

ANNEX 1: LIST OF RESPONDENTS TO QASA FOURTH CONSULTATION

Key

Those [underlined in blue](#) have consented to their response being published

Organisations

[Birmingham Law Society](#)

[Co-ordinated Action Against Domestic Abuse \(CAADA\)](#)

[Criminal Law Solicitors Association \(CLSA\)](#)

[Gray's Inn](#)

[Just for Kids Law](#)

Personal Injuries Bar Association (PIBA)

[Proceeds of Crime Lawyers Association \(POCLA\)](#)

[Solicitor's Association of Higher Court Advocates \(SAHCA\)](#)

[Technology and Construction Bar Association \(TECBAR\)](#)

The Advocacy Training Council (ATC)

[The Bar Council](#)

[The Bar European Group](#)

[The Chancery Bar Association](#)

[The Chartered Institute of Legal Executives \(CILEx\)](#)

[The Commercial Bar Association \(COMBAR\)](#)

[The Criminal Bar Association](#)

The Crown Prosecution Service (CPS)

[The Crown Prosecution Service: Proceeds of Crime Unit](#)

[The Employed Barrister's Committee of the Bar Council](#)

[The FDA: Crown Prosecution Service Section](#)

The Howard League for Penal Reform

[The Law Society](#)

[The Legal Services Commission \(LSC\)](#)

[The Legal Services Consumer Panel](#)

The London Common Law and Commercial Bar Association

[The London Criminal Courts Solicitor's Association \(LCCSA\)](#)

The Midland Circuit

[The North Eastern Circuit](#)

[The Northern Circuit](#)

[The Property Bar Association \(PBA\)](#)

The South Eastern Circuit

[The Wales and Chester Circuit of the Bar](#)

The Western Circuit

[The Young Barrister's Committee of the Bar Council](#)

[The Youth Justice Board \(YJB\)](#)

[Victim Support](#)

[Young Legal Aid Lawyers \(YLAL\)](#)

Barrister's Chambers

2 Bedford Row, Chambers of William Clegg QC

[5 King's Bench Walk, The Chambers of Sarah Forshaw QC & Mark Heywood QC](#)

7 Bedford Row Chambers

[18 Red Lion Court](#)

[25 Bedford Row](#)

39 Park Square Chambers

[Blackstone Chambers](#)

Broadway House Chambers

[Charter Chambers](#)

Citadel Chambers
Doughty Street Chambers
Farrar's Building
[Garden Court Chambers: Crime Team](#)
[Garden Court North Chambers \(Chambers of Ian Macdonald QC\)](#)
[Monckton Chambers](#)
[St Philips Chambers: Criminal Team](#)
[Tooks Chambers](#)

Solicitor's Firms

[Beaumonde Law Practice](#)
Clyde & Co. LLP
[Craigen Wilders & Sorrell Solicitors](#)
Edward Hayes LLP
[Keogh's LLP](#)
Haskell & Co.
[T V Edwards LLP](#)

Individual Barristers

[Abbas Lakha QC](#)
Adam Birkby
Adrian Dent
Alan Conrad QC
Alan Jeffreys QC
Alexander Cameron QC
Alexander Upton
Alisdair Williamson
[Alistair Mitchell](#)
Allegra Bell
Amos Waldman
Andrew Haslam
Andrew Hurst
Andrew Robertson QC
Andrew Smith
Andrew Stubbs QC
Andrew Tucker
Anesta Weekes QC
Angus Robertson
Austin Stoton
Barry McElduff
Baz Bhatia
Ben Thomas
Benjamin Archibald Campbell
Bill Emlyn Jones
[Bruce Holder QC, DL](#)
Bryan Cox QC
Cairns Nelson
Carole Fern
Caroline Haughey
Carwyn Cox
Charles Blatchford
[Charles Miskin QC](#)
[Chas MacLean Cochand](#)

Chris Smith
Christopher Bertham
Christopher Dorman-O’Gowan
[Christopher Hewertson](#)
Christopher Rose
Christopher Stables
Daniel Benjamin
[Daniel Bunting](#)
[Daniel Lister](#)
David Allan
David Fisher QC
Daniel Fugallo
David Hislop QC
David Hood
David Povall
David Woolley QC
Delroy Henry
Derek Wood CBE QC
Douglas Taylor
Dylan Morgan
Edward Bindloss
Edward Elton
Edward Jenkins QC
Eleanor Fry
Elisabeth Bussey-Jones
Emil Mihai Lixandru
Eric A. Elliott QC
Ethu Crorie
Euan Duff
Felicity Jane Hemlin
Felicity Thomas
Francis Jones
[Gareth Underhill](#)
Georgina Coade
Geraldine Kelly
Gerrard P. Doran
Giles Harrap
Gillian Batts
Glen Parsons
Graham Smith
Grant Goodlad
Gurdial Singh
Guy Gozem QC
Guy Ladenburg
[Hannah Kinch](#)
Harry Potter
Hilary Roberts
Holly Webb
Hugh Forgan
Ian Hope
Ian McLoughlin
[Ian Wade QC](#)
[Ian West](#)
J J Reilly
James Adkin

[James Bourne-Arton](#)

[James Dennison](#)

James Lewis QC

[James Normington](#)

James Wood QC

Jane Brady

Jeremy Lasker

Jessica Habel

Jessica Strange

Jodie Mittell

[John Butterfield](#)

John Elvidge QC

John F. Harrison

John Lofthouse

John Meredith Hardy

John Pini QC

Jonathan Coode

Jonathan Dingle

[Jonathan Elystan Rees](#)

Jonathan Fuller QC

Jonathan Gregg

Jonathan Underhill

Julian Jones

Julian Smith

Juliet Oliver

Justin Gau

[Kate Lumsdon](#)

Katherine Pierpoint

Kevin Donnelly

Kevin Grego

[Kevin Leigh](#)

Kirsten Frankland

Kirsten Mercer

Lesley Bates

Lisa Freeman

Louisa Bagley

M Cane-Soothill

Malcolm Gibney

Margaret Rogers

Marion Smullen

Mark Cannon QC

Mark Fenhalls

Mark Giuliani

Mark Stevens

Mark Trafford

Martin Adams

Martin Towers

Mary Aspinall- Miles

Matthew Jewell

Michael Forster

[Michael Harrison](#)

Michael Le Fort

Michael Vere-Hodge QC

[Michelle Heeley](#)

Natalie Wood

Neil Davey QC
Neil Fryman
Neil Saunders
Nicholas Charles Wilson Campbell QC
Nicholas Dennys QC
Nicholas Haggan QC
[Nicholas Lumley QC](#)
Nicholas Rimmer
Nicholas Worsley
Nick Gedge
Nick Tucker
Nicola Talbot
Nicoleta Alistari
Nigel Spencer Ley
Oliver Wellings
Omar Malik
Patrick Dennis
Patrick Duffy
Paul Abrahams
Paul Bogan
[Paul C. Reid QC](#)
Paul Cross
Paul Newcombe
Paul Reid
Paul Russell QC
Penny L Bottomley
Peter Fortune
Peter Savill
Peter Spink
Philip Glen
Piers Norsworthy
Rachel Cooper
Rachel Kapila
Rebecca Vanstone
Richard Bennett
Richard Doman
Richard English
Richard Hall
Richard Onslow
Richard Sharpe
Richard Wood
Richard Wright
Ricky John Holland
[Rob Griffiths](#)
Robert Banks
Robert Howe QC
[Robert M. Kearney](#)
[Robert Rhodes QC](#)
Robin Hollington QC
Robin Sellers
Roy Brown
Russell Pyne
Sarah Campbell
[Sarah Mallett](#)
Samantha Davies

Sharon Amesu
[Simon Baker](#)
Sharon Beattie
Simon Foster
Simon Goodman
Simon Perkins
Simon Rippon
Simon Smith
[Stephen Bailey](#)
Stephen Betts
[Steven Coupland](#)
Stephen Duffield
[Steven Gee QC](#)
The Rt Hon Daniel Joseph Mitchell Janner QC
Tim Boswell
Tim Hanman
Timothy Compton
Timothy Gittins
Timothy Moores
Tom Godfrey
Tom Mitchell
Tom Storey
Tony McGeorge
Trevor Archer
Virginia Cornwall
William Eaglestone
William Mousley

Individual Solicitors / Solicitor Advocates

Alan Cleary
Alesdair King
Ammolak Singh Bains
Andrew Davidson
Chloe Jay
[David Chimes](#)
[Fedor Philip Kazantzis](#)
[Gareth Davies](#)
[Geyve Walker](#)
[Graham Stewart Hills](#)
[Hywel Lloyd Davies](#)
Louise Watson
[Micahel Robinson](#)
[Paul Crome](#)
Sharon Smith
[Shelagh Lyth](#)
Sophie Smith
Stephen Downing
Stephen Thomas
Susan Ridge
[Terry Medcalf](#)
Timothy Kirkhope

Others

[Andrew Argyle](#)
[Ann Crighton](#)
Daniel Jones
Eloise Marshall
Erica Foster
[Gaon Hart](#)
[Geoffrey Pimm](#)

[+ 6 Anonymous Responses](#) * ***ANONYMOUS 3 TO BE ADDED SHORTLY***

27 Respondents did not wish for their name or response to be published

Organisations

The Birmingham Law Society

Birmingham Law Society Response to Fourth Consultation on QASA

The Birmingham Law Society represents solicitors working in the Midlands area. The Society is responding to the fourth consultation on the development of Quality Assurance Scheme for Advocates (QASA).

This response is submitted having had site of the response submitted on behalf of the Law Society. We confirm that we agree with the arguments put forward by the Law Society.

The Birmingham Law Society accepts that in principle the quality of delivery advocacy services is appropriate. However there are too many factors and variable to be taken in to consideration in assessing levels of advocacy services that the proposed scheme requiring specified factors to be considered may well become a tick box exercise which ultimately fails to provide an objective assessment of such skills.

The Scheme's reliance upon judicial evaluations is likely to cause immense difficulties. The defence advocate who knows that he is being assessed by the trial judge may not feel he is able to challenge the judge on particular matters for fear of being marked down in his assessment. Equally if there are more than one advocate that the trial judge is assessing, it may not be possible for the Judge to devote as much attention to the factors he has to consider in each case whilst at the same time keeping a full note of the evidence being presented, assessing such evidence to be able to sum up at the end to the jury and ensuring that the trial process is fair to the defendant. In our view if there is to be assessment then it should be carried out by an independent assessor. The objective is to assess the advocacy skills of an advocate. His knowledge of the law can be readily tested by examination and his advocacy abilities tested in a specifically prepared course which ensures he acquires the knowledge relevant to the level he wishes to practice at without being put to the test in the course of an actual trial. The judges would of course continue to have the right to report any particularly bad advocates to the regulator should the need arise as they presently are able to do.

- 1. Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?**

We share the concerns that there may be insufficient number of cases available for the number of advocates wishing to be assessed for accreditation. The assessment of the ability of an advocate should be handed to an independent assessor or body. If the present Scheme is to continue we agree longer times should be allowed: Level 2 - 18 months, Level 3 - 24 months, and Level 4 - 36 months. We also agree that In view of the statistics now available the requirement should be of one case to be assessed per candidate. There should be a requirement that the candidate produce evidence that he or she has attended the relevant specified course for the level of advocacy he or she wishes to undertake.

2. **Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?**

Most solicitor advocates who appear as Level 2 advocates would already have handled cases of lesser offences of theft, deceptions or handling stolen goods, section 47 assault, burglary, less serious drugs offences, lesser offences involving violence or damage, straightforward robberies, non fatal road traffic offences, or minor sexual offences. In achieving their higher rights accreditation, they will have demonstrated sufficient ability to be able to practice at this level. In our view there is no need for a judicial evaluation at this level. We support the point that the critical stage of any offence is at the start of the investigation. At the police station a solicitor advises the suspect on all aspects of the case. At this level there is no need to impose a stricter judicial evaluation process.

3. **Q3: Are there any practical issues that arise from client notification?**

We believe that advocates should be trusted to ensure that they do not take on cases which are beyond their capacity. There is no need for such client notification. Where the advocate has acted beyond his capacity he will have the Judge to contend with who will have the ability to report him to the regulator. Any repeated notification in this respect would be something which the regulator would look at when the advocate seeks reaccreditation.

4. **Q4: Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?**

None that we can see. We agree that Level 1 is enough for youth court.

5. **Q5: Do you foresee any practical problems with a phased implementation?**

We do not see a problem with a phased implementation.

6. **Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.**

We do see practical problems in the process of determining the level of case. By having four different levels the process is made unnecessarily complicated. Levels 1 and 2 should be merged and levels 3 and 4 should be looked at again to see which of the level 3 cases may be dealt with in level 2. The rest of the cases will then be the most serious cases in the highest level. The complexity of the case can be determined by looking at the level of judge who will hear the case.

7. **Q7: Do you agree that the offences/hearings listed in the table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?**

See reply to Q6 above. We agree they have been improved.

8. **Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level**

3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

It is more complicated to divide the levels into four categories. Two categories would be simpler. For instance child abuse cases and serious sexual offences in Level 3 should be moved to Level 4 category. The remainder of Level 3 should be moved to Level 2. Rather than adding in another tier of checklists to determine different categories of cases the process should be kept simpler. With the advocate having to keep in mind the different categories for the purposes of sentencing guidelines and for the purposes of billing, another category system is likely to cause confusion.

9. **Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?**

If only Level 3 advocates are allowed to cover first two hearings in a murder case this is likely to reduce the number of advocates available and increase cost. There should be no difficulty in a Level 2 advocate, under the guidance and supervision of a Level 4 advocate, undertaking Level 4 non trial hearings. In many cases by the time such hearings are conducted, issues have been clarified and there is close cooperation between the two advocates. Therefore we agree that this should be possible. In many cases by the time such hearings are conducted, issues have been clarified and there is close cooperation between the two advocates. Therefore we agree that this should be possible.

In respect of bail the defendant's solicitor is far better equipped to make such an application because he or she would have had conduct of the case from the beginning of the police investigation and would best know the issues involved. From murder downwards, many solicitors have appeared and applied for & got bail in all manner of cases. It should not be necessary to be QASA grade 4 to make such applications. Similarly many solicitor advocates have appeared for defendants charged with s.18 wounding with intent, downwards when their clients have pleaded guilty & mitigated on their behalf. Again a high QASA grade 4 ought not to be necessary.

10. **Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?**

Proceeds of Crime hearings should be specifically addressed. The consequences of such hearing can lead to substantial prison sentences. They inevitably involve complicated legal arguments.

11. **Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible.**

The statement of standards should be set out in the handbook. It should not just be in the Criminal Advocacy Evaluation Form.

12. **Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?**

We agree allocating cases to levels is going to be difficult for practitioners. Especially at the start of the Scheme. More guidance than that provided in paragraphs 4.18 and 4.21 would be beneficial.

13. Q13: Do you have any comments on the proposed modified entry arrangement for QCs?

We confirm it is appropriate for some provision to be made for Queen's Counsel who have taken silk recently, although their competency levels are going to be really high being in mind the training that they have undergone.

14. Q14: Do you agree with the proposed approach to the assessment of competence?

We agree with the approach for assessment to take place once all the evidence is available. We welcome the point that the Judiciary will not have the direct responsibility for an advocate's ability to practice and that the responsibility for that decision is placed with the regulator.

15. Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response

We agree that the review should be kept as flexible as possible because the Scheme will throw up issues which will not have been anticipated.

16. Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

We agree that the handbook is comprehensive.

17. Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Include the frequently asked questions for solicitors

18. Q18: Do you have any comments on the Scheme Rules?

In our view all advocates who appear in a court should be subject to the same rules. There is no reason why the SRA & Bar Council should not agree a set of rules governing all advocates. Further we agree the penalty should be spelt out in clear terms if for an advocate practices without the appropriate accreditation.

19. Q19: Do you agree with the proposed definition of "criminal advocacy"? If not, what would you suggest as an alternative and why?

We accept that the criminal advocacy definition is acceptable.

20. Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

We support the proposition that in certain circumstances the specialist practitioners should be allowed to undertake criminal advocacy without QASA accreditation. The wider the pool of advocates available to members of the public, the better.

21. Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

Judicial assessments will cause considerable problems. As an alternative, assessment centres should be considered. The advocate should be given a choice: judicial assessment or attendance at an assessment centre.

22. Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIAs will be mitigated by the measures outlined?

We agree that there will be fundamental problems as far as equality impact is concerned. It will impact disproportionately on women and BAME solicitors. We agree that revisions to the scheme did alleviate part of the difficulties but the underlying issues remains

23. Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

We share the concern that QASA will impact disproportionately on women and BAME advocates. .

24. Q24: Are there any other equality issues that you think that the regulators ought to consider?

None at this stage.

BIRMINGHAM LAW SOCIETY
30 October 2012

Co-ordinated Action Against Domestic Abuse (CAADA)

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|---|---|
| Name: | |
| Organization: | CAADA (Coordinated Action Against Domestic Abuse) |
| Role: | |
| Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme? | |
| | |
| Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates? | |

Q3: Are there any practical issues that arise from client notification?

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

Q5: Do you foresee any practical problems with a phased implementation?

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

4.10 The level of the case should be set by the instructing party and then agreed with the advocate at the earliest stage possible.

CAADA's primary concern is the competence of advocates **prosecuting** domestic abuse/violence¹ crimes. The CPS, as the instructing party will set the level.

According to the CPS website, "the qualification, experience and competence for [grades of junior counsel on CPS advocacy lists] are included in a protocol maintained by the Joint Advocate Selection Committees. To promote a consistent approach, the Bar and the CPS are currently working towards a national framework." [QASA].

It is unclear which level or grade will apply to advocates prosecuting domestic violence crimes. There is no requirement for any awareness or specialist knowledge and training in respect of prosecuting domestic violence crimes for any level in the QASA scheme. CPS advocates (in the advocate panel scheme) should have an "awareness of CPS Policy" applicable to prosecuting at the level required at each level (1 – 4) in respect of "hate crime and domestic violence".² In house CPS advocates have undertaken specialist training in prosecuting domestic violence crimes.

We propose that for advocates prosecuting domestic violence cases, the CPS and QASA

¹ The CPS uses the term Domestic violence, CAADA uses the term domestic abuse. There is no specific statutory offence of domestic violence. "Domestic violence" is a general term that describes a range of controlling and coercive behaviours, which are used by one person to maintain control over another with whom they have, or have had, an intimate or family relationship. It is the cumulative and interlinked physical, psychological, sexual, emotional or financial abuse that has a particularly damaging effect on the victim.

² CROWN PROSECUTION SERVICE – ADVOCATE PANEL SCHEME 2011:

Grade/level 1: Awareness of CPS Policy: Applicants should have an awareness of CPS Policy applicable to prosecuting at Level 1 in respect of:

1. Victims and Witness Code
2. Statutory Charging
3. Hate Crime and Domestic Violence
4. Custody Time Limits
5. The Prosecutors' Pledge

Subsequent CPS grades or levels: Awareness of CPS Policy: Applicants should have an awareness of CPS Policy as with Level 1 but at the level required for prosecuting at Levels 2,3,4.

standards are aligned. Specifically; that the CPS requirement for an awareness of CPS policy on prosecuting domestic violence crimes, and specialist training on domestic violence are incorporated at each level of the QASA standards.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

4.18 The levels table should always be the starting point to determine the level of a case. There may be circumstances when it is appropriate to deviate from the levels table, by taking the case up or down from the starting point

4.21 Factors to be taken into account that might suggest a different level is appropriate include:

- Trial characteristics: multi-handed prosecutions, contested expert evidence, expected length of trial.*
- Witness characteristics: the nature of the witness' relationship with the defendant, age, learning difficulties, otherwise vulnerable witnesses.*
- Offender characteristics: vulnerable defendant including a youth in an adult court or those with learning difficulties, previous convictions if they could trigger certain greater sentencing provisions.*
- Offence characteristics: particular violence, use of a weapon, very high cost of damage or loss.*
- Circumstances that make the proceedings substantially easier than other cases at this level, including, for example, substantial agreement on evidence or with the case against the defendant.*

Witness characteristics:

We propose that the criteria for allocating the level of advocates prosecuting domestic violence crimes are aligned with the criteria regarding vulnerable and intimidated witnesses used in the sentencing guidelines to ensure that a higher level of prosecuting advocate is required rather than it being optional.

We are concerned that there is an inconsistency between the approach taken in 4.21 and the approach taken across the rest of the CJS where the vulnerability of victims of domestic violence is taken into account. This is reflected in the police response, which is graded by risk of serious harm or murder, the CPS in terms of additional training and competence, and the sentencing guidelines, which specifically acknowledge the additional vulnerabilities of witnesses in such cases.

Offence characteristics:

We propose that for advocates prosecuting domestic violence cases, the risk of serious harm to the victims, as assessed by the police or probation, is included as a factor to be taken into account in determining the appropriate level.

Where the risks are high, the instructing party and the advocate have a responsibility to set the appropriate competence level to reflect the need for enhanced preparation for increased seriousness

or complexity and specialist knowledge of domestic violence in order to ensure that they are not putting victims and their children at greater risk of harm.

The majority of domestic violence cases will be heard at magistrates courts, set at level 1, but there is often a significant disconnect between the seriousness of the crime charged, on which the competence level is set, and the risk of serious harm or murder to the victim or witnesses and any children.

In a recent analysis of data on Criminal Justice outcomes for victims of domestic violence, the perpetrator was charged with common assault in the case of 313 (54%) victims (out of 576 where any charge was brought). 233 (74%) of these victims were deemed to be at high risk of serious harm or murder. 212 (68%) victims reached the MARAC threshold, indicating a very serious risk of harm or murder. Specifically, 95% of these victims were subject to physical violence, 18% sexual abuse, 38% stalking and harassment. 70% suffered severe levels of abuse such as attempted strangulation, stalking, or threats with a weapon³. In contrast, the offence charged and thus the level of prosecuting advocate allocated will typically only reflect the most recent incident, which for reasons that are well known, will frequently result in only a minor charge such as common assault. In these circumstances the charge in no way reflects the risks associated with the domestic violence and the potential impact of poorly judged bail decisions.

In a further analysis of police incidents in respect of 345 cases from 15 MARAC meetings where the victims were deemed to be at a very high risk of serious harm or murder; 248 incidents resulted in the perpetrator being arrested and charged with a crime. 60% were for offences likely to be allocated a level 1 prosecuting advocate using the criteria proposed, ie at a very different level from the risk that the witness faced.⁴

Prosecuting advocates are expected to be proactive in addressing the security and safety of the victim and any children from the point of charge and throughout the prosecution. This is especially important at bail hearings where a lack of competence can have very serious, even fatal, consequences. There are several recent cases where women have been murdered when the defendant has been granted bail. (See the submission from John and Penny Clough below).

The risk of serious harm or murder to the victim is assessed by all police forces in England and Wales using a standardised risk indicator checklist. The highest risk cases are heard at MARAC (multi agency risk assessment conferences). These risk assessments are readily available from the police.

³ CAADA Insights service January to December 2011, n=2,761 victims (Analysis CAADA July 2012).

⁴ Cases from 15 MARAC meetings between May and October 2010 were analysed before and after the MARAC. 1,048 police incidents were recorded and a total of 248 resulted in the arrest and charge of the perpetrator: 24% were for common assault, 23% were for breaches of non-molestation or restraining orders or bail, and 13% were for public order or offences against property CAADA analysis 2012.

The significance of risk assessments in domestic violence cases is acknowledged in the CPS policy and guidance on prosecuting domestic violence crimes, with particular emphasis on their relevance in bail hearings.⁵

The following, submission is made by John and Penny Clough, the parents of Jane Clough, A&E Staff Nurse, murdered by her ex partner who was out on bail despite having been assessed as extremely high risk.

“Thank you for giving us the opportunity to contribute to the consultation regarding advocacy. We speak from the victim’s perspective, and feel it is highly important that legal counsel working on behalf of victims have the correct credentials and competencies in order to give the best representation for the victim.

We realise that prosecution counsel works for the Crown, but they must not forget that there is a victim at the heart of the offence, who at times seems inconsequential.

The prosecution will rely on the victim (witness) to give evidence, and so must take some responsibility for the safety of the victim, and must where possible fight against bail being granted when the victim is placed in danger of harm or death.

The DASH risk assessment should form part of the bail hearing, especially the conclusion of the assessment and it should be recorded that the risk has been taken into account by the Judge.

The only way a Judge can make an informed decision is by being in possession of important relevant information, and the risk assessment is such an important part of that, and in cases where decisions are made in chambers the disclosure of risk should not only have a bearing on the bail decision, it should also be recorded that it was discussed”.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

⁵ CPS prosecuting guidance states that “Risk assessments conducted by the police can provide invaluable background information for prosecutors. Prosecutors should therefore routinely request risk assessments from the police, and should consider these in every domestic violence case”. CPS guidance for prosecutors on bail hearings in domestic violence cases states that “It is vital that the CPS gets as much information about the offence, the effect on the victim and any fears or concerns that the victim may have about repeat offending or intimidation. Normally, the police will supply such information with the case file, but we need to be proactive to ensure that every effort is made to protect vulnerable victims or witnesses by seeking confirmation or further information about any views or concerns expressed by the victim or any witnesses.”

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

Q13: Do you have any comments on the proposed modified entry arrangement?

Q14: Do you agree with the proposed approach to the assessment of competence?

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

There are similarities between the youth court cases and domestic violence cases in that they both involve vulnerable and/or intimidated witnesses. Specialist skills are necessary to manage these cases and the impact of incompetent advocacy is potentially serious. CAADA proposes that the regulators should conduct a review of available evidence as well as focused research into domestic violence cases to establish whether there are risks present and if so what, if any additional measures (such as specialist training) might be necessary to address these.

The case for prosecuting advocates to have specialist training and awareness of policy and guidance applicable to prosecuting in respect of domestic violence, is accepted by the CPS.

In a recent analysis of data on victims of domestic violence, CAADA found that the conviction rate for domestic violence cases heard at specialist Domestic Violence Courts, where the prosecuting advocates have the necessary specialist skills was 83% versus 52% of cases that were not heard at an SDVC.⁶

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Q18: Do you have any comments on the Scheme Rules?

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

⁶ CAADA Insights service January to December 2011, n=2,761 victims (Analysis CAADA July 2012). The sample size for the non SDVC cases was very small.

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| Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why? |
| |
| Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised? |
| |
| Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined? |
| |
| Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper? |
| |
| Q24: Are there any other equality issues that you think that the regulators ought to consider? |
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Criminal Law Solicitors Association (CLSA)

CLSA

Response to the Fourth consultation paper on the Quality Assurance Scheme for Advocates (Crime)

Criminal Law Solicitors' Association

The Criminal Law Solicitors' Association is the only national association entirely committed to professionals working in the field of criminal law. The CLSA represents criminal practitioners throughout England and Wales and membership of the Association is open to any solicitor - prosecution or defence - and to legal advisers, qualified or trainee - involved with, or interested in, the practice of criminal law. The CLSA is responding to the consultation on behalf of its members.

The Association retains significant reservations over the Quality Assurance Scheme for Advocates (Crime) (QASA) which have not been addressed in the current consultation.

Consultation response – introduction

This response is submitted having had sight of the draft response to be submitted on behalf of the Law Society. Our approach is substantially in agreement with that of the Law Society. This response has been carefully considered by the Committee of the CLSA is submitted on behalf of the membership of the CLSA.

The Association supports the principle of quality assurance in the delivery of legal services. However, any scheme must be necessary and proportionate. Throughout this process we consider that there has been no evidence to support the necessity for QASA and it has offered neither an appropriate nor proportionate response to the perceived deficiencies in the standards of criminal advocacy.

We do recognise that significant changes have been made to the scheme by the SRA during the course of this last year, following the very flawed scheme proposed in July 2011. However, our fundamental objections, as detailed in our response to the previous consultations, have not been allayed and we consider that significant flaws in the scheme remain.

There is still no information as to the likely cost of accreditation under QASA. The process driven nature of the administrative arrangements indicated by the draft Handbook and Guidance suggests that a sizable staff will be necessary to manage the scheme. What those documents do state is that fees will be set at a level necessary to meet the costs of managing the scheme. We are concerned that the SRA scheme may require solicitor advocates having to pay more for QASA accreditation than the other two professions. Already we have experienced increased bureaucracy for Solicitors who, alone of the three professions, have been required to pre register. We understand that 10,000 solicitors have registered – indicating the scale of the Administration that will be required. The majority of those registering will be from practises dependent upon a shrinking Legal Aid budget and we, once again, question whether this costly scheme is necessary and proportionate.

Our concerns over the nature and methods of judicial evaluation have not been addressed. Our views were reflected by the speech of Lord Justice Moses⁷. Lord Justice Moses sets out far more eloquently than we could ever articulate concerns that are so fundamental that they strike at the very heart of this scheme. If his concerns are well founded the scheme risks undermining principles of adversarial advocacy that have served so well for centuries and which are admired and emulated the world over.

When such a senior Judicial figure expresses such fundamental concerns then we respectfully suggest that it is time for all concerned to pause and reflect on whether it is right to plough on with this scheme – no matter that a significant amount of time and energy have been invested to date. We understand that initiatives of this nature gain a momentum which is difficult to stop but sometimes it is calling a halt that is the courageous and right thing to do.

We have a significant concern about whether there will be a sufficient number of cases before the Crown Court to enable all of the advocates to be judicially assessed. We are aware of many judges who have their own personal reservations about the process of judicial evaluation and have indicated that they do not wish to participate.

The effect of QASA will be to annul the historic rights of the majority of solicitors to appear before the Magistrates' Court as only those who appear regularly will want to be reaccruited after the first five years of the scheme. This is a change of great significance to the profession but the implications of QASA are known only to criminal practitioners. It risks undermining the ability of qualified solicitors, mindful of their professional obligations, to develop a new area of practise and may prevent some from becoming committed and hard working Criminal Defence lawyers.

Our responses to the consultation must be seen in the light of the above objections. However, we have to acknowledge that regardless of the concerns of Lord Justice Moses, the Association, the Law Society and many others the Regulatory bodies will plough on with this scheme. Hence we have endeavoured to provide a constructive response to the questions posed.

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would these difficulties be addressed by

⁷ <http://www.southeastcircuit.org.uk/education/seventh-ebsworth-memorial-lecture-looking-the-other-way-have-judges-abandon>

allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?

We are concerned that advocates will find it difficult to obtain the requisite number of judicial evaluations to achieve full accreditation within 12 months of registration – two or three evaluations from the first five effective trials. The number of cases coming before the courts has declined in recent years. Many trials crack or are ineffective for a variety of reasons, including judicial pressure, non appearance of witnesses, acceptance of pleas previously deemed unacceptable by the Crown and Defendants changing their instructions at the door of the court.

It should also be noted that evaluation can only be carried out by a circuit judge who has undertaken the necessary training; a large number of trials are in fact conducted by Recorders freeing the circuit judges to deal with lengthy trials and case management hearings.

We should like to see an analysis done of the total number of trials annually and the total number of Higher Courts Advocates seeking accreditation to examine whether it is even statistically possible to evaluate every advocate within 12 months. The Bar is at greater risk than Solicitors as Solicitors can control the briefing of cases to ensure in house advocates get the required number of cases.

We strongly urge the SRA to reconsider the time limit and to allow a longer period for advocates to be assessed or to obtain judicial evaluations.

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

The Association acknowledges and respects that the SRA has taken on board the results of the survey it undertook into the impact of QASA on solicitor advocates and has listened to the representations from the profession. It would not have been in the public interest to reduce at a stroke the number of solicitor advocates able to undertake non trial advocacy in the Crown Court by half.

This will ensure that many very experienced solicitor advocates can continue to practice and provide service to clients.

Q3: Are there any practical issues that arise from client notification?

The issue of client notification illustrates the muddle headed nature of QASA. The Scheme is supposed to protect advocacy standards in the interests of the client and the public purse. In the real world clients are not interested in the “badge” that their advocate holds. They want an advocate who can do a good job in presenting their case and one who will see the case through. Telling the client, for example, that in certain circumstances the advocate will not be able to appear on their behalf if the case goes to a higher court is not an attractive proposition for either the client or the advocate. If the client objects on quite logical grounds to a mere Level 1 advocate, will the public purse be prepared to pay for advocates at a higher Level? What will be the impact on the junior members of the professions trying to gain and develop experience in the Magistrates’ Court? There is also a difficulty in that clients may insist on a higher level of advocate than is warranted by the case. We are all familiar with Defendants stating they want a QC. Notification will mislead the Defendant’s who believing they can choose the level of advocate.

Q4: Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?

The Association notes that the SRA has listened to representations from practitioners with experience of work in the Youth Court and has decided that to appear in the Youth Court the advocate should not need to be accredited higher than Level 1. The Association considers this is the correct decision and sees no practical difficulties arising from it. If the nature of the case is more complicated, the overriding obligation not to undertake work outside of an advocate’s competence will resolve any difficulties.

Q5: Do you foresee any practical problems with a phased implementation?

We accept that administrative convenience dictates that the implementation of the Scheme will have to be phased. Indeed there is the advantage that any problems encountered in the first phase can be ironed out before subsequent phases. The only complication is the possible confusion of an advocate who normally works within a Circuit due for later implementation appearing on, for example, the Midlands Circuit where the Scheme has already been applied. It must be made clear to such advocates that they are able to appear occasionally on Circuits where the Scheme has been applied ahead of their own customary Circuit.

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

The proposal that the level of a case should be determined by the instructing party in practice reflects the position at the present. An instructing solicitor will contact a chambers to discuss with the clerk the seriousness of a case and the level of experience which a barrister should have in order to undertake the particular case.

In future an instructing solicitor will be asking chambers to provide them with, for example, a Level 3 barrister (if they themselves do not know the levels to which individual barristers are accredited) rather than asking for a barrister by name/reputation. It is questionable whether this will protect advocacy standards or protect advocates who have achieved a certain level, regardless of their current ability/reputation.

The Association has concerns over the suggestion that judges should be entitled to submit adverse assessments on an advocate to that person's regulator if they consider their performance to be below the standard of competency to be expected of an advocate accredited to the level appropriate to the case. In itself, and absent QASA, it may have been a workable scheme that the regulation of Advocates would be by comment from Judges to Head of Chambers/Senior Partners. A referral to a professional body might have been appropriate in extreme cases. This informal method has been in place for centuries and arguably has worked well. The CLSA has argued that this method of regulation – referral to firms/chambers and/or professional bodies only when things have gone wrong is a far more cost effective, less bureaucratic and "light touch" method of ensuring good advocacy standards than QASA.

Q7: Do you agree that the offences/hearings listed in the table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

The classification is a huge improvement on the July 2011 proposal and we acknowledge that the SRA has taken account of comments made previously.

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

Levels guidance will be necessary at the start of QASA to enable advocates to familiarise themselves with the Levels table and the additional factors that can be taken into account in determining a case level. An advocate's own professional judgment of their experience and capability will be a factor in this process.

It is a matter of some concern that a scheme which set out to protect the client's best interests by assuring advocacy standards has resulted in a framework which could interfere with the choice of advocate available to a client. A client may have instructed an advocate in the past and may want to employ the same advocate in a subsequent case. If the advocate does not have the requisite accreditation to the Level of that case, that choice is removed from the client.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to

availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

Yes we do. As an example, an experienced Magistrates Court advocate may represent a Defendant on a murder charge. The advocate may know the client well and understand the arguments to be presented at a bail application. The advocate may deal with the first remand hearing in the Magistrates Court and the first Crown Court hearing is usually 24 hours later. That advocate, say they are a level 2 advocate, is perfectly capable of dealing with the first Crown Court hearing which involves setting a timetable for service of papers and any bail application that is made (indeed it may be that it is agreed that no bail application should be made). To force that level 2 advocate to instruct a level 3 or 4 advocate to deal with that first hearing is unnecessary, costly, potentially detrimental to the interests of the client and adds to the expenses of the solicitors firm. It is an example of how these rules may get in the way of common sense.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

For the sake of clarity, it would be helpful to list further examples of the types of non-trial hearings in the guidance. Bail applications at any level of case should be capable of being dealt with by an advocate of any level.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible.

