

Perceptions of Criminal Advocacy

BAR
STANDARDS
BOARD

26th March 2012

ORC*International*

Objectives and Methodology

- **Objectives:**
 - To evaluate the current perceptions of the standards of criminal advocacy
- **Combined Qualitative and Quantitative Surveys:**
 - **Quantitative:** 10 minute online survey
 - 762 completed interviews among criminal advocates, legal executives and magistrates (see appendix for detailed breakdown)
 - Questionnaire focussed on obtaining a baseline of current perceptions of criminal advocacy and problem areas
 - Targeted survey link sent to a mailing list of barristers provided by the Bar Standards Board, and open link sent to contacts in a number of stakeholder organisations (ILEX, CPS, SAHCA, and the Magistrates Association)
 - Fieldwork: 10th February – 8th March 2012
 - **Qualitative:** 15 minute telephone depth interviews
 - 16 completed interviews among criminal advocates and a variety of stakeholders of criminal advocacy in order to clarify and expand on the responses to the online survey
 - Sample of criminal advocacy stakeholders supplied by the Bar Standards Board, and expanded by asking respondents for referrals to other appropriate contacts
 - Fieldwork: 8th February – 15th March 2012
 - NB. Online respondents unhappy with their inability to provide feedback were invited to provide comments via email, and these have been included in the qualitative feedback

Conclusions

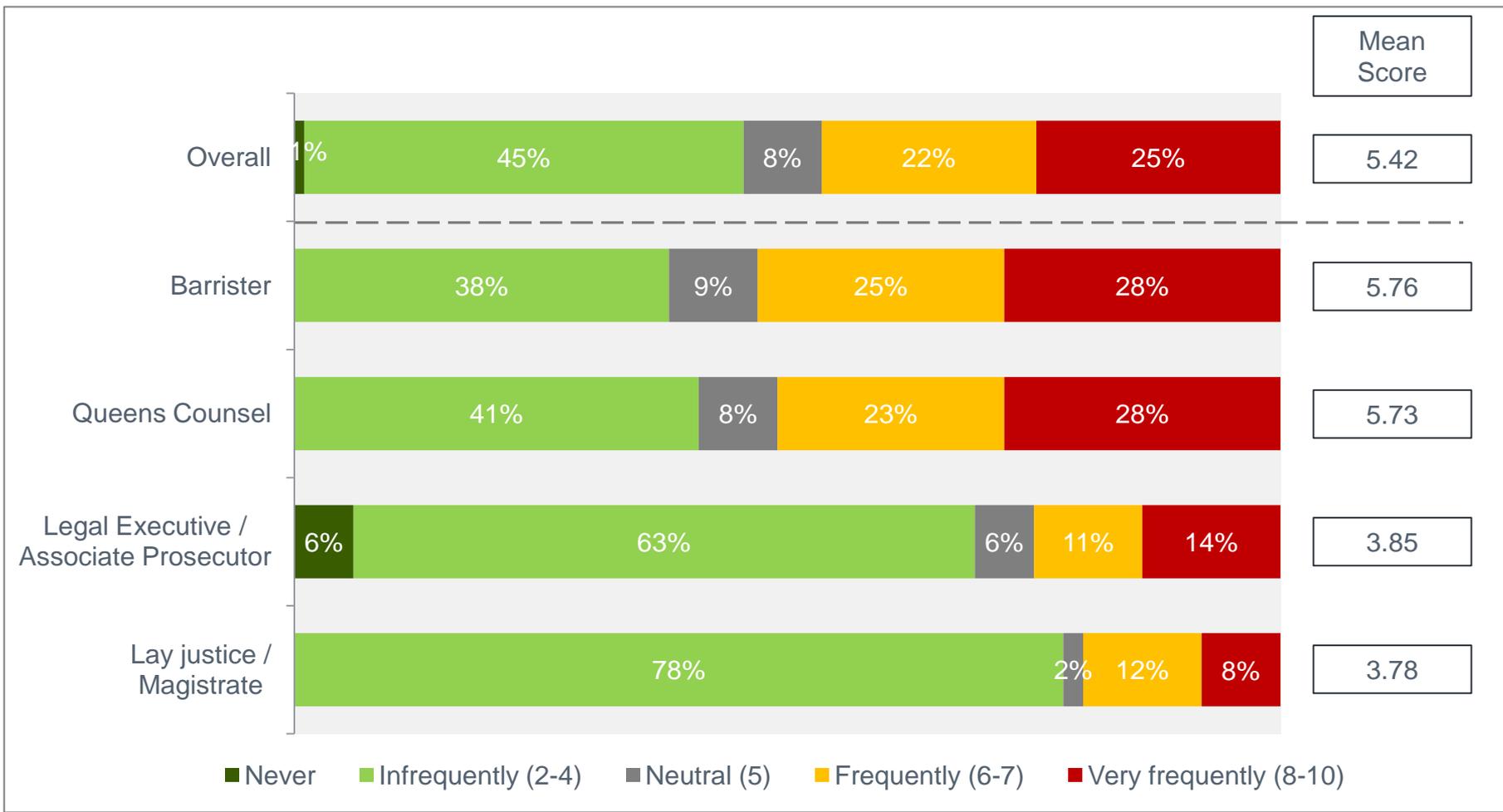
- Over half of all respondents feel that existing levels of underperformance in criminal advocacy are having an impact on the fair and proper administration of justice, with 31% rating the impact as “very high”
- A quarter of all respondents feel that criminal advocates “very frequently” act beyond their competence
 - Barristers and QC’s are considerably more likely to feel that they frequently encounter advocates acting beyond their competence, and have a noticeably more negative view of all areas of criminal advocacy
- 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
- 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
- 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
- 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

Perceptions of Criminal Advocacy:

Current Standards

A quarter of all respondents feel that criminal advocates very frequently act beyond their competence

How often do you encounter advocates acting beyond their competence in the criminal courts?



