

BAR
STANDARDS
BOARD

REGULATING BARRISTERS

Response from the Bar Standards Board to the Ministry of Justice Consultation:

Preserving and enhancing the quality of criminal advocacy

Bar Standards Board
November 2015

Preserving and enhancing the quality of criminal advocacy consultation paper Response from the Bar Standards Board

Introduction

1. The Bar Standards Board (BSB) is the independent regulator of barristers in England and Wales.

Responses to the consultation questions

Q1: Do you agree that the government should develop a Panel scheme for criminal defence advocates, based loosely on the CPS model already in operation? Are there particular features of the CPS scheme which you think should or should not be mirrored in a defence panel scheme?

2. The BSB has no particular view on the means by which the government procures legal services, be that through a defence panel scheme or some other mechanism. As a regulator we are concerned to ensure that the standards of all advocates are maintained and have developed and are implementing QASA to achieve that aim. Since the consultation paper sees QASA as operating complementarily to any defence panel, the issue for the BSB is therefore how QASA can be integrated into procurement mechanisms for advocacy services in the criminal courts in England and Wales. Our response therefore sets out how anyone seeking to institute any panel-based selection scheme for criminal defence advocacy services will be able to draw on the imminent roll-out of QASA to plan economically effective and constitutionally appropriate processes for assuring the quality of those who might provide services. Any arrangements the government adopts will have a cost and it will need to be clear what the additional costs are and the need for them.
3. At the heart of QASA is a set of professional standards in advocacy with competence descriptors at four levels. The standards and descriptors have been developed by practitioner and judicial experts in the field over a period of years and have been comprehensively consulted upon and independently scrutinised. They have also withstood judicial review and been found lawful in the Supreme Court.
4. The standards and the Scheme apply to all advocates irrespective of whether they are prosecuting or defending, or whether they are barristers, solicitor-advocates or chartered legal executive advocates. When the Scheme is implemented over a maximum of two years, clients, the general public and the taxpayer will be assured that all advocates in the criminal courts meet objective, common professional standards and are competent to carry out work at their level of accreditation.
5. The public will also have the assurance that assessment of whether an advocate meets the required professional standards will have been made by the relevant independent regulatory body with the assistance of the judiciary or other independent specialist assessors, with the costs borne by those who are regulated: in respect of defence advocacy, this provides important constitutional safeguards where advocates' work is funded by the state.

6. This response explains what the standards are, how they were drawn up, and how the standards and the Scheme can provide an objective, cost effective quality assurance mechanism in a panel procurement process.

The criminal advocacy standards: development.

7. These have been developed over the period 2009-2013 by the independent regulatory bodies for barristers, solicitors, chartered legal executives and associate prosecutors regulated by CILEx Regulation. ¹
8. A working group of specialists in the field, led by a very senior member of the judiciary, oversaw a process which included:
 - A review of existing sources for standards including those used in Queens Counsel appointments by the QCA; those used by the Crown Prosecution Service and its independent Inspectorate; the Dutton Criteria which are used for training of barristers and were themselves developed by representatives of the Judiciary, the four Inns of Court, the Specialist Bar Associations (SBAs), the DPP, and providers of education and training in advocacy.
 - A development process on draft standards (and the indicators that sit behind them): workshops with a wide range of stakeholders including practitioners, academics, the Inns, the Advocacy Training Council (ATC), the professions' representative bodies
9. The regulators consulted publicly on the standards and the detail of the Scheme in 2010, 2011 and 2013. Additionally in 2012 independent consultants were appointed by the LSB to review both the standards and the ways in which they could be used to assure quality. That review found that the approach proposed by the regulators for the development of a quality assurance scheme for advocates was robust and in line with accepted good practice.

The standards and competence descriptors at 4 levels

10. There are eight standards in which an advocate can demonstrate competence at four levels. These standards cover the core skills that all advocates need to be able to demonstrate in order to be competent. They are:
 - i. Has demonstrated the appropriate level of knowledge, experience and skill required for the Level.
 - ii. Was properly prepared.
 - iii. Presented clear and succinct written and/or oral submission.
 - iv. Was professional at all times and sensitive to equality and diversity principles.
 - v. Provided a proper contribution to case management.

¹ <https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/quality-assurance-scheme-for-advocates/>

- vi. Handled vulnerable, uncooperative and expert witnesses appropriately.
 - vii. Understood and assisted court on sentencing.
 - viii. Assisted client(s) in decision making.
11. Each standard has specific indicators that should be taken into consideration when determining the overall level of competence. The standards are further expanded to reflect the greater level of competence required to satisfy a standard as the level of advocacy increases. This means that a level 4 advocate will be assessed to a higher degree of competence than a level 2 advocate in respect of each standard. See the Criminal Advocacy Evaluation Form (CAEF) for an illustration of how that works in practice. The levels also give a guide to the types of case advocates at each level will be competent and experienced in: for example a level 4 advocate will be experienced in serious sexual offences.

