

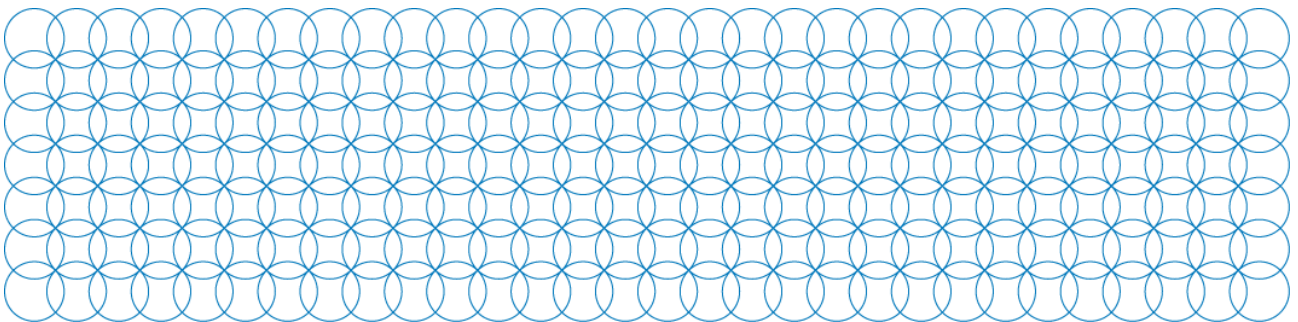


Ministry
of Justice

Preserving and Enhancing the Quality of Criminal Advocacy

This consultation begins on 1 October 2015

This consultation ends on 27 November 2015



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Preserving and Enhancing the Quality of Criminal Advocacy

**A consultation produced by the Ministry of Justice. It is also available at:
<https://consult.justice.gov.uk/digital-communications/enhancing-the-quality-of-criminal-advocacy>**

About this consultation

- To:** This consultation is aimed at anyone with an interest in the provision of advocacy in criminal courts in England and Wales. This will include, but is not limited to, members of the legal profession and their professional representative bodies, members of the judiciary, and legal services regulators.
- Duration:** From 1 October 2015 to 27 November 2015
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- How to respond:** Please send your response by 27 November 2015 to:
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- Response paper:** A response to this consultation exercise will be published in due course at: <https://consult.justice.gov.uk/digital-communications/enhancing-the-quality-of-criminal-advocacy>

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Foreword

The quality of advocacy in our courts is a guarantee of liberty in our lives.

Our criminal justice system depends on high quality advocates to uphold basic freedoms. Before any individual is deprived of their liberty they deserve to have the case against them tested in open court. With so much at stake it's vital that arguments are made, and tested, by professionals of the highest quality, individuals not just with a knowledge of the law but skill and experience in advocacy and a commitment to serving the interests of justice.

We are fortunate that there are many high quality advocates serving the cause of justice in England and Wales. Whether solicitors, or barristers, the quality of legal representation in our courts makes this jurisdiction the most respected in the world.

But if we are to maintain our global reputation, and indeed serve the cause of justice better, then we need to be vigilant. The legal services market has changed radically over recent years. While there has been welcome innovation there have also been practices that have developed which do not serve the cause of justice, do not serve the needs of defendants and do not support high quality advocacy.

Sir Bill Jeffrey, in his report on independent criminal advocacy, outlined ways in which the criminal defence market does not operate competitively, or in a way which optimises quality. His arguments are compelling.

My own observation of how our courts operate reinforces my sense of concern.

I am concerned that, currently, the government has limited ability to ensure the quality of advocates paid through the public purse to defend those accused of a crime.

I am concerned that referral fees are being paid in order to secure instruction in some cases. The quality of the advocate and the needs of the individual client may not always be the guiding principles.

And I am concerned that the choice of advocate available is too often opaque.

I want to address these concerns, but I want to do so in a way which goes with the grain of the best traditions of our justice system.

I hope that the measures in this consultation package will help tackle the problems we face. I hope they will raise quality standards in our criminal defence market, ensure the market works fairly and make the choice of advocate available more transparent.

I look forward to the debate they will stimulate.

Michael Gove

Lord Chancellor and Secretary of State

Executive summary

1. In his Review of Independent Criminal Advocacy, Sir Bill Jeffrey found a level of disquiet amongst judges and practitioners about the standards of criminal defence advocacy, and found that the market was not operating competitively so as to optimise quality.
2. The government shares a number of Sir Bill Jeffrey's concerns, and is therefore consulting on a package of measures to preserve and enhance the quality of publicly funded criminal defence advocacy.
3. The government, via the Legal Aid Agency (LAA), is the largest single procurer of criminal defence advocacy services, and has a responsibility to ensure that, where such advocacy services are being paid for with public money, they are of a good quality. The government also wants to ensure that the client's choice of advocate is preserved and not unduly influenced by financial incentives.
4. In light of this, we invite views on:
 - *the proposed introduction of a panel scheme – publicly funded criminal defence advocacy in the Crown Court and above would be undertaken by advocates who are members of this panel;*
 - *the proposed introduction of a statutory ban on referral fees;*
 - *how disguised referral fees can be identified and prevented; and*
 - *the proposed introduction of stronger measures to ensure client choice and prevent conflicts of interest.*
5. The consultation proposes **that a panel of publicly funded criminal defence advocates is introduced**. Publicly funded criminal defence advocacy in the Crown Court and above would be undertaken by advocates who have successfully applied and been accepted onto a panel. This would provide valuable quality assurance and enable the government to have greater confidence in the quality of publicly funded defence advocacy in the most serious cases. This paper sets out the key features of the Crown Prosecution Service's own advocacy Panel scheme, since the government takes the view that this would be a sensible starting point in exploring what any defence advocacy scheme should look like. We are seeking views as to whether consultees agree that a panel scheme should be introduced, and what the key features of a panel scheme should be. The detail of exactly what the model will look like, if the decision was taken to proceed, would then be developed taking into account responses to the consultation.
6. We also propose to introduce a **statutory ban of referral fees**. Referral fees can be described as fees paid, by an advocate, in exchange for instruction. The payment or receipt of these fees are subject to various bans and prohibitions under LAA contracts and rules imposed by various regulators of the legal services market. In spite of these prohibitions, we are told by the Bar Council, other advocates, and the Law Society that referral fees are frequently paid and received. We want to ensure that advocates are instructed because they are operating at a high level of competence and have the right experience to do the job well - not because of their relationship with an instructing litigator, or because they were prepared to pay a fee