The Statement of Standards ought to appear in the Handbook: users should not be referred to the Criminal Advocacy Evaluation Form to be issued to the judiciary to find this significant information.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

The section on levels guidance in the draft Handbook is blank, referring readers to the consultation paper. Allocating cases to levels is going to be a difficulty for practitioners, especially at the outset of the Scheme, and more guidance than that provided at paragraphs 4.18 – 4.21 will be necessary. More worked examples like those provided in paragraph 4.22 would be helpful.

Q13: Do you have any comments on the proposed modified entry arrangement for QCs?

It is essential that any scheme for quality assurance of criminal advocacy must encompass all practitioners whatever the length of their experience or their seniority within the professions and that includes silks. We accept that some provision must be made for QCs who have taken silk recently. Their competency will have been tested rigorously recently and at considerable expense to themselves. There are also administrative advantages in reducing the number of advocates that need to be assessed at the inception of the Scheme.

The Association welcomes the fact that a similar modified entry arrangement will be available for those solicitors who have attained Higher Rights of Audience – a solicitor who became a higher court advocate in 2010 would not need to be re-accredited under QASA until 2015 etc. unless they wished to progress to accreditation at Level 3. That provision is buried in the draft Scheme Handbook and needs to be better advertised.

Membership of the Law Society Criminal Litigation Accreditation Scheme ought to passport solicitors and FILEX to Level 1 QASA accreditation. That would remove the need to pay two fees for accreditation under both CLAS and QASA (and remember that legal aid practitioners can ill afford additional expenses), it would ease the administrative burden on the SRA when it

comes to instituting QASA at Magistrates' Court level, and it would have the added bonus of applying to two of the three professions covered by QASA.

Q14: Do you agree with the proposed approach to the assessment of competence?

The competence framework and assessment against it are important and need to be available in one place. The footnote on page 21 of the consultation paper directs users to paragraphs in the Handbook which do not appear to be correct and that makes it difficult to comprehend the assessment of competence.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

We agree that the Scheme must be subjected to an early review, with ongoing monitoring to ensure there is suitable data to feed into that review. The precise scope of the review must at this point remain flexible as issues will certainly only arise once the Scheme comes into operation. At this stage the Association's priorities would be: whether the Scheme has forced many criminal advocates out of this field of practice; the cost implications of the Scheme for practitioners (there is still no indication of the cost of accreditation to the practitioner); and judicial assessments both in terms of their robustness and of their fairness as between advocates of different professional backgrounds.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

The draft Handbook is reasonably easy to use and would appear to be comprehensive. The specification of requirements applicable to the three professional groups under separate headings is a sensible way of presenting the information. As for the Bar and CILEX, an explanation of the appeals process for solicitor advocates ought to be included at paragraph 8.116 in the Handbook and not just in the SRA Regulations.

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

The FAQ for solicitors ought to be included in the Handbook, as they are for barristers and FILEX, rather than directing users to the SRA website.

Q18: Do you have any comments on the Scheme Rules?

We support the decision to have separate BSB and SRA Rules.

Q19: Do you agree with the proposed definition of "criminal advocacy"? If not, what would you suggest as an alternative and why?

Yes we accept the proposed definition of criminal advocacy provided that arrangements are in place so as not to exclude completely specialist practitioners from criminal proceedings.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

We welcome the fact that the Regulators have listened to representations in relation to the position of specialist practitioners under QASA. We support the proposal that in certain circumstances specialist practitioners should be allowed to undertake criminal advocacy without QASA accreditation. The Regulators must ensure that specialist practitioners are aware of the saving provision and the circumstances in which they will in future be allowed to appear in a criminal court. Clearly this arrangement must be kept under review.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

The SRA's track record of on line registration, application, re-accreditation etc. does not inspire confidence. There must be scope for those who do not or who are not comfortable using on line facilities to participate in the Scheme by post.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIAs will be mitigated by the measures outlined?

The research undertaken by the SRA among solicitor advocates revealed the fundamental problem with QASA as far as equality impact is concerned. It will impact disproportionately on women and BAME practitioners. The revisions to the Scheme adopted this year will go some way to alleviate that problem (particularly access to non trial work in the Crown Court and the allocation of Youth Court work to Level 1) but this underlying issue remains a matter for concern.

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

We remain concerned that QASA is going to impact disproportionately on women and BME lawyers as the SRA's own research last autumn indicated. Women are more likely to work part time and so may be restricted in the types of trials that they can undertake. This may limit the number of trials available to them and they may not meet the required numbers. There is also a concern that about age discrimination. Older solicitors are more likely to work part time and again the requirements as to the number of trials they must do for accreditation/re-accreditation might be difficult to meet.

Q24: Are there any other equality issues that you think that the regulators ought to consider?

None that we can think of.

**Criminal Law Solicitors Association
8th October 2012**

Gray's Inn

THE HONOURABLE SOCIETY OF GRAY'S INN

**QASA - Fourth Consultation
Response**

Introduction

1. The Honourable Society of Gray's Inn (Gray's Inn) has read the response written by the Advocacy Training Council (ATC). Gray's Inn supports the ATC response.
2. The purpose of this response is to emphasise certain aspects of the ATC's response and to make further comment on four points relevant to the work of the Inn.
3. We agree with the Joint Advocacy Group (JAG), as set out in paragraphs 1.6-1.7 of the consultation document, that there is a regulatory need for quality assurance. Gray's Inn (along with other Inns) has been and will continue to be at the forefront of provision of advocacy training and Continuing Professional Development (CPD). As a major provider of advocacy training we expect that QASA will have some effect upon the usual work of the Inn in the provision of supplemental training during the Bar Professional Training Course and compulsory training for pupil barristers and new

practitioners. QASA will require Gray's Inn to give some consideration to the provision of training for advocates applying for levels 2 to 4 assessments and to those who fail assessments and require additional training as a result. Adequate, effective monitoring of the scheme by the regulator and timely receipt of feedback from all parties involved will be crucial in order for this Inn to prepare itself to support the profession.

The provision of CPD training

4. The Inn fully supports the points made by the ATC in paragraphs 11 to 13. CPD training (both in advocacy and professional development in general) is a vital and integral part of the Inn's education and training curriculum. The Inn has provided CPD to a consistently high standard for a considerable length of time and hence has substantial experience and expertise in this area. We expect to continue to provide CPD and to expand if necessary to meet the new demands of QASA. To date CPD and advocacy training has been effectively monitored by the BSB and the ATC. Therefore it can be safely stated that the Inns are fit for purpose in respect of preparatory CPD training and will easily adapt to the requirements for remedial CPD training. If however, the new tender document makes a requirement for CPD to be administered by a JAG approved organisation, this will adversely affect the work of Gray's Inn. A requirement to tender for CPD will be time consuming and expensive. It is very important to the profession that the Inns continue to provide the service they do provide in relation to CPD without having to bid for a commercial contract to do so.

Q 2:

Are there any difficulties that arise from the revised proposals for the accreditation of level 2 advocates?

Non-trial advocates

5. Gray's Inn agrees with the points made on this issue by the ATC at paragraphs 17—26. In particular we endorse the questions raised by the ATC at paragraph 20. We add this important point: advocacy training of a non-trial advocate will be problematic. It is simply not possible to train an advocate in non-trial matters only. It would be wrong in principle to conduct such training for a number of reasons as all aspects of a trial will impact upon non-trial matters. In order to advise properly as to whether the client should plead guilty simpliciter, plead guilty subject to a Newton Hearing or undertake a contested trial, the advocate must have prepared extensively for a contested trial. Otherwise the advocate will not have taken into account all the tactical, evidential and advocacy skills necessary for a trial.

Q 1:

Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?

6. We endorse the ATC response that 12 months will not be a sufficient length of time for many Junior and QC advocates to complete their assessments. The regulator may have

overlooked the fact that the legal aid market for work at the criminal bar has drastically changed over the last 5 years. Junior barristers must share the availability of work with higher rights advocates from solicitors and the CPS, and QCs are not required in the numbers they use to be required for such cases as rape, fraud and murder. Silks have consequently diversified their practices and frequently practise outside of the criminal courts where judicial assessments are not available. Some QCs conduct criminal cases in non-UK jurisdictions where judicial assessments do not apply (although there seems to be no good reason why these cases should not be considered).

7. One way of increasing the number of cases available for assessments, so giving advocates opportunity to obtain the required number is to allow Recorders to give Judicial Assessments. Recorders generally deal with levels 2 and 3 cases, sometimes level 4. Levels 2 and 3 cases make up a large proportion of cases which go to trial. Many junior advocates will appear in front of Recorders for such trials. Gray's Inn appreciates that at present there has been no indication given that Recorders can be part of the pool of judges to be trained in QASA judicial assessments. Objection to this suggestion may be raised in that Recorders are part time judges and may, because of their judicial status, be unsuitable to give assessments as they are still in practice needing assessments themselves. We don't consider this argument to be of sufficient merit to exclude Recorders from giving assessments. We invite the regulator and judiciary to consider involving Recorders with requisite length of service. It may be that once the scheme is up and running further thought can be given to this suggestion. We suggest 5 years is the minimum length of experience for those Recorders who can deliver QASA assessments.

Q 6:

Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

8. Gray's Inn considers that the suggestion set out in paragraph 36, items 4 to 7 is a very good alternative to allowing the instructing party to set the case level. Barristers and solicitors alike will be vulnerable to inaccurate case level decisions for the reasons set out in paragraph 36, items 1 and 3 of the ATC's response. Gray's Inn and all advocacy training organisations will wholly depend upon consistent accuracy in the setting of case levels for QASA training purposes in order for the training materials to appropriately mirror the levels.

Q 13:

Do you have any comments on the proposed modified entry arrangements?

The accreditation of Silks

9. Gray's Inn endorses the content of paragraphs 60 to 63. We add the following: the scheme for awarding the QC kite mark was hotly debated not so long ago. After careful and extensive consultation a decision was made that the level of QC should be retained as to do so was in the public interest. For this reason alone there should be a case level 5. There will always be cases requiring the skills of a Silk. Such cases should not be left in the level 4 pool of cases. The QC level must be distinguished from level 4 cases otherwise the kite mark will effectively be devalued. It is obviously in the public interest that anyone wishing to use the services of this special category of advocate

can easily identify the level of case requiring a the skills, experience and expertise of a Silk. QCs are entitled to be assessed within the special category to which they have been placed because they have gone through a rigorous assessment in order to attain the QC kite mark. QCs are a valuable source of pro bono training within the Inn. The QC kite mark is particularly valuable and respected in the important area of international advocacy training.

Just for Kids Law

Introduction

We would like to submit a response concerning the use of QASA for youths in the criminal justice system.

Just for Kids Law is an organisation that works with young people caught up in the criminal justice system. We work in conjunction with criminal solicitors firms to set up youth departments which provide quality representation to young people in the criminal justice system. Our organisation then provides a holistic support dealing with the raft of issues young people often face, such as housing, education, welfare and immigration. In addition the charity undertakes policy work, using our experience from working with young people to help inform our approach to trying to improve policy aspects of youth justice.

For some time now we have been concerned with the standard and quality of representation for young people both in the youth court and crown court.

Since 2008 Just for Kids Law has been providing specialist trainings in representing youths for legal practitioners, and other professionals in an effort to try to improve standards. We had our training independently analysed in 2010, **81% of experienced practitioners said some of the content was new to them and 90% said they would change the way they practiced from having attended the course.**

In 2011 The Centre for Social Justice provided a report on youths in the criminal justice system called The Rules of Engagement
[http://www.centreforsocialjustice.org.uk/client/downloads/CSJ_Youth_Justice_Full_Report_WEB%20\(2\).pdf](http://www.centreforsocialjustice.org.uk/client/downloads/CSJ_Youth_Justice_Full_Report_WEB%20(2).pdf) which states at page 17:

‘Further, youth-specialised training and expertise is minimal amongst sentencers and defence practitioners who participate in youth proceedings. Whilst magistrates and district judges must undertake specialist youth training to practice in the youth court it includes little or no content on issues such as child development, welfare, and speech, language and learning needs. The majority of Crown Court judges and legal practitioners representing child defendants remain untrained to deal with youth cases. Without such youth-specific expertise young people are less likely to receive the services and sentences appropriate to address their offending.’

The CSJ recommendations are, at 4.2.1

Introducing mandatory specialist youth training in the *immediate term* for all defence lawyers and Crown Court judges appearing in youth proceedings. Training for magistrates and district judges should be developed to include comprehensive

understanding of the distinct vulnerabilities of children and young people. Youth specialised training for court practitioners should be based on the excellent youth-led approach of the charity Just for Kids Law.

Response

We have a two-fold response to QASA

1. First we believe that *anyone* representing children and young people in criminal proceedings should be specifically trained and either accredited or kitemarked to provide this specialist representation. Regarding the first point we understand that JAG is looking into this separately and so I won't go into further detail here, save to say that we would support some specialist training to be undertaken by any lawyers who represent children, which would presumably be a requirement separate from and in addition to the QASA system.
2. Secondly children should have as high a level of representation in courts as adults. whether they are in the youth court or the Crown Court. We hope this is a matter of basic fairness and common sense but also of Equality of Arms as protected by Article 6 of European Convention of Human Rights.

The youth court is different to the adult magistrates' court because it deals with more serious offences and has greater sentencing power. The youth court deals with very serious offences, including a large number of robbery cases, and can deal with offences as serious as rape. A magistrates' court will sentence up to maximum of six months or in some very specific cases up to 12 months, the youth court sentences children to up to 2 years' imprisonment.

It is our view that if a defendant is charged with a serious offence he should be entitled to a lawyer of a level capable of handling such serious cases. It seems unfair that a child, who is more vulnerable and has protected status, should have a lower level of legal representation than an adult.

We see this as an addition to the specialist training for representing children as there are additional skills that lawyers develop skills in advocacy, knowledge of law, rules of evidence, witness handling and the like. We are concerned that a level 1 advocate will not always have the requisite experience in these skills, even if they are good at the specialist youth elements, to properly represent someone at a trial for a serious offence. Obviously it is vital for anyone charged with very serious matters, to be provided with an advocate of sufficient skill and experience in handling complex and serious cases, as well as being properly trained in youth law.

We do not suggest that all youth court work be set at a higher level. Given the wide range of work undertaken by the youth court we would recommend that different levels are required for the different offences in line with whatever level would be required to represent an adult charged with a similar offence. So we believe that if an adult charged with rape, for example, is entitled to a level 3 advocate that should also apply to a child, irrelevant of which court it is being heard in except their level 3 advocate will be accredited to work with children. This would result in a lot of the work still being undertaken by level 1 advocates, but would require more experienced advocates for the more serious work.

Follow Up

We would be very happy to discuss any of the above matters further. Our strategic litigation panel has been looking at ways of taking forward the accreditation process.

For further information please do not hesitate to contact:

Shauneen Lambe, director, shauneenlambe@justforkidslaw.org

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Proceeds of Crime Lawyers Association (POCLA)

QUALITY ASSURANCE SCHEME for ADVOCATES FOURTH CONSULTATION

SUBMISSION OF THE PROCEEDS OF CRIME LAWYERS' ASSOCIATION

October 2012

The Proceeds of Crime Lawyers' Association - the Scheme's effect on its members

1. The Proceeds of Crime Lawyers' Association ("PoCLA") was established in the UK in 2008. Its aims are to advance, foster and encourage the exchange of information, education and training in all matters relating to the practice of law involving the proceeds of criminal conduct.
2. PoCLA is open to full membership to barristers and solicitors, judges, legal executives and qualified overseas lawyers. It currently has 667 members. Most of these are barristers and solicitors in independent practice.
3. The current President of PoCLA is Lord Justice Laws. Its Chair is Andrew Mitchell Q.C..
4. PoCLA is committed to the maintenance and improvement of advocacy standards in all courts in which its members practice. PoCLA believes that the UK laws in relation to proceeds of crime are the most sophisticated and complex in the world. The proper and fair application of them in the courts places particular demands on advocates. PoCLA is determined to ensure that the courts receive the best assistance from advocates in the public interest. And, more particularly, in the interests of consumers.
5. There is now a specialist proceeds of crime Bar. Some sets of chambers have teams whose members practice exclusively in proceeds of crime law. One London set (33 Chancery Lane), was created in the last 4 years primarily to provide specialist advocacy services in proceeds of crime. As a measure of consumer recognition of the existence of this specialism, consider the leading commercial guide to the Bar,

Chambers and Partners. It has a separate section exclusively for proceeds of crime practitioners.⁸

6. Many practitioners in proceeds of crime do not practice in conventional criminal law. They seldom conduct trials in which guilt or innocence is determined. They would not qualify for registration under the Scheme. Neither is it necessary or desirable that they should conduct such trials. As this submission will demonstrate, the issues that arise in proceeds of crime litigation are wholly different from and not framed by the criminal charges. The rules of evidence and procedure are different. The skills which are necessary to conduct trial work are not those which are relevant to a proceeds of crime practice.
7. It follows that:-
 - (1) Assuming proceeds of crime specialists are required to register (and the current framework of the Scheme is unclear), it is unlikely that they would be able to meet the qualification requirements to do so; and
 - (2) Those who conduct trial work and so are able to register will be deemed competent to conduct complex proceeds of crime cases without necessarily having the skills and experience to do so.
8. PoCLA believes that QASA can only be justified if it can be shown to protect consumers from advocates ill qualified to conduct a particular case. It cannot have been intended that the Scheme will operate so as to disqualify the most able practitioners from appearing in cases in which they specialise. Yet, as currently drafted, the Scheme would seem to have that effect.
9. This is plainly unlawful as it is wholly contrary to the regulatory objectives set out in s.1 of the Legal Services Act 2007.

The Criminal Courts' Proceeds of Crime Jurisdiction

10. It is not clear from the Rules and the consultation documents produced by JAG whether it appreciates the jurisdiction of the criminal courts in relation to proceeds of crime or the nature of the advocacy which it creates.
11. This is disturbing. Confiscation laws have been in place since 1986. They were extensively overhauled by the Proceeds of Crime Act 2002. This is one of the largest and most important pieces of legislation in recent years, running to 462 sections and 12 schedules. It is hard to believe that the existence of this jurisdiction, and more importantly the manner in which advocacy services are delivered within it, has crept by unnoticed in consideration of QASA.
12. The primary jurisdiction is created by the Proceeds of Crime Act 2002. The principal powers are conferred on the Crown Court. They are as follows:-
 - The making of confiscation orders following conviction (s.6).
 - The making of restraint and ancillary orders in any case where there is a criminal investigation or prosecution (s.41).

⁸ A copy of this is attached to this submission

- To appoint receivers to manage assets where there is a criminal investigation or prosecution or to enforce confiscation orders once made (s.48, 50).
- The making of investigatory orders to facilitate the investigation of the proceeds of crime (Part 8).

Confiscation Proceedings

13. A confiscation order can only be made following conviction. It is part of the manner of dealing with the defendant. But the statute provides that it is separate from sentencing. Plainly therefore, the making of these orders is for determination by the judge alone. They can be made on application of the prosecutor or at the court's initiative.
14. The making of an order involves the calculation of 2 figures and then the imposition of a liability to pay an amount equal to the lower. The first figure is benefit from crime. In most serious cases, this is not just benefit from crime of which the defendant is convicted: it is all crime carried out by the defendant, whether or not it is prosecuted. It is calculated by assessing the value of property passing through the defendant's hands. The second figure is the current value of the defendant's interest in his property.
15. Confiscation proceedings are of incalculable importance to the consumer, particularly defendants. This is because they carry a term of imprisonment of up to 10 years in default of payment. Further, unlike fines, even if the term of imprisonment is served, the liability to pay will usually remain for the rest of the defendant's life. The liability can be enforced against subsequently acquired property.
16. It is essential that the nature and characteristics of confiscation hearings are properly understood. Of course in many cases, confiscation issues are straightforward and do not require particularly demanding advocacy skills.
17. But in very many cases, the issues are hugely complex. They usually relate to i) whether the defendant has obtained certain property and ii) the nature of his interest in property. As the House of Lords pointed out in *May* [2008] AC 1028, these issues involve the application of property law. They have nothing to do with the nature of the offences framed by the indictment or the issues which arose in the trial.
18. This means that in many cases the confiscation proceedings which follow conviction comprise a piece of litigation in their own right. They may be extensive. Confiscation proceedings often take days sometimes weeks to resolve. For example, *Ahmad and Ahmed* [2012] EWCA Crim 391, currently on appeal from the Court of Appeal to the Supreme Court, was heard by a High Court judge at first instance and occupied 31 days of court time. Another current example from 2012 is the conjoined appeals of *Bagnall and Sharma* [2012] EWCA Crim 677. These were different cases at first instance. *Bagnall* occupied several weeks at first instance and resulted in a £1.8 million confiscation order. *Sharma* is a good example for a different reason. *Sharma* was convicted of stealing a comparatively modest £40,000 from his clients. An analysis of his finances showed that over

£16m had passed through bank accounts apparently controlled by him through his family, resulting in a confiscation order of £4.1m being made.

19. Cases such as *Bagnall* and *Sharma* are not unusual. According to HMCTS during the financial year 2010/2011, 6,242 confiscation orders were made. The amount calculated for benefit by the courts exceeded £1,320 million and the value of the confiscation orders made exceeded £126 million.⁹
20. The importance and complexity of the confiscation jurisdiction is hard to overstate. Confiscation appeals have reached the House of Lords or Supreme Court in 17 different cases since 2000, more than any other area of law, civil or criminal. If a member of JAG interrogates Westlaw or Lexis for confiscation appeals heard in the Court of Appeal he will find hundreds every year.
21. It is the experience of PoCLA that its members are often only instructed after conviction to conduct confiscation proceedings, both for the prosecution and the defence. This is at first instance and on appeal. Indeed the prosecuting authorities (CPS, SFO and RCPO) have had specialist confiscation panels for many years. The CPS has invited applications from advocates to a specialist confiscation panel and is currently considering the grading of applicants and appointment to its panel.
22. Many PoCLA members specialise in the conduct of such proceedings. As is obvious from the summary above, the property law issues which arise in a confiscation case have nothing to do with any other aspect of the criminal case. The advocate instructed in the confiscation case very often does not have a criminal practice and does not conduct criminal trials.
23. Such advocates are unlikely to qualify under the QASA scheme for registration because they do not conduct trials, yet they are plainly most suited to conduct the confiscation proceedings.
24. It is understood that JAG proposes an exception for specialist practitioners. As expressed in the Scheme Handbook it is said that there is no requirement for an advocate to be registered if “*the advocate has been instructed specifically as a result of their specialism.*” An example is given of a health and safety expert being instructed in a manslaughter trial.
25. Plainly, if confiscation proceedings are regarded by the scheme as “specialist proceedings” within this rule, then the consumer is able to instruct a confiscation specialist.
26. It cannot have been the intention of JAG to deny to the consumer, particularly the defendant, the right to instruct a specialist confiscation advocate to conduct confiscation proceedings in such important cases.
27. As said above, PoCLA believes that if such advocates are excluded, then the scheme will plainly operate contrary to the regulatory objectives in s.1 of the Legal Services Act 2007.

Restraint and Freezing Jurisdiction

⁹ www.justice.gov.uk/downloads/information.../foi.../foi-75719.doc

28. The restraint jurisdiction is a statutory enactment of the civil jurisdiction to make freezing orders prohibiting the disposition of assets. This statutory jurisdiction is civil in character, not criminal: *Re O* [1991] 2 QB 520. The principles which apply to the making and operation of restraint orders under PoCA are those which apply to civil freezing orders: *SFO v X* [2005] EWCA Civ 1564.
29. Restraint orders are now principally made by the Crown Court under s.41 of the Proceeds of Crime Act 2002. However, the legislation which PoCA replaced (the Criminal Justice Act 1988 and the Drug Trafficking Act 1994) is still in force in relation to criminality carried out before March 2003. Under the previous legislation, the power to make and maintain restraint orders is exercisable by the High Court (CJA s.77; DTA s.26). There are several hundred sets of these restraint proceedings ongoing under the old legislation. The previous law conferring jurisdiction on the High Court continues to apply.
30. Crown Court and High Court restraint powers are broadly similar. Restraint orders can be made against any person, provided the defendant has any interest in the property restrained or has made a gift to that person. Any person affected by a restraint order can apply to vary or restrain it.
31. Consequently, the usual issues which arise in restraint proceedings are:
- Who holds the property interests in the property under restraint.
 - Whether a restraint order is necessary to prevent dissipation of assets and if it is, the terms of such an order.
 - As restraint orders are usually made ex parte, whether the applicant has complied with his duty of full and frank disclosure.
32. Thus, restraint proceedings always concern the prosecuted (or investigated) person. But they also almost always involve consumers as litigants who have nothing to do with the criminal investigation and are not being prosecuted.
33. The issues which arise in the restraint jurisdiction are civil property law or civil procedure issues which have nothing to do with criminal liability.
34. Further, these issues are often exceptionally complex and demand particular advocacy skills. The courts have frequently made observations on complexity and specialism. For example in *Lexi Holdings v SFO* [2009] QB 376, the victim of the investigated defendant's crime applied to vary a restraint order to recover his loss. The case reached the Court of Appeal which said:

“[92] First, there can be little doubt that the issues which arose in this case concerning beneficial interests, equitable charges and tracing were far from straightforward. They are not part of the daily work of most Crown Court judges, and indeed this constitution of the Court of Appeal (Criminal Division) was deliberately arranged so as to ensure that appropriate expertise in matters normally falling within the jurisdiction of the Chancery Division was available. Sometimes issues may arise in restraint order proceedings about equitable interests which are not unduly complicated and can readily be dealt with in the Crown Court. In other cases the sums involved may not warrant any unusual steps. But there may be other times

when the complexities are such that it may not be wise for the Crown Court judge to embark on seeking to decide those issues. In such a case where a relaxation of a restraint order is sought, consideration should be given to adjourning those variation proceedings to enable the issues to be determined in proceedings before a specialist Chancery Circuit judge or High Court judge of the Chancery Division.

35. Similarly in *Re Stanford* [2011] Ch 33, the liquidator of a victim company in a fraud investigation applied to vary a restraint order. The Court of Appeal repeated the necessity to convene a tribunal with specialist experience, saying:
“The legal complexities may be of property law or equity, as in the *Lexi Holdings* case, but are not limited to those issues. They may be of insolvency and cross-border recognition, as here. In some cases they may relate to tax law or the law of matrimonial property and ancillary relief.”
36. A total of 11 advocates (including 5 Q.C.s) appeared in the Court of Appeal in the 2 cases referred to above. None of them is a criminal practitioner. It is thought that none of them would qualify for registration under the Scheme.
37. The current definition of “criminal advocacy” in the Scheme is:
“advocacy in all hearings arising out of a police or SFO investigation, prosecuted in the criminal courts by the CPS or SFO.”
38. It would seem that restraint proceedings (assuming the investigative authority is a police service or the SFO) are covered by this definition.¹⁰ In which case advocates conducting restraint proceedings would be required to register under QASA. Obviously, many of those barristers best qualified to conduct these cases of the highest complexity would be ineligible to do so due to insufficient exposure to trial work.
39. As said, it would appear that JAG proposes an exception for specialist practitioners. There would be no requirement to register under QASA if “*the advocate has been instructed specifically as a result of their specialism.*”
40. Plainly, if restraint proceedings are regarded by the scheme as “specialist proceedings” within this rule, then the consumer is able to instruct a confiscation specialist.
41. If they are not so regarded, the consumer will be denied the right to choose such a specialist advocate. He will be required to instruct an advocate whose skills and experience will not equip him or her properly to deal with the requirements of the litigation.
42. PoCLA believes such a result cannot have been intended by JAG and it would plainly be contrary to the regulatory objectives set out in the s.1 of the 2007 Act.

Receivership Proceedings

¹⁰ However, restraint orders can be made before criminal proceedings are instituted and so, in such cases, there is no prosecution in a criminal court (and there may never be one). It would therefore seem that the current definition of criminal advocacy means that an application to vary a restraint order is not criminal advocacy if it is made before a defendant is charged but is criminal advocacy if it is made after charge.

43. The Crown Court can appoint a receiver to manage assets pending the making of a confiscation order; and to realise assets in order to pay a confiscation order. Again, the powers are conferred on the High Court in relation to criminality carried out before March 2003.
44. A receiver is an office recognised in the civil law of equitable execution. A receiver appointed under proceeds of crime legislation is to be treated in the same way and has the same rights and duties as his common law counterpart: *Hughes* [2003] 1 WLR 177.
45. As with the restraint order jurisdiction, receivers affect the property rights of third parties. Receivers are normally appointed to enforce confiscation orders by realising the defendant's assets in order to pay the order. In many cases that property is jointly owned by the defendant and a third party or a third party claims ownership.
46. It is well settled that a third party is entitled to assert his interest and that any finding by the Crown Court when making the confiscation hearing are not relevant: *Norris* [2001] 1 WLR 1388. Consequently, when appointing a receiver, all parties with an interest in the property have to be served with notice of the application (PoCA s.50). The court has to resolve their claim to ownership applying conventional property law principles: *Larkfield v RCPO* [2010] EWCA Civ 521.
47. It follows that receivership proceedings are often complicated trials of property law issues. They never have anything to do with the nature and seriousness of the offence which led to the conviction.
48. It is the experience of PoCLA that it is rare for the litigants to contested receivership to be represented by advocates who conducted the trial. The prosecuting authorities tend to instruct advocates from their specialist proceeds of crime lists and third parties were (by definition) not parties to the criminal proceedings.
49. Again, as with restraint proceedings, members of PoCLA regularly conduct receivership proceedings and do not conduct trials. They could not qualify for registration under QASA.
50. As with restraint proceedings it is not clear whether it is intended under the Scheme that these type of proceedings be excepted as specialist proceedings. If it is not so intended, then the consumer is required to instruct an advocate who is unsuitable for the litigation and is prevented from instructing one who is.
51. This is totally contrary to the interests of the consumer. PoCLA repeats its observations as to the unlawfulness of such a result.

Investigative Proceedings

52. Part 8 creates a number of highly intrusive powers to obtain information in proceedings of crime cases. The powers to make production orders and issue search warrants are the most frequently used. These powers are exercisable by the Crown Court and are often made ex parte. They may be challenged by application back to the Crown Court under Part 2 of the Criminal Justice and Police Act 2001 or by judicial review to the Administrative Court of the High Court.

53. It cannot be doubted that the issue of a search warrant is a serious infringement of a person's liberty. JAG should be aware that the search warrant jurisdiction in particular has spawned considerable case law in recent years. Perhaps the most notable recent case is the *Tchengquiz* case, where the Divisional Court quashed search warrants obtained by the SFO in relation to their investigation into the *Tchengquiz* brothers.¹¹
54. In practice, most applications for investigative orders are made by investigators. They do not hold legal qualifications and so are wholly outside the scheme. In most cases these orders are not challenged.
55. As with confiscation restraint and receivership, members of PoCLA are frequently instructed in complex, serious or sensitive cases, to obtain or challenge orders and search warrants. This is because most of those who specialise in proceeds of crime are specialists in areas ancillary to criminal litigation of which intrusive investigative litigation is one.
56. At the moment, it is unclear whether advocates conducting this type of investigative litigation are required to be registered under QASA. Most orders are obtained before criminal proceedings begin and so the definition of "criminal advocacy" does not appear to embrace such litigation. However, if criminal proceedings are underway, it would seem that the conduct of an application relating to such orders or warrant would comprise criminal advocacy.
57. Further, assuming this litigation is criminal advocacy, it is not clear whether it is capable of being specialist proceedings. In many cases, the consumer would seek to instruct an advocate who specialises in this type of work, usually as part of a broader practice, often focused on proceeds of crime.
58. However, in some cases it would be hard to describe the chosen advocate as a specialist in investigative powers. But because the issues have usually got nothing to do with those which might arise in trials, it is usually the case that the advocate is not a conventional criminal advocate and so would not qualify for registration. JAG should consider the *Tchengquiz* litigation above as an example. The principal advocates for the successful applicants were the former Attorney-General and the former Director of Public Prosecutions. It is not thought that either of them would qualify for registration under QASA. But it cannot be intended that the Scheme should operate to prevent consumers instructing such experienced and able advocates.

The Solution

59. There would seem to be 2 principal solutions:-
- (1) Re-consideration of the operation of the Scheme so that consumers are not restricted to the selection of advocates who qualify for registration.
 - (2) Re-wording the definition of criminal advocacy and/or specialist proceedings to ensure that the jurisdiction created by the Proceeds of Crime Act 2002 is excepted.

¹¹ *R (on the application of Rawlinson and others) v Central Criminal Court* [2012] EWHC 2254 Admin. Although this was not a search warrant obtained under the proceeds of crime litigation, but under the SFO powers in the Criminal Justice Act 1987.

Solution (1)

60. QASA as drafted fails to recognise that some areas of criminal practice (if it can be called criminal practice at all) do not depend on skills which are acquired by trial advocacy, yet require highly developed advocacy skills of a specialist nature. As demonstrated above, proceeds of crime litigation is a paradigm example.
61. Consumers of these advocacy services are overwhelmingly likely to make informed choices of representation which should not be artificially restricted to those who have skills of limited relevance to the specialist area concerned.
62. It is no part of the remit of PoCLA to try to identify all these potential areas. It would seem to PoCLA that this cataclysmic faultline in the Scheme is best remedied simply by providing that it is open to consumers to choose any advocate he or she pleases for non-trial work. This is entirely separate from the question of plea only advocates (in respect of which PoCLA endorses the position of the CBA).

Solution (2)

63. This is a matter of the drafting of the definitions. PoCLA submits it should be made clear that advocates chosen because of their confiscation specialism should not be required to register under QASA.

SUPPORTING DOCUMENTATION:

https://www.barstandardsboard.org.uk/media/1460413/qasa_crf_-_proceeds_of_crime_lawyers_association_supporting_evidence.pdf

Solicitor's Association of Higher Court Advocates (SAHCA)

Solicitors Association of Higher Court Advocates

Response to the Joint Advisory Group's 4th Consultation on the Quality Assurance Scheme for advocates, dated July 2012.

1. SAHCA is the voice of Solicitor Advocates in England and Wales and represents more than 1250 members out of the 5000 solicitors currently with Higher Rights. In response to all previous consultations on quality assurance we have said that we are committed to maintaining and improving advocacy standards amongst our members, and indeed across the advocacy market as a whole. From the Cardiff pilot to the present, we have encouraged our

members to engage with the development of a scheme, and we have excellent credentials in advocacy training.

2. We welcome some of the new thinking apparent in this 4th Consultation and appreciate the work the SRA has done in listening to and accommodating the concerns of our members and thousands of solicitor advocates in determining new proposals for non-trial advocates seeking accreditation in the Crown Court.

3. We have read the Law Society's draft response, and we are largely in agreement with it, however, where we have a different or additional view this is set out below. In particular, we endorse the Law Society's comments concerning plea-only advocates (Q2). The notion that experienced solicitor advocates who routinely advise clients at the point that a plea may be first tendered in the magistrates court (as applies in the majority of cases) are not qualified to do so in the Crown Court is wholly unsustainable in our submission.

4. We entirely support the Law Society's views as to the unrealistic timescale for achieving the sufficient number of cases under judicial evaluation (Q1) and consider that this is another justification for having an alternative method of obtaining accreditation and progression. It bears highlighting that the number of cases eligible for judicial evaluation is declining year on year (as the Law Society's statistical analysis of Crown Court trial data indicates) while the pool of available advocates seems to be increasing.¹² If this situation persists, and a significant (and rising) proportion of trials at the proposed levels 2 and 3 are presently conducted by Recorders (who are not entitled to perform judicial evaluation under QASA) we anticipate that many of our members will face serious difficulties in obtaining the number of judicial evaluations that is required within the requisite time frame.