QASA – how the scheme works

12. QASA is a compulsory scheme for any advocate wishing to undertake criminal advocacy. Advocates are initially required to self-assess at which of the four levels they believe they are competent to practise. Guidance will be provided by the regulators to help advocates make that decision and random sampling will be conducted in order to assure the integrity of the self-assessment process. Advocates will be awarded provisional accreditation at the level of their self-assessment and will have a maximum of two years within which to convert that accreditation to full accreditation. In order to do so, advocates must be evaluated as competent against the advocacy standards in a minimum of two and a maximum of three consecutive trials at their level. The presiding judge will complete the evaluation form and return it to the advocate or to their regulator. The regulator will take a decision as to the competence of each advocate based on the body of evidence gathered through judicial evaluation as well as any other material information that the regulator might hold (such as disciplinary findings).
13. It will be possible for advocates who do not intend to undertake trials to obtain accreditation at level 2 via evaluation at an assessment centre. At these centres, advocates will be evaluated in simulated advocacy exercises against all of the advocacy standards. Successful completion of the evaluation process will give the advocate non-trial accreditation at level 2. Should those advocates wish to undertake full trials they can do so through successful judicial evaluation in a minimum of two cases at the advocate's accredited level.
14. Given the frequency of court appearance of the majority of advocates a high percentage of advocates will have completed the accreditation process within 6-9 months. Those advocates who appear less frequently or who have a small number of long trials will have two years to complete their evaluations – extensions will be available where that is not possible for good reason.
15. Advocates, irrespective of their profession or their pattern of practice, will therefore be assessed against the same standards. The strength of the Scheme is its consistency and transparency of evaluation.

16. All judges who undertake evaluation will first have completed specialist training on the assessment of advocates against the advocacy standards. This ensures that assessments are carried out by the judiciary in a consistent and objective manner.
17. A panel of independent assessors will be established which will be used by the regulator to undertake targeted evaluations where necessary. These assessors will have undertaken the same training as judges.
18. Advocates will be subject to re-accreditation every five years through a similar process of evaluation to that described above. Advocates will also be able to apply to progress to the next level when they believe they are competent to do so. This is achieved first by demonstrating that they are very competent at their current level and then through positive evaluation at the higher level. Again that assessment is carried out against the advocacy standards.
19. The accredited level of the advocate will be publicly available on the regulators' websites.
20. Where an advocate fails to be assessed as competent at their chosen level they will drop down to provisional accreditation at the level below and will then need to apply for full accreditation at that level. The Scheme therefore prevents advocates who are not competent at a particular level from practising at that level.
21. Allied to the formal accreditation and evaluation process will be the opportunity for judges at any point to refer instances of poor performance to the regulators. Regulators will consider such referrals in the context of any other performance indicators or information to determine what the appropriate regulatory response should be. Such a response would include encouraging advocates to undertake training to address perceived areas of weakness to more formal arrangements to manage underperformance.

Procuring advocacy services

22. A purchaser of professional services might take one of several possible approaches to doing so in order to ensure that best practice in procurement is observed and the market in the service sector concerned operates effectively in relation to the quality and price considerations driving the purchaser's choices and that no perverse incentives or unintended consequences of the procurement system develop.
23. In advocacy services to date one key method for procuring services has been the "panel" system: this is used for prosecution advocacy, as well as for the procurement of government legal advice and representation through, for example, the Treasury panel process.
24. Panel procurement processes typically break down into several stages:
 - a. The identification of basic eligibility criteria for potential providers.
 - b. The identification of criteria relating to the capacity and capability of potential providers: criteria which will allow the purchaser to determine whether a provider has the scale of resources required to provide the service, and the right experience and qualifications to be able to do so at the levels of quality

and competence needed by the purchaser. These criteria may have “core” and “additional” sets.

- c. (usually but not always) some means of assessing independently or verifying whether the potential supplier can do what s/he says s/he can.
- d. (usually but not always) parameters for price offers from the prospective suppliers.

25. This process is used to identify a pool (panel) of people / suppliers to whom offers of subsequent work / contracts for services will be made.

26. Looking at an established panel procurement process we can see that the CPS scheme adopts this process as follows:

- a) Prospective panel members are asked to provide basic professional information such as names, practice addresses and academic qualifications; and to make declarations about their personal history in relation to criminal or disciplinary proceedings. They are asked to indicate in which location/s they seek to work and at which levels – on which panels – they want to offer services.
- b) Potential panel members are asked to provide a narrative with evidence in relation to their past experience and the competence criteria set out against four levels, broken down broadly into five areas – advocacy, advisory work, PII and disclosure, other relevant knowledge skills and experience, role of CPS panel advocate. They may also supply information to be considered for work on specialist panels for e.g. extradition, rape and child sexual abuse.
- c) References re the above from judges, instructing solicitors, more senior advocates etc.
- d) Not applicable.