to secure that instruction. For that reason we are proposing a new statutory ban on referral fees.

7. We are also requesting views on how to better **identify and prevent disguised referral fees**. These can include ‘administration’ or ‘management’ fees paid by advocates. There may be cases where these services are honestly sought and provided. But if such payments are in practice a way of securing instruction, they are unacceptable. We would welcome views on what, if any, steps could be taken in order to make it more difficult for such arrangements to persist.
8. We are proposing to introduce **stronger measures to protect client choice and safeguard against conflicts of interest**. A client should be able to make an informed choice of advocate on the basis of clear and impartial advice. We want to ensure that there is no conflict of interest, in a litigator’s advice on choice of advocate, which could arise from financial considerations. We would welcome views on steps that could help prevent any conflict of interest, for instance restricting the instruction of advocates within the same firm as the instructing litigator, or amending the LAA’s standard contracts to better reflect the obligation of litigators to provide impartial advice to clients on their choice of advocate. This could include a requirement for the litigator involved to sign a declaration, to the effect that client choice had been provided, giving reasons for recommending a particular advocate.

Introduction

- 1.1 This paper sets out a package of proposals designed to preserve and enhance the quality of publicly funded criminal defence advocacy in England and Wales. The consultation is aimed at anyone with an interest in the provision of criminal advocacy in England and Wales, including, but not limited to, members of the legal profession and their professional representative bodies, members of the judiciary and legal services regulators.
- 1.2 In September 2013, the then Lord Chancellor, the Bar Council and the Law Society jointly commissioned Sir Bill Jeffrey to review the provision of independent criminal advocacy in England and Wales.
- 1.3 Sir Bill was asked to consider:
 - the way in which the market in criminal advocacy services operates in practice – including in relation to the supply of qualified advocates – and the reasons it operates as it does;
 - the linked issues of quality and training; and
 - the extent to which any shortcomings are attributable to the structure of the profession providing advocacy services, and could be addressed by changes to that structure.
- 1.4 Sir Bill found that there was a level of concern amongst the judiciary over the current standards of quality in defence advocates, and that the market for criminal advocacy was not operating competitively in a way as to optimise quality.
- 1.5 The government has a responsibility to ensure the delivery of an efficient, fair and effective justice system in which the public has confidence and therefore has a legitimate interest in making sure that good quality criminal advocacy services are available to those that need them. The government, via the Legal Aid Agency (LAA), is also the largest single procurer of criminal defence advocacy services, and has a responsibility to ensure that, where such advocacy services are being paid for with public money, they are of a good quality.
- 1.6 The importance of ensuring the high quality of criminal advocacy has long been recognised. Over the past decade, work has been underway to design and implement the Quality Assurance Scheme for Advocates (QASA), which will set minimum regulatory standards for all advocates. Once implemented this scheme will encompass prosecution and defence advocacy work, both publicly and privately funded. Steps have also already been taken to address quality in the context of the Crown Prosecution Service's panel scheme for advocates (which is considered later in this paper). QASA is not yet operational and has a broad regulatory remit, and the CPS scheme is concerned with publicly funded prosecution work only.
- 1.7 In parallel, Sir Bill Jeffrey's report has highlighted ongoing concerns about the quality of defence advocacy and the operation of the market (as noted above). These were echoed by many of the professionals he spoke to while preparing his report. Given these concerns, the government believes it is right to take steps to preserve and

enhance the quality of criminal defence advocacy, and to explore measures to prevent abuses of the system which threaten the ability of advocates to compete for work on the basis of quality. This consultation paper focuses on the further steps which could be taken to preserve and enhance the quality of publicly funded criminal defence advocacy.

