

Independent criminal advocacy in England and Wales

Annexes

Contents

Annex A – List of organisations and individuals	3
Annex B – Terms of Reference of the review of the provision of independent criminal advocacy	6
Annex C – Advocacy training	7
Annex D – A defendant’s journey through the Criminal Justice System	13
Annex E - Non-Traditional Models for Providing Advocacy Services	14
Annex F – International comparisons	17

Annex A – List of organisations and individuals

Reference Group

Richard Atkinson

Gennaro Baffa

The Hon. Mr Justice Sweeney

Mark Wall QC

Courts

Fiona Abbott (Youth Panel Chairman) and colleagues, Wimbledon Youth Court

HHJ Atherton and colleagues, Manchester Crown Court

HHJ Davis QC and colleagues, Birmingham Crown Court

HHJ Ford QC and colleagues, Bristol Crown Court

HHJ McCreath and colleagues, Southwark Crown Court

HHJ Radford and colleagues, Snaresbrook Crown Court

HHJ Rees and colleagues, Cardiff Crown Court

Senior District Judge Riddle, Chief Magistrate and colleagues, Westminster Magistrates' Court

HHJ Stockdale QC and colleagues, Manchester Crown Court

Judiciary

Magistrates' Association

Council of Circuit Judges

The Rt Hon Lady Justice Hallett DBE, Vice President of the Criminal Division of the Court of Appeal

The Rt Hon Lord Hughes of Ombersley, Justice of the Supreme Court of the United Kingdom

The Rt Hon Sir Brian Leveson, President of the Queen's Bench Division

The Rt Hon the Lord Neuberger of Abbotsbury, President of the Supreme Court of the United Kingdom

The Rt Hon Lord Justice Pitchford, President of the Inns of Court

The Rt Hon the Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales

Organisations

Advocacy Training Council

Bar Council

Bar Standards Board

Chartered Institute of Legal Executives

Chartered Institute of Patent Attorneys

Council of the Inns of Court

Criminal Bar Association

Criminal Law Solicitors Association

Crown Prosecution Service

Equality and Diversity Committee, Bar Council

Equality and Diversity Committee, Law Society

Independent criminal advocacy in England and Wales - Annexes

HM Crown Prosecution Service Inspectorate
HM Courts and Tribunal Services
Justices' Clerks' Society
Kaplan
Kyles Legal Practice
Law Society
Legal Aid Agency
Legal Services Board
Legal Services Consumer Panel
London Criminal Courts Solicitors' Association
Perrin Buildings
Riverview Chambers
Solicitors' Association of Higher Courts Advocates
Solicitors Regulation Authority
Public Defender Service
Young Barristers' Committee
Young Legal Aid Lawyers

Individuals

Attorney General, Dominic Grieve QC MP
Sir Alan Beith MP, Chair, Justice Select Committee
Lord Carter of Coles
Professor Martin Chalkey
Kenneth Clarke QC MP
Amanda de Winter
Lord Faulks QC
Professor John Flood
Simon Hughes MP
Susan Jacklin QC, Chair, Family Law Bar Association
Sir Paul Jenkins QC, Treasury Solicitor
Sadiq Khan MP
Professor Richard Moorhead
Chief Inspector Mark Payne, Charing Cross Police Station
Jeremy Robson, Nottingham Law School
Roger Sahota
Professor Andrew Saunders, Head of Law, University of Birmingham
Andy Slaughter MP
Christopher Stephens, Chair, Judicial Appointments Commission
Solicitor General, Oliver Heald QC MP
Shailesh Vara MP
Jeremy Wright MP

I met groups of barristers and solicitors including representatives from:

25 Bedford Row Chambers

Albion Chambers

Apex Chambers
Beaumonde Law Practice
Bullivant Law
Burton Copeland
Cartwright King
Chris Clark Solicitors
Citadel Chambers
Doughty Street Chambers
Glaisyers Solicitors
Guildhall Chambers
Jonas Roy Bloom Solicitors
Kelcey and Hall
Kingsley Napley
Lincoln House Chambers
Martyn Prowel Solicitors
Queens Square Chambers
Red Lion Chambers
Tuckers Solicitors

Scotland

Faculty of Advocates
Law Society of Scotland
Public Defence Solicitors' Office
Scottish Legal Aid Board
Scottish Executive

New Zealand

Criminal Bar Association
Crown Law
Professor Tony Smith, Faculty of Law, Victoria University
Attorney-General, Chris Finlayson QC
Solicitor-General, Michael Heron QC
Acting Deputy Solicitor-General (Criminal Group), Madeleine Laracy
Hon Sir Grant Hammond KNZM, President, Law Commission
New Zealand Law Society
Ministry of Justice
Legal Services Commissioner
Robin McCoubrey
Public Prosecution Service, NZ Police
Public Defence Service
Hon Justice H D Winkelmann, Chief High Court Judge

Annex B – Terms of Reference of the review of the provision of independent criminal advocacy

1. To review the provision of independent criminal advocacy services¹ in the courts of England and Wales with reference to such matters as:
 - The experience, capabilities and skills needed for such services;
 - The future structure² for the profession providing advocacy services in England and Wales;
 - The arrangements for training advocates having regard to the recommendations of the Legal Education and Training Review; and
 - The standards needed to maintain and improve the quality of advocacy
- 2 To make recommendations, having regards to the existing regulatory objectives in the Legal Services Act 2007, and the need to ensure the sustainability of publicly funded criminal advocacy.

¹ Independent criminal advocacy services should be taken to include services undertaken by self-employed barristers, and those employed by solicitors or ABS to undertake advocacy work, as well as solicitor advocates. Advocacy services should primarily relate to representations before court, but also cover related client care.

² Excluding remuneration rates and the requirement for public funding

Annex C – Advocacy training

In order to undertake specific barrister or solicitor training, students must first complete a law degree. Non – law graduates wishing to train as either barristers or solicitors must first undertake a conversion course, a Graduate Diploma in Law, and pass the Common Professional exam.

The Legal Services Board, in its role as oversight regulator for the legal profession as a whole, has a statutory duty to develop and maintain standards of education and training within the sector, although it is the Approved Regulators that are responsible for setting and monitoring the standards for their own branches of the profession.

Barristers

The regulatory arm of the Bar Council, the Bar Standards Board (BSB), is responsible for setting the education and training requirements for becoming a barrister and setting continuing training requirements to ensure that barristers' skills are maintained throughout their careers. Education and training is also a core function of the 4 Inns of Court³. Both the Inns and the Circuits⁴ play a significant role in providing the external, assessed compulsory advocacy sessions required under the BSB Training Regulations.

The Council of the Inns of Court (COIC) – the co-ordinating body for the Inns of Court - has established the Advocacy Training Council (ATC) to oversee the quality of provision and to set and monitor the standards of training being delivered.

Training

The first step (following a law degree or equivalent qualification) to qualifying as a barrister is to pass the Bar Course Aptitude Test (BCAT) and join an Inn of Court. The BCAT does not include a mandatory advocacy element. The student will then commence the Bar Professional Training Course (BPTC) which focuses on advocacy skills.

