

Sir Bill Jeffrey  
Review of the Provision of Independent  
Criminal Advocacy Secretariat  
Ministry of Justice  
102 Petty France  
London  
SW1H 9AJ

13 December 2013

Dear Sir Bill,

### **Review of the provision of independent criminal advocacy – LSB submission**

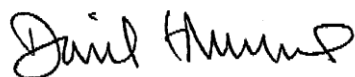
Thank you for providing the opportunity for my Chief Executive, Chris Kenny, and Head of Development and Research, Alex Roy, to meet you in October to discuss independent criminal advocacy. We are pleased to now provide you with some written views about this important market. This letter will be published on our website early next week.

Annexed to this document is an updated version of the briefing pack about advocacy services in England and Wales that Chris and Alex gave you when you met. The slides provide an overview of criminal advocacy in terms of regulation, supply and demand<sup>1</sup>. It should be noted that we draw on the best information available. However, there is a recognised shortage of good data in this area. This was noted by Lord Carter of Coles in his 2006 review of criminal legal aid<sup>2</sup>. It remains the case today.

This document does not replicate that overview. Rather it provides a narrative of some key points drawn from the supporting evidence, whilst recognising its weakness.

Please do not hesitate to get in touch if you would like to discuss any part of our submission in more detail.

Yours sincerely,



**David Edmonds**  
**Chairman**



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<sup>1</sup> The briefing pack uses only published data with the exception of some unpublished Solicitors Regulation Authority research from 2011 referenced on slide 10.

<sup>2</sup> Legal Aid: A market-based approach to reform, Lord Carter of Coles, 2006,  
<http://www.lccsa.org.uk/assets/documents/consultation/carter%20review%2013072006.pdf>

## **Review of the provision of independent criminal advocacy – LSB submission**

1. The Legal Services Board (LSB) would like to see the following recommendations made in relation to the provision of independent criminal advocacy:
  - There should be no significant Governmental intervention into the operation of the market. The LSB cannot identify any problems which require such intervention:
    - There are sufficient criminal advocates at each tier of the criminal courts to deal with demand.
    - Supply in the market is already starting to adapt to meet the challenges in the way that this market is developing, with a growing imbalance between supply and demand and changing financial incentives, reinforced by legal aid funding change.
    - Continued market liberalisation to promote competition between and within each branch of the profession and allow new business structures are the interventions most likely to result in better value and better quality services. Access to justice in this area is most likely to be preserved and enhanced through liberalisation rather than protection for certain types of historical business models.
  - Proposed changes to remove regulatory barriers to the type of business barristers can engage in so as to effectively compete with solicitors for advocacy work should be progressed on the fastest possible timetable. The ban on barristers undertaking litigation falls away at the start of 2014 and we expect proposals from the Bar Standards Board (BSB) very shortly to enable them to regulate entities, which will open further opportunities. Many of the other long-term regulatory barriers have been recently removed. Remaining obstacles are more historic, cultural and commercial, than matters of statute or regulation.
  - Professional bodies and training providers should better respond to market opportunities to help people diversify within the professions or, where necessary, exit from them.
  - Regulators should implement the Quality Assurance Scheme for Advocates (QASA) on the fastest possible timescale. The scheme will be crucial for generating the information needed to make the changing market work more effectively and to protect the interests of advocates and consumers alike.

## The Market

2. This section sets out an overview of the changing market picture in relation to demand, supply, price and how regulatory developments may have further impact.

### *Demand*

3. The market for criminal advocacy is different from many other areas of law. Neither providers of criminal advocacy nor their regulators can influence the aggregate demand for services. Offering more accessible fixed price services, for example, may well help secure the work available, but it will not increase the overall volume.
4. Wider societal factors influence the level of crime. Equally a wide range of organisations and individuals influence the demand for legal services once a crime has been committed and suspects arrested. Demand for different types of case at different tiers of criminal court is determined by factors such as:
  - The number of crimes committed – the level of recorded crime in 2012/13 was 3.7m and is lower than at any time since 1989. Between 2008 and 2012 recorded crime fell by 21%<sup>3</sup> while the number of total criminal proceedings fell by 17%<sup>4</sup>.
  - The number of arrests and prosecutions – this will depend on factors such as police resourcing and priorities, as well as policy and operational decisions by government, police, Crown Prosecution Service (CPS) and others about how to proceed with cases. For example, changes in the frequency of out of court disposals by the police are very likely to affect the volume of cases going to court.
  - The seriousness of the crime and complexity of the case – the type of offence will determine which court the case is heard in, and hence the number of advocates utilised and the rights of audience required. Committals (where the case could be tried in the magistrates or the Crown court) accounted for 42% of 152,000 trials in the Crown court in 2010, compared to just 36% of 133,000 in 2012<sup>5</sup>.
  - Decisions by defendants about how to proceed with cases - eg how they plead, or whether a case is heard in the magistrates court or Crown court if a choice is available. At the Crown court the proportion of guilty pleas has increased in each of the last two years, standing at 67% in 2012<sup>6</sup>.
  - The decisions of the CPS and solicitor firms about whether to undertake the advocacy in house, or refer it out to a self-employed advocate - the CPS

