



# **A market analysis of legal aided services provided by barristers**

**A REPORT PREPARED FOR THE DEPARTMENT FOR CONSTITUTIONAL  
AFFAIRS AND THE LEGAL SERVICES COMMISSION**

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## Executive summary

In late 2003, the Department for Constitutional Affairs (DCA) and the Legal Services Commission (LSC) commissioned Frontier Economics (Frontier) to undertake a market analysis of legal aided services provided by barristers. This study complements work relating to the supply of legal aided services provided by solicitors that Frontier undertook on behalf of the DCA and LSC during 2003. The objectives of both studies were to understand the extent to which there might be either excess or under supply of services at current remuneration rates, and whether the way in which the services are procured could be changed such that better value for money could be achieved.

The focus of the study relating to barristers was largely on the specific issues of demand and supply, reflecting both the time available for the study and also that many of the issues relevant to procurement are currently being considered in the wider context of David Clementi's review of the legal profession. The specific objectives of the study of legal aided services provided by barristers were therefore to:

- (i) identify trends in demand and supply of legal aided work undertaken by barristers over the last ten years;
- (ii) assess whether there is evidence to suggest that conditions of either excess supply or under supply currently exist; and
- (iii) assess whether such conditions of excess or under supply might arise in the short to medium term.

Given the time available for the study, the analysis drew largely on existing data and information relating to barristers' legal aid work. In addition, a telephone survey of legal aid solicitors – in their capacity as the direct users of barristers' services – was undertaken. In total, 326 solicitors responded to the survey providing results broadly representative of the population of legal aid solicitors.

The survey asked about the occasions on which solicitors used barristers for legal aided work during 2003 and the experiences that the solicitors had in securing barristers' services on these occasions. Responses were given separately for criminal, family and other civil categories of law. A more qualitative understanding of the issues relevant to family and criminal law was obtained through interviews with the Bar.

### INDICATORS OF EXCESS AND UNDER SUPPLY

The survey asked whether solicitors had, over the past year, experienced occasions on which they were unable to secure the services of a barrister, of appropriate expertise and experience, for the type of case in which they were involved. The responses were as follows.

- “ 63% of solicitors surveyed said that there had been no occasions in the last year on which they had been unable to secure a barrister of appropriate expertise and experience. The remaining 37% of solicitors reported that they

had experienced at least one occasion on which they had been unable to secure a barrister; this percentage was highest for solicitors undertaking family law and lowest for those practising in the other civil categories of law.

- “ Of those solicitors reporting at least one occasion on which they had been unable to secure the services of a barrister, the majority were unable to do so for between one and five cases. This was consistently the case by type of law, although, the likelihood of being unable to secure a barrister when one was sought was higher for solicitors undertaking family law.
- “ Solicitors reported the implication of being unable to secure a barrister as either a detriment to the advice received by the client or an unacceptable delay on a proportion of these cases. For both criminal and family law, a detriment to the advice provided to a client was more likely to result than a delay. A detriment to the advice provided to the client was also more likely to arise for family law cases than for criminal law.

A more detailed presentation of the results described can be found in Table 1 and Table 2 below. Table 1 presents the numbers of cases that were undertaken, in 2003, by solicitors surveyed, the number of occasions on which they were unable to secure a barrister for these cases and the implications of not being able to secure a barrister.

	Criminal	Family	Other civil
Total cases	24,550	18,570	10,410
Cases where barrister used	5,240 – 7,040	3,510 – 5,290	3,100 – 5,320
Cases unable to secure a barrister	400	420	330
Cases delayed	100	30	30
Cases where detriment	170	260	60

Table 1: Number of cases conducted in 2003 by those solicitors surveyed

Source: Survey of solicitors, Frontier Economics estimates (numbers rounded to nearest ten units)

Table 2 shows the number of cases for which a solicitor was unable to secure a barrister (and the number of cases on which detriment and delay occurred) as a proportion of all cases undertaken by the solicitors surveyed and those cases on which they required a barrister.

	Criminal	Family	Other civil
Cases unable to secure a barrister: % of total cases % of cases where barrister sought	2% 6% – 8%	2% 8% – 12%	3% 6% – 11%
Cases delayed: % of total cases % of cases where barrister sought	0% 2%	0% 1%	0% 1%
Cases where detriment: % of total cases % of cases where barrister sought	1% 2% – 3%	1% 5% – 7%	1% 1% – 2%

Table 2: Proportion of cases conducted in 2003 by those solicitors surveyed

Source: Survey of solicitors, Frontier Economics estimates (numbers rounded to nearest whole number)

These responses to the survey indicate that there may be a degree of under supply; that is, there are occasions where a barrister with particular expertise and experience is sought but cannot be secured. The responses to the survey revealed that this was more likely to arise when solicitors were seeking the services of a senior-junior barrister and where a solicitor was seeking to secure a barrister located close to the solicitor's office; fewer problems were encountered when solicitors looked over a wider geographic area.

Solicitors were asked about the reasons they thought explained why there had been occasions on which they had been unable to secure a barrister of appropriate expertise and experience. For solicitors seeking to procure the services of a criminal barrister, the main response (given by 54% of respondents) was that barristers were too busy. For solicitors seeking to secure the services of a family barrister, the main response (again, given by 54% of respondents) was that barristers had said that the fees were unreasonable.

The findings of the survey should be treated with care. While they provide an indication of under supply and the circumstances when it is most likely to arise, the results do not present accurate estimates of the *degree* of under supply. Consideration should be given to two potential sources of error.

- “ The survey required solicitors to judge the expertise and experience of barristers required to provide advocacy and advice on particular cases. Since solicitors do not pay the barristers' fees (for the majority of cases), it could be the case that solicitors have the incentive to seek the services of barristers with the greatest expertise and experience and there may be a question as to whether this is the required expertise and experience.
- “ The survey relies on solicitors accurately reporting the number of cases undertaken in 2003, the number of cases for which barristers' services were sought and the number of cases for which they were unable to secure barristers' services. Moreover, with regard to the number of cases on which barristers were used, estimates were reported in a broad range only.

An objective of the study was also to consider the extent of any excess supply at current remuneration rates; that is, whether there would be barristers (of appropriate expertise and experience) willing and able to take on more legal aided work at current rates. The survey was unable to inform this issue.

## IMPLICATIONS OF UNDER SUPPLY

That there are occasions on which a solicitor cannot secure the services of a barrister of appropriate expertise or experience is not in itself surprising. One would expect there to be occasions on which a customer cannot find a supplier in most markets; indeed, the survey revealed that when procuring barristers for private clients, 14% of solicitors had experienced difficulties finding barristers of appropriate expertise and experience.

The question as to whether the higher incidence of being unable to secure a barrister for legal aided cases constitutes a problem is a policy issue. It will depend, first, on the requirements of the Access to Justice Act 1999 and whether, for example, it is acceptable for there to be *any* occasions on which it is not possible to secure the services of a barrister with appropriate expertise and experience.

Second, it will depend on the scale of the detriment and delay associated with solicitors not being able to secure the services of a barrister of appropriate expertise and experience. For example, where solicitors are able to undertake the work themselves, and have done so, is there a detriment? To inform this question it would be helpful to have an objective measure of the expertise and experience required. Equally, is there a detriment – or does there need to be a detriment – if solicitors widened the geographic area from which they seek to secure a barrister?<sup>1</sup>

Whether it is appropriate to adjust remuneration rates in the short term in order to increase supply depends on these policy issues. However, consideration should also be given to the longer-term implications of current remuneration rates and changes to them.

## THE LONGER TERM AND PROCUREMENT

Relatively limited information was available in the time available for the study to reach a view on the extent to which conditions of under supply might improve or deteriorate in the future. From the survey, there is evidence to suggest that solicitors found it less easy to find a suitably qualified barrister in 2003 than in the previous year and, to a larger extent, than three years previously. This was consistently the case for all types of law, with family solicitors reporting the greatest decline in the ease of securing a barrister.

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<sup>1</sup> It should be noted that where solicitors were seeking to secure the services of a barrister located close to their office, that this might have been driven by regulations associated with undertaking legal aided work.

This deterioration could imply that, if demand continues to grow at the rate at which it has over previous years, there is unlikely to be a reduction in the number of occasions on which solicitors are unable to secure a barrister of appropriate expertise and experience, unless there were to be significant entry to the profession, and to legal aided work specifically. This assumes that there is no significant change to the regulatory framework within which the Bar operates that would impact on the potential supply of suitably qualified advocates.

In the short to medium term, there is little evidence to suggest the prospect of entry on a considerable scale, either to the profession generally or to legal aided work in particular. The net increase in practising barristers (barristers entering the profession less any barristers leaving the profession) is estimated to have been approximately 2% a year for recent years. There is no reliable information as to the proportion of this net increase that would be translated in to an increase in barristers undertaking legal aided work.

There may, therefore, be relatively limited immediate prospect (over the short to medium term) of an increase in the numbers of barristers willing to undertake legal aided. At the same time, there has not been a large reduction in the numbers of barristers undertaking this work in recent years. Moreover, increasing use has been made of solicitor-advocates for criminal law. In total, 2,185 solicitor advocates were practising at the end of March 2004 compared to 11,248 self-employed barristers and 2,737 employed barristers at December 2003.

The prospect for the longer term is more uncertain and would require a detailed analysis of the potential earnings and opportunities of barristers and would-be barristers in other areas of the law and in alternative professions. It would also require analysis of the extent to which there is likely to be growth in the number of solicitor-advocates. Neither were it possible in the timescale for this study, nor given the available data. One of the recommendations in this report is that the data required to undertake these analysis be collected. In particular, data relating to the number of barristers and solicitor-advocates engaged in legal aid and private work, by type of law, together with reliable data relating to earnings achieved in different specialisms would be needed.

With respect to whether consideration should be given to changing the way in which barristers' services are procured for legal aided work, this study suggests that the case is less strong than it was for solicitors.

- “ First, the study has not revealed strong evidence of excess supply as was the case for solicitors. There may, therefore, be no need to change the procurement method in order to reduce any instances of “over-payment”.
- “ Second, the existing procurement method provides good incentives for barristers to deliver high quality services. On the whole, solicitors will demand it (they do not pay for it) and barristers will have the incentive to supply it in competition against one another.

The downside of the existing procurement method is that it requires those managing the legal aid scheme to make an accurate estimate of the price that is necessary to obtain an appropriate quality of service. Given the current paucity of data this is inevitably a challenge. Moreover, it does not guarantee that there

will be *no* occasions on which a solicitor cannot secure the services of a barrister with appropriate expertise and experience. As noted above, this requires a policy decision to be taken as to whether such occasions are acceptable, following which changes to procurement might be considered.

# 1 Introduction

Following the 2002 Spending Review, a joint review was undertaken by the Lord Chancellor's Department (now the Department for Constitutional Affairs, DCA) and Her Majesty's Treasury (HMT) of the measures in place for both forecasting and controlling government expenditure on legal aid. This review recommended that certain further work should be carried out in preparation for the 2004 Spending Review. In particular, consideration should be given to issues of supply, demand, contracting, remuneration and incentives related to the procurement of legal aided services.

In May 2003, the DCA and the Legal Services Commission (LSC) commissioned Frontier Economics (Frontier) to undertake a study of the supply of legal aided services provided by solicitors. The aim of the study was to inform the extent to which there might be conditions of either excess or under supply of solicitors' services at current remuneration rates, and to consider whether an alternative procurement mechanism might offer better value for money. The findings of the study were presented to the DCA and LSC in December 2003, and will inform the wider review of legal aid for the Spending Review 2004.

The same issues of demand, supply and contracting are relevant for legal aided services that are provided by barristers; expenditure on barristers accounts for at least 26% of the Government's total expenditure on legal aid, and barristers are involved in a larger proportion of cases. The extent to which a sufficient volume of services, of the required quality, can be secured in a way that maximises value for money is therefore of central importance for the operation of the legal aid scheme.

In late 2003, Frontier was commissioned by the DCA and the LSC to undertake a second study to consider the supply of legal aided services provided by barristers. The specific objective was to undertake a market analysis to inform:

1. trends in demand and supply of legal aided work by barristers over the last ten years;
2. whether there is evidence to suggest that conditions of either excess supply or under supply currently exist;
3. whether such conditions of excess or under supply might arise in the short to medium term; and
4. whether the current method by which the DCA and LSC procure barristers' services could be changed such that conditions of excess or under supply would be less likely to arise.

Given a shorter timescale for this study, the focus of the work was on the first three tasks. Moreover, since barristers are instructed to undertake work on a case by solicitors, the issue of the procurement of barristers should not be considered in isolation from the procurement of solicitors for legal aided work. The consideration of procurement of barristers therefore draws on Frontier's report in relation to the procurement of solicitors.

Frontier has now completed its work in relation to the above remit. The main body of this report provides an overview of the work undertaken and the conclusions reached. A number of annexes provide further details of both the analysis and the results.

Frontier is grateful to the contributions made to the study by the Bar Council, by individual members of the Bar, by the Bar Council's advisor Professor Martin Chalkley and by the Crown Prosecution Service. Views presented during interviews with the above, along with views presented by the Law Society, were valuable in developing a full understanding of the issues relevant for the study. Frontier would also like to thank members of the DCA and LSC for their input throughout the study.

## **1.1 OBJECTIVES AND SCOPE**

To understand fully conditions of demand and supply in a market, and to identify the extent of any excess or under supply, one would ideally seek to measure levels of demand and supply separately over a period of time, and to understand how demand and supply might separately change in response to a change in price. Given this information, it would be possible to estimate the extent of any excess or under supply at any given price.

Such an analysis is typically not feasible for many markets, not least because the available data relating to services delivered is the result of the interaction between what is demanded and supplied. This is certainly the case for legal aided services provided by barristers. Moreover, there has historically been little variation in the price paid for legal aided services provided by barristers and this – along with the fact that responses to price changes can take time to have full effect – makes it difficult to observe how demand and supply might respond to changes in price.

The scope of the study was therefore to bring together existing information of direct relevance to the issues of concern and analyse these as far as possible. As was the case for the study of solicitors, much of the understanding of the nature of demand and supply was developed through obtaining a better understanding of the legal aid scheme and the way in which barristers' services are provided in this context. In addition, a short telephone survey was undertaken of solicitors who undertake legal aid work – in their capacity as the direct customers of barristers – which was intended to provide additional quantitative indicators of excess and under supply.

A brief overview of the survey is provided at the end of this section in the context of the overall approach to data collection. First, further details are provided with respect to the context in which conditions of excess or under supply might arise and particular considerations relevant to procurement. This discussion sets the scene for the analysis undertaken and reported in the remainder of the report.

### **1.1.1 The nature of demand and supply**

The demand for barristers' services for legal aid cases originates from solicitors who undertake legal aid cases. For certain cases, or certain parts of cases,

solicitors will have little option but to instruct a barrister; this arises most often where a solicitor does not have the rights of audience to be heard in the court where the trial is being held. For other cases, a solicitor has a choice to undertake the work himself or herself, or to commission a barrister.

It is not the case, as it is for solicitors, that the demand for barristers' services will be exogenously determined once decisions have been taken with respect to means and merits tests and the scope of services covered by legal aid. Rather, solicitors have a degree of control over the volume of barristers' services they demand. Given existing remuneration arrangements, the volume of services demanded will primarily depend not on the price of legal aided services provided by barristers but on the price paid to solicitors if they were to do the work themselves and the volume of work solicitors currently have at any one point in time.

This is the first critical issue that needs to be taken into account in analysing demand; it is important to understand the nature of incentives faced by solicitors and how these might have changed over time such that demand for barristers' services might also have changed. The interaction between solicitors and barristers that is described will also be central to consideration of the procurement of barristers' services.

With respect to the supply of services, the key issue will be the extent to which barristers supplying legal aided services have options available to them other than representing legal aided clients. This requires identification of:

- ⌘ the existence of other clients of barristers' services, such as private clients or the Crown Prosecution Service (CPS);
- ⌘ the ability of barristers who are currently undertaking legal aided work to undertake work for these clients;
- ⌘ the prices offered by the alternative clients relative to prices for legal aided work, and the extent to which barristers would seek to work for different clients in the face of changes in relative prices;
- ⌘ whether the Cab Rank rule<sup>2</sup> applies and influences the choices made by barristers with respect to the clients for whom they will work;
- ⌘ the value that barristers place on leisure time, where this should also be considered an alternative option for barristers; and
- ⌘ alternative employment opportunities, for both existing and prospective barristers.

A critical issue relating to supply will be the extent to which there is a divergence between responses on each of the above in the short to medium term and in the longer term. Even if current remuneration rates are sufficient to secure the necessary supply of the required quality today, they may not be sufficient to

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<sup>2</sup> The Cab Rank rule and its implications are discussed in more detail in Section 2.2.2. In brief, it is a self-imposed rule that requires a barrister to undertake a piece of work requested by a solicitor.

discourage barristers from leaving the profession in the longer term, or to encourage law students to enter the profession. Thus, indicators of future excess or under supply will need to include those relating to both entry to and exit from the profession.

### 1.1.2 Indicators of excess or under supply

The appropriate indicators of excess or under supply will depend on how one would expect these to be manifested in the provision of legal aided services by barristers. For example, if remuneration rates were set “too low” such that barristers were typically unwilling to supply a given volume of services (of the required quality), what might one expect to see? Examples would include:

- ⚡ solicitors may be unable to secure the services of a barrister with appropriate experience and expertise;
- ⚡ as a result, solicitors may choose to undertake the work themselves where they can;
- ⚡ where solicitors cannot undertake the work themselves, solicitors may choose to instruct a barrister with less experience and/or expertise than that which is considered appropriate;
- ⚡ equally, once a barrister has been instructed, he or she may play a more limited role than would strictly be required; and/or
- ⚡ cases may be delayed as a result of solicitors being unable to secure a barrister of appropriate expertise and experience for the timeframe originally specified for the case.

Similar effects can be identified with respect to identifying excess supply. If the price paid for barristers’ services for legal aid clients is “too high” one might expect to find:

- ⚡ solicitors being able to secure the services of barristers without any difficulties – indeed solicitors may find that they are contacted on a regular basis by barristers’ clerks;
- ⚡ an increase in the quality of services provided, either in terms of the experience and expertise of barristers taking cases, or in terms of the effort devoted to the case once it has been taken on; and/or
- ⚡ a reduction in the work undertaken by solicitors in the event that barristers are willing to play a larger role, and solicitors’ time can usefully be employed elsewhere.

This discussion raises a number of issues to be considered. First, what is meant by “barristers of appropriate experience and expertise” and how can services that do not meet this threshold and those that exceed it be identified? This issue is discussed at length in Section 2.3. Second, if it were to be the case that there are occasions on which solicitors are unable to secure services of appropriate expertise or experience, would this constitute under supply or simply reflect natural peaks and troughs in workload? Thus, there is an issue about what

constitutes under supply and whether it is considered acceptable for there to be occasions on which such barristers cannot be procured. Ultimately, this is a policy issue (driven by considerations such as the Access to Justice Act 1999) rather than an empirical economic issue.

Given the second issue, in particular, the scope of this report is to present a factual economic assessment of conditions of supply and demand, cast in the framework needed to identify excess or under supply. However, the report stops short of making recommendations with respect to the information and analysis presented.

### 1.1.3 Procurement alternatives

The findings with respect to excess or under supply, and the understanding of both demand and supply developed in the early part of the study, are both needed to inform (a) whether there is a case for making changes with respect to the procurement of barristers' services and (b) how such a change might be made.

The scope of Frontier's work with respect to procurement was limited to an initial discussion of the relevant issues, with parallels drawn with recommendations made in the report on solicitors. As was the case for the study of solicitors, a full assessment of the costs and benefits associated with different procurement options was not feasible in the timeframe available.

Moreover, given some uncertainty surrounding other relevant regulatory aspects of the profession, a full cost benefit analysis of procurement options would not be desirable at this time. The Government is currently undertaking a consultation exercise and review relating to the role of QCs. Separately, David Clementi is leading a wider review of the provision of legal services. The issue of procurement of barristers should be revisited once the findings of these reviews are known.

## 1.2 DATA COLLECTION

As discussed above, the timeframe of this study did not allow an in-depth quantitative analysis of conditions of demand and supply. The information required to do this was not available and fresh data collection on an extensive scale was not feasible. Rather, the study brought together both quantitative and qualitative information from a range of sources, including:

- ⌘ LSC and DCA administrative data relating to trends in cases undertaken and expenditure on cases;
- ⌘ survey data relating specifically to the availability of barristers for legal aided family cases (including a survey of solicitors undertaken by SFLA in

conjunction with the FBLA, and a survey of the Family Bar undertaken by the FBLA, both 2002<sup>3</sup>);

- ⌘ survey data relating to trends in entry and exit and the use of barristers for legal aided work (including a number of the BDO Stoy Hayward annual surveys of the bar<sup>4</sup>, the Junior Bar in 2002 and a number of reports from the Task Force on Funding entry to the Bar);
- ⌘ interviews carried out by Frontier with members of the Family Bar and members of the Criminal Bar, and with the Bar Council's Remuneration Committee; and
- ⌘ interviews with the CPS and with the Law Society.

In addition, a short telephone survey of solicitors, in their capacity as the direct users of barristers' services, was conducted. This survey, which was undertaken by an MRQSA accredited company<sup>5</sup>, asked specifically about the services that solicitors typically seek to secure from barristers, and solicitors' experiences in securing these services.

Responses were obtained from 326 experienced solicitors who had instructed a barrister at least once for legal aided work over the past year. Of the 326 responses, 105 were from solicitors specialising in criminal legal aided work and who answered the questions with respect to their experiences procuring barristers for criminal work only. The equivalent figures for solicitors specialising in family law and other categories of civil law were 146 and 75, respectively.

The survey responses were broadly representative in terms of the characteristics of the legal aid offices from which solicitors responded. First, the mix of responses across LSC regions matched the regional mix of solicitors' offices with contracts to undertake legal aided work. Second, the average annual revenue from legal aided work for firms where a solicitor responded to the survey closely matched the average revenue across all legal aid offices. Third, the number of solicitors who refused to be interviewed was low. Only 96 solicitors did not wish to be interviewed, compared to 1,055 solicitors who were contacted and were willing to be interviewed.<sup>6</sup>

A more detailed description of the survey and the questionnaire that was used can be found in Annexe 1. Annexe 2 provides information on the representativeness of the survey.

The key piece of information that is missing from the above, and therefore from the analysis in this study, relates to the income that barristers earn undertaking

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<sup>3</sup> The SFLA is the Solicitors Family Law Association (Report of a Survey of Solicitor Firms with Active Family Contracts with the Legal Services Commission in 2002). The FBLA is the Family Bar Law Association ("Survey of the Family Bar, 2002).

<sup>4</sup> As will be discussed below, the BDO Stoy Hayward report has not been used for the income information it contains, given concerns regarding its reliability.

<sup>5</sup> MRQSA stands for the Market Research Quality Standards Association.

<sup>6</sup> In the event, not all 1,055 firms were interviewed. The target number of 300 was quickly reached.

legal aided work. Equally, there is no reliable information readily available that relates to the income that barristers can earn undertaking work for other types of clients. The BDO Stoy Hayward annual survey of barristers' chambers was the only source of information provided, but there are concerns as to its reliability. One recommendation of this report is that better data relating to barristers' earnings under the legal aid scheme and outside the scheme should be collected on a systematic basis.

### **1.3 STRUCTURE OF THE REPORT**

The remainder of this report is structured as follows.

- “ Section 2 describes the conceptual approach that has been taken to analyse the supply of barristers' services for legal aid cases and the way in which the interaction of solicitors and barristers (within the context of the legal aid scheme) is important for understanding demand and supply.
- “ Section 3 brings together and discusses the evidence that informs the existence of either excess or under supply at current remuneration rates. This section also comments on the strength of conclusions that can be drawn from this information.
- “ Section 4 discusses the likelihood of excess or under supply either occurring or persisting in the future. A distinction is drawn between the likelihood of this occurring in the short to medium term, which can be informed by quantitative information provided by the survey. The discussion relating to the longer term is more speculative.
- “ Finally, Section 5 provides an initial view of the need for change in the way in which barristers' services are procured such that conditions of excess or under supply can be removed, and better value for money secured. Some initial ideas as to how changes might be made are discussed.



## 2 The conceptual approach

Underpinning the conceptual approach for this study is the standard micro-economic framework of demand and supply. Demand in this case originates from solicitors and is for advocacy and advice on certain legal aided cases. The suppliers of advocacy and advice for these cases may be barristers, solicitor-advocates<sup>7</sup> and also solicitors, where they have rights of audience.

Conditions of demand and supply of advocacy and advice can be expected to differ by type of law, by the quality of service and also by geographical location, not least because of the nature of the advocacy and advice itself, but also as a result of the operation of the legal aid scheme. The purpose of this section is to consider the relevant level for analysis (Section 2.1) and the wider implications of the operation of the legal aid scheme (Section 2.2) for the analytical approach.

Section 2.3 then outlines the analytical approach to the study taking into account the discussion in the previous two sub-sections. It should be noted that wider regulatory influences on demand and supply (such as those associated with membership of the bar, say) are not considered on the basis that these are being considered in detail by the Clementi review. The discussion in Section 2.3 takes the existing framework of regulation of the Bar as given.

### 2.1 AN APPROPRIATE LEVEL FOR ANALYSIS

Ideally, one would undertake a separate analysis of demand and supply for each of the economic markets covered by this study. An economic market is defined, broadly speaking, as the group of products that are subject to the same set of competitive pressures. Firms supplying a given market will be subject to similar demand conditions and face similar issues in the decision to supply. Conversely, firms in different economic markets could face conditions of demand and supply that are quite different; hence the need for separate analyses where separate markets are identified.

While a full market definition exercise was beyond the scope of this study, the principles used to define economic markets are nevertheless helpful in identifying potential differences in conditions of demand and supply, and therefore the appropriate level for analysis. Specifically, it is helpful to consider the extent of:

- ⌘ demand-side substitutability, where customers view different services as close substitutes for one another; and
- ⌘ supply-side substitutability, where suppliers of one service are easily able and willing to switch to supplying another.

Applying these principles to barristers' services it is clear that one type of law is not substitutable for another from the customers' perspective. Equally, it appears that, for the most part, barristers would not be able to switch from providing advice in one area of the law to another. Thus, there is a need to

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<sup>7</sup> Solicitor-advocate are solicitors who have rights of audience in the higher courts.

consider conditions of demand and supply separately for the different law types. This was possible for criminal, family and other civil; it was not possible to undertake separate analyses for individual categories of law within other civil.<sup>8</sup>

There is also a need to consider conditions of demand and supply separately in different locations. While barristers can, in theory, work in any location in England and Wales, in practice there are constraints imposed by the operation of the legal aid scheme that have led to services being delivered more locally. Due to data limitations, a full regional analysis was not possible. However, it was possible to conduct an analysis using the four regions also used in the study of solicitors.