5. Furthermore, we continue to have the gravest concerns as to the lack of empirical evidence as compared to anecdotal comment demonstrating the need for a Quality Assurance scheme for advocates involved in criminal defence work which goes beyond what is already set out in the respective professions' own Codes of Conduct. In particular we object, in principle, to the

¹² "Ten thousand register for criminal advocacy", The Law Society Gazette, 24 September 2012. This figure does not include members of the bar as the BSB did not take part in the QASA registration scheme.

central role given to judicial evaluation in QASA and echo the concerns expressed by Lord.0

Justice Moses in his Seventh Ebsworth Memorial Lecture¹³ earlier this year. We are also disappointed that assurances we received from the SRA in Summer 2011 have not held good.

At that time we were told in clear terms that the scheme would maintain a path for progressing through the 4 levels which would not require judicial evaluation. We remain adamant that mandatory judicial evaluation will be detrimental to the justice system as a whole, for the reasons we have expressed in previous consultation responses.

6. We have been contacted by a number of local government lawyers, and those practicing regularly in Courts Martial. There is some confusion as to whether they are required to register and participate in the Quality Assurance Scheme, but that can no doubt be resolved with clear communication. More fundamentally however, it must also be acknowledged that allowances must be made within any Quality Assurance Scheme for those who enter the criminal courts occasionally to conduct specialist cases, While they may not conduct criminal cases frequently, their expertise in their specialist fields will nonetheless make them an appropriate choice for the right kind of work. Such lawyers should not be artificially restrained from criminal court practice.

7. We disagree with the Law Society's response in relation to their views as to Question 6 of the consultation specifically in that we do not oppose the suggestion that Judges should be entitled to submit adverse assessments of any advocate of any level, to that advocate's regulator for investigation, if the Judge considers that their performance has fallen below the standards required for the level appropriate to the case. Such a referral should be a measure of last resort. Judges should in the first instance, make a formal complaint to the advocate's firm or chambers, using the published complaints mechanism with complaints addressed to a designated complaints handler within the organization. The process must be entirely transparent. SAHCA has long campaigned for a Practice Direction to give effect to such a process, not least because it would end once and for all, judicial comments against solicitor advocates that are sometimes made in open court, in the presence of the defendants. A fair and transparent complaints mechanism would ensure absolute parity between both sides of the profession.

13

<http://www.southeastcircuit.org.uk/education/seventh-ebsworth-memorial-lecture-looking-the-otherway-have-judges-abandon>

8. In response to Question 11 of the consultation SAHCA considers that the meaning of the individual standards needs much greater explanation to assist advocates, judges and all those involved in dealing with the scheme to understand what is being sought. For example, standard 4.1.2 is described as “able to question effectively”, without clarification as to the meaning of this expression there is a risk that Judges and/or evaluators will assess an advocate's *style* as opposed to the content of their advocacy. There is then the concomitant risk that the person completing the assessment form will mark an advocate as not competent simply because they are not doing it the way the assessor would.

9. In response to Question 13 the Law Society seeks to incorporate a justification for the need for regular reaccreditation of members of the Criminal Litigation Accreditation Scheme (CLAS). SAHCA does not agree with the Law Society's assertion that there is a need for reaccreditation of members of the CLAS in the absence of any empirical evidence demonstrating a need for such reaccreditation and before any consultation has taken place with its membership.

10. Due to our concerns raised in paragraph 4 above, SAHCA strongly believes that the review of the QASA scheme in 2015 must focus on empirical evidence. Any post review amendments to the scheme must be entirely in response to the evidence and must be proportionate. If, for example, it is found that judicial evaluation does not deliver improvements to the perceived anecdotal shortfalls in current advocacy standards, then judicial evaluation should be scrapped forthwith.

8th October 2012

<http://www.southeastcircuit.org.uk/education/seventh-ebsworth-memorial-lecture-looking-the-otherway-have-judges-abandon>

Technology and Construction Bar Association (TECBAR)

http://www.barstandardsboard.org.uk/media/1460437/qasa_crf_-_technology_and_construction_bar_association.pdf

The Bar Council



Bar Council response to the Fourth Consultation paper on the Quality Assurance Scheme for Advocates (Crime)

1. The General Council of the Bar of England and Wales (the Bar Council) welcomes the opportunity to respond to the consultation paper prepared by the Joint Advocacy Group (JAG) entitled "Fourth consultation paper on the Quality Assurance Scheme for Advocates (Crime)".¹⁴
2. The Bar Council is the governing body and the Approved Regulator for all barristers in England and Wales. It represents and, through the independent Bar Standards Board (BSB), regulates over 15,000 barristers in self-employed and employed practice. Its principal objectives are to ensure access to justice on terms that are fair to the public and practitioners; to represent the Bar as a modern and forward-looking profession which seeks to maintain and improve the quality and standard of high quality specialist advocacy and advisory services to all clients, based upon the highest standards of ethics, equality and diversity; and to work for the efficient and cost-effective administration of justice.
3. The Bar Council responds to this consultation solely in its representative capacity. Paragraphs 4-10 below set out the overall view before turning to address the specific questions which have been posed in the consultation paper.

Overview

4. Whilst only a small proportion of the general public have any direct involvement with the criminal justice system, all have an interest in the professional standards that characterise it. Incompetent, insensitive or ill-mannered advocacy debases the system. Dishonest or unethical conduct corrupts it.
5. Those seeking representation before the criminal courts should be assured of informed, principled advice, and a demonstrably high standard of advocacy. Witnesses and victims should be treated with consideration and sensitivity.
6. The criminal Bar provides representation that reflects these requirements. Its standards of advice, ethics and advocacy are consistently high. In common with the

¹⁴ Joint Advocacy Group's 2012 consultation "Fourth consultation paper on the Quality Assurance Scheme for Advocates (Crime)"

<http://www.qasa.org.uk/QASA%20Fourth%20Consultation.pdf>

Bar generally these are achieved and maintained by its provision of high quality training, the rigorous enforcement of the Bar Council's demanding Code of Conduct, and the chambers system.

7. It is unsurprising that concern has been expressed about the standard of services provided by some advocates in criminal cases. A decline is evident to anyone involved in the administration of criminal justice. The principal cause is the involvement of Higher Court Advocates (HCAs) in trials or appearances beyond their competence.

8. There are very few criminal barristers who fail to act competently. We acknowledge, however, that any failure to act proficiently or to requisite standards of honesty and integrity must be identified and resolved. The Bar Council is determined that this should be achieved. It will not be accomplished if the proposed regulatory scheme perpetuates prevailing abuses or affords scope for them to continue. The proposals relating to plea-only advocates and acting up are of particular concern in this context.

9. To satisfy the regulatory objectives it will be essential that all advocates, whether barristers, solicitors or legal executives, are assessed against the same standards and that those standards are rigorously enforced.

10. We further observe that the proposals are complex and expensive. They are unlikely to be capable of efficient application. Proportionality underpins the regulatory objectives. At a time of reduced resources it is vital to ensure that any scheme is efficient and economical and that it does not impose an unnecessary burden on criminal advocates, the courts or the judiciary.

Question 1 - Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?

11. The Bar Council prefers a period of 18 months within which to obtain the requisite number of judicial evaluations, particularly during the early stages of implementation of the scheme. A period of 18 months will allow those with other commitments (for example sitting as a judge part-time, lecturing, preparing lengthy cases, those on maternity leave or who are caring for relatives) and those who are competent but who are suffering from a shortfall in work, a more flexible period within which to obtain the necessary evaluations.

12. The Bar Council is conscious of the fact that junior advocates, those who are seeking to move from level 1 to level 2, are the most likely to struggle to be instructed in Crown Court work. The lion's share of prosecuting work at this level is conducted in-house by the Crown Prosecution Service and anecdotal evidence suggests that those solicitors' firms with in-house advocates are more likely to conduct trials at this level

in-house. Those junior advocates who obtain Crown Court instructions are likely to find themselves involved in “warned list” cases. These are cases which may or may not be called on during a certain a period. Frequently they move from one warned list period to the next without being listed for trial for several months. It is therefore possible that junior advocates will struggle to obtain the requisite number of judicial evaluations within 12 months.

13. While the reference to statistics obtained from the Ministry of Justice is noted, they have not been made available for scrutiny or comment, nor are their confines defined. Was an assessment made of the number of trials briefed to the Bar? Unless those statistics demonstrate that there will be sufficient trial opportunities for each limb of the profession to be assessed, their value is limited.

14. There is no obvious advantage in requiring advocates to obtain evaluations within 12 months, and no disadvantage in extending the period to 18 months. Once the scheme has embedded and the regulators and the JAG have had the opportunity to assess the ease or difficulty with which advocates are able to obtain the required judicial evaluations the period can be adjusted if it is necessary to do so.

Question 2 - Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

15. To offer any prospect of success and to satisfy the criteria of fairness and proportionality the scheme must apply equally to all advocates and be applied consistently by all regulators. Its efficacy is dependent on the precision of its standards and the uniformity of its application. Departure from those principles will undermine the regulatory objectives.

16. Accordingly, the Bar Council has serious concerns about the creation of a category of non-trial, or plea only advocates, which it believes would not be in the public interest.

17. The consultation paper does not suggest that the creation of a category of non-trial or plea only advocate would serve the interests of the public or those seeking representation. It is said, only, that there is evidence that it is in the interests of solicitor advocates. The question of accreditation of level 2 advocates refers to “further research undertaken by the SRA into patterns of practice of solicitor advocates” (para. 3.9). However, this research is not appended to the consultation paper. Nor does the consultation paper state what research methodology was applied or whether or not the JAG has had the opportunity to consider, and if necessary, test, the results.

18. The changes to level 2 accreditation are said to reflect concerns about the impact of the scheme on those advocates who “for various reasons undertake little or no trial work in the Crown Court” (para. 3.9). However, no consideration appears to have been given to the potential impact on defendants and victims. There is no evidence that those who are represented by non-trial advocates benefit from the same cohesive

and comprehensive judgment and advice on the evidence, the law and likely outcome at trial as those who are represented by trial advocates whose experience is gained in consistently conducting trials and confronting the many challenges they involve. It is, however, axiomatic that poor advice at the plea stage may have significant knock-on effects. For example, if those facing criminal charges are advised at important hearings by advocates who do not conduct trials, either because their standard of competence is insufficiently high or because they lack of experience in trial work, they may be advised to plead guilty when they have an arguable defence and should be contesting the case. This may not be remediable later, and even where the issue is subsequently addressed, this will almost inevitably cause unnecessary expense and delay, and cause additional stress and anxiety to those involved in the case, whether as defendant, victim or witness.

19. It seems to the Bar Council that, even without such evidence, the scheme gives regulatory approval to a group of advocates who may be placing vulnerable members of the public at risk in this way. This is starkly contrary to its stated aim and purpose. In the absence of evidence that advocates whose practices are limited in this way do not harm the interests of those they represent, the Bar Council cannot see any justification for such an approach by the regulators.

20. The Bar Council considers that a scheme which gives regulatory approval to this category of advocates is not in the public interest, and risks undermining public confidence in the legal profession and in the criminal justice system.

Question 3 - Are there any practical issues that arise from client notification?

21. Serious thought needs to be applied to determine the minimum that needs to be done to achieve the consumer protection that is the objective of the scheme. A blanket scheme of notification is likely to add a layer of unnecessary bureaucracy. The Bar has recently had imposed on it a requirement that in each case in which a barrister is instructed, that barrister serves on the lay client a notice explaining how complaints about service may be made. This creates a totally unnecessary burden particularly where, for example, counsel is instructed in Government work and the nominal lay client is a Minister. Applying the test of consumer protection and proportionality would indicate that all prosecution work should fall outside any notification scheme. Any notification scheme should be focused on informing lay clients what an advocate cannot do, rather than what he or she can.

22. It follows that advocates at level 4 can practise without limitation at all levels and that notification is not required. Any scheme should also focus on circumstances in which a lack of notification may give rise to a lay client being misled. It is difficult to conceive of circumstances where an advocate dealing with a plea and case management hearing or other pre-trial hearing will not have informed the lay client of the role he or she will play in the trial. If regulatory approval is to be given to the category of plea only advocates, the Bar Council agrees that it is essential for there to be notification where a lay client is advised and represented by a plea only advocate.

The notification will need to be sufficiently detailed to explain in clear terms to the lay client that the advocate is not qualified to conduct a trial in the Crown Court. However, we question whether, without an explanation of the potential consequences of being advised at a crucial stage in proceedings by a plea only advocate (outlined in the answer to Question 2 above), an explanation of the technical limitation of a plea only advocate allows the client to understand the choice they are making and to give real and informed consent to the advocate acting for them. This is the situation which in our view gives rise to the greatest potential for a lay client to be misled as to the competence of the criminal advocate.

Question 4 - Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?

23. Youth courts have power to try 10 to 18 year old defendants on all indictable offences save homicide subject to a "grave crimes" exception. Decisions made there are likely markedly to influence the personal development of those who appear before them. The defendants are often deprived, disadvantaged and may be subject to disability. Some cases will involve complex issues of fact and law. Many will require adept cross-examination of vulnerable witnesses. All will need sensitivity and judgment. The skills required cannot be assured by level 1 accreditation. Such categorisation would expose vulnerable young defendants to inadequate representation and young witnesses to insufficiently sensitive treatment. Accordingly it cannot credibly satisfy the regulatory objectives, and would not secure the confidence of the public or the profession. The proposed categorisation is therefore not in the public interest.

24. An approach is necessary which recognises and guarantees the specialist skills necessary to the proper conduct of serious or sensitive youth court work.

25. This might be achieved by categorising a relevant case according to:

- a) the nature of the hearing;
- b) the gravity of offence or consequences of conviction,
and/or
- c) the complexity or sensitivity of its presentation.

26. We recognise, however, that the application of such criteria is likely to prove cumbersome, even impractical. The interests of both advocates and court users will be properly reflected in a requirement that trials of indictable only offences and others deemed unsuitable for summary only trial must be conducted by advocates of at least level 2. The remainder can properly be conducted by level 1 advocates.

27. Experienced advocates currently undertaking work in the Youth Court are likely routinely to conduct trials there. If competent they should have no difficulty in satisfying the assessment criteria at level 2. It is plainly in the public interest, and that of all interested parties, that they should do so. If potential difficulties are identified in

the proposed qualifying procedures these can surely be amended to ensure that deserving advocates are able to achieve accurate accreditation.

28. New advocates will have the opportunity to conduct trials of “summary only” offences. Having gained experience, they can notify their intention to progress and receive provisional accreditation at level 2.

Question 5 - Do you foresee any practical problems with a phased implementation?

29. The purpose of the scheme is to protect the consumer of criminal advocacy services. Public confidence will be seriously, perhaps fatally, undermined if the scheme experiences serious problems during implementation. It is also important that the confidence of the three branches of the profession is engaged and maintained. Whilst a regulatory scheme can encourage general compliance through making examples of defaulters, the sheer scale and complexity of this proposed scheme should not be underestimated. It would take little by way of non-compliance, unintentional or otherwise, to give rise to major disruption. Whilst it is accepted that much effort has been made to keep the scheme simple, that has only been achieved in part.

30. This will be a major exercise for a large number of professionals, both assessed and assessors. Much will rely on them getting it right first time. Whilst the principle of a phased introduction is necessary and welcomed, it is considered that the time gap between areas being phased in is far too short. It is insufficient to learn lessons and to correct problems that may have arisen. As it stands, there is a risk that the predictable problems of introduction will still be being dealt with by the regulators when the large South Eastern circuit is phased in after a three month gap. There must be a risk that the available resources of the regulators will be stretched to, or beyond, breaking point. Such a failure would result in the very opposite of that which the scheme is intended to achieve, with an obvious risk to the reputation of the regulator and thereby to that of the profession. The Bar Council urges the regulators to give serious consideration to the possibility of running one or more pilot schemes before any full-scale implementation of the scheme.

Question 6 - Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

31. The Bar Council welcomes the improved flexibility contained within the approach to determining the level of a case and agrees with the observations in the consultation paper that the previous approach was too prescriptive.

32. However, there is room to improve on the current proposals. The consultation proposes that the level of the case should be set by the instructing solicitor and then agreed with the advocate. There are difficulties, both in principle and in practice with this approach. As a matter of principle, the Bar Council is of the view that, while an instructing solicitor is entitled to form a view of the level of a case, it should be determined by the instructed advocate. It is, after all, the advocate who will conduct

the case at trial, the advocate whose trial experience will alert him or her to potential issues in the case that may make the trial more complex and thus increase the level. And, most importantly, it is the advocate who is required by their Code of Conduct not to undertake cases which are outside their competence. It makes logical sense, therefore, to place the burden of determining a level on the shoulders of the advocate.

33. Turning to practical difficulties, the consultation paper does not state what the position is if the parties do not agree. How are disagreements to be settled? Whose opinion is to prevail? If an advocate believes that the level of the case is in fact higher, or lower, than the level determined by the instructing solicitor, will that advocate be deemed to be in breach of his or her code of conduct in conducting the case at trial?

34. The Bar Council suggests that the public interest might be better served if the case categorisation, as determined by the advocate, were to be notified on the Plea and Case Management Hearing (“PCMH”) form in order that the judge may indicate at the PCMH whether he or she agrees with the categorisation. This will not impose any significant obligation on the judge over and above his or her ordinary work load in relation to the PCMH. In the event that a client wishes to appeal as a result of the performance of his advocate, or should a judge wish to refer an advocate to his or her regulator as a result of his or her performance in a case, then the fact that a judge disagreed with the advocate’s classification of a case should be made available to the client and the regulator.

35. With regard to paragraph 4.12 of the Consultation Paper, the Bar Council is of the view that it is an insufficient safeguard simply to state that judges will be able to use their on-going monitoring powers in the event that they form a view that a case is of a higher level than that set by the advocate. This provides little protection to the defendant or client who may have representation at a level below that which their case merits. Conversely, the position set out above will let the advocate (and the client) know that the judge disagrees with the level from the very outset of the case and will increase the likelihood of the correct level of representation being available at trial.

36. The proposal to carry out “spot-checks” on advocates conducting criminal cases and the agreed levels also has difficulties. Neither the Consultation Paper nor the handbook makes any reference as to how these “spot-checks” will be carried out or whether or not all regulators will employ the same method. The Bar Council is concerned that this is a level of administration which is unnecessary and costly. The Consultation Paper, both here and in other parts of the scheme, appears to have adopted the view that criminal advocates’ compliance with this scheme (and therefore their code of conduct) needs constant monitoring and review in every aspect. In our view, this is disproportionate, and is also inimical to engendering good will and the cooperation of the professions with the scheme. The Bar Council suggests that the JAG should adopt a starting point of trusting the advocates, if it turns out that such monitoring is required (for example because the JAG is notified frequently by judges that they have disagreed with levels allocated to a case) then spot checks can be introduced. To borrow a phrase from the Consultation Paper itself, “the Scheme is

likely to evolve over time and it will be much easier to move gradually from a more flexible to a more structured approach (if necessary) than seek to impose a highly complex approach...." (para. 4.8).

Question 7 - Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

37. The Bar Council has the following comments to make:

- a) Kidnap/ false imprisonment and bribery are offences which should be included;
- b) It may also assist to have a definition of high value dishonesty. In our view, an appropriate value would be in excess of £10,000.
- c) "Child abuse" (listed at level 3) is not an offence known to law.
- d) What is the difference between "more serious sexual offences" (level 3) and "serious sexual offences" (level 4)? Likewise, what is "substantial child abuse" (level 4)?
- e) It would be simpler to restrict level 3 to indictable-only offences, or level 2 offences with exceptional features (complexity, length, unusual legal or factual features).
- f) Level 4 should include the offences presently listed (subject to clarification on matters raised in c. above), but also level 3 cases with unusual features.

Question 8 - Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

38. The examples are useful and we have no further comment to make.

Question 9 - Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

39. We agree that in principle all hearings associated with a case should hold the same level as that case. The "acting up" provisions should ensure that advocates of the required categorisation or one below are generally available to appear.

40. We acknowledge that there may be occasions upon which this is not possible. If the scheme is properly respected, enforced and supported by the professions these should be rare. To accommodate them a balance must be achieved between the fundamental aim that standards be consistently maintained and the practical necessity to ensure that representation is always available.

41. This is best achieved by requiring that only an advocate of the level required by the case should become the instructed advocate under the funding order. That advocate would bear responsibility for the overall conduct of the case. This would

include a discretion to authorise, if necessary, an advocate of a lower than stipulated category to cover certain non-trial hearings.

42. It is impractical and undesirable to attempt to prescribe examples of non-trial hearings that level 2 advocates should be able to undertake.

43. Impractical because in serious cases the nominal purpose of such hearings may not reflect the significance or complexity of issues arising during them. If the advocate appearing is incapable of dealing with such issues, resolution and progress is delayed, time and costs wasted.

44. Prescription is undesirable because too many exceptions to the scheme's general rules will dilute them and undermine its efficacy.

Question 10 - Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

45. It is recognised that Newton hearings can range in content and complexity. Some require witnesses with examination and cross-examination, others may be less complex. However, in all cases evidence is being challenged and tested and in all cases the result will have a significant impact on sentence. The Bar Council considers that Newton hearings should only be undertaken by an advocate qualified to conduct the matter if it were to go to trial. If regulatory approval is given to a category of plea only advocates, in no circumstances should those advocates conduct a Newton trial, as it is inherent in the limited scope of their regulatory approval that they do not test evidence in court and so lack the necessary competence.

Question 11 - Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible.

46. We agree with the general approach proposed at paragraph 4.28 of the Consultation Paper.

47. In relation to paragraphs 4.29 to 4.31 and 4.33 of the Consultation Paper, we consider that any deviation from the "one below approach" must be subject to express judicial approval. If the matter is determined at the discretion of the instructing party or instructed advocate, there is potential for this scheme to be abused and entirely undermined in its application to the most serious cases.

48. The allocation of junior briefs in serious cases is an area in which notable anecdotal evidence suggests that some criminal advocates are instructed beyond their competence: often, strikingly so. The cause lies in the commercial interests of firms of solicitors, some of whom allow their own interests to take precedence over the interests of the client. Profits are significantly enhanced by the instruction of an "in-house" advocate. At least two fees from one case are then available to the firm. In the worst

cases, which unfortunately are not uncommon, the instructed advocate is entirely incompetent to perform at the level required.

49. If a simple discretion is afforded to instructing parties or instructed "in house" advocates to deviate from the "one below approach", there is a real risk that it will be exploited to subvert it. We consider that formal judicial control is essential.

Question 12 - Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

50. Without wishing to repeat the points already made, the Bar Council recognises that the allocation of a case to the right level is fundamental to the proposed scheme and welcomes the more flexible approach that is now being considered. However, given that the purpose of the proposed QASA scheme is the protection of the public in the criminal justice system, it is important to ensure that criminal cases are allocated to the correct level without there being any risk, or reasonable perception of risk, of decisions being improperly influenced by financial considerations. For the reasons set out above, we consider that the level of case should be determined by the instructed advocate, having consulted the instructing solicitor.

51. We are also of the view that the role of the judiciary in ensuring that the case allocation process is not abused needs to be formalised. Regardless of the duties on individual advocates, it is the responsibility of the court to ensure its own processes and that the conduct of a trial is fair. It is an aspect of the fairness of trial that the advocate representing the defendant is competent to undertake a trial of that nature. We do not, therefore, consider it any great extension of the role of the judiciary to take a more formal approach to approving, or not, cases within specific levels.

Question 13 - Do you have any comments on the proposed modified entry arrangement?

52. The QC award denotes excellence in advocacy in the higher courts. It is beyond question that the process is rigorous and impartial. The award was re-established because it was recognised to be in the public interest.

53. The QC award is as subject-specific as QASA because the award is accompanied by specification of the broad field of law in which the applicant has demonstrated excellence in advocacy in the higher courts. Crime is one of those broad fields of law.

54. The QC appointment system, as agreed between Government and the profession, contains express provision for the removal of the award for cause (see paragraph 9 of the section entitled "the Selection Panel" in the Summary of Revised Process). Any person, and in particular any Judge, is able to raise any failure to meet the standard of excellence and the QC Appointments Panel can consider whether the award should be removed. (It should be noted further that there is nothing to limit this to QCs appointed under the new system, rather than the new system and the previous system alike.)

55. In these circumstances there is neither need nor value in requiring QCs appointed under the current system to undertake accreditation under QASA as well, or to undertake periodic reaccreditation under QASA, and it would not be proportionate to do so. In fact the removal mechanism contained in the QC system is more sensitive than periodic re-accreditation. Re-accreditation was discussed and analysed at length during the creation of the current QC system, including with the assistance of independent experts funded by the Government, and removal for cause was chosen instead.

56. There is a further reason for not requiring re-accreditation in the case of QCs, and this too was appreciated and analysed at length in the process of agreeing to restore the award of QC and the design of the current QC system. The Government received cogent evidence that the award of QC on merit to candidates from minority backgrounds encouraged others from minority backgrounds to aspire for the senior ranks of the profession (and in turn the judiciary). That is one of the reasons why, on careful study and analysis, the reinstatement of the award was important in the public interest. However it was recognised that applicants from minority backgrounds were less confident about applying. In this connection it was appreciated that periodic re-accreditation would affect confidence adversely because it increases the risk taken by the applicant – the applicant already has to consider the risk that he or she may not succeed as a QC, but periodic re-accreditation adds to that the consideration that even if he or she obtained the award it would only be for 5 years and at that stage failure to achieve re-accreditation would destroy the career of the applicant altogether. Removal for cause was the better form of safeguard.

Question 14 - Do you agree with the proposed approach to the assessment of competence?

57. The Bar Council agrees with the proposal that the regulator should reach a decision on an advocate's competence based on all the evidence available. It is also vital that all advocates, whatever their professional background, are tested to the same level and with the same rigour.

Question 15 - Are there any other issues that you would like to see included within the review? Please give reasons for your response.

58. Not at this stage.

Question 16 - Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

59. The current format of the Handbook leads to a considerable amount of duplication and cross-referencing, for example the information on appeals appears in at least three separate places.

60. It is suggested that, other than the chapters which are of general application, e.g. background, regulatory framework, levels & FAQ, the information applicable to barristers is consolidated in chapter 7, the information applicable to solicitors is consolidated in chapter 8 and so on.

Question 17 - Is there any additional guidance or information on the Scheme and its application that would be useful?

61. The following additional guidance would assist.

Re-accreditation at level 1:

62. Para 5.10 describes how an advocate who fails to complete the required CPD by the end of their accreditation period will "drop out" of the scheme. It does not describe how (or whether) that advocate can re-enter the scheme.

Judicial evaluations:

63. At page 33, para 5.75 the Handbook states that a connection with an evaluating judge must be disclosed. Such connection includes having at any point been in the same chambers at the same time as that judge. However, the Handbook is silent as to the effect, if any, on that judge's evaluation of that advocate. For example, does it disqualify the evaluation or is it something to which weight is given by the regulator? If so, this is not something which has been the subject of consultation in the past.

64. A regulator understandably may wish to consider the fact that an advocate shared chambers with an evaluating judge. Thereafter, the potential relevance of the fact must depend upon whether the two were known to each other and if so the extent of their relationship.

Registration spot checks:

65. The process of registration spot checks is set out at page 43 of the Handbook. No mention is made as to how the "Assessment Managers" shall be required to make their decisions. In the interests of transparency and fairness, the criteria to be applied should be set out in full in the Handbook.

Re-accreditation at levels 2, 3, 4:

66. Para 7.35 at page 45 states that "if your application clearly shows that you are competent to continue practising at your current level, you will be re-accredited at that level" . It is important that advocates know what criteria will be applied in determining that competence is "clearly" shown. The Handbook includes neither definition nor guidance. It should do so.

Question 18 - Do you have any comments on the Scheme Rules?

67. Not at this stage

Question 19 - Do you agree with the proposed definition of "criminal advocacy"? If not, what would

you suggest as an alternative and why?

68. "Criminal advocacy" should be defined as that arising in cases in the criminal courts and should include prosecutions brought by all bodies, e.g. RSPCA, Environment Agency and others or private individuals. Private prosecutions are not subject to the detailed guidance which applies to the Crown Prosecution Service and it is arguably therefore the more important that the defendant should be represented by competent counsel.

69. We suggest the following definition:

"Criminal advocacy" means advocacy in all hearings in a criminal court in the course of a prosecution brought by the Crown Prosecution Service, by the Serious Fraud Office, by any other body, or by a private individual.

Question 20 - Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

70. We welcome and endorse the proposed approach to specialist practitioners. We believe that it is in the public interest for specialist practitioners to be able to provide their skills and expertise in appropriate cases, and that the proposed approach provides a sensible and proportionate means of achieving this.

Question 21 - Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

71. We have highlighted in our responses above certain practical problems which we foresee.

72. In addition, the Bar Council is very concerned about the limited right of appeal which is proposed. The Bar Standards Board's draft QASA rules provide that any appeal against a decision of the Bar Standards Board to refuse an application for accreditation, re-accreditation or progression, or to revoke an accreditation at its current level (rule 34), may only be brought on the grounds that the decision reached was one which no reasonable person would find comprehensible and/or there was a procedural error in the assessment or decision-making process and the barrister suffered disadvantage as a result which was sufficient to have materially affected the decision, making it unsound (rule 37).

73. The problem with the rules in relation to appeals is compounded by the proposed procedure for deciding appeals, which is that an appeal shall be considered on the papers, at a meeting, in private, unless the Chair of the Panel, at their discretion, decides that a hearing in person is required (rule 38). Given that a refusal or revocation of accreditation may in some cases end a barrister's career, we consider that the procedure proposed may violate Article 6 of the European Convention on Human Rights. We consider that nothing less than a full review of the decision on the merits,

at a hearing at which the barrister is entitled to appear and, if he or she so wishes, to be represented, is required before a decision of this gravity is taken.

74. Further, para 7.59 (page 48) states that an appeal cannot be filed against the outcome of a judicial evaluation, nor against a decision to refer an advocate to CPD or training. Without a right of appeal against the outcome of a judicial evaluation, the right of appeal against the Bar Standards Board's decision, which was based on the evaluation, would be rendered nugatory in some cases. Further, referring a barrister to undergo CPD or training could have significant consequences in terms of cost and time for the barrister, and would be likely to have significant adverse effects on the barrister's professional reputation. We consider that an appeal should be available in all circumstances.

Question 22 - Do you have any comments on whether the potential adverse equality impacts identified in the draft EIAs will be mitigated by the measures outlined?

75. The remaining responses have been prepared by the Bar Council's Equality and Diversity Committee (EDC). As stated in responses to earlier consultations, the EDC is in principle opposed to the introduction of the QASA. The EDC welcomes the development of a competency framework for advocacy and accepts the need for compulsory advocacy training and for measures to remedy inadequate advocacy in specific cases. It does not consider that the proposed QASA is a proportionate response to the need to ensure quality and consistency in criminal advocacy standards as recommended in the 2006 Carter Report.

76. The EDC supports objective and transparent processes for determining career progression at the Bar. It does not consider that QASA, with the bureaucracy and ensuing costs it imposes, is the only means to achieve such processes nor that it is an appropriate or justifiable means.

77. Amendments to the scheme have been made to reduce some of the potential negative impact on those who have no or limited recent court experience such as young barristers or those who take parental leave or career breaks. These include provisions on temporary licensing and the use of independent assessors at no extra cost where barristers have not had the opportunity to obtain judicial assessments.

78. The Committee noted in an earlier consultation response that given the diversity profile of the judiciary few judicial assessors will be female or of Black, Asian and Minority Ethnic (BAME) background. Independent assessors are to include retired members of the judiciary who will be less diverse than current members and may have had less exposure to the diversity training now received by judges.

79. The EIA refers to new measures introduced to reduce the risk of assessment bias. These include a half day training course on applying the assessment criteria, some information about the duty to make reasonable adjustments for disabled advocates and a briefing paper on avoiding bias. Other background papers on the competency

framework and scheme and videos of case studies of advocate assessments will be provided. The half day course is an important improvement but inadequate training is provided to judges and independent assessors specifically on avoiding bias in assessments and on making reasonable adjustments for advocates. This is in contrast to the training the BSB requires of Disciplinary Panel members delivered by an expert discrimination practitioner and covering full information on the equalities legislation and how it applies in the disciplinary context and on understanding and avoiding bias. The consequences of failure to receive a positive evaluation are serious in respect of an advocates' continuing ability to practise and every effort should be made to avoid biased outcomes. The commitment to ongoing equality and diversity monitoring of the scheme is important but many advocates could be lost to the profession before trends and patterns emerge from this monitoring.

80. The cost of the scheme is to be graduated so that assessment at the junior level costs less than at the more senior levels and the scheme will be operated electronically to minimise costs. This will mitigate some of the adverse impact on the young Bar and those on low earnings. However there will be no reduction in the fee charged to those working part-time.

Question 23 - Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

81. The EDC has taken account of the mitigation of some adverse impact of the Scheme as set out in the Equality Impact Assessment (EIA). Despite efforts to keep costs low, the EDC considers that significant negative impact results from the Scheme because of the added financial burden it imposes. This will compound the financial pressures facing criminal practitioners and will adversely impact on the lowest earners who are disproportionately female. The Exit Survey¹⁵ has shown consistently a high drop-out rate of criminal and female practitioners and that financial reasons are the most significant contributing factor identified by respondents to the surveys. The outcome will be a less representative profession and this will adversely affect consumers of legal services.

Question 24 - Are there any other equality issues that you think that the regulators ought to consider?

82. Assessments: the criminal advocacy assessment evaluations by judges are a central part of QASA. The EDC recommends, should the Scheme be implemented, that advocates who are being monitored (as well as advocates who apply to judges for an evaluation assessment) should receive a copy of their judicial evaluations. Full disclosure ensures fairness, promotes equality and inspires trust in the system. It has the added advantage of improving advocacy skills because those who fall short will have accurate first hand assessments informing them where they should focus improvement rather than less useful second hand feedback.

¹⁵ General Council of the Bar Exit Survey 2011.

83. Disabled Practitioners: the view of the EDC's Disability sub-group is that the EIA has not taken sufficient account of disabled practitioners. As noted in the EIA disabled practitioners returning from career breaks may qualify for assessment by independent assessor instead of judicial evaluation. Reasonable adjustments will be provided to those who might otherwise be disadvantaged by the requirement to operate the scheme electronically. The following concerns remain:

84. As noted above, the training of judges or independent assessors is too limited in relation to different types of impairment and on how to determine what reasonable adjustments are appropriate in relation to the assessment evaluation.

85. There is no procedure for disabled advocates to follow to ensure a judge who is assessing him or her is aware of a disability. The disability may not be immediately obvious but may affect the barrister's performance.

86. The scheme is designed to fit the average criminal advocate and because of its complexity and lack of flexibility (even taking account of the amendments referred to in the EIA) it cannot be applied fairly to the advocate who does not fit the norm. It lacks the subtlety to allow for the differing requirements and circumstances of disabled practitioners. It will deter advocates not fitting the norm from entering or remaining in areas of practice to which QASA applies and as a result will have an adverse impact on consumers of criminal advocacy services.

Bar Council
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Re: BEG response to 4th consultation on QASA

DRAFT RESPONSE

Introduction

1. On 12 July 2012, the 4th consultation (“the Consultation”) on the development on the Quality Assurance Scheme for Advocates (“QASA”) in the criminal field opened. The Consultation will close on 9 October 2012.
2. Although the present consultation relates specifically to the Scheme for criminal advocates, public statements from the Bar Standards Board (“the BSB”) have made it clear that QASA in one form or another is intended to be rolled out across the advocacy profession.
3. To that end, the Bar European Group [“BEG”], which represents barristers practising: (i) EU law (including EU human rights law whether under the EU Charter or otherwise) in both domestic and EU fora, i.e. the Court of Justice of the European Union (“CJEU,”) General Court, EFTA Court and like institutions); (ii) appearing in the European Court of Human Rights (“ECtHR”) (together “European Law” for convenience), makes the following submissions. For obvious reasons, this response does not deal with the detail of the criminal advocates’ proposed scheme, save to the extent that: (i) it impacts upon European law practitioners; or (ii) raises questions of European law.