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<sup>3</sup> Office of National Statistics, <http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-june-2013/sty-crime-summary.html>, see slide 20 of the briefing pack:

<sup>4</sup> LSB analysis of MoJ courts data - <https://www.gov.uk/government/publications/court-statistics-quarterly-april-to-june-2013> and <http://www.official-documents.gov.uk/document/cm74/7467/7467.pdf>

<sup>5</sup> Ibid

<sup>6</sup> Ibid

reportedly saved £26m by using in house advocates instead of self-employed counsel. Money no longer being paid in agents and counsel fees was reported to be £141m between 2006-2011<sup>7</sup>.

5. Published court statistics for 2012 show that there were over 1.6 million criminal proceedings in magistrates' courts, which deal with the less serious, less complex and therefore faster trials. There were 133,000 trials in the Crown court and 8,000 in the appeal courts in the same year.
6. Overall the number of criminal proceedings has decreased over the past five years. But the picture is not uniform either over time or over the different 'tiers' of trial. The total number of criminal proceedings has fallen significantly in the magistrates courts. There was a 5% increase in Crown court proceedings of any type between 2008 and 2010, falling back to 8% below 2008 levels by 2012. The number of criminal proceedings at the appeal courts has risen by 5% in the past two years<sup>8</sup>.
7. Using published statistics, it is not clear whether cases have got more or less complex over the same time period. The picture is likely to be mixed. The number of defendants in the Crown court has increased but the number of cases has fallen, suggesting more trials involving multiple defendants.
8. However, the number of guilty pleas that result in sentencing hearings stands at around two-thirds of all cases in the Crown court and is increasing<sup>9</sup>. These are cases that can usually be serviced by less experienced, and therefore, less costly advocates. Evidence gathered in the course of the QASA development process suggests that some advocates (mainly solicitors) choose to specialise in this kind of work.

### *Supply*

9. The number of criminal advocates has not changed to reflect changes in demand and overall rewards available in this market. There are more providers competing for less work at a time when less money can be earned from most legally aided criminal cases. Indeed, the potential pool of criminal advocates has increased. This reflects the overall growth of the professions and also the removal of the barristers' monopoly in the higher courts.
10. The criminal advocacy market is made up of solicitors, barristers and a small number of legal executives. Solicitors and barristers are authorised to provide advocacy for criminal trials in the lower courts upon qualification. Barristers had a monopoly on providing advocacy in the higher courts until the Courts and Legal

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<sup>7</sup> Report of the thematic review of the quality of prosecution advocacy & case presentation, HMCPSI 2009 [http://www.hmcpsi.gov.uk/documents/reports/THM/ADV/ADV\\_thm\\_Jul09\\_rpt.pdf](http://www.hmcpsi.gov.uk/documents/reports/THM/ADV/ADV_thm_Jul09_rpt.pdf) (figures corrected January 2014)

Follow up report of the thematic review of the quality of prosecution advocacy & case presentation HMCPSI 2012 , [http://www.hmcpsi.gov.uk/documents/reports/THM/ADV/ADV\\_FU\\_Mar12\\_rpt.pdf](http://www.hmcpsi.gov.uk/documents/reports/THM/ADV/ADV_FU_Mar12_rpt.pdf) , please see slide 13 of the briefing pack

<sup>8</sup> <https://www.gov.uk/government/publications/court-statistics-quarterly-april-to-june-2013> and <http://www.official-documents.gov.uk/document/cm74/7467/7467.pdf> , see slide 27 in the briefing pack

<sup>9</sup> Ibid

Services Act 1990 (CLSA). CLSA made it possible for solicitors to obtain higher rights. The Access to Justice Act 1999 made it possible for other professionals, such as legal executives, to obtain higher rights. Therefore, there is potentially competition between the different types of provider in all criminal courts.