In terms of core training components and skills the Bar Professional Training Course (BPTC) covers the following areas:

- Civil litigation
- Evidence and remedies
- Criminal litigation and evidence
- Advocacy
- Opinion writing
- Drafting
- Conference skills
- Resolution of disputes out of court
- Professional ethics

³ Lincoln's Inn, Inner Temple, Middle Temple, Gray's Inn

⁴ The Bar in England and Wales is divided into six regions, Midlands, Northern, North Eastern, South Eastern, Wales & Chester and Wales, which are more commonly known as "Circuits".

There is a focus on writing skills, caseworker skills, fact management, legal research, management and interpersonal skills are embedded in the curriculum.

The BPTC is a 30 week academic year course (if undertaken full time) and can be undertaken at 9 locations:

- Nottingham Law School
- The College of Law London/Birmingham
- BPP Law School – London/Leeds/Manchester
- Kaplan Law School
- University of the West of England Bristol
- Cardiff Law School
- Manchester Metropolitan University
- Northumbria University
- City Law School – London

On completion of the BPTC barristers are called to the Bar by one of the 4 Inns of Court. Before call the barrister must attend a minimum of 12 qualifying sessions at their Inn. The qualifying sessions cover a range of subjects, including advocacy skills.

Once called to the Bar, barristers are required to complete a pupillage with a set of chambers. After the first 6 months of pupillage (which is a non practicing stage spent shadowing a barrister) and having acquired the Provisional Qualifying Certificate, the pupil may exercise rights of audience in the lower courts and on completion of the full year's pupillage may exercise higher rights. During the first 6 months of pupillage a pupil must complete the Pupils Advocacy Course (PAC) and be assessed by the trainers as competent. The Practice Management Course (PMC) must be completed during pupillage. Both the PAC and PMC are provided by the Inns of Court and Circuits within the framework of the Bar Training Regulations.

A full qualifying certificate is awarded by the Bar Standards Board after the successful completion of the pupillage.

Once qualified, barristers must undertake Continuous Practice Development (CPD). The mandatory New Practitioner Programme (NPP) requires 9 hours of compulsory advocacy skills training spread across the first 3 years post qualification as well as 36 further hours of accredited CPD over the same period, which focuses on advocacy and ethics. This is delivered by the Inns of Court and the Circuits. After 3 years barristers become Established Practitioners and then must undertake 12 hours CPD per annum.

The Bar also run other training events through chambers and the chambers model itself allows for the development of useful networks of learning.

At each of the stages which include advocacy training as a compulsory element, trainers employ the Hampel Method⁵ as the training tool.

⁵ A systematic six-stage method devised by Professor George Hampel QC of the Australian Bar.

The method requires pupil barristers and new practitioners to perform as advocates in a simulated courtroom environment. Advocacy trainers observe the performance, and then use a 6 step approach to identify and address particular issues with the performance.

The six steps are:

- Identifying one particular aspect of the performance to be addressed;
- Reproducing verbatim that identified aspect of the performance;
- Explaining why this issue needs to be addressed
- Explaining how to improve this aspect of the performance;
- Demonstrating how to apply the remedy to the specific problem;
- The pupil performs again, applying the remedy.

Solicitor advocates

The regulatory arm of the Law Society, the Solicitors' Regulation Authority (SRA), is responsible for setting solicitors' qualification standards in England and Wales and monitoring the performance of training organisations providing qualifications

Training

On completion of the law degree, or equivalent qualification, the solicitor must undertake the Legal Practice Course (LPC). This is a 12 month post graduate course that follows the completion of a law degree or CPE Graduate Diploma and provides the general foundation for practicing as a solicitor. Reflecting the emphasis on core skills for solicitors (rather than solicitor advocates) it does not focus on advocacy although it does contain a compulsory advocacy module that must be passed by the student. Providers that deliver LPC training have a degree of flexibility in terms of the amount of advocacy training that is offered but it ranges from 4 hours as a minimum up to 15 hours.

Following the completion of the LPC, trainee solicitors must complete a 2 year training contract with a firm. During the contract trainees undergo compulsory training known as the Professional Skills Course (PSC). In terms of core training components and skills the PSC covers three compulsory core modules:

- Financial and business skills;
- Advocacy and communication skills
- Client care and professional standards

The 18 hour advocacy and communication module involves both trial preparation and participation in a mock trial. Trainees have the opportunity of practising their advocacy skills on an individual basis and observing others.

Those who qualify and are admitted as solicitors automatically gain the rights to conduct advocacy in the magistrates' courts, the county court and various tribunals.

To gain rights of audience in the higher courts solicitors must undertake a compulsory advocacy assessment. Advocacy training (which is not compulsory) prior to undertaking the assessment can be delivered by 7 recognised assessment providers, although only 6 institutions provide training in criminal advocacy:

- Swansea University,

- The University of Law,
- The City Law School (City University London),
- BPP Law School (London/Manchester),
- Kaplan Altior (Cardiff),
- Nottingham Law School

The higher rights of audience courses usually take place over two to four days. The structure of the courses includes modules on evidence and litigation (key rules of evidence and procedure), advocacy (essential practical advocacy skills) and practice assessments as well as ethics and performance.

The compulsory advocacy assessment includes:

- Part 1 – Written Examination 2.5 hours
- Part 2 – Practical Examination -Oral Examination/Advocacy Exercises

Once a solicitor has obtained higher rights of audience they must complete at least 5 hours of Continuous Practice Development (CPD) related to advocacy in the higher courts in each of the first five years following the award of the qualification. This requirement is not in addition to a solicitor's compulsory CPD requirement, currently 16 hours per year.

The Solicitors' Association of Higher Courts Advocates (SAHCA)

The Solicitors' Association of Higher Courts Advocates (SAHCA) is a not for profit organisation founded in 2004 when solicitors first gained the right to appear in the higher courts. Its aim is to promote the best in terms of advocacy – both training and standards - and in terms of parity and equality with the Bar.

SAHCA runs 8 advocacy training sessions a year for solicitors. The training uses the Hampel Method, as does the Bar, and covers both beginner and intermediate levels.

Legal Executive advocates

The regulatory arm of the Chartered Institute of Legal Executives, ILEX Professional Standards (IPS) is responsible for ensuring that the arrangements and standards relating to qualifications and experience, study and training; and assessment of candidates are fit for purpose. It is also responsible for ensuring that members maintain the minimum standards of competence expected of them by means of Continuing Professional Development.

Training

Aspiring Chartered Legal Executives undertake a series of training courses and are required to pass qualifications relevant to the area of practice in which they intend to specialise. The first stage is the CILEx Level 3 Professional Diploma in Law and Practice and is set at the equivalent to A-level law. The second and final qualifications are equivalent to an Honours degree course - the CILEx Level 6 Diploma in Law and Practice. Trainees will often work at the same time as studying in order to acquire practical skills. The courses can be undertaken at a college, university or through an open learning programme. The courses are open to graduates and non-graduates. A trainee must also gain 3 years' vocational experience before being admitted as a Fellow. One of the three years must be completed in the graduate membership grade and the two years immediately preceding application must be consecutive.

