

<b>Title: Preserving and Enhancing the Quality of Criminal Advocacy</b>  <b>IA No:</b> MoJ015/2015  <b>Lead department or agency:</b> Ministry of Justice  <b>Other departments or agencies:</b>	<b>Impact Assessment (IA)</b>		
	<b>Date:</b> 30/9/2015		
	<b>Stage:</b> Consultation		
	<b>Source of intervention:</b> Domestic		
	<b>Type of measure:</b> Consultation		
<b>Contact for enquiries:</b> Thomas Roberts Advocacy_Consultat@justice.gsi.gov.uk			

<b>Summary: Intervention and Options</b>	<b>RPC Opinion:</b> N/A
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Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out?	Measure qualifies as
N/A	N/A	N/A	No	N/A

**What is the problem under consideration? Why is government intervention necessary?**  
In his Review of 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. As the procurer of publicly funded criminal defence advocacy, the government has a legitimate interest in its quality. The government has therefore developed various proposals to address these concerns.

**What are the policy objectives and the intended effects?**  
The objectives and intended effects of the proposals are:

- To preserve and enhance the quality of publicly funded criminal defence advocacy, both to ensure that individuals are being represented by high quality advocates and to ensure value for money for the tax payer.
- To reduce the risk of financial incentives determining the choice of advocate by taking measures to stop the payment of referral fees in return for instruction.
- To better protect defendants' ability to make an informed choice of advocate and safeguard against conflicts of interest.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**  
The following options have been considered in addition to the base case:  
Option 0 – Do nothing  
Option 1 – Introduce an advocacy panel for legal aid criminal advocacy in the higher courts.  
Option 2 – Introduce a statutory ban of Referral fees  
Option 3 – Enhance transparency of client choice by expanding on the obligation already in the Legal Aid Agency's contracts to make sure clients are given impartial advice on their choice of advocate. This could be achieved through a standalone declaration or through a change to the Plea and Trial Preparation Hearing (PTPH) form.  
These are independent options which could be taken forward either separately or in tandem.

<b>Will the policy be reviewed? N/A If applicable, set review date: N/A</b>					
Does implementation go beyond minimum EU requirements?			No		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	<b>Micro</b> N/A	<b>&lt; 20</b> N/A	<b>Small</b> N/A	<b>Medium</b> N/A	<b>Large</b> N/A
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b> N/A		<b>Non-traded:</b> N/A

***I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.***

Signed by the responsible Minister:  Date: 30/09/2015

# Summary: Analysis and Evidence

# Policy Option 1

## Option 1- Introduce an advocacy panel for legal aid criminal advocacy in the higher courts

### FULL ECONOMIC ASSESSMENT

Price Base Year 2014	PV Base Year 2014	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: N/A	High: N/A	Best Estimate: N/A

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	N/A	N/A
High	N/A	N/A	N/A
Best Estimate	N/A	N/A	N/A

#### Description and scale of key monetised costs by 'main affected groups'

The costs associated with this measure are currently not quantifiable.

#### Other key non-monetised costs by 'main affected groups'

The Legal Aid Agency (LAA) would incur costs associated with establishing and operating the panels.

Advocates are likely to incur adjustment costs from additional accreditation requirements.

Litigators may face higher search costs as they may spend time locating advocates of appropriate quality for the case, although the existence of a panel will reduce these costs.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A	N/A	N/A
High	N/A	N/A	N/A
Best Estimate	N/A	N/A	N/A

#### Description and scale of key monetised benefits by 'main affected groups'

The benefits associated with this measure are currently not quantifiable.

#### Other key non-monetised benefits by 'main affected groups'

Defendants would benefit from having an advocate of appropriate quality for their case.

Advocates may benefit as the scheme would further enable competition within the market to be conducted on the basis of quality.

Litigators could experience efficiency benefits in areas such as correspondence between the litigator firm and the instructed advocate.

The LAA may benefit due to greater levels of assurance that the quality of advocacy work paid for meets specified standards.

HM Courts and Tribunals Service may benefit from quicker case progression.

