

Sir Bill Jeffrey  
c/o Ministry of Justice  
102 Petty France  
London WC1H 9AJ

6 December 2013

Dear Sir Bill

### **Review of the provision of independent criminal advocacy**

We are pleased to provide a consumer perspective for your review. As you will be aware, the Legal Services Consumer Panel is a central feature of a regulatory framework which is designed to transform the legal services market around the needs of its users following centuries of self regulation by lawyers. As a permanent, discrete champion for consumers we have an essential responsibility to ensure that regulators are able to consider and act on the user perspective.

We have taken consumers in this context as most obviously including those accused of a crime who receive legal representation for their defence. Effective legal representation is especially vital for that person as their liberty may be at stake, while victims and society as whole need assurance that the correct culprit has been identified and justice done. Individuals who represent themselves as litigants in person, who may be excluded from the advocacy market, should also be treated as consumers. Victims and witnesses can also said to be consumers of criminal advocacy services to the extent that they are affected by the actions of advocates. Section 207 of the Legal Services Act defines consumers as persons who: use, have used or may be contemplating using, legal services; who have rights or interests which are derived from, or are otherwise attributable to, the use of such services by other persons; or who have rights or interests which may be adversely affected by the use of such services by persons acting on their behalf or in a fiduciary capacity in relation to them.

In responding to your letter we have considered the nature of the consumer evidence base, issues relating to access to legal services including choice and quality, and what this means for models of regulation.

In summary, we conclude that:

- There is a lack of research on the consumer experience of criminal advocacy services which means the evidence base is weak

- The current system provides consumers with a wide choice of advocates. However, legal aid eligibility means there may be a latent demand for criminal advocacy services
- Choice for legally aided clients has been retained following a Government consultation, but 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.
- The review should explore whether competition between solicitors and barristers is working fairly and whether lifting of restrictions on barristers will remedy any problems or if more needs to be done. Our view is that different regulatory regimes and embedded cultural traditions are at the root of perceived problems around competition between barristers and solicitors
- There is significant evidence of poor quality advocacy, which is why QASA is such an important development.
- A single regulator for legal services could offer the best solution for lawyers and consumers alike

### **Weak evidence base**

From the outset I would like to recognise that our submission is not as evidence based as we would wish as there is a lack of recent research evidence on the consumer experience of criminal advocacy services. Court data shows 1.6 million cases heard in the Magistrates Courts and 123,000 in Crown Courts in the last recorded year. When consumers are considered as a combination of clients, victims and witnesses this would total a considerable volume of individuals who are affected by criminal advocacy services. Yet although a sizeable number, robust data is difficult to extract from general surveys of legal consumers due to sample sizes. Specific studies with users are feasible, but evidently this has not been a recent priority. The Legal Services Research Centre carried out a study in 2010 focusing on access to legal advice in police stations and Magistrates Courts.<sup>1</sup> However, this is a notable exception and the study itself criticised the paucity of previous research. Further, client feedback is not a routine feature of regulatory monitoring or accreditation schemes. This represents a real gap in understanding and adds to the problem that the legal profession is the dominant voice in debates on the future of legal services.

Therefore, while we hope our remarks below are helpful, we ask that your report acknowledges the evidence gaps with users and stresses the need for fresh research and better data on the demand side of the market.

### **Access**

The first question a consumer representative asks is whether consumers have access to the relevant service. The regulatory data suggests there is no shortage of available advocates for cases heard at each of the various tiers within the court system. In 2012 nearly 150,000 professionals had rights of audience in the lower courts, and there were over 21,000 individuals with rights of audience in the higher courts. Further, the

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<sup>1</sup> Dr Vicky Kemp, *Transforming legal aid: Access to criminal defence services*, Legal Services Research Centre, September 2010.

potential pool of advocates has grown despite the number of criminal trials falling over time. We would be concerned if changes to legal aid made criminal work an unattractive career option or reduced the quality or diversity of advocates, but we have not seen evidence of this to date.

