequate system for record keeping.

10.2 Investment in IT to support a modern and efficient adjudication system is urgently required. An electronic case management system would not only benefit working practices but also allow the extraction of data to enable the provision of performance reports to management, COIC and the BSB, as regulator. The ultimate aim should be to create a reliable, automated case management system which would enable the Service to work in a more efficient manner, reduce organisational risk and allow the extraction of information such as who sat on which case.

10.3 Benefits of a case management system would include:

- improved administration and record keeping of cases;
- avoidance of missed milestones in progressing cases;
- improved reporting accuracy and historical data storage;

¹⁹ It is recommended that this policy is reviewed in the context of developing an information retention and disposal policy.

- active management of work flow;
- provision of an audit trail;
- improved budgetary planning, forecasting and trends analysis;
- increased reliability and trust in all processes;
- improved service for users;
- better management of staff performance;
- improved workload monitoring; and,
- maintenance of proper records of occasions when barrister and lay members have sat in order to secure fair rotation and avoid Pool members losing the experience derived from regular sitting.

10.4 A specification for a case management system will need to be developed and put out to tender. It may be that rather than commissioning a bespoke system, a basic off-the-shelf case management system configured to COIC's needs would be appropriate. This would obviously reduce costs. There will be a need to buy in external advice on this project. This will certainly extend to engaging appropriate technical advice but consideration should also be given to the advantages of buying in advice from a business analyst. The need to allow for sufficient in-house staff time to support this project will need to be taken into account. The commissioning of a case management system would sensibly run side-by-side with the review of processes and systems (see paragraph 9 above).

10.5 Putting in place a case management and work flow system will take time and the immediate problems with record keeping remain. To reduce risk, it is recommended that whilst work is underway to develop a more sophisticated case management system for the long term and as an interim measure, records of hearings/panels are retained on Excel spreadsheets. Expertise in setting up appropriate spreadsheets should be bought in. It is recommended that this interim measure should be implemented without delay.

11. Recruitment of COIC Disciplinary Pool²⁰

11.1 Given the problems discovered with the appointment of persons to the lists, in making its proposals for the future, the Group has set out to implement a new system of appointments to the Disciplinary Pool, reconstituting the TAB [with new TOR as adopted by COIC at its meeting on 28 March 2012 ([Annex 7](#)) and a new membership appointed by COIC on 30 March 2012]. On behalf of COIC, TAB has launched an advertising campaign to recruit silks, barrister volunteers and lay representatives for the COIC Disciplinary Pool²¹. The deadline for applications was 29 June 2012²², with the first tranche of interviews taking place in July and the second in the autumn.

11.2 In relation to TAB, the Group was strongly of the view that:

- to avoid any perception of bias, members of TAB should not be members of the Bar Council or BSB or their committees (mirroring the requirement in the Disciplinary Tribunals Regulations for those sitting on Tribunals) *[implemented]*;
- members of TAB could not concurrently sit on Tribunals as there needed to be a separation of functions (i.e.: appointment and adjudication) and mere suspension from sitting would not solve this dilemma, since the TAB member would need to apply to TAB to be re-appointed *[implemented]*;
- TAB would, necessarily, need to be at arms-length from the running of the Tribunals Service;
- a larger TAB should be put in place to accommodate the need to interview more applicants *[implemented]*;
- each TAB interview panel would be required to include a lay representative *[to be implemented at interview stage]*;
- members of TAB would be required to have received equality and diversity training *[implemented]*;

²⁰ To indicate a new regime, appointments are made to the newly named “COIC Disciplinary Pool”.

²¹ It has been agreed with the BSB that the aim should be to recruit: 15 QCs; 25 Barristers and 11 lay representatives, to give a total Pool size of: 20 QCs; 40 barristers and 20 lay representatives.

²² 247 applications were received (lay representatives: 145; QCs: 27 and barristers: 75).

- improved record keeping and reporting were required, with the aim being to ensure greater accountability from TAB *[implementation underway]*; and,
- responsibility for appointments to the Disciplinary Pool should lie with TAB and the President of COIC will need to delegate this responsibility *[implemented]*.

All of these points have been reflected in the revised TOR approved by COIC in March 2012. The TAB TOR do not specifically cover the appointment of medical experts to Fitness to Practise Panels (FTPs) and the Group recommends that as the need to appoint this category arises on such an infrequent basis²³, the practice be that the President of COIC is authorised to make such appointments to individual FTPs at his discretion (under a written procedure to be agreed, in due course, by COIC, after consultation with the BSB).