#### Key assumptions/sensitivities/risks

Discount rate (%)

3.5%

That all advocates, regardless of their professional background, are eligible to apply for each level of accreditation within the scheme.

This panel will sit alongside Quality Assurance Scheme for Advocates and the Crown Prosecution Service (CPS) scheme, but will not depend on either for its own operation.

### BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m: (2009 prices)			In scope of OITO?	Measure qualifies as
Costs: N/A	Benefits: N/A	Net: N/A	No	N/A

# Summary: Analysis and Evidence

# Policy Option 2

## Option 2- Statutory Ban of Referral fees

### FULL ECONOMIC ASSESSMENT

Price Base Year 2014	PV Base Year 2014	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: N/A	High: N/A	Best Estimate: N/A

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
	Low	N/A		
High	N/A		N/A	N/A
Best Estimate	N/A		N/A	N/A

#### Description and scale of key monetised costs by 'main affected groups'

The costs associated with this measure are currently not quantifiable.

#### Other key non-monetised costs by 'main affected groups'

The Legal Aid Agency (LAA) would incur adjustment costs through implementing the statutory ban. Litigators that currently charge a referral fee would lose income.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
	Low	N/A		
High	N/A		N/A	N/A
Best Estimate	N/A		N/A	N/A

#### Description and scale of key monetised benefits by 'main affected groups'

The benefits associated with this measure are currently not quantifiable.

#### Other key non-monetised benefits by 'main affected groups'

Advocates would benefit from no longer paying referral fees. The LAA could benefit from increased efficiency in the market that it funds.

#### Key assumptions/sensitivities/risks

The ban will only affect publicly funded (legal aid) criminal work.

Discount rate (%)

3.5%

### BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m: (2009 prices)			In scope of OITO?	Measure qualifies as
Costs: N/A	Benefits: N/A	Net: N/A		

# Summary: Analysis and Evidence

# Policy Option 3

## Option 3- Enhancing Transparency of Client Choice

### FULL ECONOMIC ASSESSMENT

Price Base Year 2014	PV Base Year 2014	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: N/A	High: N/A	Best Estimate: N/A

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A		N/A	N/A
High	N/A		N/A	N/A
Best Estimate	N/A		N/A	N/A

#### Description and scale of key monetised costs by 'main affected groups'

The costs associated with this measure are currently not quantifiable.

#### Other key non-monetised costs by 'main affected groups'

The Legal Aid Agency (LAA) would incur adjustment costs of changing contracts with litigators.

Litigators may face a cost of extra work to ensure they meet the requirements set out in the revised LAA contract.

Some advocates may lose work due to increased transparency, although this would be offset by the time that this frees up and the advocates that gain that work.

Defendants could face an opportunity cost of spending more time going through the choices of advocate.

HM Courts and Tribunals Service may incur minimal adjustment costs if PTPH forms were altered.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A		N/A	N/A
High	N/A		N/A	N/A
Best Estimate	N/A		N/A	N/A

#### Description and scale of key monetised benefits by 'main affected groups'

The benefits associated with this measure are currently not quantifiable.

#### Other key non-monetised benefits by 'main affected groups'

Defendants may experience a benefit by being better able to make a more informed choice.

Litigators may receive an improved reputation as it would be easier to demonstrate that they are acting on the defendant's best interests.

Some advocates may benefit from receiving new work under increased transparency, although this would be offset by an increase in resource to conduct this work and advocates that lose this work.

#### Key assumptions/sensitivities/risks

Discount rate (%)

3.5%

There may be increased costs to some litigators who do not currently give impartial advice.

### BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m: (2009 prices)			In scope of OITO?	Measure qualifies as
Costs: N/A	Benefits: N/A	Net: N/A	No	N/A

# Evidence Base (for summary sheets)

## 1. Introduction

- 1.1 The Ministry of Justice has a responsibility to ensure the delivery of an efficient, fair, timely 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, is also the largest single procurer of defence advocacy services, and has a responsibility to ensure that advocacy services being paid for with public money are of a high quality.
- 1.2 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, the QASA 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.
- 1.3 In parallel, Sir Bill Jeffrey's Review of Criminal Advocacy<sup>1</sup> report has highlighted ongoing concerns about the quality of defence advocacy and the operation of the legal services market. There is also concern from the Bar about the prevalence of advocates being selected for instruction for economic reasons, rather than in the best interests of the client.
- 1.4 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. The government is, therefore, proposing a number of measures designed to achieve the following objectives:
  - To improve the quality of publicly funded criminal defence advocacy, both to ensure that individuals are being represented by high quality advocates and to ensure value for money for the tax payer.
  - To reduce the risk of financial incentives determining the choice of advocate by taking steps to stop the payment of referral fees in return for instruction, that is fees paid, by an advocate, in exchange for instruction<sup>2</sup>.
  - To ensure that true client choice is preserved, and any choice of advocate based on economic grounds is discouraged.

## Proposed reforms

- 1.5 We are consulting on a number of proposals to address some of the issues raised by Sir Bill Jeffrey. These are:
  - A panel for publicly funded criminal advocacy. Only advocates who are recognised by the panel would be eligible to undertake publicly funded defence work in the higher criminal courts. This would provide certainty that all those undertaking defence advocacy meet certain quality standards, and, depending on whether numerical limits are applied, also has the potential to tackle the problem of oversupply in the criminal advocacy market. The Crown Prosecution Service (CPS) run a similar scheme for those wishing to undertake criminal prosecution work and provides a useful starting point for the design of a defence advocacy scheme. A new defence panel scheme would need to be designed in such a way that it sits alongside the existing CPS scheme, as well as the QASA.
  - A statutory ban on referral fees. Referral fees are already prohibited or restricted by the regulators and the Legal Aid Agency's (LAA) existing contracts, but we are told by the Bar Council, other advocates, and the Law Society that the practice prevails, resulting in financial incentives influencing the choice of advocate. The government has a legitimate interest in ensuring that public money is being used for its proper purpose, and in taking steps to ensure that choice of advocate is motivated by factors such as quality and relevant experience rather than improper financial incentives.

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<sup>1</sup> Independent criminal advocacy in England and Wales (2014)

<sup>2</sup> Section 56 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 sets out the existing definition of a referral fee in full.

- Transparency of Client Choice. The proposal is to alter the Legal Aid Agency's standard contracts to better reflect the obligation of litigators to provide impartial advice to clients on their choice of advocate. The consultation paper, to which this Impact Assessment is appended, also seeks views on whether the government should go further and either require that litigators complete a signed declaration setting out a summary of their advice on the choice of advocates available and the reasons for the selected advocate, or to alter 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. A more radical approach would involve altering the rules concerning the instruction of in-house advocates to further reduce the influence of financial incentives on choice of advocate.

## Economic rationale

- 1.6 Conventional economic approaches to government intervention are based on efficiency or equity arguments. The government may consider intervening if there are strong enough failures in the way markets operate, e.g. monopolies, or if there are strong enough failures in existing government interventions, e.g. outdated regulations generating inefficiencies. In all cases the proposed intervention should avoid generating a further set of disproportionate costs and distortions. The government may also intervene for reasons of equity or fairness and for redistributive reasons (e.g. reallocating resources from one group in society to another).
- 1.7 These reforms should lead to an improvement in quality for the same expenditure and hence improved effectiveness. In particular, there is a disparity in the levels of information that clients, litigators and potential advocates have regarding the quality of advocacy in the criminal legal aid market. Individuals requiring representation, and to some extent litigators, have only a limited ability to assess the quality of an advocate unless they have used them previously. The government is particularly concerned about this issue where public money is funding the defence advocacy services being provided. A panel scheme would establish an agreed method of assessing and demonstrating quality. This may drive up quality across publicly funded defence advocates operating in the higher criminal courts. Expanding on the obligation already in the LAA's contracts to make sure defendants are given unbiased advice, and potentially requiring this to be evidenced through either a specific declaration document or the Plea and Trial Preparation Hearing (PTPH) form may help to correct this disparity in levels of information.
- 1.8 Perverse incentives may also exist if advocates pay referral fees to litigators in order to secure instruction. Improving clarity on the scope of the prohibition of referral fees through a new statutory ban attempts to address this issue of perverse incentives. It is possible that where referral fees are being paid, a new statutory ban may divert work towards more appropriate advocates and could improve overall quality. Therefore by banning referral fees this policy has the potential to improve outcomes for clients.