Advocates acting beyond their competence

- Barristers and QC's have considerably less positive perceptions of advocacy standards than legal executives, associate prosecutors and magistrates
 - Over 50% of Barristers and QC's claim that they frequently or very frequently encounter advocates acting beyond their competence in the criminal courts
 - Only 25% of legal executives and associate prosecutors perceive this, and 20% of magistrates
- The majority of qualitative respondents comment that they would like to split their responses between advocates from the Bar and solicitor advocates or those at the Crown Prosecution Service
 - Standards are generally seen as lower for solicitors and CPS advocates. The reasons suggested for this variability in ability tend to focus on the differences in training received and experience gained, with the Bar training being focused a lot more directly on developing advocacy skills
 - This comment was also made by several online survey respondents via email
 - It is worth noting however, that not all respondents feel that this split exists; a minority of respondents, particularly those answering from a more neutral background (not associated with the Bar in any way) feel that there is less of a difference, or that standards are variable across all organisations
 - Several respondents also comment that there is more pressure on an in-house advocate to take on a case even if they felt it might be beyond their competence, in order to keep the advocacy fees for the firm – this is seen as less likely with members of the Bar, who are usually instructed based on their relevant experience
- Respondents appearing most regularly in the Northern and North Eastern circuits are most likely to say they frequently encounter respondents acting beyond their competence

Most underperformance is encountered in the Crown Court, although this is impacted by where respondents spend most of their working time

At what level do you encounter the highest incidence of underperformance?

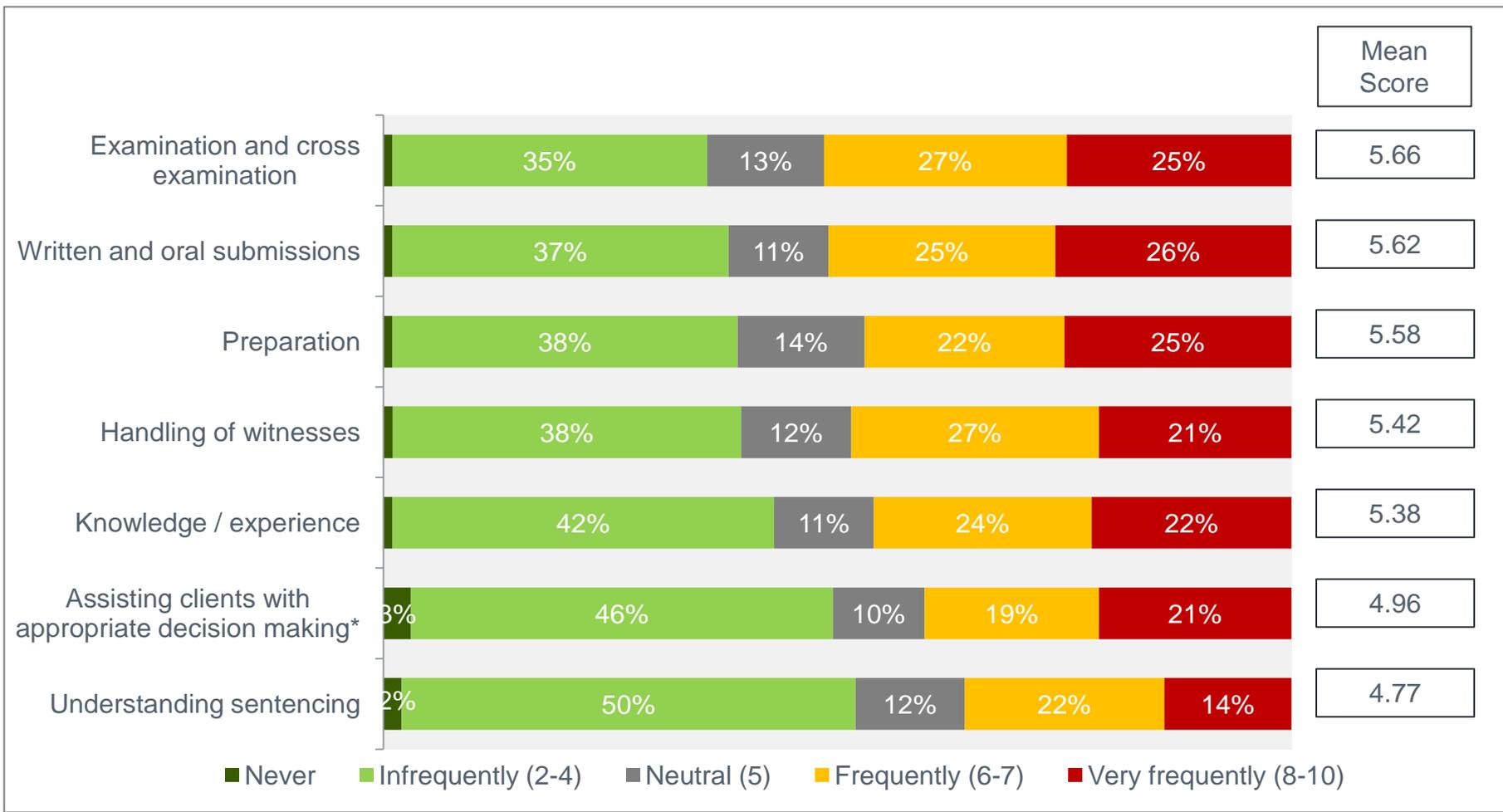
	N	%
In the Magistrates Court	140	19%
In non-trial hearings in the Crown Court	222	29%
In Crown Court trials	317	42%
Don't know	77	10%

When conducting criminal work where do you spend the majority of your working time?