- 1.8 The way the publicly funded defence advocacy market is operating has changed significantly in recent years. The proportion of publicly funded Crown Court defence work undertaken by solicitor advocates for effective trials increased from 5% in 2002-03¹ ² to 24% in 2014-15³. Greater access to the advocacy market has encouraged solicitors' firms to innovate in the way in which they provide legal services. This development has meant that a variety of different advocates with different experience and training are now operating in the advocacy market. This is a welcome development, but makes it all the more important to ensure that all advocates undertaking defence advocacy work are providing a high quality service, irrespective of their professional background.
- 1.9 We have heard concerns from members of the legal profession that abusive practices such as referral fees are still a reality, despite being prohibited in the contracts that the LAA maintains with litigators. Such behaviour is particularly objectionable because it threatens the ability of advocates to compete for work on the basis of quality. Linked with this are concerns that not enough is currently being done to ensure an individual needing representation in court is able to make a fully informed choice of advocate. While not causing either of these perceived problems, the changes in the advocacy market described above may lead to the advocate, intentionally or otherwise, being unduly influenced by financial interests, as expanding firms taking on both litigation and advocacy work have the opportunity to instruct in-house. The government is therefore seeking to make the choice of advocate presented to the client more transparent, and to safeguard against conflicts of interest.
- 1.10 This consultation paper therefore sets out a number of proposals aimed at addressing the concerns raised in Sir Bill Jeffrey's report and by members of the legal profession. We propose to introduce a panel scheme to ensure that publicly funded criminal defence advocates are of a high quality. We propose to introduce a new statutory ban of referral fees, and to update the relevant parts of LAA contracts and guidance to ensure consistency with this ban. We propose to support individuals' right to make an informed choice of advocate by introducing a client choice declaration, to be made by instructing litigators, confirming the advice they have given their client on available advocates.

¹ Independent criminal advocacy in England and Wales: Analytical Narrative (2014)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310717/jeffrey-review-criminal-advocacy-analytical-annex.pdf

² Data after 2010/11 comes from LAA administrative datasets. Data for 2010/11 and previous years comes from the Criminal Legal Aid Transition (CLAT) database held by the MoJ. CLAT is a management information system that records payments made to barristers and solicitors for work carried out in the Crown Court - AGFS payments were originally made via the CLAT system but responsibility has since transferred to the LAA.

³ This is an update of the figure used in the Jeffrey Review, which presented figures up to 2012-13, and is a previously unpublished breakdown of published LAA Statistics on AGFS payments. The same source and methodology used for the Jeffrey Review was used to produce the figure for 2014-15. LAA administrative systems collect information as to whether the account relates to a barrister or a solicitor advocate using a free text field rather than a categorical variable.
<https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2015>

A Welsh language summary will be published, when available, at:
<https://consult.justice.gov.uk/digital-communications/enhancing-the-quality-of-criminal-advocacy>

An Impact Assessment is available at:
<https://consult.justice.gov.uk/digital-communications/enhancing-the-quality-of-criminal-advocacy>
Comments on the Impact Assessment are very welcome.

An Equalities Statement is available at:
<https://consult.justice.gov.uk/digital-communications/enhancing-the-quality-of-criminal-advocacy>
Comments on the Equalities Statement are very welcome.

Proposals to preserve and enhance quality

Introducing a panel for publicly funded criminal defence advocacy

Underlying concerns about quality

- 2.1 The government is concerned that the quality of criminal defence advocacy varies widely. We would like to ensure that advocacy funded by the LAA meets prescribed quality standards. As set out in his report, and summarised below, Sir Bill Jeffrey found widespread disquiet amongst the judiciary about the quality of advocacy. His view – which the government shares – is that it would be a mistake to dismiss these concerns.
- 2.2 It is worth revisiting the evidence submitted to Sir Bill. 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... 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' (Jeffrey, 2014, p.22).
- 2.3 In Sir Bill's words, 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."' (Jeffrey, 2014, p.22). The Law Society took a different view and pointed out that complaints to the Legal Ombudsman relating to crime are a small minority of the total and rarely lead to serious disciplinary action.
- 2.4 Sir Bill also reports that from extensive discussions with circuit judges 'there was a strong and consistent view that...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.' (Jeffrey, 2014, p.22). He met fewer district judges but they made similar points about diminishing quality.
- 2.5 Referring to the circuit judges he spoke to, Sir Bill also presents their key concern about the incentives the current system may be providing: "Most of those I spoke to 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." (Jeffrey, 2014, p.22). These comments support the case for further action to ensure quality.

Recent changes to the market

- 2.6 Solicitors first acquired Higher Rights of Audience in 1994. Since then the number of solicitor advocates practicing in the criminal courts has increased year on year, with numbers increasing sharply from around mid 2005. In the 11 years between 1994 and 2005 the number of solicitor advocates in the criminal courts grew by 1,262

but in the three years between 2005 and 2008, the numbers grew by 1,197 – a similar increase over a much shorter time span⁴. Currently a total of 4,882 solicitor advocates are able to operate in higher criminal courts⁵.

- 2.7 Data suggests that there has been a significant rise in the share of Crown Court work undertaken by solicitor advocates in recent years⁶. In 2014/15, 35% of publicly funded Crown Court defence advocacy was undertaken by solicitor advocates. Broken down by trial type, solicitor advocates constituted 43% of advocates in guilty pleas, 29% in cracked trials and 24% in effective trials. Guilty pleas saw the largest rise in the proportion of publicly funded Crown Court defence advocacy undertaken by solicitor advocates between 2006/07 and 2014/15, by 36 percentage points from 7% in 2006/07⁷ to 43% in 2014/15.
- 2.8 The government does not want to stop new and innovative business models developing, and the expansion of rights of audience for solicitors appears to have been a catalyst for this. This expansion of rights has the potential to be positive for clients by increasing choice and competition in the advocacy market. Similarly, the ability for advocates to undertake work previously reserved for litigators provides the same potential. The touchstone, though, must remain the quality of advocacy available.
- 2.9 As Sir Bill Jeffrey noted in Chapter Two of his report (2014, p. 21), the quantitative evidence about advocacy quality is limited. The government is not suggesting that the apparent correlation between the changing constituents of the advocacy market and concerns about quality are causally linked. Now that a broader range of advocates with differing training and experience are operating in the market, it is particularly important that the choice of advocate is underpinned by quality standards, rather than being driven by financial incentives. As Sir Bill Jeffrey has said: "...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." (Jeffrey, 2014, p.42).