CILEx members are now able to qualify as Chartered Legal Executive Advocates in civil, criminal or family through the rights of audience qualification. This is a 5 day course followed by assessment, including a written test on day 6.

Once a Fellow has qualified as an advocate they gain greater rights of audience and can undertake the follow criminal advocacy:

- to appear before all adult magistrates courts and youth courts in relation to all matters within that court's criminal jurisdiction
- to appear in the Crown Court on appeal from the magistrates' or youth court or on committal for sentence from the magistrates' court, and before a judge in chambers to conduct bail applications; and
- to appear before Coroners Courts in respect of all matters determined by those courts and to exercise rights of audience similar to those exercised by solicitors and barristers

Chartered legal executive advocates are required to renew their certificate within one year of issue, and then every three years after that. At the first renewal they must produce a portfolio detailing the advocacy experience they have gained and must also complete 5 hours of CPD each year on advocacy skills out of a total of 12 hours.

Vulnerable Witnesses⁶

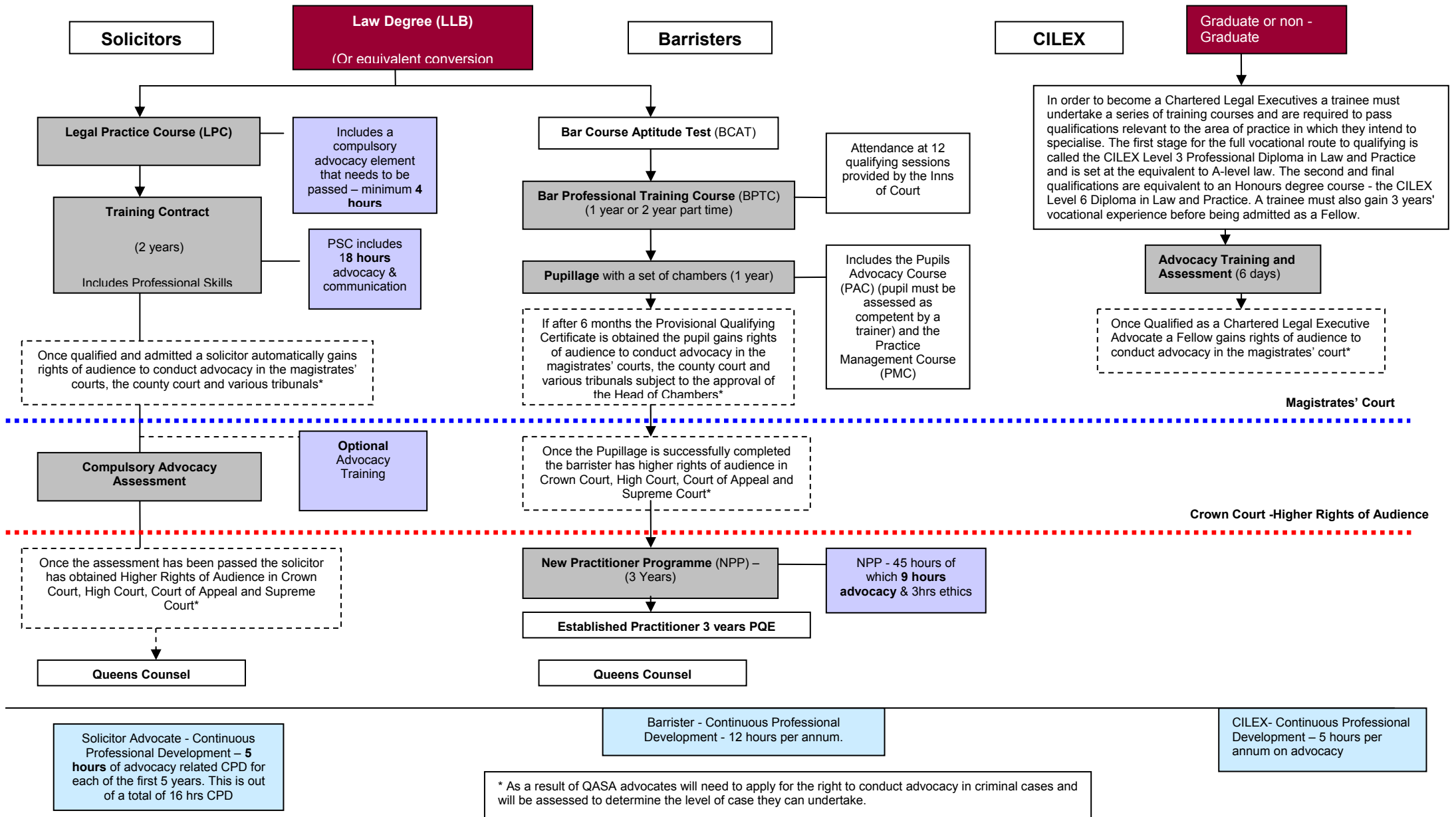
The handling of vulnerable witnesses in court calls for particular skills from advocates in terms of questioning people in a manner which is appropriate, sensitive and effective. In order to properly equip all advocates for dealing with vulnerable witnesses the ATC has launched the Advocate's Gateway website which gives free access to practical, evidence based guidance. The website provides a range of toolkits which deal with different vulnerabilities, information on intermediaries and the Criminal Bar Association's (CBA) training film.

While hosted by the ATC, the Advocate's Gateway is a profession wide project. In developing the Gateway the project included representatives from the Judicial College, Solicitors Association of Higher Courts Advocates, Criminal Bar Association, Chartered Institute of Legal Executives, Crown Prosecution Service and leading academics and researchers.

The toolkits provided bring together policy, case law, transcripts, excerpts and practice examples. They are specifically referred to in the Criminal Practice Directions issued by the Lord Chief Justice in October 2013, which directs advocates to consult and follow the relevant guidance and suggests that judges should refer advocates to this material.

