

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

10 November 2013

Dear Sir Bill,

### **Review of the Provision of Independent Criminal Advocacy**

We are grateful for the opportunity to provide written submissions to assist you with your review.

Below we have set out an overview of our position, followed by responses to the three areas that you have specifically requested information on.

#### **Overview**

1. We believe that the criminal Bar sets the benchmark in terms of high quality criminal advocacy. We are concerned that increasing competition from solicitors and legal aid reform are putting significant pressure on the independent criminal Bar. As matters stand, in this particular segment of the legal services market, competition cannot be relied upon to ensure that those offering the best combination of value and quality thrive. The legal aid system tends to encourage the use by solicitors' firms of in-house advocates, whether or not that is in the client's best interests; clients all too often lack the understanding or means to exercise choice; and the pressure of successive cuts in fees poses a risk to quality and is liable to drive out of this type of work those who are most highly skilled and best able to attract privately funded work in other fields. These factors are increasing the risks of inconsistent standards and incompetent representation. This in turn emphasises the need for greater consistency in training, standards and regulation to ensure that criminal advocacy standards are maintained, in the interests of justice and the public.
2. At a minimum, this will require ever closer cooperation between the different regulators involved. An alternative, which should be evaluated but would require amendments to the current statutory framework, would be to move to activity based regulation whereby advocacy was subject to a single regulator, code of conduct and training regime, whether the advocate is self-employed or practising within an entity (which might be regulated by a different regulator).

#### *Setting the benchmark*

3. There are a number of reasons for our contention that the criminal Bar sets the benchmark in terms of high quality criminal advocacy. These include:

- a) **Training:** Barristers are specifically trained in advocacy from the Bar Professional Training Course, through pupillage and thereafter. To be called to the Bar, an individual must have passed a minimum of two modules during the Bar Professional Training Course in which their performance of advocacy is continuously assessed. During pupillage barristers will spend six months observing advocacy and up to six months also performing advocacy under the supervision of a trained pupil supervisor. There is further advocacy training and assessment within the first three years of practice as all new barristers must complete the New Practitioners Programme, which involves nine hours of dedicated advocacy training and assessment. Therefore junior barristers receive a significant amount of targeted advocacy training and assessment.
- b) **Infrastructure:** Even after the first three years of practice, barristers benefit from the training and support infrastructure that the Bar has established. Notably, this includes the Advocacy Training Council, which coordinates a range of high level advocacy training courses across the Inns of Court (including the renowned Keble course). Vulnerable witness handling provides a recent example of the very real benefits of this infrastructure. In 2009, the Advocacy Training Council responded to emerging concerns about the handling of vulnerable witnesses in criminal trials by setting up a working group to investigate the matter. This group was responsible for the “Raising the Bar” report in 2011 which has since resulted in the development of specialist training as well as a toolkit for advocates to assist them to develop their skills. This toolkit is available through the Advocate’s Gateway website, which is managed by a Committee which includes representatives for the Ministry of Justice, the Judiciary and the CPS. Concerns over vulnerable witness handling have gathered force again in the last year and the Bar has therefore demonstrated that it is ahead of the curve in having already developed and delivered (through the ATC) high quality training and guidance on this high risk area.
- c) **Specialist criminal advocates:** The criminal Bar provides a pool of dedicated and specialist criminal advocates, many of whom have experience of both prosecuting and defending criminal cases. Crucially, almost all criminal barristers practise advocacy in trials as well as non-trial hearings. In addition to allowing them to develop and improve their advocacy skills, we believe that this has a significant impact on their ability to properly advise clients on what to expect if a case goes to trial. The pattern of practice amongst solicitor advocates is significantly different, with many not undertaking trials. In general, it is likely to be in a client’s best interests to be advised and represented by a specialist criminal advocate (whether barrister or solicitor) whose experience and skill enables them to provide reliable advice on the prospects of defending a case, and who can continue to represent them if a case does proceed to trial. Where an individual’s experience does not include trial advocacy, it is important that the client understands this and is able to exercise an informed choice as to their representation. We return to this point, below.
- d) **Dedicated regulation:** The criminal Bar also benefits from the dedicated, specialist regulation of the Bar Standards Board. This helps to ensure that there are well informed standards and regulatory obligations placed upon barristers and that appropriate action is taken to respond to individual or wider risks in relation to this.