Summary

4. The starting point in the Consultation is that, in order for there to be a justification for introducing QASA in any particular field, there must be a public interest in or regulatory need for quality assurance. In the criminal field the reasons given for that perceived need are set out at paragraphs 1.6 to 1.9:

“1.6: Advocacy is a vital part of an effective justice system. Members of the public involved in litigation rely upon advocacy for the proper presentation of their case. Those who are involved in decision making whether as Judge or jury rely on advocacy for the proper administration of justice. For defendants reliant on effective advocacy in the criminal courts the stakes are high: loss of liberty may be an outcome.

1.7 A key element of professional responsibility is the maintenance of professional standards. The changing legal landscape coupled with competition and commercial imperatives are putting pressure of the provision on good quality advocacy. The economic climate, both generally and in terms of legal aid, has created a worry that advocates may accept instructions outside their competence. The Judiciary has also raised concerns about advocacy performance.

1.8: QASA has been developed to respond to these issues. It will ensure that all advocates in criminal courts undergo a process of accreditation so that they only handle cases within their competence and that they are subject to assessment and monitoring of their performance against a common set of agreed standards.

1.9 This approach is consistent with the regulatory objectives of the SRA, BSB and IPS. Under the Legal Services Act 2007, the regulators are responsible for setting and maintaining standards. This includes a requirement upon them to have in place effective quality assurance arrangements in order to benefit and protect clients and the public.”

5. BEG understands that the case as to whether or not such regulatory need is demonstrated in relation to the criminal bar is highly controversial and that the CBA resists QASA as unnecessary and disproportionate. These are matters upon which the CBA is much better placed to comment than BEG. It should go without saying that good quality advocacy involving European law (in whatever field it arises) is extremely important to the legal process as whole. However, that does not mean (any more than in criminal law) that a QASA should be brought in for advocates in that field without proof of the necessity for action. Each specific field of legal activity requires, if there is to be lawful additional regulation of advocacy, a case by case investigation of the justification for such regulation.

6. Under the current proposals the QASA scheme applicable to criminal practitioners, to which this consultation is directed, does not apply to European law specialists instructed in response to the particular needs of a case. Such specialists need not be accredited. Putting aside questions about the overall necessity/proportionality of QASA for criminal practitioners, such exception makes good sense since situations do arise with some regularity where, in cases brought by the prosecuting authorities, substantial, even determinative questions of European law arise. Cartel offence charges, serious IP infringements (TV decoders) or other offences raising free movement issues are real illustrations. BEG thus supports the present rules carving such areas out from the scope of QASA. This must reflect the fact that the case of the need for regulatory intervention in other areas of specialist advocacy: (a) is not presently being made; and (b) raises substantial and distinct issues arising in a profoundly different context or market.
7. BEG is not aware of any judicial concern about advocacy performance in the specialist field of European law, whether domestically or internationally. Indeed, the evidence is very much the reverse, with advocates from England & Wales being praised for their advocacy skills in for a such as the General Court, the CJEU and the ECtHR. Indeed, English barristers are often instructed by the EU institutions in the EU courts.
8. There is also no evidence that EU/ECHR law advocates are accepting instructions outside their level of competence. The law in question is technical and complex and work will only be given to those specialists with the appropriate knowledge and skills base. Indeed, as indicated above, to a degree the market for European law services is a European (even international) one: there is no or no meaningful "must deal" element to instruction of such counsel of the kind provided in other areas by the presence of a dominant public funding model.
9. Accordingly there is no need, perceived or actual, for a QASA in the field of EU/ECHR law, nor (due to the specialist exemption) any case presently being made for its introduction.
10. In view of this fact, BEG will not engage with the multifold problems of applying a QASA system to a specialist area of law like European law that cuts across and informs so many other discrete areas of practice. It merely notes that so far as any attempt is made to roll out a QASA system to European Law then (as indicated above) the evidence necessary to justify such a step is presently lacking. BEG also notes that there may be jurisdictional difficulties in requiring members of the judiciary appointed to supra-national courts such as the CJEU and ECtHR to conduct appraisals of English advocates appearing before them. We do not know whether any attempt has been made to see whether these Courts would voluntarily undertake a monitoring or appraisal role.
11. BEG will not reiterate the concerns expressed by other SBAs about QASA as applied to criminal advocates. However, BEG does feel well qualified to comment on two features of the QASA scheme in its present format (which will no doubt form the blue print for any proposed roll out to other practice areas).
12. **First**, as a matter of general principle, BEG is concerned that the QASA scheme for advocates that is centrally predicated on continuing and intrusive judicial assessments may be found to be inconsistent with the fundamental concept of an independent legal profession as developed at a European level by the Council of Bars and Law Societies of Europe ("CCBE"). BEG understands that concerns have already been raised by members of the legal profession in both the EU and further afield about the impact such a scheme would have on that fundamental concept of professional independence and those concerns could eventually translate into fundamental difficulties in the relationship between the English legal professions and the CCBE. This is all the more concerning since not only the *adequacy* of legal representation (the only potentially proper concern of QASA) but also its independence from, amongst others, the state and the Court, which is a key component of a fair hearing under Article 6 ECHR and the equivalent EU Charter right, particularly a fair *criminal* hearing falling in Article 6.3, would be adversely affected.

13. **Secondly**, BEG is concerned that the QASA proposals seem to take little if any account of the phenomenon of dual qualified or re-qualified advocates, whether: (i) those who have undergone full training in England but also practise abroad; or (ii) those who exercise their rights to practice in England pursuant to the various Lawyers Directives. This is a phenomenon of which BEG is obviously well aware: advocates specialising in European law tend for professional and personal reasons to be highly mobile. BEG would anticipate that there is a minority of criminal practitioners (no doubt not as high as advocates specialising in European law) who also fall into this category. Additional regulatory hurdles like QASA, applied to such practitioners (already facing a double regulatory burden) need particularly careful justification because they will in practise operate to disadvantage advocates who do not practice full time in criminal law in the English Courts. BEG is troubled by the lack of any system for the mutual recognition of experience and competence: an advocate experienced at handling murder cases in, say, Ireland or Germany must surely be entitled, if entitled to practice in the United Kingdom through full qualification or mutual recognition of qualifications and experience under the Lawyers Directives, to full account being taken of that parallel experience. QASA seemingly contains no means to do so.
14. Finally, BEG members see no need for any scheme that is brought in to apply in the same way to silks, or at least those silks who have been appointed under the Queen's Counsel Appointment system ("the QCA") in operation since 2006, as the competences set out therein - which by definition must be met if an application is to be successful – more than meet any assessment criteria for a quality assurance advocacy scheme. Any periodic review of silk status should be a matter for the QCA.
15. Further specific answers to the Consultation are provided in the final section.

Independence of the legal profession

16. Independence of the legal profession is a key ingredient to a client having and seeing him or herself as having a fair hearing. If their lawyer is seen to be susceptible to personal pressure as to how they conduct the case from either the prosecution (direct or indirect) or the Court the client is likely to believe they have not been fearlessly represented.
17. Such thinking lies at the heart of Article 1.1 of the Charter of Core Principles of the European Legal Profession, unanimously adopted by the CCBE on 25 November 2006, provides as follows: "In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defence and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society. ..."
18. In its commentary on the Charter, the CCBE notes the following in connection with the core principle of the independence of a lawyer:

"A lawyer needs to be free – politically, economically and intellectually – in pursuing his or her activities of advising and representing the client. This means that the lawyer must be **independent of the state** and other powerful interest, and must not allow his or her independence to be compromised by improper pressure from business associates. The lawyer must also remain independent of his or her own client if the lawyer is to enjoy the trust of third parties and the courts. Indeed without this independence from the client there can be no guarantee of the quality of the lawyer's work. The lawyer's membership of a liberal profession and the authority deriving from that membership helps to maintain independence and bar associations must play an important role in helping to guarantee lawyers' independence. Self-regulation of the profession is seen as vital in buttressing the independence of the individual lawyer. **It is notable that in unfree societies lawyers are prevented from pursuing their clients' cases**, and may suffer imprisonment or death for attempting to do so."

19. The first of the general principles listed in the Charter relates to independence:

“The many duties to which a lawyer is subject require the lawyer’s absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. **A lawyer must therefore avoid any impairment of his or her independence and be careful not to compromise his or her professional standards in order to please the client, the court or third parties.**”

20. Article 4.3 of the Charter provides as follows with regard to the demeanor of a lawyer in Court:

“A lawyer shall while maintaining due respect and courtesy towards the court defend the interests of the client honourably and fearlessly **without regard to the lawyer’s own interests** or to any consequences to him or herself or to any other person.”

21. QASA as presently constituted will operate uniquely by way of an intrusive and continual judicial assessment for the more serious categories of criminal cases. It is to be contrasted with other systems (the QCA process for instance) in which judicial references are but one (albeit important) component for decision-making by an independent body, and in which such references are considerably removed (both in time and by capacity of the applicant to select referees) from cases in progress. By contrast the QASA process requires prospective judicial referees (who have central importance) being approached *before* the trial in question (a CAEF assessment form must be provided by the advocate to the judge) so as consciously to start the process of evaluation during the hearing.

22. The duty of an advocate to act independently and on behalf of his/her client seems inevitably be at risk from by an assessment regime operated by the judiciary. The risk (or, as bad, the client’s perception) is that arguments that could otherwise be put to a Court could be altered or excluded completely so as to ensure that the interests of the advocates in terms of assessment were advanced. Any such system would fundamentally damage the healthy and disinterested relationship between bar and bench with the potential for infelicitious conduct, in the sense of conduct not being in a client’s best interests and worse. Any system like QASA embedding such judicial role front and centre in an advocate’s career progression risks structural incompatibility with the demands of CCBE Charter of Core Principles, a Charter most likely to be drawn upon as a source by either the ECtHR and/or CJEU when developing their case-law on fair hearings.

The fundamental freedoms under EU law

23. It is clear that any QASA would impact adversely upon criminal lawyers: (a) coming from other Member States (e.g Ireland, Cyprus, Germany) or indeed other jurisdictions within the United Kingdom (Scotland, Northern Ireland), whether they fully requalify here or obtain full integration under the Lawyers Directives; and (b) English qualified advocates who pursue at least part of their practice abroad. Such practitioners are disadvantaged by the fact they do not pursue an English legal advocacy career full time, even if they are undertaking comparable or even more complex work abroad. Needless to say, because of this, the QASA proposals are likely to be indirectly discriminatory on grounds of nationality.

24. As far as BEG can discern the QASA system contains no mechanism for comparable comparative experience to be taken into account. Yet without such flexibility in place any attempt to impose a QASA advocacy service providers working in multiple jurisdictions must be regarded as open to serious question under EU law. Whatever QASA’s good intentions it will, for those advocates, operate as a substantial barrier to their pursuit of a legal career in England or in other jurisdictions; and it will be an unjustified barrier if not flexible enough to take account of relevant and comparable advocacy experience abroad. EU law demands mutual recognition of experience; indeed the Lawyers Directives seek to harmonise the qualification and experience requirements upon which a state may legitimately insist for “full integration” of foreign lawyers. Thus to build a further practical process of experience based qualification applicable to criminal lawyers without a mechanism for recognition of experience

seems to create (in effect, if not by design) an area to which foreign lawyers or those regularly pursuing practice abroad cannot easily gain access whatever their demonstrable ability.

Miscellaneous

25. **Questions 1 to 5:** BEG has no comment.

26. **Questions 6 to 12 (levels):** BEG has no comment.

27. **Question 13: accreditation of silks.** See section C above.

28. **Question 14-15, 21, 22-24:** See Section A and B above for BEG's concerns as to how assessment of competence works and the potential incompatibility with multi-jurisdictional practice and unjustified indirectly discriminatory effects on grounds of nationality given the absence of any mutual recognition mechanism.

29. **Question 16-17:** BEG has no comment.

30. **Question 18:** Scheme Rules. BEG can see no reason for the standard of substantive review formulated in Rule 37.1 in terms of whether or not a decision is one " *which no person would find comprehensible*". That conforms to no recognised test of rationality. Indeed, comprehensibility and rationality are quite distinct concepts. An irrational decision (e.g. to victimise red haired teachers) can be perfectly comprehensible. Equally at odds with first principle is the requirement to demonstrate that a procedural error in the assessment process also was one from which " *you suffered disadvantage as a result ... sufficient to have materially [affected] the decision*". This additional criterion of materiality is bad as matter of domestic administrative law. There are sound reasons for not requiring a party to demonstrate a procedural error affected the result, not least of which is that it is routinely impossible to predict how a panel unaffected by the procedural error would have decided a case. Grounds of appeal formulated on such narrow grounds (narrower by far than conventional judicial review) are unlikely to find favour with the Courts, with the result that the Administrative Court is may well consider such appeal route need not be exhausted before judicial review is a permissible option.

31. **Question 19: the definition of criminal advocacy.** The definition as presently formulated extends to advocacy in the CJEU (on a preliminary ruling) and ECtHR in a case arising out of a prosecution. This seems inappropriate and the definition should be modified to limit its scope to purely domestic proceedings.

32. **Question 20: the approach to specialist practitioners.** BEG supports this approach (subject to its overall and overarching reservations about QASA above). European lawyers having expertise reasonably required in a criminal trial should not be required to have QASA accreditation.

BEG

The Chancery Bar Association

RESPONSE OF CHANCERY BAR ASSOCIATION
TO JAG'S FOURTH CONSULTATION PAPER ON THE
QUALITY ASSURANCE SCHEME FOR ADVOCATES (CRIME)

Introduction

1. This is the response of the Chancery Bar Association (“the Association”) to the above-named Consultation Paper (“the Paper”). It is submitted to the Bar Standards Board on behalf of JAG.
2. The Association is one of the longest established specialist bar associations and represents the interests of over 1,100 barristers. It is recognised by the Bar Council as a senior specialist bar association. Its members handle the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but the Association also has academic and overseas members whose teaching, research or practice consists primarily of Chancery work.
3. Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. These days, much Chancery work is disposed of in specialist tribunals and in the County Courts.
4. Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property and business law, including (with particular relevance to this Paper) financial disputes, fraud, asset tracing, search and seizure and other restraint orders, receivership and professional and financial regulatory matters.
5. We refer to the responses submitted by the Association to the previous Consultation Papers on the QASA scheme. Although the architecture of the scheme has now changed, we maintain the general criticisms of QASA that we made in those Responses, which remain relevant and valid.
6. The particular subject matter of the Paper will not directly affect the interests of the majority of our members. It will, however, directly affect the interests of some, who practise as specialist practitioners in some cases in the Crown Court relating to the fields of practice identified in para 4 above, and in confiscation and related proceedings under the Proceeds of Crime Act 2002. It also indirectly affects all our members, in that a regulatory justification for a detailed and bureaucratic scheme of accreditation is being advanced which may (though we would suggest it should not) become seen as a template for accreditation schemes in other areas of practice.
7. We therefore seek to address the issues of principle raised by the Paper, with their larger potential significance in mind, before turning to the specific questions. We do not seek to respond to every question relating to the intricacies of the scheme for criminal advocates on the basis that others are better qualified to comment on those matters. We are, however, aware of the detailed criticisms of QASA made by the Criminal Bar Association and others.

The regulatory approach

8. As originally envisaged, a scheme of accreditation for criminal advocates was a term of a procurement agreement brokered by Lord Carter of Coles and the then Chairman of the Bar, Geoffrey Vos QC. The Carter Review recommended to Government an increase in the fees for publicly-funded criminal advocacy work in return for an assurance of the quality of the advocate briefed. The agreement to increase advocacy fees was then reneged on by successive Governments. Instead, a significant reduction in legal aid fees for criminal work has been introduced. The procurement justification for an accreditation scheme for

criminal advocates is therefore no longer present. In language that would be used by members of this Association, there was a total failure of consideration.

9. Moreover, the procurement justification existed because there was a need to guarantee quality to those paying the fees of advocates where no open market in their services operated. The sole purchasers of such services were the Crown Prosecution Service and the Legal Services Commission. Where a highly competitive open market in advocacy services exists, there is no similar justification for a scheme to guarantee quality. The market itself will identify quality and lack of quality and those purchasing services will act accordingly.
10. The scheme now put forward is unequivocally on a regulatory basis. In the introduction to the Paper, the JAG comment that:

“The economic climate, both generally and in terms of legal aid, has created a *worry* that advocates may accept instructions outside of their competence. The Judiciary has also raised *concerns* about advocacy performance. QASA has been developed to respond to these issues”.

11. Although the Association recognises the public interest in high standards of representation and advocacy in the Crown Court, it has serious doubts that any proper regulatory basis exists for the Scheme. By virtue of section 28 of the Legal Services Act 2007, intervention by the BSB needs to be justified by evidence of a need for intervention, and the intervention needs to be, among other matters, targeted and proportionate.
12. As far as the Association is aware, judicial concerns about advocacy performance are limited to two cases: one in Scotland and one in Leeds, where the Recorder of Leeds, Peter Collier QC, criticised the performance of the solicitor advocates involved in the case. The BSB has always espoused an evidence-based approach to regulation and the other regulators in the JAG should have the same approach, bearing in mind best regulatory practice and the terms of the Act of 2007. There seems to us to be no hard evidence of poor standards of work of barristers (certainly not barristers in independent practice) that could justify such a burdensome and bureaucratic scheme as QASA. A “worry”, one case north of the Border, one case involving solicitor advocates and a lot of anecdotal material relating to solicitor advocates accepting briefs outside their competence is no evidential basis whatsoever for a scheme of this nature for the Bar.
13. The true position is that the BSB was persuaded by the Criminal Bar Association to espouse such a scheme many years ago in the belief that a single scheme of accreditation for advocates in the Crown Court would serve the public interest and, incidentally, enable barristers to dominate the market for Crown Court briefs. There might have been a regulatory justification of a kind in that the survival of the independent Bar is clearly in the best interests of customers and the public alike; but no more specific regulatory justification ever existed. Now that it seems clear that the Scheme, in its current incarnation, will not serve those interests, for the reasons that the Criminal Bar Association has explained, and will serve only to support a cadre of “plea only advocates” that the BSB recognises are not in the public interest, that original regulatory justification has disappeared.
14. In our view, no other regulatory justification exists. There is no evidence of a widespread problem that could justify the imposition on all criminal advocates of a regulatory burden of this nature; even if there were, the Scheme proposed is not targeted at where the problem lies and is not proportionate to the extent of the problem. It is spectacularly burdensome

and expensive: consider the time required of individual barristers to comply with the scheme from year to year; the cost of setting up and administering the scheme, which will have to be borne substantially by those who use it; the cost of setting up an Article 6 compliant appeals procedure, which will fall on users or subscribers of the Bar Council generally; and perhaps most of all the significant burden to fall on Judges at a time when judicial resources are limited and reducing and demands on their time are increasing.

15. There also remains the residual, niggling concern that reliance on good assessments by Judges may, in some cases, get in the way of a barrister's duty to act fearlessly in the best interests of his or her client.

Queen's Counsel

16. So far as the inclusion of Queen's Counsel in the Scheme is concerned, there is not a jot of evidence to support a conclusion that there is a problem with the quality of performance of silks that needs to be addressed by QASA. Given the likelihood that the Scheme as proposed will destroy the rank of silk among criminal advocates, contrary to the public interest that justified its re-introduction in 2006, there can be no regulatory justification for the inclusion of Queen's Counsel in QASA.

17. In our view, the argument that "it is only fair and reasonable" to include silks in the same scheme is wrong in principle. The Scheme is a significant regulatory burden and should only be imposed in areas where there is a need for a proportionate remedy. Since the Scheme does not include a separate category for silks and does not purport to assess them at any higher level, the problem (established by evidence) would necessarily have to be that silks are failing to perform at the level to be expected of junior barristers who conduct the most demanding cases. Does the JAG have any such evidence?

18. If the Scheme is to proceed and Queen's Counsel are to be within it in some form, the Association agrees with COMBAR that the appropriate basis of their inclusion (indeed, the appropriate starting point for any such scheme) would be to permit (as the Scheme does) Judges to report to the Regulator under-performance of particular advocates on an ad hoc basis, with particulars of their failings. Given (a) the absence of any evidence to date of under-performance by silks and (b) the inherent unlikelihood that those excellent enough as advocates to obtain the rank of silk in criminal practice would seriously under-perform or be under-qualified, an approach that allows evidence to be gathered over time in the suggested way is the most appropriate basis on which to bring within the Scheme those who are least likely to require its attention. Indeed, if properly established and implemented more systematically, such a reporting structure would be entirely appropriate and sufficient to identify and deal with those of any rank or experience who perform below par in the Crown Court.

Future Accreditation Schemes

19. In this regard, we have heard many comments to the effect that the QASA Scheme might be some kind of precedent for future accreditation schemes in family or civil work. We have specifically enquired of the BSB previously and been told that no such plan currently exists for the family and civil Bars. Nevertheless, we would make the following observations. First, there is (so far as we are aware) no evidential basis for concluding that there is a significant problem with the under-performance or under-qualification of advocates in these courts. Before the BSB and other Regulators are minded to extend the QASA Scheme,

they should go to the trouble of investigating whether there is a significant problem, and if so in what areas of practice, by making relevant and detailed enquiry of the judiciary and others. Secondly, if there is a sufficient evidential base for taking some action, that action should be targeted and proportionate, and there should be no assumption that the QASA Scheme should be a template for any further accreditation scheme. There is no indication that a more modest “traffic light” scheme would not address any problem equally effectively, and probably more quickly and much more cheaply, without creating a substantial regulatory burden on those who are perfectly competent advocates. In any event, given the vast range of types of case litigated in civil practice, the adoption of a scheme with four levels of case, summarised in a table on one page, could not possibly form a basis for such a scheme in the civil courts.

Non-specialist advocates

20. In our response to the Third Consultation Paper on QASA, we suggested an amendment to the definition of “criminal advocacy” designed to prevent the unfair exclusion of non-specialist criminal practitioners from certain types of case conducted in the Crown Court. At that time, the definition of “criminal advocacy” was by reference to the Tables of Offences. The Paper has abandoned that approach and instead defines “criminal advocacy” by reference to the identity of the prosecutor, such that specialist prosecutions are automatically excluded from the definition. There is then a further exclusion, described in paragraph 5 of the Handbook and defined in Rule 3 of the BSB Rules, in relation to hybrid indictments and specialist advocates.

21. We are pleased to see that in principle the terms of that exclusion follow the drafting that we previously suggested. We agree with the principle. However, some drafting matters arise.

22. First, we take it to be implicit in the definition of “criminal advocacy” that it relates only to hearings in criminal courts. What it says is:

“Criminal advocacy” means advocacy in all hearings arising out of a police or SFO investigation, prosecuted in the criminal courts by the Crown Prosecution Services or Serious Fraud Office.

We suggest that, to avoid any ambiguity, the words “in a criminal court” should be stated expressly after “hearings” and that the words “, prosecuted” should be replaced by “and prosecution”. We are unsure whether this definition is intended to include or exclude confiscation proceedings, but suggest that in principle they could be excluded (since they are essentially civil proceedings) by a further amendment, as follows:

“Criminal advocacy” means advocacy in all hearings in a criminal court arising out of a police or SFO investigation and taking place in the course of a prosecution by the Crown Prosecution Services or Serious Fraud Office.

23. Secondly, paragraph 5.5 of the Handbook needs the words “Subject to paragraph 5.4 ...” at its start, in the same way that paragraph 5.3 has. Thirdly, Rule 3 of the BSB Rules seeks to encapsulate the wording in paragraph 5.4 of the Handbook but uses slightly different language. We cannot see why there should be a slight difference between the wording of the Handbook and the wording of the BSB Rules; indeed, it is clearly preferable not to have such differences, which could give rise to issues of interpretation. We suggest that the

wording of paragraph 5.4 of the Handbook is preferable and that Rule 3 of the BSB Rules should be brought into line with it.

The Particular Consultation Questions

24. In view of the general commentary above, we do not seek to answer all the specific questions of the Paper, in relation to many of which we are not well equipped to do. However, for convenience, we set out below a summary of our views in relation to those Questions where we feel able to contribute.

Q3: Are there any practical issues that arise from client notification

25. We would have thought the practical issue that will arise is the enduring problem of requiring a human being to act contrary to his own best interests. Unless the content of the notification is expressly prescribed and the requirement to notify strongly enforced, effective notification will often not occur.

Q4: Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?

26. We are surprised that offences that, in the case of adults, would be at Level 2 or above in the Crown Court should be treated as Level 1 cases in the Youth Court. We would have thought that with vulnerable defendants, requiring greater experience and sensitivity from the advocate, the movement in Levels should if anything be in the opposite direction.

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

27. The practical problem that we foresee is that, given the porosity of the border between Level 2 and Level 3 cases, as revealingly shown by the Table on p.15 of the Paper, there will be no effective means of ensuring that cases that ought to have Level 3 advocates are determined at that level, rather than at Level 2. The only way to resolve this problem seems to us to be for the judge at the PCMH to review the allocated level of the case independently. Once judges are used to the Levels of the Scheme, which they will have to be, this will be the product of a few seconds' work.

Q9: Do you foresee any practical problems with this proposal?

28. We struggle to see in what circumstances it might be thought appropriate that an advocate who is only accredited to conduct Level 2 trials could be thought to be suitable to advise on evidence, advise on plea, draft defence statements, etc for offences at higher levels, when that advocate does not have the requisite experience to conduct a trial at that level. It is only through preparing and conducting trials that an advocate develops the instinct, judgement and expertise to advise how the defence might be conducted, or whether the defendant should plead guilty, and whether a basis of plea less than the full facts should be offered and can be established if not agreed.

Q13: Do you have any comments on the proposed modification entry arrangement [for silks]?

29. We regret the comparatively dismissive approach taken to those who took silk before 2006. Contrary to what is said in paragraph 4.35 of the Paper, there was a formal, independent and evidence-based means of assessing applications for silk made before 2006. It was conducted by the Lord Chancellor's Department based on evidence given by judges and senior practitioners. The only pertinent criticism would be that it lacked the transparency of the new system. Nevertheless, does the JAG have any evidence that the standard of silks appointed after 2006 is higher than those appointed before, or that there are fewer "surprising" appointments or omissions after 2006?

30. For the reasons explained previously, we do not agree that silks should participate in the Scheme in the same way as juniors, on the basis that there is no evidential basis for such an imposition. We agree with the Criminal Bar Association that the ability of the QCA to revoke an award of silk for cause shown is sufficient, given the complete absence of any evidence of a problem with performance. If silks are to be monitored in any way within QASA, it should be by ad hoc report under the Scheme by judges to the silk's Regulator.

Q14: Do you agree with the proposed approach to the assessment of competence?

31. We are a little surprised that the BSB should consider itself qualified to make a decision on an advocate's competence in place of Judges or a specialist body comprising those with substantial experience of advocacy. The decision of the BSB could affect the livelihood of the barrister. Even in the case of conduct complaints, where the BSB should have some expertise, the decision-making in any serious contested case is done by a specialist tribunal appointed by COIC. Further, the system proposed is bureaucratic, cumbersome and bound to be expensive. It will also inevitably give rise to inconsistencies between different regulators in the way that they appraise the material provided by judges or by assessment centres and make decisions. There also does not appear to be an Article 6 compliant appeals process.

Q19: Do you agree with the proposed definition of "criminal advocacy"? If not, what would you suggest as an alternative and why?

32. We do agree, for the reasons given above.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

33. We do agree, as explained above, subject to the points on drafting of the Handbook and the BSB Rules mentioned in para 17 above.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

34. We foresee a great financial and casework burden on practitioners and the BSB respectively. The Scheme is much too bureaucratic and the BSB does not currently have the resources or the expertise to fulfil the role of making a decision on every criminal barrister's level of competence. The Scheme should be abandoned and, if and when there is evidence of a significant problem with the under-performance or under-qualification of barristers in the Crown Court, a simpler and more economical "traffic light" scheme should be established to identify and remove those whose performance is unsatisfactory.

TIMOTHY FANCOURT QC

The Chartered Institute of Legal Executives (CILEx)

QASA

Fourth consultation paper on the Quality Assurance Scheme for Advocates

A RESPONSE BY THE CHARTERED INSTITUTE OF LEGAL EXECUTIVES

DATE: 9 October 2012

1. This response to the fourth and final consultation paper on the Quality Assurance Scheme for Advocates (QASA) represents the views of The Chartered Institute of Legal Executives (CILEx), an Approved Regulator under the *Legal Services Act 2007 (the 2007 Act)*. The consultation paper covers all the relevant areas and we hope the responses below may be of value to the Joint Advocacy Group (JAG) and help to inform its approach to the scheme.

Executive Summary

2. CILEx agrees with QASA that 'Advocacy is a vital part of an effective Justice system'. For this reason alone, it is important that there is a quality assurance scheme in place for advocates. CILEx is proud to have had such a scheme in place for a number of years.
3. CILEx is pleased to note that JAG has committed to a full review of the scheme commencing in July 2015. The origin of QASA has been so difficult that there is a real risk of compromises being reached to ensure that the scheme can be launched in January 2013. For this reason it is vital that the scheme is closely monitored across all aspects during its first two years rather than waiting for July 2015 to reassess its effectiveness.
4. JAG quite rightly identifies that the scheme cannot override statutory rights of audience. However, the scheme requires advocates to demonstrate through assessment that they meet the required standards to pass through to the next level; this approach does somewhat undermine the rules relating to rights of audience, which currently bear no relation to competency. Whilst this issue is clearly outside the remit of JAG and the scheme, it is an issue which CILEx will raise with the sector and the Government as QASA progresses.
5. CILEx, for the reasons below, remains concerned about the widespread use of judicial evaluations.

6. Comments on the proposals in the consultation have been presented below where CILEx is able to offer a view.

Judicial Evaluation and Trial Opportunities

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?

Q2: Are there any practical issues that arise from client notification?

Questions 1 and 2 are answered collectively

7. CILEx has concerns about the widespread use of judicial evaluation. The reason for our continuing unease is that we have not seen anything within the scheme which addresses the scheme's ability to deliver the same standards of evaluation across advocates, across Judges, across Courts, across trials and across time. The following appears to have reinforced our concerns:

- Paragraph 3.2(e) of the consultation makes it clear that judicial evaluation will be the compulsory means of assessment for those advocates undertaking trials at levels 2, 3 and 4. However, this is slightly at odds with paragraph 3.3 where it states that assessment at level 2 will be by assessment organisation, judicial evaluation, or a combination of the two.
- At paragraph 3.2(f) we note that trained Judges will continue to exercise their inherit jurisdiction over those who appear before them in the Courts, and continue to utilise the complaints procedure operated by each of the regulators where there are concerns about performance.
- The scheme envisages (as set out in paragraph 3.4 and 3.5) the extensive use of independent assessors and assessment organisations. There has been no cost analysis and there appears to be little evidence about costs at this stage.

8. Although CILEx is not primarily focused on levels 2, 3 and 4, we do note with approval the statement at paragraph 3.9 that, 'the purpose of the scheme is to ensure competence and not limit practice unnecessarily'. CILEx hopes that any developments to the scheme will be measured against this statement.

Notification

Q3: Are there any practical issues that arise from client notification?

9. CILEx agrees that it will be imperative for clients to know how far their advocates will be able to progress their case (we will return to this point concerning the instructing Solicitor or CILEx lawyer). However, there will be significant responsibility on the instructing party not only to ensure that the appropriate level of advocate is utilised in each case, but also to ensure that the client is comfortable with that choice. There is a danger that clients will form the perception that their advocate is 'limited' and therefore not 'good enough'.

The Level of Youth Court Work

Q4: Are there any practical problems that arise from the starting categorisation of Youth Court work at Level 1?

10. CILEx is pleased to see that JAG is now proposing that Youth Court work should continue to start at Level 1. CILEx advocates are currently licenced to undertake youth work and they are not aware of any concern over their performance.
11. CILEx can see no practical problems that arise with the starting categorisation of Youth Court work at Level 1.
12. Whilst it is true that Youth Court cases involve vulnerable defendants and witnesses, it is the case that the instructing party, whether Solicitor or CILEx lawyer, will be managing those vulnerable defendants and some witnesses throughout the preparation for trial. As the consultation rightly points out, the impact of incompetent advocacy is potentially serious. However, it is potentially serious in any case at any level. Given the manner in which CILEx advocates specialising in crime qualify, their experience over many years of handling vulnerable defendants and witnesses and their ability to conduct Youth Court work is likely to be more embedded than that of a Level 1 Barrister or Solicitor. This position at Level 1 appears to have been reinforced by Cardiff University's Research. For example, when the QASA trials took place, CILEx advocates were deemed to be the only branch of the legal profession that could be considered competent without the need for additional training. CILEx advocates are only granted certificates when considered competent by the training provider and the Chartered Institute.

Questions 5 to 14 are answered collectively.

Phased Implementation

13. CILEx understands that CILEx advocates will be required to register during Phase 1, regardless of their practising certificates. Presumably, there will be facilities in place for those advocates who do not register now (for whatever reason) or for those that decide to move to criminal work after phased implementation?

Determining Levels

14. The responsibility which QASA places upon the instructing party is something that has not been entirely clear, and remains unclear to a significant number of practising criminal lawyers, many of whom do not exercise advocacy rights. CILEx would urge JAG, the regulators and the Approved Regulators, to commence a programme of raising awareness with the full range of criminal lawyers, not merely advocates. CILEx will be assisting its members who practice criminal law to understand the implication of QASA regardless whether they are advocates.
15. At paragraph 4.14 it is stated that the regulators will conduct spot checks on the level of advocates conducting cases, including the agreed level of the case. It is unclear as to how this will be undertaken and further clarification is sought.
16. The factors on determining case level as set in the consultation at paragraph 4.21 seem appropriate, and the examples are helpful. It would be useful to include similar examples within the Levels guidance. As regards to different levels in the same case (paragraph 4.23), there is a potential issue regarding fairness and perceptions of justice when different levels of advocates are appointed to different defendants in a multi-handed case. Paragraph 4.23 quotes the example of a different level of advocate for the defendant who is first on the indictment as

opposed to fifth. However, there may well be a public perception of unfairness if, for example, the first defendant represented by a higher level advocate is acquitted, but the fifth defendant represented by a lower level advocate is convicted.

17. CILEx approves the proposal that advocates are permitted to undertake non-trial hearings (including guilty pleas) in cases at one level above their own accredited level, provided the advocate believes they are, in all the circumstances, competent to act. Presumably it will be not merely for the advocate to believe that they are in all the circumstances competent, but that the instructing party also believes they are fully competent. The final sentence at paragraph 4.25 is unclear. Is the demonstrated competence that exhibited at Level 2, or at Level 3? Clarification is sought.

Client Choice

18. CILEX approves of QASA's approach to client choice set out in paragraph 4.33 of the consultation. This enables an advocate to 'act up' one level in light of the prescribed criteria as set out in the consultation. Presumably this will be subject to rights of audience?

Scope of Review

Q15: Are there any other issues that you would like to see included in the review?

19. CILEx is pleased to see that JAG and the regulators have committed to a full and comprehensive review of the operation of the July 2015 scheme. However, operation of the scheme should be monitored in the interim.

SCHEME HANDBOOK

Questions 16-20 on The Scheme Handbook and Rules are combined for a response.

The Aims and Objectives of QASA

20. Paragraph 2.6 of the Scheme Handbook sets out the aims and objectives. CILEx does not disagree with those aims and objectives, but would prefer to be referred to as a 'professional association', as opposed to 'the representative body'. Each of the professional associations, that is the Bar Council, the Law Society and The Chartered Institute of Legal Executives, is an Approved Regulator under the Legal Services Act 2007; and whilst carrying out 'representative' functions, also carry out considerable quasi regulatory functions under the provisions of the Act which refer to 'permitted purposes'. CILEx itself is a Chartered Institute, and therefore must at all times act in the public interest. Our responsibilities go well beyond being a representative body.