11. There are now approximately 150,000 (133,000 in 2009) individuals with rights of audience in the lower courts (undertaking civil, family and criminal work). There are approximately 21,000 (up from 20,000 in 2009) individuals with rights of audience in the higher courts<sup>10</sup>. Of these 15,000 are barristers and 6,000 are solicitor advocates<sup>11</sup>. There are over 2,000 solicitor firms undertaking criminal work, many of them small firms<sup>12</sup>. This presents a picture of a high number of self-employed individuals and small businesses seeking to derive salary and profit from criminal work. The relatively high incomes of the past that may still be expected by owners and the self-employed, as experts and investors in this field, are increasingly unlikely to be met as demand and available resource shrinks.

### *Price and income*

12. Legal aid pays at least part of the cost of criminal advocacy where a defendant is represented in court in many cases. The Legal Aid Agency (LAA) contracts with providers to deliver services. Legal aid payment rates are currently set by the Government, not by the provider delivering the service. There has been a drive to reduce criminal legal aid spend in recent years. This is ongoing:

- There have been a number of changes to case fees in recent years that result in less money being available for providers in some cases, including a staged 13.5% reduction in the advocates' graduated fee scheme in the Crown court. Government has announced a 17.5% cut in lower crime (police station and magistrate court work) legal aid rates staged over the next two years.
- Tightening of financial eligibility criteria (e.g. the introduction of means testing in the magistrates court in 2006) means that fewer people will be eligible for legal aid. Ministry of Justice estimates in 2012 suggest one third of all clients in the magistrates court are legally aided.
- Current LAA policy is to award fewer, bigger legal aid contracts to obtain economies of scale, with a guaranteed number of cases meaning that businesses can be profitable on smaller fees per case overall. This means fewer providers will be able to access legally aided work. There is likely to be fewer firm owners and self-employed individuals and more, less well paid employees.

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<sup>10</sup> Not all professionals with rights of audience will choose to exercise these rights

<sup>11</sup> Solicitor data from the Law Society Annual Statistical Reports; 2000 and 2001 data -

<http://www.barcouncil.org.uk/media/18200/annreport2001.pdf> , 2012 data from -

[https://www.barstandardsboard.org.uk/media/1443096/aggregated\\_diversity\\_data\\_2012\\_research\\_reportfinal.doc](https://www.barstandardsboard.org.uk/media/1443096/aggregated_diversity_data_2012_research_reportfinal.doc), see slide 7 of the briefing pack

<sup>12</sup> Evaluation: Changes in competition in different legal markets ANNEX. LSB 2013 -

<https://research.legalservicesboard.org.uk/wp-content/media/Changes-in-competition-in-market-segments-ANNEX.pdf>, see slide 15 of the briefing pack

13. Solicitor firm income from all criminal work, not just advocacy, has fallen in real terms by 3% in the past three years. This decline is broadly in line with trends for all solicitor firms. The self-employed criminal bar in particular argues that many of their members are badly paid. Incomes from criminal advocacy for the bar are difficult to establish. There is little reliable data. The Bar Council has often quoted in the past that a self-employed criminal barrister of 4-5 years call can expect an average pre-tax take home income of £35k – 42k. Information on ranges of income is not available<sup>13</sup>.
14. Typical rates of pay are driven by typical levels of utilisation. The challenge is to be working as much as possible to generate fees, maximising chargeable work and minimising non-chargeable time. There is limited information on utilisation for criminal advocates. However, in 2011 BSB research reported that<sup>14</sup>:
- Across the whole self-employed Bar, 24% of barristers reported that their workload had reduced in the previous 12 months.
  - 30% of self-employed criminal barristers said that their workload is substantially less or somewhat less than previously. This compares to just 7% of the employed Bar.
  - 84% of employed criminal barristers said that their workload had increased in the previous year<sup>15</sup>.
  - In the past 2 years 49% of criminal barristers have seen a drop in gross billed income, 23% have seen an increase and 28% have seen no real change<sup>16</sup>.

#### *Market dynamics and regulation*

15. The vertically integrated nature of solicitor firms gives them some competitive advantages over other groups in responding to the changing market. These firms have their own clients and/or will obtain clients through the duty solicitor schemes operated by the LAA. The vast majority of legal aid contracts are with solicitors. These contracts anticipate one firm dealing with a case from start to finish. Firms will decide whether or not to outsource advocacy to a barrister of their choice. It is possible that at a local level criminal work may be dominated by a small number of solicitor firms that specialise in servicing repeat offenders. As around three quarters of all offences in the 12 months ending September 2012 were attributed to repeat