### *Risks to standards and competence*

4. We are therefore concerned that a number of changes to the market are threatening the independent criminal bar and the high standards that it has fostered. Most notable amongst these changes are:
  - a) **Increasing competition from solicitor advocates:** The criminal advocacy market has evolved significantly since solicitors gained higher rights in 1990. The traditional model whereby specialist litigators would instruct a specialist advocate for all courtroom hearings has developed into a situation whereby many solicitors firms include in-house advocates who also appear in some hearings. Many firms will seek to keep as much advocacy in-house as possible, often through in-house advocates who only undertake non-trial hearings (pleas, mitigation, sentencing and pre-trial hearings). As a result, the Bar has increasingly focussed on the more complex trial hearings and has a reduced presence in the Magistrates Court (including Youth Courts) and in non-trial hearings in the Crown Court.
  - b) **Legal aid reform:** Consistent and sustained legal aid funding cuts are having an impact on the number of barristers who specialise in criminal work. This can be seen from the following statistics:
5. In the last five years, the number of criminal barristers has decreased from 5,858 to 5,625. This represents a drop from 42.7% to 36.1% of the entire Bar. This trend has been gathering pace for some years; 15 years ago criminal barristers made up 47.8% of all barristers.<sup>1</sup>
6. The decreases in specialism appears to be more acute at the top levels. Whilst criminal barristers still make up 36.1% of the overall bar, they comprise a smaller proportion of applicants for silk; criminal advocates comprised between 26-27% of the total applicants for silk in the last three rounds<sup>2</sup>.
7. Moreover, legal aid rates incentivise early guilty pleas (and are likely to do so even more so under the proposed reforms), which is fuelling an increasing market of in-house advocates who never conduct trials but only appear in non-trial hearings. It is understood that the SRA estimate that as many as 50% of solicitors with higher rights do not conduct trials.
8. These changes do not just threaten the sustainability of the independent criminal Bar; crucially, they increase the risk of lower or inconsistent standards of criminal advocacy across the whole market. This has many aspects, including:
  - Contributing to decreases in experience and specialisation in criminal advocates;
  - Contributing to increases in special purpose non-trial advocates who may not have experience of contesting trials;
  - Reducing opportunities for advocates to develop their skills in complex cases
  - Creating disparities in the level of experience of advocates for different categories of defendant; and
  - Establishing a two tier system

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<sup>1</sup> These figures have been extracted from the BSB's records, which record barristers' practice areas.

<sup>2</sup> <http://www.qcappointments.org/>. These figures includes solicitor advocate applicants, although they only comprise between 1-3% of all applicants.

9. We have expanded on these points under (A) below.
10. This is not just a theoretical concern; there is significant evidence that the risk of lower and less consistent standards is indeed materialising in criminal work. This includes:
- The Carter Report (2006);
  - The LSC's Cardiff research project (2007);
  - A number of high profile judicial pronouncements
  - CPS Thematic Reviews (2009 and 2012)
11. In addition, in 2011 the BSB commissioned ORC International to undertake a perceptions study of the standards of criminal advocacy. This can be found on our website at: [https://www.barstandardsboard.org.uk/media/1402386/orc\\_international\\_-\\_perceptions\\_of\\_advocacy\\_report.pdf](https://www.barstandardsboard.org.uk/media/1402386/orc_international_-_perceptions_of_advocacy_report.pdf). This study included over 750 online surveys completed by criminal barristers, legal executives and lay justices as well as 16 in depth telephone interviews with key parties. Its conclusions included the following:
- a) Over half of all respondents feel that existing levels of underperformance in criminal advocacy are having an impact on the fair and proper administration of justice, with 31% rating the impact as "very high";
  - b) A quarter of all respondents feel that criminal advocates "very frequently" act beyond their competence;
  - c) Most qualitative respondents feel that standards are generally lower for solicitors and CPS advocates than they are for the self-employed Bar. The main reasons suggested for this are that barristers receive training which is more focussed on advocacy and gain more experience before moving on to complex cases;
  - d) Over three quarters of respondents feel that standards of advocacy have declined over the past five years. Two main reasons are given for this; the increasing involvement of solicitor advocates, and the impact of public funding;
  - e) Three quarters of respondents feel that standards of criminal advocacy will decline in the coming years in the absence of any regulatory measures to address this;
  - f) Public funding is having a very large impact on the provision of good quality advocacy, according to over three quarters of respondents. Some feel that this factor is driving the decline in standards to such an extent that it will be hard for any regulatory intervention to have a significant impact.
12. It is clear therefore that the risks in relation to standards are in fact manifesting in underperformance in criminal advocacy.
13. The implications of incompetent advocacy are significant; it impacts upon the consistent and fair administration of justice and the interests of individual consumers. It is also likely to result in less efficient criminal trials and hearings, more retrials or appeals and therefore increases in the costs associated with criminal justice.