Implementation of the Scheme

21. It would be useful if the information at paragraph 2.10 in the Scheme Handbook was reflected in the consultation document itself. It is unclear from the consultation document that CILEx Advocates and Associate Prosecutors will need to register between January and April 2013.

Level 1 – Registration and Re-accreditation

22. CILEx notes that at paragraph 5.7 of the proposed Handbook, Solicitors must hold a Practising Certificate and register with the SRA as a Level 1 advocate during the implementation phase. Once the implementation phases are concluded, Solicitors will automatically be granted Level 1 accreditation when they are given their first Practising Certificate. However, CILEx Advocates will only be given a provisional accreditation when 'newly qualified', and will need to wait for their first renewal in order to gain full accreditation. This does not seem to be on a level playing field with solicitors, many of whom may never have set foot in a Magistrates' Court. This situation will, of course, change on re-accreditation. Because of rights of audience, CILEx Advocates will not be able to progress.
23. CILEx approves the approach to re-accreditation at Level 1 being focused on CPD activity. This will be particularly pertinent to Chartered Legal Executives and the changes to CPD which are proposed by IPS.

Section 9- Chartered Legal Executives and Associate Prosecutors

24. At paragraph 9.21 we are told 'an appeal may only be brought on the grounds that the decision reached was one which no reasonable person would find comprehensible'. This would indicate that no reasonable person could possibly understand the decision, as opposed to it being one that no reasonable person could reach. There is a distinction. We would ask that ILEX Professional Standards clarify what they mean, and suggest that it be the latter i.e. as an appeal may be brought where the decision reached was one that no reasonable person with all the facts could reach. This would reflect judicial review principles.

Practicalities and operation of the Scheme

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

25. One of the difficulties that CILEx has with the answer to this question is that there is no agreed base line from which to measure whether the scheme is making a positive or negative impact. The research commissioned by the Legal Services Commission from Cardiff University was perhaps unfairly criticised by in particular, the judiciary, the Bar Council and the Bar Standards Board. Clearly that cannot form a base line in those circumstances. The original driver for the QASA scheme was, in fact, anecdotal reports and anecdotal 'perceptions' from the judiciary that advocacy was somehow not as good as it used to be. Could JAG please be clear about the base line that will be used to assess 'if the scheme is making a difference'?

Equality and diversity

Questions 22 to 24 are combined for a response:

26. Introducing a quality assurance scheme for advocates will provide the regulators with an opportunity to promote equality issues within the profession by helping to eliminate the discrimination of advocates based on characteristics irrelevant to their competency. One of the benefits of the scheme is that it will provide a wealth of equality and diversity monitoring information. This will allow for its true impact to be measured and for any necessary changes to be made to the scheme, in order to identify and address negative impacts or enhance positive impacts.

27. Returners to work may also benefit from a scheme, provided there is in place a structured path back to the level at which they were previously practising. This will not only assure them of their own competence at a certain level but will also eliminate any discrimination they may be subject to due to their time away from practice.

The Commercial Bar Association (COMBAR)

http://www.barstandardsboard.org.uk/media/1460441/qasa_crf_-_the_commercial_bar_association.pdf

The Criminal Bar Association

The Criminal Bar Association – who we are; what we stand for.

1. The Criminal Bar Association is the largest specialist bar association. Its members are self-employed barristers in independent practice who are 'on the cab rank' and appear for both the prosecution and the defence, but also employed barristers in both the Crown Prosecution Service and other prosecuting agencies, and firms of criminal defence solicitors. Members of the CBA thus prosecute as well as defend cases of all levels of seriousness in the Crown Court and appellate criminal courts. The English criminal justice system, its judges and advocates, enjoy a high reputation throughout the world, and is much copied in other criminal justice systems across the English-speaking world. That English criminal justice is so admired and copied is due, in no small measure, to the skill, professionalism, commitment and ethical standards of CBA members who appear as advocates for both sides in criminal trials. It should not be overlooked that the excellent English criminal judiciary are largely drawn from the ranks of criminal advocates. Members of the CBA, and judges who are former members of the CBA, thus ensure that those accused of crime are robustly and fairly prosecuted and defended, and that the high standards of criminal justice are maintained.
2. The CBA is committed to driving up standards of criminal advocacy. It fully supports the Bar Council/Bar Standards Board's programme of Continuing Professional Development (CPD) for barristers, and note that the minimum requirement of relevant training is due imminently to rise from 12 to 24 hours per annum. The CBA has demonstrated its commitment to the delivery of CPD training for its members through its long-established and comprehensive programme of education events.

Executive Summary

3. The CBA believes that the QASA scheme as presently structured and as proposed in the fourth consultation paper (CP/4) is a) unlawful and b) a bad scheme. It is unlawful because it is unnecessary to impose such a scheme via a regulatory framework. It is a bad scheme because it will not deliver higher standards of criminal advocacy - quite the reverse.
4. The CBA believes that QASA is born, not of concerns that existing standards of criminal advocacy, and publicly-funded criminal defence advocacy in particular, are low, and driven by a genuine desire to raise those standards, but is instead driven by a well-founded fear that they will fall in the future. That is a future in which the procurement structures within which solicitors and barristers presently delivering those services will be radically overhauled in the pursuit of ever-lower fees. The government fears – with justification, we submit - that, in such a future, there is a real danger that standards will fall, and fall to the point at which its treaty obligations under Article 6 of the European Convention on Human Rights toward those accused of crime cease to be met. We refer to proposals (presently shelved, but only temporarily) to introduce a contracting regime based upon a single case fee to cover both litigation and advocacy – 'one case, one fee' or 'OCOF'. It is the CBA's

view that, far from contributing to the achievement of the regulatory objectives and professional principles set out in section 1 of the Legal Services Act 2007, QASA will simply pave the way for OCOF, and thereby provide a cloak of respectability for the cheap criminal defence lawyers - advocates and litigators - that OCOF is intended to deliver. That would be to perpetrate a fraud upon the public, and the CBA will not engage with a scheme that does that.

5. The framework within which the scheme is intended to be introduced – by regulatory changes to be imposed upon barristers by the Bar Standards Board (BSB) via the Code of Conduct (CoC) is, we believe, unlawful, for a number of reasons, reasons which fall under two heads:
 - a. the power to regulate only arises in case of necessity, and no such necessity has been identified, and;
 - b. the regulatory changes must meet such necessity as is identified – here to raise standards of criminal defence advocacy – and this scheme will not achieve that.
6. Our more detailed reasons follow, but the consequence of the view we have taken is that the CBA is, along with other representative organisations, taking leading counsel's opinion with a view to challenging, by way of judicial review, any attempt by the BSB or the LSB to impose this, or indeed any, QASA scheme, via the CoC. The issue of the quality of advocacy in publicly-funded criminal defence work (PFCDW) is primarily a procurement issue between, on the one hand, the providers of those services – barristers and other advocates - and the 'consumer' of those services – the accused himself, and, ultimately, the Legal Services Commission, which foots the bill.
7. The regime of 'light touch' regulation established by the Act means that the regulatory powers of the BSB/LSB are only engaged in the event of necessity: necessity that must be based upon evidence that barristers are failing to deliver advocacy services of a standard that meets the regulatory objectives and professional principles enshrined in section 1. There is no evidence that the 'consumers' of PFCD services – defendants themselves (or 'assisted persons' to use the terminology of the CDS Funding Orders) or the LSC – are receiving anything less than an exemplary service from criminal barristers: the fiercely competitive market in which barristers in independent practice (BIPs) operate means that bad ones simply do not survive. On the contrary, all of the available evidence, from a number of different sources, indicates that the advocacy services provided by barristers, and by BIPs in particular undertaking PFCDW is of a very high standard. Accordingly, there is no necessity for regulatory change, and the powers of the BSB, and the oversight regulator, the LSB, are not engaged. Consequently, any attempt by the BSB to impose a QASA scheme by regulation will be resisted.
8. Having said that the CBA does not believe that a QASA imposed by regulatory changes is the correct vehicle for the delivery of higher standards of criminal advocacy, we remain willing to engage in a constructive dialogue with the LSC and other stakeholders, to develop a framework within which that objective may be achieved.
9. Accordingly, we offer our Response to this consultation in two parts. In Part 1 we will deal with the legality of the scheme, setting out, briefly, the reasons why we have concluded it is not lawful. In Part 2, we will give our detailed responses to the specific questions asked in respect of the scheme as drafted.

Part A – the Legal Framework for Quality Assurance by Regulation.

10. The BSB is the designated 'Approved Regulator' for barristers under the Legal Services Act 2007 (the Act). Its powers to regulate are derived, externally, from the Act and, internally, from its constitutional relationship with the General Council of the Bar (GCB). Under the Act, as an Approved Regulator, the BSB must promote the regulatory objectives and the professional principles set out in s.1(1) and (3) of the Act: see s.28¹⁶. This section both

¹⁶ Sections 1 and 28 are set out in full in Appendix 1.

imposes the duty, and grants the power, to regulate. The regulatory regime has been – accurately – described as ‘light-touch’: the BSB has no duty, and no power, to regulate for its own sake beyond the pursuit, promotion or achievement of the regulatory objectives and the professional principles. The power and the duty are coterminous. For the sake of completeness, it is to be noted that the BSB is subject to the oversight regulation of the Legal Services Board (LSB).

11. The regulatory objectives in s. 1(1) include:

- protecting and promoting the public interest;
- protecting and promoting the interests of consumers;
- promoting competition in the provision of legal services;
- encouraging an independent, strong, diverse and effective legal profession; and
- increasing public understanding of the citizen’s legal rights and duties;

12. The professional principles in s. 1(3) include:

- that lawyers (“authorised persons”) should act with independence and integrity;
- that they should maintain proper standards of work;
- that they should act in the best interests of their clients.

13. Under such a ‘light touch’ regulatory regime, in order for regulation to be lawful, there must be a demonstrated, evidence-based, necessity for regulatory intervention. It must be not merely desirable, but **necessary**, to regulate. Where the regulatory objectives are being met, and the professional principles are being adhered to without intervention, then, it is submitted, there is neither the duty upon, nor the power in, the BSB (still less the LSB) to act by regulation.

14. The Act could not be clearer as to the approach that the regulator needs to take in relation to the promotion of its regulatory activities. Section 28 states:

“Approved regulator’s duty to promote the regulatory objectives etc

1) *In discharging its regulatory functions (whether in connection with a reserved legal activity or otherwise) an approved regulator must comply with the requirements of this section.*

2) *The approved regulator must, so far as is reasonably practicable, act in a way-*

- a) *Which is compatible with the regulatory objectives and*
- b) *Which the approved regulator considers most appropriate for the purpose of meeting those objectives.*

3) *The approved regulator must have regard to-*

a) *the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed and*

b) *any other principle appearing to it to represent the best regulatory practice”*
(Emphasis added)

15. It is against this background that the question must be asked whether there is a necessity, and therefore whether it would be lawful, for the BSB to impose prescribed standards of quality by regulatory action, enforced by the threat of disciplinary action under the CoC. The CBA believes not. The evidence for that assertion can be summarised shortly:

- i. the market has not demanded it. The ‘consumer’ of PFCDW, the LSC, has not hitherto sought to negotiate any ‘service standards’ with BIPs in relation to PFCDW, equivalent to the General Criminal Contract (GCC) under which it contracts with solicitors to provide litigation services.
- ii. for prosecution work, the CPS - the largest ‘consumer’ of the bar’s services – assures the quality of work done by negotiated service standards – most recently through the establishment of the Panels Scheme, not via the BSB and regulation.

This is, the CBA submits, the model for quality assurance in a 'light touch' regulatory regime.

- iii. there already exists within the CoC a robust structure of complaint/disciplinary procedures for dealing with barristers who provide an inadequate service of whatever description. Further, the CoC imposes upon barristers a duty not to accept instructions in a case beyond their competence.¹⁷ The fact that there are so few disciplinary cases against barristers generally, and criminal BIPs in particular, for breach of these provisions, is powerful evidence that there is no problem that requires to be addressed by regulatory changes on this scale. The judiciary themselves have their own duty to intervene when they consider that the quality of advocacy before them falls beneath the standard necessary for that case: see, for example, **R-v-M [2012] EWCA Crim 228**, where the Court of Appeal did so in trenchant terms.
- iv. cases of BIPs providing inadequate service to defence criminal clients so as to cause injustice are even rarer. There were in 2011-12 approximately 135,000 Representation Orders (ROs) granted to accused persons (and perhaps millions of hearings) in Crown Court cases committed and sent for trial.¹⁸ In any year, there are no more than a tiny handful of cases in which there was a successful appeal to the Court of Appeal based upon the conduct of defence counsel;
- v. Lord Carter of Coles, in the foreword to his report said:
*"I have been impressed by the deep dedication and integrity of the professionals involved in legal aid work, and their real commitment to the principles of legal aid. They should be proud of their hard work on behalf of their clients, and acknowledged rightly as a credit to the legal profession."*¹⁹
- vi. In the only independent research encompassing both clients, solicitors and advocates, conducted by the BSB (Ipsos Mori, August 2007) and published by them, this was said:
"barristers are perceived to be competent, highly qualified and dedicated professionals. Specialist advocacy services set them apart"

[Emphasis added]

"The findings of the research show that there is a great deal that is positive about the performance of the Bar. It is perceived to be a strong, highly competent profession providing a good quality service. Even amongst prisoners, whose views of the Bar are generally more negative than those of the general public, the majority remain at least fairly positive about the overall quality of service they received. Solicitors readily acknowledge the good or excellent advice they receive from the Bar. As professionals, barristers are thought to be people of integrity, honesty and intellect."

The CBA submits that all of that remains the case.

16. Accordingly, the CBA submits that there is, in respect of the quality of criminal defence advocacy services being provided by barristers, and in particular by BIPs, no necessity which would justify intervention by regulation. Action must be, to quote the Act, "targeted only at cases in which action is needed".
17. Whilst the LSB and the BSB have often cited "public concern" or "judicial comment", they have not produced, or relied upon, any evidence that questions the advocacy skills of

¹⁷ Para. 603(a).

¹⁸ Source: LSC Statistical Information Pack for financial year 2011-12, table CDS/4.
http://www.legalservices.gov.uk/docs/about_us_main/LSC-Stats-Pack-2011-2012.pdf

¹⁹ Lord Carter's Review of Legal Aid Procurement: Legal Aid. A Market Based Approach to Reform, July 2006.

barristers. On the contrary, although the BSB has not itself cited it, its own commissioned paper points, as noted above, overwhelmingly the other way. It is perhaps noteworthy that the LSB in its own review of the literature on quality, did not cite the Ipsos Mori research (see LSB “Quality in legal services: a literature review”). We wonder why the LSB did not highlight to the consumers the excellence in advocacy set out in an independent report of such pedigree.

18. In other areas where the LSB seek the roll-out of QASA, they seek “evidence” and “need” before the scheme is extended (see p2, letter from LSB to JAG, 5th May 2010).²⁰
19. Thus all of the available evidence demonstrates that the level of service being provided by the criminal Bar is of an extremely high standard. Such concerns as have been expressed in recent years about falling standards of criminal advocacy have been almost exclusively about others who appear in the criminal courts²¹.
20. Accordingly, the CBA submits that there is, in respect of the quality of criminal defence advocacy services being provided by barristers, and in particular by BIPs, no necessity which would justify intervention by regulation. On the contrary, all of the available evidence demonstrates that the level of service being provided by the criminal Bar is of an extremely high standard.
21. A further aspect of the QASA scheme as proposed in CP/4 calls for comment in this Part of the Response, dealing with the issue of the necessity for regulatory change. That is the proposal to include QCs. In summary, it is proposed that QCs should be required to re-accredit periodically as junior advocates do. The only concession to QCs is that not all would be required to apply immediately for provisional accreditation as a precursor to acquiring full accreditation via Judicial Assessment in trials (as with juniors). Those appointed prior to the establishment of the QC Appointments scheme in 2006 would have to do so. The participation/accreditation of those QCs who were appointed under the QCA scheme will be ‘phased in’ over a period.
22. The CBA believes that the late decision to include QCs is indicative and symptomatic of the lack of thought that seems to have gone into the design of the scheme. This is a matter dealt with more fully in Part B of this Response.
23. For present purposes, it is, the CBA submits, a good illustration of the point being made about the lack of necessity for the QASA scheme. The CBA sees the proposal as the blurring of the real distinction between QC and junior counsel and, therefore, the effective abolition of Silk.
24. The status of QC is a long-established badge of excellence, awarded on merit to a small number of the most able advocates - solicitor-advocates as well as barristers. It is an internationally-recognised status, and one adopted in other English-speaking jurisdictions. If there is a paucity of evidence that junior barristers in independent practice are not delivering a quality service to criminal defence clients, the evidence that barrister QCs – all, or nearly all of whom are in independent practice - are under-performing, is even more scant still.
25. This scheme would make silks compete for the category 4 work with juniors who would then have to compete with category 3 juniors for that work. The system of advocacy would be skewed, against the interest of the public, for a generation. The Lord Chief Justice in his annual review on 27th September 2012, repeated the concerns he raised in the Clinton case²² when asked about the failure to appoint silks in serious cases. He stated that high

²⁰ ⁵ Attached, Appendix 2

²¹ See Perceptions of Advocacy, a research paper commissioned by the BSB, and published in March 2012 - http://www.barstandardsboard.org.uk/media/1402386/orc_international_-_perceptions_of_advocacy_report.pdf

²² [NCN: [2012] EWCA Crim 2]

quality advocacy is more likely to get a just result; a principle that had been enshrined for centuries.

26. The special status of silk has a recognised, and long-standing position within legislative frameworks established under the LSC's purview; for example, in the Criminal Defence Service (Funding) Order 2007, the statutory instrument which prescribes the fee scales for PFCDW, and under which there are separate, higher, scales of fees for QCs, whether they act alone or with a junior. This special status is a recognition by the LSC, the consumer of the bar's services, of the excellence of the QC mark. In the QASA scheme proposed, no distinction is made between QCs and other grade 4 advocates. This devalues both the QC mark and the scheme.
27. The second aspect of unlawfulness of the scheme as we see it concerns whether the response is targeted, effective, and proportionate. Even where a necessity for regulatory change, based upon evidence, is identified, in a regime of 'light touch' regulation, such change must go no further than is needed to meet the regulatory objective or professional principle that has been identified. In the context of this consultation, what that means is that in order to be lawful, the QASA scheme must be effective in addressing any targeted needs, and go no further. Put another way, the scheme must 'do what it says on the tin' and deliver on the objectives set for it. For the reasons set out in Part B, it is the CBA's view that the scheme as proposed is a flawed scheme, and does not so deliver. Further, it may have unintended consequences which actually run contrary to the regulatory objectives and professional principles. We do not propose to set these out in more than outline here, but they can be summarised as follows:
 - i. the scheme purports to operate by way of restricting 'non-accredited' barristers' rights of audience. If, as envisaged, the scope of the scheme is extended to other practice areas, the consequence would be to divide what is presently one profession, whose members presently enjoy the right of audience in all courts, into a number of sub-professions. That would, or certainly may be thought to, require primary legislation.
 - ii. the proposal to introduce the scheme in phases is anti-competitive and unlawful. It is proposed that barristers whose chambers are located in the first areas to be included – the Western and Midland Circuits - will have to apply for provisional accreditation at a particular level (and thus potentially disqualify themselves from certain types of work) whilst barristers based off-circuit could accept work at all levels in the courts on these circuits without restriction;
 - iii. the scheme may be discriminatory/anti-competitive in that it operates as a restraint of trade upon other EU lawyers;
 - iv. there are issues with regard to whether the scheme as presently proposed, and in particular the 'guidelines' for the allocation of cases to levels, lacks sufficient certainty to found potential criminal liability under s. 14 of the Act;
 - v. there are issues with regard to the authority, both under the Act and within the BSB's constitution, for the levying of the fees proposed. The BSB will need the approval of the Bar Council, who themselves must be satisfied that any scheme is targeted, necessary and proportionate before agreeing to ask its members for such funding.
 - vi. The Scheme is likely to prove very expensive, and it is presently unclear how in particular the start-up costs are to be borne by the professions. The BSB has sought substantial increases to its budget which is funded by the Bar Council. These costs are in turn met from the Practising Certificate fees collected from barristers in all areas of practice, not just PFCDW. It is, we think disproportionate and unlawful to require barristers out with the ambit of QASA to pay for the scheme in this way. Further, the requirement for upward of 15,000 advocates – barristers and solicitor-advocates – to seek QASA accreditation will make significant calls

upon judges' time and HM Courts and Tribunal Service (HMCTS) resources – leading to inevitable delays, and additional cost to the public.

28. For these and other reasons connected to its belief that the scheme is fundamentally flawed, until such time as it is satisfied that the scheme is lawful, the CBA, acting in the public interest, will not engage with implementing it, and will resist any attempt by the BSB or the LSB to impose it upon the profession.
29. If QASA foreshadows OCOF, the consequence will be, the CBA believes, that the independent referral bar will be destroyed, and a valuable resource – a pool of excellence from which the judiciary is appointed - would be irretrievably lost. The CBA firmly believes that that would be contrary to the public interest.
30. The desire for OCOF is therefore, the CBA believes, the true driver for QASA. It is simply an essential cornerstone to be put in place before the postponed contracting consultation can occur. Effective client choice would have ended. The accused person's only guarantee would be that is that his or her case will be conducted by a cheap, but QASA-graded, advocate. It is, we submit, obvious that a weak, poorly-designed, and badly-policed QASA scheme will not, as is said to be intended, maintain, or drive up, standards of criminal advocacy. It will have precisely the opposite effect - paving the way for cheap, bad advocates that OCOF will deliver to be clothed with a fig-leaf of respectability beyond that which their skill and experience warrants. The scheme will legitimise bad advocacy. That cannot be permitted to happen, and the CBA is determined that it will not happen. The criminal bar, and the CBA, will not lend its aid, or be a party to, this scheme as designed, or at all. At a time of great cost-cutting and, what is called a "bonfire of regulation", the only people who would benefit from such a scheme are not the public, or 'consumers' - there is, as cited, evidence that they are well-provided for - but those employed in the business of regulation. This scheme is as ill-conceived as it is expensive to bring to birth.
31. We now turn to part B, and offer our detailed critique of the scheme as proposed in CP/4, and our answers to the questions posed.

Part B – the Merits of the Scheme:

Overview

32. We have already made reference in Part A to the regulatory objectives and the professional principles set out in s. 1 of the Legal Services Act 2007. It is claimed that the scheme has been designed with these objectives and principles in mind. It aims to promote confidence in the criminal justice system, and, through the establishment, maintenance and enforcement of a robust regime of proper standards of advocacy, to protect the 'consumers' of criminal advocacy services. QASA is born of the Carter Report,²³ and accordingly its principal focus is upon criminal defence advocacy, though it aspires to reach beyond that.
33. It is, we believe, important to remember that the 'consumers of criminal advocacy services' are not just those accused of crime - but the wider public also, whose interest is in seeing justice done for the victims of crime, and seeing criminals punished. It is in the public interest that criminal cases are both properly and robustly prosecuted as well as properly and robustly defended, in order to ensure, so far as possible, that the guilty are convicted and the innocent acquitted. There is a serious injustice done if an innocent person is convicted – and not just to the individual concerned – but a cost to the public, in terms of appeals, in correcting such injustice. There is an equally serious injustice – and a cost to the public - if the guilty are acquitted. The referral bar represents a cadre of highly skilled, independent advocates, available to both prosecution and defence, and a valuable resource from whose ranks the excellent criminal Judiciary is drawn. The CBA firmly believes that the continued existence of the independent referral bar is in the public interest, and is committed to the maintenance of the high quality standards that are its

²³ Lord Carter of Coles: Legal Aid: A Market-based Approach to Reform; July 2006

hallmark. It is our commitment to these objectives that underpins our position with regard to QASA (and OCOF) and informs our submissions in response to the present consultation.

Core Principles

34. Whilst the CBA sees the issue of the quality of publicly-funded criminal defence advocacy as essentially a procurement issue for negotiation and agreement between the bar and the LSC/CDS, and not a regulatory issue, we recognise that elements of the QASA scheme proposed in CP/4 provide a sound basis for the establishment of a framework within which higher advocacy standards may be delivered. The vehicle by which that would be delivered would not be, as is proposed, a QASA scheme embedded into regulatory frameworks for the professions delivering those services – the bar, solicitors, and legal executives – but one based upon an agreed service standard, perhaps modelled upon the GCC and/or the CPS Panels Scheme. Access to PFCDW thus would not be a matter of ‘accreditation’ but dependent upon practitioners meeting the agreed service standard, and being awarded a contract, or appointed to an Advocates Panel (AP) at a particular level. We would envisage that access to PFCDW would not be artificially limited. As at present with the GCC, the number of contractors or Advocates Panel members (APMs) would be determined simply by the number that wished to join and were able to meet the agreed service standard.
35. So far as advocacy standards are concerned, such a framework, in order to achieve the objectives set for it, must be founded upon the following core principles:
- i. The standards must apply to all APMs, be they barrister in independent practice, employed barrister, solicitor-advocate or legal executive. There must be a level playing field.
 - ii. Access to the AP at the higher levels must be by Judicial Evaluation (JE) in all but exceptional cases. As with QASA, APMs would be required to re-apply periodically, and the advocate would be required to demonstrate the acquisition and application of both the necessary competences, and sufficient trial experience to continue to practice, whether at the same level, or to move up to the next level;
 - iii. Grading to be of cases themselves, not hearings in cases, so no ‘Plea Only Advocates’ (POAs) or ‘non-trial advocates’;
 - iv. Cases to be allocated to levels by reference to clearly defined criteria intended to reflect the seriousness and complexity of the case, and the responsibility borne by the advocate conducting it. Allocation to levels by negotiation and agreement between litigator and advocate is unacceptable. It is too uncertain to offer any real assurance of quality, and is open to abuse by solicitors firms with in-house advocates (IHAs).
 - v. Recognition of the special position of QCs.
36. The CBA regards these core principles as constituting the essential foundations for the scheme, if it is to deliver on the objectives set for it. The absence or dilution of any one or more of these core principles is likely, we believe, to render impossible the achievement of the overriding objectives of the scheme mentioned above. For the reasons outlined in Part A, the CBA believes that such a scheme would drive standards not up, but down, whilst providing a fig-leaf of respectability for falling standards. That would not be in the public interest, and the CBA could not countenance engagement with such a scheme. Our members nationwide expressed their views in the strongest terms when completing the CBA online Survey in March and April this year. There is a real risk of wholesale rejection, by the practising Bar, of any scheme which fails to represent the core principles which we have identified above.
37. Whilst we have set out in Part A why we believe the scheme is unlawful and unnecessary, we submit that the scheme as presently proposed in CP/4 falls some way short of delivering upon a number of these core principles. We should first observe that CP/4 seems to regard much of the scheme as settled, or ‘embedded’: see para. 1.4. The CBA

cannot, and does not, share that view, when we take the view that the Scheme as drafted is not lawful, and not in the public interest.

38. Having made our observations in Part A about the lawfulness of the scheme, we now turn to answer the 24 specific questions posed by the consultation paper.

Q1: (para 2.7)

Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?

39. The CBA welcomes the acceptance of the principle that Judicial Evaluation (JE) should (save in exceptional cases) be the compulsory means of assessment for accreditation for advocates undertaking trials at levels 2, 3 and 4 (para. 3.2). It is essential, in order that the scheme is not discriminatory, that the advocate is allowed sufficient time in which to allow for JE in the requisite number of trials at the appropriate level. Even in a busy practice, both at the independent bar and for IHAs, it may be that cases in any given period are at different levels, or may be disposed of as guilty pleas. The problem becomes more acute at the higher levels. Even senior barristers doing the most serious cases also receive instructions in less serious cases. For these reasons, we submit that the assessment period should be 18 months at levels 2 and 3, and two years at level 4, not, as is proposed, 12 months at all levels.

Accreditation of Level 2 Advocates/"Plea Only Advocates"

40. The allocation of cases to particular levels is dealt with later. This section of CP/4, paras. 3.2 and 3.9, deals with accreditation of advocates at level 2, which is proposed to be the entry level for Crown Court work. The first point to make is that we have given anxious consideration to whether the breadth of complexity of work in the Crown Court, the skills required and the responsibility borne by the advocates who undertake it, means that there should be more than three levels, 2, 3 and 4, but, on balance, we have concluded that three levels is sufficient. The special, and difficult, position of Youth Court work is discussed below. The core issue we see with regard to accreditation at level 2 (and indeed at level 3) is that of 'Plea Only Advocates (POAs), raised in paras. 3.9 – 3.17, and returned to at paras. 4.25, 4.26. This is a critical issue.

Q 2: (para 3.17)

Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

41. The CBA cannot accept the concept of POAs. There cannot be such a thing as a part-competent advocate – one who is not competent to conduct a defendant's trial, but is said to be competent to advise him whether he should have a trial, or should plead guilty. The plea, and more particularly the stage of advising about the plea, and the consequences of the plea, is precisely the stage at which the advocate's responsibility is borne most heavily, and experience most needed. The overriding objective contained within the Criminal Procedure Rules requires that every case is actively managed and therefore issues that might affect a trial are identified and dealt with at an early stage. An advocate who has no experience of actually dealing with these issues cannot be properly said to be fit to either advise a client on them, or provide comfort to the court that these matters have been, or are being, dealt with appropriately. The argument that has been advanced in favour of such a species of advocate is that solicitors without higher court rights of advocacy have been advising clients as to their pleas for a long time. Whilst that is true, it overlooks the fact that such advice has always been subject to the independent scrutiny of the BIP instructed to conduct the case, which barrister may, and often will, express a different view to that which has been provided by the solicitor. The advice of an in-house POA would no longer be subject to such independent scrutiny.

42. The CBA submits that the concept of the POA runs counter to a number of the regulatory objectives and professional principles enshrined in the Act designed to ensure that lawyers act with independence and in the interests of their client, and to inspire public confidence. The concept of the POA is anathema to such principles: "My advice to you is to plead guilty – that way I can continue to represent you. If you wish to plead not guilty, I will have to instruct someone else to conduct your case, because I am not competent to conduct your trial." How could anyone have confidence that such advice is being tendered independently and without regard to the lawyer's own financial interests? Instead of advancing the objectives of the Act, the concept of POAs embeds a fundamental conflict of interest. Any scheme which included POAs would be, the CBA submits, contrary to the public interest and unlawful. Put bluntly, either you are competent to appear as an advocate at the level for which you are accredited - whatever your instructions - or you are not, and if not, you should not be doing the job. It is as simple as that. As we have made clear, the CBA could not countenance engagement with a QASA scheme which included POAs.
43. On more than one occasion those representing the BSB have conceded that POA's are not in the public interest. They put forward the argument that while logic dictates that is so, there is no evidence to support it, so POAs will have to be permitted as a species until such time as there is evidence. A 'trial period' of two years has been suggested. That approach is a nonsense. We do not permit advocates unqualified in the law to represent those accused of crime, not because there is no evidence that do so would be contrary to the public interest, because logic and common sense dictates that it is so. The public cannot be used as guinea pigs for one minute, let alone for two years.

Q 3: (para 3.19)

Are there any practical issues that arise from client notification?

44. The Client Notification proposals in paras. 3.18 and 3.19 expose the concept of POAs for the nonsense it is. Clearly, it is necessary that an accused person must be fully informed as to what level his or her case is allocated to, and that the advocate assigned to deal with the case - the Instructed Advocate (IA) to use the terminology of the CDS Funding Order – is of that grade. Where another advocate (in the Funding order, a 'Substitute Advocate' – SA) is to conduct any hearing within the case, the client must be informed. As will be made clear from our submissions below, the CBA is of the view that whereas only the IA or an SA of the equivalent grade should conduct the case at trial, and should deal with any sentence hearing, there are circumstances in which an SA of a lower grade could conduct certain hearings.
45. Whilst we reject outright the idea of POAs as such, the CBA accepts that, if, contrary to our submissions, the QASA scheme is to be implemented via a regulatory framework, there should be a framework within the scheme for permitting an advocate, on application to the court, to accept instructions (and therefore to become the IA) in a case one step up from his/her level of accreditation. This we call 'acting up'. The circumstances in which such applications might be made would need to be carefully controlled, and robustly policed by the court so as to ensure that the accused's right to competent representation is assured, and to prevent abuse.
46. Leaving to one side the issue of POAs and acting up, the CBA welcomes the acknowledgement by the JAG, in paras. 3.2 et seq, that the principal method of assessment (the JAG says for trial advocates; the CBA says for all advocates) should be by JE. There is, we submit, no substitute for the experience gained by doing real trials 'in combat conditions'. That is not to say that there is no value in participating in mock trials by way of training, organised by Assessment Organisations (AOs) but these cannot be an alternative route to full accreditation at any level in the Crown Court.

Youth Court (YC) work.

Q 4: (para. 3.21)

Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?

47. The grading of Youth Court work presents particular difficulties. Youth Courts try offences which would be, if the accused were an adult, triable only on indictment in the Crown Court. We do not agree with the suggestion in paras. 3.20, 3.21 that all YC work should be allocated to level 1. This would pave the way for vulnerable youngsters, charged with serious crimes, to be represented by advocates who could not represent them were they older and being tried in the Crown Court. We suggest that there be two levels within YC work. Level 2 work would comprise the following:

- i. any offence triable only on indictment in the case of an adult;
- ii. any offence triggering the notification requirements under section 80 of, and Schedule 3 to, the Sexual Offences Act 2003;
- iii. any case in which either the accused or any witness requires the use of an intermediary.

Phased Implementation

Q 5: (para. 3.33)

Do you foresee any practical problems with a phased implementation?

48. As we have already said in Part A, we regard the proposal to implement the scheme in stages as being discriminatory and unlawful. Quite apart from that, we see no purpose in the proposal to implement the scheme in stages. The scheme is not to be 'piloted' in any real sense – there is no provision for any meaningful assessment/revision of implementation in the phase 1 areas before roll out in phases 2 and 3. If, contrary to our submissions that the way forward is an Advocates Panel scheme, and QASA is to proceed within a regulatory framework, then surely the principle that the scheme is designed to protect the public requires that implementation must be across the board.

Allocation of Cases to Levels

Q 6: (para 4.15) & Q 7: (para 4.17)

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

49. We regard these questions, and Q 8, as being inextricably linked and we intend to answer them together. We do not agree that the proposed structure as proposed in paras. 4.4 – 4.33 of CP/4 is adequate to protect the public. The allocation of cases to a particular level is crucial to the scheme, and there are competing considerations which have to be finely balanced. Too much prescription and not enough flexibility, there is a danger of the scheme becoming so unwieldy as to become unworkable. Too much flexibility, and the scheme is so devalued that it becomes open to abuse, offers nothing by way of reassurance and protection to the public, and becomes a fig-leaf of respectability for low standards.