The reasons underpinning these conclusions are discussed in Sections 2.1.1 and 2.1.2 below.

### 2.1.1 Analysis by type of law

As noted above, the relevant issue determining whether the demand and supply of advocacy and advice need to be considered separately for each type of law will depend on the ability of those supplying the advocacy and advice to switch between law types; if there are no substitution possibilities, then each type of law has its own set of suppliers who need to be identified separately.

The evidence from a variety of sources suggests that, certainly after an initial one or two years, barristers tend to specialise in a given type of law, gaining expertise and experience that is valued by clients and allows barristers to advise on more complex cases. While this evidence relates specifically to barristers, as the primary suppliers of advocacy, it is assumed that the findings hold for the specialisation required for solicitors and solicitor-advocates.<sup>9</sup>

The first piece of evidence on specialisation came from the Bar. The view put forward was that:

- ⚡ newly qualified barristers – those with one or two years experience – may be expected to work across two or more areas of the law, or in what is known as “general common law”;
- ⚡ to develop expertise in an area of law and progress in one’s career it is necessary to invest in building knowledge of both the relevant procedure and case law; and
- ⚡ it is difficult to build this knowledge across more than one area of the law at a time (this is particularly the case for criminal law, where there have been a number of recent changes that have made criminal law and

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<sup>8</sup> This was due to the small number of observations in most datasets relating to categories of law within other civil.

<sup>9</sup> If this were not the case, one would question the reason for barristers specialising to the extent observed and whether services provided by solicitors and solicitor-advocates can reasonably be considered substitutes for services provided by barristers.

procedure more complex and necessitated a greater degree of specialisation).

As a result, barristers tend to specialise in one area of law. This view is supported by the administrative data held by the LSC for civil law. Figure 1 shows that, with respect to work undertaken in 2003, the majority of barristers working on legal aid cases did so in only one area of civil law.

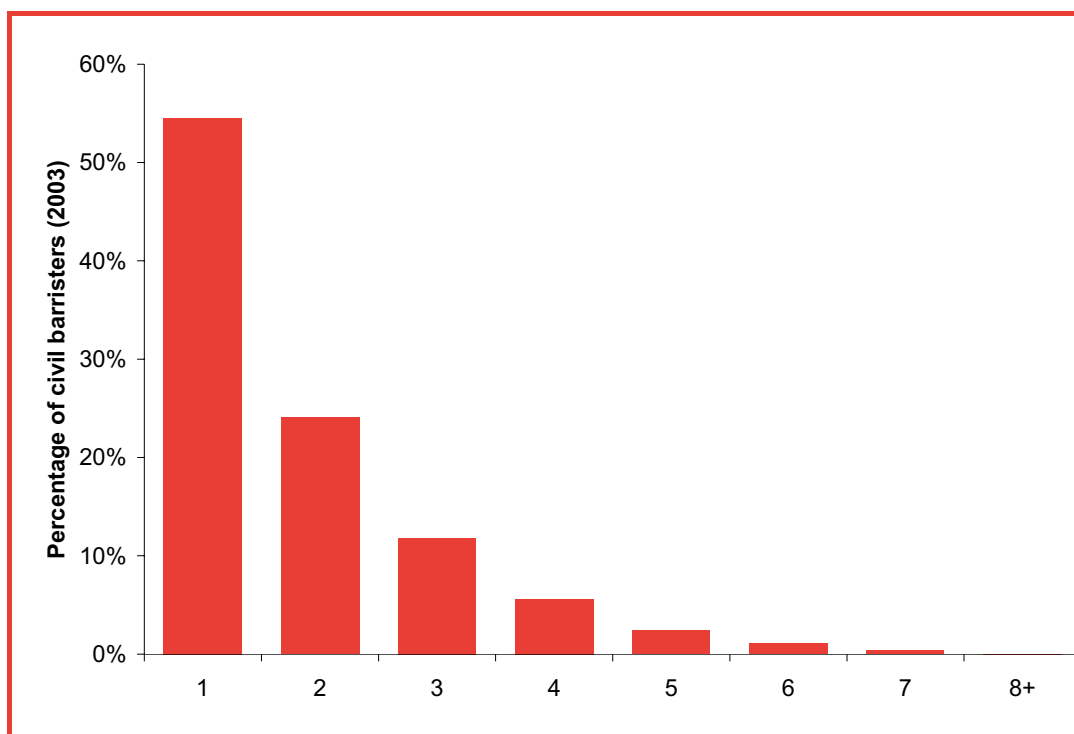


Figure 1: Percentage of barristers working across one or more areas of law

Source: LSC administrative data for civil law

Given the comments from the Bar, one might expect those barristers working on cases across more than one area of law to be newly qualified and/or working on cases that did not involve complex issues. It is unfortunate that this analysis could not include barristers working on criminal cases. Given the comments from the Bar, one might expect there to be a higher degree of specialisation if one included criminal barristers in the analysis.<sup>10</sup>

The LSC's administrative data also supports the Bar's view that there has been an increasing trend towards specialisation in one area of the law. This can be seen for types of civil law in Figure 2, which shows how the number of areas in which barristers work has changed over the last five years. The figure shows that the percentage of barristers undertaking cases in only one area of law increased from approximately 35% of all barristers in 1999 to over 55% in 2003.

<sup>10</sup> This is not possible given the way in which the data is collected by the LSC and DCA.

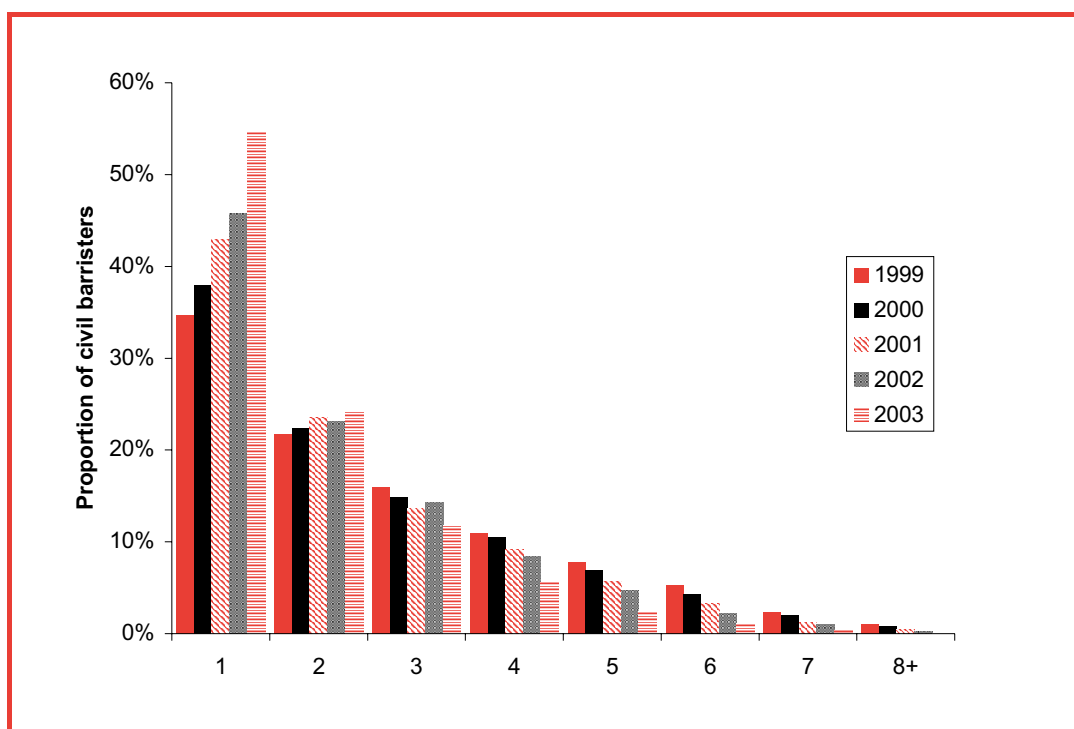


Figure 2: Change in specialisation 1999 to 2003

Source: LSC administrative data for civil law

The issue of specialisation is also considered by the Institute for the Study of the Legal Profession in its report on the Junior Bar in 2002. This study concerns all barristers in private practice – not only those undertaking legal aided work – and has findings that are consistent with the points raised above. Specifically, the report finds that there is an increasing tendency towards specialisation overall, and that specialisation (which can already exist for barristers with one or two years call) increases as barristers become more experienced (noticeably the case for barristers with three or four years call).

The report suggests that specialisation is driven, in part, by an increasing tendency towards specialist sets of chambers, which is believed to have driven even newly qualified barristers to become specialised as a result of being exposed to a limited number of types of law. This is particularly thought to be the case in London; outside London those undertaking their pupillage are still most often trained in “general common law”.

The above discussion relates to specialisation by type of law. It should be noted that there is less specialisation within any one type of law. Thus, while a barrister may undertake a large amount of public law children work, this barrister might be likely to, and would be able to, undertake work in ancillary relief or domestic violence, say. Figure 3 shows this lower degree of specialisation within family law; it presents the percentage of barristers that worked in a given number of areas of family law in 2003.

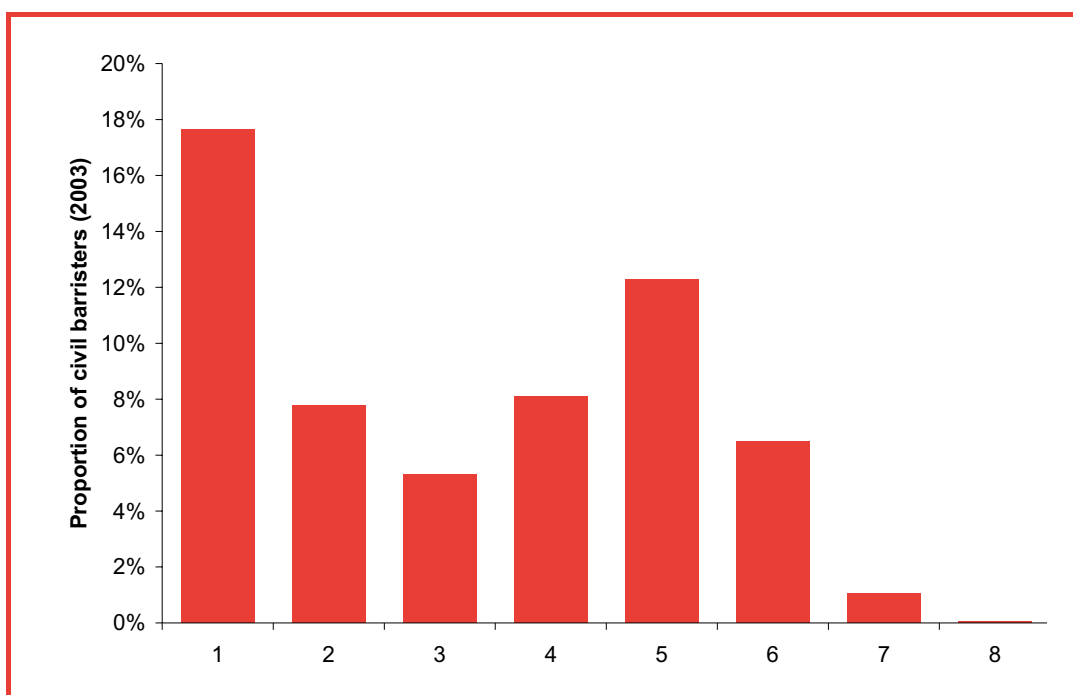


Figure 3: Areas of family law across which barristers work

Source: LSC administrative data for civil law

The chart shows that fewer than 20% of barristers worked in only one area of family law in 2003. Indeed, only a slightly lower proportion of barristers undertook cases in five different areas of family law.

To summarise, the above suggests that there is a need to consider each category of law separately, driven by the specialisation of barristers at an early stage in their career. While a barrister specialising outside of a particular area of law could undertake certain cases, these would typically be less complex cases; complex cases usually require a level of experience and expertise associated with specialisation.

An extension of this point is that there may be a need to consider separately advocacy and advice provided by experienced barristers; thus the pool of potential suppliers of advocacy and advice within any one area of law for more complex cases may be smaller still. Section 2.2 returns to this issue of the level of experience and expertise that might be required.

### 2.1.2 Analysis by geographic location

A separate analysis by geographic region would not be required if individual barristers are willing to travel to undertake cases across England and Wales, and equally, if solicitors are prepared to work with barristers located in different geographic locations. While there is some evidence to suggest that this is case, there are also certain requirements of the legal aid scheme that limit geographic mobility.

First, evidence from the survey of solicitors undertaking legal aid work revealed that many solicitors do not view location as a relevant criterion for selecting a barrister as chose a barrister close to their office. This can be seen in Figure 4.

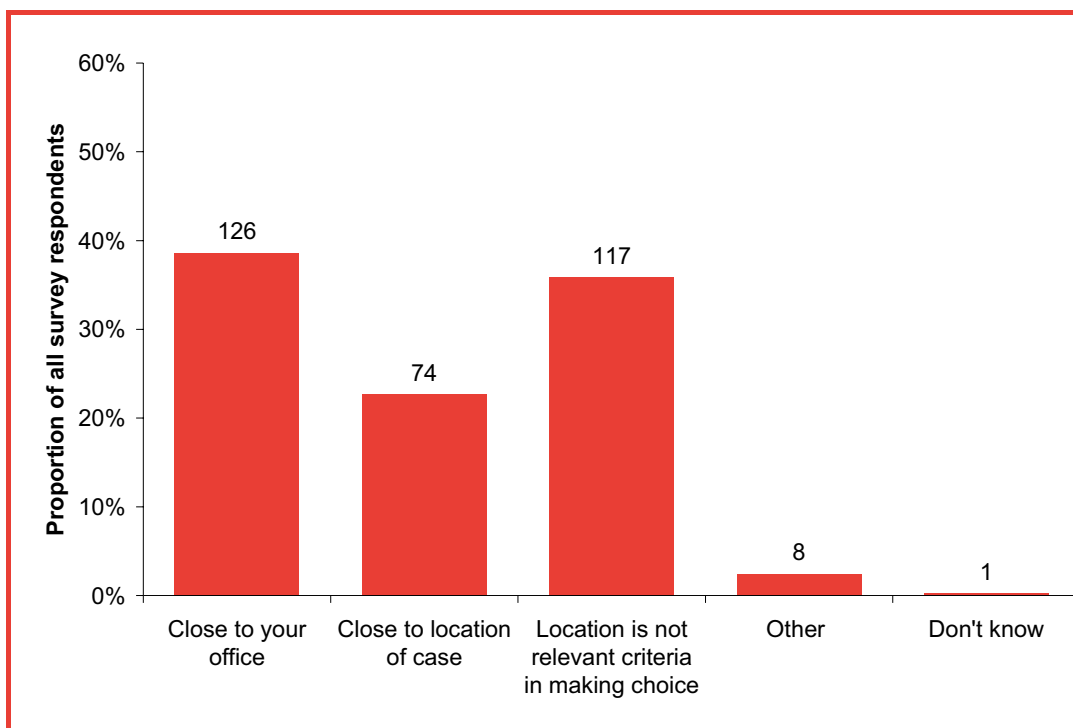


Figure 4: Preferred choice of barrister by location

Source: Survey of solicitors

This pattern was consistent across different types of law. For each law type, solicitors choosing a barrister located in a different geographic area to their office did so for a number of reasons, including:

- ⌘ no barristers' chambers located in the area;
- ⌘ a lack of the relevant expertise; and
- ⌘ a barrister was selected closer to the location of the trial.

It is clear from the above that, if it is necessary to secure counsel, a barrister will be instructed who is not located in the same geographic location as the solicitor. No information was provided in the survey that would allow an estimate to be made of the number of times that this occurred. However, there are specific features of the legal aid scheme that suggest that it may not be a frequent occurrence. In particular, under the payment scheme for family cases, there are specific requirements that solicitors instruct local counsel, and there are also restrictions on the payment of travel costs. The requirement for solicitors (under the Specialist Quality Mark scheme<sup>11</sup>) to maintain lists of barristers used, and to

<sup>11</sup> The Specialist Quality Mark (SQM) must be obtained by all solicitor offices wishing to obtain a contract to undertake legal aided work.

use barristers only on these lists, may further lead to solicitors using local counsel.

To summarise, the specific requirements of the legal aid scheme suggest that there is merit in considering demand and supply separately for different geographic locations. However, the fact that barristers can and will travel if needed, means that the differences between regions might be smaller than would otherwise be the case.

The analysis presented in the remainder of this report is undertaken across four geographic regions, which are the same regions as used in the study on solicitors. The four regions used each comprise a number of LSC regions.<sup>12</sup>

- ⌘ North – Newcastle, Manchester, Leeds and Liverpool;
- ⌘ Midlands and Wales – Nottingham, Birmingham and Cardiff;
- ⌘ South – Bristol, Reading, Brighton and Cambridge; and
- ⌘ London – London only.

Further details of the operation of the legal aid scheme, and specifically of the fee structure for barristers is discussed in the next section.

## 2.2 OPERATION OF THE LEGAL AID SCHEME

The intention of this section is not to provide an overview of the operation of the legal aid scheme as a whole, rather it is to describe those aspects of the scheme that have a direct impact on the demand and supply of legal aided services provided by barristers. A first important feature is that the demand for barristers to provide advocacy and advice on legal aid cases will depend not only on the volume of legal aid cases coming forward, but also on the work that solicitors choose to undertake themselves. The interaction between barristers and solicitors is given consideration in Sections 2.2.1 and 2.2.2.

Second, there have been a number of changes to the legal aid scheme over the past five years, both in terms of the work that is within the scope of legal aid, and also with respect to remuneration for both barristers and solicitors. The changes in remuneration will be of particular importance for barristers in considering their decision to supply, taking into account their outside opportunities. This is discussed in Section 2.2.3.

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<sup>12</sup> A more disaggregated approach was not possible given the data available.

### 2.2.1 Role of barristers and of solicitors in legal aid cases

Certain legal aid cases require the use of counsel to provide advocacy, expert advice and/or to aid with the preparation of documents. Whether a barrister is used (as opposed to a solicitor or solicitor-advocate) will vary across type of law and also from case to case.

For certain cases, there are regulatory requirements – set in place by the courts – that require the use of counsel with particular qualifications. Specifically, with respect to advocacy in the higher courts, solicitors may not have the necessary rights of audience and a barrister or solicitor-advocate must be used. The occasions on which solicitors are unable to undertake the advocacy as a result of not having the necessary rights of audience are for:

- ⌘ advocacy in the Crown Court and above for criminal cases;
- ⌘ advocacy in the High Court and Court of Appeal for civil cases; and
- ⌘ advocacy in the Magistrates Court for criminal and civil cases, where the court specifically assigns counsel.

With respect to the provision of advice and preparation of documents, it is not strictly necessary (that is, there is no formal requirement) to use a barrister; a solicitor would be allowed to perform this role.

Actual use will reflect these regulatory requirements plus any additional requirements associated with the need to secure particular experience and expertise, say, for a given case.

The actual use of barristers, and the reasons why they are instructed, is informed by the survey of solicitors. The survey also provides information in relation to the use of solicitor-advocates. The remainder of this sub-section describes the factual information relating to the use of both barristers and solicitor-advocates.

#### *Use of barristers*

Solicitors responding to the survey reported that, when they use a barrister (which is typically for fewer than half of their cases), it is most often as a result of the need for higher rights of audience. This can be seen in Figure 5, which shows that over 40% of solicitors stated that their use of barrister was typically driven by a requirement of the court.

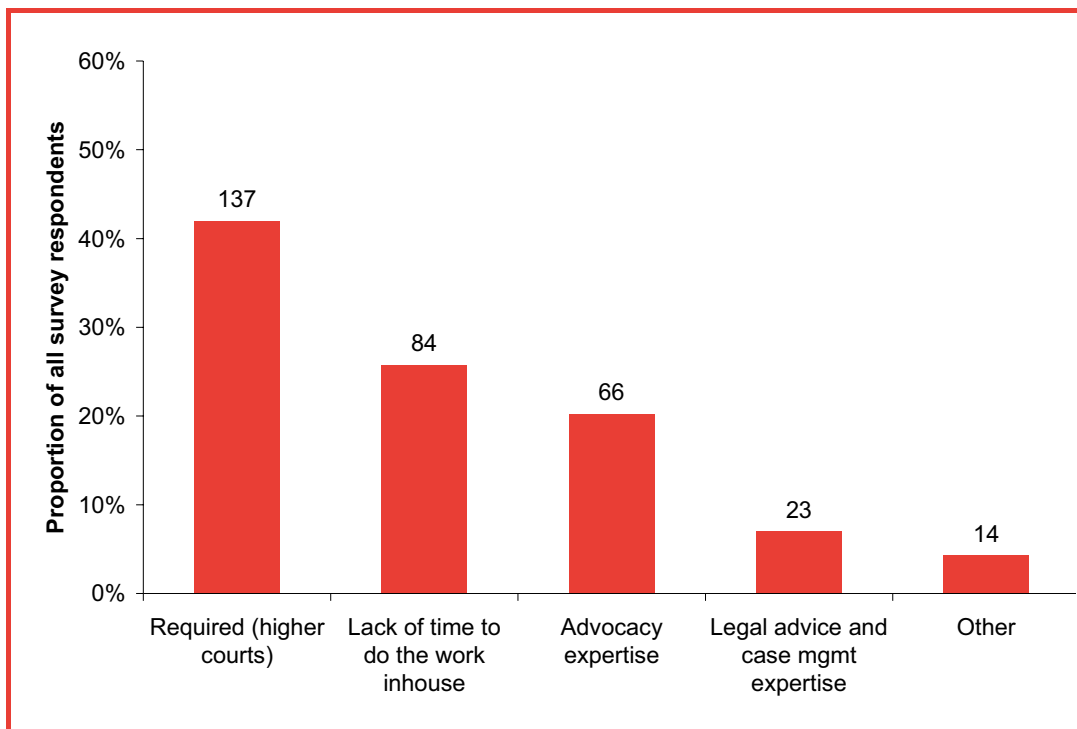


Figure 5: Main reasons for instructing a barrister

Source: Survey of solicitors

The second most popular answer – given by close to 30% of solicitors interviewed – was that solicitors did not have the opportunity to undertake the work themselves. This reflects the fact that it is often an option for solicitors to undertake the work themselves, as has been discussed above.

As would be expected, given the distinction between the requirements for criminal versus family and other civil law, the balance between responses is different across the types of law. For criminal cases, solicitors are more likely to use a barrister because of the need for counsel with higher rights of audience. Figure 6 shows that 70% of solicitors specialising in criminal law use barristers because it is required by the courts. For solicitors specialising in family or other civil law, the equivalent figure was less than 30%.

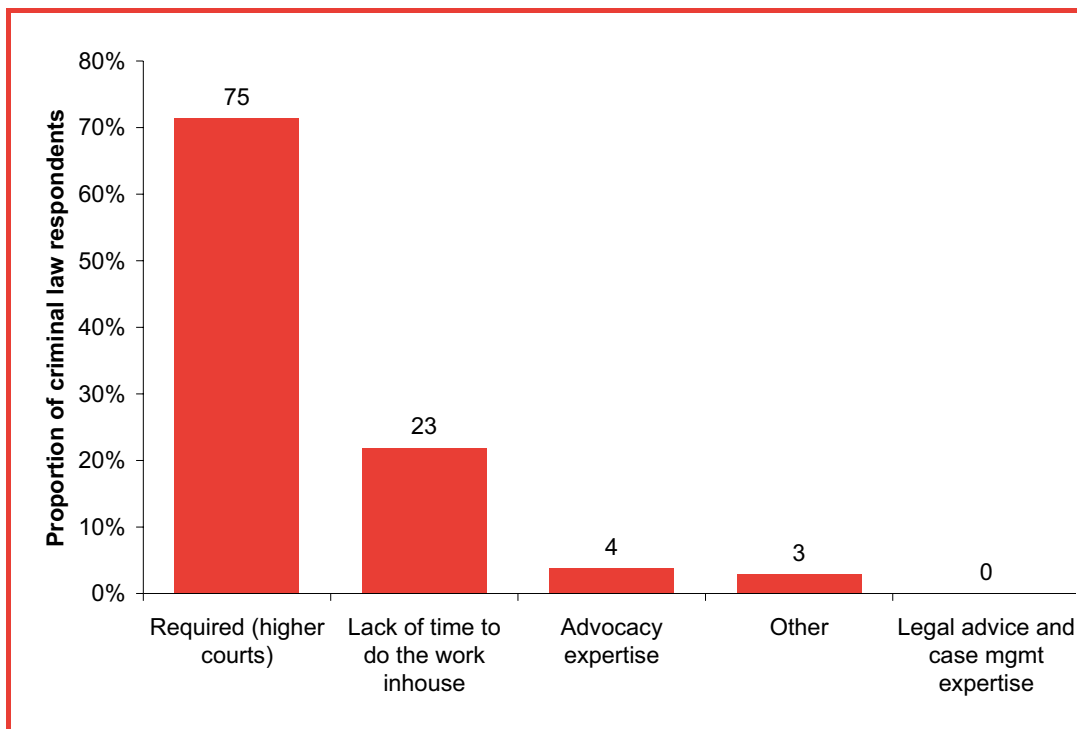


Figure 6: Reasons for instructing barristers for criminal cases

Source: Survey of solicitors

The role played by barristers on cases also differs by type of law. According to the survey, barristers are rarely instructed to provide advice (including the preparation of documents) for criminal cases; a finding supported by members of the Criminal Bar. Figure 7 shows that over 60% of solicitors stated that they did not use barristers to provide advice on their criminal cases at all over the last year. A further 30% used barristers for advice in less than one quarter of their cases.