#### *The need for greater consistency*

14. Whilst the risks highlighted above are real, they are not insurmountable and it is imperative that they are addressed. We believe that to mitigate these risks effectively we need to strive for greater consistency in four main areas:

- Education and training
- Standards and expectations around competency
- Regulatory obligations
- Regulation

15. The BSB currently has a number of projects in hand which seek to address these areas. The most notable are the Legal Education and Training Review and the Quality Assurance Scheme for Advocates, both of which involve cooperation between the main regulators of advocates.

16. Even greater consistency and consolidation is required in the future, so that all criminal advocates can benefit from the training, infrastructure and dedicated regulation that have fostered the high standards at the Bar and that any additional quality assurance mechanisms apply equally across the professions. This should ensure consistent and high standards of criminal advocacy and representation at all levels, which is in the public interest and in the interests of justice.

#### (A) The market for criminal advocacy

17. As set out above, since solicitors gained higher rights in 1990 the criminal advocacy market has been evolving. In more recent years some significant reforms to legal aid have accelerated these changes. This has exposed some pressure points in the criminal justice system and created a number of risks to consistently high advocacy standards. These include:

- a) **Contributing to decreases in experience and specialisation in criminal advocates:** The combination of a decrease in the number of QC certificates issued, significant decreases in criminal legal aid rates and reductions in the number of criminal trials have meant that there is less trial advocacy work available for criminal advocates and specifically fewer of the most complex and challenging cases. This has led many criminal barristers to attempt to diversify their practices in order to remain busy and maintain earnings. As a result, we have noticed a decrease in the number of specialist criminal barristers (criminal barristers now make up just 36.1% of all barristers compared to 42.7% 5 years ago and 48.8% 15 years ago) and we expect this trend to continue in the coming years. This is particularly noticeable at the senior end, with criminal advocates accounting for 26-27% of applicants for silk.

If criminal work decreases it is to be expected that the market for criminal advocates will also constrict. However, as competition in this particular market cannot be relied upon to ensure that those offering the best combination of value and quality thrive, we are concerned that the market might be losing some of the more experienced and competent criminal advocates and that this could contribute to greater inconsistencies in standards.

- b) **Contributing to increases in special purpose non-trial advocates who may not have experience of contesting trials:** Legal aid rates are fuelling an increasing market of advocates who never conduct trials but only appear in non-trial hearings. It is understood that the Solicitors Regulation Authority estimates that around half of solicitor advocates with higher rights do not undertake trials.

The BSB is concerned 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; such non-trial

advocates mean that some defendants might proceed through the whole process without ever having been accurately advised on the prospects of success if they plead not guilty. In order to address this risk, we believe that as a minimum, clients should be informed if they are being advised and represented by an advocate who has never undertaken a criminal trial before and does not intend to do so.

- c) **Reducing opportunities for advocates to develop their skills in complex cases:** A decrease in available work for more senior advocates means that many are taking on less complex work as a matter of necessity. This in turn means that there are less challenging cases for more junior advocates to appear in, which reduces the opportunities for developing their skills. This is further exacerbated by the decreases in trial opportunities flowing from the growing market for plea work. This increases the importance of ongoing training opportunities and requirements for advocates to assist them to develop the skills required to undertake more complex cases when appropriate opportunities do arise.
- d) **Creating disparities in the level of experience of advocates for different categories of defendant:** The Youth Courts provide a tangible example of one of the other consequences of frustrated career progression. Legal aid rates in the Youth Courts are much lower than the adult courts, even for comparable very serious cases (such as sexual assault). This means that more experienced advocates are often not prepared to appear in the Youth Courts, even on challenging cases. It therefore provides opportunities for more junior advocates to gain experience of serious and complex cases which are increasingly scarce in the adult courts. As a result, youth defendants may receive less experienced advocates for a comparable case than an adult defendant would. Youth Courts are likely to have many vulnerable defendants and witnesses, which makes the quality of advocacy particularly important.

The BSB, SRA and IPS are currently undertaking a research project to establish what competences are required for effective Youth Court advocacy. This will provide the basis for decisions as to whether any specific quality assurance mechanisms can be implemented to address the risks.

- e) **Establishing a two tier system:** In the BSB's response to the Ministry of Justice's recent Transforming Legal Aid consultation we highlighted the risk of legal aid reforms creating a two tier system whereby those who can afford to pay privately for criminal defence work will have access to a greater choice of specialist advocates than those who rely on criminal legal aid.