The Panel wishes to preserve a diverse market consisting of solicitors, barristers and chartered legal executives. A common argument is the need to ensure there remains a sufficient pool of self-employed barristers as, unlike firms of solicitors, the chambers structure allows barristers within the same chambers to act on both sides of a case without being conflicted. The notion that the chambers structure fully avoids conflicts should not go unchallenged. Further, it is difficult to foresee competition reforms in the legal services market creating consolidation to such an extent that criminal advocacy services are unavailable due to gaps in expertise or conflicts of interest. Although we are not complacent around arguments about the independent Bar, any remedial action must be evidence-based and targeted in the right areas. There are more relevant issues around fair competition between different branches of the profession that would benefit from deeper exploration, which we explore later below.

The cab rank rule, which applies to barristers only, aims to guarantee access to representation for individuals accused of even the most heinous of crimes. As a recent report has highlighted, the aim of the rule is undermined due to work funded via legal aid being exempted.<sup>2</sup> The new BSB Handbook will leave it to individual barristers to judge whether they can reasonably decline to accept instructions in legally aided work in all the circumstances, including where they are not being offered what they consider a proper fee. There is, however, no evidence of recent cases where individuals have been unable to secure legal representation. We gather that the BSB is due to review the detail of the cab rank rule soon.

A choice of advocates is only meaningful for consumers if they can afford to purchase the relevant services. If someone is charged, legal aid may pay for some or all of the costs of legal representation in court. Financial means is the main factor that determines if funding will be provided and the size of any contribution that the individual must make towards the cost of legal representation. A tightening of legal aid eligibility means a greater number of consumers will be expected to make at least some financial contribution to their defence costs. Individuals may also choose to decline legal aid and pay for their costs privately. Legal aid eligibility falls outside your terms of reference, and indeed our statutory remit, but the regulatory implications of these changes are a relevant context for the review.

One implication of this is a potential rise in litigants in person who consider they either do not need representation or cannot afford it. Court data on numbers of litigants in person in criminal cases is not recorded. LSB survey data suggests that 16% of people arrested deal with their matter without seeking formal legal advice. The LSRC study in 2010 found 82% of defendants in Magistrates Courts reported having a solicitor. There may be a range of reasons why people self-represent in criminal cases. For some

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<sup>2</sup> John Flood and Morten Hviid, *The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market*, Legal Services Board, 2013.

this is an active choice that they do not need or want legal representation. However, it is possible that financial considerations influence others, while the LSRC study identified concerns that the administrative requirements of the means test could be too onerous for some people, particularly those who are vulnerable. Therefore, even though legal aid is available, there may be a latent demand of unknown scale for criminal advocacy services.

In addition, lawyers are increasingly facing competition from unregulated lay service providers. For example, the Panel is currently investigating the emergence of ‘professional McKenzie Friends’, i.e. those who charge for this service. A common marketing message of such businesses, whether true or not, is that they are far cheaper than traditional lawyers. While such services are mostly prevalent in family law, we have come across providers who offer such assistance in criminal cases. Some offer to act as lay advocates, subject to the judge granting them rights of audience on a case by case basis. We are in the early stages of this project, which is initially seeking to build a picture of this emerging market. Stakeholder attitudes are mixed: some object on moral grounds or think it undermines lawyers’ reserved rights, whereas others see this as extending access to those who otherwise would not be represented.

### **Choice and information**

Following the consultation on price competitive tendering, the Government has decided that choice of lawyer for legally aided clients will be retained. However, the Panel’s survey data across all legal services shows that consumers find it difficult to compare lawyers, undermining freedom of choice. This partly reflects the asymmetries of information between lawyer and client, the rare use of legal services and the often distress nature of the situation – all apply in criminal cases. However, it is also due to the absence of credible choice tools such as comparison websites and quality marks, plus a lack of performance data about lawyers, which could inform consumer choice. Demand side competition for criminal advocacy services would be strengthened if comparative information about the past performance of lawyers was readily available to consumers. Moreover, since lawyers may be funded via legal aid, this also raises issues of accountability for use of taxpayer money. This is information the public has a right to know.