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<sup>13</sup> See for example, The Future of the Bar, Nicholas Green QC, 2010:  
[http://www.barcouncil.org.uk/media/144676/future\\_of\\_the\\_bar\\_\\_17\\_.pdf](http://www.barcouncil.org.uk/media/144676/future_of_the_bar__17_.pdf)

<sup>14</sup> The Barristers' working lives survey published by the BSB in 2011 -  
[https://www.barstandardsboard.org.uk/media/1385164/barristers\\_working\\_lives\\_30.01.12\\_web.pdf](https://www.barstandardsboard.org.uk/media/1385164/barristers_working_lives_30.01.12_web.pdf), please see slide 16 of the briefing pack

<sup>15</sup> Barristers employed by the Crown Prosecution Service or in criminal defence solicitors

<sup>16</sup> [https://www.barstandardsboard.org.uk/media/1385164/barristers\\_working\\_lives\\_30.01.12\\_web.pdf](https://www.barstandardsboard.org.uk/media/1385164/barristers_working_lives_30.01.12_web.pdf), table 4.4

offenders, such market distortion may have a significant impact on the distribution of work to advocates<sup>17</sup>.

16. However, there is nothing in statute or regulation that disallows barristers directly competing with solicitors for clients. Recent regulatory rule changes mean that consumers may directly instruct barristers that are members of the BSB's public access scheme. The regulatory restrictions on barristers undertaking litigation falls away at the beginning of 2014. New business models such as 'Barco'<sup>18</sup> operate an escrow service to receive and disperse client funds so barristers do not have to handle client money themselves. This removes a further regulatory advantage in the solicitors' regime, albeit one of only glancing relevance in relation to advocacy.
17. There is nevertheless tension between existing practice at the Bar and legal aid procurement arrangements, which the current complex structure of legal regulation as a whole has exacerbated. The LAA do not currently award contracts to self-employed barristers. Chambers are a collection of self-employed individuals. The LAA cannot contract with individuals, only entities. The BSB has not historically authorised or regulated entities. This has meant that a barristers' chambers could not set up as a single entity under their regulatory scheme.
18. In practice, this has left chambers wishing to contract with two options. First, it could attempt to establish an entity at arm's length which would own the contract but pass all of the work to chambers, the individual members of which would remain self-employed. In 2010, the Bar Council launched the 'ProcureCo' corporate vehicle to enable this to happen. Data on the number of self-employed barristers adopting this model is not available publicly, but is thought to be small<sup>19</sup>. Second, chambers could seek to be authorised as an entity by another legal regulator. Although we understand that cases of this type exist, they are few in number and raise potential issues in relation to conflict rules. Moreover, other regulators face some restrictions due to their own complex establishment frameworks and their ties to representative, professional bodies.
19. The BSB will be applying to the LSB for authorisation as a regulator of entities in early 2014. If this application is successful, it will provide a significant degree of simplification and should open the door for chambers to win a range of LAA contracts, including for activities beyond the conduct of advocacy itself.
20. This would mirror a trend argued to be happening in solicitor firms of increasingly keeping advocacy in-house, using solicitor advocates or employing barristers. The fact that there has been a downturn in other work, that higher rights qualifications are increasingly common and that in-house advocates can be employed relatively cheaply intensifies the financial incentives for doing so. The Bar Council reports that

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<sup>17</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/220090/criminal-justice-stats-sept-2012.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220090/criminal-justice-stats-sept-2012.pdf)

<sup>18</sup> <http://www.barcouncil.org.uk/for-the-bar/barco/>

<sup>19</sup> <http://www.legalfutures.co.uk/latest-news/whatever-happened-procureco-part-2>

legal aid funding structures, such as the Litigators' Graduated Fee Scheme, also have had this effect<sup>20</sup>.

21. A 2012 survey showed that, across all areas of law, a third of solicitors used external advocacy. However, criminal firms maintained a higher proportion of advocacy in-house than any other area of law that has a large referral bar. Moreover, a survey of individual consumers from the same year showed that while solicitors were used by 77% of individuals who had a criminal legal problem, only 3% used barristers<sup>21</sup>. It should be noted that not all of these cases would have gone to court, highlighting the barristers' limited access to clients in the absence of extensive use of public access.
22. Other market developments may further reduce the amount of advocacy referred to self-employed barristers. There is some evidence that the frequency of referral to barristers may be linked to the size of the instructing firm, with larger firms more likely to keep work in-house. Legal aid reforms resulting in larger contracts may therefore reduce demand for the criminal referral bar. Economies of scale will put large solicitor firms using in-house advocates (and perhaps also Alternative Business Structures (ABS) owned by a mixture of solicitors and barristers) in the best position to win these contracts, especially if price competitive tendering is introduced into the tender process.
23. It should also be noted that the CPS is a major provider of criminal advocacy services and has itself moved more work in-house since 2005. It is reported that as a result of this strategy the CPS made significant savings as set out above in paragraph four. In 2010 the Bar Council linked this strategy to 'a flow of barristers leaving private practice to seek the security of employment in the Civil Service' that 'has caused a dearth of work for young barristers in Chambers to cut their teeth upon<sup>22</sup>'. However, the overall number of self employed barristers has not shown a significant reduction between 2005 and 2010.