## **(B) Quality and training**

18. There is an inherent risk within the criminal advocacy market that flows from the fact that criminal advocates could be solicitors, barristers or legal executives. Each path has very different education and training routes. In particular, barristers are trained specifically in advocacy whereas solicitors can obtain higher rights with less focussed advocacy training, experience and assessment. Concerns about the quality of training for solicitor Higher Court Advocates was highlighted in a report that Nick Smedley's provided for the Law Society in 2010.
19. This inherent risk has become increasingly relevant given the pressures flowing from legal aid reforms that were detailed above.
20. It is for these reasons that we believe that it is imperative that we strive for greater consistency in four key areas:

- Education and training
- Standards and expectations around competency
- Regulatory obligations
- Regulation

21. There are currently two particularly notable projects that are being undertaken across the regulators that should contribute to greater consistency in these areas:

- a) **The Legal Education and Training Review:** Through the LETR the BSB and SRA are, amongst other things, attempting to agree a general competency framework. This will help to ensure comparable competences at entry to the profession. Further, LETR provides an opportunity for regulators to review routes to enter the legal profession and to consider whether or not there are other approaches to qualification ie – requiring specialism at a later stage.
- b) **The Quality Assurance Scheme for Advocates:** Through QASA the BSB, SRA and IPS have developed a competence framework against which all criminal advocates will be assessed, regardless of their route to qualification or prior experience. The competence framework covers four levels of competence. In order to progress to a higher level and undertake more complex work an advocate will need to demonstrate competence against this framework.

22. Whilst these projects should help to encourage consistency, there are many other areas for improvement. It is particularly important that all advocates receive an equivalent quantity and quality of training and assessment in advocacy, as highlighted in the Smedley Report. We are concerned about the disparities in advocacy training and assessment between solicitors and barristers; this applies to qualification, the process for gaining higher rights and the first three years of practice.

23. Disparities are relevant not only in the early years of practice but also through available training and support thereafter. For example, the BSB is currently assessing whether it should require criminal barristers to undertake training (such as that developed by the ATC) in handling vulnerable witnesses. Such measures could be incorporated into the CPD requirements for barristers. However, it would clearly be contrary to the public interest if such training was available or indeed mandatory for barristers but not solicitor advocates. This demonstrates that whilst the BSB and SRA are working together on issues such as LETR and QASA it is difficult for all regulatory requirements to be developed jointly across regulators. It is therefore not possible to fully mitigate the inherent risk of different types of advocates receiving different levels of training and quality assurance. This is particularly concerning given the risks that have been set out in relation to consistent standards of criminal advocacy, both within and across the professions.

### **(C) Structure of profession**

24. It is clear that even in jurisdictions that do not have separate professions, specialist advocates are normally present and identified in one way or another. Whilst specialisation is no longer so clearly demarcated by title in England and Wales, it is important that it continues to be recognised through practice and regulation. It is in the public interest that those needing representation can readily identify specialist advocates and are assured of a high level of consistency, in terms of quality and ethics, whatever the professional title of the individual advocate.

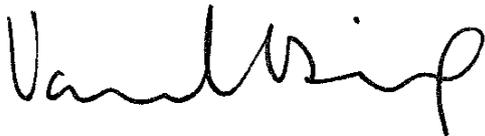
25. It has been stated above that we believe that the criminal bar sets the benchmark in terms of high quality criminal advocacy. We believe that the training, infrastructure and dedicated regulation that have fostered these high standards at the Bar should be available and applied to all criminal advocates in order to ensure consistently high standards and to mitigate the risks of inconsistent standards and incompetence. This may be achievable by cooperation between regulators; but the alternative of moving to activity based regulation of advocacy by the BSB should also be evaluated, in the context of an overall review of the regulatory framework created by the Legal Services Act 2007.

## **Conclusion**

Recent reforms are increasing risks in relation to poor advocacy performance and it is crucial that these risks are effectively mitigated so that standards of criminal advocacy are maintained. We believe that the blueprint for training and regulation of the Bar provides a solid foundation for mitigating this risk and that greater consistency in training and regulation will be key to ensuring consistently high standards.

Please let us know if there is anything further that we can provide to assist with the review. We would also be happy to meet again to discuss any of the matters sets out in this response or any proposals that you may have.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Vanessa Davies', written in a cursive style.

**Dr Vanessa Davies**  
**Director, Bar Standards Board**