	N	%
In court (Magistrates Court)	105	15%
In court (Crown Court)	554	78%
Out of court (case management / preparation)	42	6%
Prefer not to say	8	1%

Over half of respondents frequently encounter under performance in examination and cross examination, as well as with written and oral submissions

How often do you encounter problems with competency in the following areas?



Base: All answering (n: Total =762, Barrister = 527, Queens Counsel = 102, Legal executive/associate prosecutor = 79, Lay justice/ magistrate = 50)

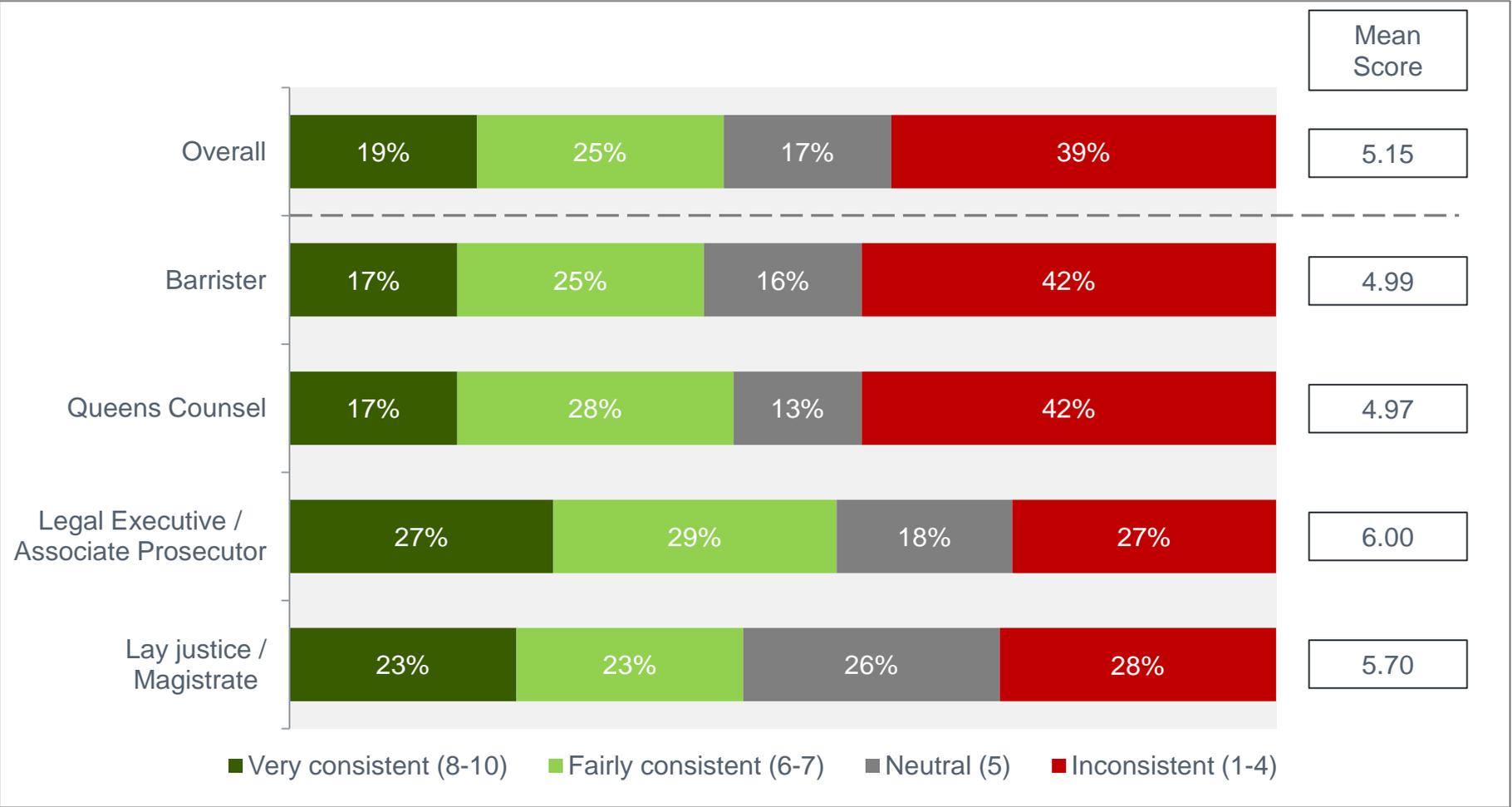
* 131 Don't Know responses to this question; total base = 631

Problem areas

- Examination and cross examination, and written and oral submissions are seen as the most common problem areas
 - The qualitative feedback is similar to that provided for the overall competency levels question; the majority of respondents highlight a marked difference in standards between barristers and solicitor and CPS advocates. Again the main reason cited for this is that passing the Bar is a much more difficult and rigorous preparation for traditional advocacy skills such as these, and that barristers are more likely to spend time gaining experience before moving on to more complex cases
- Preparation is another area which is rated poorly; a quarter of respondents claim that they frequently encounter problems with advocates in this area
 - Many qualitative respondents comment that this can often be a problem area regardless of the actual quality of the advocate. This is because due to the way court time is structured advocates will often not receive information about a case until such a late time that thorough preparation would be impossible
 - Another comment made by several respondents is that in-house advocates will often be encouraged (or forced) to work on as many cases as possible by their firm in order to keep hold of the fees, and that this kind of workload impairs the advocates' ability to fully prepare
- Although knowledge and experience is not highlighted as one of the poorest areas in the online survey, qualitative feedback highlighted concerns around the way that junior advocates are used in trials
 - It is felt that junior advocates are often used who are very short of the knowledge and experience to be able to take over the case if required, and that this is done in order to keep some part of the fees, even when the cases are complex enough that they have to instruct an advocate from the Bar

Less than half of all respondents feel that standards of advocacy are consistent

How consistent do you feel that current levels of advocacy are?



