

Independent criminal advocacy in England and Wales

A Review by Sir Bill Jeffrey

May 2014

Independent criminal advocacy in England and Wales

Review by Sir Bill Jeffrey

This information is also available at : www.justice.gov.uk

Contents

| | |
|--|----|
| Introduction | 3 |
| Summary and Main Conclusions | 5 |
| 1. The landscape of criminal advocacy | 14 |
| 2. Quality | 21 |
| 3. Training | 26 |
| 4. Reflections on quality and training | 30 |
| 5. The market in defence criminal advocacy | 35 |
| 6. The supply of criminal advocates | 48 |
| 7. How the system works and its impact on quality | 55 |
| 8. International comparisons | 59 |
| 9. Implications for the future structure of the legal profession | 60 |
| 10. Research and information | 66 |
| 11 Costs | 67 |
| Conclusion | 68 |

See separate supporting annexes and statistical narrative documents

Introduction

Effective advocacy is at the heart of our adversarial system of criminal justice. If prosecution and defence cases are not clearly made and skilfully challenged, injustice can and does result. Effective advocates simplify rather than complicate; can see the wood from the trees and enable others to do so; and thereby can contribute to just outcomes, and save court time and public money.

This review reflects concerns about the quality of advocacy in the English and Welsh criminal courts and the longer term implications of current trends in the way advocacy services are provided. These are matters of legitimate interest to the Government and the public at large, but they also have a strong bearing on the future structure and professional standards of the legal profession. Although this report was commissioned by the Justice Secretary, such conclusions as I have been able to reach are addressed as much to the profession and its regulators as to the Government.

I have had meetings with, and received submissions from, the Council of Circuit Judges, the bodies representing barristers, solicitors and legal executives, the main regulators and the Legal Services Consumer Panel. I have visited Crown Court centres and magistrates' courts in five cities, spent time observing proceedings and had meetings with judges, groups of advocates (including younger practitioners), solicitors' firms, barristers' chambers and several businesses providing advocacy services in less conventional ways. I have taken the views of academics and educators in the legal field, and some who provide continuing professional training for advocates. I have also had helpful meetings in Scotland and New Zealand, and am particularly indebted to those who took time and trouble to explain to me the system in these countries. Finally, I have been much assisted by a small Reference Group, comprising representatives of the judiciary, the Bar Council, the Law Society, and the Chartered Institute of Legal Executives, who have given freely of their views and experience. None bear any responsibility for my conclusions.

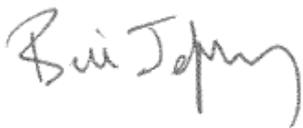
There is a full list of those whose views I have taken in annex A. I offer warm thanks to all of them. I also offer a pre-emptive apology to the Chartered Legal Executives. They are an increasingly significant part of the scene, particularly in the magistrates' courts. As yet they provide very few advocates, although those whom I met were distinguished by their enthusiasm. It would have been cumbersome to have mentioned them at every stage of

the analysis, and I hope they will forgive phrases such as "the two sides of the profession" where they appear in this report.

My approach has been to attempt to describe the "landscape" of criminal advocacy as it is now and the forces which have moulded it in recent years (particularly those which have a bearing on quality), and to offer a view on the longer term implications. Inevitably, this involves an element of speculation, both because the future is unknowable and because hard facts about the present and the recent past are not easy to come by. I also offer some thoughts on measures that could be taken to improve things in the shorter term, if there were sufficient consensus to do so.

My terms of reference (which can be found at annex B) explicitly excluded consideration of legal aid remuneration rates and the requirement for public funding. These are currently matters of public debate and controversy, and many of those in the profession to whom I have spoken in the last few months have found it difficult to get beyond the legal aid cuts as an explanation for poor advocacy quality and indeed any other shortcomings in the system. My own view is that legal aid fee rates are neither the whole story nor none of it. The income to be derived from doing publicly funded work clearly affects behaviour, but there are, I believe, other factors at work which deserve attention. In a system which is still largely publicly funded, the significance of legal aid fee levels cannot be ignored; but it is to these other factors that this report pays most attention

I have been splendidly supported by a small team comprising Farah Ziaulla, who has led the team ably, Terry Davies and Bridget Doherty. They have been intelligent contributors as well as arrangers of meetings and gatherers of information, and I am very much in their debt. At the beginning of the review, before the team had been assembled, Jenny Pickrell and Judith Evers were a great help in getting me started, and I am grateful to them too.



Summary and Main Conclusions

The landscape of criminal advocacy has altered substantially in recent years. Recorded and reported crime are down. Fewer cases reach the criminal courts. More defendants plead guilty, and earlier than in the past. Court procedures are simpler. There is substantially less work for advocates to do. Its character is different, with more straightforward cases and fewer contested trials. In the publicly funded sector (86%¹ of the total), it pays less well (paragraphs 1.3 to 1.6).

There has been a marked shift in the distribution of advocacy work in the Crown Court between the two sides of the profession. There are many more solicitor advocates than there were in the years following the liberalisation of rights of audience. Between 2005-06 and 2012-13, the percentage of publicly funded cases in which the defence was conducted by a solicitor advocate rose from 4% to 24% of contested trials and from 6% to 40% of guilty pleas². Both figures are on a rising trend. In 2012-2013, Crown Prosecution Service (CPS) in-house lawyers led the prosecution in approximately 45% of Crown Court trials³ (paragraphs 1.8 to 1.10).

Standards, quality and training

There is no hard research evidence on the quality of advocacy, but I found a level of disquiet about current standards among judges (including some with long experience as solicitors) which was remarkable for its consistency and the strength with which it was expressed. It would be a mistake to discount these views (paragraphs 2.1 to 2.9, 4.1 and 4.2).

The disparity in mandatory training requirements expected of barristers and solicitor advocates reflects historic differences in the main focus of the two sides of the profession. But it is no reflection on the many highly capable solicitor advocates to observe that it is so marked as to be almost impossible to defend. To be called to the Bar, a barrister needs to have completed 120 days of specific advocacy training. A qualified solicitor can practise in the Crown Court (subject to

¹ MoJ/LAA Data – Defendants committed or sent for trial in the Crown Court in 2012 who were represented under legal aid.

² MoJ/LAA Data

accreditation) with as few as 22 hours such training. There are also different expectations of continuous professional development training (CPD) for advocates in the Crown Court, for which there is no rational basis. High quality CPD training has been developed by both sides of the profession. There would be a good deal to be gained from a common approach (Section 3 and paragraphs 4.3 to 4.9).

The Quality Assurance Scheme for Advocates (QASA) has divided the legal profession and its regulators. I find it hard to assess how well-founded the professional concern about judicial assessment in live trials will prove to be. I am more inclined than some to have confidence that judges will in practice be able to distinguish poor advocacy from the carrying out of wrong-headed client instructions. The High Court has suggested some changes to the scheme to help mitigate any risk. I hope these are implemented. I do not doubt the strength of the case for some kind of quality assurance scheme, both to reassure the public that there is a means by which advocates can be denied the opportunity to act beyond their competence, and to encourage continuous professional development (paragraphs 2.10 to 2.15 and 4.15 to 4.17).

The market in defence criminal advocacy

The key decision on the choice of advocate is made, if not directly by the solicitor representing the defendant, then at a point when that solicitor is effectively in charge of the case. Solicitors are under a professional duty to ensure their clients are in a position to take informed decisions about the services they need. In the past this was done by recommending a suitable member of the self-employed Bar. This ensured a strong measure of competition, based on barristers' reputations.

Today, the competitive dividing line is between in-house providers and outsourced specialists. The legal aid system provides a fixed fee for the litigation and advocacy elements of defence representation. It is widely believed that solicitors have a commercial incentive to assign a solicitor advocate to retain the combined value of the fee in-house, especially if a guilty plea is likely. The Bar considers that this creates a potential conflict of interest, which needs to be addressed. Solicitors say that they assign advocates on a judgement of what will be in the best interests of

³ CPS Data

the client. Many clients prefer continuity of representation (paragraphs 5.8 to 5.12).

As it exists now, the market could scarcely be argued to be operating competitively or in such a way as to optimise quality. The group of providers who are manifestly better trained as specialist advocates are taking a diminishing share of the work, and are being beaten neither on price nor on quality (paragraphs 5.22 to 5.24).

Solicitors are bound, for good reason, to be influential in the choice of advocate. The fact that there are now internal commercial interests at stake makes it even more important that the process by which an advocate is assigned should be above reproach. This suggests that there would be advantage in reinforcing and clarifying solicitors' professional responsibilities in this area (paragraphs 5.27 to 5.29).

An alternative, more radical approach would be for the Legal Aid Agency (LAA) to take a more assertive role in the acquisition of advocacy services and act more as a guarantor of quality than they do at the moment. Where public money is being spent - as it is both on legal aid and on avoidably protracted trials - the public has a legitimate interest in advocacy quality. An option would be for the LAA to maintain a list or panel of approved advocates for legally aided defence, on the model of that kept by the CPS. This would need to include both barristers and solicitor advocates, but might be a means by which concerns about over-supply and diversity could be addressed (paragraph 5.30).

It is possible to overstate the argument that advocates who only appear in guilty pleas in the Crown Court cannot effectively give advice on plea. Someone who has experience of defending trials in that jurisdiction will no doubt have a better sense of their dynamics, the likely reaction of juries, and the legal issues likely to arise. But legal advice which amounts to advice on plea is given by solicitors from the earliest stage in the process, based on the facts and the inherent strength of the defence case.

Where it is known that a defendant will plead guilty, I can see no objection in principle to him being represented by a less accomplished advocate than would represent him if he pleaded not guilty. Of more concern are the practical consequences for case management where there is doubt about how the defendant will plead, and the assignment of an advocate is deferred until very late in the day, to keep the advocacy task in-house for an advocate who only appears in pleas

(paragraphs 5.13 to 5.17, 5.25 and 5.26).

In principle, there is nothing to prevent the Bar from competing now for criminal legal aid contracts. To do so a set of chambers would need to form a legal entity with whom the LAA could do business. They would also need to be able to provide other elements of representation, including (at present) duty advice at police stations and magistrates' courts and case preparation. There are already a few "alternative business structures" led by barristers, but the overwhelming majority of criminal representation is provided in the traditional way.

Even those barristers who are open to the idea of changing the model to compete for legal aid contracts object that they would have to employ so many people to do the non-advocacy elements of the work as to lose the essential independent character of the self-employed Bar. If the LAA were able to contract separately for duty advice and post-charge work, and if, in more straightforward cases, junior barristers were able to operate as a "single pair of eyes" undertaking case preparation as well as advocacy, this objection would have less force. It might be possible for the Bar to compete effectively without changing their current business model out of all recognition. Their high reputation and low overheads could put them in a strong position. Adjusting the legal aid system as I suggest would not be straightforward, and much would depend on whether there were any signs that the Bar was interested (paragraphs 5.31 to 5.43).

Supply of criminal advocates

The number of practising advocates in all courts appears to have increased over a period when magistrates' courts business reduced substantially and Crown Court business fluctuated in volume, but reduced in complexity. There are now many more criminal advocates than there is work for them to do. Under-utilisation depresses average earnings, and makes it even harder to manage reductions in legal aid fees (paragraphs 6.1 to 6.4).

There are no reliable figures for new entrants to the criminal Bar, but strong signs that it is an ageing profession, with fewer younger members than in the past. It is not well-equipped to undertake work-force planning of the kind undertaken by managed businesses in the public and private sectors (paragraphs 6.5 to 6.8).

There are many more graduates of the Bar Professional Training Course (BPTC) than there are pupillages on offer. I cannot fault the logic on which the Wood Working Group dismissed the idea of a cap on numbers taking the BPTC. But the problem of high levels of debt and disappointed hopes of pupillage persists, and is probably most acute in relation to crime (paragraphs 6.10 to 6.15).

Some of these trends seem likely to tell against progress on diversity. There is a realistic fear that the good work which has been done in this area in the relatively recent past is in danger of being undone, with a reversion to a more socially advantaged, less ethnically diverse profession. This is one of the issues which any radical change in the structure of the profession should seek to address (paragraphs 6.18 to 6.20).

How the system works and its impact on quality

Inadequate preparation is the enemy of good advocacy. A combination of delay in assigning advocates (both prosecution and defence) and uncertainty over trial dates makes the system more hand to mouth than is conducive to good quality advocacy. What is badly needed is the timely assignment in as many cases as possible of an advocate who has a good prospect of actually conducting the trial. There was some consensus among the defence practitioners I consulted that advocates on both sides should be assigned about two weeks before the Plea and Case Management Hearing. This would work only if the CPS played its part, and if there was greater certainty over trial dates. To make best use of court time, some flexibility over the scheduling of trials is inevitable, but the "warned list" system as it operates in most parts of the country makes it very hard for advocates to plan their diaries, and increases the likelihood of changes of representative at the last minute. Sir Brian Leveson's review of practice and procedures in the criminal courts provides an opportunity to consider these issues more fully (section 7).

The longer term

There are longer term trends and forces at work which could have profound implications for the future of criminal practice in the legal profession.

The solicitor side of the profession faces a period of upheaval following the legal aid changes, which will probably involve substantial consolidation and the

emergence of fewer, larger criminal practices. This will not be easy, but the general character of the change is reasonably well understood (paragraphs 9.2 and 9.3).

The future of the self-employed Bar is less clear. If the trends described here continue unabated, the Bar will undertake a diminishing share of the available work. The intake of younger barristers will decline further, and they will find it even harder to get the early experience of simpler work necessary to build skills. Against that, there are some signs that the tide away from the self-employed Bar may be turning, or be capable of being turned. But this is by no means assured, and if - as appears to be the case - the Bar itself lacks confidence in the future of criminal work, or willingness to adjust to compete for it, the continuation of recent trends will become a self-fulfilling prophecy. In that case, as the present generation of experienced criminal barristers moves towards retirement, concerns about the future "talent pipeline" for criminal QCs and judges are not, in my view, fanciful (paragraphs 9.4 to 9.11).

