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Response to the SRA Consultation on Assuring Advocacy Standards

October 2019

Response of the Criminal Law Committee of the Birmingham Law Society to the SRA Consultation on Assuring Advocacy Standards

This response has been prepared by the Criminal Law Committee of the Birmingham Law Society. The Society is the largest provincial law society with some 5,000 members. The response represents the collective view of its members who are specialist lawyers practising in all aspects of the criminal law and from all branches of the legal profession.

Overview

The Committee responds only to those parts of the consultation concerning advocacy in the criminal courts.

We recognise that it is of vital importance to defendants and witnesses in criminal cases, who are often highly vulnerable, that advocates appearing in the criminal courts are competent to do so. The criminal courts continue to benefit from the appearance of solicitors and solicitor advocates who have many years' experience in court.

We recognise many of the SRA's proposed reforms as welcome improvements to the current system. However, where new regulatory barriers are proposed in the consultation, the Committee has the following concerns:

These are difficult times for criminal solicitors. Cuts in legal aid fees, coupled with decreasing volumes of work, and a lack of new entrants to criminal practice, have led to an ageing and financially vulnerable profession in the field of criminal law. In a marketplace this fragile, any significant change could have fatal and irreversible consequences. It follows that new regulatory barriers to practice within the sector (and the consequent financial implications to practitioners) should not be introduced lightly: there should be a clear evidence base for doing so. We do not believe that there is such evidence.

In the absence of evidence of a clear and compelling need for improvement in advocacy standards, the obligation on solicitors to act only when they are competent to do so, coupled with robust reporting mechanisms, should be sufficient to assure quality of advocacy by solicitors in the criminal courts.

It appears to be recognised that although generalised concerns have been expressed to the SRA about advocacy quality, there is a lack of specificity or methodological rigour as to how these have been collected. Some of the phrasing used in the consultation document casts some doubt on whether there is, currently, an evidential basis for any significant reform:

> *We have carried out research, commissioned jointly with the BSB, to understand in more detail the size and nature of these concerns and where advocates are failing to meet our standards. But it has proven difficult to establish robust evidence that accurately identifies how widespread the problem is.* (para.6)

> [From the SRA's own research amongst the judiciary] *Most of the judges thought that most current advocacy is of an adequate standard but viewed good/very good advocacy as relatively infrequent.* (para.7)
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> *But all this evidence is anecdotal. There is little evidence about whether poor advocacy is a widespread problem. We have looked at our internal data, but this does little to identify whether there is a widespread problem. For example, we receive relatively few reports of poor advocacy from judges and the courts. Only 89 complaints were received between 1 January 2015 and 28 February 2018. Of these, only three percent related specifically to the solicitor's competence.* (para. 9)

We take into account the different routes taken to the profession by Solicitors and the Bar. We note the longer and more rigorous training contracts to which Solicitors are subject. Solicitors are no longer able to obtain the Higher Court Advocacy qualification by way of exemption and all such entrants are therefore subject to examination. Whilst we note the concern of the SRA to establish a single or unified process of assessment it remains the case that those exercising their rights of audience are first required to pass the relevant assessment. We raise our concern that increased regulation in this area may give rise to a disincentive to Solicitors which will not apply to the Bar. This may exacerbate the present position where many young solicitors consider the obtaining of higher rights of audience to be a significant hurdle. The SRA should consider the proposals in the light of the potential to reduce the numbers of Solicitor applications for the Higher Court Advocacy qualification.

1. **Do you agree with our proposal not to change existing practice rights, and to rely on the obligation on solicitors not to undertake witness handling where they are not competent to do so?**

   Yes. For the reasons given in the Overview above, we see no reason to add to the already existing regulatory obligation on solicitors to only act when competent to do so.

2. **Do you have any comments on our revised HRA standards?**

   This Committee participated in the preparation of these revised HRA standards. Having done so, and having had its views taken into account at the drafting stage, the Committee endorses the proposed revised HRA standards.

3. **Do you agree that we should introduce a single assessment organisation for the HRA qualification?**

   Yes. Anecdotal evidence from members suggests that the current provision of assessment is inconsistent in quality and outcome as between the different providers. Provided that steps are taken to ensure that, under a single provider, sufficient assessments are available to those wishing to obtain HRA accreditation, the Committee agrees with this proposal.

4. **Do you agree with our proposal that the HRA assessment can only be attempted by admitted solicitors?**

The Committee recognises the rationale underpinning the proposal. It is unlikely that newly qualified solicitors with no advocacy experience would be competent to act in Crown Court trials, notwithstanding that they might (under the current scheme) have the requisite HRA qualification. However, there was anecdotal evidence in committee that the few solicitors qualifying with HRA under the current scheme either do not go on to practice in the higher courts at all, or do so only after gaining sufficient experience in summary cases. Although anecdotal, this suggests that the general obligation on solicitors only to practice when competent to do so was a sufficient safeguard, and that a change to the regulatory framework may not be required.

