

**Crown Prosecution Service:
the choice between in-house
and self-employed advocates**

A critique of the CPS' analysis

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Summary

- 1 The CPS has published two documents – a Press Release and a paper on cost considerations – that deal with advocacy quality through a new “national system of advocacy assessment” and with the comparative costs of in-house counsel and the self-employed Bar.
- 2 The connection between CPS’ quality commitment and its claimed savings is not made clear. Rather, the CPS assumes equal quality across its in-house advocacy service and that provided by the self-employed Bar. This is a crucial assumption that remains untested.
- 3 The CPS goes on to compare the short-run marginal costs of deploying in-house advocates with the fees of self-employed barristers. This is plainly wrong, both economically and as a basis for policy-making. Barristers’ fees necessarily include an allowance for long-run costs and fixed overheads; the CPS incurs such costs too but ignores them. Such skewed comparisons will always favour CPS advocates over the self-employed Bar, and will encourage the CPS to acquire excessive numbers of advocates and excessive accommodation and overhead costs to support them.
- 4 The CPS does not make clear its overarching policy purpose in favouring in-house advocates, since it says that cost is not always the determinant of deployment. If its aim is to provide a benchmark against which to purchase of advocacy services (which would be perfectly reasonable), it ought then to assess what scale and scope of advocacy activity it needs – but it does not. In the absence of any such assessment, basing procurement practice on nothing but the short-run marginal cost of in-house advocacy will lead to the wrong answers.
- 5 Furthermore, inflating the size of the CPS’ in-house advocacy service (a) gives rise to tension between the CPS’ roles as buyer and supplier and (b) flies in the face of modern management belief that it is generally better not to nationalise services that can be provided by a competitive private sector.
- 6 The CPS’ analysis does not meet the standards set by government for public sector policy initiatives, in that:
 - it fails to assess all costs and all benefits;
 - it is not sufficiently transparent;
 - its use of short-run marginal costs is inappropriate for policy-making; and
 - it incorrectly treats property costs.
- 7 All in all, the CPS’ approach is so profoundly flawed that it should not be relied on.

Introduction

8 Europe Economics (hereinafter “we” or “us”) has been engaged by the General Council of the Bar (“the Bar Council”) to prepare an independent critique of certain documents produced by the Crown Prosecution Service (“the CPS”). These documents concern the choice that the CPS has to make, both as a matter of policy and case by case, between using its in-house advocates (“Crown Advocates”) and independent self-employed barristers.

9 We emphasise that this critique represents only a preliminary assessment of the issues. Some questions arise which need more time than is available to the Bar Council or to us at present.

10 The documents we considered were:

(a) CPS Press Release 130/09 dated 25 June 2009 and entitled “CPS announces first advocacy assessment system”¹; and

(b) A further document referred to in the Press Release entitled “Cost Considerations Governing the Deployment of Crown Advocates”².

11 In addition we consulted:

(c) The CPS Annual Report and Resource Accounts 2007-2008.³

(d) A document compiled in June of this year by Mr. Alistair Mitchell of 49 Chambers, Bridgnorth, Shropshire, from information supplied to him by the CPS under the Freedom of Information Act. Mr Mitchell’s document covers certain CPS costs incurred over the period 2004 to 2009.

12 For convenience we reproduce documents (a) and (b) in Appendix 1 to this report.

¹ http://www.cps.gov.uk/news/press_releases/139_09/

² http://www.cps.gov.uk/news/assets/uploads/files/higher_court_advocacy_costs_final.doc

³ <http://www.cps.gov.uk/publications/reports/2007/index.html>

What the CPS says

Press Release of 25 June 2009

- 13 The Press Release announces the creation of “a national system of advocacy assessment”, itself part of an “Advocacy Quality Management Strategy”. The strategy is said to “ensure public money is being spent wisely”, and in that context the Director of Public Prosecutions (DPP) reports that savings achieved by the CPS through conducting its own hearings in the Crown Courts have risen from around £413,000 four years ago to £11.5 million in the last financial year (the year ending March 31 2009).
- 14 The DPP goes on to say that “In-house advocacy brings about improvement across the board in the services the CPS provides to the public, the police and the courts. It improves the quality of our advice to the police about investigations, improves our charging decisions, contributes to better witness care and has significantly broadened the career opportunities open to our current and future staff.”
- 15 The Press Release thus conflates at least three issues – quality of advocacy, cost savings said to be associated with the deployment of Crown Advocates, and career opportunities for CPS staff (including, presumably, advocates).
- 16 As regards cost savings, the Press Release provides a link to a further paper entitled *Cost Considerations Governing the Deployment of Crown Advocates*.