This matters, because the particular strengths of the English and Welsh criminal Bar are a substantial national asset, which could not easily be replicated. There is also a distinct national interest in having sufficient top-end advocates to undertake the most complex and serious trials, and senior judges with deep criminal experience.

Attempting to turn the clock back, for example by restoring exclusive rights of audience in the Crown Court, would be neither feasible nor desirable. Solicitor advocates are a valuable and established part of the scene. The sensible approach is to invest in their skills and professionalism (paragraphs 9.12 and 9.13).

It may, however, be worth looking more radically at the future structure of this part of the legal profession. In paragraph 9.18, in the hope that it will stimulate debate within the profession and with its regulators, I describe a possible model in which the decision to become a specialist advocate would be taken later in a lawyer's career; a smaller criminal Bar would concentrate on cases where specialist advocacy skills were most evidently required; and early advocacy experience would be obtained elsewhere.

The potential advantages of such a model are that the distribution of work between the two branches of the profession would be clearer and less contested; young criminal practitioners would be called to the Bar with some previous advocacy

experience; and the problem of over-provision on the BPTC and indebtedness among its disappointed graduates might be reduced if not removed altogether.

The Lord Chief Justice has encouraged the criminal Bar to consider where it wishes to be in ten years time. Such a reappraisal of the future of the criminal Bar is, in my view, urgently needed. The two broad avenues of development described in this report - adjustment of the business model to compete for legal aid work on a more level playing field, and restructuring as a smaller, more specialist resource - may not be the only possibilities. But simply carrying on as at present, in an effort to keep intact, in radically changed conditions, every aspect of the model as it existed many years ago, does not seem to me to be a viable option (paragraphs 9.14 to 9.22).

Recommendations

1. The implications for the legal profession of the trends in advocacy described in this report are potentially profound, and - notwithstanding the strong feelings that they arouse - I would urge the profession to seek consensus on how best to address them (Conclusion).
2. There should, over time, be developed a common training expectation of all those practising as advocates in the Crown Court, which need not be as demanding as the Bar's, but should substantially exceed the current requirement on solicitors seeking higher court rights (paragraph 4.6).
3. In following up the Legal Education and Training Review, the profession and the regulators should consider taking the limited advocacy element out of the existing Legal Practice Course and instead develop a more substantial elective advocacy course for trainee (or indeed qualified) solicitors minded to pursue a career in advocacy, completion of which could in future be mandatory for those seeking higher court accreditation (paragraph 4.7).
4. The SRA and the Law Society should consider proportionate ways of replicating for higher court solicitor advocates the supervised experience which pupillage provides for barristers, including early exposure and practice (paragraph 4.8).

- 5. The profession should work together, with the regulators, to develop common minimum expectations for continuous professional development training (CPD) for advocates in the Crown Court. A common approach could build on the excellent work already being done by the Advocacy Training Council (ATC), including the ATC's Advocacy Gateway, the Solicitors Association of Higher Court Advocates (SAHCA) and the Law Society's Advocacy Section (paragraph 4.9).**
- 6. The profession should consider the early adoption for defence advocates of a "ticketing" system, of the kind already in place for the judiciary and the CPS, under which those appearing in rape and sexual abuse cases must demonstrate that they have undertaken relevant training. To go further by extending such a requirement to the generality of cases involving vulnerable witnesses would have wider implications, but would make sense in principle, and is something the judges, the CPS and the profession might wish to consider (paragraph 4.11).**
- 7. The SRA and the Law Society should consider what further regulatory or other steps could be taken to clarify and reinforce the professional responsibilities of solicitors in the assignment of advocates and in giving advice on plea (paragraph 5.29).**
- 8. The Government should consider whether the LAA should maintain a list of approved defence advocates in publicly funded cases, on the model of the CPS's panel of barristers briefed to represent the prosecution (paragraph 5.30).**
- 9. The Government should reflect on the implications for the legal aid system of contracting directly with the Bar for defence representation, including the weight given to capability in advocacy, and consider the desirability and feasibility, in future contracting rounds, of separating police station advice and post-charge representational work (paragraph 5.43).**
- 10. In his review of practice and procedures in the criminal courts, Sir Brian Leveson may wish to consider whether there are changes in Court Rules or judicial direction which would help to ensure the timely assignment of advocates, and the impact of the "warned list" system of scheduling trials on the consistency and quality of advocacy (paragraph 7.12).**

- 11. The Government, the regulators and the representative bodies should consider whether more could be done, without over-elaboration, to develop relevant data on criminal advocates and advocacy (paragraph 10.2).**
- 12. They should also look kindly on the case for research in this area, both on the working of the advocacy market – which would repay rigorous economic analysis – and on the vexed question of quality (paragraph 10.3).**

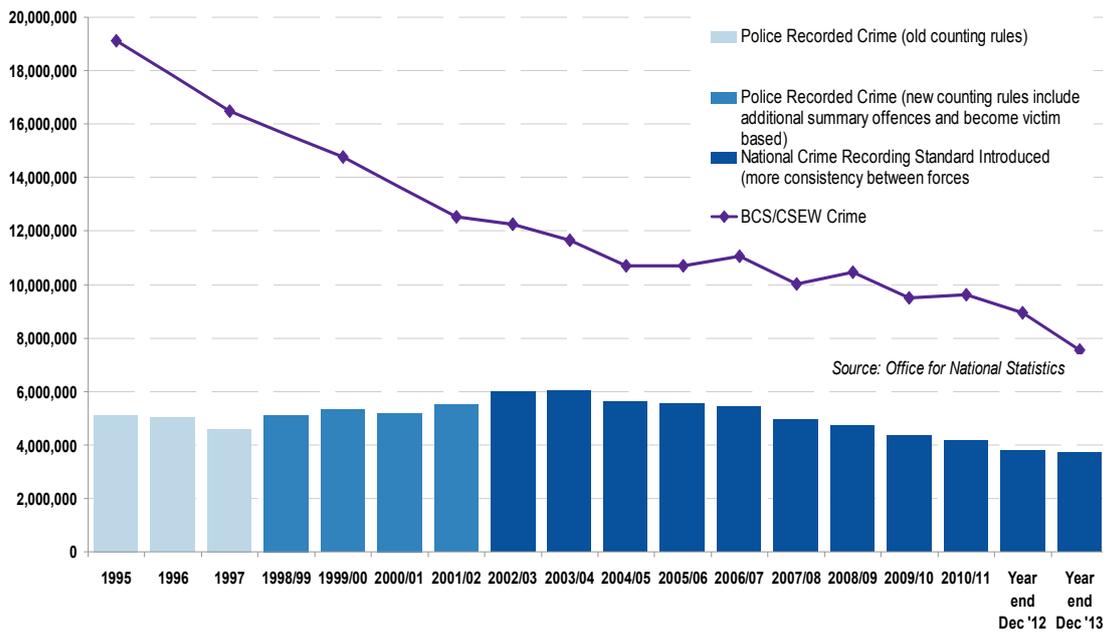
1. The landscape of criminal advocacy

- 1.1 Until solicitors first gained the right to appear in the Crown Court in 1994, all prosecution and defence advocacy in the higher criminal courts was undertaken by members of the Bar. In the magistrates' courts and the predecessors of the Youth Court solicitors could and did represent the majority of defendants, but it was not uncommon for barristers to appear, particularly in cases which were triable in the Crown Court and which could at that time be the subject of substantial committal proceedings in which much of the evidence was heard by magistrates. Many of the most senior members of today's criminal Bar gained their early experience in the magistrates' courts. Most of the work was, as now, publicly funded, but legal aid fee rates were significantly higher.
- 1.2 The extension of Crown Court rights of audience to solicitors following the Courts and Legal Services Act 1990 does not appear to have had much immediate impact on the distribution of advocacy work between the two sides of the profession. A number of the most experienced and capable solicitor advocates were able to carry on representing their clients after committal to the Crown Court, and to develop their advocacy skills in that rather different environment. But as recently as 2006-07, barely 5% of publicly funded Crown Court advocacy was undertaken by solicitors (see figure 4 below).
- 1.3 There have however been other trends at work over the period. Crime has fallen, both as recorded by the police and as estimated by the Crime Survey for England and Wales. Between 2003 - 04 and 2013 recorded crime fell by 38%. The most recent Crime Survey for England and Wales suggests that crime fell by 60% between 1995 and 2013 to the lowest level since the survey began in 1981. The proportion of crimes resulting in prosecutions and court appearances has also been falling, in part because of the development of more informal ways of dealing with offenders. The number of defendants proceeded against for indictable offences in the magistrates' courts fell by 23% between 1995 and 2013. In the Crown Court, as

will be seen from figure 2, the position is more complicated, but there are signs of a reduction in business since 2010⁴.

Figure 1: Crime as recorded by the Crime Survey of England and Wales, and Police Recorded Crime

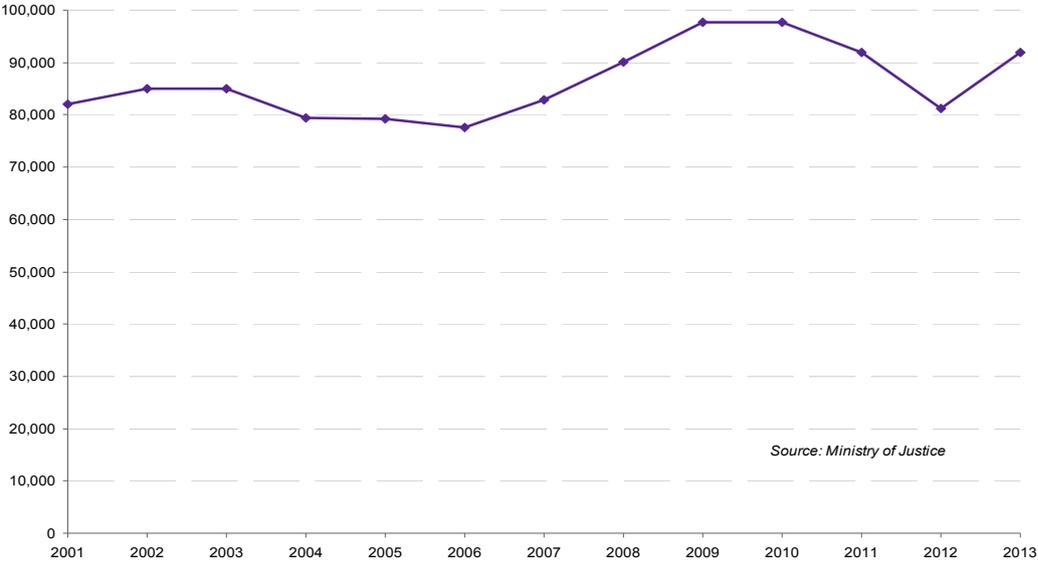
1995 to year end December 2013



⁴ 2013 wasn't a typical year because of the abolition of committal hearings in 'either way' cases which commenced on 28th May 2013. This may have led to a significant, one-off increase in receipts as cases reached the Crown Court quicker than would otherwise have been the case, and could account for most of the 2013 increase.

Figure 2: Crown Court receipts for cases committed or sent for trial

-2001 to 2013

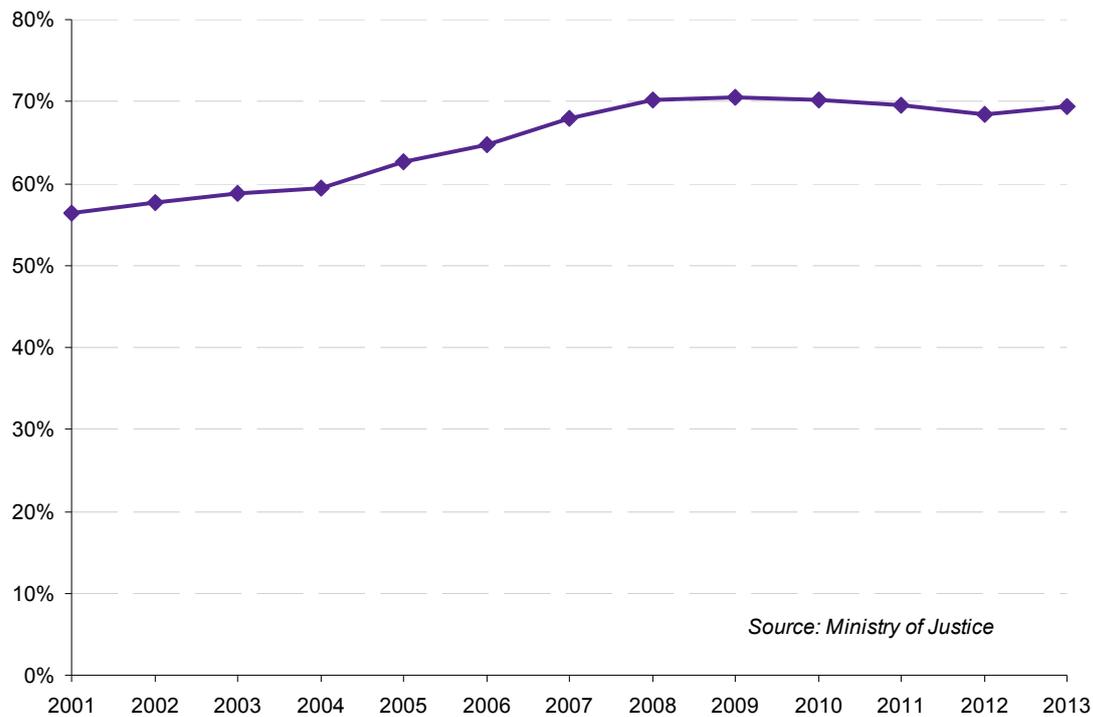


1.4 The court system has become more efficient at discharging its business. Although by no means perfect, the system is appreciably less beset by delay and repeated adjournments than when I was familiar with it in the 1980s. Procedures have been simplified, notably by streamlining the process for delivering indictable cases to the Crown Court. Judges and magistrates have been ready to assume a more assertive role in ensuring that cases are ready for trial. Some progress has been made in encouraging early guilty pleas and reducing the incidence of cracked trials. Guilty plea rates⁵ in the Crown Court increased from 56% in 2001 to 69% in 2013.