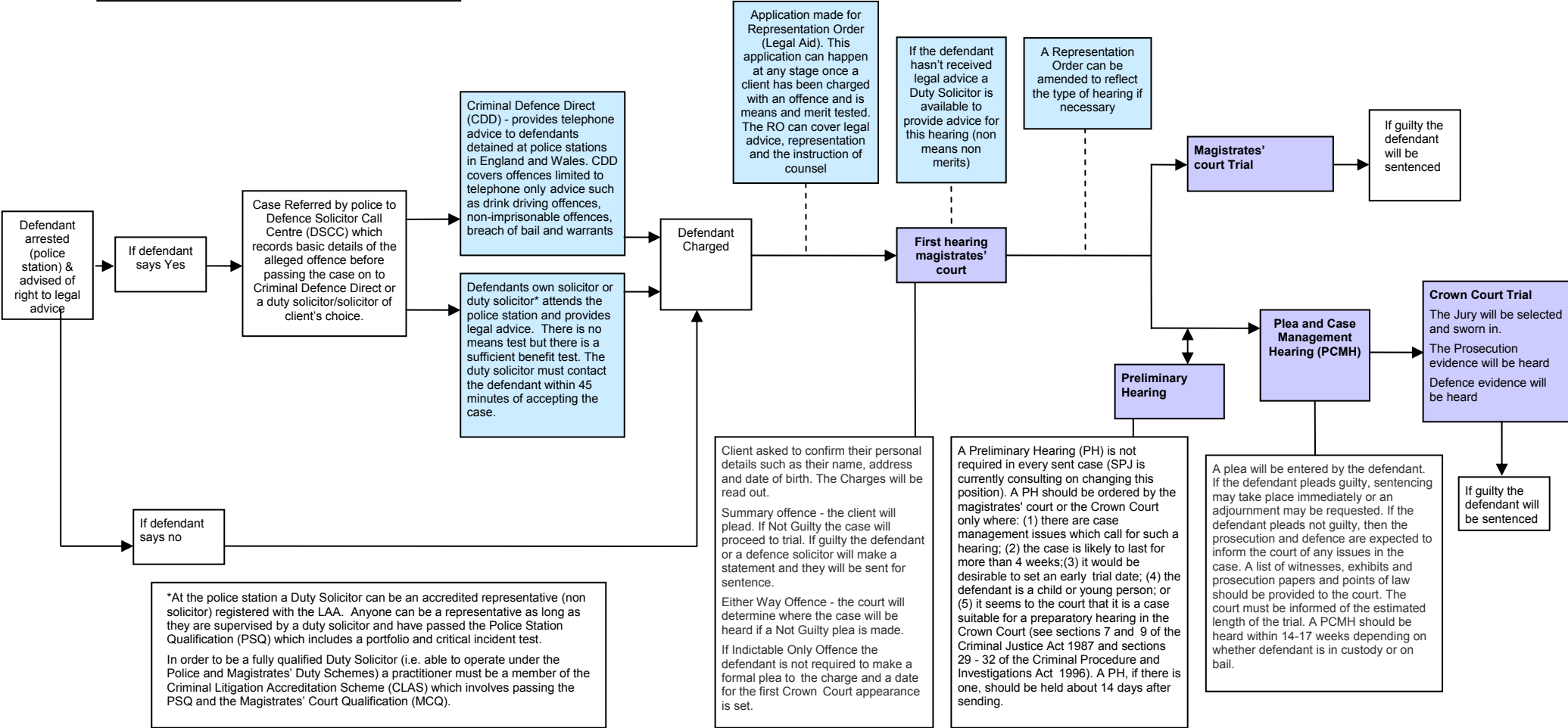
⁶ 'Vulnerable' includes those under 18 years of age and people with a mental disorder or learning disability; a physical disorder or disability; or who are likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case

Current Professional Routes to Obtain Rights of Audience



Annex D – A defendant’s journey through the Criminal Justice System

A defendant’s journey through the Criminal Justice System



Annex E - Non-Traditional Models for Providing Advocacy Services

Most of our discussions in the course of this review have been with barristers and solicitor advocates operating on the traditional model. In recent years a number of non-traditional practices have emerged. These mostly take advantage of the deregulation brought about by the Legal Services Act 2007, which allows for Alternative Business Structures (non-lawyer ownership and investment) and Legal Disciplinary Practices (multi-lawyer partnerships) to be set up. Examples of these which we met or heard about are given below.

Direct Access

In 2004 the Bar Council's Code of Conduct rules were amended to allow clients direct access to the Bar, known as Public Access (PA). This change meant that anyone could go directly to a barrister without first having to instruct a professional client, such as a solicitor. As a result, barristers could now advise clients on their legal status or rights, draft and send documents for clients and could represent them in court, tribunals or mediations. Some barristers have started to take advantage of direct access in order to secure a greater share of the legal services market. This area should continue to grow as further deregulation through changes to the Code of Conduct in 2010 and in January 2014 mean barristers can now be authorised to conduct litigation such as issuing of proceedings and the serving of documents at court subject to becoming authorised to do so, although they are still prohibited from handling client money. Previously, clients directly instructing barristers in this capacity would have to conduct certain administrative tasks themselves if they didn't also instruct a solicitor.

Although 5,771 barristers had registered to undertake public access instructions by April 2014, with approximately 1,738 of those registered working in the area of crime, many have expressed reservations about this approach. The point has been made to the review that this way of working is better suited to certain areas of law which involve professional clients and most chambers are not set up to facilitate meeting with the general public in this way.

ProcureCo

ProcureCo has been developed by the Bar Council as a model available to barristers which allows them to tender and secure work directly, whilst preserving the traditional chambers model in which they operate. This model allows corporate vehicles to be added as an adjunct or 'bolt-on' to chambers in order for barristers to contract directly with a purchaser of legal services such as a business, a local authority or the Legal Aid Agency. ProcureCo as an entity cannot actually supply or provide any reserved legal services itself as the Bar Standards Board (BSB) can only regulate individual practitioners, but is the vehicle that can procure the services of lawyers to be provided to the clients.

Consequently, any ProcureCo model set up can be linked to a specific chambers to deliver the advocacy services and provide the facility or means thereafter to instruct other professionals, including solicitors, to perform parts of the work which the chambers does not wish to, or cannot, perform. It is unclear how many ProcureCo structures have been set up to date, but estimates suggest the volume is currently low.

If and when the BSB can regulate entities then the need for a procurement model such as this will no longer be required as the reserved legal activity of advocacy can be delivered by groups of barristers who form an entity and can be regulated directly by the BSB.

Digital Hub Chambers

To address the issues of high overheads, a number of chambers such as Mansfield Chambers have left expensive premises and moved into smaller office facilities, embracing IT and technology to facilitate greater remote working. This has had the benefits of drastically reducing overheads of high value city centre premises and lowering the number of clerks needed to support the business model, whilst continuing to provide the professional support network that the chambers model offers.

This has allowed barristers greater flexibility to work remotely and work more efficiently, particularly at court, using mobile technology. The latest virtual office software can be used for secure discussions, file-sharing, book keeping and for setting up and conducting meetings with information updated instantly whilst on the move. A barrister can keep all precedents, templates and case law and this can be accessed securely over the internet. This has significantly reduced the fees paid by barrister to chambers by as much as 20% (30% down to 10%) in some cases, which has offset some of the losses incurred as a result of changes to legal aid remuneration.

Other delivery models

The Review team has also had the benefit of speaking to others who have established various innovative models for the delivery of advocacy services.

One such model is that adopted by Riverview Law. This company delivers services to businesses of all sizes on a fixed fee basis, with a particular focus on the outsourcing of legal advisory work and in-house activity for large (FTSE 100 and equivalent) organisations. Its other services include annual unlimited contracts for mid-sized businesses, with legal advice primarily being delivered from its operations centre in the North-West of England. Legal advice for Riverview Law's customers is delivered by Riverview Solicitors and members of Riverview Chambers who are regulated by the SRA and BRB respectively in order to undertake the work (Riverview Law is in the advanced stages of applying to be an ABS in its own right). All activities are underpinned by a bespoke IT platform, which drives operational efficiency whilst producing valuable real-time management information for the company's customers. Riverview Law also provides a full range of fixed fee litigation and representation services with a Barrister-led model, centred on the members of Riverview Chambers, with each matter being led by a Barrister, supported as required by Solicitors. All the Barristers are independent practitioners retaining tenancies in other Chambers and continue to gain other work through their Clerks in the usual way.