Paper entitled *Cost Considerations Governing the Deployment of Crown Advocates*

- 17 The CPS Finance Directorate’s paper on cost considerations deals primarily with case-by-case “deployment decisions”, i.e. whether to appoint an in-house Crown Advocate or to engage a self-employed barrister. It provides a degree of financial detail that the Press Release does not.
- 18 Although the subject of the paper is costs, the CPS opens by saying that costs are not the driving force behind deployment decisions:

“Whilst using in-house advocates to prosecute cases brings some financial benefit to the Service, it is not the main reason behind the advocacy strategy.”⁴
- 19 Nevertheless, it goes on to say that for each case the CPS’ own marginal costs (which ignore fixed and sunk costs) should be compared with the “estimated” fee that a self-employed barrister would charge. By implication, the lower figure should determine who takes the case.

⁴ *Cost Considerations Governing the Deployment of Crown Advocates*, paragraph 1.

- 20 The CPS uses figures on in-house salary and salary-related costs, and an estimate of certain other overhead costs, to provide an average rate per hour for Crown Advocates in each of fifteen CPS geographic Areas. The paper does not, however, provide an equivalent dataset covering the average rates for self-employed barristers.
- 21 The paper states that “the quality of data captured by Areas is audited (in sample Areas in 2007, 2008 and 2009) and has been found to be at least sufficient.”
- 22 It concludes by summarising the savings achieved from the deployment of in-house advocates, which are carried over into the Press Release, namely £413,000 in 2004-05 rising to £11.6 million in 2008-09.

The structure of our critique

- 23 We see these two documents as confusing two sets of issues which need to be disentangled:
- at a high level, the basis on which policy is conducted; and
 - at a lower level, the way in which deployment decisions are reached.
- 24 We deal with each of these in turn.

Quality and cost in CPS advocacy policy

25 The principal components of the CPS' declared policy in relation to advocacy are quality and cost. We begin by examining its pronouncements in relation to each of these.

Quality

26 In the Press Release the DPP gives great prominence to quality as a policy objective:

"The delivery of high quality advocacy is a mark of a modern public prosecution service and therefore I am determined that quality will be at the heart of the advocacy service the CPS provides."⁵

27 Later he says:

"In-house advocacy.....improves the quality of our advice to the police about investigations, improves our charging decisions, contributes to better witness care and has significantly broadened the career opportunities open to our current and future staff."⁶

28 Despite such emphasis, the Press Release says nothing about how quality has been or is to be measured.

29 In economics, quality is generally taken to be measurable except in certain difficult situations. For example, water quality can be measured by reference to its chemical make-up, and quality in electricity supply quality by (for example) the frequency of outages and voltage stability. The cost of raising quality is thus generally measurable too. The quality of an advocacy service may be less easy to measure, but the DPP is not entitled to say that the CPS is delivering quality simply because he says it aims to.

30 The connection between the Advocacy Management Quality Strategy described in the Press Release and the delivery of high quality advocacy is not drawn. Although we have not been asked to assess the grading approach that the Press Release refers to, our understanding is that it grades the capability of advocates individually, not the quality of the output or of the service that they provide.

31 Furthermore, it is not shown how in-house advocacy has contributed to maintaining or raising quality. One might reasonably expect that, if it had so contributed, some reference to supporting surveys or documents would be forthcoming – but none appears.⁷

32 Until then the CPS appears to assume that the two sources of advocacy are of comparable quality. This seems to us an excessively grand assumption, and we suggest that quantitative analysis *is* warranted.

⁵ Press Release 130/09, *op cit*, paragraph 2.

⁶ Press Release 130/09, *op cit*, paragraph 4.

⁷ Nor does the CPS Annual Report 2007- 2008 expand on quality measurement or achievement.

The role of costs in decision making

33 CPS thinking on the role of costs in decision-making appears to us to be confused. In one and the same paper, it suggests that:

“...financial benefit to the Service...is not the main reason behind the advocacy strategy”
(*Cost Considerations*, paragraph 1)

yet that

“...all decisions will be rational and will be made using relevant costs and revenues... In the context of the decision to choose between [Crown Advocates] and self-employed advocates there are no revenues so the decision is based on the relative costs.” (*Cost Considerations*, paragraph 3)

34 Two economic issues thus arise:

(a) what role do costs play in determining the long-term relationship between an in-house CPS advocacy service and the self-employed Bar?

(b) for case deployment decisions, are the cost calculations carried out by the CPS the right ones to use?

35 We consider issue (a) first, then in the section headed “Analysis of costings” starting on page 9, we consider issue (b).