⁵ The guilty plea rate is the number of defendants pleading guilty to all counts as a proportion of all defendants with a plea. It includes those who change their plea from not guilty to guilty during a case

Figure 3: The guilty plea rate in trial cases in the Crown Court, for England and Wales

2001 to 2013



1.5 These are all welcome developments, but they have combined to reduce the pool of work available to advocates.

1.6 Over the same period the legal aid system has developed in ways which have had an impact on advocacy. In the Crown Court, following Lord Carter's report in 2006 on his review of legal aid procurement⁶, the introduction of the Litigator Graduated Fee Scheme (LGFS) and amendments made to the Advocates Graduated Fee Scheme (AGFS), and of contracts with providers of duty solicitor and litigation services, mean that, for most cases, there is a fixed fee payable to the solicitor to cover all defence costs, including advocacy. Under pressure to reduce public expenditure, successive Governments have significantly reduced legal aid fees. AGFS fees for criminal work have, broadly speaking, fallen by 21% (37% in real terms) since 2007⁷, with a further

⁶ Legal Aid a market-based approach to reform – Lord Carter Review of Legal Aid Procurement July 2006

⁷ Prof Martin Chalkley – Bar Council Response to Transforming Legal Aid: Next steps Consultation Oct 2013

5-6% now in the pipeline, although this further cut is not due to be implemented until 2015.

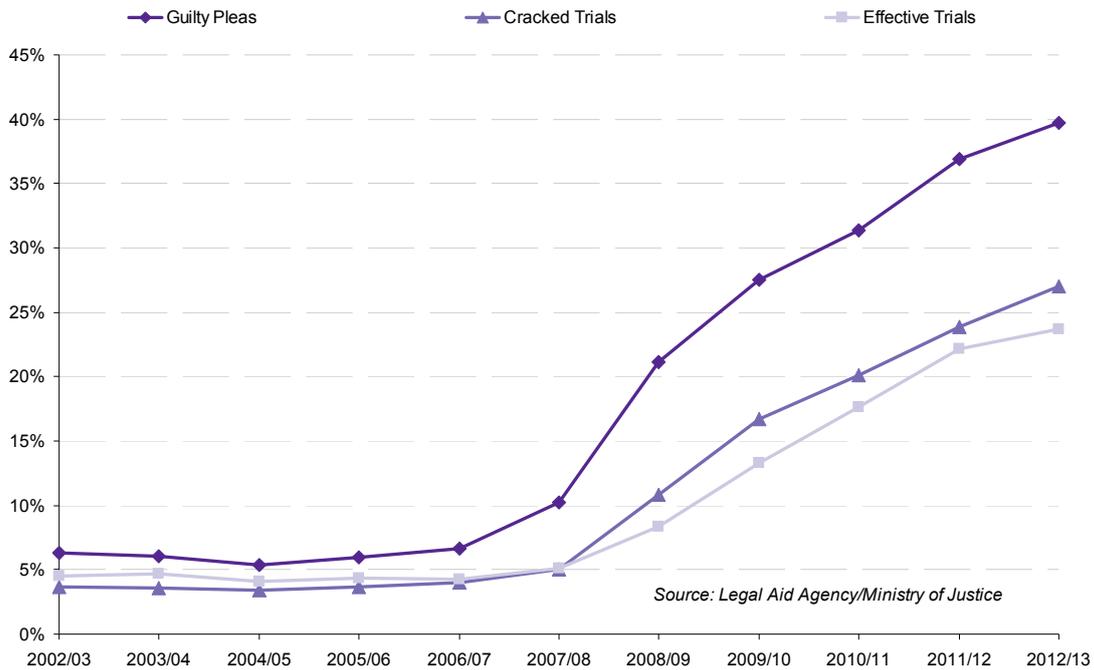
1.7 I shall explore in more detail in sections 5 and 6 the impact of these changes on the provider market, which varies in different parts of the country. In brief summary, there has been substantial growth in the number and scale of in-house advocacy departments within solicitors' firms, beyond anything experienced in the years immediately after the liberalisation of rights of audience, employing solicitor advocates and in some cases employed barristers. Of around 11,000 solicitors providing criminal advocacy services, the number of solicitor advocates with higher court rights in crime was 4,815 in February 2014, of whom 3,284 worked exclusively in crime. This compares with 1,303 and 913 respectively in 2003⁸. The number of self-employed barristers may have fallen, but not by nearly as much as the increase in solicitor advocates.

1.8 Reflecting this, there has been a marked shift in the distribution of defence advocacy work in the Crown Court between the two sides of the profession.

Figure 4: The proportion of publicly funded Crown Court defence advocacy undertaken by solicitor advocates, for effective trials, cracked trials and guilty pleas

2002/03 to 2012/13

⁸ Data SRA



From 2006-07 onwards, there has been steady growth in the proportion of publicly funded defence work conducted by solicitor advocates. In 2012-13, they undertook about 24% of contested trials in the Crown Court, and about 40% of those in which the accused pleaded guilty. Both of these statistics are on a marked upward trend which shows no sign of flattening. In the magistrates' courts, the great bulk of advocacy work is undertaken by solicitor advocates, and in some parts of the country barristers in effect represent only those who have the means to fund their own defence.

- 1.9 The only other provider in the market is the Public Defender Service (PDS), which was established in 2001 and is a department of the Legal Aid Agency (LAA). It works alongside private providers in four locations, providing a full range of defence services including advocacy and employs police station representatives, solicitors and barristers. Nationally, it only accounts for approximately 4% of publicly funded advocacy work in the magistrates' court, but its location within the LAA gives Government a particular perspective on how the market is working.
- 1.10 On the prosecution side, there has been a similar trend towards the use of in-house advocates. In the early days after its establishment in 1986, and even after the grant of Crown Court rights of audience to solicitors, the Crown Prosecution Service (CPS), generally looked to the self employed Bar to undertake Crown Court

advocacy. From about 2005, CPS management built internal in-house Crown Court advocacy capacity, both to achieve financial savings and as a means of controlling quality. The CPS now has 2,607 employed prosecutors, of whom about 500 are Crown Advocates, including a number of barristers, and - although there has been some recent reduction in in-house strength and signs of a move back towards the self-employed Bar and independent agents - in 2012-13 in-house CPS advocates prosecuted in approximately 45% of Crown Court hearings. Self employed advocates continue to retain 71% of the value of the work available, reflecting the fact that they are generally still the first choice for more complex cases.

- 1.11 The landscape is therefore one which has been changing rapidly in recent years and is still very fluid. There is substantially less advocacy work to be done. Its character is different, with more straightforward cases and fewer contested trials. In the publicly funded sector, it is less well paid than in the past. There are many more qualified people available than there is work for them to do. The question is how much that matters, and in particular how it impacts on the quality of advocacy and, therefore, the quality of justice.

2. Quality

- 2.1 If hard facts about advocacy in the criminal justice system are difficult to come by, reliable information about its quality is even more elusive. There is remarkably little research evidence.
- 2.2 In 2009, the Quality Assurance Scheme for Advocates research pilot undertaken by Professors Richard Moorhead and Ed Cape⁹ found that there were high failure rates in the advocacy skills of those practitioners assessed in certain types of cases. However these findings were based on a relatively small number of practitioner assessments, and it would be a mistake to over-rely on them.
- 2.3 The only other relevant study relates to the quality of prosecution advocacy and case presentation, and is therefore outside my terms of reference. In a thematic review in 2012¹⁰ which is again based on a small sample, the Crown Prosecution Service Inspectorate found that although there was no evidence of significant advocacy failings and improvements had been made in areas such as cross-examination there was evidence of a decline in the quality of some elements of in-house CPS advocacy, with failures by Crown advocates to challenge inadmissible and prejudicial evidence, a lack of preparation and over-reliance on case notes.
- 2.4 In 2011, the Bar Standards Board (BSB) commissioned ORC International¹¹ to undertake a perceptions study of the standards of criminal advocacy. It included over 750 online surveys completed by criminal barristers, legal executives and lay justices and 16 in depth interviews. The conclusions were at a relatively high level of generality and might be argued to reflect the particular perspectives of those completing the survey, who do not appear to have included any solicitors. Over half of respondents felt that existing levels of underperformance in criminal advocacy were having an impact on the fair and proper administration of justice, with 31% rating the impact as "very high", while a quarter felt that criminals advocates "very frequently" acted beyond their competence.

⁹ Legal Services Commission – Quality Assurance for Advocates – Moorhead and Cape Cardiff University Nov 2009

¹⁰ HMCPSI – Follow up report of the thematic review of the quality of prosecution advocacy and case presentation

¹¹ Perceptions of Criminal Advocacy March 2012- BSB and ORC International

- 2.5 Those who submitted evidence to this review offered a wide variety of views on the question of quality. The Council of Her Majesty's Circuit Judges reported a widespread view among their members that the level of basic competence displayed by an increasing number of advocates in the Crown Court had diminished in recent years, which was, they said, a matter of "serious concern to the judiciary". There was, in particular, a risk that in smaller solicitor practices the employed in-house advocate would for commercial reasons retain cases that were beyond his or her expertise. They believed there was evidence that this was currently happening. The Bar Council concentrated on the strengths of the self-employed Bar, but observed that some in-house [solicitor] advocates are "pushed by their employers to take on cases which are far beyond their experience and of a difficulty in excess of their talents".
- 2.6 The Law Society, on the other hand, pointed out that complaints to the Legal Ombudsman relating to crime are a small minority of the total and rarely lead to significant disciplinary action. They concluded that "there may well be scope for improvements in quality standards and support for advocates, but these should be based on evidence and should be proportionate to the problem and the means of practitioners".
- 2.7 In the course of my visits to Crown Court centres, I met groups of circuit judges and took the opportunity to ask about the quality of advocacy. With the exception of one court centre (where the view was more positive), there was a strong and consistent view that, although the best was still very good indeed, among both barristers and solicitor advocates standards had in general declined; that it was not uncommon for advocates (for both the prosecution and the defence) to be operating beyond their level of competence; and that judges frequently felt concern about "inequality of arms" between prosecution and defence if one side or the other was inadequately represented. Most of those to whom I spoke were at pains to stress that there were some very capable solicitor advocates, and some very poor barristers; but the main area of concern was that identified above - relatively inexperienced solicitor advocates being fielded by their firms (for what were presumed to be commercial reasons) in cases beyond their capability. I met fewer district judges but they made similar points about an overall reduction in quality. They noted that this was true of both barristers and solicitor advocates, observing that in many instances advocates were being fielded in cases for which they lacked the necessary experience. They also made the point (which was re-iterated in several of my discussions with

practitioners) that the functioning of the criminal justice system as a whole depended on the dedication and good will of those operating within it. The Magistrates' Association also commented on the overall decline in quality as they saw it, attributing some of this to remuneration rates, limited funding for training and also an overall lack of preparedness.

- 2.8 Among those I consulted within the profession, there was also a distinct view, strongly held by some, that reductions in legal aid fees were in themselves driving down quality, by disincentivising the more capable advocates, who were turning to other areas of the law, and exacerbating the other trends noted above.
- 2.9 Among the regulators, there were different views. The Legal Services Board (LSB) commented that "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". The BSB drew attention to their survey quoted above, and remarked that it was clear "that the risks in relation to standards are in fact manifesting in underperformance in criminal advocacy". In my discussions with the Solicitors Regulation Authority (SRA) they recognised the existence of concerns about the quality of advocacy across the criminal market as reflected in the studies referred to above and in judicial feedback. However, the SRA felt the evidence base stopped well short of indicating that solicitor advocates were of poorer quality than the self-employed Bar.

Quality Assurance Scheme for Advocates (QASA)

- 2.10 The regulators all acknowledged the absence of hard evidence about advocacy quality. To address this, they pin their hopes on the Quality Assurance Scheme for Advocates (QASA), now being introduced. This had its origins in Lord Carter's report cited above, in which he noted that, while there were quality assurance mechanisms in place for legal advice and litigation, there was limited or no requirement for advocacy other than reactive, complaints based mechanisms and traditional professional training and entry regimes. The Carter report recommended the development, for all advocates working in the criminal, civil and family courts, of a

"proportionate system of quality monitoring based on the principles of peer review and a rounded appraisal system".

- 2.11 The QASA scheme was developed by the three 'hands on' regulators (the BSB, the SRA and ILEX Professional Standards (IPS)) under the supervision of the LSB. It is, in essence, a means of continuously accrediting advocates at levels of competence (1 to 4), which they themselves initially assess, subject (in relation to level 1, practice in magistrates' courts) to completion of the education and training qualifications to enter their respective professions, and (in relation to solicitors wishing to practise in the Crown Court - levels 2-4) to their having been granted higher rights of audience. The conduct of trials in the Crown Court at level 2 and progression to the more complex cases (levels 3 and 4) is then subject to judicial evaluation by observation in live cases in the Crown Court. The scheme is not designed or intended to assess quality in any absolute way, simply to confirm (or not) the accreditation of advocates as having met the minimum standards for the level at which they are practising.
- 2.12 The QASA scheme is favoured by all the regulators, as providing for the first time a relatively objective means of assessing quality, providing commonality of standards as between advocates, and informing the debate with some hard information. Despite the fact that they were consulted extensively during its preparation, it is however unpopular with the profession. The Criminal Bar Association (CBA) supported an application for judicial review against the LSB's decision to approve the scheme, arguing *inter alia* that the use of judicial evaluation during live criminal trials to assess advocates created a "clear and irreconcilable conflict of interest" for those advocates, was inconsistent with judicial independence and exposed individual judges to the possibility of civil suit.
- 2.13 There were echoes of these concerns in many of the conversations I had with individual criminal barristers (and indeed some solicitor advocates), who expressed fears that they would be caught between, on the one hand, the instructions of the client, and on the other, the risk that the assessing judge would form an adverse impression of their advocacy skills if they followed those instructions to the letter. The point was also made that an independent advocate sometimes needs, in the interests of his or her client, to conduct the case in a way that might not please the judge.