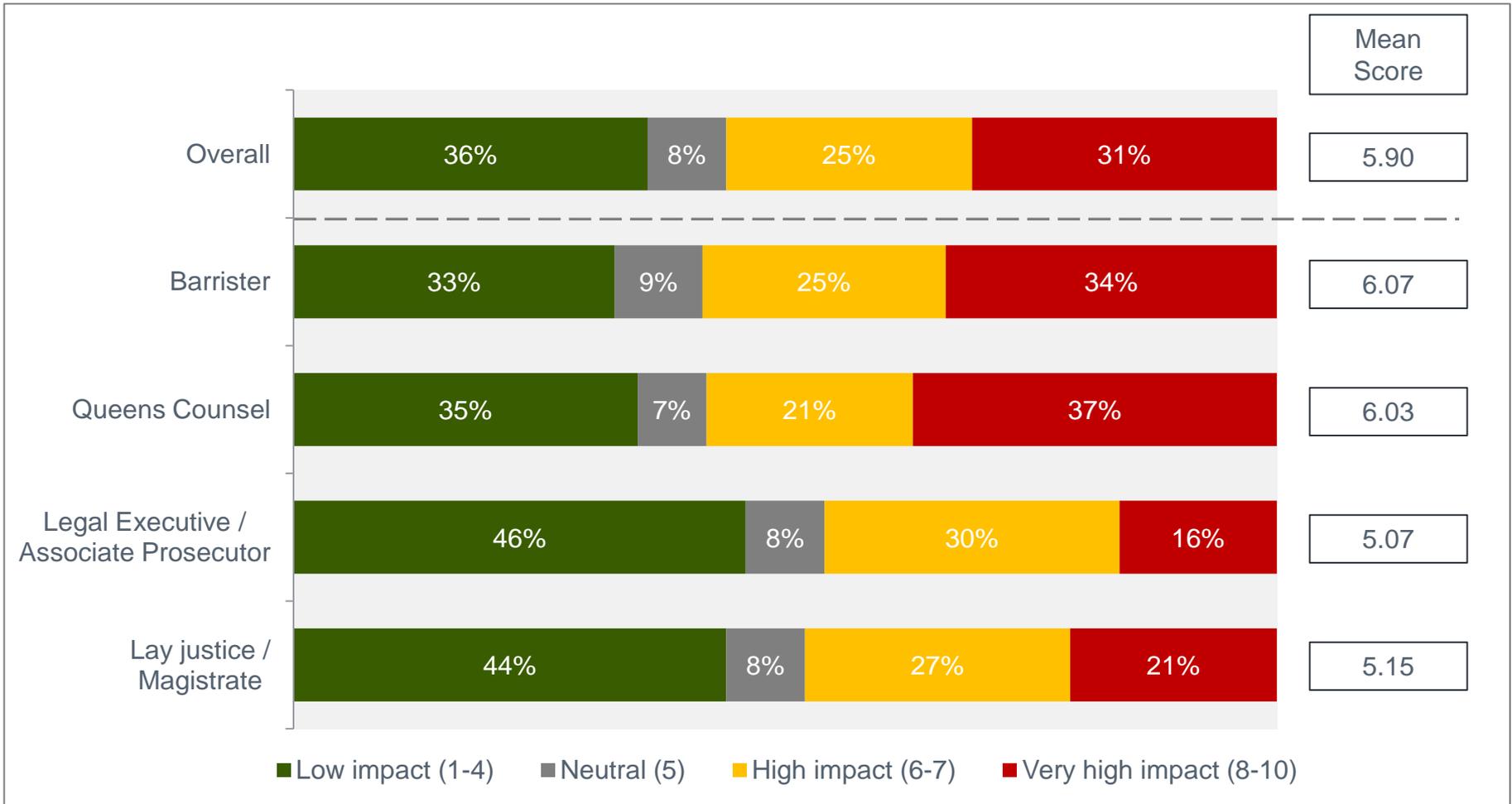
Base: All answering (n: Total =744, Barrister = 516, Queens Counsel = 98, Legal executive/associate prosecutor = 79, Lay justice/ magistrate = 47)

Consistency

- Barristers and CPS members are least likely to feel that standards of advocacy are consistent
 - Legal executives / associate prosecutors are the only group where more than 50% of respondents feel standards are consistent (6-10)
- Qualitative feedback shows that there are mixed opinions around consistency; all respondents mention there is some degree of inconsistency, however some feel that it is no more than would be expected, some feel that all areas of advocacy suffer due to inconsistency, and others perceive some areas as being more or less consistent than others
- The most commonly mentioned opinion is that levels of consistency are different in different areas; standards at the Bar are seen as most consistent, and standards at the CPS and of solicitor advocates are seen as more variable, as well as generally lower
- A number of respondents feel that competition alone is enough to maintain consistent standards of self employed barristers. However there are some who feel that this is not actually the case, and that it is difficult to tie back advocacy performance to the likelihood of a barrister being instructed in a particular case:
 - *“There are some advocates who just get work because they are the people who play golf with the right people, and that's the way it works... you can get work by being friends with the chief clerk”*

The majority of respondents feel that existing levels of underperformance in criminal advocacy have an impact on the administration of justice

How much of an impact do you feel that existing levels of underperformance have on the fair and proper administration of justice?