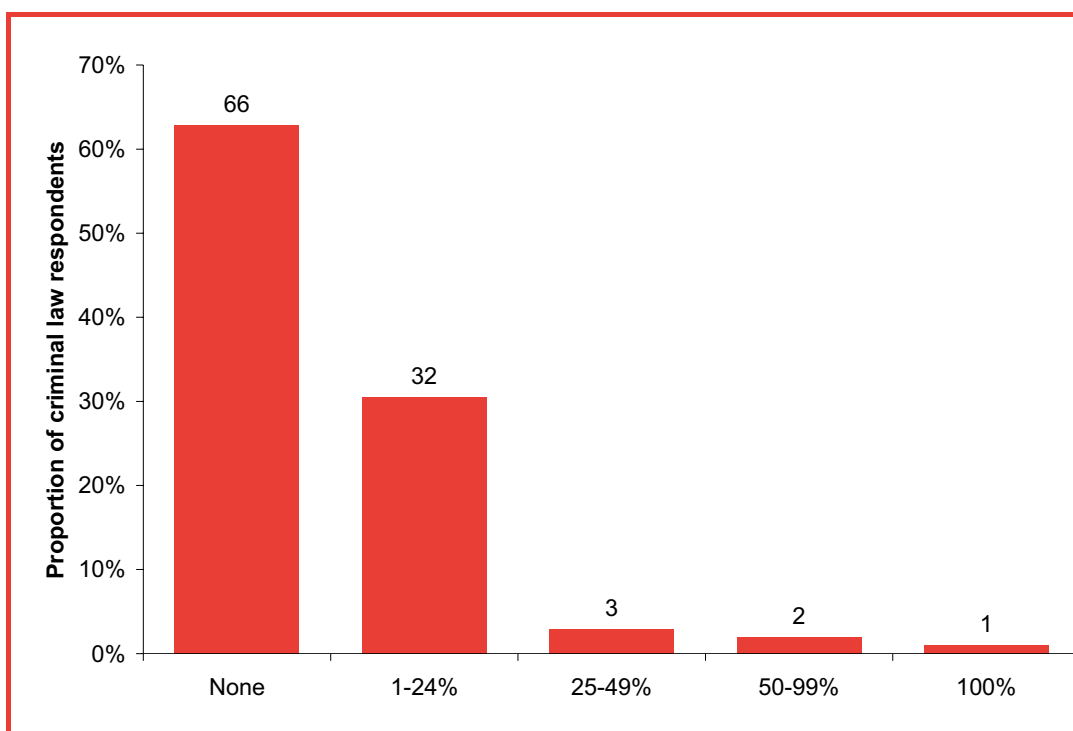


Figure 7: Proportion of cases where a barrister is used for advice

Source: Survey of solicitors

While use of barristers to provide advice (including document preparation) is also relatively limited for family cases, a larger proportion of solicitors (close to 60%) responded that they used barristers for advice over the last year.

The findings with respect to barristers' roles in providing advice should be contrasted with their role in providing advocacy. Only one solicitor out of 105 reported that he or she had not used even one barrister for advocacy in a criminal case over the last year. No family solicitor reported never using a barrister for advocacy on a family case.

#### ***Use of solicitor-advocates***

As described above, solicitor-advocates have the same rights of audience in the higher courts as barristers. Solicitor-advocates can therefore be used as direct substitutes for barristers on cases. At the current time, however, use of solicitor-advocates is limited. This can be seen in Figure 8, which shows solicitor-advocates were not used at all for advocacy by the majority of respondents.

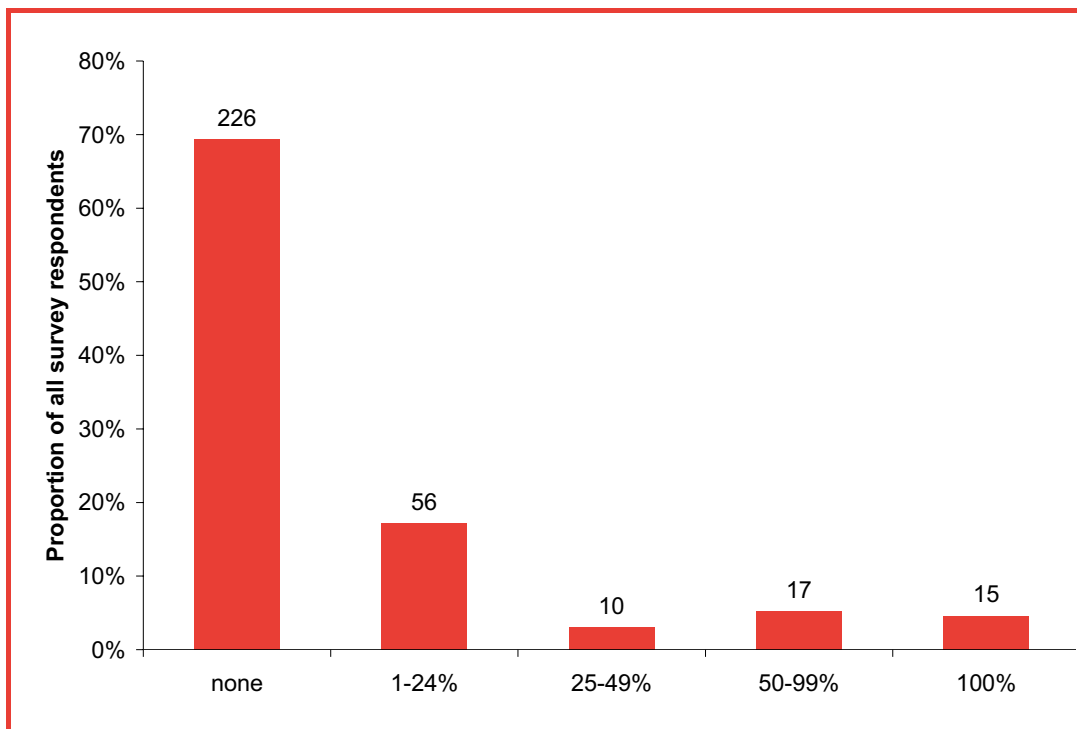


Figure 8: Proportion of cases on which solicitor-advocates have been used

Source: Survey of solicitors

Again, the picture differs by type of law. The proportion of solicitors using solicitor-advocates for at least one case rises to over 50% for criminal law, with over 20% of solicitors using solicitor-advocates for over half of their cases last year. The greater use of solicitor-advocates for criminal work, relative to family and other civil, is perhaps a reflection of the requirement for counsel with higher rights of audience for criminal cases tried in the Crown Court.

There is also evidence to suggest that, while current use of solicitor-advocates is low relative to barristers, it is increasing. This is certainly the case for criminal law, as can be seen in Figure 9, which shows approximately 30% of solicitors reporting an increase in use of solicitor advocates over the past three years. The proportion of respondents reporting an increase for family law and other civil law was much lower at fewer than 10% and fewer than 5%, respectively.

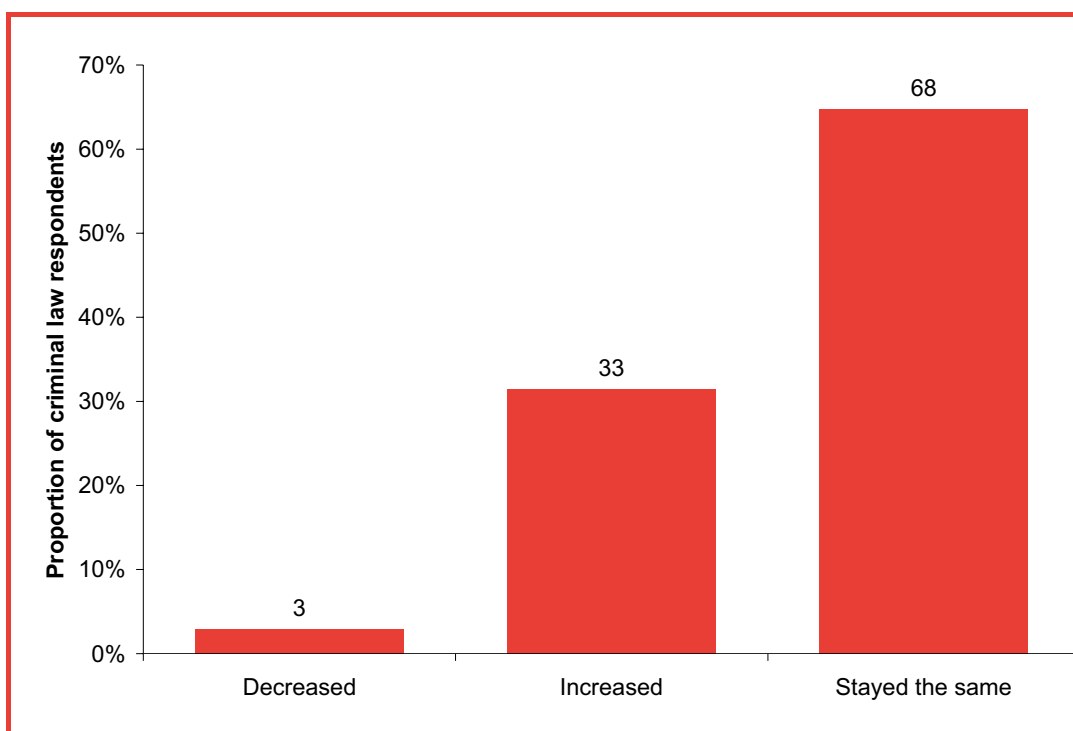


Figure 9: Change in use of solicitor-advocates for criminal cases (last 3 years)

Source: Survey of solicitors

The primary reasons given for the relatively limited use of solicitor-advocates (which were broadly consistent across all law types) were that they are difficult to find and that they do not have the relevant expertise. Both may be a function of the fact that solicitors being able to obtain the higher rights of audience occurred only recently with the Access to Justice Act 1999. As more solicitors undertake the necessary training to obtain the higher rights of audience, increased availability and use of solicitor-advocates may be expected in the future.

This trend may be reinforced by the practices of the CPS, which is increasingly using in-house solicitor-advocates for advocacy on criminal cases. Moreover, the Law Society stated that solicitors are being encouraged to take the opportunity to obtain the necessary qualifications for obtaining higher rights of audience.

### 2.2.2 Interaction of barristers and solicitors

The discussion above reveals that, for the most part, barristers' roles on legal aid cases are to provide advocacy and they are used largely because it is a requirement of the court that counsel have higher rights of audience, which are not held by solicitors. This is particularly so for criminal cases. Thus, on many occasions when solicitors are seeking to secure the services of barristers, it will be because the nature of the case requires it. On these occasions, solicitors can be expected to have relatively limited options for undertaking the work themselves.

For a smaller number of cases, solicitors may consider whether to undertake some of the work themselves, or whether to instruct a barrister or solicitor-advocate. For these cases, because solicitors are the first point of call for legal

aid clients, solicitors have a relatively large amount of discretion to choose the work that they undertake and the work they choose to pass to a barrister or solicitor-advocate.

Once a solicitor has determined the work that is to be passed to a barrister, however, the process for instructing a barrister is the same. In brief, a solicitor will approach the clerk in a set of chambers with which the solicitor's firm has an established relationship. The solicitor will ask for either a named barrister that the solicitor knows, or for a barrister with particular expertise. The clerk will inform the solicitor as to which of the barristers, possibly the named barrister, has time to take on the case and whether they would be willing to do so. The barrister "selected" is not then set in stone and late changes are sometimes made with respect to the barrister taking the case.

Notwithstanding the development of personal relationships, the barristers' clerks have a relatively large amount of discretion to allocate the cases among barristers in their set. The CPS said that clerks actively manage case distribution to manage barristers' time and workload; for example, if a barrister is to attend court on a particular day, then if a new case arises that would involve being in that court on the same day, the clerk would actively seek to pass the case to the same person. Cutting down travelling and waiting times was seen by the CPS as one way barristers have sought to improve the profitability of legal aid work under the current fee schemes for legal aid.<sup>13</sup>

Three issues arise from the above that are of particular relevance to the issue of matching demand and supply and also to procurement.

- " First, while there are contract requirements on firms of solicitors undertaking legal aided work to use barristers from a list maintained by the firm of solicitors, in practice this constraint is not binding. The Bar reported that, if a solicitor was unable to secure a barrister from a set of chambers from their "list", then they would use a barrister from a different set of chambers and simply amend the list.
- " Second, the fact that solicitors tend to instruct a barrister who is known to the solicitor, or whose chambers is known, suggests that the solicitors are informed customers. In particular, the solicitors will frequently have a view on the quality of the barrister instructed and, indeed, there is likely to be competition between barristers and sets of chambers on the basis of quality to secure work. This effect is compounded by the fact that solicitors do not (for the most part) pay a price for the barrister – the barrister is paid directly by the LSC.<sup>14</sup> – and there is no price/quality trade-off faced by a solicitor. Solicitors will have the incentive, therefore, to have the most qualified barrister that can be obtained.

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<sup>13</sup> This can typically only be achieved where cases are relatively short and it is possible for two or more cases to be tried in one day.

<sup>14</sup> The exception to this is for criminal and other civil work undertaken in the Magistrates Court. Here barristers are treated, for the purposes of billing, as a disbursement of solicitors.

“ Third, there is a need to take account of the Cab Rank rule, which states that a barrister (or a barrister’s clerk on behalf of the barrister) must say yes to taking on a case if:

- (i) the barrister is available to do the case;
- (ii) the case falls within the barrister’s area of expertise; and
- (iii) the rates are deemed reasonable.

It used to be the case (and still is the case for other civil work) that the fees paid for legal aid cases were automatically deemed reasonable by the Bar. As a result, a barrister would have to take on a legal aid case if they had time available and the expertise. This is no longer the case for criminal or family law, where the fees were “undeemed” as reasonable by the Bar. This makes it easier, in principle, for clerks to turn work away.

The implications of these three factors for the analytical approach is discussed in Section 2.3 below.

### **2.2.3 The remuneration of legal aided work**

As noted above, there have been recent changes in the fees offered for legal aided work that have led to the Bar “undeeming” certain types of legal aided work under the Cab Rank rule. These changes to remuneration, and the subsequent “undeeming”, have occurred relatively recently. As such, the effects on work undertaken are likely to be only now becoming apparent.

This section outlines the remuneration schemes for each type of law, and describes the recent changes for criminal and family law. The intention is to provide the necessary context for interpreting the trends in the data and also for interpreting responses to the various surveys. This section also discusses the fees available for legal aided work in the context of fees available for other types of work or for other clients.

#### ***An overview of legal aid fees***

Prior to 1997, barristers were remunerated for all legal aid work undertaken under a system of Ex Post Facto (EPF) determination. This system allowed the barrister to bill retrospectively for all work undertaken on a case and for the taxing master in the court to then judge whether the bill was reasonable for the amount of work undertaken and the complexity of the case. The principles applied by taxing masters for legal aided work were agreed between the judges and the LSC (previously the Legal Aid Board), and in this way the LSC exercised control over legal aid rates.

The EPF system of remuneration is still in place for other civil law. However, for both criminal and family law the a system of graduated fees has been introduced. This applies for cases costing up to a maximum of £150,000 for criminal work. For civil cases, the threshold is more complicated; cases costing less than £25,000, where a QC has not been instructed, or in family case where the final hearing is likely to last fewer than 10 days. Those family cases not covered by graduated fees maybe classified as High Cost Cases (HCC) and are

subject to a different set of remuneration changes, either via individual case contracts or EPF.

Taking the introduction of the graduated fees first, Figure 10 illustrates the time-line for their introduction for family and criminal law, and the subsequent “undeeming” of this work by the Bar.

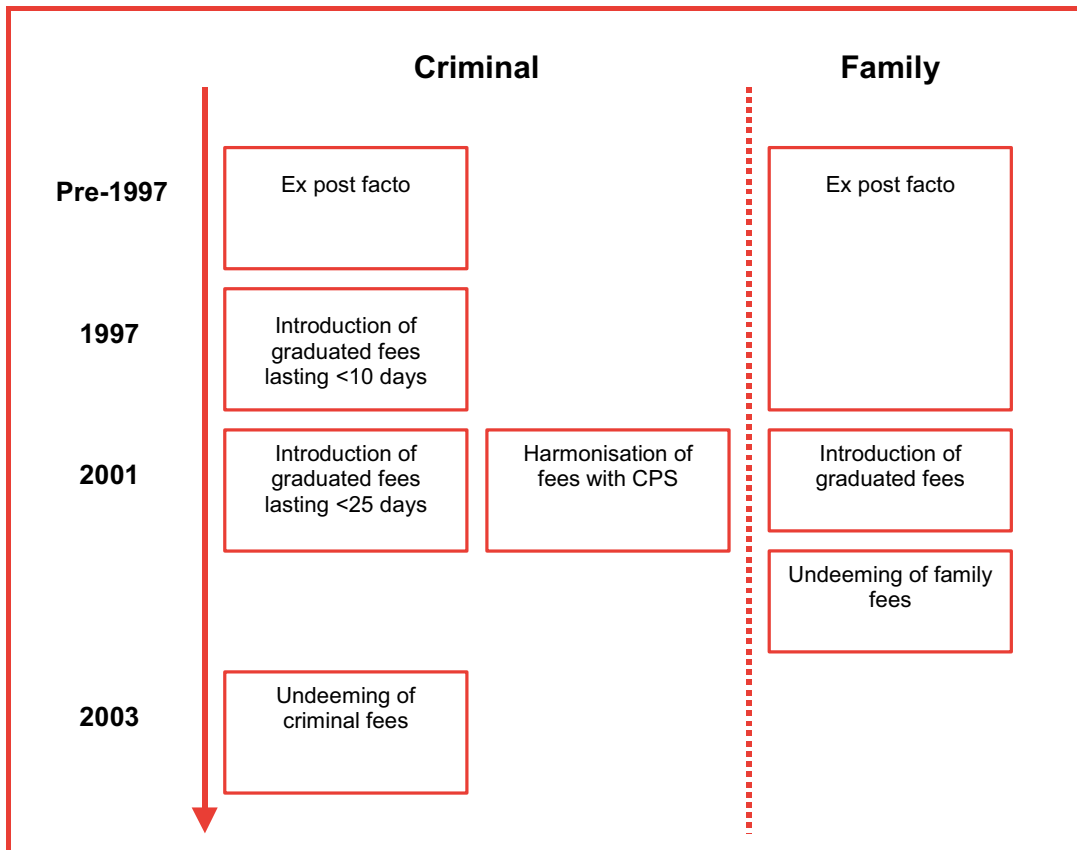


Figure 10: Introduction of graduated fees for criminal and family work

Graduated fees were introduced first for criminal cases lasting fewer than 10 days, which occurred in 1997. The graduated fees introduced standard payments for particular tasks – case preparation, plea and directions hearing, sentencing – where the fee would differ depending on the length of documents to be read, whether the defendant pleads guilty or not guilty, and on the number of days in court. The intention was that barristers should be remunerated on the basis of outputs delivered rather than time spent.

This scheme was extended to criminal cases lasting up to 25 days in 2001. At the same time, rates paid by the CPS – the other main procurer of barristers for criminal work – were brought into line with legal aid rates. The CPS had previously paid lower rates than those available under legal aid, leading to concerns about equality of arms between the defence and prosecution. The graduated fee was also introduced for family cases in 2001. This followed similar principles to the scheme for criminal cases, where payment was made on the basis of outputs delivered.

In response to the introduction of graduated fees, the Bar took the decision to “undeem” family work, which had previously been captured under the Cab Rank rule. This occurred in late 2001. Criminal work was not “undeemed” until November 2003.

With respect to HCCs, the DCA and LSC introduced August 2001 a system of contracting for each individual case. This allowed the scope of work to be determined in advance of the case beginning and the fee for the work to be agreed. The introduction of contracts and negotiations relating to total fees meant that these cases always fell outside the Cab Rank rule.

### ***The impact of graduated fees on remuneration***

The impact of fees in terms of remuneration is not straightforward to estimate. This is largely because two effects occurred with the introduction of the fees, namely:

- ⌘ a change in the structure of remuneration, with certain cases and activities paying a higher fee than was previously the case and certain cases and activities paying a lower fee; and
- ⌘ a change in the level of fees paid, on average.

Work was undertaken by the DCA in conjunction with an advisor to the Bar Council to understand these two effects in more detail for the family graduated fees. This work was undertaken by comparing the effective fee rate for cases undertaken 19 months prior to the introduction of the graduated fee, with the effective fee rate paid to barristers for cases completed up to 19 months after the introduction of the fee.

The analysis suggested that the effective fee rate rose in comparison with what it was under the EPF system for short cases, and fell for cases of longer duration. On average, however, it suggested that rates fell by between 11% and 13%, with larger reductions for ancillary relief and private family law, and an increase in rates for public law children cases. Members of the Criminal Bar also reported reductions in the effective fee rate for legal aided cases, especially those remunerated under HCC contracts.

The figures presented above are acknowledged to be estimates. Difficulties arise in undertaking an appropriate analysis given that the work involved in any one case differs from another, and also given that the full effects of the fees have yet to work through. In particular, since some cases last for a number of years, there are cases that have still not completed that are being remunerated under the EPF scheme. The figures presented above should therefore be taken as indicative only.

### ***Comparison with fees paid by other clients***

A key issue for the supply of barristers in relation to legal aided services will be how the fees compare to those that could be obtained providing advocacy and advice to another client. While information relating to fees paid by other types of clients is limited, some progress can be made by, in the first instance, identifying

the other potential clients of barristers undertaking legal aided work in the different categories of law. This is summarised in Table 3.

	Legal aid	Other public sector	Private
Criminal	Accounts for large share of demand	Mostly CPS, plus some demand through Serious Fraud Office, Customs and Excise	Negligible demand
Family	Smaller share of demand than for criminal	Main clients are local authorities, particularly for public law children	Considerable demand
Other civil	Smaller share of demand than for criminal	Central Government and local authorities are the main clients and account for significant share of demand	Considerable demand

Table 3: Potential clients for barristers, by type of law

The key points are as follows.

- “ *Barristers specialising in criminal law have two main clients:* Barristers will typically work either for legal aided clients or for the CPS. Demand from the Serious Fraud Office and Customs and Excise is not insignificant but tends to be for specialist cases requiring specialist expertise and would therefore not be an option for most criminal barristers. As discussed above, the fee rates for legal aid criminal aid work have been harmonised with those paid by the CPS.
- “ *Barristers specialising in family law have a broader potential mix of clients:* For most private family law, barristers will have the choice of undertaking work for legal aided or private clients. The large private market arises due to the discretionary nature of legal aid in this area, with only a minority of potential clients being eligible. This is not the case for public law children cases, where legal aid is non-discretionary. For this type of work, barristers will typically work either for a legal aided client or for a local authority. However, since a barrister undertaking public law children cases would have the relevant expertise to also undertake ancillary relief work, the range of clients for barristers working on legal aid public law children cases is not limited. While there is little evidence on the level of fees paid by private clients or by local authorities, the Bar report that fees for private work are higher than available for legal aid work; fees paid by local authorities are more comparable with legal aid.
- “ *Barristers specialising in other civil law also have a broader mix of clients:* It is difficult to generalise across other civil categories of law, given that there are many different specialist areas of law classified as other civil. However, for most of the specialisms, there will be a number of different clients, including both private clients and other public sector organisations that require advocacy and advice. In particular, it is thought that there is significant demand from

central government departments. No evidence is readily available to inform the level of fees paid by these organisations, either with respect to legal aid (paid under EPF) or by other clients.

Even in the absence of accurate fee information, the above description of clients and suggested ranking of fees available is helpful in understanding the likely supply decisions that barristers take. This is discussed directly below.

## 2.3 ANALYTICAL APPROACH

Thus far this section has provided a description of certain characteristics of the services provided by barristers for legal aid and the context in which these services are delivered. The question is, what do these characteristics and the context of the legal aid scheme imply for the analytical approach? The main implications are described below under the headings of demand and supply. In addition, it should be noted that the analytical approach is also influenced by the time available for the study. This is also considered.

### 2.3.1 Demand for barristers to undertake legal aid work

Demand for barristers' services is primarily for advocacy rather than advice, and is typically required as a result of the solicitor not having higher rights of audience. This is particularly the case for criminal law and less so for both family and other civil. The implication is that demand – in terms of the volume of services required – is largely determined by the demand for legal aid. However, there is a greater degree of flexibility with respect to family law and other civil.

There is a separate issue as to the quality of the advocacy and advice that is demanded. There are a number of relevant issues here.

- “ To the extent that barristers are used for their ability to offer advice on their area of specialism, it may be that solicitors cannot substitute for barristers with respect to all advice. Or rather, that they cannot without a drop in quality. The implication is that the number of occasions on which solicitors have little choice but to instruct a barrister is greater than those cases where higher rights of audience are required.
- “ Obtaining an objective measure of the quality “required” is difficult. In part, it will be determined by the need to secure equality of arms; that is, the expertise and experience required for a barrister will in part depend on the expertise and experience of the barrister representing the other side. It will also depend on the complexity of the case and the issues it raises. As has been noted elsewhere, solicitors will be in a position to judge the quality (expressed in terms of experience and expertise of the barrister) that is required. However, as has also been noted, given that solicitors do not pay for their use of counsel, they have the incentive to obtain the best quality barrister that is available.

Notwithstanding the above, the views of solicitors are nevertheless informative in relation to understanding the experience and expertise that is required of barristers for certain cases. To obtain indicators of excess demand (or under

supply), questions were asked in the survey of solicitors regarding the occasions on which solicitors had been unable to secure a barrister of “appropriate experience and expertise for the case”. However, acknowledging the preference of solicitors for as much experience and expertise as obtainable, further questions were asked in relation to what was the effect (on the case and on the client) of an inability to secure a barrister of “appropriate experience and expertise”.

A further analytical question then arises concerning these indicators of excess demand (or under supply). To the extent that there are occasions on which a barrister of appropriate experience and expertise cannot be secured, what does this mean with respect to under supply? For example, does this mean that there is consistently a number of solicitors that cannot secure a barrister to undertake work from them and that, as a consequence, there may be too few barristers in place to undertake the volume of work?

On one level, this must be the case. However, the policy response would be quite different if this were to occur systematically for all cases, in all parts of the country and at all times over a year or if, instead, the occasions were limited to particular cases, parts of the country and particular times of year – due to peaks in demand, say.

Thus, there is a need for the analytical approach to discern, if possible, the nature of any under supply such that an appropriate policy response can be considered. This involved considering the indicators of under supply in the context of overall changes of demand and supply – using the administrative data – and also comparing the indicators with information gathered from other surveys and from the interviews conducted. Given the imperfect nature of any one data source for the purpose of identifying excess demand (under supply), greater weight was given to findings where more than one source was found to suggest a given finding.

### 2.3.2 Supply of barristers to undertake legal aid work

With respect to supply, it is typically necessary to make a distinction between supply in the short to medium term and in the longer term. In the context of barristers’ services for legal aid, the following applies.

- “ *In the short run criminal barristers have few outside opportunities and there will be relatively stable supply:* That is, the supply demand balance in the short-term is driven primarily by the demand for barristers’ services and is relatively unaffected by any changes to the remuneration rate.
- “ *The short run conditions would be different for barristers specialising in family and other civil law:* These barristers have greater outside opportunities with respect to being able to work for alternative sets of clients, and so the fee levels paid will be more important in the short run. Specifically, where fee rates are lower for legal aid work than for private client work, an increase in demand for private client work would be expected to lead to a reduction in the supply for legal aid work (and there could then be under supply of services for legal aid at the existing rates). Equally, however, if rates were to be increased, one would expect there to be some immediate supply response.