11.3 In relation to the appointments process, the Group was strongly of the view that:

- a uniform procedure was required for recruitment to the Pool, with each member being recruited on the same basis (regardless of category). In contrast to previous arrangements, where only lay applicants were interviewed, henceforth both barrister and lay applicants should be interviewed for Pool membership *[implemented]*;
- applications for membership should be in electronic form only, to allow more effective management of both the recruitment process and records and ensure computer literacy on the part of applicants *[implemented]*;
- recruitment for Pool members should be competency based *[implemented]*;
- appointments to the Pool should be for 5 years, renewable once (subject to satisfactory performance²⁴). The Group judged that 3 years would not allow the Tribunals Service to benefit sufficiently from the build-up of experience *[to be implemented]*;
- appointment should be conditional on successful completion of training *[to be implemented]*; and,

²³ 10 appointments to individual panels made since 2006.

²⁴ TAB (on guidance from the DTHRG), will need to address how this is achieved: in line with best practice, annual appraisal for Pool members is likely to be the way forward.

- refresher training should be provided *[to be implemented]*.

11.4 The first two bullet points have been implemented for the current recruitment exercise. Consultancy advice has been sought from Bindi Dholakia CPsychol, AFBPsS who has expertise in the areas of assessment; selection and competency framework development (CV provided at [Annex 8](#)). Her aim is to make the current recruitment round as fair and transparent as possible and ensure that the sift and interview stages are competency based. The shortlisting form (indicating competencies) is attached at [Annex 9](#). She has also been asked to suggest improvements to be considered for future recruitment rounds. The Chairman of TAB has commended Ms Dholakia for her sensible and highly practical advice.

11.5 The Group suggests that a document similar to the Solicitors Disciplinary Tribunal Appointment Protocol²⁵ should be developed and published, setting out the procedure by which appointments of barristers and lay representatives to the Disciplinary Pool are made and covering eligibility requirements for barrister and lay membership of the Disciplinary Pool; the appointment criteria and processes and the terms of appointment and re-appointment.

12. Defining the categories of Pool members

12.1 The current recruitment round has revealed that it would be beneficial to provide publicly clear guidance on the definitions attaching to the different categories of Pool member (for inclusion in a COIC Recruitment Protocol – see paragraph 11.5 above). The following definitions are suggested.

Queen's Counsel:

1. Queen's Counsel are only eligible for appointment to the COIC Disciplinary Pool ("the Pool") where they hold a current practising certificate. Queen's Counsel must continue to hold a practising certificate in order to remain eligible to sit on Disciplinary Tribunals and/or other COIC-administered panels.

²⁵ <http://www.solicitortribunal.org.uk/Content/documents/SDT%20Appointments%20Protocol%202012.pdf>

2. A Queen's Counsel member of the Pool who temporarily ceases to hold a current practising certificate may remain a member of the Pool but will not be eligible for appointment to sit on or chair panels for as long as he/she does not hold a current practising certificate.
3. Because they do not hold a working rank, honorary Queen's Counsel are not entitled to be appointed to the Pool as Queen's Counsel members and are not eligible to sit on COIC-administered panels in their capacity as Queen's Counsel.
4. A Queen's Counsel may not be appointed to the Pool if he/she is a member of the BSB's Prosecutors' Panel.

Barrister:

1. A barrister is only eligible for appointment to the Pool if he/she:
 - a) is of seven years' standing²⁶ at the date of their appointment to the Pool;
and
 - b) holds a current practising certificate.
2. A barrister member of the Pool who temporarily ceases to hold a current practising certificate may remain a member of the Pool but will not be eligible for appointment to sit on panels for as long as he/she does not hold a current practising certificate.
3. A barrister may not be appointed to the Pool if he/she is a member of the BSB's Prosecutors' Panel.

Lay:

No person may be appointed as a lay representative to the Pool if they:

1. Currently practise or have ever practised as a barrister.
2. Hold or have ever held judicial office (other than as a lay magistrate).
3. Currently are or have ever been a member of an Inn of Court (including an honorary Bencher of an Inn of Court).

²⁶ See footnote 14 for definition of "standing".

4. Currently are or have ever been on the Roll of Solicitors.
5. Currently are or have ever been a trainee solicitor.
6. Currently are a participant or have ever completed the Legal Practice Course or equivalent.
7. Currently are or have ever been regulated by any of the Approved Regulators overseen by the Legal Services Board.
8. Currently are or ever have been a senior employee of the Bar Council, the BSB or the Inns of Court.

Additional exclusions are provided, under the TAB TOR 2012, clause 21(2)(ii)-(v) which states a person will not be eligible for appointment to the Pool in any capacity if:

- “(ii) they are convicted of a criminal offence in any jurisdiction (except for minor motoring offences);
- (iii) they are the subject of an adverse finding by a disciplinary panel of a professional regulatory body in the previous 10 years;
- (iv) they are disqualified under the Directors’ Disqualification Act 1986 or are adjudicated bankrupt or the subject of a bankruptcy restrictions order; and/or,
- (v) they are a member of the Bar Council or any of their committees or the BSB or any of their committees or are in receipt of payment from either body for the provision of services.”