## Main affected groups

- 1.9 The following individuals/sectors likely to be affected by the proposals are:
  - Defendants (advocates' clients)
  - Advocates
  - Litigators
  - The LAA
  - HM Courts and Tribunals Service (HMCTS)
  - Regulators

## 2. Costs and benefits

- 2.1 This Impact Assessment identifies impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the do nothing option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However at this stage there are a number of costs and benefits that cannot be estimated, which we have outlined in a qualitative sense. These might include how the proposal impacts differently on particular groups of society or changes in equity (fairness), either positive or negative. A further Impact Assessment

with a more detailed assessment of costs and benefits will be published in due course if the decision is taken to proceed with some or all of the proposals outlined in the consultation paper.

**Key data**

- 2.2 As of 2014, there were 15,716 barristers practising in England and Wales, an increase of 5% from 2010<sup>3</sup>. The Bar Standards Board (BSB) estimates that around 5,000 specialise in criminal law. However, it is difficult to establish reliable figures on the number of barristers by area of practice as it is not compulsory for barristers to disclose their area(s) of practice.
- 2.3 All barristers with Practising Certificates may work as self-employed, employed or as dual practitioners (barristers who undertake both self employed and employed work). Sole practitioners are a subset of self-employed barristers. Table 1 shows that the majority of barristers are self employed and relatively few are sole practitioners, although the number has been increasing in recent years.

Table 1: Volume of barristers with different working arrangements<sup>4</sup>

	2010	2011	2012	2013	2014
Total barristers in practice	14,907	15,463	15,472	15,541	15,716
All Self-employed barristers	12,133	12,534	12,581	12,666	12,709
Employed barristers	2,755	2,851	2,761	2,689	2,794
Sole practitioners	363	375	406	458	498
Dual capacity	19	78	130	186	211

- 2.4 In 2014 there were 3,361 solicitor advocates with Higher Rights of Audience who were qualified to represent clients in the higher criminal courts, and a further 1,550 were qualified in both civil and criminal advocacy<sup>5</sup>. This provides a total of 4,911 solicitors with Higher Rights of Audience able to practise in the higher criminal courts, a figure that has increased by 12% since 2010. Overall, therefore, there were approximately 10,000 criminal law advocates able to practise in the higher courts in 2014.
- 2.5 Since 1994, when solicitors first acquired Higher Rights of Audience qualifications, the number of practicing solicitor advocates has increased year on year to a total in August 2015 of 6,651, with 4,882 qualified to operate in the higher criminal courts<sup>6</sup>.
- 2.6 The proportion of solicitor advocate led juniors in Crown Court cases has risen in recent years. Between April 2012 and March 2013, in the 1,220 Crown Court cases paid under the Advocates Graduated Fee Scheme (AGFS) with led juniors, 26% were solicitor advocates<sup>7</sup>. This compares to approximately 8% in 2007/08. Over time there has been a shift in the balance of work conducted by solicitor advocates and barristers in the Crown Court, with solicitor advocates taking on proportionately more of the work.
- 2.7 In summary, there is now a variety of different advocates with different experience and training operating in the defence advocacy market. This is a welcome development, but makes it all the more important to ensure that all advocates undertaking criminal defence advocacy work are providing a high quality service, and are being measured against the same quality standards, irrespective of their professional background.

<sup>3</sup> Bar Standards Board statistics available at: <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/>

<sup>4</sup> Bar Standards Board statistics available at: <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/> The total barristers in practice exclude sole practitioners. Figures are taken from a live database and may be updated.