“ *In the longer run, there will be the possibility of both entry and exit by barristers into each type of law in response to the price charged:* The way in which longer term supply decisions are taken will be broadly similar for each type of law. With respect to the decision to either enter the profession or exit – and the decision as to which type of law in which to specialise – individuals will make assessments of the earnings, working hours, possibilities of progression, job satisfaction and so on, offered by different areas of law and alternative professions.

Any changes to remuneration rates should therefore be considered not only in relation to the short term supply/demand balance, but also in relation to the longer terms impact on numbers in the profession.

The approach to assessing the existence of under supply, discussed above, will provide information relating to the short to medium term. Indicators relating to excess supply are more difficult to obtain, without a detailed understanding of fees available for different types of work or indicators through a survey of barristers. While both were available for the report on solicitors, it was not possible for this study and more limited information is available.

With respect to the longer term, in the ideal one would undertake a study of entry and exit in relation to the relative attractiveness (based on a comparison of earnings, hours, progression and so on) of different professions. While some information was available relating to entry and exit, it was not possible to undertake a comparison of incomes in alternative relevant areas of law or other professions.



### 3 Evidence of excess or under supply

This section presents the key findings with regard to the existence of conditions of excess or under supply of barristers' services for legal aided work. The findings draw on the quantitative indicators provided by both the survey of solicitors and the DCA/LSC administrative data and on qualitative information provided during interviews held with members of the Bar, the CPS and the Law Society.

The sources of information used provide a broadly consistent view with regard to under supply of barristers' services. However, it should be noted that the main results are survey based and are therefore subject to the usual caveats (which are described in detail in Section 3.2). In addition, relatively little could be established from the survey to inform the issue of excess supply.

With respect to under supply, the survey revealed that:

- “ 63% of solicitors surveyed said that there had been no occasions in the last year on which they had been unable to secure a barrister of appropriate expertise and experience. The remaining 37% reported that they had experienced at least one occasion on which they had been unable to secure a barrister; this percentage was highest for solicitors undertaking family law and lowest for those practising in the other civil categories of law.
- “ Of those solicitors reporting at least one occasion on which they had been unable to secure the services of a barrister, the majority were unable to do so for between one and five cases. This was consistently the case by type of law, although, the likelihood of being unable to secure a barrister when one was sought was higher for solicitors undertaking family law.
- “ Solicitors reported the implication of being unable to secure a barrister as either a detriment to the advice received by the client or an unacceptable delay on a proportion of these cases. For both criminal and family law, a detriment to the advice provided to a client was more likely to result than a delay. A detriment to the advice provided to the client was also more likely to arise for family law cases than for criminal law.

Whether the occasions on which solicitors were not able to secure a barrister for legal aided cases constitutes a problem is a policy issue. It will depend, first, on the requirements of the Access to Justice Act 1999 and whether, for example, it is acceptable for there to be *any* occasions on which it is not possible to secure the services of a barrister with appropriate expertise and experience. Second, it will depend on the scale of the detriment and delay associated with solicitors not being able to secure the services of a barrister of appropriate expertise and experience.

The survey responses and their implications are discussed in detail in the remainder of this section. Given the limited information in relation to excess supply, this section focuses on evidence concerning under supply.

- “ Section 3.1 begins with an overview of trends in the demand for and supply of barristers’ services for legal aided clients, in order to provide a context for the findings.
- “ Section 3.2 presents the evidence provided by the survey of solicitors and interviews with respect to solicitors’ experiences securing barristers and how these vary according to the services required.
- “ Section 3.3 discusses the implications of solicitors being unable to secure a barrister on particular occasions, with a view to understanding the nature and level of potential existing under supply.
- “ Finally, Section 3.4 discusses the implications of the findings with respect to whether there is a need to alter remuneration rates. In addition, recommendations as to the analysis required to further understand the nature of excess or under supply are made.

### 3.1 THE PROVISION OF BARRISTERS’ SERVICES

To place the findings in context, it is helpful to understand the extent to which there have been changes in the volume and nature of services delivered by barristers. This section provides an overview of trends in legal aid expenditure and cases undertaken by solicitors and barristers.

The headline figures show an increase in spending on legal aid over the past five years (from 1998 to 2002) of 18%, associated largely with an increase in spending on criminal cases and, to a lesser extent, public law children work. It is likely that this is driven, at least to some extent, by an increase in the volume of work undertaken, particularly for criminal cases where fee rates are thought to have fallen.<sup>15</sup> This would suggest that there has been an increase in the demand for and supply of barristers’ services, at least for criminal cases.

However, it is difficult to report this with accuracy. It should be noted that there are some weaknesses relating to the administrative data, due largely to changes in the administration of the legal aid scheme. Specifically:

- ⚡ the change in the basis of remuneration of barristers for criminal and family work – from Ex Post Facto determination to graduated fees – led to the earlier payment of fees under the new system and an increase, therefore, in expenditure overall where the Ex Post Facto and graduated fee schemes overlap<sup>16</sup>;
- ⚡ this problem is compounded by the fact that neither civil nor criminal data record an exact measure of actual time input into a case, which means that it is not possible to establish real time input into a case;

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<sup>15</sup> As discussed in Section 2.2.3, this was the finding of work undertaken jointly by the DCA and an advisor to the Bar Council.

<sup>16</sup> It is expected that this would be followed by a decline to a steady state level of expenditure once the majority of cases involving Ex Post Facto payments have finished. This return to steady state expenditure is expected to occur in the near future.

- ⚡ it has not been possible to obtain civil legal aid data going back prior to 1999 that is consistent with the data after 1999 and so any trends are based on a limited amount of historical information; and
- ⚡ the data relating to expenditure and cases for criminal work does not allow the identification of barristers' work in the magistrates court, although there is a longer time series of data available for criminal legal aid work.

Notwithstanding these comments, the data provide a useful context with respect to, first, aggregate demand for barristers' services and, second, barristers' roles alongside solicitors. Where possible, the data are supplemented by barristers' and solicitors' views of changes in the use made of barristers.

### 3.1.1 Total expenditure on barristers on legal aid cases

According to LSC annual reports, total legal aid expenditure increased from £1.62 billion in 1998 to £1.91 billion in 2002. Expenditure on civil legal aided cases declined from £844 million to £813 million while expenditure on criminal legal aided cases increased from £779 million to £1.10 billion. Consequently, the share of total legal aid expenditure attributable to civil legal aided cases fell from 52% to 43%, in favour of non-discretionary criminal work.

#### *Civil legal aid*

To analyse trends within civil legal aid, data was used for 'closed cases' only; these are cases that are finished, data for which provides a more accurate picture of the cost of a given set of cases.<sup>17</sup> According to the LSC, trends based on the closed case data are reliable.

Figure 11 shows that total expenditure on barristers and solicitors (including disbursements, travelling costs, profit costs and counsel fees) on all civil closed cases has remained relatively stable at approximately £600m per annum.

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<sup>17</sup> Closed cases do not reflect the current cash-flow position of the LSC and will be lower than the expenditure implied than that given in the LSC annual reports.

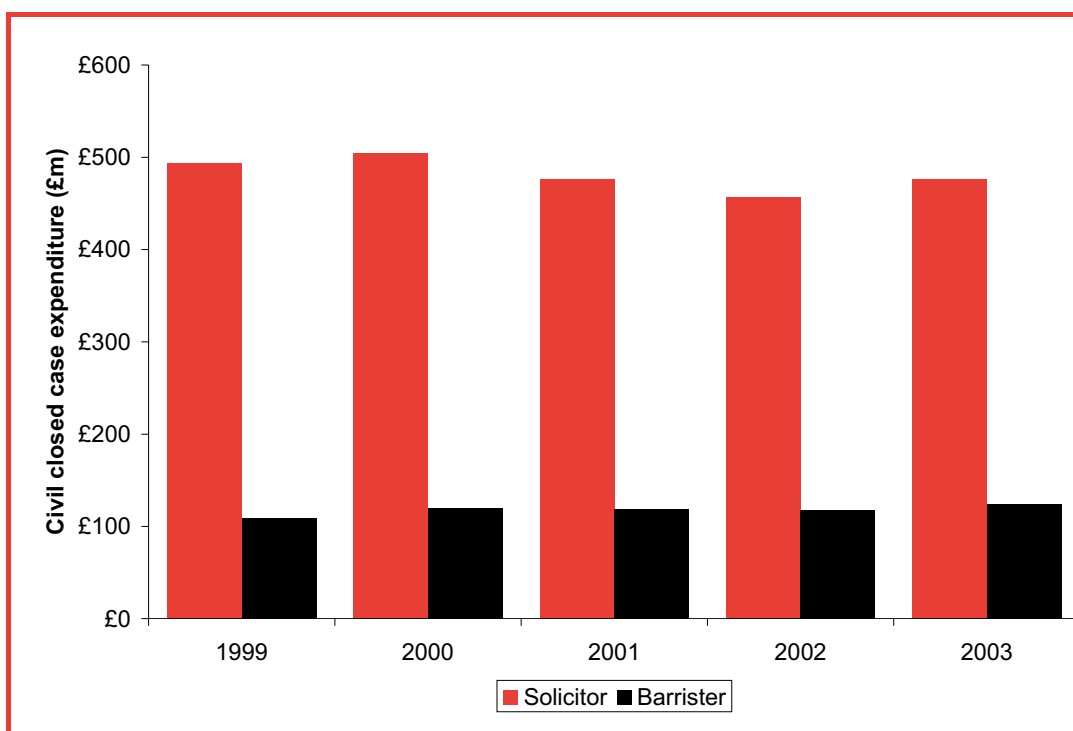


Figure 11: Total costs of civil closed cases

Source: LSC administrative data

The costs were incurred, however, with respect to a declining number of cases. In 1999, there were over 218,000 closed cases compared to an estimated<sup>18</sup> 171,000 closed cases in 2003, indicating a decline of approximately 27%. Figure 12 shows that the number of cases in which barristers and solicitors were involved have both declined. Figure 11 and Figure 12, taken together, imply that the cost per case for civil closed cases has increased over the past five years (accepting the pull forward effect of the change in the remuneration scheme).

<sup>18</sup> The civil closed data is available up to the 3<sup>rd</sup> quarter of 2003 and so it has been extrapolated linearly by a factor of 4/3 to give an estimate of the year end figure.

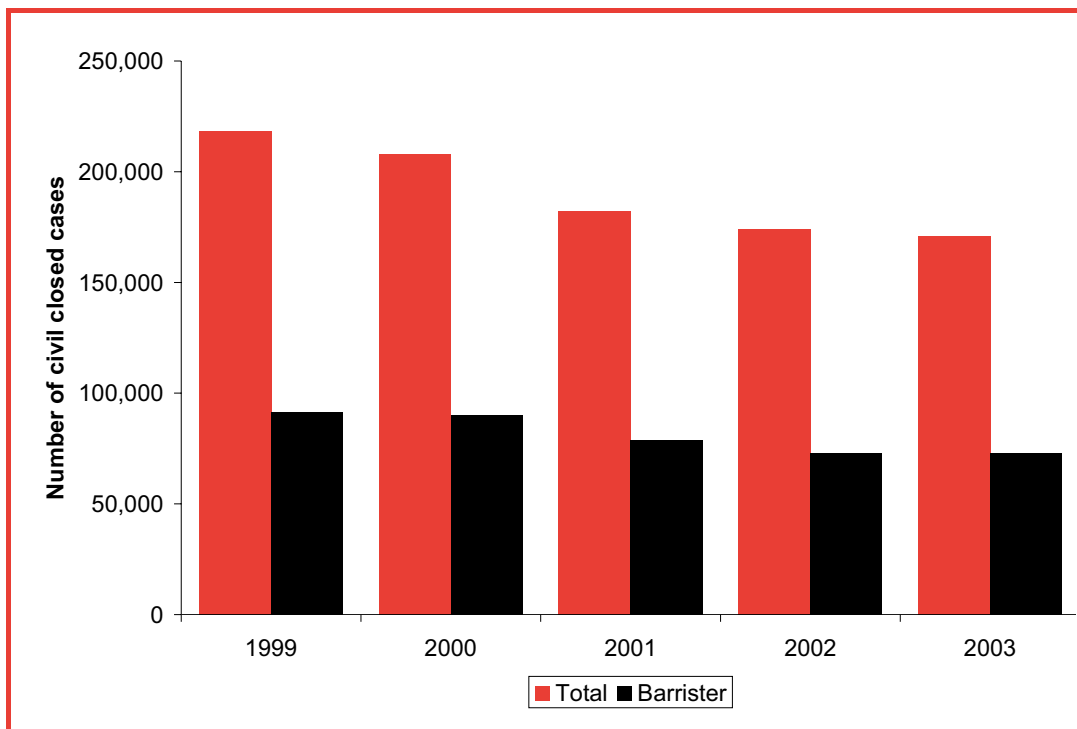


Figure 12: Total number of civil closed cases

Source: LSC administrative data

Although total civil closed case expenditure has been stable, Figure 13 and Figure 14 show that *within* the civil category of work there have been changes in the extent of barrister involvement on the basis of expenditure and number of cases. Expenditure on barristers for public law children work has doubled and the number of the cases they are involved in has risen by approximately 30%. Again, there has been an apparent increase in the cost per case public law children. This is likely to be associated, in part, with the increase in fees for public law children work under the graduated fee as well as by the pull forward effect of the fees.

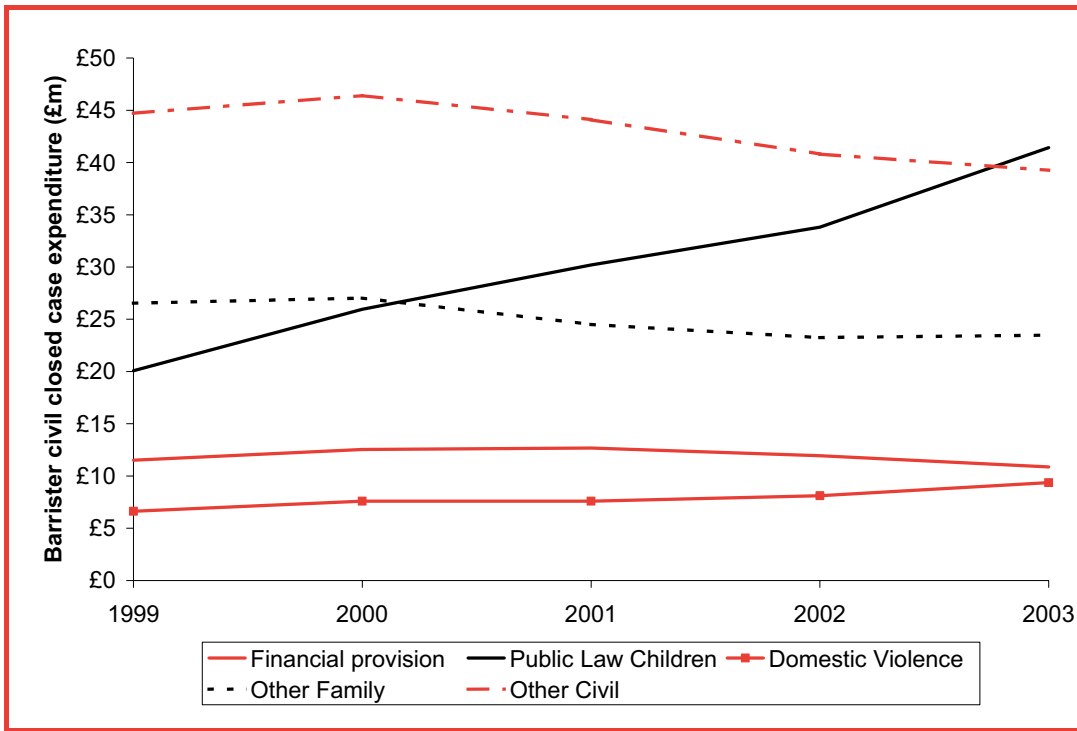


Figure 13: Cost of closed civil cases including barristers by type of law

Source: LSC administrative data

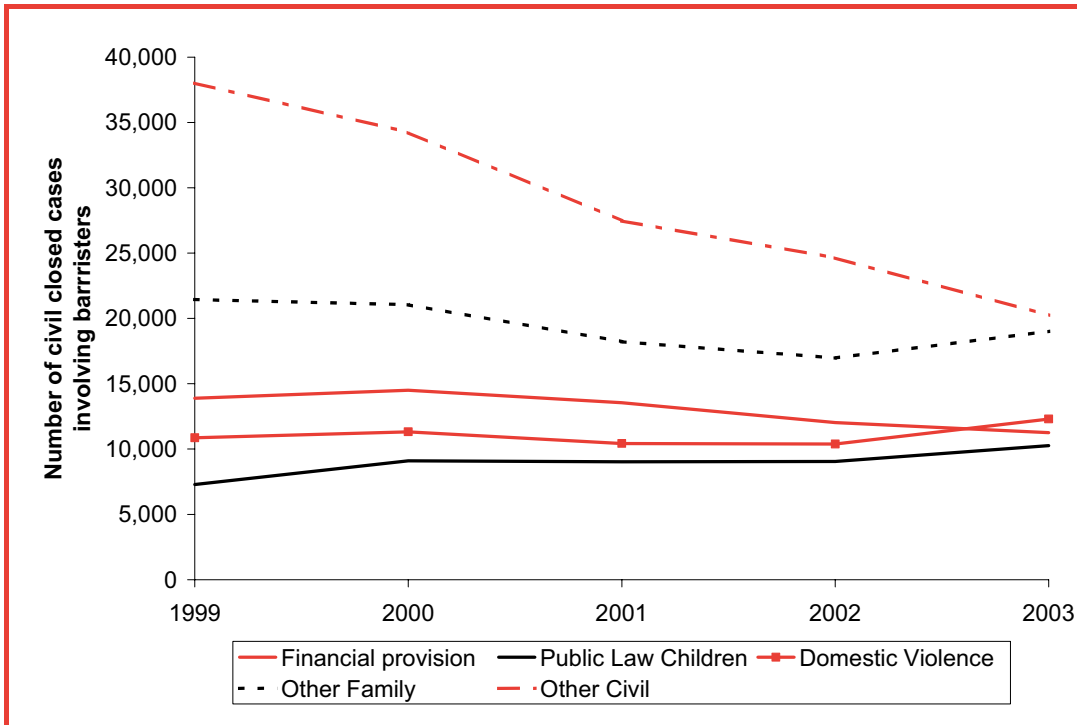


Figure 14: Number of closed civil cases including barristers by type of law

Source: LSC administrative data

The most significant trend observed by members of the Family Bar was a reduction in barristers' services provided for ancillary relief cases (shown in the figure as financial provision), and also for advice and preparation of documents. The Bar indicated that the willingness of barristers – particularly senior-junior barristers – to undertake this work had fallen as a result of the introduction of the graduated fee.

This view is supported by the survey of solicitors. As shown in Table 4, while most solicitors stated that their use of barristers for advocacy and advice stayed the same over the last three years, there was a significant minority of solicitors reporting a reduction in the use of barristers.

	Advocacy	Advice
Increased	7%	3%
Decreased	29%	22%
Stayed the same	62%	74%
Don't know	2%	2%

Table 4: Change in the use of barristers for advice/advocacy (last 3 years)

Source: Survey of solicitors

For family law, in particular, the reduction in the use of barristers for advocacy was considerable; 40% of respondents reported a reduction. This effect may have been driven either by a fall in the demand for barristers' services, or by a fall in the supply such that solicitors would have to undertake the work themselves. Given the views put forward by the members of the Family Bar, it may be reasonable to assume that the effect is largely supply driven. This issue is returned to in Section 4, where the impact of the graduated fees is discussed in the context of longer-term supply issues.

However, it is interesting to note here that there is an apparent inconsistency between the administrative data – which shows little decline in expenditure on ancillary relief cases – and the view presented by the survey responses and by the Bar. While the administrative data is difficult to interpret in the face of fee rate changes and the pull forward effect on expenditure, there may also be a difficulty in using the administrative data currently available at a time when the full effect of the introduction of the graduated fees may not have worked through; members of the Family Bar noted that barristers are waiting for the outcome of the review of graduated fees.

### ***Criminal legal aid***

At the current time, expenditure on criminal legal aid is similar in the lower and higher courts; £520 million was spent in lower courts in 2002 compared with £568 million in the higher courts. These figures represent a considerable increase on expenditure in 1998; expenditure increased by 38% between 1998 and 2002.

With respect to work undertaken by barristers specifically, and expenditure on barristers, there is no information relating to the lower court (barristers are

procured through solicitors and do not submit a separate bill). In the higher courts there has been an increase in expenditure on both barristers and solicitors, as can be seen in Figure 15.

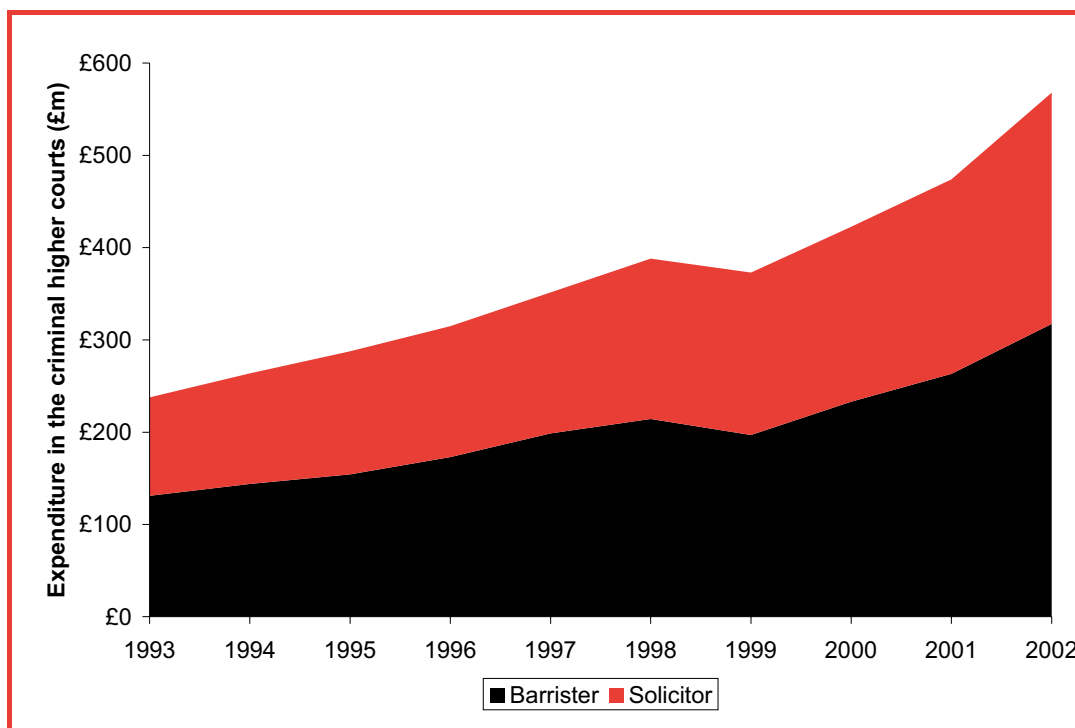


Figure 15: Barrister and solicitor costs in higher court criminal legal aid

Source: DCA administrative data

This increase in expenditure occurred without an accompanying increase in the number of cases; measured by the number of committals, sentence and appeal hearings, the number of cases brought to the higher court varied between 114,000 and 120,000 between 1998 and 2002. This is comparable with the number of crown court finalisations data provided by the CPS (CPS finalisations are within 97% to 104% of the number of hearings). Data provided by the CPS show that the number of cases held in the magistrates' courts has remained at approximately 1.4 million between 1998 and 2002.<sup>19</sup>

Since expenditure has risen and the number of cases has not, the cost per case in criminal higher work has risen. In addition, if the price of criminal work has declined since the introduction of graduated fees, as suggested by the Bar and the DCA, the hours worked by barristers – and therefore the demand for their services on criminal cases – has also risen. The interviews with Bar, CPS and Law Society did not provide any qualitative information that could be used to interpret these trends.

<sup>19</sup> The criminal bar indicated that at a local level the number of crown court cases (and their workload) varies with legislation and local conditions, such as policing levels, but that the number of cases each year does not change markedly.

### 3.1.2 The extent of barrister involvement relative to solicitors

Since solicitors have some discretion about the type of work they ask barristers to undertake, it is interesting to observe the extent of barrister involvement relative to solicitors in order to understand the nature of changes in demand and supply.

As implied by charts in the previous section, barristers are involved in a larger share of civil cases than reflected by their share of expenditure. Barristers' input, in terms of the number of cases in which they are involved, was stable between 1999 and 2003, remaining between 40% and 45%. Barristers' share of total civil legal aid expenditure increased by 3 percentage points from 18% in 1999 to 21% in 2003.

Figure 16 demonstrates that the aggregate picture presented above masks variation in the share of civil work undertaken by barristers by type of law. For other civil work and public law children act cases, barristers' share of expenditure relative to solicitors is higher and has increased over time.

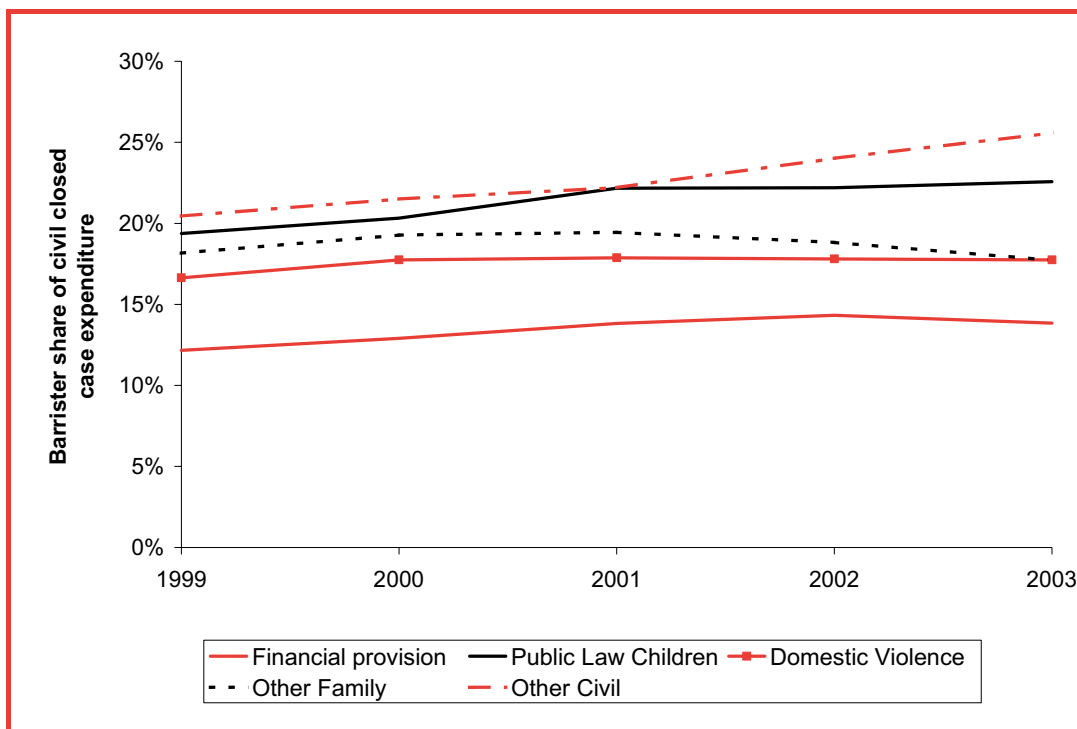


Figure 16: Barrister share of civil costs

Source: LSC administrative data

There is also considerable variation in the proportion of civil cases in which barristers are involved, by type of law. Barristers were involved in around 30% of public law children act cases and their involvement varied between 50% and 60% for other civil cases.