Q 8: (para 4.22)

Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

50. It is one of the core principles we have outlined above, that cases must be allocated to levels by reference to clearly defined criteria. The proposals in CP/4 fall some way short of that mark, and are among the principal reasons why the CBA says that this is a bad scheme. The proposal that cases be allocated to a level by reference to 'guidance', but ultimately by agreement between the litigator and the advocate, subject to the court having an 'informal' oversight role (para. 4.12) makes the scheme, we submit, so flexible, and open to abuse by firms which have in-house advocates (IHAs) as to make it utterly worthless as a guarantee of quality standards. This method of allocation is thus wholly unacceptable to the CBA. The basis for allocation to a particular level must be by reference to criteria which are reliable proxies for the seriousness and difficulty of the case, and the consequent responsibility borne by the advocate conducting it. Whilst the offence codes in the CDS Funding Order are a starting point for allocation, we think that other proxies must be woven in to the allocation criteria. We envisage further discussion about this with other stakeholders in the design of the Advocates Panel Scheme we propose, but we offer our suggestions for such other proxies in paragraph 54, below.
51. The CBA recognises the need for a degree of flexibility in the method of allocation, whether it be a regulatory scheme or not. We have already made reference to our proposal that the court be given the power to permit an advocate to become the IA in a case one level above his or her level of accreditation – 'acting up'. But we say that if the scheme is to deliver higher, not lower, standards, the allocation criteria should err on the side of over-classifying, with a discretion vested in the Court to permit acting up, and, further, of its own motion in a particularly complex case (we think that these will be very rare) to move a case up one (or more) levels.
52. Acting up would give the power to the court, on written application, to effectively downgrade a particular case, for a particular defendant, to allow the advocate to become the IA and conduct the case. So, the advocate or litigator instructed for a defendant who is a 'tail-ender' in a multi-handed case, or a defendant in a serious case where the issue is straightforward – e.g. the correctness of a single identification - may make such an application. There would have to be safeguards for the accused to prevent abuse. If the accused certifies that s/he has been advised of his or her right to an advocate of the requisite grade (one other than an in-house advocate employed by his litigator, possibly) and consents to the advocate 'acting up', the judge may, if satisfied, grant the application. We think that the accused should always be present (either actually in the courtroom, or on videolink) at the hearing of such an application, so that the judge can, if he thinks it right to do so, question him or her directly. With the forthcoming abolition of committal proceedings in all either way cases, there will be the opportunity for the judge to exercise real oversight at an early stage (and before the advocate has got too settled into the case, if the judge refuses the application).
53. Erring on the side of allocating cases to the higher of two possible levels, but with a 'top down' discretion to reclassify one level down would, we think, offer sufficient flexibility to avoid the potential problem of advocates not being able to 'cut their teeth' on more serious cases, whilst offering the necessary protection to the public, and according proper and sufficient weight to client choice. Having considered the matter further since publishing our Interim Response, we have concluded that the public interest does require there being a residual discretion in the court to re-classify a case upwards one level (or possibly more than one level) if, in the opinion of the judge, the case has particular complexities not normally encountered in cases of that type. An example would be the 'Operation Spanner' cases, of consensual sado-masochistic assaults, charged under s.47 or s.20 of the Offences against the Person Act 1861, but raising points of human rights law that ended in the Supreme Court. We think that such cases will be rare, but we have concluded that the power should be given to the court in order to protect the accused in such cases.

54. There must be allocation criteria other than simply the nature of the offence with which the accused person is charged. The scheme must, in its structures, acknowledge that what is required of the advocate in any given case is a combination of legal knowledge, wisdom, skill, technique, tactical awareness, and the ability to carry the burden of responsibility that attaches where the stakes for the client are high (whether by reason of, say, the value of a dishonesty offence, or because of the likely sentence for any type of offence). For example, a straightforward s.47 assault trial, where the protagonists are adults of full capacity, where the issue is self-defence or identification, might be properly categorised as a level 2 case, but if the victim is a child, or a vulnerable adult requiring an intermediary, the skills, techniques and experience needed to conduct such a trial might require a grade 4 advocate. Accordingly, we would suggest, for example, that the presence of one or more of the following criteria should automatically (subject to the court's discretion to allow a particular advocate to 'act up' one level) move a case up to level 3 or, in some cases, to level 4:
- i. the need to cross-examine a child witness under (say) 10 years, to make a case level 4, aged 11 – 15, up one level;
 - ii. the need to cross-examine a witness of any age through an intermediary – to level 4;
 - iii. any case in which a life sentence would ordinarily follow on conviction (the 'two-strikes' rule being re-introduced) to level 4;
 - iv. any case in which the particular defendant is charged with a 'lifestyle offence' under s.75, POCA, to be level 3. (We envisage applications to act up being readily granted in this category of case, for example if the accused, charged with a straightforward drug dealing offence, plainly has no assets);
 - v. any offence prosecuted by the Serious Fraud Office, to be level 4;
55. Accurate case allocation is crucial to the effectiveness of the scheme. It may be that other criteria/proxies for complexity can be identified in the discussions we envisage having with other stakeholders before implementation (whether regulatory implementation or an Advocates Panel Scheme is the way forward).

Non-trial Hearings

Q 9: (paras. 4.25, 4.26)

Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

56. We have already stated our opposition to POAs. The allocation of cases to a particular level should mean, we suggest, that only an advocate of that level may become the 'Instructed Advocate' (IA) under a Funding Order. Accordingly whilst the IA remains responsible for the overall conduct of the case, s/he may arrange for ancillary hearings within the case to be conducted by a 'Substitute Advocate' who need not be of the requisite QASA grading. The IA once appointed retains overall responsibility for the conduct of the case. So long as the IA exercises the oversight that the role carries with it, we do not see the necessity to specify the grade of SAs for any particular hearings within the case. Whether the scheme is embedded by regulatory change or by agreement, we consider that the IA's obligations are adequately enforceable by existing disciplinary/ regulatory structures.

Newton Hearings

Q 10: (para 4.27)

Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

57. The CBA's position is that it is the **case** that is graded, not the hearing within the case, and that the QASA scheme operates to specify who may become the IA and assume the responsibilities of that role. Accordingly, we do not agree that Newton Hearings can be aligned with non-trial hearings, and conducted by any advocate with Crown Court rights. Newton Hearings are trials, and, subject to acting up, should be conducted by the IA, or another advocate of the same grade.

Leader/Junior

Q 11 & 12: (para. 4.28)

Q. 11 Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible.

Q.12 Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

58. We repeat the point made above. Where the two-counsel certificate provides for leading and junior counsel, except where the junior is a noter only, and subject to acting up, the junior should be no more than one grade below the leader. Where the leader is a QC, the junior should, subject to acting up, be at least level 3. The days of the 'straw junior' are over. If the certificate is for a full junior, s/he must be of capable of taking over conduct of the case if needed. This is of fundamental importance for the protection of the public.

Changes to complexity – paras. 4.30 and 4.31

59. We believe that the appropriate discretion vested in the Court to move a case up a level in appropriate circumstances is sufficient to protect the public interest.

Client Choice – para. 4.33.

60. We have already dealt with this in our submissions about acting up. We regard it as essential to avoid abuse that the court be satisfied that the client has been advised of his right to choose an advocate other than the in-house advocate employed by his solicitors.

The Accreditation of Silks

Q 13: (paras. 4.34 - 4.40)

Do you have any comments on the proposed modified entry arrangement?

61. For the reasons set out above we take the view that it would be unlawful to include Queen's Counsel in the scheme without primary legislation. In any event, we do not agree that QCs should be regulated as part of the scheme. The proposal that they should be included is new to CP/4. We are of the view that the hallmark of quality that silk represents (and not just since QCA was established) means that there is, as we see it, no need for a duplication of already high quality assurance standards. It is entirely un-recognised that the kite mark of silk, even pre-2006, and the Queens Counsel Appointments (QCA) scheme, is world renowned. The QASA scheme is based upon periodic re-accreditation to practice at various levels, dependent upon the ability to demonstrate, via judicial evaluation, that the advocate is competent. The appointment to Queens Counsel is not about a level of competence; it is an award based on the demonstration of excellence. The inclusion of silks in QASA devalues the award. The CBA is sceptical of the fact that the BSB, having eschewed the inclusion of silks in QASA now seeks to include them, but criminal silks only. It smacks of

regulation for its own sake. The very fact that there are no proposals to include Silks from other practice areas underlines the point.

62. There are in place adequate structures for policing of the QC mark through the QCA system and the CoC. The current appointment system envisages that the awarded QC mark can be removed “for cause shown”. This can be triggered by a judge or a consumer of the QC’s services. This power is entirely sufficient to protect the public, and is indeed a stronger power than exists in most other professions.
63. The scheme is unclear as to the grading of QCs - there is no separate grade for them. It seems that level 4 will include junior advocates acting alone, leading juniors, as well as QCs. The long-established and world-renowned rank of QC is thus reduced to a purely ceremonial honour.

Competences and Regulatory Frameworks

Q 14: (para 4.45)

Do you agree with the proposed approach to the assessment of competence?

64. If the structure is to a regulatory one, it is clearly essential that all advocates, whoever their regulator, are assessed and graded according to common standards, but also, that they adhere to the same high professional standards and ethics, and that effective sanctions exist for non-compliance. We have already referred more than once to the obligation imposed by the bar’s Code of Conduct, paras. 603(a) and (b), 606.1, 608 and 701, not to accept instructions to act, or continue to act, in a case beyond one’s competence. There is no equivalent professional obligation in the SRA’s draft regulations, Annex C2, nor in the ILEX Codes, Annex C3A and B. This is totally unacceptable. All advocates who appear in the courts must be subject to the same professional code, and face the same sanctions for any breach. The public can simply have no confidence in a system that regulates advocates who do the same work, in different ways.

Scope of Review

Q 15: (para 4.48)

Are there any other issues that you would like to see included within the review? Please give reasons for your response.

65. Included in the review should be an assessment of whether the three regulators are responding to complaints and the administration of sanctions in precisely the same way. As has already been pointed out, there can be no confidence in the system unless they are.

Part 5: The Scheme Handbook and Rules

Q 16 & 17: (para 5.4)

Q16 Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

Q17 Is there any additional guidance or information on the Scheme and its application that would be useful?

66. In light of our previous observations we have chosen not to comment on the Scheme Handbook as presently drafted. If the Scheme is to operate in the interests of the public, the Scheme and its rules would have to be re-drafted wholesale to reflect our proposals.

The Scheme Rules and Regulations:

Q 18: (para 5.6)

Do you have any comments on the Scheme Rules?

67. The QASA scheme is designed to exclusively regulate those who advocate in the criminal courts, in consequence there should be no variation in wording of the Scheme Rules and Regulations as between the Regulators. If the Scheme is to operate in the best interests of the public it is essential they understand the standards all advocates should adhere to. If barristers were to start undertaking the work of solicitors we would expect no different approach.

The Definition of Criminal Advocacy

Q 19: (para 5.8)

Do you agree with the proposed definition of “criminal advocacy”? If not, what would you suggest as an alternative and why?

68. The proposed definition should we suggest be as follows:-

“Criminal advocacy” means advocacy in all hearings arising out of a criminal prosecution of whatever nature and by whomsoever brought, including a private individual.”

If the Scheme is to be a quality assurance scheme embedded within a regulatory framework, there is no case for excluding the operation of the Scheme in any area where a criminal prosecution is brought. If it is to be in the public interest it must be all or nothing.

Specialist Practitioners

Q 20: (para 5.13)

Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

69. We agree with the approach to specialist practitioners, subject to addressing the point made above in respect of EU lawyers. Additionally, we suggest the insertion of a requirement that instructions to such a person would have to be with the written consent of the client and leader. In the case of the leader, clear reasons should be given and a copy made available to the client and the Court. Finally, approval of the trial judge should be sought and given for the instruction of such a person.

Part 6: Practicalities of the Operation of the Scheme

Q 21: (para 6.2)

Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

70. In the first place, as pointed out above, the Scheme is not lawful and even if we are wrong about that, if the Scheme is not introduced with the revisions as suggested by the CBA and others there will be insurmountable problems. The bar will not co-operate with a Scheme that is not in the public interest.

Part 7: Equality and Diversity

Q 22 & 23: (para 7.1)

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIAs will be mitigated by the measures outlined?

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

71. In terms of the minutiae of the Scheme we do not see any adverse effects. We deal with the wider equality and diversity issues in our response to Q 24, below.

Q 24: (para 7.1

Are there any other equality issues that you think that the regulators ought to consider?

72. It appears to us that all regulators have ignored the devastating effect that cuts in legal aid have had on equal opportunities and diversity at the independent bar. The number of pupillages now available for some 1700 graduates of law school is less than 400. This is as a direct result of the lack of recognition that the bar is one of the very few professions that supports the training of the next generation without subsidy. The BSB is contributing to this downward spiral by placing ever more demands, financial and otherwise, on the profession as it acquires more regulatory duties.

CONCLUSION

73. The CBA has serious concerns about the scheme as presently formulated, both in terms of its legality and substance, not least because it is a Scheme which pretends to be aimed at ensuring quality of advocacy when in fact its purpose is, we believe, to pave the way for a "One Case One Fee" model for the provision of publicly-funded criminal defence services. Any measure which has as its genuine aim the raising of standards of advocacy is to be welcomed, but this is not such a scheme. The CBA will not lend its endorsement to a scheme which is not lawful and is nothing more than a cloak of respectability for ever-lower standards. That would be a fraud on the public, and the CBA will have no part of it.

Michael Turner QC, Chariman

October 2012

APPENDIX 1 – https://www.barstandardsboard.org.uk/media/1460417/qasa_crf_-_the_criminal_bar_association_appendix_1_.pdf

APPENDIX 2 – https://www.barstandardsboard.org.uk/media/1460421/qasa_crf_-_the_criminal_bar_association_appendix_2_.pdf

The Crown Prosecution Service: Proceeds of Crime Unit

| | |
|---|--|
| Name: | The Proceeds of Crime Unit (POCU) |
| Organization: | Crown Prosecution Service |
| Role: | Specialist Prosecutors and Crown Advocates |
| Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme? | |
| The Proceeds of Crime Unit (POCU) is currently comprised of nineteen solicitors and ten barristers working as Specialist Prosecutors together with their lawyer managers. Of these, seven have been approved to exercise rights of audience under the CPS' own Quality | |

Assurance scheme.

Other members of the Unit have rights of audience by virtue of being barristers and HCA solicitors while others are solicitors intending to develop their careers into the area of advocacy in the future.

The discrete and specialist nature of POCU work means that it is cost effective to have CPS specialist advocates able to cover court work so that unnecessary hearings and misguided appeals are avoided. The civil nature of the work means that cases regularly settle or are considered by judges on the papers.

Furthermore POCU work is not currently a particularly popular specialisation at the self employed bar being predominantly funded by legal aid and subject to a legislative landscape which will make it exclusively so in the future.

The Proceeds of Crime Unit therefore takes the view that its advocates should be exempted from the QASA scheme as 'Specialist Practitioners'. The work that they do is ancillary to the main criminal trial and while civil in nature is conducted both in the criminal and civil courts.

POCU advocates deal with trials of issues but not jury trials. If they are not exempt from the scheme there are likely to be considerable practical difficulties for individual advocates to obtain the requisite number of judicial evaluations within 12 months or attend at an assessment organization.

This is particularly so because assessment is to be done through the medium of jury trials and this will impact unfairly on the advocates, the employer and its business. Advocates will need to be taken away from their specialist work in order to prepare for and undertake the requisite number of jury trials.

POCU's Crown Court work is civil in nature and most of the litigation that POCU advocates conduct revolves around purely civil concepts where success is often measured in the settlement of cases.

This means that specialist advocates in POCU often perform less advocacy than their counterparts in general crime and this is a measure of their success.

Examples of the civil nature of POCU's work are as follows:

1. Restraint Orders – hearsay is permitted under the Civil Evidence Act 1995.
2. Costs in restraint and receivership applications are managed on a civil basis i.e costs follow the event.
3. Declarations as to the ownership of property are made on POCU's application and argued in the Crown Court.
4. Issues that arise in POCU work regularly relate to property law, trusts, corporate law and lifting the corporate veil, insolvency and pensions.
5. POCU advocates regularly intervene in family proceedings in the County Court and High Court.

It is submitted that a longer timeframe within which to achieve the necessary judicial evaluations would not address any of these issues.

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of level 2 advocates?

This is not directly relevant to POCU as POCU work is ancillary and conducted in the Magistrates, Crown and High Courts in the context of Level 4 cases only.

Q3: Are there any practical issues that arise from client notification?

This will not affect POCU advocates. However in self employed practice it is likely to create different classes of advocates and a perception that certain advocates are less able than others on an objective basis. This could reduce work for level 2 advocates in the Crown Court.

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

This does not affect POCU advocates.

Q5: Do you foresee any practical problems with a phased implementation?

This should not affect POCU advocates all of whom are based in London.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

Yes although it should be noted that POCU cases would fall within Level 4.

POCU is part of the CPS Organised Crime Division and as such its work would fall within Level 4.

If POCU advocates are not to be exempted as Specialist Practitioners and fall to be included in the scheme then considerable amendments would need to be made to Level 4 to include POCU's civil work which is now conducted in the Crown Court as well as the High Court.

These hearings are of a much more complex and substantial nature than any of the Level 2 and 3 hearings that advocates registered as non trial advocates under the scheme will perform.

Receivership applications under the Proceeds of Crime Act 2002 are an example of POCU

work in the Crown Court. These proceedings mirror the proceedings in the High Court under the earlier legislation which still applies in older cases and these are in essence civil trials without a jury conducted in the Crown Court.

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

Yes and Yes.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

Not strictly relevant to POCU but in general terms it would enhance the prospects of Level 2 advocates if they were able to conduct hearings in Level 4 cases. Sentencing hearings and PCMHs are the most obvious examples. This reflects previous practices at the bar which enabled junior barristers to gain limited experience in complex cases leaving more senior practitioners available for substantive hearings in those trials.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

It is vital that Specialist advocacy should be clearly defined particularly in the context of POCU work which while civil in nature generally falls within the overarching definition of criminal advocacy set out at paragraph 5.8 of the consultation. This by virtue of the fact that although civil it arises ancillary to CPS prosecutions and from police and HMRC investigations.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

The category of Specialist Practitioner is inadequately defined.

There needs to be consistency in what constitutes criminal advocacy and the fact that criminal offences investigated and prosecuted by other organisations are not included will cause confusion and unfairness to individuals.

Individual advocates and employers need to know with certainty whether or not they will be subject to the scheme.

Q12: Do you have any other comments about the levels guidance, or practical suggestions

as to how it can be improved or clarified?

Not in relation to POCU work.

Q13: Do you have any comments on the proposed modified entry arrangement?

Not in the context of POCU work. However given that the current QC applications system in place since 2010 is formulated on the basis that it is a mark denoting excellence in advocacy it seems otiose to include silks within the QASA system and this could potentially undermine the QC process.

The QASA will also undermine the SRA 'Higher Rights' system which many solicitors have expended time and money obtaining.

Q14: Do you agree with the proposed approach to the assessment of competence?

No as it is not applicable to POCU advocates who do not conduct jury trials.

This approach is acceptable for the purposes of assessing advocates working in general crime.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

More clearly defined definitions of Specialist Practitioners and criminal advocacy.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

Relatively so but it is submitted that the statement of standards and performance indicators being the basis of the whole scheme should be included within the body of the Handbook rather than as an annex. There is no difficulty with the form CAEF appearing as an Annex.

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Q18: Do you have any comments on the Scheme Rules?

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

We agree with the general approach to Specialist Practitioners but submit that more clarity is needed in respect of which areas of practice are to fall within that category.

It is submitted that Proceeds of Crime work is one of the most obvious examples of specialist work in the Crown Court and yet it is not specifically referred to in this category.

POCU work is of a civil nature and is often referred to as a civil regime operating in the Crown Court. The work while complex and substantial does not involve jury trials and as civil work does not therefore fit within the QASA scheme.

Consequently POCU advocates should be exempt from the scheme and this should be clearly set out within it.

However in considering the definition of criminal advocacy it is clear that it does arise out of Police and HMRC investigations and out of CPS prosecutions. This anomaly could be resolved by a clearer definition of the specialist practitioner category.

Furthermore POCU work is highly specialist and ancillary to the criminal trial and outside the CPS there are not many advocates who specialise in it because eventually it will be entirely funded by Legal Aid.

It is submitted that practical difficulties will arise if POCU advocates are not specifically identified as exempt under the scheme as Specialist Practitioners.

These would include the following:

1. POCU advocates do not conduct jury trials. Artificial arrangements would have to be made to prepare them for and provide them with opportunities to undertake jury trials. This would have adverse financial implications for the CPS as those advocates day to day specialist work would have to be abandoned during this process.
2. POCU advocates would be at a personal disadvantage being assessed through jury trials outside their area of expertise and time and money would be wasted in training and study outside the ambit of their day to day work. Furthermore they are likely to appear less competent than their generalist colleagues who conduct Crown Court trials on a day to day basis.
3. Under the scheme as currently conceived POCU advocates would have to register as non trial advocates at Level 2 and would be able to conduct non trial work up to Level 3. This is entirely at odds with the fact that all POCU work is ancillary to Level 4 trials. The consequence of this is that if POCU advocates are not exempt from the QASA scheme then they will not be able to perform advocacy at all.

It is submitted that these difficulties could be overcome by a clear recognition of POCU advocates within the definition of specialist practitioners exempt from the scheme.

The definition of specialists could include a non exhaustive list which could be added to or taken from as required. This would also have the benefit of reassuring specialist

advocates who are anxious to know if their particular specialisation will be exempt from the scheme.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

See points above.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

No

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

No

Q24: Are there any other equality issues that you think that the regulators ought to consider?

No

The Employed Barrister's Committee of the Bar Council



**Response of the Employed Barristers' Committee of the Bar Council to
the Joint Advocacy Group's fourth Consultation Paper
On the Quality Assurance Scheme for Advocates**

Introduction

1. This is the response of the Employed Barristers' Committee ("EBC") to the fourth consultation paper issued by the Joint Advocacy Group on Proposals for a Quality Assurance Scheme for criminal advocates in July 2012.
2. The EBC is one of the Bar Council's main representative Committees and it represents all practising employed barristers. Led by two Co-Chairmen and two Co-Vice-Chairmen, it comprises elected members of the Bar Council as well as barristers who are co-opted to ensure representation from different areas of practice. Its membership is therefore diverse and representative. In particular we represent the Government Legal Service ("GLS"), commerce, finance, industry and Crown Prosecution Service barristers. Some of our members regularly instruct self-employed advocates, and therefore are well placed as clients of advocacy services to include this perspective in our response.
3. One of the EBC functions, as set out in the Terms of Reference, is to consider and advise on the particular implications for the employed bar of any regulatory changes proposed by the BSB. However, given our commitment to the principle of One Bar, we similarly consider the position of the wider practising Bar.

Executive Summary

4. As in the past, we recognise that the impetus is firmly in favour of a quality assurance scheme for criminal advocates. However, we remain concerned that there remains no clear evidence to justify this particular scheme, which will impose a significant regulatory burden on the professions. We repeat the general observations made in our previous consultation responses, and particularly our response to the second consultation in August 2010, as we are of the view that nothing that has occurred since then has addressed the concerns we raised.
5. Against that background, we have sought to address the specific questions asked in this consultation. As a result of the diversity of the employed Bar, including privately and publicly funded work, there will be diversity in the views of its members. We have sought to highlight those areas where there are differences and put forward the range of opinions that exist.
6. Another general point we make is that judicial evaluation creates a real tension with the duty of the advocate to promote his client's case fearlessly. Will the advocate be under a duty to inform the client that he or she is asking to be assessed? We are concerned that, from the point of view of the client, this may lead to the appearance that the advocate is "toeing the line" in order to avoid a negative judicial evaluation. This runs directly contrary to one of the aims of the scheme, which is to increase public confidence in the performance of advocates.
7. Further, in some cases, a fair evaluation will require knowledge that the judge does not and should not have e.g. the nature of the client's instructions.

Question 1: trial opportunities

8. Firstly we would query whether sufficient rigorous research has been done into the numbers of cases which actually proceed to jury trial each year, and in which regions, and whether this will provide sufficient opportunity for advocates at levels 2-4 to obtain the necessary judicial evaluations at the appropriate level. Various initiatives (such as reducing the numbers of trials which are capable of being tried in the Crown Court) and the continuing pressure on costs may well reduce the opportunities for assessment further. The exclusion of Recorders from those able to conduct a judicial evaluation will be a significant factor.
9. Anecdotally, 12 - 18 months appears to be the right period of time to gain the number of assessments save in relation to work by level 4 advocates in cases such as complex fraud, organised crime, murders, etc which may last for several months. This issue might be alleviated if a single long running case might be counted as more than one evaluation. Assessment centres are unlikely to provide an adequate alternative at this level. Further, there have been reservations from those in high profile positions publicly expressing their view that assessment centres will not provide a level playing field for trial assessment, meaning that a two tier system will be perceived.

Question 2: revised proposals for level 2 advocates

10. We have a number of observations about the revised proposals for the accreditation of level 2 advocates:
 - There is an apparent inconsistency between paragraph 3.2e, which suggests that only judicial evaluation will be available at levels 2, 3 and 4, and paragraph 3.3, which suggests that assessment by assessment organisation will be available at level 2.
 - The costs of the revised proposals for the accreditation of level 2 advocates will be substantial, and we refer back to our introductory comments and responses to previous consultations, where we query the evidence base of this scheme, justifying such costs.
 - Paragraph 3.14 of the consultation refers only to non-trial work at levels 2 and 3. If there is to be accreditation of non-trial advocates, we do not understand the logical distinction between levels 2 and 3 on the one hand, and level 4 on the other.
 - We also do not understand why accreditation across the full range of standards (which encompass work only done at trials) is required for non-trial advocates, if they are never going to conduct trial work.
11. Under this question, we also raise two substantial points of concern about the way in which assessment is to be carried out:

- The exclusion of Recorders as judicial evaluators (as mentioned at 3.2e) will substantially reduce the opportunities for assessment, and increase the burden on the full-time judiciary.
- We have, as mentioned above, serious concerns that assessment centres will be viewed as inferior to judicial assessment. This will undermine confidence in the scheme and unfairly disadvantage those advocates who do not have sufficient opportunities to be evaluated by the judiciary. This may be particularly true for those whose practices are such that courtroom advocacy is not a major component of their work, although they are used in this forum because of their extensive expertise in a particular field (such as some regulatory work).

Question 3: client notification

12. The rules as drafted do not specify how or when the notification should be made nor in what form. It would appear to be unnecessary in any event in relation to advocacy services supplied solely to an employer by the employed Bar where this would form part of the recruitment and/or appraisal process. However, it is not clear if this is intended to be the case.
13. A further issue when dealing with clients is when the advocate should inform the client that they are seeking a judicial evaluation of their performance and the impact that may have on the client.

Question 4: level of Youth Court work

14. We are of the view that some Youth Court work is extremely complex, and so would agree that research is required. However, given the current position with rights of audience, we would agree that Level 1 is appropriate pending the outcome of the research. We assume that trials of youths in the Crown Court will fall within the Crown Court levels that are proposed for the rest of the scheme given the fact that this advocacy relates to some of the most complex cases, dealing with vulnerable witnesses and defendants.

Question 5: phased implementation

15. We foresee no practical problems with a phased implementation. However, please see response at paragraph 13 above.

Question 6: process for determining levels

16. We consider that the proposed arrangements will impose additional burdens on the instructing solicitor and advocate, and will involve additional costs, especially in light of the requirements for continuing review and retention of paperwork. As noted in our general response, we do not believe that the evidence base exists to justify these additional burdens in this way, at this time.
17. We believe that the proposed arrangements will be open to abuse by those whom the system particularly wishes to regulate in that it will enable an instructing

solicitor and advocate to set a level lower than justified to enable the particular advocate to conduct the case. We question whether the quality of decision making will be monitored, and how this would be done, given that no provision for spot checks of this nature has been made.

18. Further, we note the proposal that the client will be free to choose to have an advocate of a lower level than suggested. However, it is unclear how the BSB will ensure that the client has made an informed choice, given that the advice will have been given by the instructing solicitor and advocate who stand to benefit. We also note that proposals on client choice are largely irrelevant for many of the employed Bar, especially those employed by the Government.
19. We are concerned that those who are the target of this quality assurance process are those most likely to manipulate the system by incorrect categorisation of the case and the proposals provide nothing to act as a deterrence to this behaviour.
20. We observe that one of the supposed justifications for the quality assurance scheme is that, for a variety of reasons, other advocates/the judiciary cannot be relied upon to report poor quality advocacy to the relevant regulators. Despite this, at paragraph 4.11 it is proposed that the scheme should rely on other advocates/the judiciary to report concerns about case levels. The alternative, to tailor a scheme for judicial assessment, to encourage and require the judiciary to report concerns does not appear to have been considered at any length. This would be a more proportionate and less cumbersome scheme, without the costs that the current proposals will involve.
21. In response to paragraph 4.12, we would question why, if a judge considers that the advocate is asking for the case to be assessed at the wrong level, the judge should not be entitled to assess the advocate at the correct level and, if necessary, fail the advocate?
22. We do consider that the proposals around ancillary hearings present difficulties. For instance, a bail application in a level 4 murder may be very straightforward. We consider that the proposals are unduly restrictive and will unnecessarily restrict the type of advocate available to cover the ancillary hearing where counsel instructed is not available.

Question 7: starting points for the levels

23. With regard to the table of offences, we observe that it reflects the seriousness of the offence and/or sentence outcome, which is not the same thing as the complexity of the case and the advocacy required. We believe that complexity cannot be determined by reference to sentencing considerations, but should depend upon what skills are needed, for example: analysis of expert evidence, cross examination of vulnerable witness, abuse of process issues, difficulty of taking instructions, identification evidence, volume of evidence, role of offender and strength of evidence, etc. Also, the complexity of the case may depend on whether the

advocate is prosecuting or defending or particularly sensitive issues such as PII or the legislation and/or the amount of transactions/funds involved.

24. We also note:

- No mention is made of public order offences other than violent disorder.
- No mention is made of confiscation proceedings
- The use of the phrase “advocate’s firm” applies only to defence solicitors, not prosecution/government bodies. It does not therefore fully recognise and reflect the diverse groups of people affected by the scheme.

Question 8: guidance on case levels

25. We repeat the observation made in response to question 7 that the guidance focuses on the seriousness of the offence, not the complexity of the advocacy.

26. For example, the guidance for a complex robbery suggests that it might be reduced to level 2 when representing a defendant with a peripheral role. However, it may be more complex defending the defendant with the peripheral role than defending the main defendant, because the legal principles are more complex.

Question 9: non-trial hearings

27. We consider that the complexity of a case for trial will often bear no relation to the complexity of non-trial hearings on the same case. Many of the non-trial hearings in level 4 cases will be entirely inappropriate for a level 4 advocate, or even a level 3 advocate. In addition the needs of the prosecution and the defence may be extremely varied in such cases. This will cause considerable confusion and practical issues with availability of advocates.

Question 10: other types of hearing

28. We would observe that a Newton hearing is either a trial or it is not. We repeat our earlier point that it is a question of the skills involved that should be determinative, not the number of witnesses or the offences involved.

29. We also note that the proposals do not address the issue of advocates who cover for trial counsel while the jury is in retirement.

Question 11: other issues around the guidance

30. None

Question 12: other comments about the guidance

31. We question how to resolve the issue of parity between prosecution and defence levels. In light of the points we have already made about complexity not being equated with seriousness, we consider that there may be no appropriate solution to this issue.

Question 13: modified entry for silks

32. We have no comments on these proposals other than to note that even with the modifications, they may well find it difficult to secure sufficient trials for assessment purposes within the proposed time period.

Question 14: assessment of competence

33. We note that the scheme proposes a “tick box” assessment by an assessment manager. We question what qualifications will they have to assess judicial comments? We also question why there should be the possibility of judicial comments if they are not expressly to be taken into account?
34. We consider it wrong in principle that an advocate could be assessed as “not competent” in one of the core skills but still be accredited at the level sought, yet the proposals allow this to happen.
35. We also consider that unless the scheme requires all assessments to go straight to the BSB, there is a real risk that advocates will only submit their best assessments, allowing them to discard assessments where they have failed to be assessed as competent. We understand that there is a duty on advocates to submit all assessments, but how will this be enforced?
36. In addition we query why three assessments should be obtained if only two are required to meet the standard. Either only two should be required or three might be obtained with one disregarded at the choice of the advocate.
37. We consider that the proposed arrangements for the administration of the scheme are substantial, and disproportionate to any identified benefit.

Question 15: the proposed review

38. We repeat that we still consider this scheme to be inappropriate and consider it requires further fundamental review, not just for criminal advocacy but for all other forms. Given that the driving force is the protection of the consumer of legal services, there is a complete lack of consideration of the role of the employed Bar and the unique relation with their employer as a client. It would appear that no account has been taken of the internal staff appraisal processes which take place in that context and, in talking of client notifications etc, a complete lack of appreciation of the role of the prosecution employed advocate.
39. In the absence of detailed costing it is impossible to judge whether this is a framework for effective and efficient quality assurance or a mere tick box scheme to appease others and be seen to be doing something. The money may well be better spent in improving the current reporting procedures and the use of ad hoc assessments to address the perceived (but unproved) failures of the system.

Question 16: the Handbook

40. We do not consider that the Handbook makes the scheme easy to understand. It is long, complex, and contains extensive repetition.

Question 17: additional guidance/information

41. Please see our additional comments below.

Question 18: scheme rules

42. Please see additional comments below.

Question 19: definition of criminal advocacy

43. We are extremely concerned about the proposed definition of criminal advocacy, which provides that the source of work that will determine whether the case falls within or outside the scheme, not whether the proceedings relate to a criminal offence. This will exclude large amounts of work involving the prosecution and defence of criminal offences, for instance, where the prosecution is brought by the Health and Safety Executive or local authorities.
44. The consultation paper sets out its fundamental principle that it is essential that all criminal advocacy is properly assessed. However the definition of same then proceeds to exclude vast swathes of prosecutors and defenders (both qualified and unqualified) and this undermines the principles of the scheme. Our concern is that this could create a two-tier scheme of criminal case, which is wholly undesirable in terms of public perception and which does not properly reflect the impact of all criminal proceedings on those involved.
45. The confusion in the scheme is demonstrated by paragraph 5.7, since the wording suggests that it is the seriousness or complexity of the case which is in issue whereas by virtue of the definition it is the prosecution authority which will determine whether the case is within the scheme or not.
46. We are concerned that, under the current proposals, a highly competent criminal practitioner who has large amounts of experience in dealing with non-CPS/SFO work would have to go through the accreditation process when moving into CPS/SFO work. We can see no justification for this, and would recommend that if this definition is retained, some form of “passporting” arrangement be put in place.

Question 20: specialist practitioners

47. Again, we note that the rules for specialist practitioners confuse the source of the work with whether it is a criminal offence. For instance, referring to the example given at paragraph 5.12, if the main charges relate to financial regulation, it is highly unlikely that the prosecution would be brought by the CPS and so even if it includes fraud matters, it will be outside the scheme by virtue of the proposed definition of criminal advocacy.
48. There is considerable debate at the employed Bar about specialist practitioners. It is variously suggested that certain groups of advocates should be excluded from the

scheme because there are already quality assurance arrangements in place that render the scheme even more disproportionate. For instance, in-house prosecutors are already subject to the CPS quality assurance scheme upon which substantial parts of this scheme are based. Equally, in areas of criminal practice where advocates represent highly sophisticated privately paying clients, competition and the market will ensure that the quality is high.

49. We consider that this debate reinforces our key view which is that there is a lack of an evidence base showing that the scheme is necessary for criminal advocates.

Question 21: practicalities

50. The practical problems for resolution appear to be:

- the mechanism for resolving disputes between advocates and those instructing them on the level of the case
- the substantial administrative burdens the scheme will impose at a time when the aim is to reduce such red tape
- the costs of the scheme and time needed to complete it
- the lack of appeal against a judge's assessment, even where there may be real grounds for believing it to be inaccurate or motivated by improper concerns
- the inability of the judge to know all the circumstances of the advocate's instructions, which may dictate how the advocate presents the case
- the possible refusal of judges to participate in assessments
- the mechanism for factoring judicial comments into the assessment process
- the expected levels of fee for an assessment centre

Questions 21, 22, 23: equality and diversity issues

51. We observe that the more the scheme costs, the more disproportionate its impact will be on the junior Bar.

52. We also observe that the scheme does impose restrictions on work available, and our concern is that, in the absence of evidence to justify this, there will be a disproportionate burden on those members of the employed Bar who do not appear in courts frequently and on those returning to work after periods of absence, e.g. maternity or carer's leave.