Another interesting model is that of Perren Buildings, 15 Old Bailey. This organisation is a group of solicitor advocates who have set up chambers akin to that of barrister chambers. The uniqueness of this model is that many of the advocates also practice as a solicitor or advocate for other law firms. Some advocates may therefore manage the cases from start to finish and thereby provide a comprehensive service of both litigation and advocacy services to their clients. In addition, all advocates can provide independent advocacy services to other firms of solicitors and can utilise their contacts with other law firms to ensure they have a robust and wide source of referrals for the services they provide.

Kyles Legal Practice adopts a model involving both barristers and solicitors and higher court advocates in order to provide a cradle to grave service from police station right the way through to trial. The practice is barrister and solicitor led and they oversee each stage of the process and the practice employs a number of police station representatives.

During the course of the Review we have become aware of other models such as Artesian Law, which is a barrister led Legal Disciplinary Practice model. They receive their instructions directly or through solicitor firms and are supported by a solicitor within the organisation. The firm is able to operate with low overheads with barristers paying a considerably less of their income in overheads when compared to chambers by working remotely through a digital hub meaning they can keep their office small.

Another organisation is Barristers and Co which is a fixed fee direct access organisations where barristers provide litigation and advocacy services to clients directly. It also offers businesses fixed fee monthly options packages for advice and assistance. Under this model barristers can apply for licences to replicate this model in other areas of the country under this brand.

Offering a slightly different type of service is Stobart Barristers. Under this model clients call a helpline whereby a legal advisor takes details of the matter and then refer the client to an appropriate barrister who is registered with the service through their panel. It is understood that there are currently more than a 1,000 barristers on the panel. The barrister will then provide direct access services under a fixed-fee 'pay-as-you-go' remuneration model.

All of these business structures would appear to provide flexibility and have the capacity to provide a wider range of services to clients via experts in their respective fields. We are told by those who operate them that their clients see a real benefit from both the service and the mode in which that service has been provided to them.

Annex F – International comparisons

Scotland

The Scottish system provides for solicitors and advocates (barristers) to have distinct roles although, as in England and Wales, solicitors have always undertaken a significant degree of advocacy in the lower courts and in current times are doing increasingly more in the higher courts. Despite this, Scotland has always considered itself to have an independent specialist bar. One material difference to the system in England and Wales is that most lawyers in Scotland qualify first as a solicitor, regardless of whether the individual chooses to qualify as an advocate.

Training

Legal education in Scotland requires the completion of a Bachelor of Laws (LLB) degree⁷, followed by the Scottish Diploma in Professional Legal Practice (DPLP) which is a 26 week vocational course intended to equip students with practical skills. As such, compulsory Mandatory Outcomes in Private client, Conveyancing, Litigation, Business, Financial and Practice Awareness and Tax and compulsory Core Outcomes in Professionalism, Professional Communication and Professional Ethics and Standards are required to be met by students alongside the choice of various electives.

Students who have successfully completed the Scottish law degree and DLP then have to undertake a traineeship of 24 months with a solicitors firm or a legal department of an organisation to qualify as a solicitor. A solicitor who wishes to undertake advocacy in the higher civil or criminal courts requires to complete, to the satisfaction of the Council of the Law Society of Scotland, a course of training in evidence and pleading, demonstrate knowledge of the practice and procedure of and professional conduct in regard to the courts in question, and satisfy the Council that the solicitor is a fit and proper person to have a right of audience in the higher courts.

Any lawyer who following qualification as a solicitor, wishes to practice as an advocate must become a member of the Faculty of Advocates. In addition to a Scottish law degree and the DLP, the Faculty normally requires an applicant to have spent 21 months as a trainee in a solicitor's office. In practice most applicants have completed their traineeship and qualified as solicitors. In the experience of those who we spoke to in Scotland, including the Faculty and the Law Society, many would- be advocates spend at least a year, if not several, practising as a solicitor before taking this step which is widely regarded as beneficial. This early exposure to legal practice may facilitate the development of core skills and enables lawyers to make an increasingly informed choice about where their strengths lie and therefore where they would like to specialise. It may also allow would-be advocates the opportunity to establish a network of contacts within the solicitor community upon which they can later rely for instructions as advocates.

⁷ As an alternative to undertaking a law degree, an individual can enter into a 3 year pre-PEAT 1 (Professional Education and Training Stage 1) training contract with a Scottish solicitor whilst at the same time studying for the Law Society's professional exams. Individuals qualifying through this route are required to work in specified areas of practice and are still required to obtain the DLP and to undertake a Traineeship

In order to apply to the Faculty, the lawyer must pass the Faculty exams on Legal Scholarship and Evidence, Practice and Procedure. This is followed by an eight or nine month period of unpaid practical training (devilling) with an experienced advocate (a devil master). Devilling is not unlike pupillage, comprising a mix of advocacy and other core skills training (e.g. communication skills, questioning skills - including examination in chief and cross examination of witnesses- drafting skills covering both civil and criminal written pleadings and opinion writing) and mentoring with an experienced advocate (a devil master). At the end of the devilling period the trainee will undergo an assessment including his or her oral advocacy skills and written advocacy skills. On successfully completing the above stages, applicants will be formally admitted as a member of the Faculty of Advocates and by the Court to the public office of advocate.

Both the Law Society and the Faculty of Advocates observed that one of the unintended consequences of delayed specialisation as advocates may be a potential effect on gender diversity. Although at the outset there are more female than male entrants to the legal profession, this level of representation is not sustained amongst female advocates in their early 30s to mid 40s (the Law Society flagged a 40% reduction in the numbers of female advocates in this age range). One explanation for this is that at later stages in their careers, women may be more likely to have increased caring responsibilities which may take them out of the workforce for a period.

Organisation of Advocates

Advocates in Scotland must practice as sole practitioners and as such there are no 'employed' advocates. Advocates are associated in loose groupings known as 'stables', groups of advocates each of which is served by a team of clerks. However advocates are not co-located with their clerks (or colleagues) and their stables are not akin to the chambers system in England and Wales. That said, most advocates work from the Advocates Library in Edinburgh (which is adjacent to the Supreme Courts in Scotland) or routinely appear in the High Court in Glasgow. We were told of a real sense of collegiality within the advocate community who rely on each other for mentoring and support with the Faculty itself undertaking a pastoral role, not dissimilar to that provided by the Inns of Court in England and Wales. Advocates are enjoined by their professional code to seek advice in case of doubt, and Faculty office-bearers are available to provide advice and guidance to advocates on ethical and other practical issues.

Accessing Criminal Legal Aid Work

Legal aid is available for advice and representation in criminal proceedings via application to the Scottish Legal Aid Board (SLAB) subject to a client satisfying eligibility requirements and the interests of justice test.

