

Legal records at risk

The Bar is in danger of losing its distinct legal heritage, warns **Clare Cowling** – who outlines the considerable research value to be found in chambers records

There is a general lack of knowledge about the Bar, with misconceived notions of what barristers do, how they work and their professional interaction with the solicitor branch and the public...

Although much of barristers' work takes place in public courtrooms, much also remains hidden from view, with many working in the cloistered surroundings of the Inns of Court or in chambers across the provinces.' So delegates heard at last year's *Being Human festival: the 'Humanity of Lawyers'* in a session focusing on the work of the Bar.

Does the Bar want its heritage to remain hidden? Our legal framework has been affected by recent developments including changes to legal services, globalisation and digital obsolescence, but no concerted effort has, as yet, been made to protect and preserve the records which document these changes. The Legal Records at Risk project, led by the Institute of Advanced Legal Studies and working in collaboration with the legal profession, research institutions and archives, including The National Archives and the British Records Association, seeks to develop a national strategy to identify and preserve our legal heritage and to save modern (ie 20th and 21st century) private sector legal records in the UK that may be at risk.



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All records in the private sector face similar challenges, but modern legal records are particularly vulnerable due to factors transforming the nature, organisation, regulation and economics of legal services. Additionally, unless systematic efforts are made towards collecting private sector legal records, research using modern legal records will continue to be weighted towards the study of government policy, legislation and the courts, producing a government-centric historical picture of the UK's legal framework. In short, we are in danger of losing a significant proportion of our legal heritage.



The Bar at particular risk

Our initial findings indicate that the records of individual barristers and barristers' chambers are particularly at risk. The National Archives' Discovery portal (discovery.nationalarchives.gov.uk) lists only five sets of 20th century barristers' chambers papers in local archives and 152 entries for the papers of individual barristers, as opposed to 986 entries for the business records of law firms and 1,368 entries for solicitors (though some barristers will alternatively be listed under future occupations such as judges). Papers usually comprise correspondence, diaries and fee books. Some are classified as 'legal case notes' which may or may not contain confidential material. Does the Bar wish to continue to be historically under-represented in this way?

Advice on keeping records Chambers

The Bar Standards Board Handbook (p 65) states:

'When deciding how long records need to be kept, you will need to take into consideration various requirements, such as those of this Handbook (see, for example, Rules C108, C129 and C141), the Data Protection Act and HM Revenue and Customs. You may want to consider drawing up a Records Keeping policy to ensure that you have identified the specific compliance and other needs of your practice.' <http://bit.ly/1OPRcW4>

The Institute of Barristers' Clerks (IBC) also gives guidance on what records should be created and kept by chambers' clerks, including annual reports and accounts, descriptions of chambers' work and records of instructions, briefs and fees (see IBC Code of Conduct, Appendix A: <http://bit.ly/2jpQ4AV>).

Individual barristers

The Handbook advises barristers to destroy their copies of case papers after six to seven years (C129 and C141), although in the case of lay clients they are entitled to copy all documents received

BOX I: BARRISTERS AND CHAMBERS: SAMPLE RECORDS OF POTENTIAL RESEARCH VALUE

The sample records listed below would usually be made available by an archive repository for research after 20 years, other than material already in the public domain, which would immediately be opened for research, or personal data, which would be closed for 75-100 years.

Category	Sample records of permanent research value
Barristers' papers	Fees books Correspondence+ Diaries+ Case notes+
Complaints and enquiries	Annual reports of complaints and enquiries received Complaints and enquiries files: representative samples of unusual complaints and enquiries eg which resulted in major changes to a chamber's internal procedures or external image*
Corporate management	Minutes of chambers' committee meetings Annual report and accounts Business plans Organisation charts Diaries Biographies of chambers' barristers
External relations management	Design and control of chambers' corporate identity Consultation papers Seminars and conventions organised by chambers Published material (retain one copy only) Websites (retain regular snapshots)
Finance	Fees books
Governance	Regulations and rules Registers of members' interests Directories of members of chambers
Procedures and policies	Policy and strategy documents Standards Procedures Handbooks Best practice guidance notes
Training and education	Policy files Registers of pupils Pupillage files – samples (eg of prominent pupils) could be preserved for research with permission of the individual*

*Records containing personal data are closed by all archival repositories for 75-100 years unless permission to release the material earlier for research is given by the data subject. Anonymised data may be made available for research by special arrangement.
+ Subject to client confidentiality being preserved for as long as required



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We are appealing not only to your sense of the potential historical value of records of the Bar but to your understanding of the importance of letting the public know what you do and how you do it

and to retain such copies permanently (C131). Presumably these papers are stored either in chambers or in the barristers' own homes. It is clear, therefore, that chambers and individual barristers hold information of considerable potential research value which could and should be kept securely and preserved for posterity (see **box I** for a sample list). Any action to preserve such records would of course have to take into account client confidentiality (see **box II**).