26. Those making selection decisions in the CPS scheme will “rank” applicants (as long as they have satisfied the requirements in a) above) as high, medium or low relative to the extent to which they satisfy the criteria in b) above, using information supplied by the applicants and their referees in c). As payment levels are non-negotiable in the CPS process, d) does not fall to be assessed.

27. The table below indicates how QASA can fit into a typical panel procurement process.

Procurement process stage	How QASA can be used in the stage	Further comment
a) Prequalification questions	QASA is not directly relevant unless an advocate’s good standing in the Scheme were itself a prequalification question.	Note that the regulatory framework gathers information about the practice of advocates and their disciplinary and conduct history. This, and their current QASA level, appears on the public

		registers of regulatory bodies and is thus independently verifiable.
b) provide evidence in relation to their past experience and the competence criteria set out against four levels, broken down broadly into five areas – advocacy, advisory work, PII and disclosure, other relevant knowledge skills and experience	<p>The Criminal Advocacy Evaluation Forms (CAEF), which the advocate will have secured in the QASA process provide this evidence. A minimum of two positive evaluation forms will be in the possession of advocates within two years of registration. Some advocates will have more CAEFs, if for example they have progressed from one level to the next during that time.</p> <p>Using the CAEFs for this part of the process means all applicants are providing standardised information in relation to the same set of criteria, with the evaluations having been conducted by people who are all trained in the same way to evaluate against those criteria</p>	<p>The regulatory bodies will have collated CAEF evidence and any further evidence the advocate will have supplied as necessary, and will have attributed a formal level to the criminal advocates.</p> <p>Regulators will also have gathered specific information about advocates through its other regulatory activity, for example, in relation to continuing professional development or complaints. This breadth of evidence allows the regulator to take an informed decision on the competence of an advocate.</p>
Role of CPS panel advocate (role of the defence panel advocate)	<p>QASA provides no specific direct assistance, though the CAEF's might be from exclusively prosecution or exclusively defence advocacy roles, thus providing objective evidence of an advocate's capability in one role or another.</p> <p>QASA does however provide assessment against generic standards that are applicable to both the competence of defence or prosecution advocates</p>	
Supply information to be considered on specialist panels for e.g. extradition, rape and child sexual abuse	QASA is unlikely to provide sufficient specific information of the advocate's expertise so a submission from the applicant in relation to	Regulators are developing discrete regulatory responses to areas of risk, such as in relation to Youth Court advocacy (an area identified by this

	specialist work is still likely to be necessary	Government as requiring particular attention)
c) References re the above from judges, instructing solicitors, more senior advocates	<p>QASA evaluation forms are completed by judges before whom the advocate has recently appeared and who have been trained to assess against a common core of standards; and have been trained in avoiding unconscious bias. The forms could be submitted instead of judicial references, saving judicial resources and ensuring a level playing field for advocates.</p> <p>If an advocate has been through an assessment centre in QASA, the same standards are used and the pool of independent assessors is wider: the effect on this part of a procurement process of using the assessment centre outputs is similarly helpful.</p>	<p>It is important to note that the CAEFs belong to the advocate but must be submitted to the regulator, and it is the regulator which attributes the QASA level, on the basis of all the evidence before it. No single piece of evidence is determinative. Using a QASA level instead of most of step b) and all of step c) is more economical and more objective and fair than the steps in current panel processes</p>

“Ranking” of applicants

28. Although the levels give a ranking of expertise in relation to seriousness of offence, QASA accreditation status and the evidence that underpins that may not be able entirely to supplant any ranking process to the same extent that it could replace significant parts of the evidence base from applicants and judicial referees (b and c) above) – at least not as currently designed. The CAEF’s may contain important information to assist any ranking process and especially in relation to the free text reasoning for the evaluation that the assessing judge is invited to give – and required to give if the advocate has been found not competent or it has not been possible to evaluate any of the core standards on the basis of the evidence that the live trial provided.

The case for QASA as the primary means of quality assurance

29. The operation of QASA coupled with the general regulatory framework would be able to meet the majority of the quality assurance/control needs of both the CPS and any defence panel arrangements. It provides a gateway for entry on to any panel and provides assurance to major purchasers of legal services such as the CPS and the LAA that advocates have satisfied the standards of advocacy necessary to practise at a given level. The CPS and LAA will then be in a position to put in place its own model to satisfy its purchasing needs to ensure that there is adequate supply of

advocates across the country and in the volume and level necessary to meet demand.