- Over half of all respondents feel that existing levels of underperformance **do** have an impact on the fair and proper administration of justice, with almost a third saying that this impact is very high (8-10)
 - The impact is rated considerably higher by barristers and QC's, but almost half of magistrates also feel that there is a significant impact
- The qualitative feedback corroborates these scores, with a number of comments about the potential impact of inconsistency
 - *“It makes justice more of a lottery than it should be”*
 - *“It undermines faith in the system”*
 - One magistrate that was spoken to felt that poor advocacy from the CPS leads to *“people getting let off when they shouldn't; often the case for the victim is not put very well and so the victim is let down”*
- Several respondents mention that it is hard to quantify the impact of poor advocacy, and that most cases involving the poorest advocates are fairly simple and the outcome would not be significantly influenced by advocacy, regardless of the quality
- Respondents from larger chambers / firms / organisations are more likely to perceive the current impact of poor advocacy as high

Current standards – selected comments

“There is a tendency for poorer advocates to move in house to ensure that they get work, whereas the good advocates are able to maintain a level of work at the independent Bar and will not do this”

QC

“They (HCA’s) are not having the appropriate training, and then they are moving up too quickly ...if you don't give people the proper training and the opportunity to gain appropriate experience, then they are not going to have the skills to be able to do the job properly”

QC

“I think the standards of all advocates are pretty good, of course there are one or two where standards are not quite what you would expect, but I think on the whole they are good, and I'm not too convinced about the new proposals, I have to say”

Solicitor advocate

“It depends on who you are talking about; I think that the level of senior members of the Bar is very high. I think the level of the more junior Bar members is high, but with some notable exceptions. I think if you are talking about employed barristers in the CPS the standard is generally low with a few exceptions of people who are doing the job adequately or well. If you are talking about HCA's employed doing defence work I think it is very variable; there are some who do the job pretty well, but there are a large number who do it very badly”

Barrister

“Generally good; the CPS has an inspectorate that monitors standards of advocacy around the countries and within our own staff. About 97% of advocates are rated as competent within the CPS, and about 95% for general advocacy within the crown and magistrates courts”

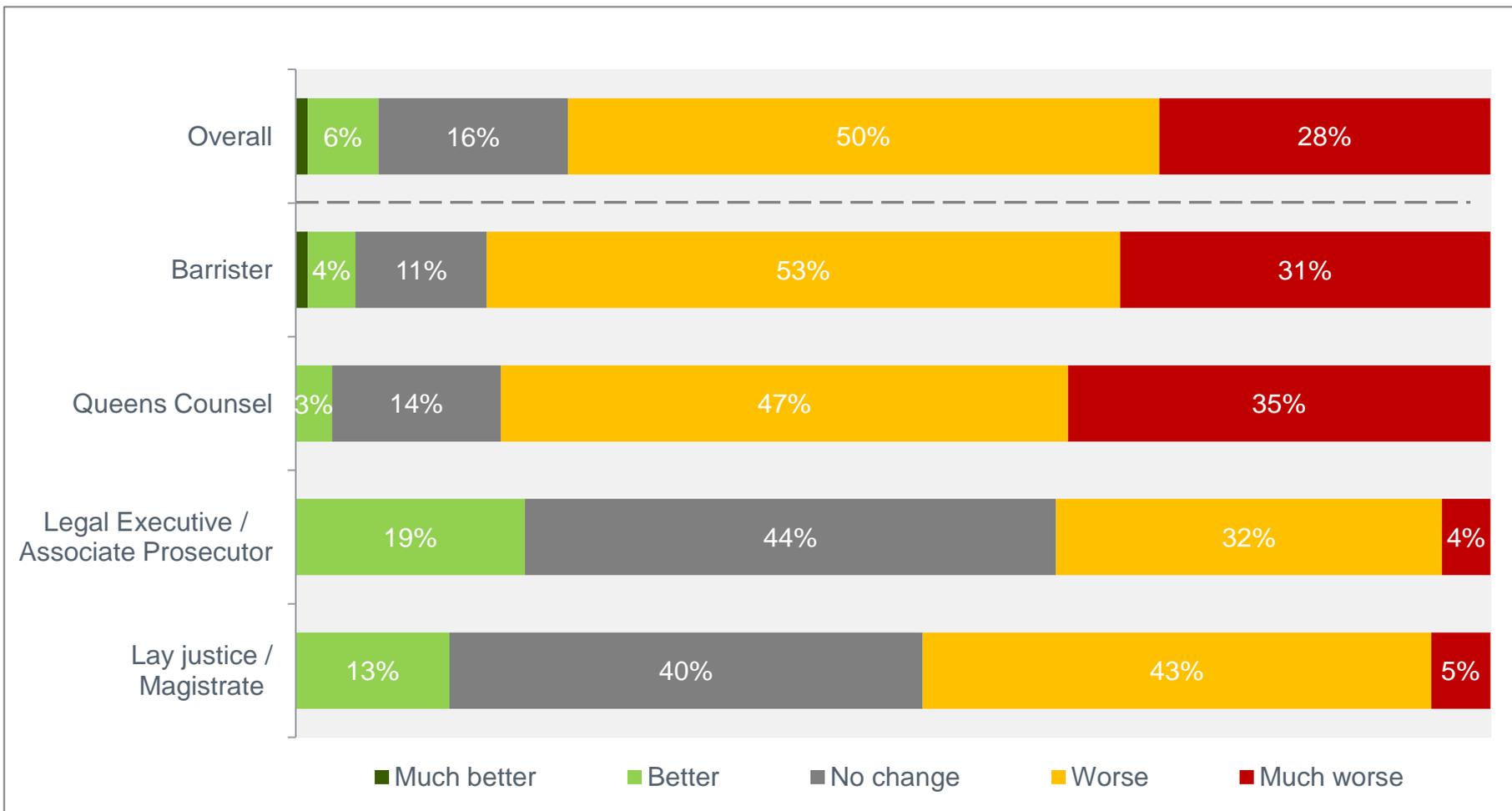
CPS

Perceptions of Criminal Advocacy:

Changes in Standards

Over three quarters of respondents feel that standards of advocacy have declined over the past five years

How do you think advocacy standards have changed over the last 5 years?