<sup>5</sup> Solicitors Regulation Authority - Regulated population statistics [http://www.sra.org.uk/sra/how-we-work/reports/data/higher\\_rights\\_of\\_audience.page](http://www.sra.org.uk/sra/how-we-work/reports/data/higher_rights_of_audience.page) (August 2014)

<sup>6</sup> Solicitors Regulation Authority - Regulated population statistics

<sup>7</sup>The data refers to the AGFS cases only, so excludes representation in Very High Cost Cases.

Source: 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](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310717/jeffrey-review-criminal-advocacy-analytical-annex.pdf)



## Option 0: Base case (do nothing)

### Description

2.8 Under the “do nothing” base case, the current system would continue to apply. Because the do nothing option is compared against itself its costs and benefits and necessarily zero, as is its Net Present Value (NPV).<sup>8</sup>

## Option 1: Introduce an advocacy panel for legal aid criminal advocacy in the higher courts

### Description

2.9 The government is proposing to introduce a panel scheme, under which only those advocates whose quality has been endorsed through acceptance onto the panel will be eligible to undertake publicly funded criminal defence advocacy in the high courts.

2.10 The following assumptions have been used to analyse the costs and benefits of this option:

- That all advocates, regardless of their professional background, will be eligible to apply to each level of accreditation within the scheme.
- This panel will sit alongside QASA and the CPS scheme, but will not depend on either for its own operation.

## Option 1: Costs

### Cost to LAA

2.11 This option would generate costs associated with **establishing and operating the panels**. The panel scheme would be administered by the LAA, and staff resource would be required to service this. If a decision is made that members of the adjudicating panel should receive a fee for assessing applications, the LAA may incur some costs in paying those fees.

2.12 The extent and nature of the costs of establishing and operating the advocate panels will depend upon the details of the scheme, which are yet to be determined. Functions might theoretically include the following: finalising the design and mechanics of the scheme, setting the quality standards to be applied, running the accreditation process, and monitoring and auditing performance.

2.13 Other factors, yet to be determined, that would affect the cost of this option are; the geographical and administrative structure of the panel system, e.g. whether the panels operate regionally or centrally, and the frequency of rounds of accreditation for new advocates or those wishing to move up to a higher level.

2.14 Some or all of the costs of establishing and operating the panel scheme could be met directly through an administration fee paid by advocates applying for accreditation. However no final decision has yet been taken on this aspect of the scheme.

### Cost to Advocates

2.15 Advocates may directly incur increased costs as a result of any **new accreditation requirements**, due to any fees which might be charged to applicants to the panel, and also as a result of any additional work required to comply with the application process, e.g. obtaining reviews of their work from colleagues and/or members of the judiciary, and any peer review requirements. This would also include any re-accreditation costs, for example where individuals wish to progress up to a higher level of the scheme. No decisions have yet been taken on the detail of any accreditation process, including whether a fee should be charged: this work will be taken forward in light of responses to the consultation if the government decides to proceed with the panel proposal.

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<sup>8</sup> The Net Present Value (NPV) shows the total net value of a project over a specific time period. The value of the costs and benefits in an NPV are adjusted to account for inflation and the fact that we generally value benefits that are provided now more than we value the same benefits provided in the future.



- 2.16 Where **some advocates may lose work** from not being accredited to a high enough level, other advocates of that higher level will gain this work. This is because the proposal should only affect the overall quality in the market, and not the total amount of work. If quotas were introduced for any or all of the levels within the scheme, there could be an increase in this distributional effect.
- 2.17 Existing advocates are likely to incur **adjustment costs** from new accreditation requirements, which might lead some to stop working in publicly funded criminal defence work. Where some advocates choose to no longer work in this area in the future, it is assumed that they engage in other profitable activities.

### ***Cost to Litigators***

- 2.18 The introduction of a requirement to instruct only those advocates on the panel for publicly funded criminal advocacy work may also result in costs to litigators if they are unable to instruct advocates that they have previous working relationships with. This may cause inefficiencies in correspondence between the solicitor firm and the instructed advocate, or loss of efficiencies of using an in-house advocate.
- 2.19 In the situation where a litigator is unable to instruct an advocate for the above reasons, a **search cost** will be incurred as the litigator would have to spend time looking for another advocate. Such costs will be reduced by making available a list of advocates accredited at each level.