30. Through QASA there is an established, operationally ready, robust and legally sound quality assurance scheme available to support any defence panel arrangements and which is already seen as the natural means of convergence for the prosecution panel system adopted by the CPS. Any alternative assurance mechanism which sits outside of the regulatory framework is likely to be more expensive, more bureaucratic and less objective and independent. There is also the risk of duplication in regulation and assessment of advocates and the associated increased costs and impact on access to justice. For example, if QASA and a defence panel scheme were established with two separate assessment processes, there is considerable risk of confusion to the public and those involved within the criminal justice system if advocates are assessed at one level under QASA and another in any defence panel arrangement. Further, public confidence is more likely to be achieved through a quality assurance mechanism operated independently of those in a legal services purchasing role.
31. Of fundamental importance to the future understanding of the legal services market will be capturing data on how that market operates and what drives change. QASA will provide a comprehensive and reliable means of gathering in one place information about all criminal advocates. It will highlight trends in patterns of practice, incidence of poor performance and gaps in the provision of legal services; all of which will be critical to understanding the future priorities for the legal sector and its regulation and addressing the information asymmetry that exists for consumers. Such a picture of the legal services market will be more difficult to achieve with different quality assurance measures being implemented by different purchasers of legal services using different evaluation metrics.
32. The BSB is therefore firmly of the view that QASA should be the only means of assuring the competence of criminal advocates. The LAA should, if they wish to proceed with a panel scheme for the purposes of procurement, ensure that the scheme is set up to accommodate, rather than conflict with, QASA.

Timetable for implementation of QASA

33. It is proposed that QASA registration will open in 2016. Advocates will then have a maximum of two years to complete their evaluation (either through judicial evaluation or assessment centre evaluation) in order to be fully accredited under the Scheme. We would expect the majority of advocates to be accredited however within the first 12 months of the Scheme's operation.

Q2: If a panel scheme is to be established, do you have any views as to its geographical and administrative structure?

34. If as the BSB suggests, QASA is integrated within the defence panel scheme as outlined above the assessment panel process could be substantially reduced as there would be less need for assessment of competence of advocates seeking to join any panel. An advocate accredited as competent to undertake a particular level of work in London would be equally competent to carry out that work in Manchester.

Q3: If we proceed with a panel, do you agree that there should be four levels of competence for advocates, as with the CPS scheme?

35. QASA has four levels of competence to reflect the increasing level of competence expected of advocates as they progress through their careers. For that reason and for ease of integration and alignment of the defence panel scheme with QASA, it would be sensible for there to be four levels of competence. However, it is a matter for the Government to determine its procurement arrangements in order to satisfy the demands placed on the criminal advocacy market.

Q4: If we proceed with a panel, do you think that places should be unlimited, limited at certain levels only, or limited at all levels? Please explain the rationale behind your preference

36. As a regulator, the BSB is keen to ensure that access to justice would not be prejudiced or compromised by any limitation of places. Our only concern therefore would be to ensure that there were not fewer places on a panel than the demands of consumers required. We assume that this principle would be fundamental to any consideration of size or composition of panels and we therefore have no other views on whether panel places should be limited or not. It is worth noting that QASA does not restrict or control numbers of advocates and only assesses competence.

Referral fees

Q5: Do you agree that the government should introduce a statutory ban on “referral fees” in publicly funded criminal defence advocacy cases?

37. Yes, although a statutory ban on referral fees only in publicly funded criminal defence advocacy cases does not, in the BSB’s view, go far enough. The Bar Standards Board’s Handbook and Code of Conduct prohibits the payment and receipt of *all* referral fees, because such arrangements are likely to compromise the independence and integrity of barristers. Balancing the different regulatory objectives set out in the Legal Services Act 2007, the BSB takes the view that the ban is in the public interest.

38. Our position is clear and was reconfirmed as recently as 2014 in our new Handbook:

rC10 You must not pay or receive *referral fees*.

39. We issue comprehensive guidance on the subject in our Handbook which makes explicit reference to publicly funded contexts:

40. Guidance on Rule C10 and their relationship to CD2, CD3, CD4 and CD5

gC29 Making or receiving payments in order to procure or reward the referral to you by an intermediary of professional *instructions* is inconsistent with your obligations under CD2 and/or CD3 and/or CD4 and may also breach CD5.

gC30 Moreover:

1. where *public* funding is in place, the *Legal Aid Agency’s* Unified Contract Standard Terms explicitly prohibit contract-holders from making or receiving any payment

(or any other benefit) for the referral or introduction of a *client*, whether or not the lay *client* knows of, and consents to, the payment;

2. whether in a private or publicly funded case, a *referral fee* to which the *client* has not consented may constitute a bribe and therefore a *criminal offence* under the Bribery Act 2010;
3. *referral fees* and inducements (as defined in the Criminal Justice and Courts Act 2015) are prohibited where they relate to a claim or potential claim for damages for personal injury or death or arise out of circumstances involving personal injury or death personal injury claims: section 56 Legal Aid, Sentencing and Punishment of Offenders Act 2012 and section 58 Criminal Justice and Courts Act 2015.