A client can choose their legal representative, although the solicitor and his or her firm must be on the Criminal Legal Assistance Register maintained by the Board. In the lower courts, including the Sheriff's Court, an application will have to be made to SLAB to secure an advocate to represent a client and sanction is normally only granted in more complex or specialised cases. In most cases in the Sheriff's Court, the accused's solicitor represents him. The Scottish system operates on the basis of fixed fees for less serious cases in the lower courts. In more serious solemn cases solicitors are paid under a hybrid system of block fees and time and line depending on the stage of the case. Counsel are paid on the basis of prescribed daily fees which include normal preparation and most written work. Additional sums can be paid to counsel in cases which require 'exceptional preparation'. These fees are based on the number of productions. The fixed fee covers all work by the solicitor up to and including the first hour of trial; however, advocates are paid

on a time and line basis. In the High Court and Criminal Appeal Court, legal aid for representation by junior counsel or solicitor advocate is available automatically, although other than in a narrow range of specified cases, sanction from SLAB will still be required for senior counsel or more than one junior. The selection of particular counsel in a case remains at the discretion of the instructing solicitor.

SLAB also employs the operationally separate Public Defence Solicitors Office (PDSO) a network of publicly funded, criminal defence lawyers with experience of dealing with all types of criminal cases; they are largely solicitors and a small number of barrister advocates. Although the PDSO only operate from 7 office locations and their numbers (23 solicitors) are small in comparison to 1500 lawyers in the solicitors profession as a whole, as an entity they are the largest provider of solicitor criminal advocacy services in Scotland both in numbers of offices and numbers of registered solicitors. In the areas in which they operate they are allocated a 35% share of the duty work. Overall around 60% of their work originates from the duty system and 40% from direct access.

Prosecution advocacy in the higher courts

In the higher courts prosecution work is principally undertaken by full-time Crown Counsel. Crown Counsel are lawyers who are employed, for a limited number of years, as full-time prosecutors in the higher courts (and also to direct the work of the permanent prosecution service). They are drawn from a varied pool (the independent bar, solicitor advocates and procurators fiscal) and, after their period of office, return to practice (or, in some cases, to the judiciary or other careers). Independent advocates may be briefed to prosecute in the higher courts on an ad hoc basis, but a relatively small proportion of the prosecution work in the higher court is undertaken on this basis.

New Zealand

In New Zealand, the professions are described as formally fused, which reflects both the single route to qualification as a 'solicitor and barrister' and the fact that the same role is undertaken by these lawyers post qualification including litigation and advocacy. However, although the majority of the 11,000 plus lawyers in New Zealand practice as both barristers and solicitors, there are some who go on to practice solely as barristers. These lawyers are known as 'barristers sole' and their existence retains the concept of an independent Bar in New Zealand, albeit one that is quite different from the Bar in England and Wales.

One other significant difference between the legal system in New Zealand and that of England and Wales which is worth noting at the outset is that there is not a single, centralised prosecuting authority. New Zealand has no centralised decision-making agency in relation to prosecution decisions. In respect of Crown prosecutions, prosecutions are mainly conducted by Crown Solicitors – private practitioners appointed to prosecute under a warrant issued by the Governor-General and overseen by Crown Law. Other prosecutions, particularly those in the lower courts, are conducted by the New Zealand Police and numerous other enforcement agencies that are responsible for enforcing a particular regulatory area.⁸

⁸ Crown Law Prosecutions Guidelines 2013 (http://www.crownlaw.govt.nz/uploads/prosecution_guidelines_2013.pdf)

The relevance of this approach to prosecutions in the current context is that unless a lawyer is employed by one of these authorities⁹, he or she will not have access to prosecution work; therefore the large majority of criminal practitioners in New Zealand appear for the defence.

Training

Qualification as a Barrister and Solicitor

In order to practice in New Zealand a prospective lawyer must first complete a Bachelor of Laws Degree (LLB), which is usually a 4 year course, approved by the New Zealand Council of Legal Education (NZCLE) which is comprised of nominees of the Law Society, the High and District Courts, Deans of each of the five legal faculties and a nominee from the Ministry of Justice.

Following completion of their law degree, students must complete the Professional Legal Studies Course ('PLSC'), which is an approximately 3 month competency skills based course including practical activities, research tasks, and assessments based on "real life" legal practice scenarios. The NZCLE regulates the course, prescribing the particular skills to be taught and that the course must deliver a minimum of 455 hours of training. Most course providers (colleges of law) deliver training through mixed courses with approximately 80% of learning online and 20% onsite, although it is recognised that some skills such as advocacy need to be delivered face to face. As part of this course students must be taught professional conduct and 11 mandatory practice focused skills including advocacy.

A minimum number of 55 hours of training must be dedicated to advocacy so that a student is able to demonstrate the ability to:

- Behave professionally and comply with the standards of conduct required in court.
- Present oral submissions.
- Identify and use appropriate methods to introduce evidence.
- Deal correctly with exhibits.
- Follow procedures for making objections.
- Use different questioning techniques in direct examination, cross examination and re-examination.

Advocacy and other skills are assessed as part of the course and the NZCLE stipulate a minimum of 45 hours total assessment time in addition to the learning time. A guide of 22.5% or approximately 10 hours of assessment time should be allocated to advocacy.

The PLSC can be undertaken alongside working in a firm which many do and there is no further requirement to complete articles or training contracts as a precondition of admission to the roll. Once a student has completed his or her PLSC and obtained a certificate of completion from the NZCLE, he or she must obtain a certificate of character from the New Zealand Law Society (NZLS) and these are filed as part of the admission process before candidates are admitted to the roll of barristers and solicitors of the High Court of New Zealand. The NZLS regulates all lawyers, including barristers sole.

⁹ Some regulatory bodies and government departments have prosecution panels, such as the Serious Fraud Office but this is less common.

Practising as a barrister sole

To be able to practice solely as a barrister on own account (as opposed to an employed barrister) a lawyer must have three years prior legal experience in New Zealand in the last five years and have completed a course known as Stepping Up. This course incorporates a 2.5 days of face to face teaching time and a minimum of 50 hours pre-course work. It focuses on skills required to run and plan the business side of a law practice, understand and apply the rules of client care. The course also addresses professional issues, consumer protection and financial aspects as well as trust accounting. Prior to 2010 barristers were not required to undertake this course. The three year rule is analogous to the amount of time in practice a lawyer must have undertaken before he or she can set up his or her own firm. The rule was introduced following real concerns about the quality of some young barristers sole who were establishing themselves as sole practitioners immediately out of university and who were not observed to have the requisite experience or skills to operate successfully. It was previously traditional for lawyers to reach partnership or at least senior level in a firm before going on to practice as barrister sole. However those to whom we spoke, including the NZLS, had observed a trend (pre the 3 year rule requirement) for young lawyers to opt to establish themselves as barristers sole much quicker and without gaining the maturity and experience that comes from working in a firm for a period of time beforehand.

For many barristers sole the incentives to opt to practice as such are not dissimilar to those that have been expressed by barristers in England and Wales. The Criminal Bar Association (CBA) and the NZLS both noted the attraction for many of the independence and flexibility that comes with a sole practitioner approach, the ability to focus more on the advocacy element of a case rather than handling client relationships plus the administrative advantage of low overheads and minimal employment liabilities – some barristers sole do not have even minimal administrative support. However as noted below, in the context of criminal legal aid work, a barrister sole often acts as an end to end case owner in much the same way a lawyer within a firm would which appears to be much more commonly the case than for barristers operating within England and Wales.