### ***Cost to Defendants***

- 2.20 Requiring advocates to have accreditation, particularly if there were multiple levels, may incur a cost on **defendants through restricting their choice**. For example, if a defendant's preferred advocate is not instructed due to not being accredited to the appropriate level. However any such restrictions should only exclude advocates who are not providing a sufficiently high quality service and who do not have the appropriate level or type of experience, so overall this proposal should benefit those individuals needing representation in the higher courts.
- 2.21 If quotas for any level were introduced, this would further restrict the defendant's available choice of advocate, but again the objective would be to enhance the quality of the pool of available advocates. Any numerical limits on some or all levels of the scheme would need to be set in such a way as to ensure sufficient supply of advocates eligible to perform publicly funded defence work.

### ***Cost to HM Courts and Tribunals Service (HMCTS)***

- 2.22 It is not expected that this option would result in any additional costs for HMCTS.

## **Option 1: Benefits**

### ***Benefits to LAA***

- 2.23 A panel would benefit the LAA and the government through providing greater levels of assurance that the **quality of advocacy** work paid for using public funds meets specified standards.

### ***Benefits to Advocates***

- 2.24 The key benefit to advocates will be that the scheme would further enable **competition within the market to be conducted on the basis of quality**, rather than be unduly influenced by financial considerations since only advocates of the appropriate quality level will be instructed in individual cases.
- 2.25 As mentioned above, this proposal should not affect the overall level of work in the market, and so where some advocates lose out on work from not being accredited to a high enough level, **other advocates with the appropriate accreditation may gain this work**.

### ***Benefit to Litigators***

- 2.26 Making sure that an advocate instructed in any publicly funded criminal defence case is providing a quality service may bring **efficiency benefits** to the litigator in areas such as correspondence between the litigator firm and the instructed advocate.

2.27 It would also result in reduced search costs for litigators as they will be able to search for advocates using the panel.

### ***Benefit to Defendants***

2.28 Defendants would benefit from having a **high quality of advocate** for their case, both in terms of the quality of their representation during court proceedings and an improved level of service in preparing for hearings (for example, through improved communication).

### ***Benefit to HM Courts and Tribunals Service (HMCTS)***

2.29 Having an appropriate quality of advocate for each case may help to **speed the progress of cases through the courts**. This may come from the advocate identifying and highlighting the key points of the case earlier. If this benefit was to arise the time saved would likely be filled by new cases being brought into the courts at an earlier date.

## **Option 1: Risks**

2.30 There may be a distributional impact on advocates if less experienced advocates are restricted in their access to work. This could result in a transfer to more experienced advocates. In advance of implementing a panel, the government would consider any impact on competition.

2.31 If there is a quota, there is a risk that there are not enough advocates to cover all the defendants in each level within a given region or at a given level. However, any decision on numerical limits for some or all levels of the panel would need to consider and be able to respond to demand levels.

2.32 Similarly, it is possible that applying a new quality standard to those wishing to undertake publicly funded defence work, a smaller pool of advocates would be available to conduct the most complex cases. The government would need to take steps to ensure any panel scheme is able to respond to demand levels to ensure effective representation.

## **Option 2: Prevention of referral fees**

### ***Description***

2.33 Referral fees can be described as fees paid, by an advocate to a litigator, in exchange for instruction<sup>9</sup>. In their purest form they are prohibited by the Bar Standards Board (BSB), restricted by the Solicitors Regulation Authority (SRA) and banned under the LAA Standard Contract. 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.

2.34 Given the apparent ineffectiveness of existing restrictions in stopping payment of referral fees, one option open to the government is to impose a statutory ban in publicly funded criminal defence cases.

## **Option 2: Costs**

### ***Cost to LAA***

2.35 The LAA would incur **adjustment costs** of implementing the statutory ban through any additional administrative costs associated with altering their contracts and guidance.

### ***Cost to Advocates***

2.36 Reducing the potential influence of referral fees on the choice of advocate may lead to some individual advocates, who had previously secured work through the payment of referral fees, acquiring less work. As this option is not expected to alter the overall amount of work available in the market, the impact would be offset by a gain in work by advocates now instructed to the case.