gC31 Rule C10 does not prohibit proper expenses that are not a reward for referring work, such as genuine and reasonable payments for:

1. clerking and administrative services (including where these are outsourced);
2. membership subscriptions to ADR bodies that appoint or recommend a person to provide mediation, arbitration or adjudication services; or
3. advertising and publicity, which are payable whether or not any work is referred. However, the fact that a fee varies with the amount of work received does not necessarily mean that that it is a referral fee, if it is genuinely for a marketing service from someone who is not directing work to one provider rather than another, depending on who pays more.

gC32 Further guidance is available at:

<https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/code-guidance/>

41. We are aware that there is anecdotal evidence, and some anonymised concrete evidence, that activity likely to fall the wrong side of the line occurs in relation to publicly funded criminal defence advocacy cases. We are also conscious that the differences in regulatory regimes overall on the subject of referral fees e.g. between the BSB and SRA, may have led to confusion and lack of transparency for clients, as well as having made enforcement challenging.
42. To the extent that a statutory ban would make the position more clear – as it appears to have done, for example, in relation to referral fees in personal injury cases since LASPO 2012 – the BSB would support a statutory ban as proposed.
43. We are nevertheless reminded that, when making recommendations in the personal injury sphere, Lord Jackson also recommended in his 2009 Report that if a ban in that area were introduced, then “serious consideration (would) have to be given to the question of whether referral fees should be banned or capped in other areas of litigation.” (Jackson Report 2009, ch20, para 5.4.)
44. The last paragraph of the BSB Guidance (see below, emphasis added) is telling in its similarity with the situation set out by Lord Jackson in relation to Personal Injury claims management prior to LASPO2012:
45. *By way of contrast, an arrangement (...) is likely to be a referral fee where the facts are such **that clients are likely to be under a mistaken impression that the***

introducer or ADR body was acting independently in selecting the barrister, when in reality their recommendation was procured by the highest bid, for example, because the percentage to be paid is not fixed in advance or the same for all.

46. (See also Jackson Report ch 20 para 4.3)
47. Assuming this is a mischief which needs to be addressed to promote the high standards in advocacy on which the justice system depends, it seems insufficient to confine a possible ban only to publicly funded criminal defence work.
48. The BSB considers that a statutory ban in relation to publicly funded work may be too narrow and that consideration therefore should be given to banning referral fees in respect of any type of litigation. It is only through a blanket ban of referral fees that consistency of regulation and clarity of what is and is not permissible could be achieved. Any ban of this kind would need to be drafted with sufficient clarity so as to provide greater certainty to legal professionals about what is and is not permissible whilst not fettering legitimate innovation or commercial practices.
49. The BSB recognises that such a ban would present challenges in its regulation, particularly given that referral fees are paid between non-regulated third parties and regulated individuals. The BSB can therefore see an argument for starting with a statutory ban on all referral fees paid between authorised persons under the Legal Services Act. This would be possible to regulate more effectively through existing regulatory mechanisms of supervision and enforcement. However, we remain of the view that a statutory ban of all referral fees should, for the reasons outlined above, be the desired objective of the Government.

Q6. Do you have any views as to how increased reporting of breaches could be encouraged? How can we ensure a statutory ban is effective?

50. The BSB's experience has been that it is singularly difficult to get those who see evidence of breaches, or think in good faith that they have seen such evidence, to report conduct to regulators, either at all, or in such a way as to make the report one which can reasonably be pursued by a regulator. The apparent unwillingness to report breaches of both BSB and SRA Codes of Conduct may itself be an indicator of the prevalence of the practices described and so be an argument in support of a statutory ban. It is equally arguable that an absence of referrals suggests that referral fees are not a wide scale problem. As a risk and evidenced based regulator it is difficult for the BSB to take active steps in relation to the regulation of referral fees unless specific referrals are made about instances of impermissible practice. Referrals of this nature are very rare.
51. Given the lack of evidence, and the BSB's overriding view of the detriment that referral fees, when present, cause to the public interest, the BSB supports a statutory ban. The BSB takes the view that the overwhelming majority of regulated practitioners, be they barristers or solicitors, take their responsibilities to uphold the law at all times very seriously and so we are of the view that levels of compliance with a *statutory* ban would in general be high.
52. Ensuring a statutory ban is effective may present practical difficulties in an environment of resource constraints and where regulators are required to prioritise use of resources on the basis of risk. The BSB would need to make innovative use of its thematic supervisory work with those it regulates to uncover instances of poor

compliance with a ban and could almost certainly only do so effectively by working with the SRA. It might be necessary to invoke the assistance of the oversight regulator, the LSB to ensure a common approach was taken by front line regulators.