Additional comments

53. We have some additional comments on some of the provisions of the proposed handbook:

4.19 –4.20

We consider it wrong that an advocate cannot appeal an individual judicial assessment or at least ask for it to be disregarded where, for example, there is evidence to suggest that the judge was racially biased

4.26

There is no information about how to obtain accreditation as an assessment organisation, nor any information about the likely costs of doing so.

5.8

There is no information about accredited advocacy CPD, which will inevitably incur costs and may be of restricted availability.

5.60

Should a judge submit an ongoing monitoring form, the regulator should be obliged to inform the advocate immediately and disclose to him or her a copy of the form.

5.75

Further definition of “family” is required. Prohibited connections should also address the issue of connections through Circuits.

7.5

There is no provision for block payments of accreditation fees for employed advocates or members of the same chambers or other organisation.

7.58

The proposed grounds of appeal are similar, but not identical to the grounds for judicial review. We consider that the grounds should be wider, and there should be a full right of appeal e.g. on the basis that the original decision was wrong.

7.59

We repeat the observation above that the right of appeal should be wider. There are substantial questions of fairness, and adverse findings may have substantial impact in terms of reputational damage

7.61

We do not agree that there should be a fee for lodging an appeal.

7.63

We consider it essential that the file should be given to the advocate and provision made to enable the advocate to respond to the contents of the file before a final decision is made.

7.68

The advocate should also have the opportunity to see and address any additional material sought by the appeal panel.

7.74

If an advocate is unable to secure sufficient hearings at their own court and they have a regional practice, how will the advocate get this work (especially as they are unable to actively canvass for work)?

Evaluation form

- Will all assessment organisations use the same form?
- Standard 9 should be excluded as it is outside the Judge's knowledge.
- The purpose of the "comments" section is unclear.
- The form is seeking to assess too much at each level. For example at Level 1, it will be very difficult to assess all of the standards of law and practice at this level on the basis of a single case. For instance, issues of disclosure are unlikely to arise but if they do they are likely to be dealt with outside the Judge's view.

Employed Barristers' Committee
October 2012

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The FDA: Crown Prosecution Service Section

| | |
|---|--|
| Name: | Andrew P. Morgan |
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| Role: | Deputy National Convenor FDA CPS Section Chair, FDA CPS Section Professional Issues Sub-Committee |
| <p>Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme?</p> | |
| <p>Looking at the position espoused with the QASA Handbook (QHB) it appears that the requirement will be for there to be 3 Judicial Evaluations (JE) out of the first 5 trials undertaken by the advocate (BSB and SRA scheme B). If this means that from the commencement of the scheme the advocates must have at least three of their first five trials assessed, this may cause bottlenecks at the commencement making it less likely that all advocates will be able to comply with the 12 month scheme and will create increased pressure for judges involved in JE. The scheme as detailed by the QHB does not appear to allow the advocate to consider which are their best cases and select those for JE. The rationale for the requirement for the JE of 3 from the first 5 trials is unclear but it would surely be better for candidates to select trials in which they are best able to demonstrate the required competencies rather than be assessed on essentially random trials.</p> <p>It would be a sensible amendment to allow 12 months with an initial extension for 6 further months rather than the currently proposed 12 +3 and then discussion with the relevant regulator. Three months does not allow for the advocate to take on board any lessons or any improvement made and is a very short period of time. It may also be a sensible modification for the advocate to be able to set their assessment period start date to allow them to gain from any good trial opportunities likely to arise during the period. The restriction of 5 consecutive cases could still apply but the advocate would at least have the opportunity to pick the best first case.</p> | |
| <p>Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?</p> | |
| <p>This section refers to data collected and the survey of solicitors by the SRA. Is it intended that the scheme will apply to all advocates (solicitors and barristers) or just those regulated by the SRA? Clearly this may apply equally to Crown Prosecution Service Crown Advocates who do not conduct trials or do so infrequently so as to mean that JE accreditation is not practicable. It would be helpful to understand just what the re-registration process will entail and whether there would be the necessity for the advocate to pay additional fees should they seek trial advocate accreditation.</p> <p>Other than the questions and observations above there are no further comments on this section.</p> | |
| <p>Q3: Are there any practical issues that arise from client notification?</p> | |

No

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

There are concerns that level 1 is very wide, encompassing everything from traffic offences to multiple defendant youth robbery. Crown Court cases can include (at level two) matters which have the potential to be less complex than some offences before the lower court. The suggestion that those who have been prosecuting and defending before the Magistrates Court for many years are included within a group which also contains Legal Executives, Associate Prosecutors, very junior members of the bar and recently qualified members of the solicitors profession should all occupy this band is somewhat troubling. It is also of concern that at the venue in which at least 80% of cases take place essentially falls outside serious consideration under the QASA scheme.

Within the youth court, as identified by the consultation, there are significant issues about how those who are most vulnerable (be they defendants or victims and witnesses) are dealt with by advocates. There are also issues about the seriousness of the cases which can be heard as compared to the adult Magistrates court. The idea that those who deal with cases here can maintain their status by simply by the completion of CPD hours and not be subject to any further scrutiny seems remiss based on the onerous provisions of level 2.

Whilst Crown Prosecution Service prosecutors are required to undertake a Youth Specialist Course and Magistrates must be youth trained there are no provisions (beyond the professional conduct rules) to ensure that all those dealing with youths at court are all suitably trained. Without the safeguard of quality assured advocacy those who are most vulnerable and least likely to highlight poor advocacy, are left unprotected.

Youth work particularly should be looked at again with regard to its status in light of these concerns. It may be that the 4 levels which underpin the QASA scheme are too narrow and far too focussed on the 20% of cases which take place in the Crown Court. It must be arguable that a scheme which seeks to safeguard users of criminal advocates but places the greatest resources essentially on regulating the self-employed bar and a number of solicitor advocates is unbalanced. The position of the JAG is that, the needs of the 80% of users fall outside any positive regulation, is simply wrong.

The categorisation of Youth Court work at level 1 belies its need to safeguard the vulnerable and the complexity of cases with which it frequently deals.

Q5: Do you foresee any practical problems with a phased implementation?

No

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

It would assist if case determination was subject to a number of defined factors which could be applied in each case to determine case complexity. For practical reasons it may be sensible to have a preliminary case level with the final determination set out at PCMH.

The present scheme sets matters such as possession with intent to supply as level 3 whereas there are examples of the case which could easily fall within level 2 or even 1. The application of offences rather than criteria means that the case level decision is at risk of being arbitrary. It would be better that a scheme is devised that sets the level of the case at PCMH so that as the point when the evidence is disclosed and the defence case statement provided the final decision as to complexity could be made. The judge would also have input and would be able to consider based on the evidence and declared defence whether the case level is appropriate. Thus the presence of factors such as multiple defendants, complex or technical defences, emerging areas of law or cases and evidential complexity should be used to assess the case level rather than the offence.

As an example it is unlikely that any elected shoplifting would exceed level 2 however should the defence outline within their defence case statement that the defence will be planted evidence, malicious witness or bad faith on behalf of the officers involved; the case could easily escalate in complexity to level 3. It seems sensible that such a determination could not properly be made until all the evidence had been disclosed and the defence case statement drafted and served.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

Please see the response to Question 6 as the answer is set out there.

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

Please see the response to Question 6 as the answer is set out there.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

As within the present system there should be no bar to any advocate undertaking preliminary, preparatory or sentencing hearings on any level case provided that they comply with their professional conduct obligations. The conduct of non-trial advocacy has far fewer of the complexities associated with full jury trial work and as such all advocates should be permitted to undertake such matters without restrictions. It is also the case that the impact of poorer advocacy on a defendant or victim at such stages will be unlikely to adversely affect the outcome of any trial and that where more 'junior' advocates undertake these cases for more 'senior' colleagues the case will be subject to further review prior to

trial thus safeguarding the interests of the defendant or victim.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

There is no specific reference to plea and case management hearings (PCMH). The suggestion in the answer to question 9 should equally apply to PCMH hearings regardless of the level of the final trial.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

Clearly details of matters surrounding the nature of assessment centres, the level of judicial involvement where more than one advocate requires assessment in a single trial must be considered and answered ahead of the launch of the scheme. Looking at the present version of this consultation and the QHB there is a large amount of detail and clarification needed for the system to be workable.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

Please see the answer to question 11.

Q13: Do you have any comments on the proposed modified entry arrangement?

No.

Q14: Do you agree with the proposed approach to the assessment of competence?

No. A finding of “competent” or “not competent” is too simplistic. The presence of provisions for a finding of ‘very competent’ (contained within Para 5.81of the QHB Annex B) “Very Competent” means the advocate was:

- a. Marked Competent in standards 1 (“Has demonstrated the appropriate level of knowledge, experience and skill required for the level”) and 5 (“Was professional at all times and sensitive to equality and diversity principles”)
- b. Marked Competent in all three of the core standards: 2 (“Was properly prepared”), 3 (“Presented clear and succinct written and oral submission”), and 4 (“Conducted focused questioning”), and
- c. Not assessed as Not Competent in any standard.

There should be provisions within the assessment of competence to allow for a rating above simply competent where the advocate has significantly exceeded the required

standards for the assessment criteria. This could then be used to track development at a particular level and guide advocates as to when they might consider seeking to advance to the next level of competency.

It should be considered as to whether a candidate subject to judicial evaluation who attains 2 or more JE ratings of 'very competent' should be offered advancement to the level above the one that they are seeking to obtain. It seems perverse that where JE is not met the candidate may have their level reduced but where they excel their competence is not rewarded.

Q15: Are there any other issues that you would like to see included within the review?
Please give reasons for your response.

The impact on employed advocates and those with protected characteristics must form part of the review. It should also not exclude the consideration of complete overhaul should the scheme produce unintended consequences which adversely affect significant numbers of those assessed.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

The QHB is adequate but some of the references to definitions could have benefitted from being included in a glossary or detailed at the head of the document. The details of the justification for the scheme should be made more concise.

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Clearly details of matters surrounding the nature of assessment centres, the level of judicial involvement where more than one advocate requires assessment in a single trial must be considered and answered ahead of the launch of the scheme. Looking at the present version of this consultation and the QHB there is a large amount of detail and clarification needed for the system to be workable.

Q18: Do you have any comments on the Scheme Rules?

There should not be a position where any advocate through not following the provisions to advance to the next level or not complying with the extension of time requirement should be left without at least a level 1 accreditation (Para 5.89 QHB). In reading through the QHB it seemed to suggest that if someone registered at a provisional level and then did not comply with the assessment requirements they should be removed from the scheme. Similarly where an advocate has sought an extension of time but failed to provide the required JE during that time they should be left with a Level 1 accreditation rather than be prevented from undertaking criminal advocacy. It is clearly not proportionate and anyone in either of these positions or where they have failed to re-accredit should be left with without a level 1 status provided they have a valid practising certificate.

The position of the requirement when progression to the next level of accreditation from 2-

3 or 3-4 (Para 5.50) suggests that there is room for a finding of “very competent”. The definition of this is at Para 5.81 and is essentially the lack of a finding of not competent in sections 1-5 and not marked as ‘not competent’ in any Area. The Criminal Advocacy Assessment Form (CAEF) contains no place to make an entry of overall assessment and only offers three options of ‘competent’, ‘not competent’ and ‘unable to assess’. A similar form was long used under the Crown Prosecution Service Advocacy Quality Assurance scheme but it included the ability to make an overall assessment of the performance. It may be considered that not allowing the ability of the judge to give a recommended level may be an omission in the process.

Q19: Do you agree with the proposed definition of ‘criminal advocacy’? If not, what would you suggest as an alternative and why?

Yes but subject to the concerns about specialism set out below in 20.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

There is a real issue about specialist prosecutors especially within the Central Casework Divisions (CCD) of the Crown Prosecution Service. CCD advocates’ work falls within the present definition of ‘criminal advocacy’ but those advocates rarely undertake the trials on which they advise. The work of advocates within such units will naturally fall at the very highest end of the scheme. Those whose work is organised crime or counter terrorism will have considerable expertise and experience in those cases but are extremely unlikely to undertake the trials in such matters. It is likely that such advocates are fully equipped to deal with all non-trial hearings relating to the cases in which they specialise. As such, the suggestion that they will only be accredited at level one due to that lack of attendance at the Crown Court in other matters is unrealistic.

A better position would be a system of specialist accreditation which allows those with recognised specialisms to undertake non-trial advocacy at any level but to be subject to the normal provisions for trial advocacy accreditation. The current provisions for having non-trial accreditation at one level above are insufficient for these advocates to undertake advocacy in the work that they do. It is also unrealistic for specialists to seek accreditation at the level required for their contested trial work. The issue would be how the specialism is defined by the scheme and what safeguards are in place to ensure that advocacy quality in the non-trial matters is maintained.

It should also be noted that not all those accredited at Level 4 (and thus able to deal with cases instructed by the CCD) have the experience or expertise in such specialist cases involving but not limited to, organised crime or terrorism. Under this scheme an expert from CCD would be unable to undertake any advocacy work on their own cases but a level 4 advocate with little experience or expertise in such cases would be considered sufficiently capable. This cannot be the intention of the scheme to exclude experts in such matter from non-trial advocacy on cases falling within their specialism.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

Yes. The absence of Recorders from the JE elements of the scheme and the very high levels of cracked or ineffective trials are likely to significantly impact on the ability of the scheme to run. Latest information from London suggests that 40% of trials are heard in front of Recorders and this is likely to be a similar statistic in other major metropolitan areas. There has been little if any information about the Ministry of Justice training on the scheme and the level of uptake of appropriately qualified judges. At present there is yet to be detailed the oversight of JE to ensure consistency and clarity of the marking scheme. In addition no information has been provided about how the scheme will deal multiple assessments in a single trial. Considering the trial assessment and the requirement to undertake 3 JE in the first 5 trials it is unclear what this means but if taken literally on every circuit there will be at least 2 JE for every trial (allowing for leader and junior cases) in the first weeks of the scheme. It seems likely that judges will quickly tire of the novelty of simultaneously assessing advocates in a single trial especially when they may be seeking differing JE levels. It also overlooks the actual role of the judge to preside over a fair trial not act as examiner on advocacy for the professional bodies.

The requirement for assessment centre places, JE and the costs associated with those are going to have significant impact on the budgets of government departments (the Crown Prosecution Service included) which may lead to issues in the ability of such department to discharge their statutory functions. Given the level of JE required to ensure that all trial advocates are able to retain the levels they now occupy and given the low levels of complaint surrounding criminal advocacy (the Crown Prosecution Service acting essentially as its own regulator through detailed internal discipline and performance policies) the question must be asked as to whether the scheme as envisaged in these documents represents a proportionate response to the risks posed by poor standards of criminal advocacy.

As presently envisaged the scheme will be costly to the individuals and departments involved; will be time consuming for judges; will struggle to discharge the required number of JE within the timescales set under the scheme and is likely to disenfranchise significant numbers of competent and experienced employed advocates. Finally any negative impacts for those affected will be significantly magnified for disabled advocates and others with protected characteristics or non-standard working patterns. Despite the assurances by the Equality Impact Assessments the scheme significantly risks setting back equality and diversity in criminal advocacy by 10 years through the lack of consideration of the various groups presently undertaking criminal advocacy.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

The draft EIA must include the impacts on those with protected characteristics whose advocacy and ability to undertake particularly trial advocacy are significantly impacted upon. Organisations such the Crown Prosecution Service has achieved a diverse workforce with two thirds of those employed being women; around 15% of those employed being declared BME; and with 6% having some form of disability. It would adversely affect those employed by the CPS if the requirements of the scheme significantly reduced their ability to practise. The scheme has the capacity to adversely affect CPS employees by restricting their access to the higher courts through the nature of the assessments undertaken.

It is significant that CPS advocates are the only sector of criminal advocates who have been routinely subjected to advocacy quality assessment (AQA) since 2009 with

substantial numbers being assessed by both internal and external assessment and with quality maintained through external monitoring of the Crown Prosecution Service assessors (over 1000 assessments since the scheme was introduced). The Crown Prosecution Service AQA scheme was designed and implemented long before the requirements of the Act and has been used to continually improve prosecution advocacy provided by the employed and self-employed advocates. Neither the Bar nor the Solicitors profession undertook comparable work and certainly nothing was implemented alongside the Crown Prosecution Service scheme.

It is extremely regrettable that the scheme as presently envisioned does not take account of the differing models of criminal advocacy and requires JE as the sole route to levels 2 and above. It is significant that around two thirds of the criminal advocacy conducted in the Crown Court is undertaken by the self-employed bar and the requirement for JE will naturally favour that sector. It is also significant that those organisations which have been at pains to undertake recruitment which fulfils the requirements of equality and diversity will find it extremely difficult to meet the JE elements for all their employees wishing to retain the levels they are currently competent to undertake.

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

Please see the points made above and the response to the questions as to specialism advocates.

Q24: Are there any other equality issues that you think that the regulators ought to consider?

No.

The Law Society

Fourth consultation paper on the Quality Assurance Scheme for Advocates (Crime)

The Law Society welcomes the opportunity to respond to the latest consultation paper on the Quality Assurance Scheme for Advocates (Crime) (QASA). The Society welcomes the significant improvements which have been made to the scheme and which will ensure that solicitor advocates who are competent to undertake advocacy in the best interests of their clients are likely to be better able to do so. We pay tribute to the willingness to listen that has been shown. However, there remain a number of significant reservations, which have not been addressed in the current consultation.

The Law Society supports measures which will maintain and improve the quality of advocacy. However, any scheme must be proportionate and based on evidence. As we have indicated

before, we have considerable doubts as to whether the evidence base justifies the imposition of a scheme of this sort and we think that the substantial problems of principle and logistics associated with the scheme need to be considered carefully.

There remain a number of substantial concerns. Our fundamental objections have not been allayed and we consider that significant flaws in the scheme remain. Our concerns over the nature and methods of judicial evaluation have not been addressed. Our views were admirably reflected by the speech of Lord Justice Moses²⁴. To add to those concerns, we question whether there will be a sufficient number of cases before the Crown Court and above to enable all of the advocates to be judicially assessed. We are aware of many judges who have their own personal reservations about the process of judicial evaluation and have indicated that they do not wish to participate. That will further exacerbate the shortage of cases in which advocates' performance can be evaluated.

In addition, we still have no definite information as to the likely cost of accreditation under QASA. The process driven nature of the administrative arrangements indicated by the draft Handbook and Guidance suggests that a sizable staff will be necessary to manage the scheme. What those documents do state is that fees will be set at a level necessary to meet the costs of managing the scheme. It is frankly astonishing that regulators can develop a scheme with no consultation on the likely costs or an assessment of how these relate to the benefits that are likely to be achieved, and cannot, within six months of the likely implementation of the scheme indicate what the costs will be.

The effect of QASA will be to annul the historic rights of the majority of solicitors to appear before the Magistrates' Court, as only those who appear regularly will want to be reaccruited after the first five years of the scheme. This is a change of great significance to the profession and which may well have implications for access to justice. In the Society's view it is a question that needs to be the subject of significantly wider consultation and to be considered in the context of ideas about activity-based regulation and the Legal Education and Training Review. We doubt that it is a proportionate response to any problems that exist.

The consultation paper does not deal adequately with the implications for level 1 advocates or the requirements for reaccruitation. This is not acceptable and we urge that the way in which level 1 is to work within the scheme be subject to a separate consultation. The Society has significant concerns about how this will affect the way many competent practitioners work and how relevant it is to their daily work. We will be writing further about this and hope that the SRA will be able to consider this further.

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?

We are concerned that advocates will find it difficult to obtain the requisite number of judicial evaluations to achieve full accreditation within 12 months of registration – two or three evaluations from their first five effective trials. The number of cases coming

²⁴ <http://www.southeastcircuit.org.uk/education/seventh-ebsworth-memorial-lecture-looking-the-other-way-have-judges-abandon>

before the courts has declined in recent years. The Law Society has obtained raw data on case throughput figures for each Crown Court from the Ministry of Justice which we have sought to analyse and would urge the Joint Advocacy Group to undertake its own analysis.

Spreadsheet 1: Trial Cases outstanding [attached] shows how, except for some isolated instances, year on year the number of outstanding trial cases carried forward has declined markedly over 2010-2012. These figures cause concern when applied to a market of some 9000 advocates. The figures of course do not indicate what levels the cases may fall into but it can be seen that the trial case loads going forward for both Southwark Crown Court and the Central Criminal Court (two of the major court centres dealing with serious crime cases) are down 33.1% and 27.4% respectively [NB columns E and F have been added by us]. This means that there is now a high likelihood of there being an insufficient number of Crown Court trial opportunities to accommodate the number of advocates needing to be assessed for accreditation.

The 12-18 month period to obtain judicial evaluations might suit a practice model as pursued by the self employed Bar where practitioners are arranged in sets of chambers which are in effect each supplied by dozens of firms of solicitors with work. Under that model, there is likely to be a greater incidence of cases at levels 3 and 4 than there would be inside a single firm of solicitors. It is commonplace for a firm not to receive a single level 4 case in an 18 month period that would ultimately end up being a trial. The current proposal is therefore possibly anti-competitive in law as its effect discriminates against the practice model used by firms of solicitors. There is a strong danger that the proposal will retard the practices and development of many higher court advocates. In fact it is also the case that with an 'over abundance' of QCs there is presently a scenario where many of them do not get a case for 12-18months. We accept that clearly some form of rule is required. We would suggest the following:

| | | |
|---------|-----------------------|------------------------|
| Level 2 | 12 months [desirable] | 18 months [acceptable] |
| Level 3 | 18 months [desirable] | 24 months [acceptable] |
| Level 4 | 24 months [desirable] | 36 months [acceptable] |

The above suggestion is built on the fact, that whilst level 2 cases may abound, level four cases that go to trial do not abound in terms of the number of advocates seeking to prove they are level 4. The latter will be a bigger problem for the self employed Bar as a very high number of its members will hold themselves out as level 4 at the inception of the scheme.

Given the lack of necessary clarity and unanimity as to the level of a particular case, it maybe thought prudent to allow a greater flexibility in the early part of the scheme.

In addition, a large number of trials crack in the final third, sometimes because of a change of plea, but often because the CPS offer no evidence or accept a lesser plea. Defence advocates have little control over such developments. Spreadsheet 2 [attached] shows the cracked trial rate at each Crown Court. In many court centres it is over 50%.

Against a falling number of trials carried forward from year to year, it should also be noted that evaluation can only be carried out by a Circuit Judge who has undertaken the necessary training. A large number of trials are in fact conducted by Recorders, freeing the Circuit Judges to deal with lengthy trials and case management hearings. Spreadsheet 3 [attached] shows that in 2010 the percentage of trials undertaken by Recorders stood at 22%, in 2011 it was 23% whilst in the first 3months of 2012 [the last

figures available] the figure was 29%. On these figures, anything between a fifth to nearly a third of trials will not count for the purposes of QASA evaluation.

It is notable that in the major Crown Court centres, certainly in London, a significant number of long and level 3 - 4 trials are presided over by experienced Recorders. This will lead to a situation where, on top of the paucity of trial cases, if a candidate does get a case at the right level, and even if it stands up as a trial, it will not count due to the fact of it being presided over by a Recorder.

As a minimum, the Joint Advisory Group should have mapped the number of advocates per circuit to the number of effective trials in that circuit conducted by judges who have not only signed up to judicial assessment but have undergone training for it. Only by undertaking this exercise can a properly extrapolated figure of the number of trials to be used for evaluation by an applicant be arrived at and over what period. Instead, a random number of cases over a randomly chosen period has been arrived at. This is a highly dangerous approach that may one day come to be seen as irrational in law if applicants, unable through no fault of their own to comply with a wholly contrived number of trials to be done over a certain period, start to present themselves in lawsuits against their regulators.

For all of the above reasons, we strongly urge the SRA to reconsider the time limit and to allow a longer period as suggested above for advocates to be assessed or to obtain judicial evaluations. In view of the statistics now available, there need not be a requirement for more than one case to be shown per candidate. The time limit can be revisited as part of the review of the Scheme and reconsidered in the light of the experience of the advocates and the Scheme's administrators in the first round of accreditations.

These trial caseload statistics indicate, moreover, that there should always be an alternative route to judicial assessment as the alternatives can all be calibrated by the regulators so that a regulatory end can be achieved, albeit via assessment centres. Judicial assessment has been thrust forward without any feasibility study having been conducted hitherto. As things stand, it is a pure gamble to go ahead with judicial assessment as the only route to accreditation for trial advocates when it flies in the face of what is statistically achievable.

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

The Law Society is grateful that the SRA has taken on board the results of the survey it undertook into the impact of QASA on solicitor advocates and has listened to the representations from the profession. It would not have been in the public interest to reduce at a stroke the number of solicitor advocates able to undertake non trial advocacy in the Crown Court by half. This will ensure that many very experienced solicitor advocates can continue to practice and provide service to clients. These appear to us to be significantly more proportionate.

In so far as further support is needed to show that objection to so called 'Plea Only Advocates' is wrong and driven by a protectionist agenda one only needs to consider the legal position. Most offences that are tried by the courts are classed as "either way" offences. We set out an example, theft of £1 million, a case that will inevitably end up in the Crown Court for disposal given the amount of money involved and a likely QASA level 3 / 4 case. When a suspect is arrested he is interviewed by the police. At that point the suspect is represented in the police station by a solicitor. The solicitor's

professional responsibility is to advise the suspect about the best course and such advice maybe to admit the offence in interview.

When this suspect is charged, and brought before the Magistrates' Court, there is a mandatory procedure prescribed by statute which is named Plea Before Venue (PBV). Every defendant charged with an either way offence must enter a guilty plea or a not guilty plea or give 'no indication' as to plea in the Magistrates' Court. Again at this procedure, which has been undertaken for years in thousands of cases each week, representation is provided by solicitors, normally level 1 advocates.

Those objecting to Plea Only Advocates completely overlook the above procedure whereby solicitors already advise and act at the point that a guilty plea is entered – in the Magistrates' Court – even for cases destined for the Crown Court. Having entered a guilty plea in the Magistrates' Court and having then been committed to the Crown Court for sentence, it is entirely logical that the lawyer who represented the client at the point of the guilty plea being entered is able to represent that client in the Crown Court when he is sentenced. The objections to Plea Only Advocates are self-serving and also in the process seek to add to the cost of litigation in a wholly unnecessary way.

In conclusion, non-trial advocates have been advising on pleas of guilty, without referral to level 3 / 4 advocates, by way of a statutory scheme for many years without any controversy.

Q3: Are there any practical issues that arise from client notification?

We do not understand what a requirement for client notification has to do with QASA. The proposal appears to be based on a fear by the Bar that solicitors will seek to influence clients to instruct them, rather than a barrister and then seek to influence the client's choice of plea. Aside from the fact that this is insulting to a highly regulated group of professionals, it is irrational.

Solicitors are governed by precisely the same duties to act only where they are competent and to act in the best interests of clients as barristers and, in terms of dealing with clients directly, have significantly stronger duties. In deciding who is the most appropriate advocate, a solicitor will inevitably have in mind the interests of the client, the nature of the case and the likely outcome and the existing Code of Conduct requires them to do so. There is no need for such a requirement any more than it would be appropriate for a barrister to warn a solicitor in writing that there was a significant chance that, owing to court listing procedures, he or she might not be able actually to appear. Moreover, there is no evidence to suggest that, in fact solicitors are acting in a way which requires such notification.

The proposal will intrude into the relationship between the client and the litigator who instructs an advocate. The litigator is at all times under a duty to instruct an advocate of the right level for the case. It is imposing an unnecessary burden on an advocate to have to write to each client setting out what they can and cannot do for them. This proposal in fact is a manoeuvre designed to get the advocate to project the notion that a Plea Only Advocate is somehow a second class advocate.

For the SRA or any regulator to agree to any such notion as detailed rules of notification would be rightly ascribed as regulatory overreach.

Q4: Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?

The Law Society notes that the SRA has listened to representations from practitioners with experience of work in the Youth Court and has decided that to appear in the Youth Court the advocate should not need to be accredited higher than level 1. The Law Society considers this is the correct decision and sees no practical difficulties arising from it. If the nature of the case is more complicated, the overriding obligation not to undertake work outside of an advocate's competence will resolve any difficulties.

99% of all Youth Court matters occur at level 1. On the rare occasion that the Youth Court matter becomes complex, there are provisions for the parties to apply for and for the Court to exercise a power to grant a Certificate for Counsel which then allows for the instruction of a level 2 equivalent. If the matter is even more complex then the case is usually heard in the Crown Court anyway as the lower court declines jurisdiction.

There is therefore no practical problem that arises from starting categorisation of Youth Court work at level 1. That is the level at which it has always been.

Q5: Do you foresee any practical problems with a phased implementation?

We accept that administrative convenience dictates that the implementation of the Scheme will have to be phased. Indeed there is the advantage that any problems encountered in the first phase can be ironed out before subsequent phases but we draw attention to the statistics that are now available and the conclusion from which should lead to a requirement for judicial assessment on only one case.

However, during the implementation stages, significant anomalies will arise in that advocates who have been assessed on one Circuit will find themselves at a significant disadvantage as against those who have not been assessed on another and rules will need to deal with the position of an advocate who normally works within a Circuit due for later implementation appearing on one where the Scheme has already been applied.

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

The proposal that the level of a case should be determined by the instructing party in practice reflects the position at the present. An instructing solicitor will contact a chambers to discuss with the clerk the seriousness of a case and the level of experience which a barrister should have in order to undertake the particular case.

In future an instructing solicitor will be asking chambers to provide them with, for example, a level 3 barrister (if they themselves do not know the levels to which individual barristers are accredited) rather than asking for a barrister by name / reputation. This may lead to debate between the parties as to the level of the case, its complexity or the experience of the barrister offered whatever their accredited level may be. What facility will there be for instructing solicitors to verify for themselves the accreditation level of a barrister offered to them?

The onus will be on the instructing party to be fully informed of the levels to which particular types of case have been allocated under the Scheme.

Q7: Do you agree that the offences/hearings listed in the table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

We welcome the adoption of more generic case levels rather than the detailed case specification adopted in previous iterations of the levels framework. On a point of detail, we consider that complex and/or high value dishonesty should be level 3 rather than level 4.

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

Levels guidance will be necessary at the start of QASA to enable advocates to familiarise themselves with the Levels table and the additional factors that can be taken into account in determining a case level. An advocate's own professional judgment of their experience and capability will be a factor in this process.

It is a matter of some concern that a Scheme which set out to protect the client's best interests by assuring advocacy standards has resulted in a framework which could interfere with the choice of advocate available to a client. A client may have instructed an advocate in the past and may want to employ the same advocate in a subsequent case. If the advocate does not have the requisite accreditation to the Level of that case, that choice is removed from the client.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

The facility for advocates to undertake non-trial hearings in cases one level above their accreditation is dependent on the advocate having demonstrated competence to act at that level. That additional requirement will inevitably reduce the number of advocates able to take advantage of the provision to appear in non-trial hearings. The number of advocates who will be able to take non-trial hearings at level 4 may, therefore, be problematic. Provision may have to be made to allow level 2 advocates to undertake level 4 non-trial hearings such as mentions, plea and case management hearings. The complexity of the case will determine whether a level 2 advocate is able to appear in that situation.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you propose they are dealt with?

For the sake of clarity, it would be helpful to list further examples of the types of non-trial hearings in the guidance.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible.

The Statement of Standards ought to appear in the Handbook: users should not be referred to the Criminal Advocacy Evaluation Form to be issued to the judiciary to find this significant information.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

The section on levels guidance in the draft Handbook is blank, referring readers to the consultation paper. Allocating cases to levels is going to be a difficulty for practitioners, especially at the outset of the Scheme, and more guidance than that provided at paragraphs 4.18 – 4.21 will be necessary. More worked examples like those provided in paragraph 4.22 would be helpful.

Q13: Do you have any comments on the proposed modified entry arrangement for QCs?

It is essential that any scheme for quality assurance of criminal advocacy must encompass all practitioners whatever the length of their experience or their seniority within the professions and that includes silks. We accept that it is appropriate for some provision to be made for QCs who have taken silk recently. Their competency will have been tested rigorously and at considerable expense to themselves. There are also administrative advantages in reducing the number of advocates that need to be assessed at the inception of the Scheme.

The Law Society welcomes the fact that a similar modified entry arrangement will be available for those solicitors who have attained Higher Rights of Audience – a solicitor who became a higher court advocate in 2010 would not need to be re-accredited under QASA until 2015 etc. unless they wished to progress to accreditation at Level 3. That provision is buried in the draft Scheme Handbook and needs to be better advertised.

The Society requests the SRA to consider providing a similar arrangement for members of the Criminal Litigation Accreditation Scheme (CLAS). That Scheme enables both solicitors and FILEX to qualify to apply for inclusion on local duty solicitor rotas under the Legal Services Commission's Criminal Defence Service Duty Solicitor Arrangements. CLAS has two levels of qualification – Police Station and Magistrates' Court. For the latter applicants must submit a portfolio to demonstrate their experience of cases in the Magistrates' Court. The portfolio must contain short notes on 20 cases and detailed summaries of 5 further cases, all of which must have been conducted in the last 12 months. Applicants also have to undertake role play exercises of an interview with a client and of appearances in the Magistrates' Court involving representations and/or submissions on 3 cases. Assessment organisations undertake the assessment of applicants against competence criteria. Members of CLAS are required to devote at least 6 of their annual CPD training to criminal law, litigation and procedure. To reinforce the robust nature of the Scheme the Law Society is in the process of introducing reaccreditation every 5 years for CLAS members.

Membership of the Criminal Litigation Accreditation Scheme ought to passport solicitors and FILEX to Level 1 QASA accreditation. That would remove the need to pay two fees for accreditation under both CLAS and QASA (and remember that legal aid practitioners can ill afford additional expenses), it would ease the administrative burden on the SRA when it comes to instituting QASA at Magistrates' Court level, and it would have the added bonus of applying to two of the three professions covered by QASA.

Q14: Do you agree with the proposed approach to the assessment of competence?

The competence framework and assessment against it are important and need to be available in one place. The footnote on page 21 of the consultation paper directs users to paragraphs in the Handbook which do not appear to be correct and that makes it difficult to comprehend the assessment of competence.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

We agree that the Scheme must be subjected to an early review, with ongoing monitoring to ensure there is suitable data to feed into that review. The precise scope of the review must at this point remain flexible as issues will certainly only arise once the Scheme comes into operation. At this stage the Law Society's priorities would be: whether the Scheme has forced many criminal advocates out of this field of practice; the cost implications of the Scheme for practitioners (there is still no indication of the cost of accreditation to the practitioner); and judicial assessments both in terms of their robustness and of their fairness as between advocates of different professional backgrounds.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

The draft Handbook is reasonably easy to use and would appear to be comprehensive. The specification of requirements applicable to the three professional groups under separate headings is a sensible way of presenting the information. As for the Bar and CILEX, an explanation of the appeals process for solicitor advocates ought to be included at paragraph 8.116 in the Handbook and not just in the SRA Regulations.

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

The FAQ for solicitors ought to be included in the Handbook, as they are for barristers and FILEX, rather than directing users to the SRA website.

Q18: Do you have any comments on the Scheme Rules?

We support the decision to have separate BSB and SRA Rules. There is no reference to any penalty which a solicitor advocate will incur should they practise criminal advocacy without QASA accreditation.

Q19: Do you agree with the proposed definition of "criminal advocacy"? If not, what would you suggest as an alternative and why?