The need for government intervention

- 2.10 The concerns highlighted above, and the apparent failure of the current market to address them, are of great concern to the government. In nearly every example of substantial public expenditure, the government is able to decide who is procured to deliver public services, and whether the service being provided is good enough. The traditional structure of the publicly funded criminal advocacy market means that it is an anomaly in this respect. Currently, the LAA has little control over the quality of advocates that legal aid litigators choose to instruct. The government wants to ensure that the quality of advocacy provided is preserved and enhanced, while safeguarding client choice.

⁴ Independent criminal advocacy in England and Wales: Analytical Narrative (2014)

⁵ Solicitors Regulation Authority - Regulated population statistics (July 2015)
http://www.sra.org.uk/sra/how-we-work/reports/data/higher_rights_of_audience.page

⁶ All figures in this paragraph are updated figures from the Jeffrey Review unless otherwise indicated. See footnote 3 for further details.

⁷ Independent criminal advocacy in England and Wales: Analytical Narrative (2014), see footnote 2 for details on figures prior to 2011/12.

- 2.11 Concerns about the quality of advocacy are not new, nor are they limited to the sphere of criminal defence work. As previously mentioned, the Quality Assurance Scheme for Advocates (QASA) is being finalised by the relevant regulators and will, when implemented, set minimum quality thresholds for all criminal advocates (prosecution and defence, both privately and publicly funded). The scheme is being delivered by the legal services regulators – the Bar Standards Board (BSB), the Solicitors Regulation Authority (SRA), CILEx Regulation and the Legal Services Board (LSB). The CPS panel scheme has been in operation since February 2012. The CPS had concerns that they were instructing on the basis of historical lists and out of date information. They wanted to improve standards and their scheme is generally seen as providing a fair and objective assessment of prosecution advocacy quality using a competency based assessment process. The government now wishes to complement these efforts to drive up quality by exploring what more can be done to address the standard of defence advocacy services.
- 2.12 One of the recommendations made by Sir Bill concerned the possibility of a “panel” of defence advocates being established:
- “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.” (Jeffrey, 2014, p.44).
- 2.13 The government is now proposing to establish a defence advocacy panel scheme focused, at least initially, on advocacy in the Crown Court and above. The rationale for this is that the level of seriousness and complexity of cases dealt with in the higher courts is greater than those dealt with at magistrates’ court level. The government believes it is right to focus its efforts on higher court advocacy at this stage, but would consider extending such a scheme more widely in the future.
- 2.14 The government believes such a panel would provide valuable quality assurance and enable the government to have greater confidence in the quality of publicly funded defence advocacy. QASA will set minimum standards across the board, and the CPS scheme deals with advocacy from a prosecution perspective. Our panel scheme, specifically for publicly funded criminal defence advocates, will be designed to sit alongside QASA, and may be able to make use of evidence of quality arising from the QASA scheme, whilst not being dependent on QASA’s prior implementation. QASA will charge advocates for accreditation; the CPS does not. If the government decides to proceed with a defence panel, we will consider whether any fee would need to be charged as part of the detailed design phase of the scheme.

Panel Scheme

- 2.15 As Sir Bill Jeffrey has identified, the CPS Panel scheme is an existing model for us to consider. Some of the main features of the CPS Panel are summarised in the section below.

Case Study - CPS Panel Scheme

- i. *There is a pre-qualification stage, which exists to exclude applicants patently unsuitable (for example, those who have criminal convictions, have had serious professional disciplinary findings against them, or have had instructions formally removed from them in the past). The scheme also features a list of “commitments” that applicants must be prepared to sign up to.*
- ii. *There are seven regional circuit based panels (including a separate panel for London). In addition there are “specialist” national panels for particular types of work. Examples include fraud and serious crime (including terrorism). The CPS also have a discretion to instruct advocates “off panel” if required.*
- iii. *There are four levels within the scheme. Level 1 being the entry level and Level 4 being the highest. There are no limits for the number of panel members at Levels 1 and 4. Levels 2 and 3 are limited by business need (numbers at each being limited somewhere around the 1,000 mark for each). 50% of places at Level 2 initially were reserved for advocates of 5 years’ experience or less. Queen’s Counsel and members of the Treasury Counsel team are exempt on the basis that they have already met a quality standard. The CPS panel also has a specialist list on each circuit for rape and child sexual abuse advocates. Places on this specialist list are restricted to level 3 and 4 advocates who have received appropriate training and can demonstrate that they have the skills and competency to prosecute these sensitive case types.*
- iv. *Level 1 is open to barristers who are at least in their second six months of pupillage/tenancy and solicitors who have a Higher Courts Advocacy qualification. Applicants should be able to deal with up to a whole day’s prosecution in the Magistrates’ Court – including simple mentions, guilty pleas, committals for sentence and appeals to the Crown Court. They should be able to demonstrate that they can do this to an “acceptable” standard.*
- v. *Level 2 applicants will generally have been Level 1 prosecutors before – and will have the confidence/skill appropriate to those with that level of experience. They will be able to examine and cross-examine and may have a mix of defence and prosecution experience. They will also need to be able to carry out straight-forward non-jury work in the Crown Court and some jury trials (including theft, assault, and deception).*
- vi. *Level 3 represents a significant step up. Applicants must be able to conduct jury trials in serious and onerous prosecutions involving fraud, serious assaults, and serious robberies etcetera. They must be able to deal with multi-handed prosecutions, with up to four defendants.*
- vii. *Level 4 is reserved for exceptional, substantially experienced advocates – it does not represent a level that can be expected to be reached merely through career progression. Applicants must show they are leaders in the field of criminal advocacy. They will have already taken returns at level 4. They will need to deal with the most serious cases, involving novel, and difficult, points of law and fact.*
- viii. *Applicants are assessed by boards, and those assessments are subsequently moderated on a circuit basis. Applications are assessed against set criteria. The criteria are:*