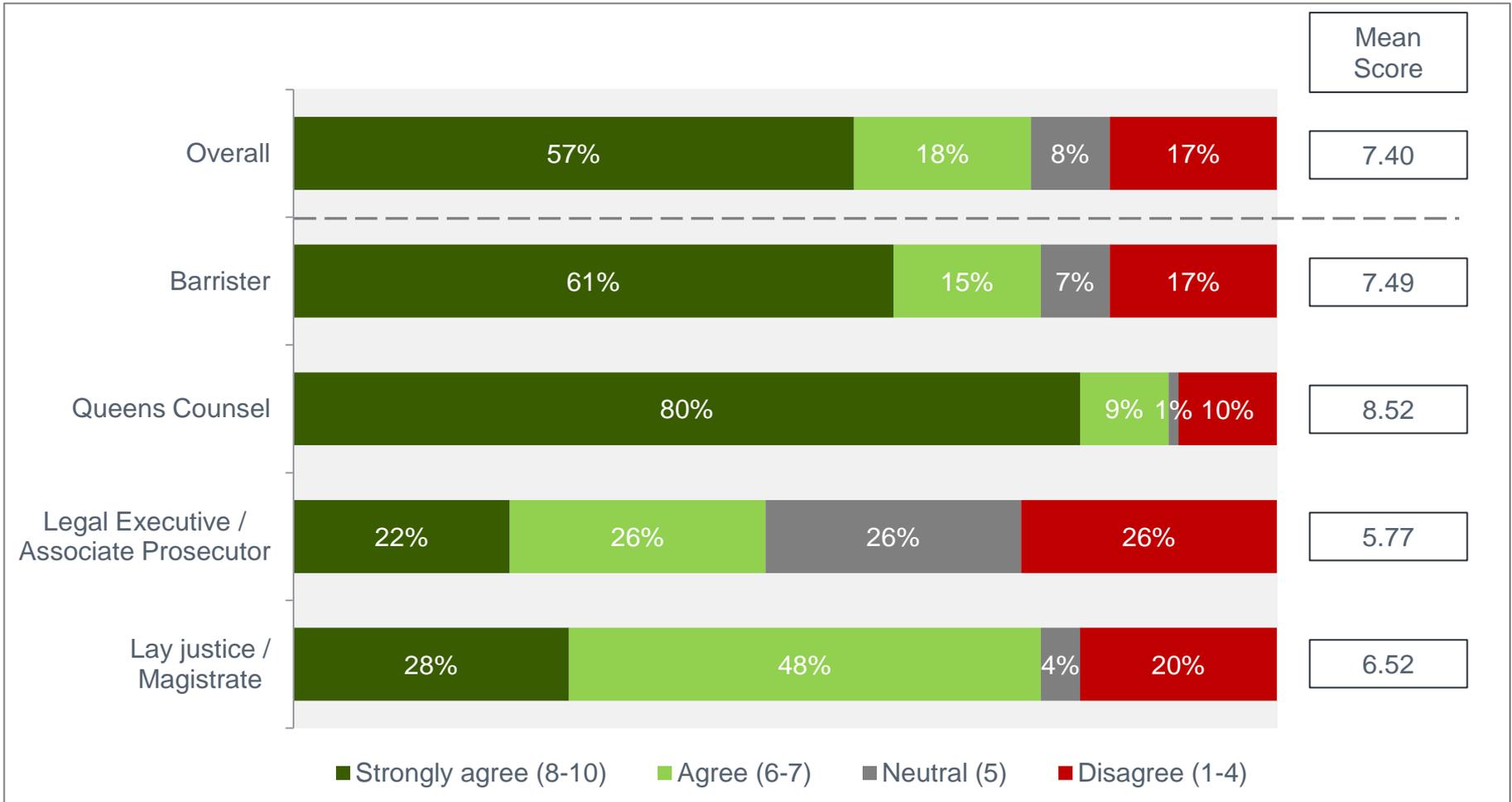


Change in standards

- As with all other areas, barristers and QC's have a more negative view of the way standards have changed over the past five years, with the vast majority feeling that standards have declined
- There are two main factors identified from qualitative feedback for this decline
 - The core reason given is the increasing involvement of solicitor advocates in the higher court, who as previously mentioned, are seen to be of a generally poorer standard than barristers. This theme is also the key one to emerge from the emails received in response to the online survey. Many respondents wanted to clarify that while overall standards have declined, they feel that standards at the self-employed Bar have been maintained by competition and standards of training, and that the decline is a result of employed advocates, both HCA's and those employed by the CPS
 - *"I'd say there has been a significant decline, mostly due to the difference in standards between the Bar and other advocates"*
 - The other key reason mentioned by many is the cutting of funding and the increased pressure which this has put on advocacy. This is also seen to be driving some of the best advocates away from criminal law and into more profitable areas
 - *"Standards will continue to decline because of the funding issues, and criminal law will become merely a training ground for young advocates before they can get a place in private practice"*

Three quarters of respondents feel that standards of criminal advocacy will decline in the coming years in the absence of any measures to address this

To what extent do you agree with the following statement?
Standards of criminal advocacy will decline in the coming years in the absence of any measures to address this.



Regulatory intervention

- The majority of respondents feel that advocacy standards will decline in the coming years without additional regulatory intervention
 - This opinion is particularly strongly held by QC's with nine out of ten agreeing or strongly agreeing
- However qualitative feedback reveals that a large number of respondents feel that even with regulatory intervention, standards will decline over the coming years
 - The main reason given by those who expressed this opinion is that without a change in the way criminal law is funded it is inevitable that the best advocates, and potential future criminal advocates will move into more profitable areas of law
 - Some respondents who feel that financial issues are going to cause a decline in standards regardless of intervention did mention that a strong and fairly enforced quality control scheme could limit this decline by maintaining or improving the standards of those who do choose to become criminal advocates despite the financial disincentives
- Several depth interview respondents mentioned that they were not in favour of additional regulatory intervention; they comment that there are already appropriate mechanisms in place, that would only require slight development to more effectively monitor and maintain feedback
 - These respondents mentioned that rather than judicial evaluation of everyone, they would prefer to see judges, and other advocates, encouraged to provide more feedback on poor advocacy which they see in court; this would be enough to maintain standards by removing the weakest advocates