How long does confidentiality last?

The Code of Conduct clearly states that client and complaints information are to be kept confidential. The Handbook states:

S12: 'The regulatory objectives of the Bar Standards Board derive from the Legal Services Act 2007 and can be summarised as follows... that the affairs of clients are kept confidential.'

rC106: 'All communications and documents relating to complaints must be kept confidential.'

The question is whether this guarantee of confidentiality is in perpetuity or for a limited (in archival terms) period. The Code of Conduct does not specify a length of time, so the next question is whether there is a tacit assumption of confidentiality in perpetuity, and whether this has ever been challenged. The expiry date for legal professional privilege is also a grey area and one reason why client case files are not usually offered to, or accepted by, archives unless they are at least several hundred years old. It is time and more that the legal profession clarified exactly how long it expects client confidentiality to last (see **box II**).

Progress to date

We have been in touch with the Inns of Court archivists and librarians to seek support for the project – all have offered support in principle despite their limited resources and an article has been published in the Inner Temple e-newsletter.



Legal documents damaged by mould: does this comply with our obligations to clients? Photograph courtesy of the Derbyshire Record Office

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An agreement has been made with the London Metropolitan Archives to accept legal records of historical value of London-based legal entities identified by the project.

In partnership with the British Records Association and The National Archives, we are also developing a consistent model for the rescue of the records of legal entities and practitioners outside London.

Appeal to the Bar

Seeking to engage the interest of barristers and practice managers, we are appealing not only to your sense of the potential historical value of Bar records but to your understanding of the importance of letting the public know what you do and how you do it, so that they in turn will have a more accurate grasp of the importance of your work and its value to the community.

Greater transparency and public engagement through the eventual release of records for research should enhance the profession's public-facing image and help address the issues raised above, not least to challenge some public perceptions about the Bar. There are other benefits, too, in terms of cost

BOX II: A NOTE ON CONFIDENTIALITY AND THE PRESERVATION OF RECORDS OF VALUE FOR RESEARCH

Archives and confidentiality: all archives have well developed techniques for dealing with sensitive records, including closure periods and conditions on access and use; they operate under strict confidentiality guidelines and follow The National Archives' advice is to close all records for at least 20 years and personal data for 100 years (Code of practice for archivists and records managers under s 51(4) of the Data Protection Act 2007).

Any legal body depositing records with an archives can also stipulate its own more stringent confidentiality requirements (though the archives, equally, can refuse to accept records with an unnecessarily long closure period).

Generic closure periods based on confidentiality applied by archival repositories, after which records may be made available, are as follows:

Records in general: all records held by an archive are closed for 20-30 years other than material already in the public domain or for which permission for earlier access has been given by the depositing organisation/individual.

Commercial confidentiality: usually assumed to expire after 20-30 years, unless a specific stipulation is made by the depositing body that it should be closed for a longer period.

Personal data: the Data Protection Act specifies that the term 'personal data' only applies to the data of living individuals, so archives close such data for 75-100 years as recommended by The National Archives. Once the data subject is deceased or presumed deceased the Act no longer applies. In certain circumstances personal data may be examined for bona fide research purposes provide a legally binding guarantee of anonymisation is signed, or research institutions may redact personal data to make it available.

Deposit agreements: where a private sector organisation deposits records in an archives a deposit agreement is always drawn up specifying the length of time the records should be closed to public access (unless the organisation is happy with the archives' own standard access rules).

savings for chambers (eg reduced storage space and more efficient records management).

The Legal Records at Risk project will:

- Advise on, and help identify, records of barristers and barristers' chambers may be of long-term value both for business reference and external research.
- Facilitate the process by which selected records are deposited in archive repositories and ensure that confidentiality and access concerns are fully addressed. This does *not* mean inundating the Inns of Court libraries and archives with records if they do not have the capacity – we have arrangements with other local archive repositories.
- Provide generic recordkeeping advice to information owners as required (such as on digital continuity of records; email management; shared drive management).

Quite simply, if you hold any of the records referred to in this article and agree that there is an argument for preserving them for posterity, not least to enhance the reputation of the Bar, please contact the Legal Records at Risk Project Director, Clare Cowling at clare.cowling@sas.ac.uk.

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How not to store records: photograph of legal records offered to a county archive, courtesy of the Derbyshire Record Office

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