Finally, Figure 17 shows that the share of civil expenditure on barristers is higher in London than outside London. These figures have been stable over the past five years. The larger involvement of barristers in cases in London may be driven

by the relative concentration of other civil cases in London, where barristers play a more significant role.

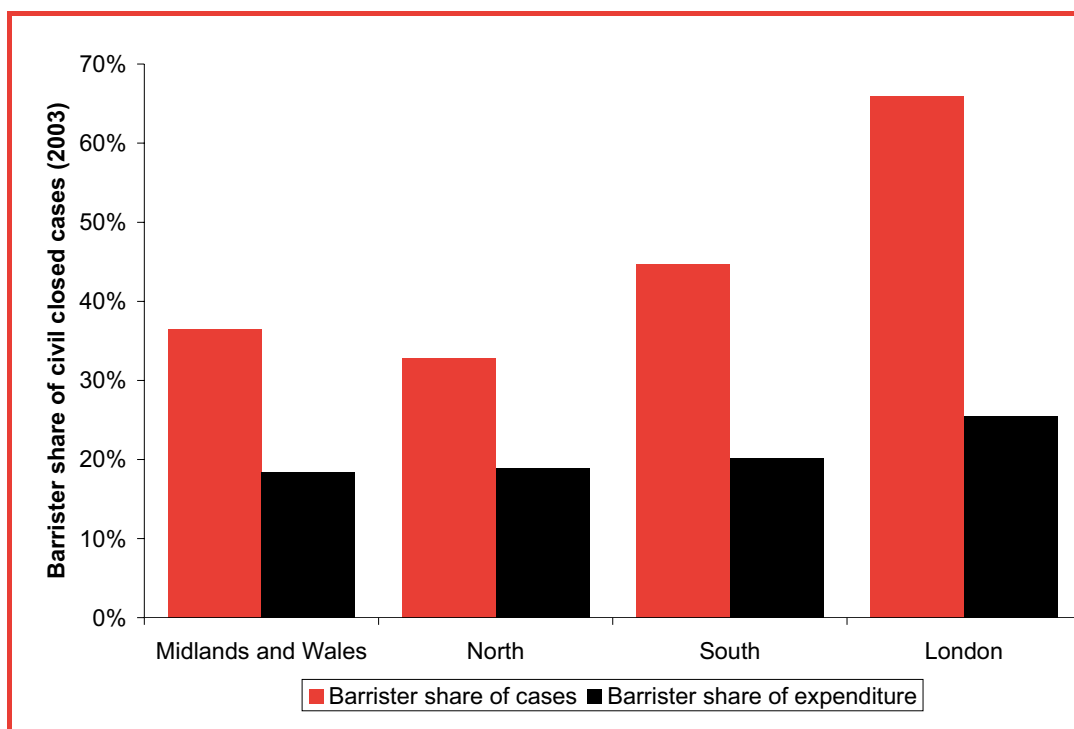


Figure 17: Barrister share of civil costs and cases by region

Source: LSC administrative data

As noted previously, directly comparable data allowing a breakdown of work within criminal legal aided work is unavailable. However, on the basis of the available data, it can be seen that barristers play a larger role with respect to criminal cases than for civil work. Specifically, the data show that, in the higher courts, barristers' share of criminal expenditure was between 53% and 56% for the period 1998 to 2002.

While the administrative data presented and described above cannot be used to identify the existence of either excess or under supply in the provision of barristers' services for legal aided work, the data are helpful for understanding the implications of the findings in relation to under supply. The discussion of under supply should also be interpreted in the light of the recent introductions of the graduated fees, which provide some information on the likely relationship between the remuneration paid for legal aided work and barristers' willingness to undertake legal aided work.

### 3.2 INDICATORS OF UNDER SUPPLY

Given the limitations of the administrative data, the survey of solicitors and the interviews with members of the Bar, the CPS and the Law Society were undertaken to establish *indicators* that could help to form a view on excess and under supply. As noted in the introduction to this section, in interviewing

solicitors – in their capacity as direct users of barristers – it was easier to establish indicators of under supply (where a barrister could not be secured) rather than indicators of excess supply.<sup>20</sup>

Given a relative lack of information relating to excess supply, this section focuses on under supply with a view to establishing both the magnitude and nature. The section provides the headline indicators and describes the circumstances in which under supply is most likely to occur and discusses the implications. One recommendation of this study is that further information should be collected to inform this issue, which is discussed in Section 3.4.1, and also that further data would be desirable to obtain a full understanding of the extent of any under supply.

It is important to recognise conclusions drawn from the survey are relevant only for the short-term and within the current legal aid framework. In addition, the results are of direct relevance to the responding group only. The extent to which conclusions can be applied to *all* solicitors largely depends upon how representative the survey is; the analysis presented in Annexe 2 suggests that the sample is broadly representative of the population.

### 3.2.1 Unable to secure the services of barristers

The survey revealed that 37% of solicitors experienced at least one occasion over the past year on which they were unable to secure the services of a barrister of appropriate expertise and experience to undertake a legal aided case. This headline finding is shown in Figure 18. It contrasts with 14% of solicitors stating that either they or their colleagues had experienced similar difficulties in finding barristers to undertake cases for private clients.<sup>21</sup>

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<sup>20</sup> It is important to recognise conclusions drawn from the survey are relevant only for the short-term and within the current legal aid framework. In addition, the results are of direct relevance to the responding group only. The extent to which conclusions can be applied to *all* solicitors largely depends upon how representative the survey is; the analysis presented in Annexe 2 suggests that the sample is broadly representative of the population.

<sup>21</sup> This figure excludes the 38 solicitors who answered ‘don’t know’.

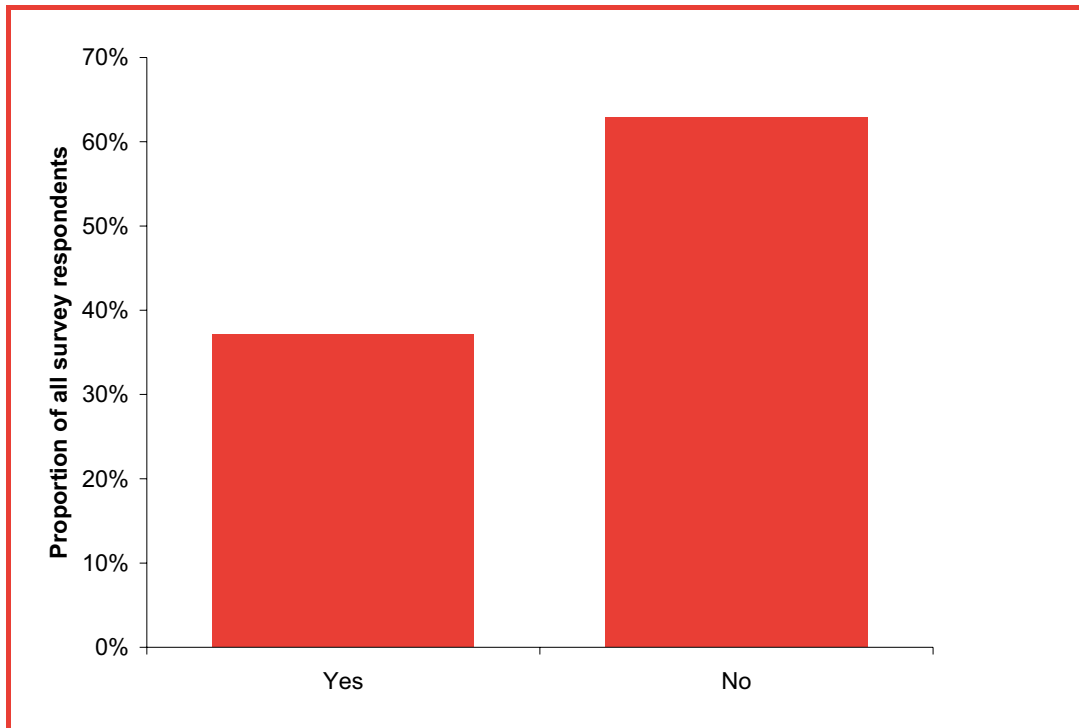


Figure 18: Unable to secure a barrister on at least one occasion

Source: Survey of solicitors

Figure 19 shows that the majority of solicitors who were unable to secure a barrister found that this occurred for between one and five cases over the past year, although, for a number of solicitors the figure was higher.

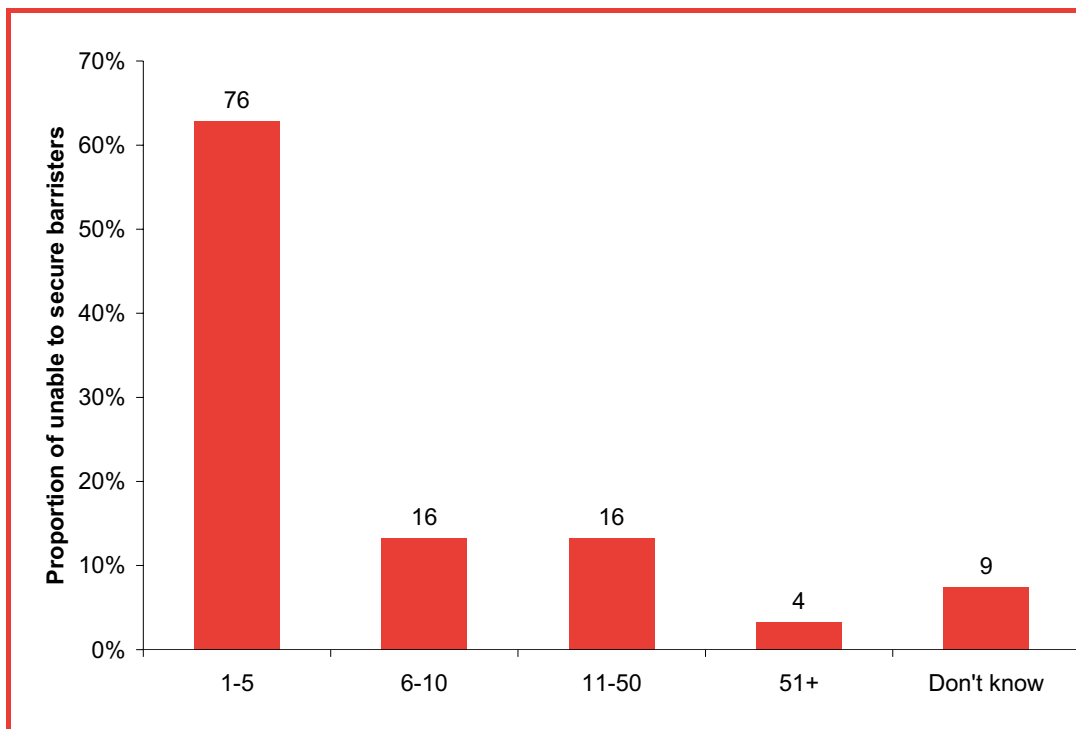


Figure 19: Number of cases where unable to secure the services of a barrister

Source: Survey of solicitors

Given the above, it can be estimated that where solicitors (all solicitors, not just those experiencing a difficulty) were seeking to obtain a barrister, they were unable to do last year so for between 6% and 12% of cases, depending on the type of law.<sup>22</sup> This constitutes a smaller proportion – approximately 2% or 3% – of all legal aid cases undertaken last year by solicitors' surveyed.

There is therefore some evidence of an under supply of barristers undertaking legal aided work. The next section explores responses to the survey to understand the occasions on which it is most likely to occur.

### 3.2.2 Factors associated with an inability to secure barristers

Following the framework in Section 2.1, conditions of under supply are likely to differ by economic market, namely: by type of law, by seniority and by geographic location. This section considers the extent to which the indicators of under supply differ by each of these characteristics, and by a number of additional characteristics.

#### *Type of law*

Figure 20 shows that the likelihood of solicitors being unable to secure a barrister is highest for family law (nearly 50% of family solicitors were unable to secure a barrister) and lowest for other civil law (below 20% for other civil solicitors).

<sup>22</sup> Annexe 3 provides details of the calculations undertaken in order to provide these estimates.

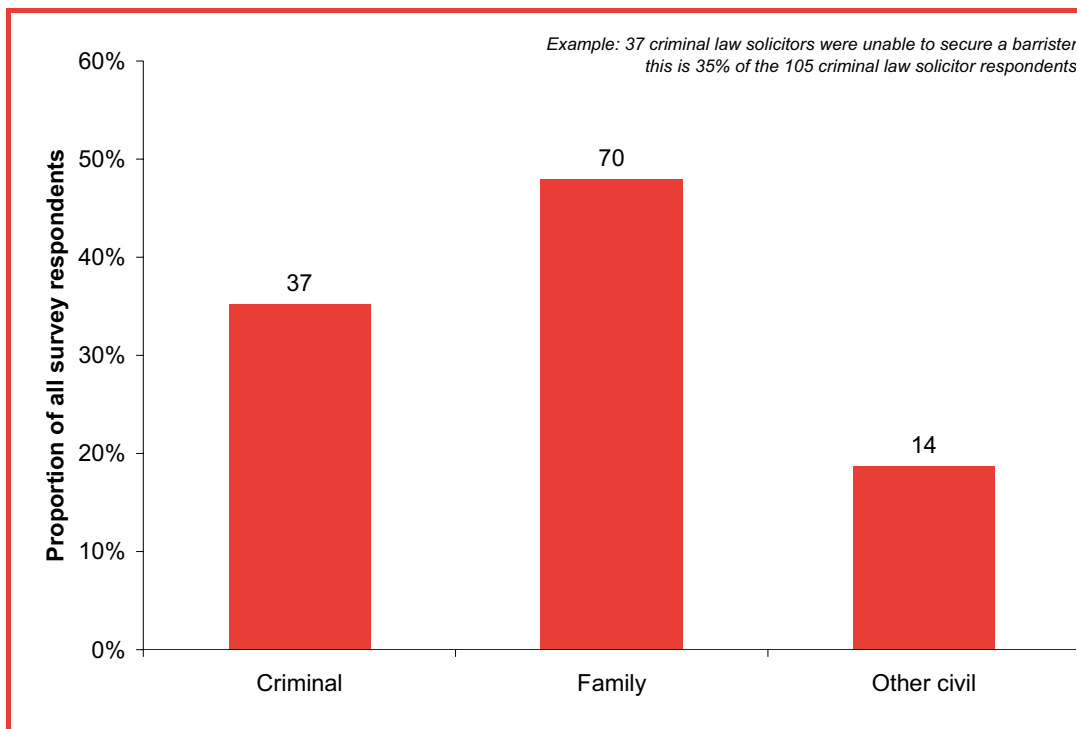


Figure 20: Unable to secure a barrister on at least one occasion by type of law

Source: Survey of solicitors

Differences by type of law are presented more fully in Table 5, which show the number of cases undertaken in 2003 by solicitors surveyed, the number of cases for which barristers were sought by solicitors and the number of occasions on which solicitors were unable to secure a barrister. The table shows that the proportion of occasions on which solicitors were unable to secure a barrister, where one was sought, was higher for family law (between 8% and 12%) than for criminal law (between 6% and 8%). When expressed as a proportion of all legal aid cases undertaken by solicitors in 2003, there is little difference between the law types.

	Criminal	Family	Other civil
Total cases	24,550	18,570	10,410
Cases where barrister used	5,240 – 7,040	3,510 – 5,290	3,100 – 5,320
Cases unable to secure a barrister	400	420	330
Unable to secure a barrister as a % of all cases	2%	2%	3%
Unable to secure a barrister as a % of cases where barrister sought	6% – 8%	8% – 12%	6% – 11%

Table 5: Number of cases conducted in 2003 by those solicitors surveyed

Source: Survey of solicitors, Frontier Economics estimates (numbers rounded to nearest ten units)

These findings are consistent with what one would expect to find given the recent introduction of graduated fees for criminal and family law and the subsequent undeeming of legal aided work by the Bar. Specifically, the undeeming of legal aided work has allowed a supply response to the change in remuneration rates under the graduated fees by allowing barristers to turn work away. Given the greater alternative sources of work (that is, private client work) for family barristers, one might expect a larger supply response away from legal aided work in recent years in family law than in criminal.

Alternatively, it is possible that the higher likelihood of being unable to secure the services of a barrister of appropriate expertise and experience for family law cases is more persistent in nature. In the absence of reliable historic data of this nature, it is not possible to discern if this is a recent phenomenon. This issue is returned to below.

### ***Level of experience***

Depending on the type of case, the solicitor may require a certain level of experience and expertise from a barrister. The chart in Figure 21 shows that the majority of solicitors (over 60%) were trying to secure a senior-junior barrister when they were unable secure the services of a barrister. The same pattern was observed across all law types.

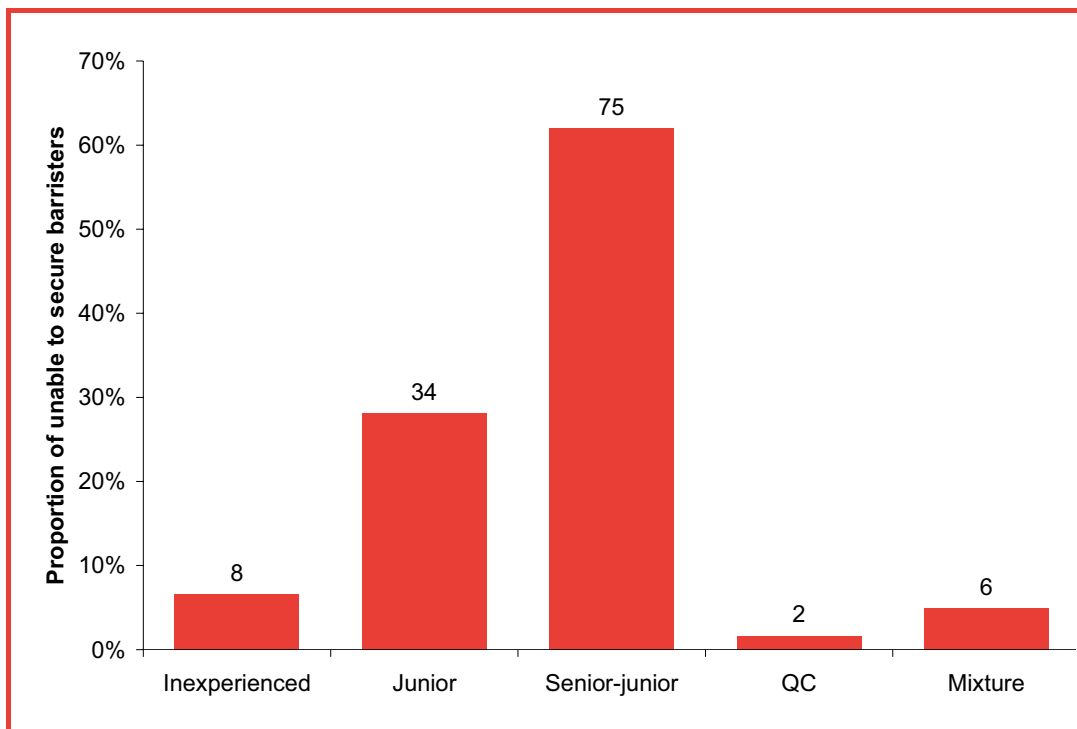


Figure 21: Unable to secure a barrister by the level of experience required

The fact that difficulties occurred with respect to securing senior barristers was not, however, a reflection of these barristers being most in demand. Typically, solicitors responding to the survey sought a mix of expertise and experience.

The finding is consistent with views expressed by members of the Family Bar. As noted above, members of the Family Bar suggested that experienced barristers are increasingly less willing to undertake ancillary relief cases under the graduated fee scheme than they would have been under EPF remuneration; under EPF, senior barristers were more willing to take on the complex cases.

Members of the Family Bar gave a number of reasons were given for this. First, it was stated that the graduated fee scheme does not allow a sufficient amount of preparation time that is required for the more complex cases and thus the effective remuneration is below that of a less complex case. This is linked to the second reason given, that there is no “career structure” for legal aided work under the graduated fee. In essence, the implication is that there is no additional payment for more complex cases and senior barristers do better to target private work.

It is interesting to consider this view put forward by the members of the Family Bar in relation to the findings for criminal law; specifically, that similar problems arise for criminal law with respect to securing the services of senior-junior barristers and yet criminal barristers do not typically have private clients for whom they can work. One interpretation of this is that the inability of solicitors to secure the services of a senior-junior family barrister may not be linked specifically to the availability of outside options.

Alternatively, if the effect in family law is linked specifically to the graduated fee, the existence of under supply in criminal law could be of a different nature and could be a more persistent problem associated with too few senior-junior criminal barristers to undertake the work. This may have resulted from the increase in demand for barristers' services in criminal law over the past five to ten years, associated with the recent increase in the cost per criminal case (noted in Section 3.1.1).

### *Location*

Figure 22 shows that there are few differences in the ability of solicitors to secure barristers across the four regions considered. The exception is that solicitors in London are marginally less likely to be unable to find a barrister than those in other regions. This effect, however, may be driven by fact that solicitors seeking barristers to undertake other civil work were unable to secure a barrister on fewer occasions; solicitors in London were most likely to undertake other civil work.

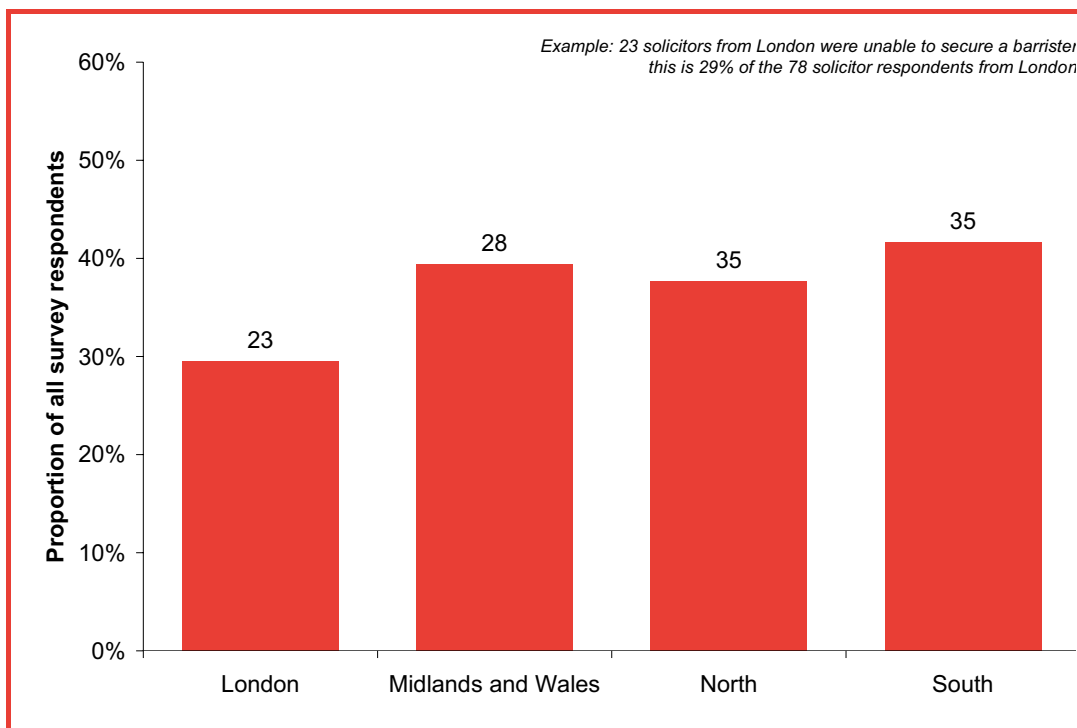


Figure 22: Unable to secure a barrister by the location of the solicitor

Source: Survey of solicitors

The chart shown in Figure 23 indicates a second location effect; that the likelihood of being unable to secure a barrister is higher where solicitors are seeking to procure one located close to their offices.

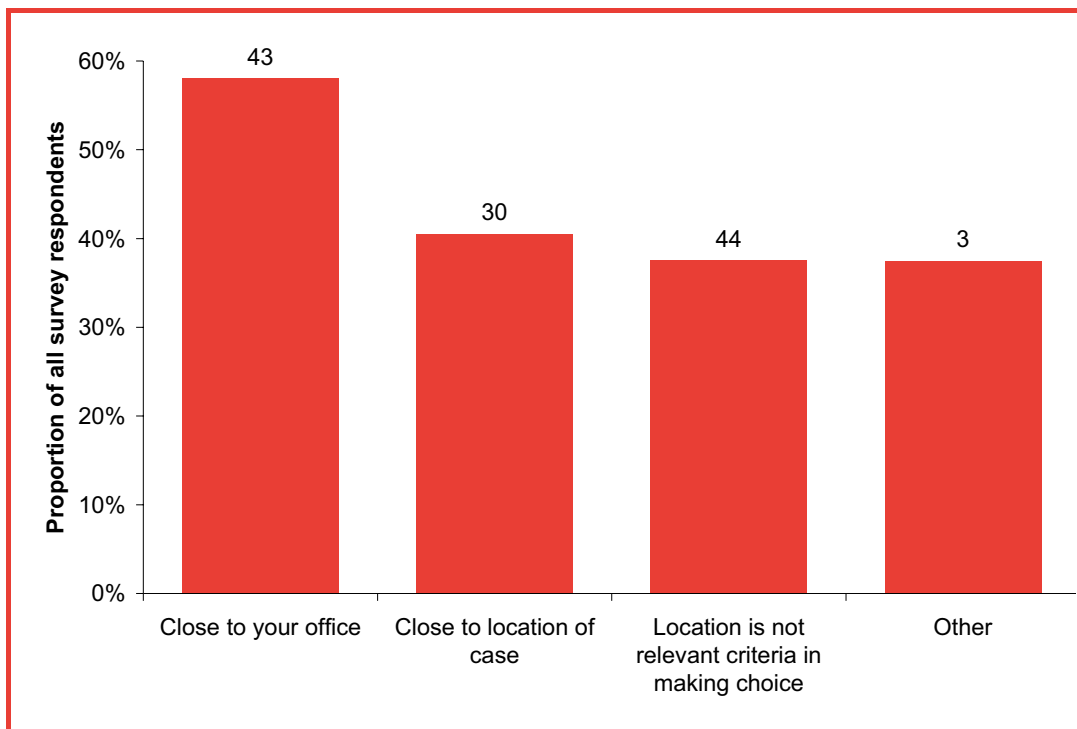


Figure 23: Unable to secure a barrister by the location of the barrister

Source: Survey of solicitors

The figure shows that nearly 60% of those solicitors seeking to secure the services of a barrister located close to their office were unable to find a barrister on at least one occasion in the past year.