- 2.14 The High Court rejected the CBA-supported application for judicial review, finding that the scheme was lawful and fell well within the legitimate exercise of the powers of the LSB and the regulators. The Court also offered several suggestions for improving the scheme. The plaintiffs have applied for leave to appeal to the Court of Appeal, and at the time of writing this report the case is therefore still *sub judice*.
- 2.15 In their submission to this review, the Law Society described the QASA scheme as flawed, pointing to the fact that judges are not always well placed to judge an advocate's performance and to practical difficulties in advocates obtaining the number of assessments they need. They were "not opposed to a proportionate, evidence based accreditation scheme for advocates ", but were not convinced that QASA matched that description. The Bar Council made the different point that QASA is only designed to ensure that advocacy is adequate and not that it is of a high standard, which by implication they regarded as a more important test.

3. Training

- 3.1 One proposition on which respondents to my Review could agree was that advocacy is a specialist skill, and that good advocates require both training and regular exposure to advocacy practice in court. Many made a distinction between the nature and level of skills required in the magistrates' courts and in the Crown Court, although others felt that this might be overstated. The general view was well captured by the Council of the Inns of Court ('COIC') in their submission to me, which observed that in order to be effective, an advocate needs to be articulate, persuasive and concise, well organised and efficient. They need to be able to undertake cogent legal and factual analysis, using skeleton arguments, oral examinations, examination-in-chief and cross examination in order to develop reasoned arguments. The importance of preparation to the quality of advocacy in court was also heavily underlined by practitioners, the judiciary and those involved in advocacy training.
- 3.2 Current arrangements for training advocates across the respective branches of the profession are described in annex C. The core training experience for barristers is the Bar Professional Training Course (BPTC), a 30 week postgraduate course of around 1200 hours of learning which focuses entirely on the core skills that an advocate would require and devotes at least 25% of the time to formal advocacy assessment¹². Those successfully completing the course must then, with few exceptions, undertake 12 months pupillage under the supervision of an experienced barrister. The first six months is non-practising and is spent shadowing the supervisor and undertaking the Pupils' Advocacy Course. Subject to the acquisition of a provisional qualifying certificate, the second six months can involve the exercise of rights of audience in the lower courts, leading - if successful - to the award of a full qualifying certificate.
- 3.3 For solicitors, the Legal Practice Course, which is a 12 month postgraduate course covering the full range of skills and knowledge to practise as a solicitor, includes a compulsory advocacy module which - depending on the provider - runs to between

¹² The BPTC – Course Specification & Guidance Handbook 2013-14 – Bar Standards Board

four and fifteen hours. The Professional Skills Course undertaken as part of the training contract also includes an advocacy element of eighteen hours¹³. Those successfully completing both courses automatically have rights of audience in the magistrates' courts. To be accredited for higher court rights of audience, solicitor advocates must undergo an assessment comprising a two and a half hour examination, the writing of a trial strategy plan, and 40 minutes practical advocacy. There is a related training course, offered by a range of providers, of two to four days' duration, but this is not compulsory.

- 3.4 The requirements for continuous professional development (CPD) vary between the different branches of the profession. For barristers, there is 9 hours of compulsory advocacy skills training and 36 hours of accredited CPD focusing on advocacy and ethics, to be completed over the first 3 years after qualifying. Thereafter, barristers are expected to undertake 12 hours CPD a year. For solicitors with higher court rights, there is a requirement to complete at least 5 hours of CPD related to advocacy in each of the first 5 years after accreditation, as part of the compulsory 16 hour CPD requirement.
- 3.5 There is also relevant training - a six day training and assessment module - provided by CILEX for Chartered Legal Executives who wish to practise advocacy in the magistrates' courts. Legal Executive advocates in the lower courts are still relatively few in number (56 nationally¹⁴) but the numbers are rising.
- 3.6 Post-qualification training is provided in a number of different ways. The Inns of Court have been active, through the ATC, in developing training courses for pupils and practitioners, involving judges and experienced advocates on a *pro bono* basis. The President of the Inns of Court and the Chairman of the ATC described to me an impressive programme of such courses, which in the criminal field includes important areas of current concern, such as the handling of vulnerable witnesses. My team had the opportunity to observe a training session on the latter, which as with other structured advocacy training of this kind followed the Hampel method. This requires advocates to perform advocacy in a simulated courtroom environment in small groups in front of their peers. Experienced trainers, some of whom are

¹³ SRA Professional Skills Course – Course Structure, provider authorisation and course accreditation

¹⁴ Figures – Chartered Institute of Legal Executives April 2014

members of the judiciary, will observe a participant's performance and then use a 6 step procedure to identify and remedy a particular issue or concern with the performance. This approach of identifying a specific issue, demonstrating how it can be addressed and providing the individual with an opportunity to practise a second time having reflected on this feedback is widely recognised - and appeared to my team – to be a very successful approach.

- 3.7 My team also had the benefit of attending an impressive training session delivered by the Solicitors Association of Higher Court Advocates (SAHCA) which focused on essential criminal advocacy training. This also utilised the Hampel method. When I met them, SAHCA told me that they now run eight such sessions a year, at weekends, throughout England and Wales. The recently established Law Society Advocacy Section told me that they too were aiming to provide a range of training opportunities for solicitor advocates. I sense that, despite these welcome developments, there is an underlying need for more CPD training for solicitor advocates than is currently available, and will return to this later.
- 3.8 Legal education and training have been the subject of a succession of reviews in recent years. The Legal Education and Training Review (LETR)¹⁵, which reported last year, was undertaken jointly by the SRA, the BSB, and IPS. It covered the whole range of legal education and training requirements, and was an attempt to develop an evidence based set of principles which would inform a more substantial redesign by the individual regulators. It concerned such generic issues as transferability of qualifications and new ways of training. With guidance from the LSB, the "front - line" regulators are now following up on the report.
- 3.9 The LETR report touched on advocacy training and - in part because of doubts which had been expressed about the quality of advocacy training for solicitors - recommended that "the structure of the Legal Practice Course stage 1 [for intending solicitors] should be modified with a view to increasing flexibility of delivery and the development of specialist pathways". The report also observed that "the adequacy of advocacy training needs to be addressed".

¹⁵ <http://letr.org.uk/>

- 3.10 There have also been substantial reviews in recent years on access and training for the Bar by Working Groups under Lord Neuberger of Abbotsbury (in 2007)¹⁶ and Derek Wood QC (in 2008¹⁷ and 2010¹⁸). The Neuberger Review examined all aspects of entry to the Bar from promotional activity in schools through to selection for pupillage and tenancy, with a particular focus on diversity and ensuring access from all social backgrounds. The 2008 Wood Review (discussed in more detail in section 6 below) focussed on access to the then Bar Vocational Course (now the BPTC), entry standards and whether there were ways in which numbers taking the course could be better matched to likely availability of pupillages. It broadly endorsed the course content, as it then stood, and the quality of teaching.
- 3.11 In 2010, the Law Society commissioned a report from an independent consultant, Nick Smedley, on the arrangements for training solicitor advocates¹⁹. Although unpersuaded that standards of advocacy by solicitors were consistently lower than those of barristers, Mr Smedley found that there was a strong case for significantly strengthening the training and methods of qualification for solicitors wishing to exercise higher rights as well as improving arrangements for post-qualification CPD. His recommendations for mandatory CPD for advocacy skills of a given number of hours a year and for the setting up of a new section within the Law Society to represent Higher Court Advocates have been adopted but other, more radical, recommendations, to bring HCA training more into line with the BPTC and to replicate for newly qualified solicitor advocates the mentoring arrangements inherent in pupillage, have not been pursued.

¹⁶ Entry to the Bar – Working Group – Lord Neuberger 2007

¹⁷ Review of the Bar Vocational Course – BSB D Wood QC 2008

¹⁸ Review of Pupillage – Working Group Report- D Wood QC 2010

¹⁹ Solicitor advocates: Raising the Bar – Law Society – Nick Smedley 2010

4. Reflections on quality and training

Quality of advocacy

- 4.1 I have set out in the two preceding sections - quite sparsely but with supporting detail in the annexes - what I believe I have heard in the last six months about the closely related issues of quality and training. Assessing from this what is actually going on, and why, is complicated by three things. The first is that many criminal practitioners are so enraged by reductions in legal aid fees that they are inclined to attribute any reduction in quality to that source. The second is that there is undeniably an element of inter-professional rivalry at play, which at the very least makes solicitors suspicious of criticism from the Bar and (given the background of most judges) of judicial dissatisfaction with solicitor advocates. And the third is that there is genuinely no empirical evidence on which to base a confident assessment.
- 4.2 On the other hand, **the preponderant view in discussions throughout my programme of meetings and visits, with few exceptions, has been that there are grounds for concern about quality. The views expressed by circuit judges (including some with long experience as solicitors) and district judges, which I have summarised in paragraph 2.7, were remarkably consistent and strongly expressed. It would in my view be a mistake to discount them.**

Mandatory training

- 4.3 I am also struck, as others have been, by the disparity between the mandatory training expected of solicitors and barristers. To practise as an advocate in any criminal court, a barrister will need to have undertaken around 120 days of specific advocacy training pre-qualification, plus pupillage. A qualified solicitor can practise in the magistrates' courts, and (subject to obtaining higher court rights accreditation) in the Crown Court with as few as 22 hours such training. The CPD requirements also expect more of barristers.
- 4.4 There is of course more to competent advocacy than training. Many solicitor advocates in the Crown Court have extensive experience at the lower level, and the Bar themselves emphasise the importance of constant practice to build skills. Also, solicitors' training tends to be funded by employers and in the current economic

climate there is an understandable reluctance to add to business costs by adding to the training requirements.

- 4.5 On the other hand, **in a professional specialism of this kind it is no reflection on the many highly capable solicitor advocates to observe that the disparity in training requirements is almost impossible to defend.** Nor is it ultimately in the interests of solicitor advocates, many of whom told me that they would welcome a more rewarding and demanding training experience. The Bar gains in reputation as much from the acknowledged excellence of its training as from the quality of its practitioners.
- 4.6 **My main recommendation in this area is therefore that there should, over time, be developed a common training expectation of all those practising as advocates in the Crown Court, which need not be as demanding as the Bar's, but should substantially exceed the current requirement on solicitors seeking higher court rights. Ultimately, these are matters for the profession and its regulators to address in following up the LETR, but I offer below a possible approach for their consideration.**
- 4.7 **First, in following up the LETR's recommendation about the development of specialist pathways, the opportunity should be taken to take the limited advocacy element out of the Legal Practice Course and instead develop a more substantial elective advocacy course for trainee (or indeed qualified) solicitors minded to pursue a career in advocacy, completion of which could in future be mandatory for those seeking higher court accreditation.**
- 4.8 **Second, the SRA and the Law Society should consider proportionate ways of replicating for higher court solicitor advocates the supervised experience which pupillage provides for barristers, including early exposure and practice.**
- 4.9 **Third, the profession should work together, with the regulators, to develop common minimum expectations for CPD for advocates in the Crown Court. There is no rational basis for different requirements for the two sides of the profession once they are practising alongside each other in the higher courts, and a good deal to be gained, in terms of mutual understanding, from a common approach. This could build on the excellent work already being done by the ATC, SAHCA and the Law Society's Advocacy Section, including the**

ATC's Advocacy Gateway.

- 4.10 One issue that has been raised by many of those to whom I have spoken is the handling of vulnerable witnesses and defendants. Questioning vulnerable people in court calls for specific skills. The advocate needs to handle the witness in a sensitive and appropriate manner, while still seeking to elicit the information necessary to advance the client's case. This is true whether the client is the prosecution or the defence. Some of the best CPD training we heard of or observed was in this area. The ATC is playing a leading part, through cross-professional training events, in which judges are involved (including as participants), and by providing easy access to practical advice, guidance, toolkits and training opportunities through the online Advocacy Gateway.
- 4.11 A question which arises is whether such training should be obligatory for those acting in trials involving vulnerable witnesses. The CPS already operates a "ticketing" system under which those appearing in rape and sexual abuse cases must demonstrate that they have undertaken relevant training. The judiciary are introducing a similar system for trial judges in such cases. **I can see no reason why such a requirement should extend to the judiciary and the prosecution but not to the defence, and recommend that the profession consider its early adoption. To go further by extending such a requirement to the generality of cases involving vulnerable witnesses would have wider implications, but would make sense in principle, and is something the judges, the CPS and the profession might wish to consider.**

Regulation

- 4.12 A number of those from whom I have heard have commented that it makes no sense for the practice of advocacy in the courts to be regulated by two different regulators. The BSB argued that the training, infrastructure and dedicated regulation that have fostered the Bar's high standards should be applied to all criminal advocates. This might be achievable by cooperation between regulators, but the alternative of activity-based regulation by the BSB should, they said, also be considered.

4.13 Since then, the Government has announced that, in the light of its recent review²⁰, it does not intend to bring forward proposals for change in the regulatory landscape. This means that, for the time being, the present structure of regulation, based largely on the two traditional branches of the profession, will continue. Within that structure, the implications for individual advocates (and in particular solicitor advocates if the decision were taken to put the task in the hands of the BSB) of a single regulator for advocacy are complex, and would warrant more thorough analysis than has been possible in the course of this review. Many solicitor advocates do much more than advocacy, and for as long as there was an SRA it would be logical for their professional conduct to be regulated by it.

4.14 **The fact that the training and accreditation regimes for advocates have developed separately and in completely different ways in the various branches of the profession is, however, a real weakness. There is already a growing level of consultation between the BSB and the SRA. In the absence of any more radical reorganisation of regulatory functions, there is in my view a strong case for deepening this cooperation, and for developing, over time, a more consistent training and accreditation framework for criminal advocates, irrespective of their professional origins.**

QASA

4.15 On the debate on QASA, it is difficult for me to comment on a partially implemented scheme which is still the subject of outstanding legal proceedings. I respect the concerns about the potentially false position in which judicial assessment in live trials might put both judges and advocates. **I find it hard to assess how well-founded these concerns will prove to be, and am more inclined than some to have confidence that judges will in practice be able to distinguish poor advocacy from the carrying out of wrong-headed client instructions. The suggestions made by the High Court in the judicial review hearing would help mitigate any risk, and I hope they will be adopted.**

²⁰ <https://consult.justice.gov.uk/digital-communications/legal-services-review>

4.16 Some of the opposition is, I sense, to the very idea of assessment, and is reminiscent of the line taken by the teaching profession on the same issue. **I have no doubt of the strength of the case for some kind of quality assurance scheme, both to reassure the public that there is a means by which advocates can be denied the opportunity to act beyond their competence, and to encourage continuous professional development.** Nor have I found any evidence to support the suspicion that Government sees the regulators' QASA scheme as a route to competitive tendering for criminal legal aid work by price, as originally envisaged by Lord Carter.