Q7. Do you have any views about how disguised referral fees could be identified and prevented? Do you have any suggestions as to how dividing lines can be drawn between permitted and illicit financial arrangements?

53. The BSB issues formal Guidance to barristers on arrangements which might be disguised referral fees and on those which are legitimate financial arrangements e.g. for marketing. We do this by explaining the principles and rules and showing worked examples. We revise the worked examples from time to time on the basis of specific reports and our view on them. This Guidance can be found at the link below and is reproduced as Annex 1 to this response.

<https://www.barstandardsboard.org.uk/search/?search=marketing+arrangement&submit.x=0&submit.y=0>

54. In considering whether to take enforcement action in cases where payments have been made which may amount to referral fees, the BSB will take a purposive approach and will consider the underlying nature and purpose of the arrangements and whether or not they were in the best interests of clients, either by helping them to access legal services not otherwise readily accessible by them or by providing some benefit to them which is directly attributable to the payment made. For example, where a professional person is under a duty to act in their client's best interests when making a referral, receipt of any payment from barristers seeking to be instructed by that professional person's client creates a risk to their independence and integrity in discharging that duty to the client, without any concomitant benefit to the client in improving their access to justice. Where, on the other hand, the payment is made by the barrister to a third party whose business is to make information about choices of barrister more readily accessible by clients so that they can make an informed choice of barrister, that is in principle capable of promoting access to justice by clients.

55. Where on the face of it a payment appears to be related to referrals (for example where the payment varies according to whether work is received) the barrister will need to demonstrate that the payment is genuinely made in return for a service other than in return for the decision by the person who instructs the barrister to instruct that barrister. Where a payment has been made other than to an agent or employee of the barrister (such as a clerk), the BSB will also consider whether the client has been informed of the fee and had an opportunity to challenge it.

The following are examples of cases in which a payment is not likely to be a prohibited referral fee

Example 1 (outsourced clerking arrangements)

56. A barrister or Chambers arranges to outsource its administrative and clerking arrangements. The barrister or Chambers pay fixed fees on a contractual basis to a company providing these arrangements, which may also include marketing and advertising services. The outsourcing company acts as a barrister's agent and liaises with solicitors and other professional clients, including over billing and fees. The role of the outsourcing company, in respect of referrals of work, is to market the services of the barristers who retain them to those who are looking to instruct them, in the

same way that in-house clerks would do. By competing with others to secure the work from referrers they contribute to a competitive, efficient and informed market place. The outsourcing company does not purport to make recommendations that are independent of the barristers who retain it and does not assume a duty to advise the client in the client's best interest as to selection of a barrister, so as to owe any duty to the client that would conflict with the duty they owe to those whom they represent. Rather, the outsourcing company represents the barristers. It is the barrister who has a duty to the client not to take on work that is outside his competence or which he does not have time to carry out.

Example 2 (marketing services)

57. Members of a Chambers appoint a marketing or advertising business to promote their services. Clients who contact chambers in answer to the advert are asked to identify this at the point of instruction in order to measure the effectiveness of the advertising campaign. Members pay a fee for these services which is reviewed quarterly based on the number of instructions identified as being referable to the marketing campaign or adverts. The marketing techniques used do not mislead clients into believing they are receiving independent advice as to their choice of barrister and are clearly identifiable as advertising. The members are able to demonstrate that the payment was genuinely made for the purpose of receiving the marketing services. (See general guidance above.)

Example 3 (barrister owned referral company)

58. Members of a Chambers establish, own and manage a limited company in order to advertise and market their services more effectively. The company provides no legal services itself but operates a website or 'shop front' which advertises to potential clients how to instruct barristers on a direct access basis. It is comparable in nature to other limited companies owned by barristers in Chambers which provide administrative and accommodation services to them. Members of the public get in touch by telephone, email or by visiting in person. Clients who are introduced in this way then instruct individual barristers in Chambers via the clerks in the traditional way, paying fees directly to them. Members of Chambers pay regular fixed fees to the company which reflect the costs of the advertising services provided and are not linked to individual referrals. The company acts as agent for Members of Chambers, not as agent for potential clients. The role of the company is analogous to that in example 1 and the analysis is therefore the same.

Example 4 (third party introducer)

59. A company sets up a service which introduces direct access clients to barristers. The introducer operates a commercial website and a call centre for consumers to phone and outline their legal problems. The introducer provides no legal advice or services itself and is not an authorised body under the LSA 2007. It trades on its offer to put consumers in touch with individual self-employed barristers who have the relevant expertise to meet their needs and who are able to be instructed on a direct access basis. The introducer introduces potential clients to barristers who are on a national panel, pre-selected by the introducer. The introducer undertakes the costs of advertising, operating the website and call centre, setting up the panels and vetting potential clients and recoups these costs from its fees. Barristers on the panel may also be charged a one off or annual fixed fee to the agency but this does not vary depending on the number of referrals received.