#### ***Requirement for advocacy or advice***

As was established in Section 2.2.1, solicitors seek to instruct a barrister for a number of different reasons, including the fact that it is a requirement of the court and that there may be insufficient resources in the solicitor firms. Figure 24 shows that the inability to find a barrister does not seem to vary with the reason for a barrister being sought.

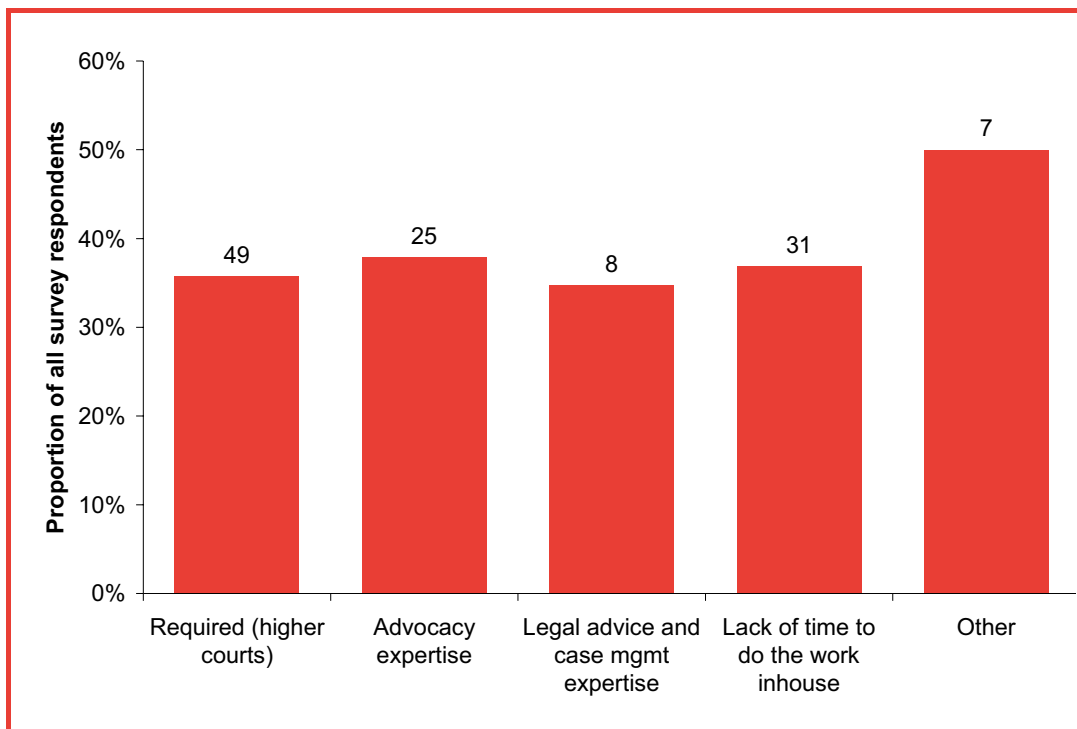


Figure 24: Unable to secure a barrister by the reason for needing them

Source: Survey of solicitors

However, this lack of variation could reflect the fact that differences in solicitors' motivation for securing a barrister do not translate into differences in the services that barristers are asked to supply. Thus, barristers may not be expected to have different willingness to undertake the work by the categories shown above.

Rather, the difference might appear in the response of solicitors as a result of not being able to secure a barrister. For example, where the barrister was sought because the case required higher rights of audience (expressed above as the court required it) the solicitor would not necessarily have the option of undertaking the work himself or herself. This issue is discussed in Section 3.3 below.

### ***Size of firm***

Finally, responses to the survey were used to identify whether the likelihood of being unable to secure a barrister was associated with the size of solicitors' offices. Evidence of smaller offices having fewer difficulties was reported in the SFLA (2002) survey of solicitors. Specifically, the SFLA survey found that solicitor firms with more fee earners were more likely to find barristers more reluctant to accept publicly funded family work. This may reflect closer relationships developed between small solicitor firms and barristers' chambers. Alternatively, one might expect the opposite to be the case if, for example, barristers attempt to form closer relationships with larger solicitor offices (by virtue of the fact that they have more work).

Although the survey does not include information about the number of fee earners, it does include information about the number of cases in which the

solicitor surveyed was involved last year, and also regarding the fee income from legal aid for the solicitor's firm. Both provide potential proxies for firm size. However, solicitors' ability to secure a barrister was not found to vary with either measure.

### 3.2.3 Reasons given for inability to find suitable barristers

The 37% of solicitors who indicated that, in the last year, at least one occasion arose on which they were unable to secure a barrister of appropriate expertise and experience were asked why they thought this had occurred. The chart shown in Figure 25 shows that nearly 40% of respondents said that the barrister was too busy. A further 40% said that the barrister thought that the fees were unreasonable.

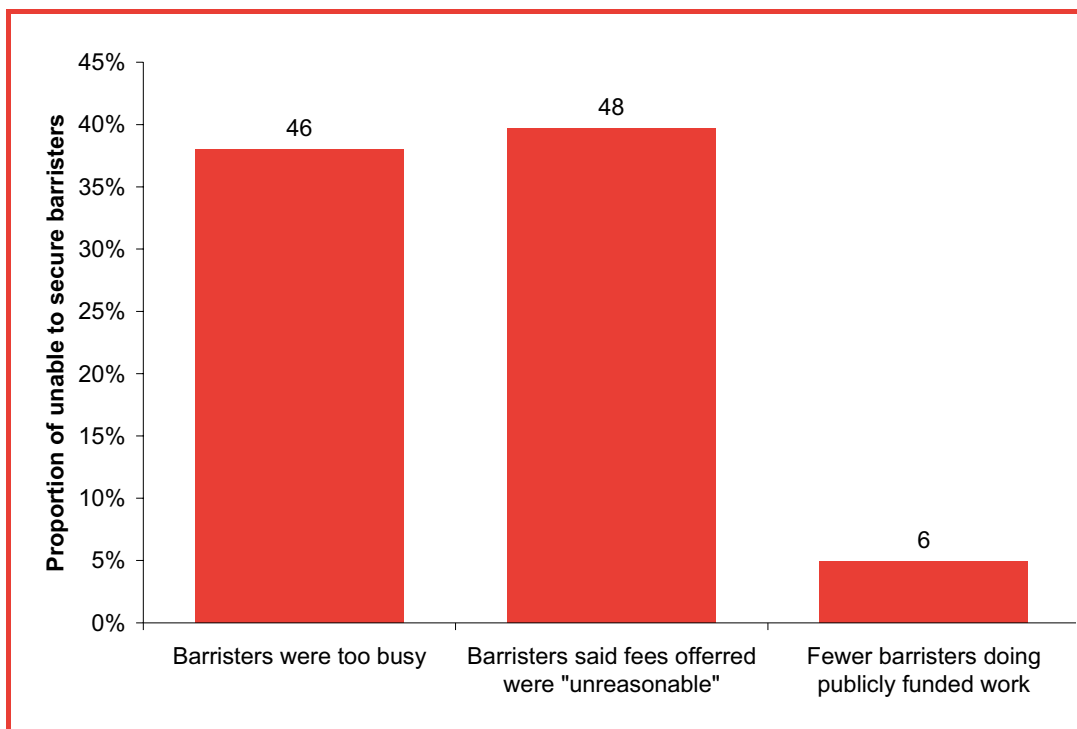


Figure 25: The reasons why solicitors were unable to secure a barrister

Source: Survey of solicitors

As can be seen from the figure, these were the main reasons given. The next most frequently given reason – by only six respondents – was that there are “fewer barristers doing publicly funded work”. However, it is interesting to see that the relative importance of the two reasons differed markedly by type of law.

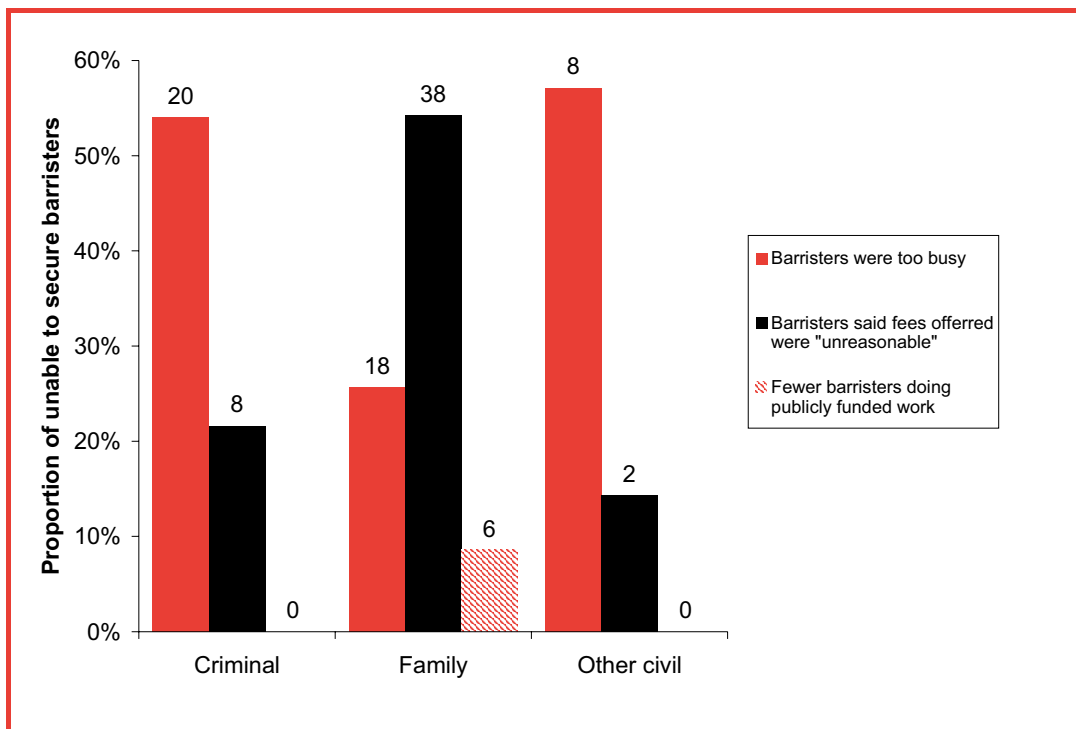


Figure 26: Reasons for inability to secure a barrister by type of law

Source: Survey of solicitors

Figure 26 shows that solicitors undertaking criminal work were more likely to offer the reason that “barristers were too busy” than “barristers said fees offered were unreasonable”. The opposite was the case for family solicitors, where most solicitors reported the reason that “fees offered were unreasonable”.

This is also consistent with what one would expect given the outside opportunities for family barristers versus criminal barristers and given the transition from Ex Post Facto determined fees to the graduated fee structure. Further, given that other civil work has not been undeeded, one would not expect fees being unreasonable to be given as a reason.

### 3.3 IMPLICATIONS OF INABILITY TO FIND A BARRISTER

The implications of solicitors being unable to secure the services of a barrister can be analysed along two dimensions. First, what did solicitors do as a result of not being able to secure a barrister and, second, what were the implications of this.

The two most frequent actions of solicitors were to hire a less experienced barrister or undertake the work themselves. The next most frequent actions were to delay the work for the client or change chambers/look elsewhere. These findings are shown in Figure 27.

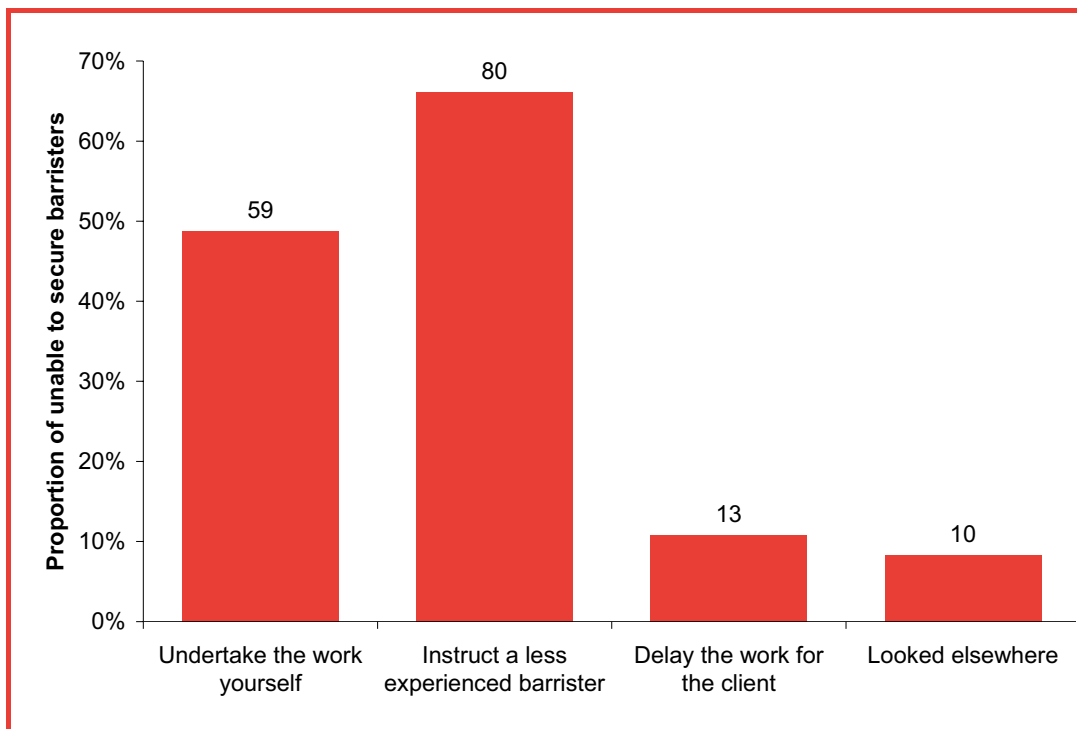


Figure 27: What solicitors do when they are unable to secure a barrister

Source: Survey of solicitors

The ability of solicitors to undertake the work themselves will depend upon the nature of the case and whether higher rights of audience are required. It is therefore interesting to analyse solicitor reactions to not being able to secure a barrister by type of law. Figure 28 indicates little variation. This result is surprising given that the analysis presented earlier in this report suggests that barristers are most frequently used for advocacy in criminal cases and that solicitors use barristers because they do not have the higher rights of audience required.

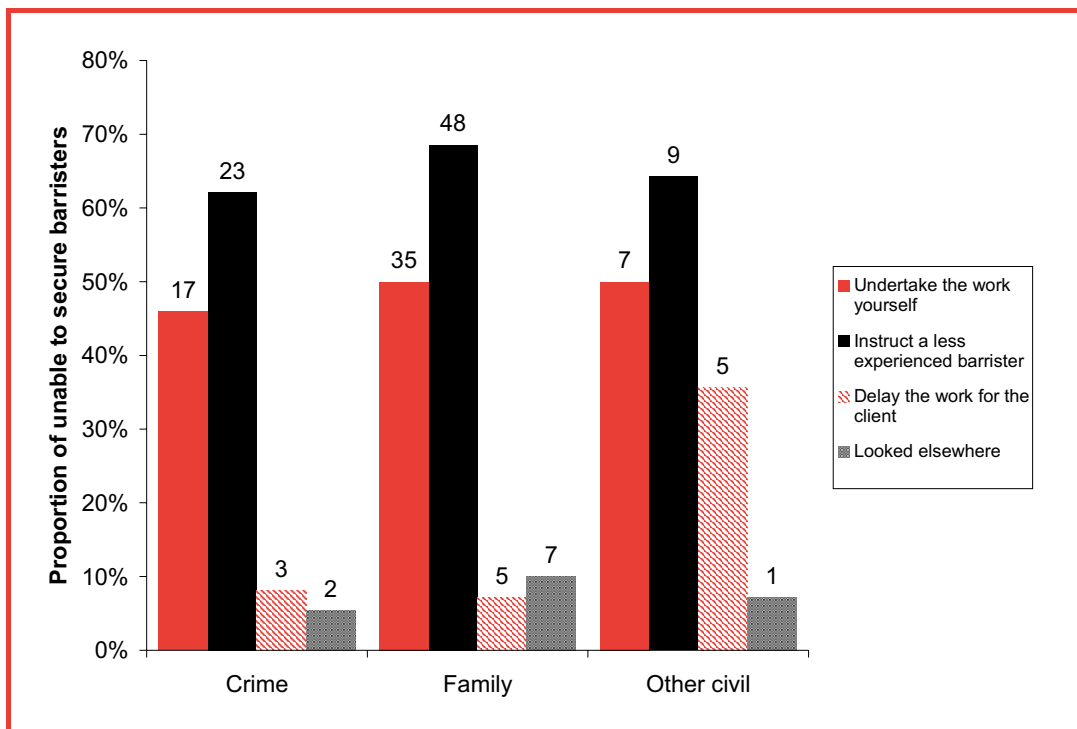


Figure 28: Response to inability to secure a barrister by the type of law

Source: Survey of solicitors

Solicitors were then asked about the implications of being unable to find a barrister, whether using a less experienced barrister or doing the work themselves. A range of responses were given; the four most frequent answers are shown in Table 6.

Result	Number
Significant detriment to the client	38
Unacceptable delay to the case	18
Client was dissatisfied with the service	18
No negative consequences	15

Table 6: The result of being unable to secure a barrister

Source: Survey of solicitors

Table 6 shows that the most frequent response by solicitors was that there was a “significant detriment to the client” (31% of solicitors who had significant difficulties). 15 respondents (12%) stated that “no negative consequences” occurred. These were the most common results given by respondents across all type of law.

This information relating to the implications of solicitors being unable to secure the services of a barrister can be used alongside the data relating to the number of cases undertaken and the number of cases where a barrister was sought to provide estimates of the likelihood of cases with certain implications arising. The

two particular implications of concern are cases where either detriment or delay arises. The incidence of both are shown in Table 7.

	Criminal	Family	Other civil
Total cases	24,550	18,570	10,410
Cases where barrister used	5,240 – 7,040	3,510 – 5,290	3,100 – 5,320
Cases where detriment	170	260	60
% of total cases	1%	1%	1%
% of cases where barrister used	2% – 3%	5% – 7%	1% – 2%
Cases where delay	100	30	30
% of total cases	0%	0%	0%
% of cases where barrister used	2%	1%	1%

Table 7: Number of cases conducted in 2003 by those solicitors surveyed

Source: Survey of solicitors, Frontier Economics estimates (numbers rounded to nearest ten units)

For both criminal and family law, a detriment to the advice provided to a client was more likely to result than a delay. Further, the table shows that the likelihood of detriment arising for family law cases was higher than for either criminal or other civil categories of law. This reflects a higher incidence of solicitors being unable to secure a barrister for legal aided work and a higher likelihood of detriment given that a barrister of appropriate expertise and experience could not be secured.

### 3.4 SUMMARY AND INTERPRETATION

The evidence presented above indicates that there is some under supply of barristers' services for legal aided work that arises in some situations; that is, there were a number of occasions last year when a solicitor was unable to secure a barrister of the appropriate expertise and experience.

As has been suggested above, one would expect to see this in many (unregulated) markets, including those for professional services. Situations where a customer is unable to secure the services they are seeking are likely to arise if customers cannot physically find a willing supplier – which is more likely to occur if searching for suppliers is difficult for customers – or where there are peaks in demand (over the course of a year or from one year to the next) that cause suppliers to run into capacity constraints on particular occasions.

That there can be difficulties securing suppliers in unregulated markets is demonstrated by considering the incidence of solicitors being unable to secure the services of barristers for private client work. Approximately 14% of solicitors surveyed indicated that either they or their colleagues had been unable to secure a barrister for private client work.

However, it appears that the likelihood of a difficulty arising is higher for legal aided work than for private client work. Whether this constitutes a problem is a policy issue. It will depend, first, on the requirements of the Access to Justice Act 1999 and whether, for example, it is acceptable for there to be *any* occasions on which it is not possible to secure the services of a barrister with appropriate expertise and experience.

Second, it will depend on the scale of the detriment and delay associated with solicitors not being able to secure the services of a barrister of appropriate expertise and experience. For example, where solicitors are able to undertake the work themselves, and have done so, is there a detriment? To inform this question it would be helpful to have an objective measure of the expertise and experience required. Equally, is there a detriment – or does there need to be a detriment – if solicitors widened the geographic area from which they seek to secure a barrister?<sup>23</sup>

Whether it is appropriate to adjust remuneration rates in the short term in order to increase supply depends on these policy issues. It will also depend on whether adjusting rates could be expected to have an effect in the short term. The answer is likely to differ by type of law. Specifically:

- ⚡ given a specialised set of criminal barristers currently working primarily for legal aided clients or the CPS, an increase in the supply of services would be likely to need to come from attracting more barristers to specialise in criminal law – this is not an effect that might be expected to occur in the short run (within one year, say) in response to a change in rates;
- ⚡ family barristers typically work for a broader range of clients and an increase in the remuneration rates for legal aided work may induce more supply if such an increase makes this work more attractive than work for other clients.

However, consideration should also be given to the longer-term implications of current remuneration rates and changes to them. Before turning to this issue in Section 4, the sub-section below makes a number of recommendations with regard to the data and information that would ideally be collected in order to obtain a better understanding of the extent of under supply and its implications.

### 3.4.1 Recommendations for further data collection

Ideally one would wish to have more information in order to reach a view regarding the extent of under supply, the resulting detriment and the effect that a change in remuneration rates could have. One would also wish to have data to inform the issue of excess supply, an issue that could not be tackled in this study.

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<sup>23</sup> It should be noted that where solicitors were seeking to secure the services of a barrister located close to their office, that this might have been driven by regulations associated with undertaking legal aided work.

The additional information that would ideally be sought with respect to under and excess supply is identified for each in turn below.

“ · *Understanding under supply will require more information on the occasions on which it arises and on barristers’ remuneration rates for different types of work by type of client:* First, it would be helpful to understand whether occasions on which solicitors are unable to secure a barrister arise due to unpredictable peaks in demand that mean, at certain points within a year or between years, there are insufficient barristers at current remuneration rates to undertake the work. If this were to be the case, then the policy response with respect to legal aid may involve a change in the management of legal aid cases.

Second, one would need to understand the extent to which there is a detriment to the case associated with using a less experienced barrister than the solicitor has reported would be desirable. As noted in Section 2.2.2, solicitors will typically have the incentive to use a barrister with the greatest expertise and experience. However, this may not necessarily be the required expertise and experience if measured in an objective manner. The DCA and LSC might give consideration to how such an objective measure could be developed.

Third, data should be collected to inform the relative rates of remuneration that a barrister can obtain by undertaking different types of legal aided work and work that would be a viable option for barristers to undertake for private clients and other publicly funded clients.

“ · *Understanding excess supply will require greater information on the current working practices of barristers:* To inform the short to medium term, the aim would be to assess whether there are barristers currently practising who would be willing to take on more legal aided work at current remuneration rates. This will depend on their current utilisation rates, how many hours they work and are willing to work, on the remuneration they can expect from legal aided work compared to private client work (or work for other clients, such as local authorities). Obtaining this information could involve undertaking a survey of barristers that is similar to the survey undertaken of solicitors firms for the separate study of solicitors.

The above relates to information that would primarily be required to understand the issues of under and excess supply in the short term. As will be seen in the next section, additional information would also be required to obtain a full understanding of longer-term trends.

## 4 Future trends in supply and demand

As discussed in Section 3.4, whether it is appropriate to alter remuneration rates for barristers is not only an issue of whether this will secure sufficient supply in the short term, but also whether it will secure appropriate supply in the medium to longer term. This section discusses the evidence relating to the likelihood of conditions of under supply – identified in Section 3 – persisting or improving in the medium and longer term.

In brief, assuming there were to be no changes to the regulatory framework that governs the legal profession, there is little evidence to suggest a reduction in the observed level of under supply. First, in the face of growing demands on barristers by the legal aid scheme, there is evidence to suggest that solicitors are finding it less easy to secure the services of a barrister of appropriate expertise and experience than they did three years ago. This trend could continue; projections of demand made by the DCA and LSC for the solicitors study show that hours could rise by 2% over the course of the next three years (assuming no increase in remuneration).<sup>24</sup>

Second, in the short to medium term, there is little evidence to suggest the prospect of entry on a considerable scale, either to the profession generally or to legal aided work in particular. While the use of solicitor-advocates is increasing, it was seen in Section 2.2.1 that this is starting from a low base.

Whether current trends in entry to profession are likely to continue will depend on changes made to the regulatory framework as a result of David Clementi's review of legal services. However, rates of entry will be informed – whether changes are made or not – by giving consideration to the relative attractiveness of legal aided work at the Bar by comparing the potential earnings and opportunities of barristers and would-be barristers in other areas of the law and in alternative professions. The data required to undertake this analysis was not available in the timescale for this study.<sup>25</sup> At the end of this section there is a brief discussion of the data that would ideally be required.

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<sup>24</sup> Although these (short to medium term) projections of demand were developed for solicitors' services, consistency in the pattern of work undertaken by solicitors and barristers over time suggests that the projections are also relevant to the services that are likely to be demanded of barristers in the short to medium term.

<sup>25</sup> The only available source of evidence relating to barristers earnings was an annual survey of barristers' chambers undertaken by BDO Stoy Hayward. The Bar have indicated that the income data contained within the survey is inappropriate to form a comparison of average incomes of barristers over time. Three reasons are given for this. First, the sample is not representative (it under represents smaller chambers). Second, the sample changes each year and so changes in income may simply reflect changes in the composition of the sample. Finally, there is no indication of the variability of income within a chamber; as such it is not possible to establish how precise the average income estimate is.