Medical Expert:

COIC requires medical experts to sit on FTPs. See the recommendations at paragraph 11.2 above.

13. TAB Terms of Reference

13.1 It is recommended that the TAB TOR adopted in March 2012 should be reviewed in the light of lessons learnt since their adoption. A paper detailing possible amendments to be considered is attached at [Annex 10](#).

14. Performance Management

14.1 The Group recommends that the competency framework developed in the context of recruitment should also be applied to a system for annual appraisal and performance assessment of Pool members. Whilst the BSB has introduced appraisal of Committee members, COIC has not previously addressed appraisal of members of the lists either in relation to re-appointment or as an on-going process. It is recommended that COIC should introduce an assessment and appraisal process for members of its Disciplinary Pool. This would have the benefit of:

- providing an assurance that a high quality service is being provided;
- assisting members in improving their performance;
- providing an objective method of evaluating performance and making decisions regarding reappointment; and,
- allowing any training needs to be identified, individually or across the whole Pool.

14.2 The system should not be unduly onerous and the intention should be to put in place a positive scheme aimed at helping individual Pool members improve their performance. To ensure maintenance of standards, there will be a need to ensure that there are adequate systems for addressing poor performance of panellists, whether professional or lay.

14.3 It is suggested that advice should be sought on the alternative approaches to appraisal (self-assessment; 360 degree reviews; Chair reports and observation). An initial and outline proposal for advice being provided by Bindi Dholakia on development of an appraisal system is at [Annex 11](#). The work already underway to develop a competency framework will provide the basis for a future appraisal scheme.

15. Training

15.1 The Group recommends that there should be regular training for Pool members, including equality and diversity training. The practice in the past had been to arrange initial training but the Group recommends that, in line with the practice

elsewhere, in addition to introductory training, there should be periodic training for Pool members so as to ensure they are kept up to date.

15.2 The training programme for Pool members should address: the nature of the public interest; means of ensuring that decision-making is independent and not influenced by professional partisanship; means of testing the evidence at a hearing; consistency between panels; equality and diversity; relevant regulatory case law and guidance (including Sentencing Guidance²⁷ and the contents of the COIC Disciplinary Pool Members Guidance Pack). Training which allows for the exchange of experiences and views between members would be highly advantageous.

15.3 Scenarios were developed for COIC new member training in 2009 and both the Group and the TAB consider them to be a carefully drafted and useful training tool which should continue to be used as the basis for group exercises.

15.4 Comprehensive records of Pool members' training should be maintained and if the required training is not undertaken by a Pool member, he/she should not be permitted to continue to sit.

15.5 The ICC Rules are silent on the issue of training for members and it is recommended that the rules be amended to make induction and refresher training a requirement. Further consideration needs to be given to the question of whether there could be elements of shared training for ICC and Disciplinary Pool members, with a separate stream for ICC members.

15.6 Paragraph 8.1 of the MOU requires:

“COIC will be responsible for the induction of new clerks and Panel Members. COIC will also be responsible for providing ongoing training, where necessary, and updates for clerks and Panel members. COIC will consult with the BSB as it sees fit as to the content of any such induction, training and updates, with the BSB providing such assistance as is reasonably required. The BSB will offer whatever assistance possible including assisting in the development of new training courses, preparing training materials and conducting induction and training sessions. Notwithstanding

²⁷ http://www.barstandardsboard.org.uk/media/30900/sentencing_20guidance_202009-20final_20pdf.pdf

the above, the content, timing and delivery of any training will remain the full responsibility of COIC.”

15.7 The Group is of the view that it is not appropriate for COIC to be required to consult the BSB about the content of training. Instead, there needs to be provision for the BSB to satisfy itself that COIC’s general policy and approach is the right one. This will ensure that the training of Pool members is kept independent and at arms-length from the BSB.

16. Mentoring

16.1 The Group considers that support mechanisms such as mentoring can help panellists grow in confidence and competence. New Pool members should therefore be assigned an existing Pool member to mentor the new recruit for 12 months from the date of appointment, with the aim of assisting them with the understanding of their role and developing the quality of their work. There may well be practical difficulties in organising this on a 1:1 basis for new appointments made this year, given that they are likely to outnumber existing Pool members. However, the aim should be to move to a fully developed mentoring system over the next 2 years.

17. Written Guidance

17.1 Following the BSB’s 2007 Strategic Review of Complaints and Disciplinary Processes²⁸, a COIC Disciplinary Panel Members Guidance Pack was produced which includes general information about the operation of the system as well as specific guidance²⁹ and policies relevant to the performance of individual roles. It is recommended that this pack is reviewed annually and updated as necessary.