5. **Do you agree that we should impose a new youth courts requirement that solicitors practising in the youth courts must hold the criminal HRA qualification where they are acting as an advocate in any case which would go to the Crown Court if it involved an adult?**

The Committee strongly disagrees that this is the correct approach to resolving the perceived problem, while recognising the importance of maintaining the highest standards of advocacy in cases involving youths and the vulnerable.

Currently, many highly experienced and competent solicitors, who do not hold and would not want to obtain an HRA qualification, practice regularly in serious cases in the youth courts. In the Committee's experience, most youth court trials are currently undertaken by solicitors who do not have HRA. The proposed change would therefore deprive these competent and experienced solicitors of work which they are perfectly competent to undertake, or force them to the time and expense of obtaining an HRA qualification when they have no desire to practice in the higher courts. There would be a significant impact on the market. In our experience there is scant evidence that those solicitors who appear in the youth court do not have the requisite skills. Indeed, their experience in routinely dealing with vulnerable youths and their families, familiarity with the Magistrates' Courts generally, and the close bond that they able to form with vulnerable youths, put them in an ideal position to appear in that court.

Notwithstanding the accepted need for high advocacy standards in such cases, the fees paid by the LAA for youth court trials are not reflective of a requirement for a highly experienced or specialist advocate. Indeed, where counsel is instructed to act in serious sexual cases in the youth court, these are generally less experienced barristers, as youth court work is regarded by the Bar as being poorly paid and only suitable for the more junior members of chambers. The proposed change would lead to counsel being instructed in an increasing number of cases, which would lead to the perverse outcome that highly experienced and competent solicitors (albeit not HRA-qualified) would be replaced increasingly by the most junior and inexperienced barristers in youth court trials.

Robberies and some other indictable-only matters retained by the youth court are often factually and legally straightforward, and involve non-vulnerable, adult witnesses. In such

cases, which would be tried in the Crown Court in the case of an adult, we suggest that the HRA qualification would be unnecessary.

In youth court cases such as rape, which involve cross examination about sexual matters, and, often, vulnerable youth witnesses, the Committee recognises that there is a need for high-quality advocates who are appropriately trained to deal with vulnerable witnesses. However, given that the HRA qualification requires no specific criteria dealing with vulnerable witnesses, youths or sexual offences (and we do not suggest that it should), we do not see that a requirement to hold the HRA qualification provides any greater assurance of quality in these cases.

In this narrower category of case, there is already specialist accreditation available in the form of Advocacy and the Vulnerable training, developed jointly by the Law Society and the Bar. It appears to us that, if there is a need to require advocates to hold a particular accreditation to deal with these cases, that would be the more appropriate one. Indeed, no responsible solicitor advocate or barrister would undertake those sorts of cases in the Crown Court, as either defence advocate or prosecutor, without undertaking that course. We do not advocate that it is necessary to make that training compulsory. Our experience is that the judiciary in this region will routinely question whether advocates proposing to represent clients in cases involving young/vulnerable witnesses have completed appropriate training. We are not aware of a body of evidence to suggest the judiciary having cause to intervene in cross examination or indicating that advocates do not possess the relevant knowledge/skills required in this area of work.

We repeat our overarching concerns that there appears to be little evidential basis for introducing such a significant regulatory change in this field. There appears to be no clear evidence that solicitors are failing to comply with their obligation to act only when competent to do so.

Coupled with the issue of low legal aid fees for youth court work, there has been a decrease of over 80% in youth court volumes in the last ten years[1]. The Committee was concerned that the introduction of this proposal could lead to 'advice deserts' in youth court work in some regions.

6. **Would you find it helpful to have access to a suite of resources aimed at supporting practitioners to meet high advocacy standards?**

1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/774866/youth_justice_statistics_bulletin_2017_2018.pdf

7. **Are there particular topics you would like to see included in our advocacy resources?**

   The Committee welcomes the provision of resources for use by practitioners. However, we question whether the SRA will be able to provide a training resource which builds on the materials already available to practitioners using the Advocates' Gateway.

8. **Do you agree with our proposals to support reporting? Do you have other suggestions about how we might improve our reporting processes?**

   Our overarching view is that any reform of advocacy standards must be based on robust evidence. It follows from that view that there should be clear and transparent reporting of any concerns about advocacy quality to the SRA, from the judiciary, from consumers and from other advocates.

   We therefore welcome the proposals to make the online reporting form easier to use and more accessible; to produce clear advocacy standards in terms that can be understood by lay consumers; to produce clear and objective HRA standards against which the judiciary can assess the competence of advocates appearing before them; and to improve judicial awareness of the reporting scheme.

   We express some concern that a culture of reporting minor concerns over advocacy may have a chilling effect on younger solicitor advocates making the transition to advocacy in the higher courts.

   We also encourage the SRA to ensure that the handling of such concerns is done in a transparent fashion enabling the advocate a right of reply.

9. **Do you have any further information to help inform our impact assessment?**

   No.