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<sup>20</sup> See for example, The Future of the Bar, Nicholas Green QC, 2010:

[http://www.barcouncil.org.uk/media/144676/future\\_of\\_the\\_bar\\_\\_17\\_.pdf](http://www.barcouncil.org.uk/media/144676/future_of_the_bar__17_.pdf)

<sup>21</sup> Evaluation: Changes in competition in different legal markets ANNEX. LSB 2013 -

<https://research.legalservicesboard.org.uk/wp-content/media/Changes-in-competition-in-market-segments-ANNEX.pdf>, see slide 10 of the briefing pack

<sup>22</sup> The Future of the Bar, Nicholas Green QC, 2010, paragraph 35:

[http://www.barcouncil.org.uk/media/144676/future\\_of\\_the\\_bar\\_\\_17\\_.pdf](http://www.barcouncil.org.uk/media/144676/future_of_the_bar__17_.pdf)



## Issues

24. This section deals with four reported issues within the criminal advocacy market:

- Criminal advocates are leaving the market
- New criminal advocates are not entering the market
- Quality shortfalls
- Threat to the survival of the independent referral bar.

### ***Criminal advocates are leaving the market***

25. It is argued by some that reducing incomes makes criminal advocacy unsustainable, or at least unattractive, to many providers resulting in them leaving the market<sup>23</sup>. This may mean either stopping practising law altogether or diversifying into other, usually non-publicly funded work (ie not criminal law). There are anecdotal reports that junior members of the criminal bar are increasingly taking on public and regulatory work. Many barristers believe that, if this trend were to continue, it could eventually result in a shortage of criminal barristers and hence access problems. A 2011 research report indicates that since 2001 criminal barristers make up the highest proportion of all barristers leaving the self-employed bar (44%). Leavers working in criminal and commercial practices are the most likely to transfer to the employed bar<sup>24</sup>.

26. There is little evidence to suggest that there is currently any shortage of advocates at any tier of the criminal courts. There is no time series evidence on the types of work undertaken by self employed barristers. However, as set out in the supply section above, the potential number of criminal advocates has increased. This is despite an overall reduction in demand for services. Therefore, the market picture is one of oversupply: more advocates competing for less work.

27. As explained above, there may be fewer *entities* (ie criminal solicitor firms and chambers) with the award of fewer, larger legal aid contracts. However, there is no evidence that this will lead to a shortage of *advocates* and hence access issues. However, as we set out below, this market change is likely to present a particular challenge to the current business model of the independent referral bar.

28. A relevant question in this context is why more advocates are not diversifying their practise into other areas that are busier and/or more remunerative in order to move

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<sup>23</sup> See for example, The Criminal Bar Association, Response to 'Transforming Legal Aid', Consultation Paper 14/2013, paragraph 25: <https://www.criminalbar.com/resources/cba-responses/>

<sup>24</sup> Electoral Reform Services Research, General Council of the Bar Exit Survey 2011:

[http://www.barcouncil.org.uk/media/18145/15\\_12\\_general\\_council\\_of\\_the\\_bar\\_leavers\\_report.pdf](http://www.barcouncil.org.uk/media/18145/15_12_general_council_of_the_bar_leavers_report.pdf)

out of criminal work or supplement their practice. LSB research indicates that there is unmet demand for legal services in many other areas. One in three individual citizens does not get the legal help they need<sup>25</sup>. Less than one in five small businesses get legal advice when they have a problem. Only 13% of SMEs see lawyers as value for money, even though 54% see law as very important for doing business<sup>26</sup>. This would be considered an opportunity in many other sectors and one which the development of public access enables barristers to address in a way that would not have been possible until recently.