²⁸

http://www.barstandardsboard.org.uk/media/1346882/bsb_strategic_review_of_complaints_and_disciplinary_processes_report_by_robert_behrens_complaints_commissioner_july_2007.pdf

²⁹ Including COIC’s Sentencing Guidance:

http://www.barstandardsboard.org.uk/media/30900/sentencing_20guidance_202009-20final_20pdf.pdf

17.2 Written procedures and guidance should be made publicly available to support all aspects of the service and, where appropriate, should be included in the COIC Disciplinary Pool Members Guidance Pack. Any communications involving the public should clearly indicate what should happen and when.

17.3 COIC's Sentencing Guidance is to be reviewed and, but for the review of the past months, the process would have already been in hand. We recommend that as part of this process of review, particular consideration is given to guidance for the recovery of costs.

18. Pool members' leadership

18.1 The Group considered whether in line with recommendations made by the Office of the Health Professions Adjudicator (OHPA)³⁰ and followed by the GMC and with the practice of the Solicitors Disciplinary Tribunal, COIC should appoint a Tribunal President or Senior Chair in addition to the ICC Chair to take an active role both in ensuring consistency in decision making and serving as leader for Pool members.

Benefits would include:

- providing visible leadership to Chairs and Pool members;
- playing a role in appointments; performance assessment; setting training/mentoring arrangements;
- taking a hands-on-role in working with and appraising senior staff members; and,
- identifying good practice.

18.2 The Group debated whether the appointment of a Chair was necessary or whether sufficient involvement of the President of COIC/Chairman of the ICC, as well as the proposed appointment of a senior level staff member with previous experience of provision of a tribunal service might suffice. In the end, the Group concluded that the need for visible leadership, as well as greater accountability were

³⁰ https://www.chre.org.uk/_img/pics/library/1108_M_EFtPA_FINAL.pdf

so important that a Tribunals Service Chairman should be appointed. That individual should attend COIC when matters concerning the Tribunals Service fall for discussion. The appointment should be for 3 years and a role description should be developed and approved by COIC, after consultation with the BSB.

19. Role of Pool Members (role descriptions)

19.1 Role descriptions have been drawn up for the barrister and lay Disciplinary Pool members, after consultation with the BSB (attached at [Annex 12](#)). Consideration should also be given to producing role descriptions for Chairs of Tribunals/Panels, Lay (Medical) panel members sitting on Fitness to Practise Hearings (once the FTP rules have been redrafted) and clerks³¹. All role descriptions should be made publicly available.

20. Transparency

20.1 It has already been agreed by COIC that the names of the Disciplinary Pool members should be made publicly available, in line with the approach taken by many other regulators (COIC, 19 October 2011). This has not been implemented whilst there remains uncertainty about the eligibility of some Pool members. The Group recommends that this should be actioned via a dedicated website for the Service (see paragraph 23 below). In the meantime, the list of Pool members should be available on request. Pool members will need to be made aware that COIC will publish their names. It is recommended that the names of ICC members should also be published via the Tribunals Service website.

20.2 The BSB website provides details of all publishable findings and sentences imposed by Disciplinary Tribunals since 2002, as well as details of forthcoming hearings³². Consideration needs to be given to whether COIC should also publish

³¹ See paragraph 24.3 of the Report.

³² http://www.barstandardsboard.org.uk/media/1three97126/pe02_-_publication_of_disciplinary_findings_-_v2_updated_march_2012_-_final.pdf

this information online. The ICC does not currently publish details of forthcoming hearings or reports of hearings. The Group recommends that it does so, where appropriate, via the dedicated Tribunals Service website.

20.3 The Tribunals Service should provide an annual report to COIC (see paragraph 26 below), which will include performance data. The Group regards this as particularly important.

21. Pay and travel and expenses for Pool members

21.1 The Group strongly recommends that like their lay colleagues, and in common with professional members of other disciplinary panels (for example, the Solicitors Disciplinary Tribunal and the General Medical Council), the barrister members should be paid for sitting. A separate paper on this issue with costings will be provided for COIC at its meeting on 18 July (attached at Annex 3 of the COIC agenda, for approval). Of particular importance is that payment will encourage equality and diversity in Pool membership.

21.2 Lay members are paid travel and subsistence in line with the Bar Council travel and expenses policy. The Group strongly recommends that like their lay colleagues, and in common with professional members of other disciplinary panels, the barrister members should also be paid travel and subsistence. The separate paper on pay also covers this topic.