2.37 Regulators may increase practising licensing fees for advocates, in order to meet an increase in regulatory cost which might result from a new statutory ban.

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<sup>9</sup> Section 56 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 sets out the existing definition of a referral fee in full.

### ***Cost to Litigators***

2.38 Those litigators that currently charge a referral fee would **lose income** as a result of this ban.

2.39 Regulators may increase practising licensing fees for litigators, in order to meet an increase in regulatory cost which might result from a new statutory ban.

### ***Cost to Defendants***

2.40 It is not envisaged that this policy would result in costs for defendants. They would continue to be able to instruct their preferred advocate.

### ***Cost to HM Courts and Tribunals Service (HMCTS)***

2.41 It is not envisaged that this ban would result in any additional costs to HMCTS.

### ***Cost to Regulators***

2.42 Legal services regulators – including the Solicitor’s Regulatory Authority, the Bar Standards Board and CILEx Regulation – already have responsibility for taking **enforcement action** where evidence is provided that prohibited referral fees are being paid. Introducing a new statutory ban, and corresponding monitoring and enforcement arrangements, may lead to an increase in these costs. Other regulators of legal services businesses might also be affected. Regulatory costs are covered by fee income from those subject to regulation; hence regulators themselves would incur no change in net costs.

## **Option 2: Benefits**

### ***Benefit to LAA***

2.43 The LAA may benefit from this option as it would help to ensure that money allocated for criminal law advocacy services is being kept by the relevant advocates and used for the appropriate purposes. This means that public money would be used more **efficiently** compared to a scenario where referral fees are paid to litigators in order to secure instruction.

### ***Benefit to Advocates***

2.44 Any advocates that currently pay referral fees would benefit from **no longer paying referral fees**.

2.45 As described above, restricting the choice of advocates using a quality threshold may lead to some advocates losing work. As this option is not expected to alter the overall amount of work available in the market, this would be offset by the benefit to advocates now chosen for the work based on the quality of the service provided rather than solely on economic grounds.

### ***Benefit to Defendants***

2.46 Defendants would be able to have greater confidence that, where they have been advised by their litigator on their choice of advocate, this advice would be based on the relative quality of different available advocates rather than because a particular advocate has paid a referral fee.

### ***Benefit to HM Courts and Tribunals Service (HMCTS)***

2.47 It is not envisaged that this ban would lead to benefits for HMCTS.

### ***Benefit to Regulators***

2.48 It is not envisaged that this ban would lead to any benefits for regulators.

## Option 3: Enhancement of the transparency of client choice

### *Description*

2.49 The government is proposing the introduction of stronger measures to protect client choice by altering the LAA's standard contracts to better reflect the obligation of litigators to provide impartial advice to clients on their choice of advocate

## Option 3: Costs

### *Cost to LAA*

2.50 As this option would require a change in the LAA's contracts, the LAA would incur an **adjustment cost** to implement this option. If the LAA are required to review any declarations provided by litigators this would also lead to further administrative costs.

### *Cost to Advocates*

2.51 Individual advocates may incur a cost of **lost work** as a result of this option, if defendants who are provided with a greater level of information about the choices open to them opt for a different advocate than they might otherwise have done. As this option is not expected to alter the overall amount of work available in the market, this would be offset by the benefit to advocates now chosen for the work due to the defendants being presented all the available choices. However, the underlying aim of both the panel and client choice proposals is to encourage competition on the basis of quality, so it can be argued that advocates will only be likely to lose work if they are not able to demonstrate the high quality of their work or that they have the right level and type of experience.

### *Cost to Litigators*

2.52 Litigators may face additional costs as a result of the **extra work** required to ensure they can meet the requirements stipulated in the revised LAA contract. This cost could manifest itself through the need to spend more time with the defendant to fully explain all the choices and administrative costs associated with completing a declaration document. There would also be associated **adjustment costs** in terms of revisions to their contracts.