Marginal costs and the policy consequences

Marginal costs and the scale of CPS in-house advocacy

- 36 Whether or not the marginal cost calculations conducted by the CPS for case by case “deployment decisions” are complete and reliable – and we think they are not – it is for certain that marginal cost calculations are inappropriate for determining the scale and scope of the CPS’ in-house advocacy service.
- 37 Consider a situation in which the CPS has in-house advocates with insufficient work to do, and a new case comes along. The CPS argues that it would be economically rational to use an in-house advocate for this work, since his or her costs are already being incurred, so that engaging a self-employed advocate would only add to its total costs. In this instance the CPS would be right to adopt a marginal cost approach, since the additional cost it would incur in taking the case on in-house (its marginal cost) would be zero.
- 38 However, consider next a situation in which the CPS in-house advocates are fully engaged when another case comes along. Does the CPS then engage a self-employed advocate or does it recruit a further in-house advocate to deal with the increased workload?
- 39 To answer that question (which it fails to do explicitly) the CPS loads the dice in its own favour by ignoring fixed costs in comparing in-house costs with third party costs. One cost that it singles out for exclusion is accommodation.
- 40 The argument runs that it is already paying for accommodation, so that accommodating one more person has nil additional (marginal) cost. This is all very well until the accommodation runs out and more has to be acquired. Conversely, if the accommodation available to the CPS is persistently more than it needs, it should let the surplus go. Thus, contrary to the CPS’ own assertion in paragraph 10, accommodation costs should not be regarded as truly fixed. No rational management concerned with efficiency would take that view. The same goes for allegedly fixed administration costs.⁸ These are arguably even less fixed than accommodation costs, and in the commercial sector one sees managers constantly seeking to reduce fixed costs, not ignore them.
- 41 The CPS’ stance on the fixedness of fixed costs is, to say the least, cavalier.
- 42 If the marginal cost principle were applied exclusively, it would be in the CPS’ interests to acquire slightly more in-house advocates than it had work for, slightly more accommodation than it could fill, and slightly more administrative capacity than it needed, so that the marginal costs always appeared to be nil. From a taxpayer’s point of view, this would clearly be perverse.

⁸ Paragraph 10 states that “Fixed costs for accommodation and the indirect costs associated with the administration of the organisation are not included as they are not *relevant* to the deployment decision.”

- 43 The only economically rational way for the CPS to assess the “right” scale and scope for its in-house advocacy services is to compare the total costs it incurs in providing them with the total cost of an equivalent volume and quality of work provided by self-employed advocates.

Management development

- 44 The CPS argues that it needs to develop a career path for in-house counsel. To quote from *Cost Considerations* again:

“There will be occasions when, because of developmental or leadership requirements, it represents value for money for the CPS to deploy a CA [Crown Advocate] even when there is no notional saving in counsel fees.” (*Cost Considerations*, paragraph 14)

- 45 This is surely putting the cart before the horse? There is a case for developing in-house careers in advocacy if it makes economic sense to run an in-house advocacy service, but not to build up an in-house advocacy service in order to run a management development programme.

Does CPS want merely to be a good buyer?

- 46 It is possible that the CPS sees the *raison d’être* of its in-house advocacy service as an effective means of checking the quality and value for money of the self-employed Bar. From an economics point of view there is nothing wrong with this – but if that is the CPS’ aim, the question then arises: how should the size of the in-house advocacy service be determined?
- 47 This would be a complex debate. In the meantime it seems to us questionable whether a function aimed at keeping the self-employed Bar on its toes would require the CPS to employ over 900 advocates competent to appear in Crown Courts or above.
- 48 That the CPS should employ such a substantial body of advocates is bound to give rise to tensions between its role as buyer and its role as supplier.
- 49 It is also notable that, in seeking (apparently) to favour the deployment of its in-house resources the CPS is ignoring modern economic belief, practised in the public sector as well as in the private, that it is preferable not to nationalise services that are better provided by a competitive private sector.

Analysis of costings

Bias from economic misapplication

50 The formula that the CPS adopts to calculate the benefits of employing in-house advocates rather than self-employed advocates is conceptually correct, provided it is properly applied. The formula as stated is:

“Counsel fees saved by CAs (inc VAT) – the full cost of HCA advocacy = saving (contribution)” (Press Release, paragraph 17)

51 But the CPS misapplies the concept by comparing its own short-run marginal costs with the long-run costs (which are reflected in the fees) of self-employed barristers. Since short-run marginal costs will almost always be lower than long-run costs, the CPS is effectively setting itself up to favour, systematically, the deployment of in-house advocates.

52 Fees paid to self-employed barristers will include both long and short term costs. Such costs include accommodation (see below) and certain other overheads. In reality the CPS too incurs such costs, but it excludes them from its comparison on the grounds that they would remain unchanged for the deployment of an in-house advocate when the next case comes along.

53 As we have already said, the logical outcome of the CPS' approach would (all other things being equal) always favour in-house advocates over self-employed barristers. If the CPS ran out of in-house advocates it would then logically recruit more. If it incurred more accommodation and fixed overhead costs in the process, that would not matter because it excludes such costs from its calculations.

54 Economic theory dictates that both the long run and short run costs (and benefits) of both sources of supply should be included for a correct comparison.

55 If we consider the decision maker to be the government as a whole (rather than just the CPS), then the inclusion of VAT further biases the cost comparison in favour of the in-house barristers. The reasoning is the following. VAT is charged on the services of self-employed barristers, but not on the services of in-house barristers. If the government recoups any VAT on its spending then all its spending is VAT neutral. So VAT is not a relevant cost to a government decision.