#### 4.1 TRENDS IN ABILITY TO SECURE A BARRISTER

The survey asked solicitors to state whether (in their experience) it was easier, less easy or as easy to find a suitably qualified barrister for legal aid work than it had been in the past. The responses revealed that most solicitors say either that it has become less easy or is as easy; only between 5% and 10% of respondents state that it has become easier. The pattern is relatively consistent across law types, with the exception that proportionately more family solicitors reported it had become less easy to secure a barrister than criminal and other civil solicitors.

Table 8 provides more details on the responses given to the question whether “*it [had] become more or less easy to find a suitably qualified barrister to meet [their] requirements for legal aided clients in [their] specialist area of law?*” over a number of different time periods.<sup>26</sup> Compared to the previous year, a relatively small number of respondents said that it had become easier to find barristers; 52% said that it was the same as last year and 41% said that it was less easy. Compared to three years ago, the proportion saying that it was less easy was somewhat higher. Looking back five years, 5% of the sample were unable to make a comparison, and the proportion saying that it was less easy or the same as five years ago was between the figure for last year and three years ago.<sup>27</sup>

	Last year <sup>28</sup>	3 years ago	5 years ago
More easy than	6%	9%	9%
Same as	52%	37%	40%
Less easy than	41%	52%	46%

Table 8: Has it become more or less easy to find a suitably qualified barrister

Source: Survey of solicitors

Focusing on those who had stated that it was now less easy to find a suitably qualified barrister, there are differences by the type of law the solicitor is typically involved in for legal aided work, as shown in Table 9. Family solicitors were most likely to state that it was less easy to find suitably qualified barristers; solicitors undertaking other civil work were least likely to say that it was less easy.

	Last year	3 years ago	5 years ago
Criminal	33%	45%	46%
Family	55%	68%	68%
Other civil	25%	28%	27%

Table 9: % responding that it was less easy to find a suitable barrister

Source: Survey of solicitors

<sup>26</sup> The numbers do not exactly sum to 100% because a small number of respondents stated that they did not know or did not want to answer.

<sup>27</sup> Since some people responded ‘don’t know’ it is possible that five years ago is too far back to remember.

<sup>28</sup> Last year refers to 2002.

The evidence presented in this section is consistent with comments offered by members of the Family Bar in relation to the impact of the introduction of the graduated fee on barristers' willingness to undertake certain types of work. They stated that the introduction of graduated fees had led to some barristers choosing to move away from legal aided family work entirely and, in some instances, away from family law more generally.<sup>29</sup>

Members of the Family Bar also expressed the view that the willingness of family barristers to undertake legal aided work could reduce further in the future. Two reasons were given for this. First, barristers are still receiving a flow of higher payments for cases that started under Ex Post Facto determined fees and are willing to continue the work on this basis. However, once these cases end, new ones remunerated under graduated fees might not be taken on. Second, barristers are reported to be waiting for the outcome of the DCA's review of graduated fees before deciding whether to turn away from publicly funded family work.

Thus, the above discussion should be considered in the context of the changes made to the remuneration of legal aided family and criminal work since 2001 and the fact that the supply of barristers' services may still be in a transitory phase. Discussions with members of the Family Bar, in particular, suggested that the inability of solicitors to secure the services of a barrister of appropriate expertise and experience could worsen.

Whether there will be an improvement or deterioration in the supply of barristers' services for legal aided work will also depend on the demand for these services in the future. The above conditions of under supply are observed over a period during which there was an increase in the demand for barristers for criminal and public law children work, and stable demand in other categories of law. Further, the projections of demand made by the DCA and LSC for the solicitors study show that hours could rise by 2% over the course of the next three years (assuming no increase in remuneration).<sup>30</sup> It is unlikely that there would be any improvement in the conditions of under supply, unless there were to be new entry into the profession or into legal aided work specifically.

## 4.2 ENTRY AND EXIT DECISIONS

In the context of growing demand for non-discretionary legal aid work (crime and public law children act cases), the viability of meeting this demand is

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<sup>29</sup> By way of example, one set of chambers experienced a reduction from 25 family barristers to 13 family barristers following the introduction of the graduated fee. Of the 13 remaining barristers, five undertake only private client work and eight undertake some legal aided work (although not ancillary relief). Of those individuals leaving the family practice and family law, one moved to the employment law practice, which involved retraining and another went into academia.

<sup>30</sup> Although these (short to medium term) projections of demand were developed for solicitors' services, consistency in the pattern of work undertaken by solicitors and barristers over time suggests that the projections are also relevant to the services that are likely to be demanded of barristers in the short to medium term.

dependent upon securing the entry of new suppliers. These could come from three sources:

- # existing barristers might increase the legal aided work they undertake, choosing to undertake less work for other clients;
- # new barristers might enter the profession and undertake legal aided work specifically; and
- # there might be an increase in the number and availability of solicitor-advocates willing to undertake legal aided work.

The likely patterns in entry over the short to medium term can be informed by observing past trends, both of entry to the profession and to legal aided work. However, because it is the number of practising barristers undertaking legal aided work that is of interest, it is also necessary to know how many barristers are leaving the profession. That is, it is necessary to understand net change each year.

This section provides an overview of the data relating to entry and exit that is provided largely by BDO Stoy Hayward's annual survey of barristers' chambers (2002). Given that, ideally, one would have a richer source of information, the last section identifies data and information that could be collected in the future.

Since 1995, the number of graduates in law has remained between 8,500 to 9,500, according to the Law Society. The BDO Stoy Hayward data indicates that the number of barristers has grown at a rate of approximately 2% per year since 1999; a lower rate than the average between 1986 and 1999.

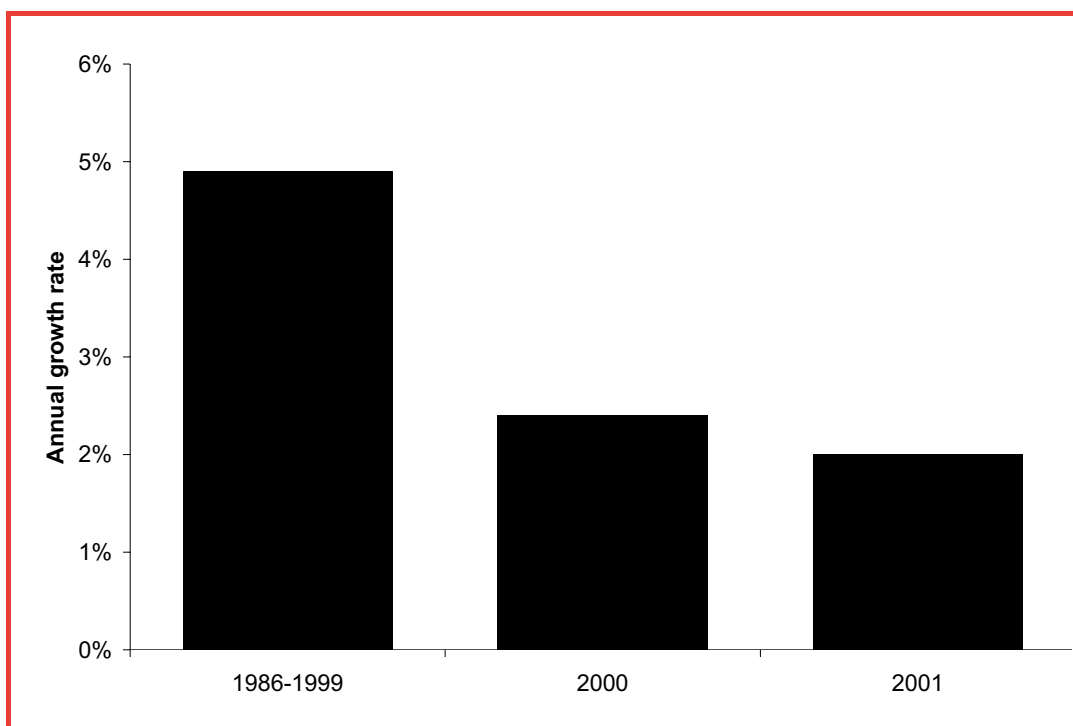


Figure 29: Growth rate in the number of barristers

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Source: BDO Stoy Hayward

The above therefore suggests small annual growth in the number of barristers each year. However, this is for the profession as a whole. Best estimates provided by the LSC and DCA suggest that there have been limited net changes to the number of barristers undertaking legal aid.

With respect to solicitor-advocates, there does appear to have been growth, although figures are only available for the current time. In total, 2,185 solicitor advocates were practising at the end of March 2004 compared to 11,248 self-employed barristers and 2,737 employed barristers at December 2003.<sup>31</sup>

Members of the Bar indicated that there could be more difficulties recruiting in the future.

“ Members of the Family Bar stated that the recent requirement that chambers fund pupillage has been unpopular, particularly with sets outside London. The expense (£10,000 per pupil), in addition to contributions that barristers must make to their chamber’s overheads and tax, may make sets reluctant to offer pupillages and reduce prospects for future entry. With respect to legal aided work specifically, it was noted that the lack of a career path due to graduated fees might mean that recruitment specifically for legal aided work will be difficult and that good graduates do not apply.

“ Members of the Criminal Bar echoed the above comments. They indicated that the reduction in fees for criminal work might result in chambers being less willing to help pupils financially. Moreover, if the reduction in fee rates for criminal legal aided work led chambers to cut costs, they might well do this by deciding to offer a pupillage only once every two years.

### 4.3 RECOMMENDATIONS FOR DATA COLLECTION

The information presented and described above is insufficient to take a robust view on likely entry to and exit from the barristers’ profession and legal aided work over the short to medium term. It is even less able to inform the longer term. Ideally, more robust and detailed evidence should be collected with respect to:

- ⊘ the number of barristers entering the profession each year;
- ⊘ the number of barristers leaving the profession;
- ⊘ the stock of barristers undertaking legal aided work in each area of law, and changes in that stock over time;
- ⊘ the type of work and the volume of work undertaken, differentiating between legal aided work of different kinds and work for other clients of different kinds;

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<sup>31</sup> Barrister figures are provided by the Bar Council and solicitor-advocate figures are provided by the Law Society.

- ⌘ relative rates of pay for advocacy and advice in different areas of law and for different clients; and
- ⌘ relative rates of pay (and more general attractiveness) of other comparable professions.

## 5 Alternative procurement options

This section draws on the findings presented and discussed thus far and considers whether there is a case for making changes to the procurement of barristers' services for legal aided work such that value for money might be improved. A short discussion of two possible options is included at the end of this section, but is limited due to the timescale available for this report and the need to avoid overlap with the ongoing Clementi review.

In brief, this section reports that there is a less strong case for making changes to the way in which the DCA and LSC procure the services of barristers for legal aided work than exists for solicitors. In particular:

- ⚡ on the basis of the evidence described, there appears to be less need to make changes to procurement in order to deal with an over supply of barristers' services (and therefore potentially "over-payment") at current remuneration rates; and
- ⚡ under the existing system, solicitors are likely to have incentives to ensure they secure a barrister of appropriate quality.

There may, however, be benefits from a change in procurement method in order to reduce the number of occasions on which solicitors are unable to secure a barrister.

This section begins with an assessment of whether the current system provides value for money, or whether there is a case for change (Section 5.1). Section 5.2 briefly considers two possible changes to the procurement system, drawing on ideas discussed initially in the solicitors report.

### 5.1 VALUE FOR MONEY AND THE CURRENT SYSTEM

The overarching aim of the existing procurement system is to provide value for money. For Government policies and programmes, value for money is typically assessed in terms of cost effectiveness; that is, a policy option that delivers the desired outcome at least cost is considered to offer the best value for money.<sup>32</sup>

On this basis, any procurement system should be assessed on its ability to provide a given volume of services (of a specified quality)<sup>33</sup> for the minimum cost to the taxpayer. An alternative way of expressing this, which would be most relevant in the context of any existing under supply, is to consider whether the volume of services (of a specified quality) could be increased for the same overall cost. This type of approach requires an assessment against four key criteria:

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<sup>32</sup> This is specifically the case where the desired outcome of a policy is hard to value in monetary terms and a formal cost benefit analysis cannot be undertaken.

<sup>33</sup> This assumes that the services currently procured represent the outcome that the DCA and LSC are seeking to achieve.

- ⊘ the *cost implication* of the scheme – taking into account both the cost of the legal aid itself and the central administration costs associated with running the scheme;
- ⊘ the *quality* of the services provided – whether the quality of the advice is likely to meet requirements;
- ⊘ the *quantity* of services that are delivered – whether the volume of services would be sufficient to ensure access to legal aid; and
- ⊘ the *practicality* of operating the system – that is, is it workable, and what administrative activities are required for the operation of the scheme.

The discussion below describes how the current system performs against these criteria. Ideally, one would then undertake a full quantitative assessment of options for change, comparing the performance of each option against the existing scheme for each of the above criteria. As has been noted above, this is not feasible in the timescale available for the study, or desirable given the ongoing review of the legal profession.

### 5.1.1 Cost of the scheme

Given a lack of information suggesting the existence of excess supply, there is currently no evidence of a clear need to improve the efficiency with which barristers are procured. Moreover, in contrast to the majority of legal aided work undertaken by solicitors, barristers' legal aided work is already remunerated on an output-based pricing model, which encourages efficiencies.

The report on solicitors included a detailed discussion (not repeated here) of the way in which payments made for *inputs* typically encourages a high cost of provision because suppliers face limited incentives for making savings in the unit cost of delivery. Conversely, payment made for *outputs achieved* (say, cases completed)<sup>34</sup> encourages suppliers to reduce inputs in order to increase their profitability in the knowledge that their payment is fixed. Since the majority of barristers are paid under the graduated fee scheme, they are effectively paid for outputs and so this will discourage a high cost of provision.

Members of the Family Bar and the Criminal Bar both suggested that there were potential inefficiencies, however, in the current procurement system that arise due to the nature of the relationship between the LSC, solicitors and barristers. Members of the Family Bar stated that in ancillary relief (financial provision) cases, if graduated fees resulted in junior counsel being used at the Financial Dispute Resolution stage, resolution may not be reached as frequently, with more cases going to trial and ultimately at a higher cost for the LSC. Members of the Criminal Bar stated that, under the HCC system, the solicitor set out the scope of the work with the LSC, often agreeing substantial pieces of work for themselves.

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<sup>34</sup> Note here that a payment made for an output, such as a case completed, need not take into account the outcome of the case that has been completed. Whether this would be desirable should be considered in piloting changes to the procurement methods.

This often prohibited the barrister from doing necessary pieces of work and potentially led to inefficiencies and unfairness to both the barrister and justice.

### 5.1.2 Quality

In the case of solicitors, a critical issue influencing procurement is the fact that those receiving legal aided advice are unlikely to be able to judge adequately (either *ex ante* or *ex post*) whether the service that they receive is good quality. This, in an unregulated market, could lead to firms providing a lower quality service in order to maximise profits, perhaps by using more junior staff. In the case of solicitors, complex quality measures were in place to guard against this.

Solicitors, however, are relatively *informed buyers* of the services of barristers and, as discussed in Section 2.2.2, solicitors are likely to have incentives to secure barristers of greatest expertise and experience for the fees offered by legal aid.

First, solicitors do not directly pay for barristers and so there is not the incentive to minimise the fee paid to barristers in most cases. Second, the procurement of a poor quality barrister could reflect poorly on the reputation of the solicitor. Finally, under the rules of franchising, solicitors are required to maintain a list of ‘preferred barristers’; if a barrister provides poor quality, solicitors are required to indicate this such that it is identified in their next audit.

There are two mitigating effects to the incentives outlined above. First, if there are costs associated with finding good quality barristers, solicitors may choose the easiest barrister to find, rather than the best quality for the fee available (for example, the barrister closest to the solicitor’s office). Second, the Clerk is ultimately responsible for assigning the barrister to the case and this may not be the barrister the solicitor originally wanted or the best quality.

### 5.1.3 Quantity

The downside of the existing procurement method is that it requires those managing the legal aid scheme to make an accurate estimate of the price that is necessary to obtain an appropriate quality of service. Given the current paucity of data this is inevitably a challenge. Moreover, it does not guarantee that there will be *no* occasions on which a solicitor cannot secure the services of a barrister with appropriate expertise and experience. As noted, this requires a policy decision to be taken as to whether such occasions are acceptable, following which changes to procurement might be considered.

As stated previously, the survey revealed that the inability to secure a barrister for legal aided work is likely to be associated with under supply, for particular types of cases and particular activities at certain points in time. If the solicitors concerned aimed to procure the barrister with the minimum necessary expertise and experience to undertake the case, this implies that there are some occasions when the quantity supplied by the market is insufficient to cover the demand for legal aid requirements.

Although it has not been possible to pinpoint the exact nature of the cases where solicitors were unable to secure the services of barristers, or whether these are associated with temporary peaks in demand, it appears to be associated with the

type of law they undertake, the experience of the barrister they try to secure and the location of the barrister.

If it were deemed desirable by policy makers to reduce the incidence of occasions on which a solicitor cannot secure a barrister, this could suggest that a change is required to the procurement process. However, as noted in the previous section, changes in the management of legal aided cases may be appropriate if the primary cause of under supply is occasional peaks in demand.

## 5.2 ALTERNATIVE PROCUREMENT OPTIONS

The survey of solicitors suggested that solicitors are more likely to be unable to secure barristers for legal aided cases than for privately funded cases. As shown in Table 7 (Section 3.3), detriment or delay have occurred, albeit in a smaller number of cases than those where solicitors were unable to secure barristers. In addition, there is some evidence of an inefficient allocation of work between solicitors and barristers. Despite these observations, there is insufficient evidence to recommend a fundamental reform to the procurement of barristers' services.

In the report on solicitors, it was suggested that one alternative procurement system would be to facilitate 'managed competition' for the work that solicitors undertake with a minimum acceptable level of quality to be imposed by the LSC as far as is possible. The competition would encourage solicitor firms to reveal the efficient price for legal aided cases. The following discussion is concerned with two related issues:

- ⌘ first, whether introducing 'managed competition' (with quality controls in place) for solicitors' services would provide adverse incentives in terms of the procurement of barristers; and
- ⌘ second, whether there is an argument to introduce the services of barristers in the same managed competition.

The discussion of both examples requires the LSC, or an agent of the LSC, to be an informed buyer of legal aided services.

### *Allow solicitors to bid for work and procure barristers in the same way*

In this scenario, the 'managed competition' framework is used for solicitors, but barristers would continue to be procured by solicitors as is currently the case.

The solicitor would still have discretion over when barristers are used in that they would bid for the part of the work that they want to undertake, but the LSC would be in a position to select the solicitor who offers the best package in terms of the price and type of work they undertake. Competition between solicitors should encourage solicitors to suggest a distribution of work that offers the best value for money and would therefore lead to a more efficient allocation between barristers and solicitors.

Further, the incentives to procure good quality barristers remain because the solicitor does not pay for the barrister and the type of interaction remains the same between them.

### ***Allow barrister to bid for work independently of solicitors***

An alternative procurement approach for barristers is to adopt a ‘managed competition’ framework in a similar manner as that suggested for solicitors. Barristers would bid for legal aid cases (or blocks of cases) *independently* of solicitors.

This approach would offer the same attractions as for solicitors, that is, to encourage barristers to reveal prices that would offer value for money (since not doing so would mean that they would lose the competition). However, there are a number of important differences:

- ⚡ first, there is no compelling evidence of excess supply and so the potential for cost saving is potentially not as great;
- ⚡ second, the current quality control provided by solicitors as informed buyers of barristers services would be lost, so a potentially costly quality control would need to be designed and put in place by the LSC; and
- ⚡ third, the solicitor would need to communicate their barrister requirements to the LSC and then the LSC to communicate those requirements to potential bidders, which could be time consuming and prone to misspecification of the requirements.

For these reasons, the costs associated with ‘managed competition’ for barristers for barristers could be considerably greater than for solicitors, and the benefits smaller.

### ***Allow solicitors and barristers to bid together for work***

Another alternative procurement approach for barristers would be to allow barristers and solicitors to bid *jointly* for legal aid cases (or blocks of cases) and for the LSC to select the joint supplier they want on the basis of comparing the deals that are presented to them. Competition between groups of solicitors and barristers would mean that there would be incentives for the efficient allocation of work between them; those putting forward inefficient allocations would lose out as the LSC would select someone else to undertake the work.

Further, since the case would need to have both a solicitor and a barrister from the outset, by definition the solicitor would need to find a barrister before agreeing to take on the case and the price that they are paid would vary depending on the case. If under supply is a result of remuneration rates for barristers’ services being too low, this system would allow the rates to rise.

However, this system has the downside in that solicitors and barristers are likely to seek to maximise their joint profits. As in the case of solicitors, this may mean that barristers would have an incentive to provide a lower quality of service on any individual case if and so require the quality of barristers’ services to be checked by the LSC.

### 5.3 SUMMARY

On the basis of the quantitative and qualitative information collected during this study, no compelling evidence has been found for a change to the way in which barristers' services are procured for legal aided work. Specifically, there is limited evidence to suggest that significant value for money gains could be achieved, and the incentives to provide good quality are present.

Potential changes to the way in which solicitors' services are procured – by introducing some form of 'managed competition' – would not necessarily create additional pressures for reform to the procurement of barristers' services. These need not change the incentives of solicitors to procure barristers of greatest expertise and experience, nor would it necessarily cause solicitors to seek to undertake more of the work themselves. Indeed, enhanced competition between solicitors could enhance the efficient distribution of work between barristers and solicitors.

## Annexe 1: The survey questionnaire

A large part of the analysis in this report is based upon responses to a telephone survey conducted by a MRQSA accredited research company in January 2004. Using LSC administrative data, 1600 solicitor offices that undertake legal aided work were selected randomly from over 5000 offices and were randomly selected from by the research agency to conduct the interview.

The questionnaire was designed to establish a better understanding of solicitors' use of barristers for legal aided work. To do this, questions were asked under five headings.

- “ · *Introduction and screening* collected general information about the solicitor e.g. location, and establish whether or not they had use a barrister for legal aid work in the past 12 months.
- “ · *Your use of barristers* established the reasons for using a barrister, compared to a solicitor-advocate for example.
- “ · *Type of barrister required* identified the typical experience level of barristers solicitors require and their location.
- “ · *Experience in finding barristers* was the most detailed section and found out about solicitors experience in securing barrister for different reasons and how this changed over time.
- “ · *General questions* sought more information, for example, about how the quality of barrister services had changed.

The questions were shaped in conjunction with the DCA, the LSC, and the Bar Council and were of both a quantitative and qualitative nature. The interviews were piloted with 30 firms and no substantive problems with the questions were identified.

# The use of barristers for advocacy and advice in legal aided cases

## SURVEY OF SOLICITORS

Telephone numbers are provided for firms of solicitors taken from the Legal Services Commission's database of firms with contracts to undertake publicly funded (legal aided) work. Interviewers should ask to speak to a partner or a senior solicitor who undertakes publicly funded work. The introduction below may or may not be required in order to be directed.

### Introduction and screening

*Good morning/afternoon. My name is X and I'm calling from [~], the market and opinion research company, on behalf of the Department for Constitutional Affairs and the Legal Services Commission. May I speak to a partner or senior solicitor who undertakes publicly funded work, please?*

*As you may be aware, the Lord Chancellor is conducting a review of the legal aid scheme. This survey seeks your views as solicitors currently engaged in legal aided work on the running of the scheme, and your use of barristers within the scheme in particular. The survey has been commissioned by the Lord Chancellor and the results will feed into the legal aid review.*

*Throughout the interview I shall refer to legal aided work. Please take this to mean the work that you undertake that is publicly funded by the LSC. Equally, where I refer to legal aided clients, these are clients whose legal costs are met in full or in part by the LSC.*

*INTERVIEWER: ADD IF NECESSARY: All answers are treated as entirely confidential and merged with results from many other interviews.*

1. What is the location of your LSC regional office?

INTERVIEWER: PROMPT IF NECESSARY

- a. Birmingham
- b. Brighton
- c. Bristol
- d. Cambridge
- e. Cardiff
- f. Leeds
- g. Liverpool
- h. London
- i. Manchester (including Chester)
- j. Newcastle
- k. Nottingham
- l. Reading

2. What is your position in the firm?

INTERVIEWER: READ OUT

- a. Salaried partner
- b. Equity partner
- c. Not a partner, but solicitor with greater than 5 years post-qualification experience
- d. None of the above

*[If none of the above, terminate. Otherwise, continue.]*

3. Do you do undertake work for legal aided clients? [YES/NO]

*[If No, terminate. Otherwise, continue.]*

4. When undertaking work for legal aided clients, in which area of the law do *you* specialise?

INTERVIEWER: DO NOT READ OUT

INTERVIEWER: IF NECESSARY ADD: Which ONE of the following areas of law did the majority of your cases fall into over the past 12 months?  
READ OUT

SINGLE CODE

- a. Criminal
- b. Family
- c. Public law/children
- d. Mental health
- e. Employment
- f. Education
- g. Immigration
- h. Community care
- i. Housing
- j. Debt
- k. Clinical negligence
- l. Consumer and contract
- m. Actions against the police
- n. Welfare benefits
- o. Other (please specify)

*I will refer to this area of law in subsequent questions as “your specialist area”, and legal aided cases you have undertaken in this area as “your cases”.*

5. Have you instructed a barrister, in your specialist area of law, for a legal aided client at least once in the last 12 months? [YES/NO]

*[If No, terminate. Otherwise, continue.]*

*I would now like to ask you some questions about your use of barristers in relation to the work you have undertaken for legal aided clients in your specialist area.*

### **Your use of barristers**

6. Which of the following reasons determine whether you choose to use a barrister on the cases you have undertaken for legal aided clients in your specialist area? Please rank the reasons from 1 (most important) to 5 (least important) [READ OUT]
  - a. The nature of the case means that a barrister (or solicitor advocate with rights of audience in the higher courts) is required to represent the client in court
  - b. Higher rights of audience are not required, but the barrister brings advocacy expertise that is not held within my firm
  - c. Higher rights of audience are not required, but the barrister brings legal advice and case management expertise that is not held within my firm
  - d. I choose to use a barrister when the solicitors in my firm do not have the time available to undertake the work
  - e. Other (please specify)
7. Approximately how many cases for legal aided clients in your specialist area of law have you been involved in over the last year? Please include all types of cases in your answer, including both legal help and certificated work in your specialist area.

INTERVIEWER: ADD IF NECESSARY: Cases should be counted if undertaken in the solicitor's name, even if other members of staff led much of the work.

INTERVIEWER: NUMERIC RESPONSE ONLY

NUMERIC

8. And for approximately how many of these cases did you instruct a barrister for advocacy support and, separately, for advice (where advice includes drafting)?