1. *Advocacy*
 2. *Advisory work*
 3. *PII and disclosure (levels 2, 3 and 4 only)*
 4. *Other relevant knowledge, skills and experience*
 5. *Understanding the role of the CPS panel advocate*
- ix. *Each criterion is scored against the required standards at the level applied for. Each criterion scores between 0-30; with each criterion equally weighted. The maximum possible score is 150.*
- x. *The CPS provides the following guide to the scores to be allocated, which needs to be tailored to the specific criteria and the different overall standards that need to be achieved at each qualifying level.*
- a. **High (range 21 – 30 points)** - *applicant whose ability, knowledge and experience, as evidenced by the application form and references, is very strong in most or all of the competency requirements, relevant to criminal work at this level, spans a range of Courts and casework and demonstrates that lessons have been learned from that experience.*
 - b. **Medium (range 11 – 20 points)** - *applicant whose ability, knowledge and experience, as evidenced by the application form and references, is strong, spans a range of Courts and demonstrates that lessons have been learned, but could not be regarded as anything other than ordinarily strong at this level in most or all of these requirements.*
 - c. **Low (range 0 – 10 points)** - *applicant whose ability, knowledge and experience, as evidenced by the application form and references, clearly does not appear to meet one or more of the requirements (not plentiful or relevant, does not span a range of Courts and does not demonstrate that lessons have been learned).*
- xi. *A minimum score is set by the assessment panel. Then (in the case of levels 2 and 3, which are number limited), if the total number of applications exceed this score, then the highest scoring applicants become panel members.*
- xii. *In the limited levels (2 and 3), the lowest successful score as a result of the exercise above then becomes the pre-selection threshold for that panel in the future.*
- xiii. *If there is a lack of coverage subsequently identified then people above the minimum score, but below that threshold, can be offered places in geographical areas at the appropriate level.*
- xiv. *References are also required. In addition, there are detailed processes and rules for appeals, for applicants to be considered at the level below the one they have applied at, for applicants to apply to be upgraded from one level to another, and for applicants to work in more than one geographical panel area (if appropriate). For further information see: https://www.cps.gov.uk/advocate_panels/application.html*
- 2.16 While the CPS scheme provides a useful example of an existing panel system, there are a number of key differences between the prosecution and defence environment which would need to be reflected in a defence panel scheme. The CPS employs a

number of in-house advocates, and contracts directly with the members of their panel scheme. The LAA does not generally have any contractual relationship with defence advocates, and would not have any such relationship under a panel scheme. The skills required for prosecution and defence advocacy are not necessarily the same, and any competency criteria and assessment arrangements developed should reflect this.

- 2.17 Nonetheless, the CPS scheme provides a model which we might want to use as a rough template for a defence panel.

Q1: Do you agree that the government should develop a Panel scheme for criminal defence advocates, based loosely on the CPS model already in operation? Are there particular features of the CPS scheme which you think should or should not be mirrored in a defence panel scheme?

Geographical structure and administration

- 2.18 An important question to be addressed is what geographical and administrative structure would be most appropriate. The choice would be between a national panel and a number of regional, circuit-based panels.
- 2.19 A national panel, with a national assessment process, would be the simplest option. It would be easiest to administer from the outset and would be likely to cost least. However, careful consideration would need to be given to managing the interaction between a single, national, pool of advocates, and varying regional demands for instruction. One variation is for a national panel with a regional assessment process. Panel membership could be assessed on a circuit basis, but successful applicants would be able to practice without geographical restrictions. The tensions between supply and demand referred to above would again need to be considered.
- 2.20 Alternatively, regional panels could be adopted (as per the CPS model). This would have the advantage of ensuring that each panel accounted fully for any regional variations in supply. A degree of movement between regional panels could be built into the design of the system. Panels established on this basis would align with the judicial circuit structure and the CPS panel scheme.
- 2.21 If we proceeded with regional panels, we might also need to supplement these with some national panels for particular case-types, as is the case within the CPS model. The CPS's regional panels have a sub-list for rape and child sexual abuse cases. In parallel the CPS also operates specialist national panels for extradition cases; fraud cases (including fiscal fraud); serious crime (including terrorism); and proceeds of crime cases.
- 2.22 The government has already announced that a requirement is being introduced whereby litigators will only be able to instruct an advocate for publicly funded criminal defence advocacy in sexual abuse or rape trials if that advocate has undertaken approved specialist training on working with vulnerable victims and witnesses. Any panel scheme would need to fit with and sit alongside this specific requirement.