56 Assuming, for example, that all services and costs (in or out-house) are equivalent, then the inclusion of VAT would always create an uneven playing field and the in-house barristers would always come out seemingly cheaper. However, the savings would be exactly equal to the VAT income to the government. The inclusion of VAT in its decision making process is thus incorrect as it does not create a like for like comparison.

Underdevelopment of cost estimation

57 The CPS' Cost Considerations paper mentions, but does little to develop, the dynamic aspect of its cost structure.

58 It acknowledges, for example, that the cost of giving experience to in-house advocates may take even its short-run costs over that of employing a self-employed barrister. To quote again from paragraph 14 of *Cost Considerations*.

“For individual deployments the decision may not be made on the grounds of costs alone. There will be occasions when, because of developmental or leadership requirements, it represents value for money for the CPS to deploy a CA even when there is no notional saving in counsel fees.”

59 “Value for money” in the sentence above logically includes all future benefits assessed against all present costs. It may be necessary to incur short term costs in order to achieve long term benefits. However, the assessment of short run costs against long term benefits is completely consolidated into the single sentence above, and clarity is thereby lost. The CPS' loose choice of words suggests to us that little has been done to quantify the value of the training of in-house advocates.

60 In effect, the CPS is asserting long-term benefits from in-house advocacy while disregarding the long-term costs. Such an underdeveloped assessment adds further bias to the CPS' analysis.

61 Furthermore, the quotation above implies that the in-house advocacy programme could even be unprofitable in the short term. This may call into question the CPS' reported savings, or that quality is being sacrificed, or both.

Inconsistent accounting

62 Some detail issues raise serious questions that must be addressed. Accommodation and overheads are examples.

Accommodation

63 The CPS explicitly excludes all accommodation costs in its calculations. Its justification is that it is paying for accommodation regardless of whether the Crown Advocates are using it. This is plainly nonsensical: if the CPS has surplus accommodation, it could and should dispose of it.

64 Accommodation attracts other costs too, for example utility costs, cleaning and security. The opportunity cost of using accommodation is thus likely to be quite high. By not

including accommodation costs in its calculations, the CPS would tend logically to acquire surplus accommodation, and to keep filling it.

- 65 The CPS 2008 Annual Report indicates that accommodation and associated costs totalled £18.5 million in 2007-08.⁹ Accommodation cost per head is stated to be £5,462. Given that there are 945 Crown Advocates, the programme uses some 28 per cent (or £5.162 million) of the total accommodation. If the advocacy service is regarded as representing the direct costs of the CPS, this implies that the remaining 72 per cent is used wholly or mainly for the accommodation of people who represent overheads.

Overheads

- 66 The CPS has provided an allowance for overheads of 10.5% of salary to cover “an assessment of a range of direct overheads such as training and recruitment costs as well as travel and subsistence costs”. In our experience, such a percentage would be lean even for private businesses.
- 67 Among the larger omissions from the Cost Considerations paper and from the 2007-2008 Annual Report we note:
- Recruitment, which one would expect to feature among the more significant costs if the CPS is actively recruiting.
 - The Quality Assessment Strategy.
- 68 The CPS states that there is saving to be had from avoiding the administration cost of paying fees to self-employed barristers. Economic intuition suggests that if the administration resource is not used for self-employed barristers it would be used instead for the administration of Crown Advocate activities. Business intuition suggests that there is likely to be a further cost arising in the administration of performance assessment of in-house advocates, subsequent decisions as to pay and promotion and HR issues generally. These costs do not arise at all if self-employed barristers are deployed.
- 69 All in all, the overhead costs of the CPS appear to us to be more substantial than the Cost Considerations paper leads one to believe. Page 55 of the Annual Report identifies £54 million of overheads (up from £52 million in 2006-2007) under the heading “Administration Costs on HQ and Central services”; and page 66 identifies a further £27 million (up from £21 million in 2006-2007) on “Other Administration Costs”.
- 70 These two items total £81 million, while total accommodation (including, on page 66 an additional £4 million under “Other Administration Costs”) adds £22 million.

⁹ Crown Prosecution Service *Annual Report and Resource Accounts 2007/2008*, p67.

71 The total of £103 million spent on overhead to support the in-house advocates is a substantial sum. It is equivalent to some 74 per cent of the total of £140 million paid in self-employed Advocates' Fees..

Lack of auditing

72 Although the Accounts are formally audited, the Cost Considerations paper is (apparently) not. The only element said to be audited is the adequacy of data collected from the geographic Area samples.

73 Thus the CPS is unable to say that its cost calculations as a whole, or the overhead percentages in particular, have been either audited or independently reviewed. Since so much hangs on the cost calculations, it would be useful if the CPS could provide reassurance on this point.

Claimed savings from deploying in-house advocates

74 We have identified a possible inconsistency between the savings that the CPS is claiming in its Cost Considerations paper and the figures reported in its 2007-2008 Accounts.