A key area for your review to explore is whether the structure of the market allows fair competition between the different branches of the profession. Historically the Bar has been a referral profession with solicitors providing initial advice and litigation services and instructing barristers to provide advocacy services. Of course, solicitors and barristers now compete for advocacy services. The duty solicitor scheme operating in police stations means that in practice solicitors have first contact with potential clients. Funding models mean that legal aid funds are awarded to one entity for each case; this entity is expected to provide an end-to-end service and sub-contract certain services as necessary. Solicitors may have an incentive to keep the advocacy element of this work in house rather than refer to barristers as they traditionally have done. The Legal Aid Agency cannot award contracts to self-employed barristers because they are not

entities. Barristers are also prohibited from providing litigation services or holding client money. On the face of it, therefore, this situation would seem to give solicitors an unfair commercial advantage over barristers.

However, recent and forthcoming rule changes should create a more level playing field between solicitors and barristers. Consumers can now access barristers directly through the public access scheme and this is no longer restricted to private work. They can also hand money over to barristers to be held securely in escrow accounts. Barristers who qualify will soon be permitted to conduct litigation. Entity regulation for barristers is on its way. The ProcureCo model may find a way around the awarding of contracts issue. Therefore, the actual differences between a solicitor and barrister have eroded almost entirely and this should allow for fairer competition. Even so, although regulatory restrictions are being lifted, it may take longer for cultural norms and operating practices to change such that barristers work in business structures and promote their services to clients in ways that allow them to compete with solicitors successfully. The behaviour of individual consumers and large purchasers will also take time to change.

In short, these are complex issues and the sector is in flux as a result of changes to legal aid, the lifting of regulatory restrictions and the market liberalisation reforms in the 2007 Act that facilitate new forms of business structures including partnerships between solicitors and barristers. The market will need time to respond to these regulatory changes. It is not yet clear whether these reforms will be sufficient to allow fair competition or whether further structural issues remain to be addressed.

## Quality

A key consumer concern is to ensure high quality of service provision. This applies to all types of consumer – clients, victims and witnesses alike. Regulators have decided to introduce a mandatory accreditation scheme to monitor the quality of criminal advocacy – Quality Assurance Scheme for Advocates (QASA) – following significant evidence of poor quality advocacy. For example, one study found that while most advocates performed well at the simplest and most serious levels, performance in lesser Crown court trials was noticeably lower, with nearly 50% failure rates in the cross examination, examination in chief and multiple choice assessments.<sup>3</sup> Moreover, two reports in 2012 by HM Crown Prosecution Service Inspectorate (HMCPSI) found the court performance of CPS advocates had shown an overall decline over two years. In the bulk of cases, where defendants pleaded not guilty, it found CPS advocates were often ill-prepared and failed to challenge prejudicial evidence.<sup>4</sup>

The Panel strongly supports the introduction of QASA, which is designed to enable regulators to build public and judicial confidence in the advocates who appear in criminal courts by tackling poor practice

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<sup>3</sup> Angela Devereux, Jason Tucker, Professor Richard Moorhead and Professor Ed Cape, *Legal Services Commission 'Quality Assurance for Advocates'*, Cardiff Law School, 2010.

<sup>4</sup> HMCPSI, *Follow up report of the thematic review of the quality of prosecution advocacy and case presentation*, March 2012; *CPS Core Quality Standards Monitoring Scheme: Thematic review of the CPS Core Quality Standards Monitoring Scheme*, March 2012.

specifically and raising the standards of advocates more broadly, thereby ensuring competence at all levels and types of practice. It has been of considerable concern to us that elements of the legal profession have challenged the need for a quality scheme developed over a period of seven years by their own regulator following numerous consultations.