- Although there was no specific question around QASA, several respondents answered the question about regulatory intervention by talking around this area, and a number of consistent themes emerged
- Firstly, as expected, there were those who said they were against any grading scheme, and that competition and judicial feedback would continue to maintain standards
- However, there were several respondents who feel that additional regulation is necessary, given the decline in standards. These respondents mentioned a number of factors which they feel are essential for the success of QASA
 - The most important factor mentioned was that any scheme implemented needs to be consistent, and assess all advocates equally and neutrally regardless of whether they are barristers or employed advocates, and that there could not be any quotas (officially or unofficially) about the ratios of barristers and solicitors awarded a certain grade
 - *“If there is going to be a QASA scheme, then it needs to be one scheme for both solicitors and barristers, with exactly the same methods of assessment and qualification”*
 - The possibility of having plea only advocates was mentioned by some respondents, who feel very strongly against this idea; it is not in the interests of the end clients to have an advocate who can only represent them under specific circumstances, as it then becomes a conflict of interest for them to advise the client about what course of action to take
 - *“The public would have very legitimate complaint about being advised to plead guilty by an advocate who can only represent them if they do plead guilty”*

Change in standards – selected comments

"I would say that at the Bar the standards have been maintained, although the overall standard has been impacted by the increasing involvement of solicitor advocates"

QC

"Standards have declined; I think you used to get people turning down cases far more regularly because they felt they were not up to it. You hardly ever get that anymore - they are just taking whatever they can"

Senior Clerk

"Standards will decline with or without regulatory intervention because without improving the finances you are fighting a losing battle. However a very strong quality control will be able to limit this decline"

QC

"I wouldn't say things are getting better... I think generally there are still very high standards, but there are probably more blips than there used to be"

Legal Service Commission

"Standards will continue to decline [without regulatory intervention]; I'm all for the grading system, I know a lot of people don't like it but I think that something has to happen"

Senior Clerk

"I think probably standards have improved slightly, I think the increased emphasis on higher rights for solicitors has improved things, I think you have more practical training before people come into the profession - I think the legal practices course and the Bar vocational course are more practical than they once were"

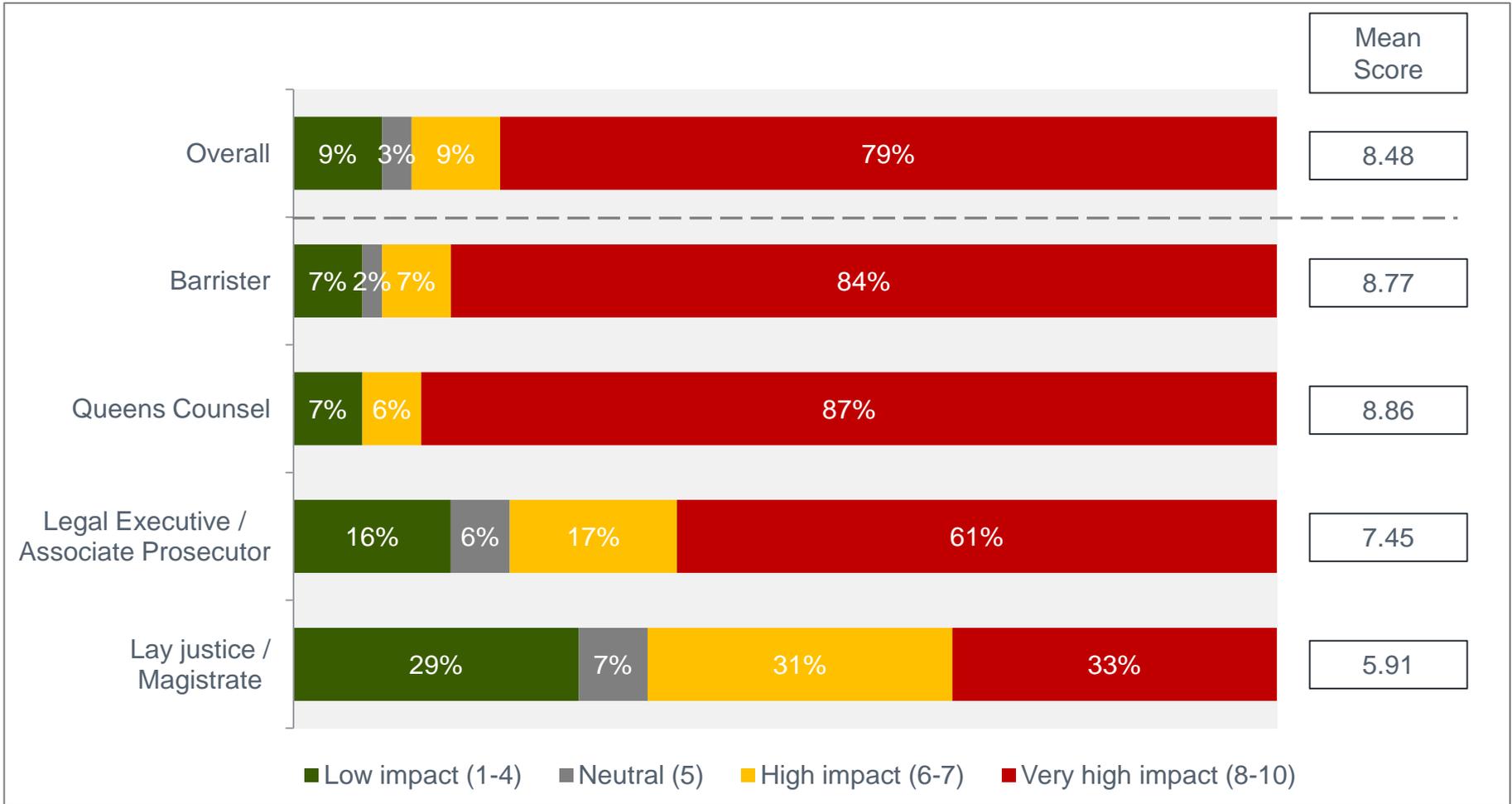
Solicitor advocate

Perceptions of Criminal Advocacy:

Public funding

Almost all respondents feel that public funding does have an impact on the provision of good quality advocacy

Do you feel that public funding has an impact in putting pressure on the provision of good advocacy?