21.3 ICC members fulfil a more administrative role and it is not proposed that they should be paid.

22. Size of Disciplinary Pool

22.1 The COIC lists have been large (in comparison with other regulators³³) and the consequent challenges in managing a pool of this size may have contributed to some of the difficulties with the appointments. It is suggested that a smaller pool would allow the introduction of a minimum sitting requirement and encourage more frequent sitting opportunities thereby building expertise. The Group has taken the view that it would not be possible to introduce a smaller pool with a minimum sitting requirement so long as barristers continue to sit without payment.

23. Website

23.1 There is an urgent need for a dedicated website for the COIC Tribunals Service. The website needs to include:

- general information on the service;
- officer and staff details;
- the COIC Constitution;
- Instrument of Delegation/Contract for Services with the BSB;
- Disciplinary Tribunals Regulations;
- TAB: TOR and membership;
- Recruitment Protocol;
- names of Disciplinary Pool members;
- names of members of the ICC;
- forthcoming hearings of the ICC and Disciplinary Tribunals (Disciplinary Tribunal dates are already provided on the BSB website);

³³ Comparison with SDT figures: In 2011, there were 61 Bar Disciplinary Tribunals (93 sitting days) [2010: 78 DTs (101 sitting days)]. COIC also supplied a barrister and Lay representative for 11 Visitors' Hearings in 2011 (15 sitting days). It should not be forgotten that the ICC uses 12 COIC Lay representatives for its evening hearings (26 sittings in 2011/12). By way of comparison, the SDT has: 34 Solicitor Members and 19 Lay Members for 306 hearing days, across the board payment of members making the populating of panels easier.

- findings of the ICC³⁴ and Disciplinary Tribunals (Disciplinary Tribunal findings are already provided on the BSB website);
- Annual Reports to COIC;
- Key Performance Indicators and quarterly reports on performance; and
- written procedures and guidance (including Sentencing Guidance), with communications involving the public clearly indicating what should happen and when.

23.2 The Solicitors Disciplinary Tribunal contains a password protected members' section which allows members to provide feedback on hearings, identifies outstanding tasks and allows members to manage their Judgments online. It is for consideration whether COIC should in due course consider developing the website to provide a similar dedicated section for Pool members. If this is considered unrealistic in the short term, it is recommended that a quarterly bulletin is produced setting out relevant information on decided cases for circulation to Disciplinary Pool members. This could also serve as a means of obtaining the input of Pool members when developing policy, guidance and procedure.

23.3 In 2011, the BSB suggested that COIC create an informal group of panel members which could be consulted via email on proposed changes to the Disciplinary Tribunal procedures (e.g.: amendments to the Disciplinary Tribunals Regulations or the Sentencing Guidance). The informal group which resulted has been consulted on disclosure of Disciplinary Tribunal panel members' names and proposed amendments to the Disciplinary Tribunals Regulations. The Chair of the COIC Tribunals Service (whose appointment the Group recommends at paragraph 18.2 above) should consider the merits of appointing Pool members to a dedicated group which could act as an advisory panel.

³⁴ Where appropriate.

24. Clerks

24.1 Clerks to Tribunals are expected to ensure the smooth running of proceedings: liaising between the panel and the parties; reading the charges to the defendant barrister; keeping them advised of progress and timings (for example when the Panel is deliberating in private session); ensuring that parties, their representatives and witnesses are available when needed; recording the judgment; sometimes providing an initial draft report of the decision for the Chairman of the Tribunal and assisting with other directions of the panel. In the past, it has been suggested that clerks should also advise the Tribunal on the Code of Conduct and its interpretation, but the Group strongly considers that it is inappropriate for clerks to fulfil this role. The Group recognises that clerking is an important function and considers it to be one which should only be undertaken by practising barristers (excluding 2nd 6 month pupils and, indeed, barristers pre-pupillage, as has previously been allowed).

24.2 Clerks are paid an attendance allowance of £200 per day/£100 per half day. In future, consideration will need to be given to whether there is a need to review the level of payment, which has been set at this rate since May 2006.

24.3 The Tribunals Secretary has indicated that she has insufficient clerks to service tribunals and that there is a need to recruit more barristers to this role. An updated role description needs to be produced and (in accordance with the MOU) the BSB consulted on its contents. In common with the Pool members, recruitment needs to be competency based and an appraisal system will need to be put in place.

24.4 Limited written guidance for clerks currently exists. It is recommended that this is reviewed with the object of producing clear and comprehensive guidance on the role. The guidance should be included in the COIC Disciplinary Pool Members Guidance Pack.

24.5 In the past, clerks have attended the general training session for panel members but do not appear to have attended the equality and diversity training provided by the BSB in 2011. It is for consideration whether a separate stream of training needs to be provided for clerks and how training for this role is accommodated within the general training provided for Pool members. Following

training, clerks have been required to shadow an experienced clerk before sitting as a clerk on their own. This practice should continue.

