

<b>To:</b>	Legal Services Board	
<b>Date of Meeting:</b>	22 May 2014	<b>Item:</b> Paper (14) 30

<b>Title:</b>	The Jeffrey review of independent criminal advocacy in England and Wales
<b>Workstream(s):</b>	Workstream B: Strategy Development and Research, Regulatory Reform
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<b>Status:</b>	Official

<b>Summary:</b>
This document provides an update following the publication of the Jeffrey review of independent criminal advocacy

<b>Recommendation(s):</b>
The Board is invited: (1) Note the content of the summary

<b>Risks and mitigations</b>	
<b>Financial:</b>	N/A
<b>Legal:</b>	N/A
<b>Reputational:</b>	N/A
<b>Resource:</b>	N/A

Consultation	Yes	No	Who / why?
<b>Board Members:</b>		X	
<b>Consumer Panel:</b>		X	
<b>Others:</b>			

<b>Freedom of Information Act 2000 (Fol)</b>		
Para ref	Fol exemption and summary	Expires
2,6,13	Section 44: restricted information under s167 LSA which was obtained by the Board in the exercise of its functions and therefore must not be disclosed	N/A / Date

## LEGAL SERVICES BOARD

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### The Jeffrey review of independent criminal advocacy in England and Wales

#### Background / context

1. The Jeffrey review of independent criminal advocacy in England and Wales (the review) was commissioned by the Justice Secretary on 5 September 2013 to look at the provision of independent criminal advocacy services. The review team have told us they held the LSB response to the review in high regard, and that it was influential on the final report.
2. [REDACTED]

#### Key points

3. The review includes the following key points:
  - There can be no “turning back the clock” to provide the bar with exclusive rights of audience, guaranteed market share or provide a privileged market position
  - The Criminal Bar should instead look to take available opportunities to adapt its operating model to compete with solicitor advocates or have a fused advocacy profession at junior levels, with a smaller and more specialist bar
  - There is a strong case for a quality assurance scheme. Sir Bill does not see that QASA would not work if the changes recommended by the High Court are made
  - There should be common training and CPD requirements for all advocates in the Crown Court, regardless of which branch of the profession they belong to
  - The SRA and the Law Society should consider steps to ensure that solicitor decisions about outsourcing are driven by professional responsibilities – not just commercial ones
4. A more comprehensive summary is provided at annex A.

#### Main areas where LSB input influenced the review’s outcome

5. The LSB input to the review stated that:

Continued market liberalisation to promote competition between and within each branch of the profession and allow new business structures are the interventions

most likely to result in better value and better quality services. Access to justice in this area is most likely to be preserved and enhanced through liberalisation rather than protection for certain types of historical business models.

6. [REDACTED]
- [REDACTED]
  - [REDACTED]
  - [REDACTED]
7. The review therefore makes suggestions for changes to come from the profession and the regulators.

#### *Quality*

8. The LSB highlighted quality concerns about criminal advocacy going back many years. We said that systematic evaluation through QASA was the way to address this, rather than favouring one type of advocate over another without any quantifiable evidence that they are uniformly of better quality. Sir Bill states that the preponderant view he has encountered, which in his view it would „be a mistake to discount’, is that „there are grounds for concern about quality<sup>1</sup>’. The report agreed that there was an undeniable case for “some kind of quality assurance scheme”. However, it stopped short of categorically saying that QASA should be adopted.

#### *Data*

9. The LSB provided a full data pack covering three main areas: regulation, supply and demand. Ours was one of the few responses to provide data and reasoned analysis. Updated versions of our data provided the backbone to the review’s final report. More than once the review highlights the lack of data available for this market. All stakeholders are urged to improve data collection.

### **Issues and risks looking forward**

#### *Entity regulation*

10. The last legal aid contracting round was in 2010, before the market had liberalised to the extent it has now. Although previous Bar Council leaderships have given considerable weight to encouraging Chambers to be aware of the advantages that corporate models (such as ProcureCo’s) can offer, it is unclear how far such thinking has advanced and therefore whether, how and to what extent the Bar will take advantage of the opportunities liberalisation has granted in the upcoming round. As only entities can bid for legal aid contracts, we expect that some chambers will organise themselves into entities so that they can bid. It

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<sup>1</sup> <http://www.justice.gov.uk/downloads/about/jeffrey-review/jeffrey-review-criminal-advocacy.pdf> at p30

seems unlikely that this will happen in large numbers, but those chambers that do alter their structure in this way could act as influential first movers ahead of the next contracting round in four or five years. This is reliant on:

- BSB being ready to regulate entities
- LSB being able to approve the necessary rule changes in a timely manner.