- The majority of respondents claim that public funding is having a very high impact on the provision of good quality advocacy
 - Lay justices/magistrates are the only group that do not agree as strongly with this; although nearly two thirds still feel the impact of public funding is high
- Qualitative feedback reinforces the scores awarded with almost all respondents feeling that there is a significant impact of some type, and many feeling that this is the main driving factor behind any decline in standards
- There are several different types of impact of funding issues mentioned by respondents, with consequences ranging from immediate through to the long term quality of criminal advocates
 - The lack of funding available is seen to be a major factor in advocates taking on cases beyond their competence, as they will not want to turn down any case they are offered. It is also a motivation for firms to keep advocacy work in-house for their solicitor advocates, as it is money lost if they bring in an advocate from the self-employed Bar
 - It is also seen as a reason for advocates having to work on more cases than they should do, and therefore being unable to devote an appropriate amount of time and effort to each individual case
 - In the longer term there is a strong feeling that the lack of funding makes it harder for people to make a living from criminal advocacy, and that the best pupils are moving into areas which are more profitable for them. It is also felt that this is having an impact on the range of backgrounds that criminal advocates are coming from, as it is now harder for those who are not already independently wealthy to work in this area

Public funding– selected comments

“I think it must have an impact, if you look at the resources that are available. If you are having to do more cases to make the same levels of remuneration, then that ultimately has to have an impact on quality”

Solicitor Advocate

“Absolutely; I think the CPS particularly are incredibly stretched and under resourced; the fact that they get a case file on the morning is ridiculous and shouldn't be happening, surely that's not in the interest of justice. I understand that they don't have money, that's the awful truth. They should be better funded, better resourced, and then they could do a better job”

Victim Support

“It absolutely does, and it's not just the time pressures and lack of preparation which can arise due to a lack of funding, there is also a longer term issue about whether the best barristers will move into different areas where there is more money”

Legal Ombudsman

“If it wasn't for the changes that successive governments have wrought in relation to the level and type of fees, then I don't think we would be in this position. As it is, I think that many solicitor firms feel that the only way they can maintain their position is to top up their legal aid litigation fees with advocates fees; so there is a pressure on solicitors to keep things in house”

Barrister

“It does put pressure on, and I think it is going to become an increasing problem. Particularly with in house advocates taking on too many cases in order to keep hold of the fees. That would be less of a pressure if the fees weren't so low; they are in a position where they feel they need to take them all on to make the position financially viable”

Barrister

Appendix

Demographics

Total respondents = 762

		N	%
Job Role	Barrister	527	69%
	Queen's Counsel	102	13%
	Legal Executive / Associate Prosecutor	79	10%
	Solicitor (not reported on as a sub group)	1	<1%
	Lay Justice / Magistrate	50	7%
	Judge (not reported on as a sub group)	3	<1%
	Other	0	0%
Proportion of work involving criminal advocacy / cases	0%	0	0%
	1-25%	44	6%
	26-50%	30	4%
	51-75%	59	8%
	76-100%	629	83%

Demographics – Online Survey (2)

		N	%
Circuit most frequently appearing / sitting in	Midland Circuit	81	11%
	Northern Circuit	78	10%
	North Eastern Circuit	89	12%
	South Eastern Circuit (based outside of London)	113	15%
	South Eastern Circuit (based in London)	301	40%
	Wales and Chester Circuit	28	4%
	Western Circuit	58	8%
	Prefer not to say	14	2%
Where majority of working time is spent	In Magistrates Court	105	15%
	In Crown Court	554	78%
	Out of court (case management / preparation)	42	6%
	Prefer not to say	8	1%

Demographics – Online Survey (3)

		N	%
Size of Chambers (629 Barristers / Queen's Counsel)	Less than 15	30	5%
	16-25	33	5%
	26-50	163	26%
	51-65	174	28%
	More than 65	221	35%
	Not in Chambers	4	1%
	Prefer not to say	4	1%
Size of Firm / organisation (80 Legal Executives / Associate Prosecutors / Solicitors)	Less than 25	13	16%
	26-50	11	14%
	51-100	6	8%
	101-150	1	1%
	151-200	0	0%
	201-250	0	0%
	More than 250	44	55%
	Prefer not to say	5	6%

Demographics – Online Survey (4)

			N	%
Ethnicity	White	English / Welsh / Scottish / Northern Irish / British	594	78%
		Irish	21	3%
		Gypsy or Irish Traveller	2	<1%
		Any other white background	33	4%
	Mixed / multiple ethnic groups	White and Black Caribbean	2	<1%
		White and Black African	2	<1%
		White and Asian	4	1%
		Any other mixed / multiple ethnic background	4	1%
	Asian / Asian British	Indian	6	1%
		Pakistani	6	1%
		Bangladeshi	5	1%
		Chinese	1	<1%
		Any other Asian background	4	1%
	Black / African / Caribbean / Black British	African	6	1%
		Caribbean	1	<1%
		Any other Black / African / Caribbean background	0	0%
Other ethnic group	Arab	0	0%	
	Any other ethnic group	10	1%	
	Don't know / prefer not to say	61	8%	
Do you consider yourself to have a disability?		Yes	30	4%
		No	574	88%
		Prefer not to say	58	8%