25. Relationship with the BSB as Regulator

25.1 As already mentioned, the BSB has statutory responsibility under the LSA for making appropriate disciplinary arrangements for authorised persons. Those arrangements are effected by means of:

- i) rules and regulations covering the investigation, prosecution and adjudication of breaches of the Code of Conduct contained in Annexes to the Code and approved under statutory requirements by the LSB (i.e. the Complaint Rules (Annex K), the Disciplinary Tribunals Regulations (Annex J), the Hearings Before the Rules (Annex M), the Interim Suspension Rules (Annex N) and the Fitness to Practise Rules (Annex O); and,
- ii) delegation to the COIC of the administration of the various hearings required in the Annexes under the MOU on disciplinary matters.

25.2 The BSB's Constitution provides that:

“11. *The BSB must:*

...

(2) Monitor and ensure the just operation of Disciplinary Tribunals and any other panels assigned to determine (whether at first instance or on appeal) any issues as to the conduct of individual barristers, including whether barristers are guilty of professional misconduct or inadequate professional service or ought to be suspended from practice by reason of medical fitness or criminal charges or convictions.”

25.3 The need to move from the MOU to a legally binding instrument covering disciplinary arrangements has been acknowledged by both COIC and the BSB. The aim will be to ensure, in the public interest, a transparent, accountable and cost effective service in support of the regulatory objectives.

25.4 It is understood that the BSB is seeking advice as to whether an adjudication service is best provided under an instrument of delegation or through a contract for

services. Whichever of these is decided, statutory responsibility for the specification, quality monitoring and control of the service rests with the BSB. As part of this process, the BSB will doubtless look to impose service level and Key Performance Indicators on COIC.

26. Reporting and accountability

26.1 It is striking that, unlike the ICC, those responsible for the administration of the Disciplinary Tribunals do not have to make an annual report to COIC. This omission goes some way to explaining why the problems with the Service have taken so long to emerge and the extensive nature of the problems revealed when they have emerged. The Group believes that it is essential that there is an annual report to COIC and the BSB from the Tribunals Service, supplemented by active internal performance management throughout the year and quarterly performance reports for COIC management (via the Senior Executives Committee or the new COIC Management Committee³⁵) and the BSB. The report will play a vital role in ensuring increased confidence in the transparency and independence of the adjudication process.

26.2 Reports from the TAB and the ICC should form part of the annual report from the COIC Tribunals Service.

26.3 The LSB and the BSB will expect to see the COIC Tribunals Service measuring itself against Key Performance Indicators. The Solicitors Disciplinary Tribunal has agreed Key Performance Indicators with the LSB, on which it reports annually when making its annual budget application to the LSB and publishes in its annual reports³⁶. The COIC Tribunals Service should put in place a range of Key Performance Indicators and assess performance against Key Performance Indicators in its annual reports.

³⁵ Annex 5 of the Agenda for the COIC meeting on 9 May 2012 refers

³⁶: http://www.legalservicesboard.org.uk/about_us/board_meetings/pdf/11_70_sdt_budget_2012_anx_b.pdf

26.4 The focus of Key Performance Indicators is likely to be service standards for case progression to encourage timely adjudication and avoid delays. Consideration should be given to linking Key Performance Indicators to personal staff objectives.

27. Relationship with the BSB as prosecutor

27.1 The Group has examined the question of whether the BSB is exercising functions beyond those it should properly hold as prosecutor (i.e.: holding adjudication panels; determining cases by consent and deciding whether to refer to a 3 or 5 person panel). The Group's view is that the COIC Tribunals Service would be a more appropriate body to exercise these functions. In particular, decisions whether to refer a case to a 3 or 5 person panel should be taken by the Chairman of the Tribunals Service or an individual to which he/she delegates this responsibility.

28. Entity Regulation

28.1 Following COIC's decision in 2010 to extend the tribunals system to cover BSB-regulated entities and non-lawyers working within such entities, at its June 2011 meeting COIC received an interim report prepared by the Secretary to COIC on the implications of entity regulation for the Tribunals Service³⁷. In his report he highlighted the difficulties in identifying the additional workload that might arise for the Tribunals Service as a result of entity regulation, suggesting that any additional workload might be compensated for by a drop in the number of CPD hearings. The Secretary to COIC indicated his intention to produce a further 'update' report to COIC once the BSB had published its consultation on the regulatory framework and draft rules. The BSB has now published its consultation on the new BSB Handbook and its proposals for entity regulation. The Group therefore recommends that the Secretary to COIC provides an update to COIC at its October 2012 meeting on entity regulation (from the perspective of its implications for Tribunals Service work levels and any additional requirements for the Service) and that updates are provided on a

³⁷ ENTITY REGULATION BY THE BAR STANDARDS BOARD AND IMPLICATIONS FOR THE TRIBUNAL SERVICE, 17 June 2011

regular basis thereafter. In leading on this area of work, he should liaise closely with those charged with developing the Tribunals Service.