Example 5 (third party introducer)

60. The facts are as in example 4 but the introducer's fee does vary with the number of referrals received. However, the barrister is able to demonstrate (see general guidance above) that the introducer makes its own independent judgment as to which barrister best meets the client's needs for the given case and advises the client accordingly, and that the percentage the introducer receives is the same regardless of which of the barristers on its panel is instructed, rather than it auctioning cases to the highest bidder. The fact that payment varies with success in attracting instructions is then a fair commercial reflection of the value of the service provided to the barrister in vetting the barrister and maintaining the barrister on the panel and does not adversely affect the client's interests. (Note, however, that quite independently of whether or not the arrangements involve any referral fee, barristers need to ensure they do not enter into any terms with an introducer that would interfere with their ability act independently and in their client's best interests.)

Example 6 (membership subscriptions)

61. Barristers pay individual membership subscriptions to a body which maintains a panel of accredited barristers from which it proposes barristers to those who contact the body requiring those with particular expertise (for example an alternative dispute resolution (ADR) body, which appoints or recommends persons to provide mediation, arbitration or adjudication services from a list of barristers who pay to maintain their membership of the ADR body). The membership subscriptions paid by barristers are on an annual or regular, fixed basis and are not per referral made or otherwise linked to the number of referrals.

Example 7 (membership subscription)

62. If the facts are as in example 6 but, instead, fees were paid to the ADR body as a percentage of the fees received for acting, it would be necessary to consider whether the situation was truly analogous to example 1 or example 5, in which case it would not be a referral fee.

63. By way of contrast, an arrangement such as that in examples 6 or 7 is likely to be a referral fee where the facts are such that clients are likely to be under a mistaken impression that the introducer or ADR body was acting independently in selecting the barrister, when in reality their recommendation was procured by the highest bid, for example, because the percentage to be paid is not fixed in advance or the same for all.

Client choice

Q8: Do you agree that stronger action is needed to protect client choice? Do you agree that strengthening and clarifying the expected outcome of the client choice provisions in LAA's contracts is the best way of doing this?

64. The BSB supports the principle of client choice and measures designed to protect client choice are welcome. The BSB is of the view that, should a defence panel scheme be established, it would be possible for the Ministry of Justice to put in place conditions of the contracting and procurement processes that would require advocates to take steps to ensure that the client is making an informed choice. However, any approach needs to be set within the context of the realities of the criminal justice market. Regulators have in place specific rules that place obligations on lawyers to act in the best interests of their clients. This would extend to ensuring

that the client is represented at all times by appropriate and competent lawyers. Whilst the BSB is aware of anecdotal evidence that suggests that these obligations are not always adhered to, we have received no complaints or reports that would substantiate those concerns. Further, no evidence is provided by the Ministry of Justice in its consultation in support of the proposal, and we have seen no such evidence from any other organisation.

65. The ability of a client to play an active role in the choice of their advocate within the criminal justice system is limited by the nature of the relationship that exists between the instructing solicitor and chambers. Whilst there is an increasing demand for public access instructions in criminal cases (where the client instructs the barrister directly and therefore is able to choose the advocate they wish to approach), in the vast majority of criminal cases the legal representation of a particular client will not be determined by the client's particular wish for a specific advocate. Rather, representation will be determined through the arrangements that are already in place between the client's solicitor and the chambers that they routinely instruct. Most firms of solicitors will have particular sets of chambers that they prefer to instruct. This does not limit client choice but merely reflects the commercial realities of the criminal advocacy market. Even within those relationships, rather than the solicitor seeking to instruct a particular barrister, in most cases the solicitor will invite the chambers' clerk to allocate cases to members of chambers who are available and competent to act. The idea therefore that the client should be put in a position to make an informed choice about their advocate is not consistent with the current arrangements within the criminal justice system. Given the absence of evidence that suggests that these arrangements are not effective in ensuring that the client receives adequate representation it is difficult to know what mischief these proposals are designed to address.
66. The BSB believes that what is important is for the client to be confident that, whoever represents them, the advocate will be competent to act and will have been the subject of independent competency based assessment. QASA is designed to, and will, provide that mechanism. All advocates, whether in-house or self-employed will be subject to the same compulsory competence assessment and the client can therefore be assured that any QASA accredited advocate is competent to represent them. QASA accreditation status will be publicly available so that clients can satisfy themselves of the level of their competence.
67. It is equally important for the client to understand the limits or otherwise of their legal representation so, for example, they are aware if their advocate is not able to represent them should a case go to trial because they do not have the necessary qualifications or accreditation.

Q9: Do you agree that litigators should have to sign a declaration which makes clear that the client has been fully informed about the choice of advocate available to them? Do you consider that this will be effective?