75 The Accounts indicate (on p.67) that expenditure on external counsel totalled £145 million in 2006-2007 and £140 million in 2007-2008. The Cost Considerations paper, however, reports £134 million and £127 million respectively. The differences are thus £11 million and £13 million respectively – more than the claimed savings arising from the use of in-house counsel¹⁰. The discrepancies are concerning.

76 At the same time, the staff costs of “Crown Prosecutions and Legal Services” (p.55 in the Accounts) show a rise from £318 million in 2006-2007 to £334 million in 2007-2008.

77 Even ignoring the discrepancies we highlighted in paragraph 74 above, what appears to be the case is that a fall in fees of £5 million paid to external advocates was offset by a rise of £16 million in in-house salary costs alone. It is hard to reconcile this with a claimed saving of £8.4 million in 2007-2008 (rising to £11.5 million in 2008-2009). The CPS should be asked to explain its calculations in much more detail than it has volunteered.

Mr Alistair Mitchell

78 Mr. Alistair Mitchell of 49 Chambers, Bridgnorth, Shropshire, sought certain information from the CPS under the Freedom of Information Act. He produced from that a summary of CPS costs incurred over a large number of Magistrates Court sessions between 2004 and 2009 and concludes that the CPS costs incurred were some way higher than the fees it would have paid to the self-employed Bar for the same sessions.

¹⁰ We have been unable to reconcile these supposed savings with the £17.1 million quoted on p14 of the CPS Annual Report 07/08.

- 79 Mr. Mitchell bases his reasoning on the differences between hourly rates for CPS advocates, which included overhead costs in the years 2004/05 and 2005/06 but excluded them in the years 2006/07 to 2008/09. The difference, he calculates, runs at between £90 and £100 per day, far higher than the 10.5 per cent figure used by the CPS, and sufficiently large to wipe out the claimed cost savings.
- 80 Indeed, if a figure of between £90 and £100 per day were added to the daily rates for Senior Crown Prosecutors and Crown Prosecutors, Mr. Mitchell calculates that they would exceed by 100% and 50% respectively the “agent” (self-employed) rate.
- 81 It is beyond our remit to investigate Mr. Mitchell’s analysis in any more detail but it seems to us important to report it.

Standard of assessment

- 82 As part of the executive branch of government, the CPS is bound by the accounting regulations and fiscal targets set by the Government. The reporting and analytical standards to which the CPS should conform are set out in several Government publications, of which the principal two are:

(a) HM Treasury’s *Green Book – Appraisal and Evaluation in Central Government*

(b) The Department for Business Innovation and Skills’ *Impact Assessment Toolkit*

- 83 The Green Book is the more relevant for purposes of this report. In Appendix 2 we set out the principal Green Book obligations upon the CPS in the current context, and comment at each point. In summary, the shortcomings we have identified are that:

- The costs and benefits of each option (i.e. deploying in-house or self-employed counsel) have been done very incompletely.
- The transparency of the CPS’ presentation is inadequate.
- Short-run marginal costs are not the basis on which government expects major policy initiatives or decisions to be taken.
- Property costs should not be treated as fixed and should not be excluded from policy evaluation.

- 84 All this apart, the CPS has a routine duty to report a credible picture of its fiscal position, as well as its year-on-year evolution. The Treasury in turn is dependent on the reliability

of departmental accounting, as witness its 2009 *Value for Money Update*, which specifically relies on the CPS forecasts of £16 million worth of savings.¹¹

85 A further standard which the CPS must observe, specific to the form of assessment for programme decisions such as more widespread deployment of in-house advocates, is the Department for Business Innovation and Skills' *Impact Assessment Toolkit*.

86 Where an impact assessment is conducted (as it must be for all major policy initiatives) all non-staff costs (IT, procurement and capital) affected by the policy changes must be included. By not including the costs of accommodation, overhead or administration, the CPS again fails to meet a standard.

87 The CPS claims that:

“The quality of data captured by Areas is audited (in sample Areas in 2007, 2008 and 2009) and has been found to be at least sufficient”.

88 As we have already said, this assurance is satisfactory as far as it goes, but it goes nowhere near far enough. So far as we can tell, the figures used by the CPS in support of its stance in favour of deploying in-house counsel have not been audited, and in any event a financial audit does not cover the same ground as a full economic appraisal. Both are necessary.

89 All in all, the CPS' analysis falls below the standards required by government of a government body.

¹¹ 2009 Value for Money Update p70.

Appendix 1

This appendix contains (on the following pages) the two primary documents produced by the CPS in relation to this report, namely its Press Release dated 25 June 2009 and its paper of June 2009 entitled “Cost Considerations Governing the Deployment of Crown Advocates”.

**CROWN PROSECUTION SERVICE
PRESS RELEASE**



25 June 2009

130/09

CPS ANNOUNCES FIRST ADVOCACY ASSESSMENT SYSTEM

A national system of advocacy assessment was announced today by the Director of Public Prosecutions, Keir Starmer QC. In an update on the progress of the CPS Advocacy Strategy, he also released the first detailed figures showing the savings the strategy has produced.