29. Changes in education and training requirements may have a role to play to help to enable individuals to move flexibly between different legal services. In the context of the recent Legal Education Training Review commissioned by three legal regulators - BSB, ILEX Professional Standards and the SRA, we agree with those that argue that students should not be compelled to choose too early between advocacy and other forms of practice.
30. Avoiding over-early career choices is also relevant once somebody has gone down the advocacy route. Generalising very widely, criminal advocacy provides excellent training in courtroom practice and procedural matters which can be applied widely. But the legal analysis needed is different to many other areas of law. The danger therefore is that an early decision to specialise may send a young advocate down a route from which they find an exit difficult. To some extent the rise of mixed skilled providers and larger, more varied entities may guard against this, but there may be scope for experimentation – for example more joint pupillages across different sets of chambers – within current structures as well.
31. However, there remains a challenge for professional bodies and regulators to ensure that mixed patterns of training, work experience, training contracts, pupillages are allowed – and indeed, actively facilitated – in order to ensure development of the widest range of skills in early years of practice and so open the widest range of progression routes. The LSB has recently consulted on statutory guidance for regulators to help them build on the progress that has already been made by some in reforming their education and training arrangements to achieve this outcome<sup>27</sup>.
32. In the light of the LETR, regulators are also considering arrangements for ongoing professional development. In this context, it is important that developments designed to move away from simple “hours of training attended” requirements into rules to stimulate more reflective practice are flexible enough to ensure that they can also facilitate the development of skills in related areas of practice (eg criminal advocates moving into related litigation or possibly police station work), movements

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<sup>25</sup> BDRC,, Legal Services Benchmarking Report, June 2012: <https://research.legalservicesboard.org.uk/wp-content/media/2012-Individual-consumers-legal-needs-report.pdf>

<sup>26</sup> Pleasance P and Balmer N *In Need of Advice? Findings of a Small Business Legal Needs Benchmarking Survey* (April 2013) <https://research.legalservicesboard.org.uk/wp-content/media/In-Need-of-Advice-report.pdf>

<sup>27</sup>

across professional boundaries (e.g. moving in-house to a firm or the CPS) or adding a “new string to the bow” in terms of developing new practice areas entirely.

### ***New criminal advocates are not entering the market***

33. A more subtle version of the arguments about supply is that shortages are being stored up for the future because it is not financially viable for most firms/ chambers to award training contracts/ or offer pupillages and tenancies specialising in criminal work and, even when this is not the case, criminal work is ceasing to be attractive to the “brightest and best” aspiring advocates because of the lack of available work and paucity of expected income<sup>28</sup>.
34. Again the available evidence does not currently support this argument. We do not have definitive data on the number of training contracts awarded by criminal firms. However, the number of criminal solicitors with higher rights grew by 5% between October 2011 and 2013<sup>29</sup>. The total number of pupillages in all areas of law has reduced by 14% since 2008<sup>30</sup>. We cannot break down this information to chambers whose main area of practice was crime over the same period. We do know, however, that the total number of pupillages offered by chambers whose main area of practice was crime actually increased slightly from 131 in 2009/10 to 136 in 2010/11<sup>31</sup>. Although it is anticipated that the data for the Bar’s next biennial survey will be published shortly and may deviate from this, it would be premature to assume from two year’s figures that this will necessarily be a permanent trend.
35. Without any scheme in place to assess the quality of advocates the assertion that “brightest and the best” potential criminal advocates are not joining the market cannot be tested. However, to highlight the risk, the Criminal Bar Association report that the average pupillage at a criminal chambers is £12k, compared to £60k in commercial chambers. It should be noted that £12k is minimum pupillage rates allowed by BSB rules, so it is unlikely that this is the true average<sup>32</sup>. Nevertheless, the scale of the likely differential does suggest that there is at least a theoretical risk of “skew” in relation to some candidates.

### **Quality**

36. Sufficient quality is particularly important in criminal advocacy because of the severity of potential consequences to defendants and victims if a wrong decision is

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<sup>28</sup> See for example Bar Council response to Transforming Legal Aid: next steps consultation 2013, [http://www.barcouncil.org.uk/media/235755/bar\\_council\\_response\\_to\\_the\\_transforming\\_legal\\_aid\\_\\_next\\_steps\\_\\_final.pdf](http://www.barcouncil.org.uk/media/235755/bar_council_response_to_the_transforming_legal_aid__next_steps__final.pdf)

<sup>29</sup> [http://www.sra.org.uk/sra/how-we-work/reports/data/higher\\_rights\\_of\\_audience.page](http://www.sra.org.uk/sra/how-we-work/reports/data/higher_rights_of_audience.page) http

<sup>30</sup> The Barristers’ working lives survey published by the BSB in 2011 - [https://www.barstandardsboard.org.uk/media/1385164/barristers\\_working\\_lives\\_30.01.12\\_web.pdf](https://www.barstandardsboard.org.uk/media/1385164/barristers_working_lives_30.01.12_web.pdf) and Bar Barometer Full Report 2012