68. The BSB has previously argued, in the context of the operation of QASA, that advocates should be required to inform clients of the limits or restrictions on their practice. For example, if an advocate does not undertake trials but will advise a client on guilty pleas or sentencing, that advocate should inform the client at the point of instruction that if the case were to proceed to trial they would not be able to represent them. The BSB believes that this requirement would enable the client to take an informed choice about their advocate.

69. It is not clear what form any declaration should take or how its use would be monitored. As highlighted above, most criminal clients are not in a position to choose the advocate they want to represent them and fully informing them of the choice of advocate would unreasonably raise their expectations around their role in deciding on legal representation and would misrepresent the way in which criminal instructions are routinely handled.
70. Lawyers are already bound by their regulatory rules to act in their client's best interests and to only undertake work for which they are competent. In the absence of evidence that these rules are not being complied with, the BSB believes that any declaration would be disproportionate.
71. The effectiveness of any declaration would depend on the Ministry of Justice's proposals for how the obligation would be monitored. The BSB is committed to the deregulation agenda and only having in place regulation that is deemed, on a risk and evidence basis, to be necessary. Any suggestion by the Ministry of Justice that the regulators would be responsible for monitoring compliance with any declaration arrangements would, on the information available, be contrary to that objective. The Ministry of Justice may therefore, should it choose to proceed with this option, consider whether such a declaration should become a condition or requirement of the contracting arrangements/ procurement process with legal services provider(s).

Q10: Do you agree that the Plea and Trial Preparation Hearing form would be the correct vehicle to manifest the obligation for transparency of client choice? Do you consider that this method of demonstrating transparency is too onerous on litigators? Do you have any other comments on using the PTPH form in this way?

72. This appears a practicable approach, however, the BSB has no particular view on the merits or otherwise of this proposal.

Q11: Do you have any views on whether the government should take action to safeguard against conflicts of interest, particularly concerning the instruction of in-house advocates?

73. Each regulator has in place regulatory requirements relating to conflicts of interest and how they should be managed. It is not clear therefore what case there is, or evidence of a need, for intervention by the Government. In any event, the BSB's view is that any action to safeguard against conflicts of interests should not be restricted to, or particularly focused on, one category of advocates. The core principle is to ensure that any lawyer does not allow their own interests to impact adversely on their responsibility to serve their client's best interests.
74. The BSB would not support any ban on solicitors instructing their own in house advocates (be they solicitors or, increasingly, employed barristers) in publicly funded criminal cases. There is no evidence that this is necessary. Further, through encouraging the strengthening of the delineation of the role of solicitor and barrister within the criminal justice system, the suggested ban would run the risk of limiting the liberalisation of the legal services market which has been at the heart of legal services regulation and statute since the introduction of the Legal Services Act.

Q12: Do you agree that we have correctly identified the range of impacts of the proposals as currently drafted in this consultation paper? Are there any other diversity impacts we should consider?

75. Yes

Q13: Have we correctly identified the extent of the impacts of the proposals as currently drafted?

76. Yes

Q14: Are there any forms of mitigation in relation to the impacts that we have not considered?

77. Not at present

Q15: Do you have any other evidence or information concerning equalities that we should consider when formulating the more detailed policy proposals?

78. Not at present.

Extract from BSB website

Guidance on Referral and Marketing Arrangements for Barristers Permitted by the BSB

Referral fees

The BSB will consider a number of features when determining whether a payment to a third party making a referral, acting as an introducer or providing administrative and marketing services constitutes a prohibited referral fee. A payment for these purposes includes not only a financial payment but also any benefits in kind such as the provision of services or facilities for no cost or at a reduced rate.

Features which will indicate that the payment is a prohibited referral fee:

1. The payment is made in circumstances which amount to bribery under the Bribery Act 2010.
2. The payment is made in connection with personal injury work and is prohibited by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Features which are likely to indicate that the payment is a prohibited referral fee:

1. The payment is made to a professional person acting for the lay client who has a duty to act in the best interests of that client when making a referral.
2. The payment to an introducer is linked to specific referrals.
3. The payment to an introducer for services provided by the barrister is not a set fee but is linked to the number of referrals.
4. In a publicly funded case, the fee paid to an instructed barrister is less than the Legal Aid Agency fee for those advocacy services.
5. The payment is a condition of receiving a referral.
6. A payment for marketing or related services is higher than market rates

Features which may suggest that the payment is not a referral fee:

1. The payment is made to an employee or agent of the barrister making the payment, e.g. a clerk or an outsourced clerking service, in return for the services they provide to the barrister and not for onward payment to any person who refers work to the barrister.
2. The payment is made to a marketing or advertising agency and the amount does not depend on whether any instructions are received or on the value of any instructions received.

3. The payment is made to an introducer who is not an authorised person or other professional person for the purpose of being included in a list of providers of legal services and the amount is not dependent on the number of referrals received from that introducer.