4.17 **If, as I recommend, a common framework and set of expectations for CPD training for advocates in the Crown Court can be developed, there could be built into the CPD programme an element of independent expert assessment (perhaps by serving or retired judges), which I could imagine in time supporting a form of accreditation different from QASA.** Some of those to whom I have spoken have argued for a scheme on these lines, and I can see its attractions; but **it would be a matter for the profession and the regulators to consider at the time, and in the light of whether practitioners' fears about QASA have been borne out by experience.**

5. The market in defence criminal advocacy

- 5.1 I deal in this section with the core issues of how the defence advocacy market works; the relevance of legal aid structures; whether the market is truly competitive; and whether there are steps that could be taken to make it more so. The prosecution is, of course, also relevant, to the extent that the CPS employs self-employed barristers as agents. I touch on this in paragraph 1.10 above. Section 6 looks more directly at the supply side of the equation - at movements in the number of people choosing to be advocates, or to undertake training with a view to becoming an advocate.
- 5.2 Although fewer people than in the past qualify for legal aid, it still dominates the market in defence criminal advocacy. In 2012, only 14% of defendants sent or committed for trial in the Crown Court employed their own legal representatives or represented themselves²¹. The way in which the legal aid system is structured and operates - as well as the absolute level of fees payable - therefore has a very significant impact on the advocacy market.
- 5.3 The criminal legal aid system in its current form is described below and by reference to the diagram in annex D. The LAA has contracts with about 1,600 providers, who provide duty solicitors at police stations and magistrates' courts. Hitherto, the number of duty slots has been allocated to firms on the basis of the number of accredited duty solicitors they employ. Under the plans recently confirmed by the Justice Secretary, the next round of LAA contracts will involve a smaller number of providers for duty solicitor contracts (about 525), and duty slots will be shared among contracted providers in each area, without reference to how many duty solicitors they employ.
- 5.4 In addition, if someone arrested for or charged with a criminal offence wishes to consult a legal representative of their choice, provided that representative has a contract with the LAA and they themselves meet the qualifying criteria, the advice will be covered by legal aid. (Under the new proposals, this principle will be

²¹ MoJ Data

preserved, but on the basis of a list of LAA-approved "client's choice" solicitors, who won't necessarily have LAA duty contracts.)

- 5.5 Depending on the part of the country, between 15% and 60% of those needing legal advice at police stations opt for the duty solicitor. The national average is 37%²². Others who have not engaged a legal representative before their first court appearance may opt to use the duty solicitor at the magistrates' court. The duty solicitor schemes are therefore a major determinant of choice of legal representative, and ultimately therefore of choice of advocate.
- 5.6 Once the case is in the magistrates' court, an application can be made (currently to the magistrates' court but in future to the LAA) for a Representation Order, to qualify for which a defendant has to satisfy the interests of justice test and the means test. If an Order is granted, legal aid will cover, on a fixed fee basis, a range of representative work, including advocacy. The solicitor will be able to instruct an advocate, provided the overall cost will not increase as a result. In practice, most solicitors represent their own clients in the lower court.
- 5.7 In the Crown Court, there are three main legal aid fee schemes: the Litigators Graduated Fee Scheme (LGFS), the Advocates Graduated Fee Scheme (AGFS), and the scheme for Very High Cost Cases (VHCC). Fewer than 1% of defendants²³ change their solicitor between magistrates' court and Crown Court, and very few arrive in the Crown Court without representation. Legal aid cover will normally carry over, in which case the solicitor can instruct an advocate forthwith if he or she chooses to do so. The choice of advocate has no bearing on the fee payable under the LGFS or the AGFS, which is fixed on a graduated basis related to the weight of the case and whether it involves a contested trial, a guilty plea or a "cracked" trial, that is one which has been listed for hearing but does not proceed because the defendant pleads guilty at the last minute or the prosecution presents no evidence.

²² Table 2 LAA - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238115/legal-aid-statistics-090913.pdf

²³ LAA Data

Advice on choice of advocate

- 5.8 The key decision on the choice of advocate is therefore made, if not directly by the solicitor representing the defendant, then at a point when that solicitor is effectively in charge of the conduct of the case. He or she is under a professional duty to act in the best interests of the client, and choose the advocate best able to represent those interests. The section of the SRA's Code of Conduct for solicitors, entitled "You and Your Client" includes as an outcome to be sought: "Clients are in a position to make informed decisions about the services they need, how their matter will be handled, and the options available to them". This implies at least a conversation between solicitor and client about the advocacy options available and their respective merits.
- 5.9 In their submission to this review, the Law Society said that there was no evidence of solicitors failing to meet these obligations. There was no "single right advocate" in every case. Some evidently required the specialist skills of an experienced barrister. But for the client, a solicitor advocate for all or part of the proceedings had the advantage that he or she was likely to have been involved from the start of the case, be familiar with it, and have the trust of the client. There was also less risk of double-booking, which caused barristers frequently to return cases to another barrister (usually less experienced) at the last minute, when another case took priority.
- 5.10 Many of the solicitors to whom I spoke confirmed that this was consistent with their own practice. Several acknowledged that there was commercial pressure to keep advocacy in-house if possible. Some firms were more responsive to this pressure than others. One said that the decision on choice of advocate was driven by a combination of the complexity of the case, its likely length, and the management of his own time. Although higher rights accredited, he would be reluctant to be away from his practice for a trial likely to last longer than about two weeks. Another commented that many clients found it unsettling to have a break in legal representation, and preferred the continuity that a solicitor advocate could provide.
- 5.11 The Bar takes a different view. In their submission to my review, the Bar Council noted that the choice of advocate properly lay with the client, and argued that "one of the litigator's/solicitor's roles is to advise the client as to the choice of advocate. Where the solicitor's firm also has in-house advocates, there is the potential for a conflict of interest between the solicitor's firm and its client. The solicitor's firm will

have a financial incentive to obtain work for its in-house advocate but the client's interest is to obtain the best advocate for the case." Almost all of the barristers to whom I spoke in the course of the review believed strongly that the commercial pressures to keep advocacy in-house and thereby retain the combined value of LGFS and AGFS fees for the case was a major factor in the assignment of advocates in the Crown Court.

- 5.12 Where the solicitor does conclude that external counsel should be instructed, the choice will be informed, as it always has been, by the reputation of barristers practising locally. Since it is now much less common for solicitors to attend trials, it is harder for them to make an informed choice.

"Plea only" advocates

- 5.13 The aspect of the matter which has excited strongest feelings is the emergence of the "plea only" advocate. To gain higher court accreditation a solicitor has to demonstrate experience and aptitude in conducting trials; but once accredited he or she may decide to limit themselves to pre-trial hearings and the representation of those who plead guilty. This is, in the Crown Court, by no means straightforward work. A well-judged plea in mitigation calls for skill and good knowledge of the relevant sentencing law, but is generally regarded as being less demanding than the conduct of a contested trial. Some solicitors limit themselves in this way because they doubt their ability to conduct the defence in a Crown Court trial; others, as noted above, because the balance of their professional lives makes them reluctant to devote several days at a time (or even longer) to trial advocacy. To enable such practitioners to be reaccredited, QASA includes (as level 2(a), the lowest level for Crown Court advocates), a self-designated category for those who do not intend to undertake trials. They will not be subject to judicial assessment, but will be able to be re-accredited following attendance at an approved assessment centre.
- 5.14 This aspect of QASA (which in fact simply reflects the reality of practice as it has developed in recent years) has polarised views within the profession. Most of the judges and almost all of the barristers to whom I spoke were strongly of the view that all advocates in the Crown Court should be willing and able to undertake a contested trial. The BSB expressed concern that "it is difficult for an advocate to properly advise upon the merits of contesting a charge if they have never appeared in a trial".

- 5.15 The Law Society found it "hard to see the rational basis" for this concern. "A plea or sentencing hearing does not require the same skills, and it is hard to see why a solicitor, familiar with the case and the client, should not appear in that hearing, particularly if the alternative is likely to be a less experienced member of the Bar. In other professions it is rare for experienced professionals to undertake work which can reasonably be delegated". Some of the solicitors I met saw it as no more than a sensible way to manage their practice. A solicitor who has been advising his client on plea from the outset is well-placed to see the case through in the event of a guilty plea. The SRA made the point that, as the number of contested trials decreases, for many solicitors and barristers this type of work already dominates their practice. Plea only work simply reflects a growing reality.
- 5.16 A somewhat different concern which has been put to me is a variant on the Bar's point about solicitor advocates being conflicted when they advise on choice of advocate. On this argument, the solicitor advocate advising on plea might be perceived to be influenced by the fact that, if the defendant pleads guilty, he or she will act as advocate, but not if they plead not guilty.
- 5.17 For the purposes of understanding how the defence advocacy market works, perhaps the greater significance of the "plea only" advocate lies in the rapidly increasing proportion of guilty pleas in which the defendant is represented by a solicitor advocate. As indicated in section 1 of this report, this stood at 40% nationally in 2012-13, compared with 6% in 2005-06, and is on a rising trend. Taking into account the increase in the guilty plea rate (from 63% in 2005 to 69% in 2013), this means that solicitor advocates are undertaking a greater proportion of a growing area of the advocacy market. Precisely how much depends, in part, on the guilty plea rate, which varies from region to region, with Durham having the highest at 80% and London the lowest at 54%²⁴. In Staffordshire, for example, where the guilty plea rate is high (77% in 2012), solicitor advocates undertook 49% of all Crown Court defence advocacy, whereas in London the figure is 37%²⁵.

²⁴ LAA/MoJ Data 2012

²⁵ LAA/MoJ Data 2012/13

- 5.18 Another area of practice in which solicitor advocates have become more prominent is as second counsel in cases which are sufficiently serious and complex for two counsel to be authorised. Between 2007-08 and 2012-13, the proportion of "double-handed" cases in which a solicitor acted as second counsel increased from 8% to 26%²⁶. These are cases in which in the past young aspirant barristers had an opportunity to develop their skills by working closely with a QC or other senior member of the profession, and seeing them in action. One young barrister told me that until relatively recently there might have been two or three such opportunities in the course of a year, but several years could now pass without one. (This in part reflects the reduction in the number of cases in which two counsel are authorised.)
- 5.19 Again, there are concerns about quality which it is hard to gauge confidently without detailed research. Many of the circuit judges from whom I heard said that in their recent experience the test that should be applied in assigning second counsel - that they should be capable if necessary of continuing the conduct of the trial if the senior was unavoidably unable to do so - was, in their judgement, a long way from being met.
- 5.20 The other noteworthy aspect of the market is the emergence of newer business structures for providing advocacy services. Annex E contains brief descriptions of such models, examples of which we have encountered in the course of the review. These include legal aid contracted firms owned and managed jointly by solicitors and barristers, and groups of solicitor advocates operating independently on the chambers model. These are interesting developments. Those involved in them whom we met are invariably enthusiastic and keen to break new ground. But the overwhelming majority of criminal representation is still undertaken on the traditional model.

Consumer perspective

- 5.21 For most practical purposes, the consumers of advocacy services are defendants in criminal trials, although victims and witnesses are also affected in important ways by the quality of advocacy. In their submission to my review, the Legal Services Consumer Panel (LSCP) noted the absence of research evidence on the consumer experience, and that robust data were difficult to extract from general surveys of

²⁶ LAA/MoJ Data

legal consumers due to sample size. The LSCP also observed that there is a lack of information on the performance of advocates to allow consumers to make an informed choice, which means demand side competition is weak. Competition is undoubtedly strongest where the defendant has previous experience of the criminal courts.

How competitive is the market?

5.22 The market in criminal advocacy has several characteristics which distinguish it from others:

- As the LSB pointed out in their submission, neither the providers of criminal advocacy nor their regulators can influence the aggregate demand for services, which is largely set by the volume and character of criminal proceedings in the courts.
- Legal aid advocacy fees are fixed, and for the 86%²⁷ of the work that is publicly funded, there is therefore no competition on price.
- As the market has evolved, the main competitive dividing line is between in-house providers who hold the funds and outsourced specialists.
- As noted in paragraph 5.21 above, informed consumer choice is limited.

The LSB's main conclusion on the current state of the market is that "continued market liberalisation to promote competition within and between 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".

5.23 I don't disagree with the LSB's anti-protectionist sentiment. I also see the case for exploring whether in a further liberalised market the Bar could compete more effectively for legal aid contracts by changing its way of working without losing its distinctive character. That is the subject matter of paragraphs 5.31 to 5.42 below.

²⁷ Defendants committed or sent to trial in the Crown Court in 2012 who were represented under legal aid.