28.2 In terms of appointments to the Disciplinary Pool, the Group recommends that the TAB should, when making lay representative appointments, consider the need to appoint persons with the expertise to make properly informed decisions in hearings involving the sort of non-lawyers likely to be partners in Alternative Business Structures (e.g. accountants).

29. Structure and Governance

29.1 COIC is currently a body with no corporate status; however, consideration is being given to the future management and structure of COIC by a sub-group of COIC appointed in March 2012³⁸. The Group believes that the Tribunals Service should be treated as an integral arm of COIC (like the Advocacy Training Council) but with some form of corporate status. Further recommendations in this area should await the outcome of the work on the future legal status of COIC itself and the recommendations of the Symons sub-group.

30. Staffing

30.1 The review has revealed seriously inadequate supervision and support for the single dedicated member of staff, the Tribunals Secretary. As far as we are aware, the job description for the role was produced in 2001 and has never subsequently been reviewed, albeit that the role has substantially changed. It is notable that the 2001 contract of employment is between the Tribunals Secretary and COIC and Lincoln's Inn (collectively named as the employer). The job description annexed to the contract is for the post of Secretary to the Under Treasurer³⁹, albeit that the post holder has responsibility for administering disciplinary tribunals. Nor has the staff

³⁸ It is understood that the Sub Group chaired by Christopher Symons QC and consisting of the Under/Sub Treasurers and the Deputy Treasurers will report to the July 2012 COIC meeting with initial recommendations for the structure of COIC.

³⁹ Under Treasurer, Lincoln's Inn.

member ever received an annual appraisal. This is despite the fact that in April 2009 it was arranged that the Tribunals Secretary be subject to an annual appraisal report initiated by her line manager, the Under Treasurer⁴⁰ then responsible for the administration of the Tribunals. This never took place.

30.2 The arrangement has been that the Tribunals Secretary reports to the Under/Sub Treasurer responsible for disciplinary matters at the time. Each of the Under/Sub Treasurers holds this disciplinary responsibility on a 3 year rotational basis, in addition to his/her other duties. Since 2007, the Tribunals Secretary has been housed outside the Inns on her own in a set of barristers' chambers and away from the Under Treasurer to whom she reports. We cannot emphasise too strongly that a regular cycle of change in management and management at a distance present very real practical difficulties. There is a complete absence of management information and performance data so it has been difficult, if not impossible, to assess whether any element of what COIC should provide has been adequate. This cannot continue.

30.3 The approach to staff matters needs to change. The aim should be to professionalise staff through competence based recruitment and proper induction, plus continuing training and on-going performance review. In addition, professional behaviour and values should be reinforced in day-to-day practice and within the culture of the Tribunals Service. Effective and dedicated leadership will play a significant part in supporting the delivery of professionalism. Staffing levels also need to be adequate, if a professional service is to be delivered, with the appropriate staff resources in place to match the number and complexity of hearings each year. There will need to be some flexibility to take account of the changing skill needs and environment of staff.

30.4 The staff training programme to be put in place will need to cover systems and procedure but equally importantly, will also need to address staff attitudes; behavioural values and the engendering of professionalism and good communication skills. Equality and diversity training should also be provided.

⁴⁰ Air Commodore Peter Hilling

30.5 The Group is convinced that the crucial first step in meeting needs in this area will be to commission a systematic work analysis. This will allow staffing levels, needs and structure to be defined and would lead to the production of job descriptions and the design and implementation of performance management arrangements (i.e.: individual performance goals with measurable outcomes linked to an annual reporting system). Given the difficulties revealed over the supervision of staff, reporting lines will need to be clearly identified.

30.6 The Group has considered whether it should recommend the immediate recruitment of a permanent staff member at a more senior level, possibly with experience of running a tribunal service. Given the need for immediate and fundamental improvements in management and uncertainty around precise staffing needs, the Group has concluded that in the first instance it would be better to recruit a manager with specialist change management skills to provide the short term intervention necessary to manage the change which is required. An important part of this role will be to focus on future staffing needs and reporting lines.

30.7 A suggested role description for this individual is attached at [Annex 13](#). The Interim Change Manager will report to the Under Treasurer, Gray's Inn as the person currently responsible for executive management of the Tribunal Service. It is likely that initially, and until the appointment of the permanent senior staff member, this will be on a daily basis. He/she should be required to report on progress to COIC on a regular basis, through the Senior Executives Committee

30.8 There will be a need to liaise with the BSB with regard to the future staffing structure and arrangements, given the BSB's responsibility for the supervision and monitoring of any work carried out by other bodies on its behalf and its specific responsibility for monitoring and ensuring the proper operation of Disciplinary Tribunals and other panels.