## INTERVIEWER: READ OUT

		Q8A Advocacy	Q8B Advice
a.	None		
b.	At least one case but less than one quarter of the cases		
c.	At least one quarter but less than one half of the cases		
d.	At least one half but not all of the cases		
e.	All of the cases		
f.	Don't know		
g.	Refused		

9. Has the proportion of cases on which you instruct barristers changed over the last *three* years, for advocacy and separately for advice?

## INTERVIEWER: READ OUT

		Q9A Advocacy	Q9B Advice
a.	Yes, it has increased		
b.	Yes, it has decreased		
c.	No, it has stayed about the same		
d.	Don't know		
e.	Refused		

q10 is NOT asked of those who answer codes c, d, e

10. What were the reasons for this change?

INTERVIEWER: CODE ALL THAT APPLY

MULTICODE

		Q10A Advocacy	Q10B Advice
a.	A change in the complexity, type or duration of cases you have undertaken		
b.	A change in requirements of the court		
c.	More or less time available for your firm to undertake the work in-house		
d.	More or less expertise within your firm to undertake the work in-house		
e.	Other Specify		
f.	Don't know		

11. Does your firm employ any solicitor-advocates, by which I mean solicitors who have rights of audience in the higher courts? [READ OUT]

a. In your specialist area of law? [YES/NO]

b. In any other area of the law? [YES/NO]

12. For what proportion of your legal aided cases in your specialist area have you used (a) solicitors and (b) solicitor-advocates (within or external to your firm) to undertake *advocacy* work in the last year? [READ OUT]

		Q12a Solicitors	Q12b Solicitor-advocates
a.	None		
b.	At least one case but less than one quarter of cases		
c.	At least one quarter but less than one half of cases		
d.	At least one half but not all of the cases		
e.	All cases		

f.	Don't know		
g.	Refused		

13. Has your use of solicitor-advocates increased or decreased over the last three years? [READ OUT]
- Yes, increased
  - Yes, decreased
  - No, stayed the same
  - Don't know

*[Ask Question 14 only to those interviewees responding a. or b. to Question 12]*

14. What is the main reason you do not use solicitor-advocates or that you use them to only a limited extent? [READ OUT]
- It is difficult to find one available to take the case on
  - It is more expensive than using a barrister
  - They do not have the relevant experience or expertise for the cases that I take on
  - Other (please specify)

*I would now like to ask you about the skills and expertise of the barristers you normally wish to instruct to provide advice and/or advocacy on legal aided cases in your specialist area.*

### **Type of barrister required**

15. What level of experience of barrister do you most often require?

INTERVIEWER: READ OUT

- Inexperienced or recently called to the Bar?
- Junior barrister?
- Senior-junior barrister?
- QC?
- A mixture?

16. Where are the barristers you instruct generally located?

INTERVIEWER: READ OUT

- Close to your office
- Close to the location where the case is being tried (if this is not close to your office)
- Location is not a relevant criterion when I decide upon which barrister to use
- Other (please specify)

17. If you do not usually instruct a *local* barrister, close to your office, what is your primary reason for not doing so?

*I would now like to ask you about your experiences finding barristers of sufficient expertise or experience for the tasks you wish to instruct them in. Please answer the questions that follow with reference to cases you have undertaken for legal aided clients in your specialist area of law.*

### **Experiences in finding barristers**

18. In the last year, have there been any occasions when you have been unable, at all, to secure the services of a barrister, of appropriate expertise and experience, for the type of case in which you are or were involved?  
[YES/NO]

*[If Yes, go to Question 19. If No, go to Question 24.]*

19. If Yes, for how many cases did this occur?

INTERVIEWER: NUMERIC RESPONSE ONLY

NUMERIC

Don't know

Refused

20. What was the consequence of the significant difficulties that you encountered?

INTERVIEWER: READ OUT AND CODE ALL THAT APPLY

MULTICODE

ROTATE

- a. There was an unacceptable delay in the case
- b. There was a significant detriment to the client, because counsel instructed did not have the skill or experience that the advocacy or advice required
- c. The client was dissatisfied with the service that he or she received, where this dissatisfaction arose for reasons other than a. or b.
- d. Other (please specify)

21. What level of experience of barrister were you aiming to procure on these occasions?

INTERVIEWER: READ OUT AND CODE ALL THAT APPLY

MULTICODE

- a. Inexperienced or recently called to the Bar?
- b. Junior barrister?
- c. Senior-junior barrister?
- d. QC?
- e. A mixture?

22. What reasons do you think explain the difficulty you had in finding a barrister of appropriate expertise and experience?

INTERVIEWER: READ OUT

- a. Barristers were too busy to take on the case(s)
- b. Barristers and or their clerks indicated that the fees offered were 'unreasonable'
- c. The LSC would not give authority to instruct the counsel you believed necessary
- d. Other (please specify)
- e. Don't know

23. What did you do as a result of the difficulties you encountered on these occasions?

INTERVIEWER: READ OUT AND CODE ALL THAT APPLY

MULTICODE

ROTATE

- a. Undertake the work yourself
- b. Decline to take on the case for the legal aided client
- c. Delay the work for the client in order to secure the services of a barrister at a later date
- d. Reduce the time input required from the barrister
- e. Instruct a barrister with less experience and/or expertise
- f. Inform the LSC
- g. Other (please specify)

*I would now like to ask you some questions relating to your experience of working with barristers more generally. [Go to Question 31.]*

*[Questions to those responding No to Question 18]*

24. In the last year, have there been any cases in which you have been involved where there was an unacceptable delay (such as the need to postpone a hearing) as a result of difficulties you had in finding a barrister with appropriate expertise and experience for the type of case?  
[YES/NO]

Refused

*[Question to those responding Yes to Question 24]*

25. For how many cases did this arise?

INTERVIEWER: NUMERIC RESPONSE ONLY

NUMERIC

Don't Know

26. In the last year, have there been any cases in which you have been involved where there was a significant detriment to the advice or advocacy provided to your client as a result of difficulties you had in finding a barrister with appropriate expertise and experience for the type of case?

[YES/NO]

Refused

*Question to those responding Yes to Question 26*

27. For how many cases did this arise?

INTERVIEWER: NUMERIC RESPONSE ONLY

NUMERIC

Don't Know

*[Ask the following questions to those responding Yes either to Question 24 or Question 26, or to both. Otherwise move to Question 31.]*

28. What level of experience of barrister were you aiming to procure on these occasions?

INTERVIEWER: READ OUT AND CODE ALL THAT APPLY

MULTICODE

- a. Inexperienced/recently called to the Bar?
- b. Junior barrister?
- c. Senior-junior barrister?
- d. QC?
- e. A mixture?

29. What reasons do you think explain the difficulty you had in finding a barrister of sufficient experience and expertise?

INTERVIEWER: READ OUT

- a. Barristers were too busy to take on the case(s)
- b. Barristers and or their clerks indicated that the fees offered were 'unreasonable'
- c. The LSC would not give authority to instruct the counsel you believed necessary
- d. Other (please specify)
- e. Don't know

30. What did you do as a result of the difficulties you encountered on these occasions?

INTERVIEWER: READ OUT AND CODE ALL THAT APPLY

MULTICODE

- a. Undertake the work yourself
- b. Decline to take on the case for the legal aided client
- c. Delay the work for the client in order to secure the services of a barrister at a later date
- d. Reduce the time input required from the barrister
- e. Instruct a barrister with less experience and/or expertise
- f. Inform the LSC
- g. Other (please specify)

*I would now like to ask you some questions relating to your experience of working with barristers more generally. [Go to Question 31.]*

### **General questions**

*The following questions relate to the experiences that you and your firm has had in procuring barristers more generally; some questions relate to your specialist area of law, some are more general.*

31. How do you find out about barristers availability to take on work for particular dates? [READ OUT]

- a. I am contacted by the barristers or clerks, who let me know their availability?
- b. The clerks tell me when I call to ask about a specific case?
- c. I ring the clerks to ask generally, so that I usually have a general understanding about availability?

d. Other (please specify)

32. Over the last three years has the frequency with which you are contacted by barristers or their clerks with respect to taking on more work increased, decreased or stayed the same?

INTERVIEWER: READ OUT

- a. Increased
- b. Decreased
- c. Stayed the same
- d. Don't know

33 In your view, has it become more or less easy to find a suitably qualified barrister to meet your requirements for legal aided clients in your specialist area of law?

INTERVIEWER: READ OUT

q33a Compared to last year? [MORE/LESS/SAME/DK]

q33b Compared to three years ago?  
[MORE/LESS/SAME/DK]

q33c Compared to five years ago? [MORE/LESS/SAME/DK]

33. Over the past three years, has the quality of advice and/or advocacy services provided in your specialist area of law

INTERVIEWER: READ OUT

- a. Improved significantly
- b. Improved
- c. Stayed the same
- d. Deteriorated
- e. Deteriorated significantly
- f. Don't know

34. Have any other fee earners in your firm who undertake publicly funded work in other areas of law commented that it has become more difficult for them to secure the services of barristers?

[YES/NO]

Refused

35. In your experience, and that of your colleagues, do similar difficulties apply in finding barristers to undertake cases for private clients?

INTERVIEWER: READ OUT

- a. Yes, to the same extent
- b. Yes, but to a lesser extent
- c. No, there are never any difficulties
- d. Don't know
- e. Refused

*[If the answer given to Question 36 is either a or b, ask Question 37. Otherwise end of interview]*

36. In what areas of law do these difficulties arise for private clients?

INTERVIEWER: READ OUT

*[Answer choices to be reviewed]*

- a. Commercial
- b. Litigation
- c. Family – public law
- d. Family – private law
- e. Other civil law
- f. Other (please specify)

*Many thanks for your time.*



## Annexe 2: Survey representativeness

The interviews took place over the course of one month in January 2004, 326 solicitors were interviewed. It is important to understand the extent to which the experience of a sample of 326 solicitors is a fair representation of the population of solicitors undertaking legal aided work. Clearly, the quantity of information required to do this comparison would be immense. Instead, it is possible to check how representative the 326 legal aided solicitor *offices* are of the population of legal aided solicitor offices using LSC administrative data.

To test representativeness, three comparisons are used:

- # geographic location by LSC regional office;
- # fees paid to solicitor offices;
- # the response rate statistics from the research company; and
- # a comparison of type of law proportions.

This exercise revealed a quite a close match of the sample to the population on this basis, with the possible exception of the type of law.

Figure 30 compares the population of offices in an LSC region with the sample. In general, the sample looks broadly representative, although there is a slight over sample from Nottingham and London.

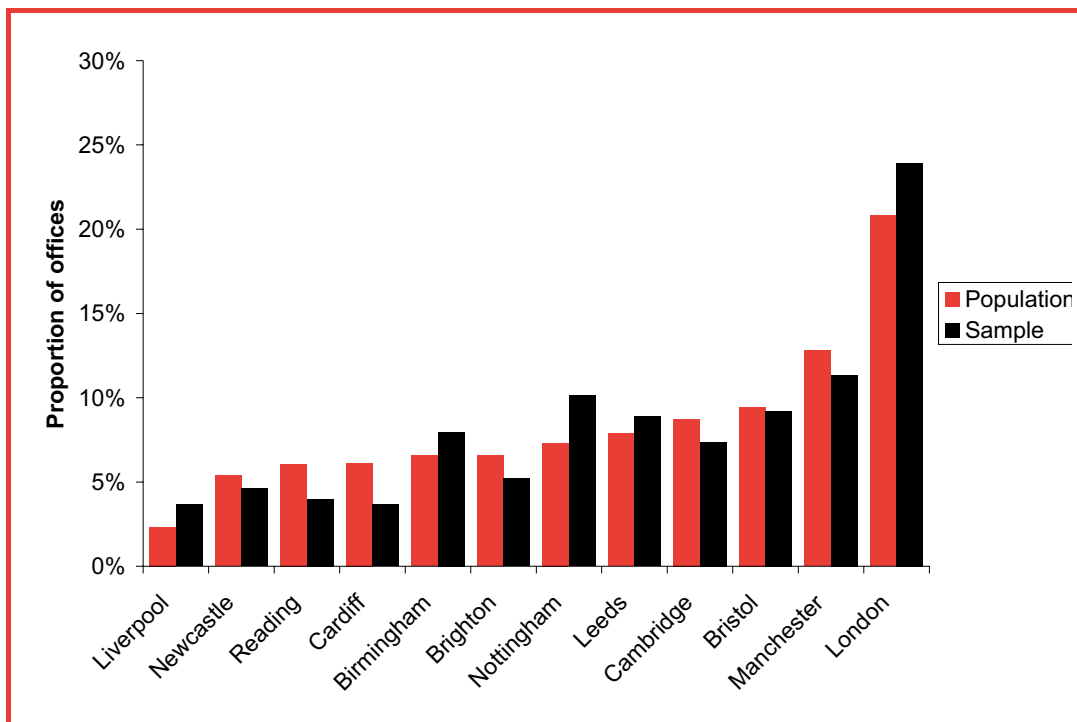


Figure 30: Location of solicitor offices

Source: Survey of solicitors, LSC administrative data

The research company was provided with the legal aid fee income of the solicitor offices, they returned fee income data for the 326 respondents to Frontier so that summary statistics could be calculated to compare to the entirety of solicitor offices. Figure 31 shows that the average and median fees of solicitor offices are very close, the population has a wider spread of fees than the sample.

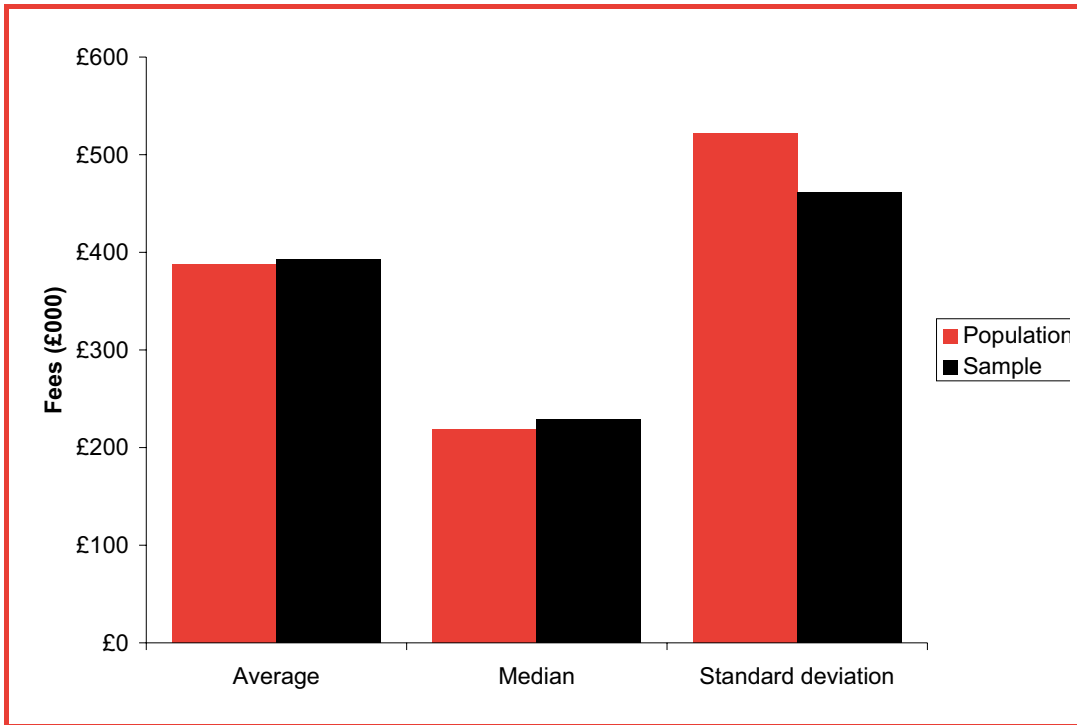


Figure 31: Fees of solicitor offices

Source: LSC administrative data

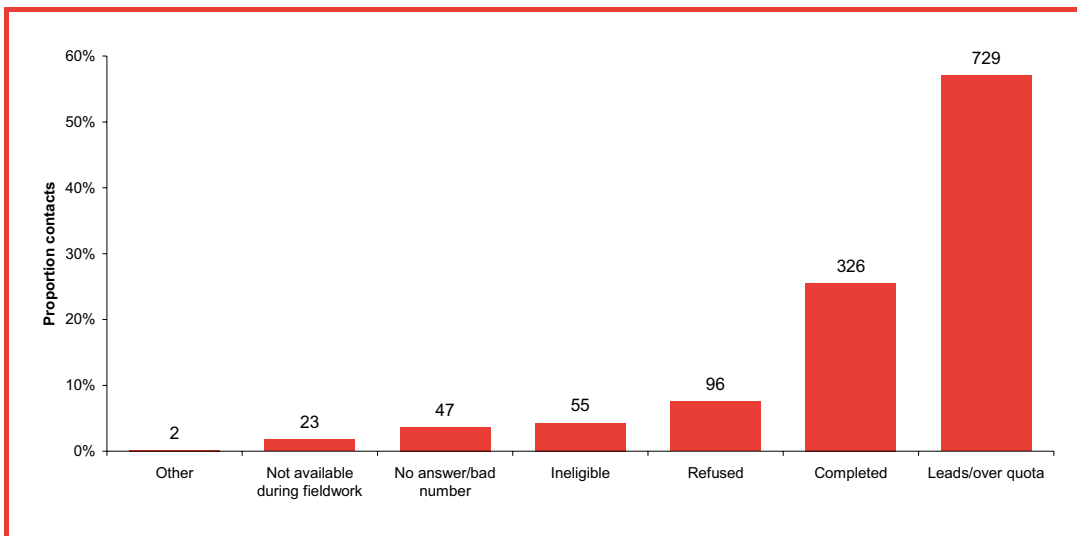


Figure 32: Response rate

Source: Survey of solicitors

## Annexe 2: Survey representativeness

Figure 32 shows that the total number of solicitors contacted was 1278. A relatively small proportion (7.5%) refused to be interviewed. 729 (57%) solicitors agreed to be interviewed, but on a different day. In practice, these solicitors were not interviewed because the quota (circa 300) was quickly reached with 326 solicitors (26%) responding and completing the interview.

The LSC does not hold data on the proportion of solicitors who undertake the different types of law. The only proxy available for this is the proportions of the total legal aid expenditure on solicitors. Figure 33 shows that comparing the proportion of legal aided expenditure with proportion of solicitors responding indicates a possible over-sampling of family solicitors and an under-sampling of crime solicitors.

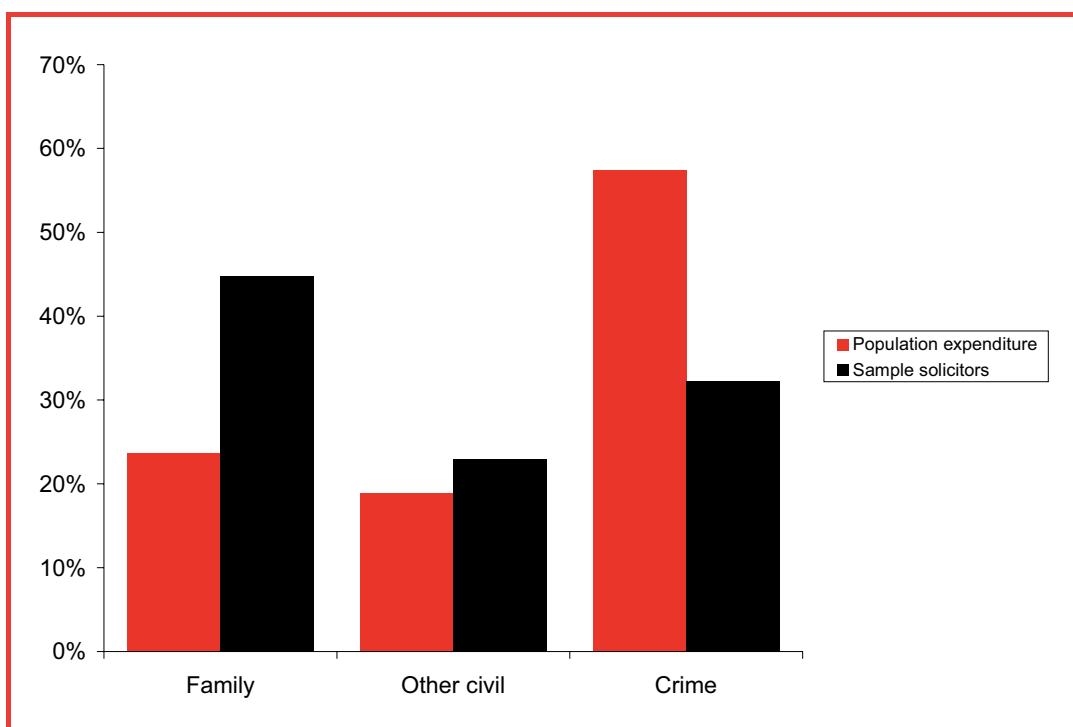


Figure 33: Comparison of law types

Source: LSC annual reports, Survey of solicitors

The sample has not been re-weighted on the basis of this evidence. There are various reasons for this:

- ⚡ expenditure bundles together quantity and prices, it is possible that a higher proportion of expenditure is spent on a smaller number of solicitors;
- ⚡ the other representativeness checks seem broadly in line with expectations; and

it is not clear what weights should be used to adjust the sample or whether this is sensible given that the sample is random.



## Annexe 3: Calculation of case numbers

This annexe outlines the information and assumptions required to calculate the different case numbers and proportions shown in Table 10 and Table 11, as presented earlier in the Executive Summary.

	Criminal	Family	Other civil
Total cases	24,550	18,570	10,410
Cases where barrister used	5,240 – 7,040	3,510 – 5,290	3,100 – 5,320
Cases unable to secure a barrister	400	420	330
Cases delayed	100	30	30
Cases where detriment	170	260	60

Table 10: Number of cases conducted in 2003 by those solicitors surveyed

Source: Survey of solicitors, Frontier Economics estimates (numbers rounded to nearest ten units)

	Criminal	Family	Other civil
Cases unable to secure a barrister:			
% of total cases	2%	2%	3%
% of cases where barrister sought	6% – 8%	8% – 12%	6% – 11%
Cases delayed:			
% of total cases	0%	0%	0%
% of cases where barrister sought	2%	1%	1%
Cases where detriment:			
% of total cases	1%	1%	1%
% of cases where barrister sought	2% – 3%	5% – 7%	1% – 2%

Table 11: Proportion of cases conducted in 2003 by those solicitors surveyed

Source: Survey of solicitors, Frontier Economics estimates (numbers rounded to nearest whole number)

Every number is calculated for each area of law indicated by Question 4 of the survey. All questions used are listed in Table 12 below.

No.	Question
4	When undertaking work for legal aided clients, in which area of the law do you specialise?
7	Approximately how many cases for legal aided clients in your specialist area of law have you been involved in over the last year? Please include all types of cases in your answer, including both legal help and certificated work in your specialist area.
8	And for approximately how many of these cases did you instruct a barrister for advocacy support and, separately, for advice (where advice includes drafting)?
18	In the last year, have there been any occasions when you have been unable, at all, to secure the services of a barrister, of appropriate expertise and experience, for the type of case in which you are or were involved?
19	If Yes, for how many cases did this occur?
20	What was the consequence of the significant difficulties that you encountered?

Table 12: Information required to perform calculations

Source: Survey of solicitors

The following sub sections explicitly indicate the calculations undertaken to populate Table 10 and Table 11 and the assumptions required.

### Number of cases conducted by those solicitors surveyed

#### *Total cases*

This is calculated by adding up the number of cases reported in Question 7 of the survey. 19 respondents were unable to respond to this question and are excluded from any of the subsequent analysis.

The total number of cases for each law type is given by equation [1]:

$$q = \sum_{i=1}^N q_i \quad [1]$$

where N is the total number of respondents in a category of law.

#### *Cases where barrister is used*

This is estimated using Question 7 along with Question 8. The response to Question 8 was within ranges e.g. “at least one case but less than one quarter of the cases”. To estimate the number of cases for advocacy or support, the midpoint of these ranges is multiplied by the number of cases given in Question 7; these are shown in equations [2] and [3]:

$$a_{advocacy} = \frac{1}{N} \sum_{i=1}^N \left( q_i \frac{u_i + l_i}{2} \right) \quad [2]$$

$$a_{advice} = \frac{1}{N} \sum_{i=1}^N \left( q_i \frac{u_i + l_i}{2} \right) \quad [3]$$

where  $u$  and  $l$  are the appropriate upper and lower ends of the relevant ranges for the respondent. These ranges may differ for advocacy and advice. It is not known whether these solicitors require advice *on the same occasions* that they require advocacy. Further, using the midpoint of a range as a reasonable estimate of the actual proportion assumes that the likelihood of the actual proportion occurs is either approximately normally or uniformly distributed or across the range.

Since the data show that  $a_{advocacy} \geq a_{advice}$  for all types of law, a reasonable lower estimate of the times that a solicitor needs a barrister is  $a_{advocacy}$  and an upper estimate is obtained by adding them together as in equation [4]:

$$A = a_{advocacy} + a_{advice} \quad [4]$$

#### **Cases unable to secure a barrister**

This is calculated by adding up the number of cases reported in Question 19 of the survey and given by equation [5]:

$$u = \sum_{i=1}^N u_i \quad [5]$$

#### **Cases delayed/cases where detriment**

This is calculated combining Question 19 with Question 20. Question 20 indicates whether there has been significant detriment or delay or both to the cases. In order to calculate the number of cases this occurs for, it is assumed that if there is detriment/delay, it occurs for *all cases when the solicitor is unable to secure a barrister*. The implication is that this is an upper estimate of the number of cases with detriment or delayed. Equations [6] and [7] show how this is calculated:

$$u_{detriment} = \sum_{i=1}^N d_{1i} u_i \quad [6]$$

$$u_{delay} = \sum_{i=1}^N d_{2i} u_i \quad [7]$$

where  $d_{1i}$  ( $d_{2i}$ ) is a dummy variable that takes the value 1 if there is detriment (delay).

#### **Proportion of cases conducted by those solicitors surveyed**

In order to calculate the proportions presented in Section 3, ratios using equations [1] to [8] were used. The specific values used are shown in Table 13.

	% of total cases	% of cases where barrister sought
Cases unable to secure a barrister	$u / q$	$u / A$ to $u / a_{advocacy}$
Cases delayed	$u_{delay} / q$	$u_{delay} / A$ to $u_{delay} / a_{advocacy}$
Cases where detriment	$u_{detriment} / q$	$u_{detriment} / A$ to $u_{detriment} / a_{advocacy}$

Table 13: Proportion calculations

All of the estimates are based on a sample. The estimates are accurate only to the extent that the survey is representative; that solicitors respond accurately to questions and that the assumptions that are required to perform the calculations are appropriate.



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