11. Our rules change team is already working with the BSB at the pre-application stage with the aim of ensuring its application is of as high a quality as possible when it is lodged. The LSB also needs to make sure that it has the necessary resource available to assess the application in a timely manner once it has been made. The award of legal aid contracts in October is a very important deadline<sup>2</sup>.

### QASA

12. In the context of ongoing legal challenge into validity of QASA, the report and response contribute to the evidence base of quality problems that require address. Sir Bill supports the view that the quality of criminal advocacy is of concern. He highlights that many judges have expressed this view to him. The Criminal Law Solicitors' Association and London Criminal Courts' Association acknowledge that they need to do better<sup>3</sup>. The Solicitors' Association of Higher Courts Advocates agrees that mandatory training is needed to address quality<sup>4</sup>.

### *Reaction of the Bar*

13. The Bar Council's initial response to the review illustrates the extreme reluctance of the Bar to look forward and adapt to market conditions. Its selective reading only highlighted parts of the review that painted barristers in a positive light and failed to mention recommendations that related to changes the criminal Bar should make, for example undertaking a full reappraisal of its future. [REDACTED]

[REDACTED]. A joint statement issued by the Criminal Law Solicitors' Association and the London Criminal Courts Solicitors' Association described the Bar Council's response to the review as "entirely preposterous entirely self-interested hubristic triumphalism".

### **How Government might react**

14. It is very unlikely that the Government will respond immediately beyond saying that it will take time to consider the review's findings. It should be noted that there is no ongoing role for Sir Bill Jeffrey in this context; moving forward this issue remains within the remit of the MoJ.

15. However, the review clearly shows that much can be done within the current regulatory structure. It is a chance for different providers to review the

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<sup>2</sup> It was confirmed with the Legal Aid Agency after the meeting that October is the deadline by which bidders will need to be able to demonstrate that they will have all necessary authorisations in place, including entity authorisation. Contracts will start in July 2015.

<sup>3</sup> <http://www.clsa.co.uk/assets/files/general/CLSA%20&%20LCCSA%20statement%20on%20Jeffrey.pdf>

<sup>4</sup> <http://www.sahca.org.uk/the-jeffrey-review-of-the-provision-of-independent-criminal-advocacy/>

opportunities open to them and how those opportunities could be taken advantage of. The Government response is likely to emphasise this.

16. It is likely also that the Government will encourage regulators and representative bodies to work together and explore the practical proposals suggested by Sir Bill. For example, Sir Bill notes the disparity in training requirements between solicitor advocates (who can appear in the Crown Court with 22 hours specific advocacy training) and barristers (who undertake around 120 days training pre-qualification). His main recommendation relating to both quality and education and training is 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<sup>5</sup>.
17. He suggests this could happen in three stages:
  - Remove the advocacy element of the Legal Practice Course and develop a more substantial elective for trainees wishing to pursue advocacy. This would be in line with the LETR recommendation to develop more specialist, but less title specific, pathways
  - SRA and Law Society to work together to replicate the supervised experience for solicitor advocates that pupillage provides for barristers
  - Profession and regulators to work together to devise minimum CPD expectations for Crown Court advocates

#### *Legal aid*

18. Despite the review's terms of reference expressly excluding consideration of legal aid remuneration rates, it has highlighted areas where legal aid policy could be looked at. However, the next round of criminal legal aid contracts is due to be awarded in October 2014. It is very unlikely that any changes will happen before then.

#### **Conclusion**

19. No formal immediate response is needed to the review by LSB, not least because none of the recommendations are directed specifically at us. The Executive is considering the content of the review in more detail to identify the regulatory implications in general and whether any LSB specific action is needed.
20. Possible activity could centre on:
  - Maintaining momentum on relevant data collection
  - Overseeing implementation of QASA post-legal challenge (or facilitating a non-judicial evaluation based version in the event that the current scheme fails)
  - Seeking to facilitate discussions on integrated training pathways in line with our section 4 duties on promoting best practice in education, if stakeholders do not develop momentum in this area themselves;

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<sup>5</sup> At p31

- Lobbying government to ensure that Sir Bill's welcome emphasis on the absence of support for restricting access to the advocacy market is maintained.
21. However, the key message from the report is that the market needs to continue to adjust in the absence of prescription from either regulators or government and it will be important, therefore, not to generate a stream of uncoordinated initiatives which might undermine the report's overall conclusions.
  22. Subject to the Board's comments today therefore, we would aim to continue to analyse the report in the light of market developments generally and come back with proposals for action, if judged necessary, in the context of: decisions on the BSB's proposals on entity regulation (and/or licensing authority status), developments in legal aid policy and the Government's response to the report.