- 5.24 Nevertheless, my main conclusion from this part of the analysis is that, **as it exists now, the market could scarcely be argued to be operating competitively or in such a way as to optimise quality. The group of providers who are manifestly better trained (if not always more experienced) as specialist advocates are taking a diminishing share of the work, and are being beaten neither on price (in a system where fee rates are fixed) nor on quality. As I shall suggest in section 6 below, the fact that there are almost certainly more advocates than there is work for them to do depresses average income and makes the reduction in legal aid fees even harder to manage than it would otherwise be.**
- 5.25 On "plea only" advocates, my own view is that **it is possible to overstate the argument about advice on plea. Someone who has experience of defending trials in the Crown Court will no doubt have a better sense of their dynamics, the likely reactions of juries, and the legal issues that are likely to arise. But legal advice which amounts to advice on plea is given by solicitors from the earliest stage of the process, based on the facts and the inherent strength of the defence case. On the point touched on in paragraph 5.16, although I don't doubt that solicitor advocates advising on plea generally frame their advice scrupulously in the interests of their client, there may be an issue of perceptions if they are thought to have a commercial interest in a not guilty plea, and I return to this in paragraph 5.29 below.**
- 5.26 The more fundamental question is whether it is acceptable to have accredited advocates in the Crown Court who are not prepared to appear for the defence in a contested trial. The Bar and most of the judges regard this as an issue of principle. On the basis of "horses for courses", **where it is known that a defendant will plead guilty, I can myself see no objection in principle to his being represented in court by a less accomplished advocate than would represent him if he pleaded not guilty. What concerns me more are the practical consequences for case management where there is doubt about how the defendant will plead. In such cases, I was told that some solicitors firms were so keen to keep the advocacy task in-house for an advocate who only appeared in pleas that they were deferring the assignment of an advocate until very late in the day, with obvious implications for case preparation and quality. I return to that issue in paragraph 7.6 below.**

Implications for solicitors' professional obligations

- 5.27 Solicitors are bound, for good reason, to be influential in the choice of advocate. In the past, this was normally a choice among external providers. The fact that there are now at stake commercial interests internal to the firm makes it even more important that the process of assigning an advocate should be above reproach, and suggests that there would be advantage in reinforcing and clarifying solicitors' professional responsibilities in this area. The passage in the SRA's Code of Conduct quoted in paragraph 5.8 above is strongly suggestive of where these responsibilities lie, but it makes no explicit mention of advice on choice of advocate. It is perhaps significant that the LSB's submission to my review is drafted on the assumption that the choice is entirely a decision for the solicitor.
- 5.28 The Bar Council suggested to me that, to address any possible conflict of interest, there should be a requirement that, where an in-house advocate has been retained, the firm should have advised the client in writing (or at least have retained a written record of any advice) as to the choice of advocate and the client's right to instruct advocates independent of the firm. Such a requirement could, they suggested, be included in the litigator's contract with the LAA, and be available to audit.
- 5.29 The detail of any measures to entrench or clarify through guidance the solicitor's obligation to ensure that clients are in a position to make an informed decision about the choice of advocate is a matter for the solicitors' profession, and it would be unwise for me to offer any blueprint. Against the background I have described, **I would, however, encourage the SRA and the Law Society to consider what further regulatory or other steps could be taken to clarify the professional responsibilities of solicitors in the assignment of advocates, and provide reassurance that they are being observed. In doing so they will no doubt give due attention to the model proposed by the Bar Council, and in particular the suggestion that there should be a record of advice given. The same consideration could cover the issues on advice on plea identified in paragraph 5.25 above.**
- 5.30 An alternative approach to addressing the problems of quality and fair competition would be for the LAA to take a more assertive role in the advocacy services market than they do at the moment. The Agency acts as customer for the "end to end" contracts for defence representation, and through the award of the contracts

exercises a measure of quality control; but it has little direct involvement in advocacy quality. **An option which the Government could consider would be for the LAA to maintain a list of approved advocates, on the model of the CPS's panel of barristers briefed to represent the prosecution.** This would not be straightforward. The analogy with the prosecution does not completely hold. In particular, a list of defence advocates approved for legal aid purposes would need to include employed solicitor advocates as well as barristers. An acceptable means of assessing quality would need to be found, although the CPS appears to have done so. But if a workable system could be devised, it would bring a degree of quality control, and could also deal with the problem of over-supply. In doing the latter, it would, of course, reduce the choice of advocates available to legally aided defendants; but in a publicly funded system client choice has, in my view at least, to be tempered with a recognition of the taxpayer's interest in value for money.

Criminal Bar competing for legal aid contracts

- 5.31 Whether the Bar could compete more effectively for work within the present system depends in part on their willingness within the emerging regulatory framework to adopt new business practices and in part on the future structure of criminal legal aid. The submission I have had from the LSB puts emphasis on the first of these. It makes the point that there is nothing in statute or regulation that disallows barristers directly competing with solicitors for clients. Consumers may now directly instruct barristers who are members of the BSB's public access scheme, but there has so far been little take-up.
- 5.32 The main regulatory impediment to barristers competing with solicitors for legal aid contracts has been the fact that the LAA will contract only with legal entities, and the BSB has hitherto been unable to regulate such entities (although the SRA could). In 2010 the Bar developed a corporate vehicle ("ProcureCo") which would have enabled the establishment of legal entities capable of contracting for work while not themselves providing legal services, and passing it to self-employed barristers. This has not in practice been taken up to any great extent, but the LSB is currently considering an application from the BSB to be allowed to act as a regulator for entities. If this is granted, which seems likely, it will make it easier for such entities to be set up within the barrister world.

- 5.33 There are however two other, related, obstacles to do with the legal aid system. The first is that, as it currently stands, the system operates through contracts with entities (principally firms of solicitors) which assume that contractors will have conduct of a case from start to finish, even if they don't do every aspect of the work themselves. For barristers to compete for legal aid contracts they would need to develop both means of accessing clients and the capability (not necessarily in-house) to do other aspects of the representation task. All of the self-employed barristers to whom I have spoken attach huge importance to self-employed status, and to the chambers model, as a guarantor, as they see it, of independence. Many are most comfortable with the traditional instructing solicitor/barrister relationship, even though it may appear to be operating to their disadvantage at the moment. Some heads of chambers would be ready to consider developing a practice that could compete for legal aid contracts, but fear that to do so the new entity would need to employ such numbers of solicitors and paralegals to generate the business and prepare the cases as to change the nature of the enterprise and lose the essential character of the self-employed Bar.
- 5.34 The second obstacle is that, as I have observed in paragraph 5.30, our legal aid system holds advocacy quality at arm's length. Contractors are assessed, broadly, on their competence as litigators, and not on their in-house or externally provided advocacy capability.
- 5.35 It may be instructive to consider for a moment how case-handling for the majority of Crown Court cases may be developing. Some of the solicitors' firms to whom I have spoken essentially replicate internally the traditional instructing solicitor/advocate relationship in which the case statement is prepared by a solicitor or legal executive, witnesses proofed etc, and the case is delivered to the solicitor advocate as it would be to a barrister. Others operate on more of a "single caseworker" model in which the solicitor in charge of the case prepares the defence statement of case and then acts as advocate.
- 5.36 These are two distinct models for case working recognisable from other walks of life. The virtue of the first is that it allows more specialisation and more of a "production line" approach. In the legal field there is also the distinct advantage that the second pair of eyes can bring a different perspective to bear and can question assumptions which may have been made by the first.

- 5.37 The virtue of the "single caseworker" model is that there is an individual who feels accountable and can be held accountable for the successful resolution of the case. Where there are voluminous papers, there are also economies to be had from only one individual having to read them. The downside, of course, is the loss of an independent second pair of eyes.
- 5.38 In New Zealand, I found that, in all but the most serious cases, defence representation is handled on the "single caseworker" model, with barristers undertaking most of the preparatory tasks which would be undertaken by a solicitor in the UK. If there are a significant number of witnesses to be interviewed, the Legal Services Commissioner will authorise the employment of an agent for that purpose.
- 5.39 If, as I suspect may be the case, the system in England and Wales is moving in that direction, if only because legal aid fees are becoming insufficient to support the traditional "two pairs of eyes" model, it will be unwelcome to the Bar, attached as they are to that model; but it may represent an opportunity. I was struck by how often barristers told me that they received cases which were so ill prepared that they ended up doing most of the work themselves. I have no way of confirming whether that is the case or how frequently it occurs. **But if barrister-led entities were able to have control of cases from the outset, possibly on the basis that in more straightforward cases their junior members would act as the single principal legal representative, their reputation for competence and relatively low overheads could put them in a strong competitive position.**
- 5.40 It would still, I suspect, be necessary to employ some solicitors or legal executives, and possibly to engage solicitors to do litigation in more complex cases - in a reversal of the normal relationship; and a legal entity of the "ProcureCo" kind would need to be established alongside the chambers to preserve the principle of self-employment. But it would be a more level playing field than the one on which the Bar are operating now. It would also meet some of the concerns about younger members of the Bar getting the experience necessary to build their advocacy skills early in their careers.
- 5.41 Whether something on these lines would work would depend crucially on the appetite of the criminal Bar for changes in their business model, and on the ability of the LAA to contract directly with barristers on a basis that did not require them to change that model out of all recognition. **One possibility would be to have**

separate contracts for duty police station work and post-charge work, with barrister-led entities competing for the latter. This would significantly reduce the proportion of cases taken on by barrister-led entities that ended up with no requirement for an advocate, and therefore the scale of the non-barrister staff requirement; but it would have other significant implications for the legal aid system which the Government would need to consider.

- 5.42 I have discussed these issues with the LAA. They are open to the idea of contracting directly with the Bar, provided there is a legal entity capable of delivering the provider's side of the contract. They believe there is nothing to prevent barrister-led entities competing for the next round of contracts now in the early stages of being put out to tender. It is, however, already too late to consider changing the basic structure of the contract in the manner I suggest on this round.
- 5.43 **I recommend that the Government reflect on the implications for the legal aid system of the LAA contracting directly with the Bar for defence representation, including the weight given to capability in advocacy, and that they consider the desirability and feasibility, in future contracting rounds, of separating police station advice and post-charge representational work. The Bar itself will want to consider its appetite for development of this kind. Adjusting the legal aid system in the way I have suggested would not be straightforward, and the Government's willingness to do so might well depend on whether there were any signs that the Bar was interested.**

6. The supply of criminal advocates

- 6.1 As with other aspects of this review, reliable information about the numbers of barristers and solicitors who are criminal advocates and the numbers entering and leaving that part of the profession is not readily available. The most reliable figures are held by the Law Society, which estimates that there are currently about 11,000 solicitors providing criminal advocacy services, many of whom will only appear in the magistrates' court. This is up from just over 3,000 in 2004 and just under 7,000 in 2010. Of these about 4,800 have higher court rights, of whom about 3,300 practice only in crime.
- 6.2 The number of barristers who practise wholly or mainly in crime, both employed and self employed, is estimated to be about 5,000 or a third of the total number of barristers in practice (15,600²⁸) in England and Wales. Of these, the number who are self-employed is estimated to be about 4,000. Whether the number of barristers practising wholly or mainly in crime has reduced in recent years, or has increased as the Bar itself has increased in size, cannot be established from the available figures, since the BSB does not collect reliable annual figures by practice area.
- 6.3 Even if the number of barristers in criminal practice has reduced in recent years, as many believe to be the case, the reduction is unlikely to have matched the increase in the number of solicitor advocates with higher court rights. **One can therefore safely assume that, in total, there are significantly more advocates practising in the Crown Court than there were in 2010, when Crown Court business was higher than it is now. Taking a longer view, the number of practising advocates in all courts appears to have increased over a period when magistrates' courts business reduced substantially (by 23% between 1995 and 2013²⁹) and Crown Court business fluctuated in volume but reduced in complexity. Despite the limitations of the data, the only conclusion one can reach is that there are many more advocates than there is work for them to do.**

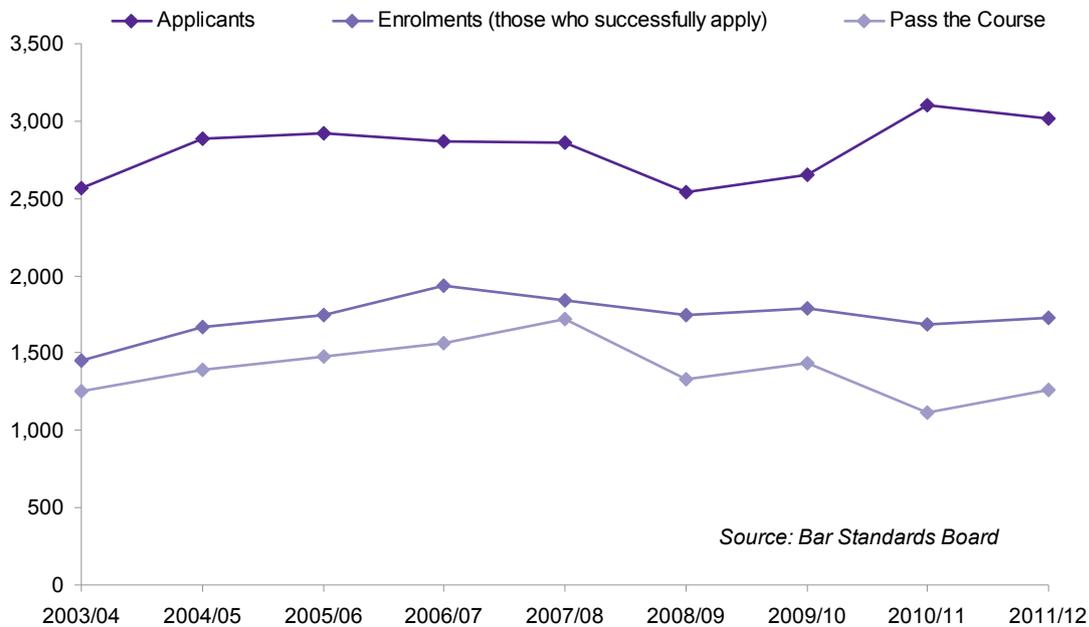
²⁸ Bar Standard Board Figures Feb 2012

²⁹ MoJ Data Year ending September 2013

- 6.4 As a direct consequence, the amount of work done by individuals has, on average, no doubt reduced. I met many advocates who are fully employed, and solicitors in particular will often have other elements to their practice. But for barristers work is harder to come by. The MoJ told me that, in 2012-13, 1,761 barristers were involved in seven or fewer legally aided AGFS cases. Some of these will also have prosecution and privately funded work, but this nevertheless suggests **a significant degree of under-utilisation.**
- 6.5 The impact of this on the inflow of new criminal advocates is, if anything, even harder to assess confidently. The BSB publishes the number of pupillages available each year, but these figures cover the whole profession and are not broken down into practice area. Based on an estimate of the percentage of pupillages in crime, the LSB estimate there were around 136 pupillages in 2010-11 where the main area of practice was crime compared to 131 in 2009-10, but these figures assume that the percentage of pupillages in crime has remained constant, which may not be the case.
- 6.6 Indeed, they may well be an overestimate. Most of the criminal sets of chambers I visited or which were represented in my meetings reported very few recent pupillages and very few tenants with less than 5 years' call. I was told there had been no pupillages offered in one large city in the last 5 years. One head of a substantial chambers in the north of England said that her set had continued to offer two pupillages a year in crime, but it was becoming harder to do so. A CBA survey of 24 chambers undertaken in response to my inquiry suggested that many chambers have reduced the number of criminal pupillages they offer by one or two over the last couple of years, although some have managed to keep the number on offer at the same level over the last 5 years. In a number of instances this has been achieved through the support of the Pupillage Matched Funding Scheme run by the Council of the Inns of Court.
- 6.7 The typical age structure in the chambers I visited was an inverted triangle, with the majority of practitioners in their 40s and 50s with only a handful with fewer than five years call.
- 6.8 To an extent, this reflects the way in which the barrister labour market works. Although forward-looking chambers of the kind I have cited above will look to the future and carry on offering pupillages where they can, they are in the end loose associations of self-employed people in which the longer-established, who

contribute more, are bound to have a substantial say. Where instructing solicitors or the CPS have a particular barrister in mind for a high profile case, it is likely to be a senior figure with a high reputation. More routine cases will usually be allocated by clerks, who will tend to allocate work within the chambers broadly on the basis of seniority. And **when the available work reduces, the devices available to managed businesses in the private and public sectors - and in particular the shedding of longer-established people to make way for new talent - are not readily available.**