2.53 If the rules concerning the instruction of in-house advocates were altered, there may be a fall in the number of in-house advocates instructed within organisations and litigator firms may experience **reduced incomes**, offset elsewhere by freed up time to take on other work. This may be offset by organisations instructing other in-house advocates.

### *Cost to Defendants*

2.54 The defendants may face an **opportunity cost** of having to spend more time going through the choices than they would under the current contracts.

2.55 There may be a restriction on choice for the defendant if in-house advocates are restricted.

### *Cost to HM Courts and Tribunals Service (HMCTS)*

2.56 If the PTPH forms were required to change, there may be adjustment costs for HMCTS.

## Option 3: Benefits

### *Benefit to Advocates*

2.57 As described above, the advocates' cost of lost work through this option would be offset by the benefit experienced by other advocates as they **gain that work**. This is because the option is not expected to alter the overall amount of work available in the market.

2.58 Advocates based outside litigator firms may benefit if the rules concerning the instruction of in-house advocates were altered. If this change resulted in an increase in the number of instructions advocates outside of litigator firms received, they may see **increased incomes**.

### ***Benefit to Litigators***

2.59 Litigators may receive an **improved reputation** through this option, as it would be easier to prove that they are acting on the defendant's best interests.

### ***Benefit to Defendants***

2.60 Defendants may experience a benefit from this option as they receive a full explanation of the choice of advocates available. This would enable defendants to make a **more informed choice** than when they are unaware of all the available choices.

### ***Benefit to HM Courts and Tribunals Service (HMCTS)***

2.61 It is not envisaged that this option would lead to benefits for HMCTS.

## **Option 3: Risks**

2.62 There is a risk that there are increased costs in the form of further work to some litigators who do not currently fully advise their clients on the choice of advocates as a result of implementing this proposal. There may for example be costs associated with the additional time taken to complete a declaration of advice given.

## **3. Enforcement and Implementation**

### ***Enforcement***

- 3.1 The detail of how the proposed advocacy panel scheme requirements would be enforced will need to be worked in greater detail taking into account views from the consultation. The LAA's contracts with litigators would be amended to include an explicit requirement that only advocates who are recognised at the appropriate level of the scheme be instructed. The scheme will then need to ensure that the LAA has in place sufficient safeguards to ensure that no defence advocacy work in the higher criminal courts is conducted by advocates who are not on the panel.
- 3.2 It is proposed that a statutory ban on referral fees would be monitored and enforced by legal services regulators. Appropriate arrangements for this would need to be put in place.
- 3.3 Detailed plans for the enforcement of any measures to safeguard transparency of client choice of advocate will need to be developed once decisions are taken on which measures would be most effective.

### ***Implementation***

- 3.4 The proposed reforms would be implemented in the following ways:
- 3.5 Advocacy panel: If the decision is taken to proceed with this proposal, a period of detailed design work would need to be undertaken to finalise the structure and mechanics of the scheme, set the quality standards to be applied and develop robust implementation plans. Secondary legislation would be required to amend the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 (S.I. 2013/614) to limit individuals' choice of advocate for a particular case in the higher criminal courts to those who are accredited at the relevant level within the panel scheme.
- 3.6 Statutory ban on referral fees: A statutory ban would be implemented through an affirmative statutory instrument under s56 of the LASPO 2012. Subsequently the legal aid contracts and guidance, and regulatory restrictions would require amendment to reflect the position in the law.
- 3.7 Measures to increase transparency of client choice: Any changes needed to LAA contracts would be made through contract amendment. If the decision is taken to introduce a stand-alone declaration further work will be required to develop a system that is more than a simple tick box exercise but also does not impose an unreasonable burden on litigators. If the decision is taken to amend the PTPH form we will seek the Lord Chief Justice's approval, who may wish to bring the proposal before the Criminal Procedure Rules Committee (CPRC). Were restrictions on the use of in-house advocacy to be introduced, secondary legislation would be required to amend the

Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 (S.I. 2013/614) to reflect this.

- 3.8 Implementation plans will be developed in more detail once final decisions have been taken, following consultation, on the proposals put forward in this consultation paper.