14.05.14

*Jeffrey review of criminal advocacy – a summary*

**Recommendations**

- Different parts of the advocacy profession should seek consensus on how best to ensure that the market works effectively.
- There should be a common training expectation of all those practising as advocates in the Crown Court – more than that of solicitor advocates but not necessarily as much as the bar.
- The profession and the regulators should consider taking the advocacy element out of the existing Legal Practice Course and develop a fuller advocacy course for solicitors minded to pursue a career in advocacy – this could be mandatory for getting higher rights.
- The SRA and the Law Society should consider ways of replicating for higher court solicitor advocates the supervised experience which pupillage provides for barristers, including early exposure and practice.
- The profession should work together, with the regulators, to develop common minimum expectations for CPD for advocates in the Crown Court.
- The profession should consider a “ticketing” system where those appearing in rape and sexual abuse cases must demonstrate that they have undertaken relevant training (as already in place for the judiciary and the CPS) and consider extending to other areas.
- The SRA and the Law Society should consider what further steps could be taken to ensure that solicitor decisions about whether to outsource and who to outsource it to are driven by professional responsibilities – not just commercial ones.
- The Government should consider whether the Legal Aid Agency should maintain a list of approved defence advocates in publicly funded cases.
- The Government should consider the pros and cons of models for contracting directly with the Bar for defence representation - including separating police station advice and post-charge representational work.
- 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 (review of practice and procedures in the criminal courts).
- The Government, the regulators and the representative bodies should consider whether more could be done to develop relevant data on criminal advocates and advocacy.

- There should be research in this area, both on the working of the advocacy market and on quality.

### **Main structural changes proposed**

- Self-employed bar should adjust business model to compete for legal aid work on a level playing field.
- Self-employed bar should become a smaller, more specialist resource.
- Self-employed bar cannot carry on as at present in an attempt to preserve historical position in a changing market environment.

### **Standards, quality and training**

- No hard evidence on quality but there is disquiet among judges.
- The disparity in the training and CPD requirements between solicitor advocates and barristers cannot be defended.
- QASA –there is a strong for a quality assurance scheme, he does not see that QASA would not work if changes recommended by the High Court are made.

### **Market**

- Solicitors decide whether to outsource advocacy or keep it in house - legal aid funding incentivises the former rather than using the best advocate for the job in the consumer interest.
- There is no reason why a client known to be pleading guilty to be represented by a narrowly skilled plea- only advocate. But it is a concern if a desire to keep the advocacy in house results in late assignment of an advocate where it is not clear which way the client will plead.
- The legal aid contracting system makes it difficult for barristers to gain a contract that gives them direct access to work rather than referral work from contracted solicitor firms – the system could be changed to make this easier e.g. separate contracts for police station work/case preparation and representation at court.

### **Supply of criminal advocates**

- Supply of advocates has increased, demand has decreased. There is oversupply and low utilisation, resulting in lower average earnings for barristers in particular.
- The Criminal Bar is an ageing profession.
- There appears to be fewer pupillages. There are many more BPTC graduates than pupillages. This may negatively impact on diversity. Any radical structural change should seek to address this.

### **How the system works and impact on quality**



- More timely allocation of cases to advocates that will be able to take on the case would increase preparation time and therefore quality.

### **The longer term**

- Legal aid policy is likely to result in fewer, larger criminal solicitor practices that are more likely to keep advocacy in house. This will mean less work for the self-employed bar, lower intake of young barristers and less opportunity for young barristers to get early experience of easier work to build skills.
- A lack of new blood may continue having a negative impact on the “talent pipeline” for QCs and judges (who traditionally come mainly from the Bar).
- It is possible for the self-employed bar to change their business model to be able to compete for work but limited enthusiasm for doing so at present.
- There is no case for turning back the clock and giving exclusive rights in the Crown Court to barristers – improving the skills of solicitor advocates is a better idea.
- A radical model - a general pool of advocates for easier work with no split between barrister and solicitor, decisions to become a specialist advocate come later in the career, a smaller criminal bar would concentrate on complex cases.
- Strongly supports the Lord Chief Justice’s advice that the criminal Bar to consider where it wishes to be in ten years time and adapt accordingly.

### **LSB issue**

- The Legal Aid Agency contracts only with entities, not individuals. Future direct contracting with the self-employed bar will be dependent on the BSB’s proposed changes to regulate entities. These changes must be approved by the LSB.