Mr Starmer said: "The delivery of high quality advocacy is a mark of a modern public prosecution service and therefore I am determined that quality will be at the heart of the advocacy service the CPS provides. We will achieve this with the introduction of the Advocacy Quality Management Strategy that will monitor performance and target training. I am delighted the CPS is leading the legal profession with this development.

"Our advocacy strategy also ensures public money is being spent wisely. Four years ago the CPS saved around £413,000 by conducting its own hearings in the Crown Courts. The savings have now risen to £11.5 million in the last financial year. In the current economic climate, saving money is essential. Before deciding to deploy a CPS advocate, my Chief Crown Prosecutors carefully consider the advocacy skills each case will demand and all other relevant factors to achieve value for money.

Mr Starmer added: "Aside from these benefits, the CPS is working closely with the Legal Services Commission to bring about a consistent approach to grading and assessing all publicly funded criminal advocates so that the public will be assured of good quality advocacy across the criminal justice system.

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"In-house advocacy brings about improvement across the board in the services the CPS provides to the public, the police and the courts. It improves the quality of our advice to the police about investigations, improves our charging decisions, contributes to better witness care and has significantly broadened the career opportunities open to our current and future staff."

The CPS Advocacy Quality Management Strategy will be implemented by a network of internally appointed, dedicated assessors located throughout the 15 CPS groups in England and Wales. They will be supplemented by independent external assessors who will ensure objectivity and consistency in the process by undertaking their own assessments and will also quality assure the performance of the internal assessors.

Ends

Background

1. The CPS first established a programme to deploy in-house advocates throughout all courts and the full range of cases in April 2006.
2. In July 2008 the CPS introduced an advocacy grading system for crown advocates closely aligned to the system the CPS already used to grade members of the self-employed Bar who are instructed in prosecution work.
3. In December 2008 the DPP indicated his support for a set of common standards for all criminal advocates whether in-house or external, defence or prosecution.
4. Work has already begun with the Legal Services Commission to converge their proposed Quality Assurance Scheme (QAA) with the CPS Advocacy Quality Management Strategy by summer 2010.
5. A converged scheme would share the following common features:
 - Common levels (1-4)
 - Common/comparable core competencies
 - Common/comparable assessment methods
6. The CPS is involved with the QAA pilots currently underway including in London, Birmingham, Winchester and Cardiff.
7. CPS advocate costs include:
 - Salary and associated costs including employers' pension contributions.
 - The costs of IT, travel, training and other overhead costs.
8. CPS advocate costs exclude fixed costs such as accommodation.
9. The systems and processes for calculating savings were developed using independent consultancy and have been subject to audit review.

10. Full details of the cost considerations governing the deployment of advocates is available here
http://www.cps.gov.uk/news/assets/uploads/files/higher_court_advocacy_costs_final.doc
11. All enquiries to CPS Press Office on 020 7796 8127 or 020 7796 8102

Cost Considerations Governing the Deployment of Crown Advocates

1. Whilst using in-house advocates to prosecute cases brings some financial benefit to the Service, it is not the main reason behind the advocacy strategy. The increased experience of advocacy, particularly in the Crown Court, leads to better charged and better prepared cases and increases the accountability of the CPS to the public that we serve. It also provides career development opportunities for our prosecutors, encourages ambitious staff to remain in the CPS and is helping to persuade high quality candidates to apply to join the Service.

The Deployment Decision

2. All CPS managers are charged with achieving best value for money and to provide high quality services as economically and effectively as possible. In the present economic environment doing so is more important than ever. Like many government departments the CPS has seen its resources diminish as a consequence of the last Spending Review and we expect that trend to continue in the future. We would not spend resources on providing advocacy in house if that expenditure did not provide value for money for the tax payer and was not justified.
3. Decision making for operational managers in this context is simply making a choice between deploying CPS Crown Advocates (CA) and instructing self-employed advocates. Guidance from the professional accounting bodies requires that all decisions will be rational and will be made using relevant costs and revenues, that is the future cash flows arising as a direct consequence of the decision under consideration. In the context of the decision to choose between CAs and self-employed advocates there are no revenues so the decision is based on the relative costs.

4. There are two cost elements for consideration:

Future costs. That means that past costs are only useful in so far as they provide a guide to the future. Costs already spent, known as *sunk costs*, are irrelevant for decision making.

Differential costs. Only those costs that alter as a result of a decision are relevant. When factors are common to both alternatives being considered they can be ignored; only the differences are relevant.

5. For the CPS and decisions on advocate deployment the fixed costs remain constant for either alternative and thus the marginal costing approach showing marginal cost and contribution is particularly appropriate. If, over the longer term, fixed costs change as a result of a substantial increase in employee numbers arising from the advocacy strategy the differential costs would be uplifted to include any changes in the amount of fixed costs.
6. Hence before deploying CAs every operational manager must have regard to the value for money of that deployment. In doing so the manager will compare the estimated cost of using self employed counsel against the marginal cost of deploying CPS advocates.