30.9 It needs to be recognised that organisations like COIC, with small staff numbers will inevitably struggle to provide the range of staff skills required. COIC should therefore recognise that on occasion it will need to buy in expertise for specific projects, and that it will need to budget for this need. External input is best retained at the project planning stage.

31. Accommodation

31.1 Disciplinary Tribunals are currently held in Quadrant Chambers in Fleet Street, with the Tribunals Secretary accommodated in a small office in those chambers. The Group considers that it is inappropriate for disciplinary hearings to take place in a set of barristers' chambers and for the system to be administered from there.

31.2 The Group's recommendation for the co-location of the secretariat for the Tribunals and the ICC necessitates the provision of more office space. This is important. The Tribunals Secretary has too long suffered from working on her own in Quadrant Chambers without the support of colleagues in the immediate vicinity.

31.3 Accordingly, the Group recommends that the COIC Tribunals Service should be run from dedicated and custom-designed premises.

31.4 The Group has also given thought to the requirements for the premises necessary to handle both administration and hearings. On the basis of regulatory best practice, it has identified the following requirements:

- two tribunal rooms [(1) one large 5 person panel room + (2) one small 3 person panel room both sufficient to accommodate numbers attending hearing, including the public⁴¹. Tribunal rooms to include induction loops and telephone conference facilities];
- 3 multi-purpose meeting rooms [provision for the panel to retire and private rooms for consultations with representative/witness or separate waiting area for witnesses];
- two separate WC areas, allowing for a separate WC for witnesses [including one DDA compliant WC];
- a small kitchenette with tea and coffee facilities;
- staff accommodation [a general office area for 3 staff members⁴² + office for senior manager];
- a waiting area;

⁴¹ Disciplinary hearings take place in public unless there has been a specific order that a particular hearing be held in private.

⁴² To include an additional desk in the shared general office to allow for some staffing flexibility.

- confidential facilities to copy/scan new or urgent documents;
- Wi-fi internet access throughout;
- digital recording facilities;
- separate storage in basement vault; and,
- extra accommodation within the Inns' estate to accommodate tribunals, including a 5 person panel room which is DDA compliant and with a video conference facility [plus additional rooms to allow the panel to retire/private consultation].

31.5 It is recognised that provision will need to be sufficiently flexible to allow for any increase in hearings (for example serious, longer or harder fought cases resulting from risk based regulation or any increase in case work resulting from the BSB regulating entities from 2014) and a consequent need for additional staff.

31.6 Accommodation has been identified in Gray's Inn to meet the above requirements. An outline scope of works, including a floor plan is attached at [Annex 14](#). The intention is that the accommodation will be ready in January 2013.

32. Summary of Recommendations

32.1 A summary of the Group's recommendations is attached at [Annex 15](#).

33. Next Steps

33.1 A draft Action Plan is attached for approval by COIC ([Annex 16](#))⁴³.

33.2 An indicative budget is attached for noting by COIC ([Annex 17](#)).

⁴³ A full working draft will be circulated before the COIC meeting on 18 July 2012.

Annexes:

- Annex 1:** Constitution of the Council of the Inns of Court
- Annex 2:** Memorandum of Understanding on Disciplinary Matters made between the BSB and COIC (September 2010)
- Annex 3:** TOR for the COIC Disciplinary Tribunals and Hearings Review Group (DTHRG)
- Annex 4:** COIC DTHRG membership
- Annex 5:** DTHRG Interim Report (February 2012)
- Annex 6:** extract from Council for Healthcare Regulatory Excellence Report on Modern and Efficient Fitness to Practise Adjudication (August 2011)
- Annex 7:** TOR for the Tribunals Appointments Body (March 2012)
- Annex 8:** CV for Bindi Dholakia CPsychol, AFBPsS
- Annex 9:** Tribunals Appointments Body shortlisting form
- Annex 10:** Tribunals Appointments Body Terms of Reference: Issues
- Annex 11:** Initial and outline proposal for advice being provided by Bindi Dholakia on development of a Disciplinary Pool appraisal system
- Annex 12:** Role descriptions - barrister and lay Disciplinary Pool members
- Annex 13:** Role description: Interim Change Manager
- Annex 14:** Outline scope of works for Tribunal Service Accommodation, including a floor plan
- Annex 15:** Summary of Recommendations
- Annex 16:** Draft Action Plan
- Annex 17:** Estimated costs of running COIC Tribunals Service, 2013