- 2.23 In specific types of case such as these, where volumes may be relatively low or where a requirement for specialist skills may be appropriate, it may be sensible to mirror the CPS approach and create sub-lists, or specialist panels alongside regional panels. This would need to be considered at the detailed design stage of the defence panel scheme, if we decide to proceed.
- 2.24 The overall administration of the scheme would be for the LAA, which would oversee and support the operation of the regional and/or national panels. The LAA would set the criteria against which applications would be assessed.

Q2: If a panel scheme is to be established, do you have any views as to its geographical and administrative structure?

Levels of accreditation

- 2.25 The CPS scheme and QASA both set four basic “levels”– with the lowest being 1 and the highest being 4. The summary of the CPS scheme above gives an indication as to the general complexity and profile of cases at each level. We would envisage adopting the basic CPS levels, but with adjustments made as necessary to levels 1 and 2 to reflect the fact that the defence advocacy scheme would not extend to cases being dealt with in the magistrates’ courts.
- 2.26 The four levels provide a well-developed and understood system that it would be useful to build on. They would need to be refined and tailored to the competences and experience most relevant to high quality defence advocacy. Assessment boards would include representatives from the professions and the judiciary.

Q3: If we proceed with a panel, do you agree that there should be four levels of competence for advocates, as with the CPS scheme?

Number of advocates at each level

- 2.27 Another important question to be considered is whether the number of places on the panel should be limited at some or all of the levels within the scheme.
- 2.28 The CPS scheme operates a hybrid approach. It places no limit on numbers of panel members at levels 1 and 4. This means that the panel structure does not prevent freshly qualified advocates being eligible for instruction on simpler cases at the appropriate venue. It also means that progression through the levels is not blocked by a numerical limit at level 4.
- 2.29 The CPS scheme does have a panel number limit at levels 2 and 3. These limits enable the CPS to align panel numbers with business need and ensure that where a large number of advocates achieve the minimum competence score required, they can then select the highest scoring advocates at that level. This also keeps the number of advocates they instruct manageable and ensures that panel members have a greater opportunity of regular instruction.
- 2.30 Sir Bill Jeffrey considered that a panel would be one means of dealing with an oversupply problem in the advocacy market. Whether a numerical limit is imposed

or not, quality standards may reduce oversupply by preventing advocates who do not meet the required mark from practising in the field of criminal defence.

2.31 Restricting numbers at levels 2 and 3 could allow an even higher quality standard to be applied. A numerically limited panel would also be more likely to deliver a steady volume of work and a sustainable and viable career for advocates who become panel members. Although panel membership would be no guarantee that clients, through their solicitors, would choose to instruct any particular advocate.

2.32 The government, at this stage, is neutral on whether any panel should be restricted numerically. We would be interested in respondents' reactions to this point.

Q4: If we proceed with a panel, do you think that places should be unlimited, limited at certain levels only, or limited at all levels? Please explain the rationale behind your preference.

2.33 If the decision is taken to proceed with a defence advocacy panel, the government will consider what, if any, transitional arrangements might be appropriate to enable the advocacy profession to adapt to the requirements of the new scheme. The government would welcome views on what, if any, measures should be considered.

Common standards of training

- 3.1 The Council of the Inns of Court, in its submission to Sir Bill Jeffrey, described an effective advocate as someone who is articulate, persuasive and concise, well organised and efficient and able to undertake legal and factual analysis. (Jeffrey, 2014, p.26) In his report, Sir Bill recognised that the quality of advocacy is a result of both training and experience. A good advocate requires constant practice to build their skills.
- 3.2 Sir Bill recommended that there should be common training expectations for all advocates, highlighting the disparity between the mandatory training expected of solicitors and barristers.
- 3.3 We understand that each of the regulators are reviewing and consulting on their training programmes in the light of the Sir Bill's recommendations and the recommendations in the Legal Education and Training Review.
- 3.4 Responsibility for training falls to the regulatory arms of each branch of the legal profession (in respect of criminal advocacy, these currently are the Bar Standards Board, the Solicitors Regulation Authority and CILEX Regulation). It is not for the government to prescribe the standards to be applied. It would not, therefore, be appropriate for us to put forward any proposals concerning training or standards but we simply seek to highlight this as an ongoing issue. We would urge the regulators to continue to work together to develop common standards for all advocates, around ethics, financial conduct and quality. Once agreed standards are in place the necessary training to enable aspiring advocates to meet those standards will naturally follow. We recognise that this will be a longer term aim.

Proposals to prevent abuses of the system

4.1 The panel scheme we are proposing is designed to preserve and enhance the quality of advocacy. We propose to complement this by introducing stronger measures to prevent abusive practices which might result in financial incentives, rather than quality, influencing the choice of advocate. It is simply not acceptable for public money to be spent on “kick-backs” as a point of principle. Where public money is being used to fund such a vital service as ensuring fair trials before our courts, we want to ensure that every penny is spent on delivering this objective.

Referral fees

4.2 Referral fees can be described as fees paid, by an advocate, in exchange for instruction⁸. They are already prohibited by the Bar Standards Board (BSB), restricted by the Solicitors Regulation Authority (SRA) and banned in the Legal Aid Agency’s Standard Contracts.