Accessing Criminal Legal Aid Work

Legal aid is available through the Ministry for Justice (MoJ) via the Legal Services Commissioner (who holds a statutory role and is responsible for the administration of legal aid) for people who are charged with criminal offences subject to them meeting certain eligibility criteria. The majority of cases handled at District Court level (which has the jurisdiction to handle both summary and some indictable offences which can carry significant penalties including life imprisonment) will be eligible for legal aid in addition to those heard at High Court level and above.

For most criminal legal aid cases the system allocates a lawyer to provide advice and representation to the client, the rationale being that for cases up to a certain level it is appropriate for the Legal Services Commissioner to assume this role and in doing so determine how public funding is allocated. The allocation of cases is done on a rota basis using an approved list of providers which meet certain quality assurance criterion. The list will include law firms, barristers sole and the Public Defence Service (PDS). The latter is overseen by but operationally independent from, the MoJ/Legal Services Commissioner and it currently operates in 10 major cities across the country. Where the PDS has a presence in a given location it will get 50% of the available allocations. Overall the PDS does around 30% of the legally aided work available and therefore has the greatest share of the market as a single provider.

For serious cases (i.e. potential imprisonment for more than 10 years) the client is able to choose their own lawyer. However, the lawyer still needs to be an approved legal aid provider, whether a lawyer from private practice or one from the Public Defence Service. If a client does not exercise a choice they will be allocated a lawyer from the approved list, again on a rotational basis.

Where a provider has conduct of a case they are treated as having responsibility for it end to end. Some firms or barristers sole may choose to contract out certain non-substantive aspects of service provision to agents (sometimes themselves barristers sole) or private investigators for example where assistance is required in preparation of the litigation (we were told that this was a useful resource for barristers sole). However many to whom we spoke confirmed that allocated lawyers, including barristers sole, would routinely deal with the cases themselves from start to finish. In the criminal legal aid context barristers sole are exempt from the 'intervention rule' which otherwise dictates that a barrister must initially be 'formally instructed' by a solicitor even if the barrister sole then effectively goes on to have sole conduct of the case. Legal Aid sets strict policies regarding what must be done by providers and only legal aid providers can work on a case (for example a barrister could not ask a non-legal aid provider to assist as an agent).

A system of fixed fees is operated for the majority of cases with an hourly rate for more complex cases. When these fees were first introduced in 2011 there was significant debate in New Zealand about the impact this might have on the quality of provider and service provision. Although some to whom we spoke would attribute a diminution in quality in part to this, others observed that there had always been issues and a lot of work had been done across the system to address quality concerns.

The context for the discussion of quality of advocacy in particular as well as the wider backdrop to some of the more recent changes to the legal aid system and the way in which its providers operate, stems from a review undertaken by Dame Margaret Blazely in 2009 called Transforming the Legal Aid System¹⁰. Amongst the 70 recommendations arising out of that Review, including the introduction of the 3 year rule prior to being able to set up as a barrister sole as noted above, Dame Margaret flagged the case for a quality assurance framework which would put systems into place to ensure that cases were handled at the appropriate level¹¹. She also noted that the experience of the PDS thus far (at that time drawing to the end of its pilot in Auckland) had been positive and it should be expanded. For their part, the Ministry of Justice undertake their own quality audits each year, sampling around 60 providers from a total of 1974 who they contract with. This is a paper exercise comparing files against set criteria and there is recognition that this and other forms of active performance review have the potential to increase and ensure good quality standards.

Australia

In Australia the structure of the profession varies from state to state. In some states, the distinction between barristers and solicitors is nominal and largely reflects individual preferences and membership of professional associations. In others the distinction is clear at least in a practical sense, from the type of practice practitioners have, even if they are entitled to practice in the other branch of the profession. What this means is that a

¹⁰ Transforming the Legal Aid System: Final Report and Recommendations November 2009 by Dame Margaret Blazely

¹¹ Dame Margaret also recommended the increase in fees to legal aid providers once changes had been implemented and quality improved. In particular, she recommended it be brought inline with Crown Solicitor rates.

member of the Bar might practice only as a barrister even though they are admitted as a barrister and solicitor. Conversely although every solicitor is also a barrister, many prefer to brief counsel rather than appear in courts or tribunals themselves which helps to support an independent Bar.

For example in the Australian states of New South Wales and Queensland there is a split in the profession and there remains a strongly independent Bar. To be called to the Bar in these states requires extra training. In these states, solicitors' rights of audience before superior courts are theoretically unlimited, but infrequently exercised in practice.

However, in the states of South Australia, Victoria, Western Australia, and the Australian Capital Territory, the professions of barrister and solicitor are fused in practice, although an independent Bar nonetheless continues to exist through membership of Bar Associations.

There have been moves in recent years towards a seamless national legal profession. Under the Legal Profession Uniform Law Application Act 2014, New South Wales and Victoria have agreed to uniform legal profession regulation which will mean, among other things, that prospective lawyers will benefit from a single set of admissions requirements. This law will cover over 70% of Australian legal practitioners and is due to be implemented on 1st July 2014. Other jurisdictions will also be encouraged to join the scheme.

Training

Legal education in Australia first requires the completion of an integrated Bachelor of Laws (LLB) degree, often conferred along with a post-secondary degree.

Completion of the LLB is followed by a period of Practical Legal Training (PLT), which replaced placements of clerkship. There are two options for completing PLT; either the Supervised Workplace Training (SWT) or an approved PLT course. The latter is the most common and includes programmed training and workplace experience covering skills and core practice areas. This is usually a 24 week full time course including a 3 week of work placement although it can be undertaken part time. There is also flexibility in doing some modules on site or on-line.

Advocacy is taught as part of the PLT under lawyer skills and the 6th Schedule of Legal Profession Admission Rules 2005 makes clear that training must be delivered on all aspects of representation at court, including evidence-in-chief, cross-examination, re-examination and making submissions.

Admission to practice is then a matter for each state and the rules and regulations that need to be met vary accordingly.

For example in New South Wales, a person is admitted as a Lawyer of the Supreme Court of New South Wales and, once admitted, may practice as either a solicitor and barrister (obtaining a practicing certificate through the Law Society of New South Wales) or as a barrister (obtaining a practicing certificate through the New South Wales Bar Association).

In order to practice as a barrister in New South Wales a trainee must pass three Bar exams, which covers legal ethics; aspects of evidence; and practice and procedure. The trainee must then take out a practising certificate. On taking out a practising certificate with conditions, the legal practitioner is termed a 'reader'. The reader embarks on the Reading Programme, which has as a major element called the Bar Practice Course which teaches advanced advocacy, mediation, and other barrister skills. The period of reading

commences on the issuance of the practising certificate with conditions attached, and continues for at least 12 months.

During the 12 month period, the reader remains under the supervision of at least one experienced barrister, who is called a tutor under arrangements known as pupillage. Depending on the reader's progress, the conditions on the practicing certificate are lifted during the 12 month reading period following which they can then practice as a barrister in that state.

Accessing Criminal Legal Aid Work

Each of the eight Australian states and territories has an independent Legal Aid Commission responsible for delivering legal aid services.