[https://www.barstandardsboard.org.uk/media/1436638/bar\\_barometer\\_nov\\_2012\\_web\\_upload\\_higher\\_res.pdf](https://www.barstandardsboard.org.uk/media/1436638/bar_barometer_nov_2012_web_upload_higher_res.pdf)

<sup>31</sup> Ibid

<sup>32</sup> Criminal Bar Association response to Ministry of Justice consultation, Transforming Legal Aid, 2013: <https://www.criminalbar.com/resources/cba-responses/>

made as a result of poor quality work e.g. the innocent being found guilty or the guilty being found innocent.

37. It is argued, not least by some very senior members of the judiciary, that there are increasingly quality shortfalls in criminal advocacy. The issue was first highlighted by Lord Carter of Coles in his 2006 review of criminal legal aid procurement. Lord Carter concluded that market forces could no longer be relied on to eliminate underperforming advocates<sup>33</sup>. There were high failure rates in certain types of cases in the QASA pilot<sup>34</sup>. Further, 2012 BSB research on the perceptions of criminal advocacy reported that over half of criminal advocacy stakeholders surveyed felt that existing levels of underperformance in criminal advocacy are having an impact on the fair and proper administration of justice<sup>35</sup>.
38. In response to longstanding concerns about the variable quality of criminal advocacy the three front-line regulators of criminal advocacy – the BSB, the Solicitors Regulation Authority and ILEX Professional Standards – have jointly developed a compulsory accreditation scheme for all criminal advocates whether acting for the prosecution or defence. This is known as QASA<sup>36</sup>.
39. In the view of the LSB, this is to be welcomed as a robust and visible mark of competence for different types of cases. It is a sign of both the profession and regulators responding to a long-established need to ensure ongoing competence rather than simply ability at the time of authorisation. Building a process jointly will ensure common standards across all branches of the profession and so help to ensure that there can be no ‘dumbing down’ of standards as work is done in different ways and in different organisational configurations. Registration for the scheme opened in September 2013.
40. One consequence of the development of a comprehensive scheme is that there will, for the first time, be comparable data about where quality shortfalls arise. Whilst assertions have been made that solicitor firms, particularly in response to legal aid cuts, may cut corners to use the cheapest, rather than necessarily the most suitable advocate and that the referral bar is more skilled at advocacy than solicitors, including solicitors with higher rights, these, at present rest on little more than generalisation from individual cases at best or self-interest at worst<sup>37</sup>.
41. The Criminal Bar Association is, through the judicial review process, resisting the introduction of this scheme. This is surprising given that the scheme that has been developed over seven years by the approved regulators has been subject to several consultation processes and is supported by the LAA and the CPS - the major public

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<sup>33</sup> <http://www.lccsa.org.uk/assets/documents/consultation/carter%20review%2013072006.pdf>

<sup>34</sup> 2009 - Pilot of QASA by Cardiff University - Moorhead, Cape et al – Quality assurance for advocates  
<http://www.law.cf.ac.uk/research/pubs/repository/2269.pdf>

<sup>35</sup> [https://www.barstandardsboard.org.uk/media/1402386/orc\\_international\\_-\\_perceptions\\_of\\_advocacy\\_report.pdf](https://www.barstandardsboard.org.uk/media/1402386/orc_international_-_perceptions_of_advocacy_report.pdf)

<sup>36</sup> <http://www.qasa.org.uk/>

<sup>37</sup> See for example, The Criminal Bar Association, Response to ‘Transforming Legal Aid’, Consultation Paper 14/2013, paragraph 40: <https://www.criminalbar.com/resources/cba-responses/>

purchasers of criminal advocacy services. Judgement is expected very early in the New Year.