4.3 In spite of these prohibitions, we are told by the Bar Council, other advocates, and the Law Society that referral fees are frequently paid and received. The evidence for this is, however, largely anecdotal. There is little quantitative evidence as to the scale of the problem due to a lack of reporting of such practices. Both advocates and litigators appear reluctant to report breaches given the obvious implications for their own reputations, and their future prospects of securing instruction.

4.4 Nonetheless, the government firmly believes that financial incentives cannot be allowed to dictate the choice of advocate. Quality and suitability of the advocate to the client and case should be the key factors. We want to ensure that advocates are instructed because they are operating at a high level of competence and have the right experience to do the job well - not because of their relationship with an instructing litigator, or because they were prepared to pay a fee to secure that instruction.

4.5 Part of the reason that existing prohibitions are ineffective appears to be that they are not consistent. This inconsistency has led to some confusion as to what behaviour is captured by the prohibitions.

4.6 We propose to end any current ambiguity and strengthen the existing position by introducing a statutory ban of referral fees in publicly funded criminal defence cases. We propose to do this by making regulations under section 56 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)⁹. This would provide clarity, send a very strong signal about the government’s stance on this issue, and ensure that all other contracts, guidance and restrictions reflect the position in law. We also consider that banning this practice in law might help change the behaviour of advocates and litigators. We would expect the regulators to respond quickly to any allegations in breach of the proposed statutory position.

4.7 The regulators are currently hampered in their ability to enforce the existing prohibitions by the lack of reporting of any breaches. The government invites views

⁸ Section 56 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 sets out the existing definition of a referral fee in full.

⁹ LASPO currently bans only one type of referral fee – those relating to personal injury cases.

on how this situation could be improved so that we can gain greater evidence of the problem, and ensure the effectiveness of any statutory ban.

Q5: Do you agree that the government should introduce a statutory ban on “referral fees” in publicly funded criminal defence advocacy cases?

Q6: Do you have any views as to how increased reporting of breaches could be encouraged? How can we ensure that a statutory ban is effective?

Disguised referral fees

- 4.8 The Bar and other advocates have also expressed concern that payments are being made which effectively amount to referral fees – although they are described in different ways. These can include ‘administration’ or ‘management’ fees paid by advocates, for services provided by litigators. These financial arrangements are not problematic if they represent services honestly sought and provided. If in practice these payments are required to secure instruction, they are unacceptable.
- 4.9 There will be circumstances in which administration services are genuinely being offered and paid for in a legitimate fashion. This might be, for example, where a firm offering litigation services provides administration services to a self-employed advocate. The government has no objection to business models developing in this way.
- 4.10 However, it is worth stressing that the process of instructing an advocate is already remunerated as part of the fee paid to litigators. Clearly, as a point of principle, litigators should not be charging advocates for services for which they are already being remunerated.
- 4.11 It is difficult to guard against such disguised referral fees. These financial arrangements are not captured by the existing referral fees prohibitions and would not be caught by our proposed statutory ban. However the government would welcome views on what, if any, steps could be taken in order to make it more difficult for such arrangements to persist.

Q7: Do you have any views about how disguised referral fees could be identified and prevented? Do you have any suggestions as to how dividing lines can be drawn between permitted and illicit financial arrangements?

Protecting client choice and safeguarding against conflicts of interest

- 5.1 In criminal defence cases, a client should be able to make an informed choice of advocate. However, in order to be able to make this informed choice, clients must be given clear and impartial advice when their case requires advocacy – advice which normally comes from litigators. As with our proposals around referral fees, we want to ensure that financial incentives are not driving the choices that defendants may be making, on the advice of litigators.
- 5.2 Sir Bill dealt with this issue in Chapter Five of his review. The SRA’s code of conduct sets out the professional obligations of solicitors, but there are differing interpretations of what this means in terms of the advice they are required to provide clients with about the instruction of advocates. As summarised by Sir Bill, commercial pressures to keep advocacy in-house may be affecting the advice clients are given.
- 5.3 Sir Bill recommended “the SRA and the Law Society...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.” (Jeffrey, 2014, p.43).

Changes to LAA contracts to reflect client choice

- 5.4 Whilst Sir Bill’s recommendation was aimed at the regulators, the government has a legitimate interest in ensuring that clients are being properly advised before selecting an advocate – especially when advocacy services are being paid for using public funds. To facilitate this, the government is proposing to alter the LAA’s standard contracts to better reflect the obligation of litigators to provide impartial advice to clients on their choice of advocate.

Q8: Do you agree that stronger action is needed to protect client choice? Do you agree that strengthening and clarifying the expected outcome of the client choice provisions in LAA’s contracts is the best way of doing this?

Choice of advocate declaration

- 5.5 One further option would be to introduce a requirement for any litigator instructing an advocate in a publicly funded criminal defence case to prepare a signed declaration setting out a summary of the advice given by the litigator on the choice of advocates available and the reasons why the chosen advocate was selected. The requirement for such a declaration to be made could be mandated in LAA contracts with litigators.
- 5.6 If such a process was introduced, we would need to strike a balance between designing something more meaningful than a mere ‘tick box’ exercise and imposing a reasonable administrative burden on litigators. If a declaration is mandated we would look to ensure that it is succinct.

Q9: Do you agree that litigators should have to sign a declaration which makes clear that the client has been fully informed about the choice of advocate available to them? Do you consider that this will be effective?