QASA provides an instructive model for wider debates around future models of regulation opened up in the Ministry of Justice Simplification Review. Regulators have collaborated to develop a common set of advocacy standards and a four-tier accreditation framework that will apply to all advocates irrespective of their previous education, training and experience. This is a risk-based approach to regulation focused on the activity and represents a welcome shift away from systems based on professional titles. Despite this, fraught negotiations produced a situation where there is scope for each regulator to apply elements of the scheme differently, thus risking an unlevel playing field and consumer confusion.

QASA also offers insights into the future education and training of lawyers, which has been subject to a separate major review – the Legal Education and Training Review (LETR). Firstly, it recognises that advocacy is a specialist activity and in this area the general legal qualification is not sufficient on its own to ensure competence. In other words, any lawyer wishing to practise criminal advocacy must obtain an extra permission to do so. Similarly, the four tiers also reflect that a single legal activity can have different levels of complexity and require lawyers to demonstrate different levels of competence, rather than one-size-fits-all. Another feature of QASA is that criminal advocates are subject to periodic reaccreditation; there is no assumption, unlike in other areas of law, that someone will remain competent throughout their careers once qualified. Instead they must regularly demonstrate their continued fitness to practise.

### **Models of regulation**

This leads to the issue of whether criminal advocacy is best served under the current system of regulation or would benefit from changing to a new structure. Notwithstanding your terms of reference, criminal advocacy should not be looked at in isolation; the right system of regulation has to take into account the needs of the legal services market overall. As the Panel has set out in responding to the Simplification Review, four years of evidence of the consumer experience has demonstrated that the existing regulatory framework does not provide a sustainable model in the long term to offer consumers the best system of consumer protection or support a competitive market place. We have recommended that a process start to design a new blueprint for legal services regulation with our lead candidate model being a single regulator for the legal services market.<sup>5</sup>

The QASA experience shows that it is possible to develop a single solution for a sub-market within the existing multiple regulator regime. However, as suggested above, the policy development process was not easy and we expect the scheme would have been up and running far quicker with a less

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<sup>5</sup> Legal Services Consumer Panel, *Breaking the maze: Simplifying legal services regulation*, September 2013.

complicated governance structure. A single regulator could also help to ensure consistent application of the scheme across the market except where risk-based reasons justified a different approach. Retaining multiple regulators for criminal advocacy would also fail to deal with the problems inherent within such a system – duplication of responsibilities adding complexity and cost; regulatory competition risking a race to the bottom and inhibiting collaboration between regulators; smaller regulators lacking the capacity and capability to deliver; and regulation being insufficiently independent of the profession.

Nor do we consider that there should be one regulator specialising in advocacy services and another regulator covering the rest of the legal services market. Advocacy is not so distinct from other types of legal service to justify a dual regime. Further, the intention of the market reforms is to enable novel business structures to flourish, with combinations of advocacy services, other types of legal services and non-legal services – separate regulatory regimes could inhibit such innovation. The problems of multiple regulators outlined above would still remain to varying extents. We do not consider that a single regulator would create fusion or undermine the independent Bar. These risks could be mitigated by introducing a flexible and risk-based regulatory regime that allowed different entry points for aspirant lawyers, a flexible labour market allowing mobility across the branches of the profession and a full range of business models to flourish.

Your terms of reference suggest that the starting point of the review is correctly the provision of criminal advocacy services, in other words the focus is on the activity being delivered rather than the professional title of solicitor or barrister. In our analysis a regulatory system based on professional title frustrates a risk-based regime and does not make sense from a consumer journey perspective. The Panel's focus is on outcomes for consumers. We recognise that consumers are best served in a diverse market and where there is fair competition between the different types of provider. Since the service provided to consumers is the same, under a risk-based system of regulation there should not be great variation in the regulatory regimes under which different legal professionals operate.

Historic differences in regulatory regimes combined with embedded cultural traditions are at the root of current perceived problems. Further, competition within a liberalised market under a common regulatory framework could offer freedom and fairness for different types of lawyer and the best chance of consumers being provided with high quality and affordable criminal advocacy services that meet their needs.

We hope these comments are helpful and we would be happy to meet you to discuss them further.

Yours sincerely,



Elisabeth Davies  
Chair