The marginal cost for the deployment of a Crown Advocate comprises:

Average Salary Cost for the CPS Area for the grade to be deployed
ERNIC (Earnings Related National Insurance Contributions).
Superannuation (employers' pension contribution)
An allowance of 10.5% of the above costs to cover certain variable direct costs

7. The salary and associated costs are calculated based on the average salary costs for the grade in the CPS Area which is used for determining the cost of deployment by reference to time spent on pre-court preparation, travel to and from court and time at court on HCA business.
8. To calculate the daily rate the average monthly salary is multiplied by 12 to get an annual equivalent, and then divided by 1,550.30 (national) or 1,508.4 (London) to provide an hourly rate, taking into account available working days.

> the national 1,550.3 divisor is made up of 209.5 (days pa) x 7.4 (hours per day).

> the London 1,508.4 divisor is made up of 209.5 (days pa) x 7.2 (hours per day).

209.5 days is the figure that was used hitherto in the CPS Activity Based Costing model which accounts for days spent on annual leave, sick absence, Public and privilege days and an estimated training allowance per staff member.

9. The allowance of 10.5% is calculated based on an assessment of a range of direct overheads such as training and recruitment costs as well as travel and subsistence costs. The costs are aggregated for all CPS operational Areas and are attributed on a simple headcount basis. Direct overheads are equivalent to 2.5% of the average salary and associated costs for a CA. Similarly we estimate the costs of IT and telephony to be around 8% of the salary costs. A further 2% is added to the direct overhead costs to represent incidental costs not captured above in the interests of prudence.
10. Fixed costs for accommodation and the indirect costs associated with the administration of the organisation are not included as they are not relevant to the deployment decision. There are also some direct costs, such as copying and printing that are excluded from the calculation as they will be constant irrespective of the status of the advocate deployed.
11. Administration cost savings for the CPS from obviating the need to deal with the checking and payment of fee notes are not included in the calculation on the same basis.
12. The following table illustrates how the marginal costs of CAs are calculated for each Group. It is a snapshot as at the end of March 2009 and the system used will revalorise the values as appropriate each month.

Crown Advocate 2009-10 Ave Payroll	Pay	ERNIC	Superannuation	Total	Overhead	Total	Hourly Rate
G01 Cymru Wales	53,473	4,814	12,290	70,577	7,411	77,988	50
G02 East Midlands	51,249	4,502	11,317	67,068	7,042	74,110	48
G03 Eastern	63,608	5,991	12,271	81,870	8,596	90,467	58
G04 Greater Manchester	53,658	4,858	11,889	70,406	7,393	77,799	50
G05 Lancashire & Cumbria	51,696	4,538	11,839	68,072	7,148	75,220	49
G06 London	59,581	5,533	13,469	78,583	8,251	86,834	58
G07 Merseyside/Cheshire	53,887	4,828	12,065	70,780	7,432	78,212	50
G08 North & West Yorkshire	51,367	4,429	11,691	67,487	7,086	74,573	48
G09 North East	51,506	4,520	11,786	67,812	7,120	74,933	48
G10 South East	54,224	4,939	12,452	71,615	7,520	79,135	51
G11 South West	51,906	4,539	12,439	68,884	7,233	76,117	49
G12 South Yorkshire/Humberstone	53,434	4,876	11,623	69,933	7,343	77,276	50
G13 Thames & Chiltern	56,629	5,135	13,001	74,764	7,850	82,615	53
G14 Wessex	54,395	4,834	12,058	71,288	7,485	78,773	51
G15 West Midlands	51,187	4,446	11,654	67,287	7,065	74,352	48
G16 CPS Direct	53,678	6,832	12,341	72,851	7,648	80,501	52
Casework	63,694	6,130	13,013	82,838	8,698	91,536	59

Benefits

13. The benefits delivered through advocacy are calculated each month and are reported back to the senior management team of each Area. Operational managers will regularly review the management information to ensure that they are continuing to deliver value for money.
14. For individual deployments the decision may not be made on the grounds of costs alone. There will be occasions when, because of developmental or leadership requirements, it represents value for money for the CPS to deploy a CA even when there is no notional saving in counsel fees. In addition the operational manager must have regard to capability and capacity and there will be occasions when there is no suitable CA available and a self employed advocate will be instructed although the costs to the CPS will be higher as a consequence. Overall however each Area must be able to show that the deployment of CAs represents good value for money for the CPS.

How robust are the data

15. Since July 2001, Crown Advocate deployment data has been routinely captured by the completion of a detailed form after every Crown Advocate attendance at the Crown Court. Data is then input to our Corporate Information System (CIS) and collated. For instance in 2007/08 we captured data in respect of 44,000 court attendances and 132,000 case hearings undertaken Crown Advocates.
16. The quality of data captured by Areas is audited (in sample Areas in 2007, 2008 and 2009) and has been found to be at least sufficient.