### ***Self –employed barristers***

42. As noted above, the Bar Council and Criminal Bar Association have identified that reducing demand, legal aid fee cuts and solicitor firms increasingly undertaking advocacy in house present real risks to the sustainability of the criminal referral bar and that this position will worsen. As set out earlier, the evidence does not indicate that barristers are leaving the market in great numbers. However, it does appear that in an increasingly competitive market the current business model of the self-employed bar faces particular challenges.
43. The LSB considers that the response should be to provide greater freedom for barristers to adapt their business model and compete with solicitor firms for work on a level playing field, rather than to protect one particular business model artificially. Such protectionism may potentially drive up costs and drive down quality and value. This is not desirable either for the public purse in the short- and medium-term or for the health of the profession in the long-term.
44. As noted above, liberalising regulatory rule changes driven by the LSB have seen increasingly levelled the playing field and provided greater opportunities for barristers to obtain work. Further examples include:
- Consumers can access barristers directly through the public access scheme. This is now available in all areas of law. This is no longer restricted to work not eligible for legal aid, although in reality the privately funded market for advocacy that is eligible for legal aid funding is likely to remain small, especially at the Crown court.
  - Relaxation of restrictions on undertaking certain aspects of a case, for example: entering correspondence, collecting evidence, attending the police station without a solicitor and taking proofs.
  - Barristers are now allowed to be employed and self-employed at the same time meaning that they can, for example, be employed by the CPS while maintaining a referral practice.
  - Barristers and solicitors (and others) can join together and be partners in the same firm.
45. Some self-employed barristers may be able to prosper in this market within the traditional chambers model. There are reports that some chambers are adapting. For example, the Bar Council's 2010 Future of the Bar document reported that action taken in response to reductions in legal aid had, in addition to ProcureCo type developments, included:
- Merging as larger sets have greater flexibility to employ support staff, invest in IT and marketing etc.

- Undertaking cost reduction using IT and downsizing physical space (in many cases, only 10-17% of overall chambers' fee income goes in central costs)<sup>38</sup>.
46. However, to be continually competitive, self-employed barristers need to consider further change to their business models. This could include increasing scale to drive efficiency, increasing utilisation by forming broader legal practises, or utilising non-barristers to undertake lower level work at a lower cost. In some cases, this may mean forming ABS with employed solicitors. It may also mean operating chambers much more like a firm rather than a collection of individual businesses, with legal as well as administrative support. This could be achieved by employing paralegals to undertake work that is within their competence at lower cost.
47. This will call for cultural, as well as commercial, change among self-employed barristers, many of whom remain wedded to the historical chambers model. BSB research from 2011 found that the reasons most often cited for this was the “independence, autonomy, control over their working life and flexibility” that the model allows<sup>39</sup>. The challenge will be to find new patterns which achieve these benefits at a cost which purchasers find acceptable.
48. To facilitate this, the BSB will need to continue to review its rule book in the light of experience, building on the simplification which comes into effect at the start of 2014 with a view to removing any unnecessary rules and maximising flexibility for different business structures while maintaining protections against regulatory risks.

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<sup>38</sup> The Future of the Bar, Nicholas Green QC, 2010:

[http://www.barcouncil.org.uk/media/144676/future\\_of\\_the\\_bar\\_\\_17\\_.pdf](http://www.barcouncil.org.uk/media/144676/future_of_the_bar__17_.pdf)

<sup>39</sup> The Barristers' working lives survey published by the BSB in 2011 -

[https://www.barstandardsboard.org.uk/media/1385164/barristers\\_working\\_lives\\_30.01.12\\_web.pdf](https://www.barstandardsboard.org.uk/media/1385164/barristers_working_lives_30.01.12_web.pdf), see slide 19 of the briefing pack

## **Conclusion**

49. The criminal advocacy market is changing. Facilitated by liberalising changes by regulators, the provider base as a whole is adjusting to service the changing market.
50. The evidence does not suggest that there are too few advocates to meet consumer need at any tier of court. Although data is very limited, it is also too early to conclude that there are risks of under supply in the medium-term. Quality issues are being addressed by the regulators through the QASA.
51. Increasing financial pressure, legal aid contracting incentives, stakeholder quality expectations, and pressure to reduce court time and increase efficiency all point to a greater proportion of the available work being delivered through larger, more varied and mixed skill providers. It seems to the LSB that neither regulation nor broader public policy should seek to obstruct this development to protect historical business models. There should be no unnecessary obstructions to the kinds of structures that can emerge and who can own them.
52. However, nor should there be any attempt to force people into new business models who believe that they can make a more traditional pattern of practice pay. What matters at the end of the day is that the service is available in the necessary quantity and quality, rather than the organisation through which it is offered, the professional training background or title of the individual provider.
53. There is a legitimate role for the Bar Council, Inns, Law Society and Chartered Institute of Legal Executives as professional leaders to set a forward looking agenda, defining new standards of what excellent practice may look like in this changing market and demonstrating how their members may reach it. But that role is to ensure that individuals and organisations can react rapidly to changing circumstances, rather than simply to lobby for clocks to be turned back. Liberalisation, not legislative or regulatory intervention, is most likely to result in an efficient market that works well for society, consumers and the profession alike in the long-term.