- 6.9 The other perceptible trend is that some sets of chambers - and some of their most talented younger members - are said to be diversifying away from legally-aided crime and into more financially rewarding areas of the law.
- 6.10 Despite the poor prospects for pupillage, both under-graduate and post-graduate legal studies remain popular. The number of under-graduates studying law peaked at 72,140 in 2009-10, and in 2012-13 was 68,540 compared with 53,865 10 years earlier. Law is, of course, a good preparation for careers in other walks of life, and many of these students will be from overseas; but a proportion will be seeking legal careers in this country.
- 6.11 For those aspiring to practise at the Bar, the BPTC is the gateway.

Figure 5: Bar Vocational Course / Bar Professional Training Course statistics*BVC for 2003/04 to 2009/10, BPTC for 2010/11 and 2011/12*

As can be seen from the chart above, the numbers completing the course have been running at over 1,100 a year for the last 10 years. A proportion of these (estimated to be about a third) will intend to practise overseas, but most of the rest will have set their sights on a career at the Bar. In the three years up to 2010 - 2011 (incredibly, the latest period for which published figures are available), the number of applications for pupillage for the Bar as a whole was running at 2,800 to 2,900 a year, reflecting the fact that multiple applications can be made and disappointed candidates in one year will often apply again the following year. This is about six times the number of pupillages on offer and some chambers can receive over a hundred applicants for each pupillage placement. How many of the applicants seek pupillage in criminal practice is not known, but the ratio of unsuccessful to successful could well be even higher.

6.12 The cost of legal training is high, and can be as much as £27,000 to £36,000 in course fees alone for a qualifying law degree, £12,000 to £18,000 for the BPTC. It is not uncommon for aspirant barristers to emerge from the BPTC seeking pupillage with debts of around £50,000. Student debt is not, of course, an issue confined to the law, and even within the legal profession young solicitors frequently face similar challenges. But the higher cost of the BPTC, and the fact that so few of those

completing it can expect to obtain pupillage, gives an added twist, and has obvious implications for diversity, to which I return in paragraph 6.18 below.

- 6.13 The problem of the gap between the number of students taking the BPTC and the number of pupillages on offer is not a new one, nor one confined to crime, though if I am right in my suspicion that recent pupillage figures in crime are over-stated it may now be even more acute in that area. It has been a source of concern to thoughtful figures in the legal profession for some years. The Working Group under Derek Wood QC to which I have already alluded considered the matter in some detail in 2008.
- 6.14 They concluded that, within the present construct, in which the course is provided by eight academic providers under franchises awarded by the BSB, there was no fair or acceptable way of cutting numbers. To cap numbers would create a situation in which providers would become the gatekeepers to entry to the Bar, which the Working Group regarded as unacceptable. A straight cut in numbers would give rise to complaints that able students were being prevented from competing for entry to the profession. The Working Group did, however, recommend that the Inns of Court and the providers should develop a short joint document warning prospective students of the shortage of pupillage compared with the numbers on the course. (This has been done, but doesn't appear so far to have had much impact.) They also recommended the introduction of an aptitude test covering analytical and critical reasoning skills and fluency in the English language, to be taken by all those seeking to take the BPTC, which they thought would have the effect of reducing numbers. This was introduced in 2013 following a successful pilot.
- 6.15 **Because their whole focus was on what is now the BPTC, the Wood Working Group gave this issue much closer attention than it has been possible for me to devote to it within the scope of this review. I cannot fault the logic on which they dismissed the idea of a cap on numbers, and would not myself argue for such a cap. I highlight the issue because the problem of high levels of debt, disappointed hopes of pupillage and the associated human cost has clearly not been resolved in the years since the Wood Working Group reported. It remains to be seen whether the aptitude test will have the effect of reducing numbers and improving the quality on the BPTC. It will be important for the profession to keep this under review, and to ensure in particular that the test is sufficiently demanding.**

6.16 **In relation to the Bar, the main conclusions I draw from this part of the analysis are that:**

- **the supply of aspirant criminal barristers appears to be as strong as ever;**
- **despite the paucity of pupillages, the number of practising criminal barristers has probably not reduced by much, if at all, but it is an ageing profession; and**
- **the problem of over- supply from the BPTC appears to be as serious as ever and is among the issues which any radical review of the structure of the profession should address. I return to this in section 9 below.**

Diversity

6.17 There is a clear public interest in the legal profession being as reflective as possible of society at large. This applies generally, but is particularly true of advocacy, which is in many ways the public face of the profession, and perhaps most of all in the criminal courts, impinging as they do on such a diverse range of victims, defendants and witnesses. I heard from the Equality and Diversity Committees of the Law Society and the Bar Council, both of whom clearly take the diversity of the profession extremely seriously.

6.18 **Some of the trends described in this report seem likely to tell against progress on diversity. There is a (to mind realistic) fear that the good work which has been done in the relatively recent past will be undone, with a reversion to a more socially advantaged, less ethnically diverse profession.** Both Committees expressed concern that the high cost of legal education and slimmer prospects of remunerative work in today's market would deter all but those with independent means and limited (if any) caring responsibilities. One straw in the wind is that, of those obtaining pupillage at the Bar in 2011, high percentages had parents with a degree and had attended fee-paying schools³⁰. The Bar has always been a more precarious existence than most, but in earlier generations it seems to have been easier for those from less advantaged backgrounds to prosper.

³⁰ Sauboorah, J. and Carney, C. (2012) Pupillage Survey 2010/11: An analysis of the backgrounds of pupils registered in 2010/11

- 6.19 In the short term, it is difficult to see how best to address these trends towards a less diverse advocacy profession. One interesting suggestion, which was put to me by a practising politician with wide experience of advocacy, is that a number of training course places, pupillages and training contracts for advocates might be funded pro bono by some combination of Government, business and the profession for candidates of limited means, on the understanding that they would commit to a number of years in publicly funded practice. The Inns of Court already provide scholarships for such candidates to enable them to undertake the BPTC, but those who benefit will still find it difficult in the current climate to obtain pupillage.
- 6.20 Longer term, changes in the point at which the decision is made to become a specialist criminal advocate, on the lines described in section 9 below, would reduce the early up-front costs and arguably lead to better-informed decisions to specialise. This might make the specialist profession more accessible to those of limited means than it is in danger of becoming now, though deferring the decision to specialise might discourage those who may have accumulated caring responsibilities in the meantime. It would certainly be important to design any changes in the structure of the profession with an eye to improving diversity.

7. How the system works and its impact on quality

- 7.1 I have dealt with advocacy quality "in the round" in sections 2 and 4, in terms of the training and inherent capabilities of those practising as advocates in the criminal courts. But factors which cannot be ignored are the point in the process at which an advocate is assigned and the way in which courts list cases for hearing. Both have a bearing on the time available to the advocate to prepare the case, and therefore directly on quality.
- 7.2 This is particularly relevant in the Crown Court. In the magistrates' courts, the business is fast-moving and the process summary. The prosecution will often field a single representative to handle all the cases listed for a particular courtroom on a particular day. The same practice will sometimes be adopted by firms of solicitors representing a number of clients at the same centre. Some defendants will use the facilities of the duty solicitor scheme. Although case preparation is still important, the process has always put a premium on advocates quickly grasping the issues involved in cases where the facts are often straightforward and not in dispute.
- 7.3 In the Crown Court, there should in principle be more opportunity for advocates to be better prepared. Although practice varies in different parts of the country, there are normally one or more pre-trial hearings to enable a degree of judicial control over the management of cases. In defined categories of cases, there is a preliminary hearing about two weeks after the case arrives in the Crown Court. This enables early consideration to be given to the management of the case. Within 14 to 17 weeks, depending on whether the defendant is in custody or on bail, there will normally be a plea and case management hearing (PCMH), at which a plea will be entered by the defendant. If the plea is "guilty", sentencing may take place immediately, or the case be adjourned for reports. If it is "not guilty" on any of the charges, the court will expect to be informed of issues likely to arise in the trial, including points of law, and how long it is expected to last, and be given a list of witnesses, exhibits and prosecution papers and the defence statement of case. In some circuits, the practice is to have an additional early hearing where there is thought to be a good prospect that the defendant will plead guilty to all charges. In others, the case will be listed for a "mention", to give the judge an opportunity to

assess its readiness or address any particular issue, e.g. disclosure of documents between prosecution and defence that needs to be addressed before the trial.

7.4 Crown Court pre-trial procedures are beyond my terms of reference. As it happens, they are currently the subject of two significant reviews. The Senior Presiding Judge is known to be considering reducing the number of pre-trial court hearings in order to streamline the process, with more reliance on electronic exchanges involving the trial judge and the parties; and the Lord Chief Justice has recently asked Sir Brian Leveson to review current practice and procedures from charge to conviction or acquittal with a particular focus on pre-trial hearings, and recommend how these procedures could be further reduced or streamlined³¹.

7.5 I mention the matter here because, in my visits to Crown Court centres, I was struck by how frequently the advocate representing either prosecution or defence had only very recently picked up the case, and - often despite best endeavours - was barely familiar with it. This impression was confirmed in conversations with judges and advocates. This is not a new issue, but my sense was that, if anything, it had become more of a problem than in the past. Poor preparation is the enemy of good advocacy.

7.6 There appear to be four contributing factors. The first has been noted above, and is the tendency of some defence solicitors to defer the assignment of an advocate until there is greater clarity about the defendant's intentions in relation to plea, in order that an in-house advocate can be used in the event of a guilty plea. The second is that, although I heard from some that it is less of an issue than in the past, it is still by no means unknown for barristers to return briefs or pass them to a colleague when there is a clash of commitments. The third is the fact that, while in complex, high profile cases the CPS will normally instruct counsel at an early stage, their general practice is to wait until after the PCMH. This is on the view that it is often only at the PCMH that the character of the case, including the likely defence, becomes clear, and a judgement can be made about advocacy requirements.

³¹ <http://www.judiciary.gov.uk/media/media-releases/2014/review-of-efficiency-of-criminal-proceedings-announced>

- 7.7 The fourth, which exacerbates the other three, is that Crown Court listing practice gives certainty about trial dates in only a minority of cases. In most centres, listing officers use the device of a "warned list", in effect to allocate cases to whole weeks, or even fortnights, with no certainty that they will be heard then. There is an inevitable trade-off between certainty over the timing of trials and court efficiency. Without such a device the courts would get through much less business than they do. Even in the best-managed system, cases will sometimes over or under-run. Building some room for manoeuvre into court listing therefore makes sense, but the effect is to make it much harder for advocates to plan their diaries.
- 7.8 The fact that trial hearing dates are often fixed at very short notice has implications not only for the quality of advocacy, but for the diversity of the advocacy profession. The Bar's Equality and Diversity Committee highlighted this as one of a number of features of criminal practice which made it unattractive to those who have to juggle professional and family commitments.
- 7.9 There is no simple answer to this. The management of Crown Court business is complex, with a variety of players (including witnesses) required to be in the same place at the same time for a trial to take place. But even allowing for these constraints, **I was struck by how hand to mouth the system seemed (both in my own observation and as reported by others), and by how often it appeared to throw up an under-prepared advocate, particularly at the pre-trial stages. I would hazard that this systemic weakness has as much impact on advocacy quality as anything else.**
- 7.10 My main conclusion is the obvious one that **the system would result in better advocacy if it secured the timely assignment in as many cases as possible of an advocate who had a good prospect of actually conducting the trial.**
- 7.11 **What constitutes "timely" is a matter for debate. The consensus among defence practitioners to whom I have spoken about this is that, if the PCMH continues to be the main pre-trial event with broadly its current purposes, the point at which one should expect advocates to have been assigned, on both sides, is about two weeks earlier.** But the same practitioners warn that this would only work if the CPS consistently delivered its case summary to the defence about two weeks earlier than that (which it is said they frequently fail to achieve) and if the courts provided greater certainty about listing dates.

7.12 Whether there are changes in Court Rules or judicial direction that would help to secure the timely assignment of advocates is a matter Sir Brian Leveson may wish to consider, and I respectfully invite him to do so. I would also encourage him to consider the impact of the "warned list" system on consistency and quality of advocacy. I don't doubt that something like it is necessary for effective court administration. But the balance I mentioned above between efficiency and certainty about trial dates appears to be struck in different ways in different parts of the country. I understand that some court centres, including Sheffield, provide much more confidence about the dates on which cases are likely to be heard than others. If that is so, it would suggest that greater consistency of practice could produce dividends in terms of the quality of case preparation and advocacy.