17. In addition to the data captured by the HCA, the CIS database is programmed to automatically add the following information:

- CA salary cost per attendance
- CA full cost per attendance

We calculate the cost differential by using the formula:

$$\text{Counsel fees saved by CAs (inc VAT)} - \text{the full cost of HCA advocacy} = \text{saving (contribution)}$$

OP3 EXPENDITURE ON ADVOCACY COSTS - 42 AREAS - SUMMARY					
	[Data from CIS]				
	2004-06	2005-08	2006-07	2007-08	2008-09
External Advocacy spend from CIS	134,558,988	130,406,471	134,063,883	127,114,623	116,183,052
Change on previous year		-4,153,527	3,648,391	-6,939,339	-11,921,471
% Change on previous year		-3.1%	2.8%	-5.2%	-9.4%
HCA Counsel Fees Saved (inc VAT)	2,008,640	5,468,118	11,301,090	20,078,126	27,760,463
Change on previous year		3,447,578	5,844,974	8,775,035	7,674,328
% Change on previous year		171.6%	107.1%	77.6%	38.2%
Advocacy Expenditure + HCA Cost fees saved	138,587,638	135,881,687	146,364,953	147,190,848	142,943,605
Change on previous year		-705,951	9,493,365	1,835,695	-4,247,143
% Change on previous year		-0.5%	7.0%	1.3%	-2.9%
CC Finalisations	122,622	124,840	123,478	131,478	139,349
Change on previous year		2,118	-1,154	8,002	7,871
% Change on previous year		1.7%	-0.9%	6.5%	6.0%
Full Advocacy Unit Cost	1,116	1,090	1,177	1,120	1,028
<small>(advocacy expenditure + HCA cost fees saved (inc VAT)) / CC finalisations</small>					

	2004-06	2005-08	2006-07	2007-08	2008-09
HCA Counsel Fees Saved (inc VAT)	2,008,640	5,468,118	11,301,090	20,078,126	27,760,463
Full Cost of HCA time	1,595,660	3,298,971	8,648,808	11,843,696	18,172,488
Efficiency (cost fees saved - full cost of HCAs)	412,980	2,168,146	4,662,484	8,432,630	11,677,985

Finance Directorate
25 June 2009

Appendix 2

1. The Treasury Green Book requirements

“2.9 Each option is then appraised by establishing a Base Case. This is the best estimate of its costs and benefits. These estimates can then be adjusted by considering different scenarios, or the option’s sensitivity to changes can be modelled by changing key variables. More fully, the appraisal may develop as follows:

Identify and value the costs of each option.

Identify and value the benefits of each option.”

Comment: both have been done very incompletely. The costs but not the benefits of deploying self-employed barristers are not explored at all.

“2.130 In all cases, transparency is vital.”

Comment: transparency is in short supply here. We have identified, as had Mr. Mitchell before us, a number of issues that require clarification.

“5.14 It is important to explore what opportunities may exist. An example of an opportunity is to use land in a different, more valuable, way than in its current use.”

5.15 What matters are costs about which decisions can still be made. However, this includes the opportunity costs of continuing to tie up resources that have already been paid for.

5.18 The full cost includes direct and indirect costs, and attributable overheads.”

Comment: this is clearly at odds with the CPS’ policy of applying short-run marginal costs.

“33 an appraisal must also include the costs of retaining vacant land. It is sometimes argued that vacant land on government sites could not be used for any other purpose because of the demands of security, and so the opportunity cost of this land is zero. However, it is generally possible, by the re-organisation of a land portfolio taken as a whole, to release land elsewhere. In practice, land that can be used for a public sector project nearly always has an opportunity cost.”

Comment: this quotation refers to land but is included in a section that covers land and property. Clearly, the CPS has ignored this provision by excluding property costs from its calculations.

2. The BIS *Impact Assessment Toolkit*

The Impact Assessment Toolkit inherited by the new BIS department from BERR sets out best practices of its own in relation to assessing the likely effects of policy changes, but refers frequently back to the Green Book for the presentation of options. Thus:

"The Impact Assessment template and guidance seek information on costs and benefits presented in three ways. This information would normally be based on one set of calculations, compliant with the guidance in the HM Treasury Green Book" (See <http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44236.html>)

"It is particularly important that the Evidence Base should show how the headline costs and benefits have been generated, by clear and transparent presentation of figures. The balance of economic, social and environmental costs and benefits should emerge clearly from this presentation. Use of disaggregated figures should help readers gain a better understanding of the costs and benefits of the policy options that are presented in aggregated terms on the summary pages of the Impact Assessment. It may also be useful to present a summary table that compared the main costs and benefits of the various options considered.

The information must stand up to external scrutiny – i.e. it should be accessible to the lay reader, and external parties with an interest must be able to contest the data. It should also be consistent with the HM Treasury Green Book guidance on appraisal and evaluation"

(See <http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44233.html>)

Comment: neither the assessment of savings from the use of in-house counsel nor the likely costs or benefits of the quality assessment programme have followed these guidelines; nor has the method been followed in the CPS' attempt to connect the quality initiative with cost savings.