Change to the Plea and Trial Preparation Hearing (PTPH) form

- 5.7 An alternative option is to invite the Lord Chief Justice to consider altering the newly created Plea and Trial Preparation Hearing (PTPH) form to include a specific reference to the obligation on litigators to enable defendants to make a free and informed choice. This would have the same aim as the declaration detailed above, but would involve a declaration made within the case preparation documents. This is a matter for the Lord Chief Justice, who may decide to consult the Criminal Procedure Rule Committee, but we would welcome views as to whether there is a case for the PTPH form to change.

Q10: Do you agree that the Plea and Trial Preparation Hearing form would be the correct vehicle to manifest the obligation for transparency of client choice? Do you consider that this method of demonstrating transparency is too onerous on litigators? Do you have any other comments on using the PTPH form in this way?

Safeguarding against conflicts of interest

- 5.8 A client should be able to make an informed choice of advocate on the basis of clear and impartial advice. We want to ensure that there is no conflict of interest, in a litigator's advice on choice of advocate, which could arise from financial considerations, for instance where instructing an advocate within the same firm. We would welcome views on steps that could help prevent any conflict of interest – for instance restricting the instruction of advocates within the same firm as the instructing litigator.
- 5.9 There is a line of argument that restricting the ability of defence firms to instruct in-house advocates in publicly funded criminal cases would reduce the influence of financial incentives on choice of advocate. It would be possible to explore ways in which instructing in-house advocates could be restricted.
- 5.10 Alternatively, we could adapt the proposal above concerning transparency of choice of advocate, to include a requirement to inform the client about the advocate's employment status. This would ensure that clients are made aware when an advocate is employed in-house. The government is neutral on these issues but would welcome views from consultees.

Q11: Do you have any views on whether the government should take action to safeguard against conflicts of interest, particularly concerning the instruction of in-house advocates?

Equalities

- 6.1 The Government is committed to considering the impact of the policy proposals set out in this consultation document, with particular reference to advocates from groups with protected characteristics.
- 6.2 In accordance with our duties under the Equality Act 2010, we have considered the impact of these proposals on individuals sharing protected characteristics in order to give due regard to the need to eliminate unlawful conduct, advance equality of opportunity and foster good relations.
- 6.3 Our assessments of the potential impact of these proposals can be found in our Equalities statement (available here: <https://consult.justice.gov.uk/digital-communications/enhancing-the-quality-of-criminal-advocacy>), which should be read in conjunction with this consultation document.
- 6.4 Once we have considered the responses to the consultation, we will update the equalities statement as necessary.
- 6.5 With this in mind, we welcome responses from consultees on these proposals with regard to the potential impacts on diversity, by addressing the questions below.

Q12: Do you agree that we have correctly identified the range of impacts of the proposals as currently drafted in this consultation paper? Are there any other diversity impacts we should consider?

Q13: Have we correctly identified the extent of the impacts of the proposals as currently drafted?

Q14: Are there any forms of mitigation in relation to the impacts that we have not considered?

Q15: Do you have any other evidence or information concerning equalities that we should consider when formulating the more detailed policy proposals?

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

Q1: Do you agree that the government should develop a Panel scheme for criminal defence advocates, based loosely on the CPS model already in operation? Are there particular features of the CPS scheme which you think should or should not be mirrored in a defence panel scheme?

Q2: If a panel scheme is to be established, do you have any views as to its geographical and administrative structure?

Q3: If we proceed with a panel, do you agree that there should be four levels of competence for advocates, as with the CPS scheme?

Q4: If we proceed with a panel, do you think that places should be unlimited, limited at certain levels only, or limited at all levels? Please explain the rationale behind your preference.

Q5: Do you agree that the government should introduce a statutory ban on “referral fees” in publicly funded criminal defence advocacy cases?

Q6: Do you have any views as to how increased reporting of breaches could be encouraged? How can we ensure that a statutory ban is effective?

Q7: Do you have any views about how disguised referral fees could be identified and prevented? Do you have any suggestions as to how dividing lines can be drawn between permitted and illicit financial arrangements?

Q8: Do you agree that stronger action is needed to protect client choice? Do you agree that strengthening and clarifying the expected outcome of the client choice provisions in LAA’s contracts is the best way of doing this?

Q9: Do you agree that litigators should have to sign a declaration which makes clear that the client has been fully informed about the choice of advocate available to them? Do you consider that this will be effective?

Q10: Do you agree that the Plea and Trial Preparation Hearing form would be the correct vehicle to manifest the obligation for transparency of client choice? Do you consider that this method of demonstrating transparency is too onerous on litigators? Do you have any other comments on using the PTPH form in this way?

Q11: Do you have any views on whether the government should take action to safeguard against conflicts of interest, particularly concerning the instruction of in-house advocates?

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Q13: Have we correctly identified the extent of the impacts of the proposals as currently drafted?

Q14: Are there any forms of mitigation in relation to the impacts that we have not considered?

Q15: Do you have any other evidence or information concerning equalities that we should consider when formulating the more detailed policy proposals?

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 27 November 2015 to:

Thomas Roberts
Ministry of Justice
102 Petty France
London SW1H 9AJ
Email: advocacy_consultat@justice.gsi.gov.uk

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Publication of response

A paper summarising the responses to this consultation will be published in due course. The response paper will be available on-line at: <https://consult.justice.gov.uk/digital-communications/enhancing-the-quality-of-criminal-advocacy>.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Consultation principles

The principles that government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<https://www.gov.uk/government/publications/consultation-principles-guidance>

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