8. International comparisons

- 8.1 The review included discussions in Scotland and New Zealand of how criminal advocacy is arranged in these jurisdictions. The team also gathered information about other comparable jurisdictions with similar legal traditions to our own. A summary of this information can be found in Annex F.
- 8.2 In some of these jurisdictions, the legal profession is split into barristers and solicitors as it is in England and Wales. In others, the profession is fused or partly fused. This review has not considered in any detail the merits and demerits of a fused profession, which are reasonably well-known. But among its underlying themes have been whether the sharp distinction between instructing solicitor and advocate is sustainable these days in publicly funded criminal defence, and whether it still makes sense - even in a split profession - for aspiring lawyers to decide at the point of graduation which branch of the profession they wish to enter.
- 8.3 The other systems are instructive in illuminating these issues. In most, there is a degree of fusion, reflected in common post-graduate professional training. In some, there is no separation of roles after qualification. Others have a progressive qualifying system, in which all first qualify as solicitors, with those who wish to become barristers taking additional qualifications, often after several years in legal practice. Even in fully fused systems, many practitioners choose either to specialise as advocates or to focus on litigation in the more traditional solicitor role.

9. Implications for the future structure of the legal profession

- 9.1 The previous sections of this report have attempted to describe the changing landscape of criminal advocacy, how the publicly funded market works, and the related questions of quality and training. There are also longer-term trends and forces at work which many of those to whom I have spoken believe could have profound implications for the future of criminal practice in the legal profession.
- 9.2 These affect both sides of the profession. The new legal aid contracting arrangements, as amended, will allow a significant number of solicitors to continue to represent existing clients on legal aid, but the contracts for the bulk of the work will be with a much smaller number of providers than in the past - around 525 compared with 1600 now. The Law Society told me that it was likely that the number of firms undertaking criminal legal aid work would reduce significantly through merger and some leaving the market altogether. Firms would have significant problems adjusting to the new environment, and many questioned whether they would be able to maintain standards at the likely rates available.
- 9.3 **The solicitor side of the profession therefore faces a period of upheaval, which will probably involve substantial consolidation and the emergence of fewer, larger criminal legal practices. It will not be easy, and it is hard to predict exactly how it will fall out, but the general character of the change is reasonably well understood.**
- 9.4 The future of the self-employed criminal Bar is much less clear, and is the aspect of this review which has excited most comment. Some of those to whom I have spoken regard the early demise of an independent criminal Bar as virtually a foregone conclusion. Others may be less apocalyptic, but fear that the diminishing amount of the kind of work on which junior barristers have traditionally gained their early experience puts in serious doubt the system's ability to produce the criminal QCs and judges of the future. More sceptical voices question whether the threat to the Bar is as serious as it has been represented, or how much it matters if it is. Other countries, such as the USA, succeed in producing high quality advocates from within criminal firms, without a tradition of self-employed specialists.

9.5 I have therefore addressed the following questions:

- what are the prospects for the self employed criminal Bar;

and more tentatively;

- if these prospects are poor, how much does it matter; and
- what could be done about it.

Prospects for the self-employed Bar

9.6 If the trends described in this report continue unabated, the Bar will undertake a diminishing amount of work in future years, which on the publicly funded side will be less remunerative than in the past. Whether that is in fact what happens will depend on how the market in criminal advocacy now evolves.

9.7 Some of the measures offered for consideration earlier in this report - on solicitors' training and practice in assigning advocates, and on opening up legal aid contracts to barrister-led entities - might, if adopted by the profession, lead to a more level playing field than exists now. The growth in the proportion of defendants ineligible for legal aid and therefore potentially funding their own defence offers opportunities for the Bar. The CPS is instructing the Bar more than in the recent past.

9.8 Although far from unanimous, some well-informed solicitor practitioners also believe that the planned legal aid changes will have the (probably unintended) consequence that solicitors will reduce rather than increase their in-house advocacy capability, and therefore bring more business to the Bar. The reasoning is that some of that capability exists largely because the individuals concerned are accredited duty solicitors and attract valued police station "slots". The linkage between slots and accredited individuals is not a feature of the new scheme.

9.9 So it may not be all one way, and it should be borne in mind that the Bar still represents 75% of defendants in contested Crown Court trials and 60% of those who plead guilty. **But business prospects turn in large part on business confidence. Although the criminal Bar is confident in its competence and in the virtues of its way of doing business, its confidence about the future struck me as being at a remarkably low ebb.**

9.10 As noted in section 6, part of the problem is the absence of what the rest of the business world would recognise as work-force planning. The Bar Professional Training Course is still popular, and produces many more candidates for pupillage than the market needs. There are many more barristers practising in crime than there is work for them to do. In a profession whose main operating unit is a mutually supportive loose association of the self-employed, where work tends to be assigned on the basis of seniority, it is hard to react to a downturn in business as well-run operations would in other walks of life - by looking actively at ways of generating new business, laying off less capable senior staff, and protecting the future by continuing to recruit as many able youngsters as the available work will support.

9.11 The conclusion I draw from all this is that **the tide away from the self-employed criminal Bar may be turning, or be capable of being turned. But this is by no means assured, and if the Bar lacks the confidence in the future of criminal work, or the willingness to adjust how they conduct their business to compete on a more level playing field, the continuation of recent trends will become a self-fulfilling prophecy. In that case, as the present generation of experienced criminal barristers moves towards retirement, concerns about the future "talent pipeline" for criminal QCs and judges are not, in my view, fanciful.**

How much does this matter?

9.12 It is true that in other countries highly skilled advocates emerge from a unified professional background in which employment is the norm. But legal systems are the product of history, evolved in most cases over centuries. **The particular strengths of the English and Welsh criminal Bar - intellect, expertise, independence, ability to represent both prosecution and defence - may not be unique; but they are a substantial national asset which could not easily (or perhaps at all) be replicated, and they contribute significantly to the high international reputation of our legal system. There is also a distinct national interest in having available sufficient top-end advocates to undertake the most complex and serious criminal trials. Although senior judges have traditionally been drawn from all areas of legal practice, and ability is the main criterion, there is a persuasive argument that criminal law is an increasingly specialist area and that the High Court benefits from having on the Bench judges with deep criminal experience.**

- 9.13 If current trends for the criminal Bar persist and worsen, to the point where the supply of capable junior barristers reduces further and there is even less of the more routine work for them to do, is there anything that could or should be done about it? **Attempting to turn back the clock, for example by restoring exclusive rights of audience for the generality of work in the Crown Court, seems to me neither feasible nor desirable. Solicitor advocates are a valuable and established part of the scene. In system terms, the sensible approach is to invest in their skills and professionalism, as I recommend elsewhere in this report.**

Careers in criminal advocacy: possible structural change

- 9.14 It may, however, be worth looking more radically at the structure of this part of the legal profession. In other countries with similar legal traditions to our own, the decision to become a specialist criminal advocate is typically taken somewhat later in life than is the case in England and Wales. In Scotland, all law graduates are expected to spend up to 24 months training in a solicitor's firm before practising, but most aspiring advocates choose to stay longer, and defer a decision to go to the Bar until their late 20s or even later. This allows them both to build contacts among instructing solicitors, and to gain experience of advocacy in the Sheriff Court.
- 9.15 In New Zealand, publicly funded defence representation is divided between a Public Defender Service, law firms and "barristers sole" - self-employed barristers who contract direct with the LAA. The barristers sole are required to have had at least three years' experience of practice before being admitted to that branch of the profession. The three year requirement is of relatively recent origin, and reflects past concerns about quality when barristers could take on legal aid work immediately after qualifying.
- 9.16 Although annex F contains fuller descriptions of what we found in Scotland and New Zealand and of what we understand about other comparable systems, I am not offering any of these as a blueprint. But they do illustrate a more general point that, **in functioning systems not unlike our own, there is more than one way for the aspirant criminal barrister to get early experience of advocacy.** Legal careers on the Scottish or New Zealand model are in fact already feasible in England and Wales. There is nothing to prevent someone joining a solicitor's firm after graduation, building a few years' experience as a solicitor advocate, and then opting to read for the Bar at that stage. But the strong expectation at the moment is that, at the point of graduation, people will nail their colours definitively to the mast marked "solicitor" or "barrister".

9.17 There are strengths in this approach. It is probably more diversity-friendly (at least in relation to women) than one in which the decision to become a specialist advocate is deferred. It also, if the work is available, gives the ablest a chance to practise earlier at the higher level en route to becoming a QC and/or a judge - though whether a few years at the beginning of a 40+ year career is material from that point of view is open to question.

9.18 **In the criminal sphere, an operating model in which the Bar concentrated on cases where specialist advocacy skills were most evidently required, with early advocacy experience obtained elsewhere, may be more sustainable than what we have at the moment. The main features of such a model might be:**

- **a two-tier approach to training, with the first level on the lines of the elective advocacy course for solicitors described in section 4 above, but taken by all recent graduates aspiring to be advocates; and the second level bringing those who seek to be specialist advocates up to the Bar's current standard. If prospective criminal barristers were expected to complete the first of these, the Bar would need to have substantial input to its content;**
- **an expectation, which could develop over time and need not be an absolute requirement, that in pursuing their careers those aiming for the Bar would gain several years' experience of advocacy in a legal firm (or the CPS) before undertaking the second tier and being called to the Bar;**
- **a smaller, more specialist criminal Bar, available for the privately funded but concentrating largely on trial advocacy, particularly in the more serious and complex cases, perhaps with exclusive rights of audience in relation to the most serious.**

9.19 **I offer this as a possible direction of travel, in the hope that it might stimulate debate within the profession and with its regulators.** With an over-populated criminal Bar and the solicitor side of the profession in turmoil as it absorbs the legal aid changes, it would not be easy to migrate from where we are now to something on these lines. Traditionalists would fear that it would further blur the boundary between the two sides of the profession. The implication for advocates in other areas other than crime would need to be considered. To succeed, it would require the criminal Bar to be ready to accommodate to being in a smaller but more sustainable niche, and solicitors to play their part, by acknowledging that they too

could build reputation by providing early experience for the future stars of the criminal advocacy profession. It would also put at an even greater premium than it is already the ability of the legal profession and its regulators to work across traditional boundaries to develop high quality advocacy training for all.

- 9.20 For all that, **there are potential benefits. The distribution of work between the two branches of the profession would be clearer and less contested. Young criminal practitioners would be called to the Bar with some previous advocacy experience. The two tier approach to training might mitigate, if not remove altogether, the problems of over-provision on the BPTC and of indebtedness among those graduates of the BPTC who fail to get pupillage or tenancy. The first tier course would probably be a good deal cheaper than the second, and those opting for the second probably do so with a better appreciation of their prospects at the Bar, and perhaps with pupillage and tenancy already arranged. The profession might become more socially diverse than it is in danger of becoming at the moment.**
- 9.21 In his speech at the Bar Conference on 2 November³², the Lord Chief Justice encouraged the criminal Bar to "look forward and see where it wishes to be in ten years' time". **My over-riding impression, having undertaken this review, is that such a reappraisal of the future of the criminal Bar is urgently needed. As will be clear from this report, my own view is that there are two possible avenues of development. The Bar could adjust its way of working sufficiently to compete effectively for legal aid contracts of broadly the existing kind. If there was a real appetite to do so, the state should in my view be ready to look imaginatively at the way in which these contracts are structured, to make it easier for the Bar to compete without changing its business model out of all recognition.**
- 9.22 **But if there is no such appetite, or so little as to make no practical difference, the other approach would be to explore more rigorously options of the kind described here for a smaller, more specialist criminal Bar, whose members acquired their early experience of advocacy elsewhere. Simply carrying on as at present, in an effort to keep intact every aspect of the model as it existed many years ago, does not seem to me to be a viable option.**

³² <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-bar-conference-02112013.pdf>

10. Research and information

10.1 At various points in this report, I have commented on the absence of data or relevant research evidence. I decided early on that there would not be time for original research or substantial data collection, and have relied on existing information held by the Ministry of Justice, the regulators and the professional representative bodies. All have been willing to share what they have (and I have particularly appreciated the LAA's willingness to provide information from their database), but the data on advocacy quality, consumer perspectives and the make-up of the profession were remarkably limited. The last of these is perhaps the most surprising. The fact that the numbers of practising criminal barristers and of criminal pupillages awarded each year exist only as estimates, on which, I was warned, no great weight could be put, suggests to me that both the regulator and the professional body are flying blind in this area. The Government also has an interest in this, since good policy development depends as much as anything on reliable data and insights into how the system is actually working.

10.2 **I would encourage the Government, the regulators and the representative bodies to consider whether more could be done, without over-elaboration, to develop relevant data on criminal advocates and advocacy.**

10.3 **I would also encourage them to look kindly on the case for research in this area, both on the working of the advocacy market – which would in my view repay rigorous economic analysis – and on the vexed question of quality.** The QASA scheme, when implemented, should provide basic data on those meeting and not meeting the requisite standards, but by its very nature it will be focussed largely on minimum standards.

11 Costs

11.1 The total cost of the review is estimated to have been approximately £30,000.

Conclusion

My intention in writing this report as I have has been to produce as dispassionate an account as I could of how the criminal advocacy market is working as a basis for debate and discussion within the legal profession and between the profession and the Government. I am conscious of the strong feelings that surround these issues, and have been dismayed both at the unhealthy extent to which they divide the profession, both within itself and from the Government, and at the low level of confidence I have found in the future of criminal advocacy. Neither is in the public interest.

It may well be difficult for the main protagonists to find consensus about the way forward but I would urge them to do so. The quality of advocacy in our criminal justice system is a precious national asset, in which the public has as much of a stake as the legal profession.

© Crown copyright 2014
Produced by the Ministry of Justice

You may re-use this information (excluding logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or email: psi@nationalarchives.gsi.gov.uk

Where we have identified any third party copyright material you will need to obtain permission from the copyright holders concerned.

Alternative format versions of this report are available on request from criminaladvocacyreview@justice.gsi.gov.uk