In all states, clients who satisfy means and merits requirements are able to choose a lawyer from private practice or an in-house lawyer employed by the Legal Aid Commission. In some states legal aid commissions create panels of lawyers from which clients can select a practitioner. Where a client doesn't have a preference a lawyer will be appointed by the Commission. In certain states they reserve the right to appoint their own lawyer regardless of the preference of the client, if by doing so it means the most efficient use of legal aid funds or because their lawyer specialises in that certain type of case.

All legal aid commissions provide a duty lawyer service at local courts to assist people who have a matter that day but do not have their own lawyer.

United States

The United States has a fused system and does not draw a distinction between lawyers as barristers and lawyers as solicitors. All lawyers who have passed a Bar examination and have been admitted to practice may prosecute or defend in the courts of the state where they are admitted. Historically, a distinction was made, and barristers were called counsellors in certain states. However, both professions have been fused for some time and are commonly known as the all-purpose attorney.

Training

In the US, most law schools require a bachelor's degree, a satisfactory undergraduate grade point average, and a satisfactory score on the Law School Admission Test (LSAT) as prerequisites for admission. The LSAT is a half day test which assesses reading comprehension, analytical reasoning and logical reasoning.

Most law schools generally require three years full-time study to earn the Juris Doctor (J.D.) degree and share a common approach to training lawyers. However, they differ in the emphasis they give to certain subjects and teaching methods, such as opportunities for independent study, legal internships and participation in clinical programmes.

Trial practice/advocacy is an upper level course offered in most American law schools designed to teach future litigators the fine points of presenting a case to a judge and jury. The course is focused on the practical application of public speaking, narrative, and using body language to communicate a particular set of events. Trial practice also contains elements of strategy for areas like cross examination, by teaching students how to decide the order in which witnesses should testify, when exhibits should be introduced, and how to trap opposing witnesses into giving testimony that damages their case.

Each state has its own Bar Association which oversees the licensing of lawyers in their state. State associations create and administer the exams for admission to the Bar, and lawyers can practice only in the state or states where they are members of the Bar. Many states will admit a lawyer to the Bar if the lawyer has been admitted to the Bar of another state and has practised law actively for a number of years (known as “admission by motion”).

To be admitted to the Bar and receive a license to practice law in a given jurisdiction, applicants must:

- have graduated with a J.D degree from an ABA-accredited law school -
All states accept graduation from an ABA-accredited law school as meeting the state’s educational requirement for eligibility to sit for the bar examination;
- in the majority of states, individuals must also pass the Multi State Professional Responsibility Exam (MPRE) of the National Conference of Bar Examiners (NCBEX). This exam can be taken while the applicant is still in law school (i.e. before graduation);
- have taken and passed the Bar examination. Since July 2013, 16 jurisdictions have used the United Bar Examination (UBE). The UBE comprises of three elements:
 - (1.) Multi-State Bar Examination (MBE), a multiple choice exam covering fundamental and federal legal content
 - (2.) Multi-State Performance Test (MPT), a written exam simulating a real-life legal scenario.
 - (3.) Multi-State Essay Examination (MEE), an essay exam with content similar to the MBE

For those jurisdictions not using the UBE, the composition of Bar examinations may vary but will consist of some or all of the tests outlined above. In some jurisdictions applicants are also required to complete essay and multiple choice questions on jurisdictional law issues.

- be certified as having good moral character before being admitted to the Bar and receiving a license to practice law.

Once admitted to the Bar and having received license to practice, lawyers can engage in any kind of practice. Although there is no formal distinction among types of legal practice, there is considerable informal specialisation and many tend to work within specialised fields of law.

All lawyers are qualified to go to court in the jurisdiction where they have passed the Bar examination.

Federal lawyers

A lawyer must apply separately to become a federal attorney and to be licensed to appear before the Federal Court. When a person submits an application to the Federal Court system to become a federal attorney, he or she must demonstrate an understanding of federal law and the federal rules of civil procedure. The application must be approved before the attorney becomes qualified to serve as a lawyer within the Federal Court system, after taking an oath of admission.

Accessing Criminal Legal Aid Work

In the United States each jurisdiction uses different approaches in providing legal advice for criminal defendants who can't afford private fees for lawyers. Under the federal system the most common approach is through a publicly funded public defender office. Typically, these offices function as an agency of the federal, state or local government and as such, the attorneys are salaried government employees. The public defender office model provides a substantial majority of the criminal defence representation in the United States to those clients of limited financial means.

In addition to government-based offices, there is also a smaller but significant number of not-for-profit agencies, often referred to as a "Defender Service", or Legal Aid Societies that provide indigent criminal defence services. These organisations tend to rely heavily on public funding and charitable contributions to continue to provide services to clients.

Hong Kong

In Hong Kong there continues to be a split between barrister and solicitors.

Training

Legal education in Hong Kong first requires the completion of a Bachelor of Laws (LLB) degree. Following this, prospective solicitors and barristers have to go through the Postgraduate Certificate in Laws (PCLL). The PCLL programme teaches core legal skills required of both solicitors and barristers. These skills include legal research and writing, document drafting and analysis, problem-solving and advocacy.

In order to qualify as a solicitor at this stage the student needs to undertake a 2 year training contract with a law firm. To qualify as a barrister a period of pupillage must be undertaken.

The period of approved pupillage in Hong Kong is not less than 12 months, of which at least 3 months are expected to be spent on civil and 3 months on criminal practice. The structure of the entire period of the pupillage basically depends on the types of work and the availability of the intended pupil masters. During the pupillage applicants may proceed to apply to the court for admission.

Accessing Criminal Legal Aid Work

The Legal Aid Department provides legal representation to eligible applicants by a solicitor and, if necessary, a barrister in criminal proceedings. Legal aid is available to cases in the District Court, the Court of First Instance, the Court of Appeal and the Court of Final Appeal. It is also available for committal proceedings in the Magistrates' Courts.

Legal aid will be granted if the applicant is able to satisfy the statutory criteria as to financial eligibility and the merits for taking or defending the legal proceedings.

Where legal aid is granted, the Director of Legal Aid may act for the aided person through lawyers employed in the Legal Aid Department (LAD). Where an employed lawyer isn't allocated the client may select a solicitor or counsel to act for them and LAD maintains separate panels of counsel and solicitors who are willing to undertake legal aid work. Counsel or solicitors holding current practising certificates may apply to join the Legal Aid Panel. There are more than 700 counsel and 2,000 solicitors on the panel.

For criminal cases, all District Court trial cases are assigned out to private practitioners on the panel. For Court of First Instance or appeal cases LAD will consider their capacity to undertake the work; whether the client has already been represented by a private practitioner; and whether the case involves multi-defendants where a conflict of interest arises is likely to arise that necessitates separate representation when determining whether to undertake the case in-house or assign it externally.

© Crown copyright 2014
Produced by the Ministry of Justice

You may re-use this information (excluding logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or email: psi@nationalarchives.gsi.gov.uk

Where we have identified any third party copyright material you will need to obtain permission from the copyright holders concerned.

Alternative format versions of this report are available on request from criminaladvocacyreview@justice.gsi.gov.uk