Yes we accept the proposed definition of criminal advocacy provided that arrangements are in place so as not to exclude completely specialist practitioners from criminal proceedings.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

We welcome the fact that the Regulators have listened to representations in relation to the position of specialist practitioners under QASA. We support the proposal that in certain circumstances specialist practitioners should be allowed to undertake criminal advocacy without QASA accreditation. The Regulators must ensure that specialist practitioners are aware of the saving provision and the circumstances in which they will in future be allowed to appear in a criminal court. Clearly this arrangement must be kept under review.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

We have referred above to the problems with judicial assessment requirements and we suspect that these will provide considerable problems, which may be insurmountable. We believe that some form of assessment centre would address the concerns.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIAs will be mitigated by the measures outlined?

The research undertaken by the SRA among solicitor advocates revealed the fundamental problem with QASA as far as equality impact is concerned. It will impact disproportionately on women and BAME practitioners. The revisions to the Scheme adopted this year will go some way to alleviate that problem (particularly access to non trial work in the Crown Court and the allocation of Youth Court work to Level 1) but this underlying issue remains a matter for concern.

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

We remain concerned that QASA is going to impact disproportionately on women and BAME lawyers as the SRA's own research last autumn indicated.

Q24: Are there any other equality issues that you think that the regulators ought to consider?

No not at this stage.

Supporting Documentation

Spreadsheet 1 – http://www.barstandardsboard.org.uk/media/1460425/qasa_crf_-_the_law_society_spreadsheet_1.xlsx

Spreadsheet 2 – http://www.barstandardsboard.org.uk/media/1460429/qasa_crf_-_the_law_society_spreadsheet_2.xlsx

Spreadsheet 3 – http://www.barstandardsboard.org.uk/media/1460433/qasa_crf_-_the_law_society_spreadsheet_3.xlsx

The Legal Services Commission (LSC)



LSC Response to Fourth QASA Consultation Response

1. Introduction

1.1 The Legal Services Commission (LSC) recognises the high quality of service provided by very many publicly funded advocates and the important role that they play in the effective operation of the justice system. It is also important to recognise that the need for a quality assurance scheme is not just about identifying those less conscious of their own abilities.

- 1.2 The LSC believes that the introduction of the Crime Quality Assurance Scheme for Advocates (QASA) will play a vital role in supporting the market and the professions and enabling consumers and procurers to have confidence in the advocacy services they purchase. In the current economic climate, ensuring 'value for money' is paramount.
- 1.3 The legal services market is changing; the acceptance of new and alternative business structures and trends to keep criminal advocacy (including prosecution advocacy) in-house has seen an increase in competition for advocacy services, with less reliance on the self-employed advocate. This will continue to offer benefits to some and create challenges for others, but for all there is the need for a common quality standard to ensure a level playing field.
- 1.4 In February 2010, the LSC published the QAA Discussion Paper which described the LSC's minimum requirements for a final operational criminal quality assurance scheme for advocates, with the ultimate goal being the introduction of a unified quality assurance scheme for all advocates across all areas of law.
- 1.5 Since, the regulators took responsibility for the development of a scheme the LSC has continued to work with the Joint Advocacy Group (JAG), to ensure the development of operational proposals that meet our minimum requirements.
- 1.6 In September 2011 the LSC responded to JAG's consultation on the regulatory changes required to implement QASA. That response focused on the extent to which the translation of the proposed scheme into the regulatory framework met our minimum requirements.
- 1.7 In responding to this fourth and final consultation on QASA, the LSC has again used its published minimum requirements as a starting point for both commenting on the specific consultation questions and raising more general points regarding the proposals.

2. The Legal Services Commission

- 2.1 The LSC is responsible for delivering, through quality service providers, legal aid (publicly funded advice and representation) to people with legal problems in England and Wales.
- 2.2 Legal aid enables people to safeguard their rights and address their problems. Our work is therefore essential to the fair, effective and efficient operation of the civil and criminal justice systems. It is also critical in helping to provide access to justice and fair trials with professional representation.
- 2.3 The LSC commissions the services people need from solicitors, barristers and advice agencies. The skills and commitment of legal aid service providers are essential to helping people resolve their problems.

3. Quality Assurance Scheme for Advocates (QASA)

- 3.1 The Quality Assurance Scheme for Advocates (QAA) project was initiated as a response to a recommendation in Lord Carter's report *Legal Aid: a market based approach to reform*. In June 2007 a joint LSC/ MoJ consultation paper *Creating a Quality Assurance Scheme for Publicly Funded Criminal Defence*

Advocates was published. The analysis of responses to the consultation was published December 2007. Following this publication, a Reference Group, comprising the bodies represented on the Working Group, was established to replace the previous Working Group. This group worked together to develop a quality assurance scheme. Following discussions led by the Legal Services Board (LSB), involving the Approved Regulators, their regulatory arms, the LSC and Crown Prosecution Service (CPS), the LSB took an oversight role in relation to the implementation of a QAA scheme which they propose is led by the regulators. In February 2010, the LSC published the QAA Discussion Paper which described the LSC's minimum requirements for a final operational scheme. These minimum requirements are included, for reference, at Annex A.

- 3.2 In September 2011 the LSC responded to JAG's consultation on the regulatory changes required to implement QASA, reaffirming its commitment to an effective quality assurance scheme but also raising a number of concerns about the structure and the content of the consultation. These concerns arose primarily from the decision to publish three discrete sections for consultation, giving the impression that there were three separate QASA schemes. The LSC noted that this approach could give rise to arguments at a later date about the comparability of apparently separate schemes and the relative quality of advocates carrying out the same work but under different regulatory frameworks (for example, barristers and Higher Courts Advocates).
- 3.3 The LSC was also concerned that the perception of three separate schemes being implemented was also enhanced as a result of the differences in the consultations' approach to terminology and scope. The LSC noted that definitions were not uniform across the three consultations and, although the differences appeared minor and related to choice of wording rather than substance, they served to give the impression that separate schemes were being proposed which, in turn, left a risk that arguments about the relative quality of advocates regulated in different ways would persist (thus impeding the level playing field which would best serve the public interest and ensure that the market – for a purchaser such as the LSC – is as effective as possible). In addition, the scope of the proposals also varied across the separate consultations e.g. the SRA and IPS consultations did not address transitional arrangements, progression and provisional accreditation, all of which were dealt with in detail by the Bar Standards Board in their section of the consultation.

3. Fourth QASA Consultation: Structure and Content

- 4.1 The LSC believes that the approach taken by JAG in the fourth consultation addresses a number of the concerns raised in the LSC's response to the 2011 consultation regarding the perception of separate schemes being implemented and the apparent lack of an overarching framework document.
- 4.2 The LSC recognises that each Regulator is required to implement QASA within their own existing framework of rules but believes the decision to publish the QASA Handbook as part of the consultation process and to create a dedicated

website for the scheme is helpful in positioning and promoting QASA as a unitary scheme applicable to all advocates.

- 4.3 However, the LSC remains concerned that each Regulator has a different and separate appeals process. As stated in the response to the 2011 consultation, the LSC is concerned that appeal mechanisms that go to separate bodies could undermine the consistency of assessments across the scheme as a whole.
- 4.4 The LSC would appreciate reassurance from JAG that a comprehensive and rigorous framework for appeals decision-making will be put in place in order to ensure consistency across the appeal bodies.

4. Areas of Concern

- 5.1 The LSC has provided comments on the consultation questions (see section 6 below) but would like to emphasise a number of key issues at the outset of this response. These are areas of fundamental importance to the effective operation of the scheme and the LSC would wish to see them addressed by the JAG before implementation.

Advocates entering the scheme at Level 1

- 5.2 Solicitors, barristers and legal executives wishing to carry out work at Level 1 (magistrates' court, Youth Court and appeals to the Crown Court) will be passported on to the scheme by virtue of their professional qualifications. If they choose not to progress to Level 2, they will need to be re-accredited within **5 years** of the initial accreditation. The LSC believes that this is too long a period for advocates to be working without formal assessment of their criminal advocacy skills.
- 5.4 Earlier iterations of the scheme (2010) had suggested that all Level 1 advocates with 5+ years PQE must complete assessed CPD (i.e. be re-accredited) **within 2 years of registration** and the LSC believes that this would be an appropriate and proportionate threshold for ensuring Level 1 advocates who have been practising without formal assessment for a considerable period of time are assessed in a timely manner.

Queen's Counsel

- 5.5 The scheme proposes to passport QCs who obtained silk between 2010 and 2013 on to the scheme. The LSC has always understood that the scheme would need to contain an element of passporting but that it must be evidentially justified.
- 5.6 The LSC would appreciate confirmation from JAG regarding the steps that have been taken to ensure that any QCs passported on to the scheme have demonstrated expertise in criminal advocacy at a standard equivalent to Level 4.

Provisional Accreditation and Judicial Evaluation

- 5.7 The scheme proposes that advocates who register at Levels 2, 3, and 4 (and who are not in the passported group of QCs) are given “provisional accreditation” for 12 months.
- 5.8 During the 12 months the advocate must obtain “full accreditation” either via judicial evaluations or assessment organisation (to undertake Level 2 & 3 non-trial work). The ability to self-certify at a particular Level has been a consistent element throughout JAG’s development of the scheme.
- 5.9 LSC is concerned about the ability of advocates to access a sufficient number of trial opportunities in the 12 month accreditation window (approximately 20,000 trials, 8,824 criminal advocates²⁵, and 1.075 advocates per trial²⁶ = 2.44 trial opportunities per advocate, per year²⁷), but acknowledges that this risk may be very slightly mitigated by advocates choosing the assessment centre route. However, the provision of assessment centres will not assist those advocates who wish to carry out trials at Levels 3 and 4.
- 5.10 The LSC as previously stated that a 12-month period is too long for advocates to be working under provisional accreditation and the suggestion in the consultation paper to increase the accreditation window to 18 months would increase the Commission’s concerns with regard to the issue of advocates carrying out work unassessed.

Equalities Issues

- 5.12 The LSC would welcome further detail on both the proposed use of Independent Assessors and the proposals regarding extending time limits (for accreditation and re-accreditation) in appropriate circumstances (e.g. parental leave, illness, acting as primary care giver etc) for between 3 and 12 months to provide assurance that equalities issues have been fully considered and effective plans are in place to mitigate potential adverse impacts.

6. Responses to individual consultation questions

6.1 Trial opportunities

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?

- 6.1.1 LSC data suggests that there are approximately 2.44 Crown Court trials per year, per advocate (20,000 trials, 8,824 advocates and 1.075 advocates per

²⁵ Barristers (self-employed and employed) and Solicitor Advocates

²⁶ MoJ Management Information

trial). The relatively low number of trials per advocate may present practical difficulties for advocates seeking to obtain the requisite number of judicial evaluations in the 12 month period following the award of provisional accreditation.

- 6.1.2 The LSC is concerned that this could lead to the creation of a “market” for trials since instructing solicitors determine which advocates get the work, self employed advocates might be denied trial opportunities as firms seek to ensure that their employed advocates are accredited during the 12 month window.
- 6.1.3 The LSC recognises that JAG has now proposed to allow accreditation via assessment organisation for non-trial advocacy which will mitigate the risks of there being either an insufficient number of trials per advocate or the potential creation of a secondary “market” in trial opportunities.
- 6.1.4 A longer period of time may further mitigate the risks around the number of trials per advocate but would lead to a longer period of time in which advocates could be carrying out work at a level at which they are not fully accredited.
- 6.1.5 In the response to the 2011 QASA consultation the LSC expressed concerns that the proposed time frame for submitting assessments following award of provisional accreditation is too long and was concerned that 12 months is a significant period of time for an advocate to be carrying out work at a level at which they have not been fully accredited and would have reservations about extending the time limit further, for example to 18 months.

6.2 Accreditation of Level 2 advocates

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

- 6.2.2 Under the revised proposals, advocates who do not intend to carry out full trials will need to inform their regulator at the registration phase of implementation. Once the advocate is provisionally registered they will need to be assessed as competent against the level 2 advocacy standards by an approved assessment centre within 12 months. Once they have done this the advocate can apply to their regulator for full accreditation and will be able to undertake non trial work at levels 2 and 3.
- 6.2.3 The LSC supports the proposed amendments for the accreditation of level 2 advocates. One of the LSC’s Minimum Requirements for the scheme is that it must be *proportionate* i.e. the scheme is accessible to different types and level of advocate and the process of accreditation is representative, responsive, and appropriate to the type of entity / individual requiring it. .The proposed amendments will ensure that advocates who currently focus on non-trial Crown Court hearings will not be materially disadvantaged by the accreditation requirements and will be allowed to demonstrate their competence in their actual areas of practice.

6.3 Client notification

Q3: Are there any practical issues that arise from client notification?

6.3.1 In the 2010 QAA discussion paper²⁸, the LSC set out a number of reasons as to why quality assurance is important to empower consumers of legal services (at paragraph 1.9.14 - 1.9.21). These included:

- The need for providers to be able to inform clients of the level at which they can operate before services are provided.
- The provision of a scheme which can provide consumers and procurers with assurance that an advocate at the requisite level and with appropriate competence will be instructed on a case by case basis.

6.3.2 The JAG proposals recognise the need for clients to know how far an advocate can progress their case.

6.4 The level of Youth Court work

Q4: Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?

6.4.1 In the response to the 2011 QASA consultation the LSC noted that Youth Court work had been categorised as Level 2 (lower level Crown Court) and that this was potentially inconsistent with both current practice and the scope of the 2010 Standard Crime Contract.

6.4.2 The LSC requested further discussion on the default entry points for all QASA levels. Youth Court work has now been re-categorised at Level 1 and the LSC believes this is the most appropriate level based on existing practices.

6.5 Phased implementation

Q5: Do you foresee any practical problems with a phased implementation?

6.5.1 The LSC is in favour of a phased implementation process. This approach represents best practice when introducing complex changes affecting a large number of individuals and organisations.

6.5.2 The LSC would welcome reassurance that JAG and the individual regulators have considered all the resourcing requirements and will be in a position to

28

http://www.legalservices.gov.uk/criminal/contracting/quality_assurance_scheme_advocates.asp

support advocates and the judiciary in carrying out the administrative elements of the scheme.

6.6 How the level of the case is determined

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome

- 6.6.1 The LSC agrees that the level of the case should be set by the instructing party at the earliest stage possible and the level should also be kept under review, by both the instructing party and the advocate, throughout the proceedings.
- 6.6.2 The LSC supports that proposal to keep the levels arrangements under review during the implementation process. Further detail would be welcomed with regard to the processes that will be put in place by the Regulators propose to monitor compliance (e.g. the proposed “spot checks” and the requirement that instructing parties and advocates are able to justify the level assigned to the case with reference to the published guidance).

6.7 Level starting points

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

Q8. Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

- 6.7.1 The LSC agrees with the proposed levels set out above as they very closely match the levels which were set out in the 2010 QAA Discussion Paper (at paragraph 3.4 page 48) and present a more flexible approach to the levels than the previous proposals which were based on the Funding Order offence categories.
- 6.7.2 However, the LSC suggests that since this a more fluid approach, the supporting guidance produced for practitioners to enable them to correctly determine the level of any particular case needs to be as clear as possible.
- 6.7.3 The LSC would also suggest adopting a similar approach to that suggested in the 2010 QAA Discussion Paper using detailed case studies for each level, rather than high-level examples, as this will help assist the instructing party in determining the correct level.

6.8 Non trial hearings (p.18)

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

- 6.8.1 The LSC's general principle and preferred position, as stated in the response to the 2011 consultation paper, is that advocates should only work at the level at which they are accredited. However, if it is decided that advocates accredited at a level below Level 4 are to be able to undertake non-trial work at Level 4 the LSC would suggest that the starting point for considering what type of hearings might be appropriate would be those that come within the standard appearance definition in the Funding Order. For example, plea and case management hearings (except the first plea and case management hearing), pre-trial review and bail and other applications.

6.9 Other types of hearing (p. 18)

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

- 6.9.1 The Criminal Defence Service (Funding) Order 2007 (as amended) treats Newton Hearings as trials for payment purposes and the LSC would therefore recommend that, in order to ensure consistency, the QASA guidance and levels table also treat these hearings as trials.

6.10 Client choice (p.19)

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

- 6.10.1 The consultation paper considers that, where more than one advocate is instructed,
"The starting point is that the junior should be no more than one level below the leader. Further, advocates at Levels 1 or 2 should not act as leaders" but goes on to say that "those instructing may use their discretion when appointing a junior and may, in certain circumstances, seek to deviate from the "one below" approach."

6.10.2 In the response to the 2011 consultation the LSC stated that it does not agree that identifying and specifying the relative levels in two counsel cases is a matter to be determined by QASA. Rather, it is a matter for the individual purchaser (or funder) or potentially the judge hearing the case to decide on whether a second advocate is required and, if so, at what level. Those issues will depend on the particular circumstances of the case and should not be prescribed.

6.11 The proposal (p.21)

Q13: Do you have any comments on the proposed modified entry arrangement?

6.11.1 The scheme proposes to passport QCs who obtained silk between 2010 and 2013 on to the scheme. The LSC has always understood that the scheme would need to contain an element of passporting but that it must be evidentially justified.

6.11.2 The LSC would appreciate confirmation from JAG regarding the steps that have been taken to ensure that any QCs passported on to the scheme have demonstrated expertise in criminal advocacy at a standard equivalent to Level 4.

6.12 Competence framework (p.21)

Q14: Do you agree with the proposed approach to the assessment of competence?

6.12.1 Solicitors, barristers and legal executives wishing to carry out work at Level 1 (magistrates' court, Youth Court and appeals to the Crown Court) will be passported on to the scheme by virtue of their professional qualifications. If they choose not to progress to Level 2, they will need to be re-accredited within **5 years** of the initial accreditation.

6.12.2 The LSC believes that this is too long a period for advocates to be working without formal assessment of their criminal advocacy skills.

6.12.3 Earlier iterations of the scheme (2010) had suggested that all Level 1 advocates with 5+ years PQE must complete assessed CPD (i.e. be reaccredited) **within 2 years of registration**. The LSC, in response to this proposal, had recommended that **all Level 1 advocates must be reaccredited within 2 years and this remains the Commission's view.**

6.13 Scope of the review (p.22)

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

6.13.1 The LSC would prefer to see the review address the wider application of the scheme, for example how the scheme can be taken forward and applied to advocates in the family and civil division in the future, ensuring a unified scheme of quality assurance for all advocates across all areas of law.

6.14 The scheme handbook (p.23)

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Q. 18: Do you have any comments on the Scheme Rules?

6.14.1 The LSC recognises that each Regulator is required to implement QASA within their own existing framework of rules but believes the decision to publish the QASA Handbook as part of the consultation process and to create a dedicated website for the scheme is helpful in positioning and promoting QASA as a unitary scheme applicable to all advocates.

6.14.2 However, the LSC remains concerned that each Regulator has a different and separate appeals process. As stated in the response to the 2011 consultation, the LSC is concerned that appeal mechanisms that go to separate bodies could undermine the consistency of assessments across the scheme as a whole.

4.15 The definition of criminal advocacy (p.24)

“Criminal advocacy” means advocacy in all hearings arising out of a police or SFO investigation, prosecuted in the criminal courts by the Crown Prosecution Service or Serious Fraud Office.”

Q19: Do you agree with the proposed definition of ‘criminal advocacy’? If not, what would you suggest as an alternative and why?

6.15.1 The Access to Justice Act 1999 defines the criminal proceedings without reference to the specific prosecuting agency. The LSC is concerned that the QASA definition of “criminal advocacy” may result in legally aided criminal proceedings (e.g. those prosecuted by Trading Standards or the RSPCA) falling outside the scope of the scheme.

6.16 Specialist practitioners (p.25)

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

6.16.1 JAG has proposed to continue allowing specialist practitioners to be exempt from QASA in “hybrid cases” e.g. where the primary offences are not included within the definition of criminal advocacy i.e. financial regulation matters that include an element of fraud or where an advocate has been instructed in a criminal case as a result of the specialism.

6.16.2 In the LSC’s response to the previous consultation paper the LSC was of the opinion that there should not be an exemption for advocates in “hybrid” cases because this may result in non- accredited advocates carrying out publicly funded criminal advocacy and this would be against the LSC’s minimum requirements. The LSC is still of the belief that specialist practitioners should not be exempt from QASA.

Annex A: LSC Minimum Requirements for an Operational Quality Assurance Scheme

| Characteristics of all approved accreditation | Definitions for all accreditation | LSC’s proposed minimum requirement for QAA |
|--|--|--|
| Comprehensive | <ul style="list-style-type: none"> • Schemes inform consumer choice by covering as broad a range of cases as is reasonable within the relevant area of law covered • Accreditation promotes a professional standard by being as relevant and attractive to any private client market (in that area) as to those who access services using public funds | <p><i>A scheme applicable to all advocates funded by legal aid</i></p> <p><i>A scheme covering all criminal advocacy funded by legal aid</i></p> |
| Established and overseen by the professions | <ul style="list-style-type: none"> • Standards are set along with assessable competences, and accreditation is managed, from within the professions • Accreditation schemes safeguard the professions’ reputation for quality service provision | <i>Owned by the professions</i> |
| Promotional | <ul style="list-style-type: none"> • Schemes allow for marketing of services on the basis of objective quality assurance | <i>Simple to apply</i> |

| | | |
|----------------------|--|--|
| | <ul style="list-style-type: none"> • Schemes are useful to consumers in making choices about which service or individual to use | |
| Robust | <ul style="list-style-type: none"> • Standards are set to provide confidence that all those who pass meet a defined quality threshold • Standards are based on objective measures that are consistently and independently assessed • Assessments should be valid and reliable predictors of performance • Assessment accurately identifies the standard, by adopting methods and processes that are entirely credible • All accreditation is subject to regular revalidation or assessment in order to remain current | <p><i>Scheme is competency-based, objectively measurable and complete</i></p> <p><i>Exemption and passporting is evidentially justified</i></p> <p><i>Assessment is independent and consistent</i></p> <p><i>Re-accreditation and/or ongoing accreditation applies for all</i></p> |
| Transparent | <ul style="list-style-type: none"> • Information about the standard(s) required and assessment processes applied are openly available to the professions, consumers and other stakeholders alike • Data is routinely available concerning the consistency of assessment and information required to validate the independent status of assessment • Accreditation records provide a public statement of the status provided for individuals | <p><i>Outcomes are available to consumers</i></p> <p><i>Assessment data is available to the LSC</i></p> |
| Proportionate | <ul style="list-style-type: none"> • Any cost of assessment (and re-accreditation, re-validation or appeal) is proportionate to the work involved | <p><i>Scheme is accessible for different types and levels of advocate</i></p> |

| | | |
|-----------------|--|---|
| | <ul style="list-style-type: none"> • The process of accreditation is representative, responsive and appropriate to the type of entity/individual requiring it • Frequency of, or processes for, re-validation are justified in consumers' interests | |
| Flexible | <ul style="list-style-type: none"> • Standards are regularly monitored and amended to ensure that they reflect changes in law, practice and/or method of delivery and to encourage continuous quality improvement • Schemes enable individuals to develop their professional skills within a quality framework • Assessment is able to factor in a range of ways in which the service might reasonably be delivered competently | <i>Reviews of the scheme are routinely scheduled</i> |
| Focused | <ul style="list-style-type: none"> • Schemes avoid duplication of assurance – where modules are common to different schemes they need only be evidenced once • Schemes allow accurate identification of levels of assurance provided and/or particular specialisms | <p><i>Ultimately covers crime, family and civil advocacy</i></p> <p><i>Delivers competence in context (i.e. operates on levels)</i></p> |
| Fair | <ul style="list-style-type: none"> • Standards, assessment and other processes are designed to be equally accessible to all who might wish to become accredited • All reasonable steps have been taken to minimise differential negative impact on any one group • Wherever possible, steps have been taken to enhance opportunity | <p><i>Follows a full Impact Assessment</i></p> <p><i>Accommodates reasonable differences</i></p> |

| | | |
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| | to encourage greater equality and diversity | |
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The Legal Services Consumer Panel

QASA: Fourth consultation paper

The Panel has consistently supported the development of a quality assurance scheme for advocates. The benefits for consumers include bolstering confidence in the quality of advocacy, helping them to choose the best advocate for their needs, clarifying what they can expect from their advocate and promoting competition between advocates on quality grounds.

This is the fourth and last consultation paper before the scheme is submitted for approval to the Legal Services Board. As the document states, the fundamentals of the scheme have been settled following previous consultations; the purpose of this exercise is to seek views on a relatively small number of outstanding issues. Therefore, the Panel will not unpick previous decisions, but seeks to make

constructive points on those remaining issues affecting consumers. For the record, we consider that the scheme fundamentals are sound and acknowledge that the Joint Advocacy Group (JAG) has addressed some of the concerns we identified in previous consultations, in particular around the assessment process. We remain concerned about the absence of consumer input in various aspects of the scheme, including in governance, the advocacy standards and assessment of advocates.

The Panel is looking to JAG for a clear public commitment that it will bolster consumer input following its planned review of the scheme, ideally much sooner.

Below we make some brief points on issues in the order they appear in the consultation document:

- Consistency – we share concerns about consistent application of the scheme by each regulator; from the consumer perspective the key risks are that the minimum competency thresholds will be differently interpreted and that consumers cannot compare like with like (this is increasingly an issue as direct access to barristers becomes more common). The scheme review exercise should gather evidence on consistency among regulators.
- Client notification – we agree it is important for clients to be aware of how far their advocate will be able to progress their case so they can decide whether to proceed or choose someone else, although we recognise that the approved regulators' existing rulebooks should cover this eventuality. The Panel would hope that in many cases advocates should have the experience to anticipate when a case is likely to escalate beyond their grade and advise clients they are not competent to act. The emphasis should be on advocates to make a judgement and advise clients accordingly.
- Youth Court work – since Youth Courts involve vulnerable groups it is highly unsatisfactory that JAG has apparently been forced to take a pragmatic decision to allow Level 1 advocates to undertake work that it earlier deemed as requiring an advocate accredited at Level 2. We welcome a commitment by the regulators to undertake research as a matter of priority to identify the risks and implement remedial measures. The regulators should also give this high priority in relation to ongoing monitoring of assessments.

- Client choice – this raises some difficult issues around allowing people to make free choices and protecting clients from themselves. This would have benefited from consumer research to test the legitimacy of the proposal and establish the appropriate safeguards. The Panel has commissioned some qualitative research on the broad theme of risk and regulation which should provide some useful insight, although this will not be available until the start of 2013. For now, on balance the Panel supports giving clients the limited option of choosing an advocate accredited one grade below their case level. We are concerned this could be abused, for example by advocates making misleading claims, but we agree that the proposed information and consent controls should help to mitigate the risks. Implementation of this policy should be monitored closely by the regulators.
- Accreditation of silks – the Panel wishes to signal its strong support for the inclusion of silks within QASA and the re-accreditation requirement. Silks are just as vulnerable to deterioration in performance over time as other advocates and should be regularly assessed. The fact they undertake high complexity work only strengthens this argument.
- Scope of the review – the overarching focus of the review should be the impact of QASA on standards of advocacy. However, JAG can only provide an incomplete answer to this central question since the scheme does not involve input from clients, witnesses, victims or other court users as part of the process for assessing advocates. Finding the right mechanism to obtain this unique lay perspective should be a key priority for the review. The review should also consider (if it is not overtaken by events) how QASA can be adapted to cover additional areas of law.
- Finally, we note the absence of user input in the governance of QASA; neither JAG nor the Advisory Group has user representation. This is a key omission and goes against the general positive trend seen in other areas of regulation. Users in their various forms are intended beneficiaries of QASA and have a uniquely valuable contribution to make. We consider user representation is vital to underpin public confidence that QASA is operating in the public interest. This needs to be urgently addressed and certainly before the 2015 review.

The London Criminal Courts Solicitors Association (LCCSA)

LCCSA Response to the 4th QASA Consultation

The London Criminal Courts Solicitors' Association (LCCSA) represents the interests of specialist criminal lawyers in the London area. Founded in 1948, it now has almost 700 members including lawyers in private practice, Crown prosecutors, freelance advocates and many honorary members who are circuit and district judges.

The objectives of the LCCSA are to encourage and maintain the highest standards of advocacy and practice in the criminal courts in and around London, to participate in discussions on developments in the criminal process, to represent and further the interest of the members on any matters which may affect solicitors who practice in the criminal courts and to improve, develop and maintain the education and knowledge of those actively concerned with the criminal courts including those who are in the course of their training.

The LCCSA has decided to only respond to those questions which are pertinent and within the ambit of knowledge and concerns.

Any questions in relation to this response should be referred to: Jonathan Black C/o BSB Solicitors jonathanb@bsblaw.co.uk or Malcolm Duxbury c/o Victor Lissack Roscoe malcolmduxbury@victorlissack.co.uk or Tony Meisels c/o Lewis Nedas Law tmeisels@lewisnedas.co.uk.

OVERVIEW OF LCCSA's RESPONSE TO THE 4th QASA CONSULTATION

While the 4th consultation paper has included some of the constructive criticism advanced in response to the last consultation in November 2011 for which the SRA is to be warmly applauded, the LCCSA nonetheless retains strong reservations over some aspects of the proposed scheme.

The LCCSA accepts in principle the concept of quality assurance in the delivery of criminal advocacy. We remain unconvinced though of the necessity of such a scheme in view of the lack of hard evidence to suggest there are significant deficiencies in the standards of criminal advocacy. Any deficiencies which may exist are amply addressed by reference to the Codes of Practice for each branch of the profession.

Our view is that the overall scheme remains 'bar centric' particularly with regard to judicial evaluation (JE) being the only avenue available to obtain accreditation as a trial advocate. Anecdotal evidence indicates many in the judiciary also have reservations and as yet are not inclined to participate in judicial evaluation.

A key impact of QASA will be the accreditation of all solicitors practicing in the magistrates' courts thereby removing a basic entitlement which is currently enjoyed by all those entering the profession. Cost is another concern at a time when most criminal practices and practitioners are struggling to survive. Very little information has been provided as to the cost of accreditation which we are concerned may be prohibitive.

Below we have answered those questions on which we wish to express a view.

Q1:-

Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?

There are insurmountable practical difficulties with the current proposal. As evidenced by the MoJ response to a recent FoI request, there has been a significant downturn in Crown court trials since 2010.

Anecdotal evidence suggests that if anything this downturn has continued through 2012 and shows no sign of being reversed. Among the many reasons for this is the change in funding for all either way cases where the magistrates court accepts jurisdiction which has resulted in fewer defendants electing crown court trials. This particularly restricts opportunities to conduct trials at level 2.

In our view the position in London is exacerbated by the number of advocates based within the capital who will be seeking accreditation. Opportunities for judicial evaluation are further restricted by the use of Recorders especially in level 2 and 3 cases.

Furthermore, for a host of reasons including lack of disclosure by the Crown, many trials are not effective and crack or are adjourned.

All these factors combined render the current proposals unworkable and we invite JAG to extend the timetable for JE. We have seen the proposals in the response of the Law Society to this consultation and endorse their recommendations.

Q2:-

Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

The LCCSA welcomes the decision to allow advocates whether they be solicitors or barristers to continue to undertake advocacy in the crown court without achieving accreditation as trial advocates. We strongly believe such advocates are, subject to assessment, as qualified as trial advocates to represent defendants at non-trial hearings. Often they will have had conduct of the matter from the outset and/or have an ongoing relationship with the client which engenders confidence in the advocate. On other occasions they have full knowledge of the case and are ideally placed to step in when the instructed advocate is unavailable for say a mention where there has been non-disclosure by the Crown.

The notion advanced by the CBA that only a trial advocate can properly advise on plea is ridiculous and ignores the very important and careful decisions made on plea at the magistrates' court often by advocates who will not be accredited beyond level 1. Furthermore, it seems to suggest that any such advice requires the safety net of further scrutiny from the bar.

Q3:-

Are there any practical issues that arise from client notification?

Our view is that client notification will only lead to confusion and may result in clients insisting on an advocate at a higher level than necessary. It is incumbent on all litigators to instruct an advocate at an appropriate level and not to do so is a breach of the litigators professional duty. The notification scheme is onerous and unnecessary.

Q4:-

Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?

The proposal to restore youth court work to level 1 is appropriate and sensible. Youth courts will decline jurisdiction in the more serious cases which when they reach the crown court will lead to the instruction of a level 2+ advocate. On those occasions where a matter in the youth court becomes more complex there already exists scope for funding to be extended to permit the instruction of counsel or level 2 equivalent.

Q5:-

Do you foresee any practical problems with a phased implementation?

Phased implementation is in our view necessary for administrative reasons.

Q6:-

Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

The proposal that the instructing party determines the level of case and hence advocate reflects the current position. Furthermore the litigator is under a professional obligation to ensure that the level of the case and hence advocate is pitched correctly.

We hope information on the levels achieved by members of the bar is made available to litigators. The LCCSA though opposes the proposal to allow judges to submit adverse assessments on an advocate to that person's regulator. However if it is felt that an outlet is required then the avenue for feedback should be to the advocates firm or chambers.

Q7:-

Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

The generic case levels suggested appear reasonable.

Q8:-

Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

Levels guidance may assist in determining the correct level for each case. There must though be a degree of discretion available to the instructing party in choosing an advocate subject to the proper exercise of the party's professional judgment. There will also be occasions when client choice must be considered particularly as QASA has been put forward as a client focused initiative.

Q9:-

Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

We do foresee practical problems with this proposal as there are likely to be an insufficient pool of level 3 and 4 accredited advocates able and willing to undertake routine hearings in level 4 cases. This may particularly apply to mentions to deal with disclosure issues where a non trial advocate who has conduct of the case will be in the best position to deal with the issues which arise at the hearing.

Permitting level 2 advocates to step up to cover non-trial level 4 hearings will help them obtain important experience of proceedings at a higher level. There are also occasions when cases have been overcharged by the Crown and should not even be at level 4.

Q13:-

Do you have any comments on the proposed modified entry arrangement?

Although the Law Society has now delayed the introduction of the new arrangements for the CLAS until next year, we remain concerned at the duplication of accreditation schemes. The LCCSA does not support the need for members of CLAS to be accredited at level 1. There is also financial burden on firms and individuals who are already struggling in what is a difficult climate for criminal litigation.

Q14:-

Do you agree with the proposed approach to the assessment of competence?

We endorse the comments made by the Law Society in response to this question.

Q15:-

Are there any other issues that you would like to see included within the review? Please give reasons for your response.

The focus of the review must in our opinion be the impact QASA has on clients and practitioners.

Q19:-

Do you agree with the proposed definition of "criminal advocacy"? If not, what would you suggest as an alternative and why?

The proposed definition appears to remove some very complex and potentially serious criminal proceedings from the QASA scheme. This includes for instance prosecutions brought by the Department for Business, Innovation and Skills, DEFRA, local authorities and the Health and Safety Executive. We are surprised that many such cases will fall outside the ambit of QASA even if the defence is funded by the state.

Q20:-

Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

Our view is that it will not be unreasonable for specialist advocates to be at least level 1 accredited which only requires they undertake appropriate CPD courses.

Q22:-

Do you have any comments on whether the potential adverse equality impacts identified in the draft EIAs will be mitigated by the measures outlined?

The LCCSA endorses the Law Society's concerns that QASA will have a disproportionate impact on women and BME lawyers. Women advocates are far more likely to only work part time which further reduces their opportunities to achieve and retain QASA accreditation.

The North Eastern Circuit

Question 1 - Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?

There may be considerable difficulties, for a number of reasons, in advocates being able to perform sufficient cases within a twelve-month period. By way of example, there may be those who are involved in a small number of longer cases or defendants in potentially long trials may plead guilty. There will inevitably be those who become ill or indisposed for a time during the assessment period and all this has to be considered against the background of a reduction in the number of instructions received by the Bar generally.

Accordingly, the Circuit considers that the period of assessment should be increased to one of 18 months. However, even with that period, it is considered that there should

be considerable flexibility and that the period should be extendable on good cause shown. Whilst there should be a degree of rigour in determining whether a sufficient reason for extension has been advanced, there should be a general presumption that, if an advocate advances an explanation, unless there are overwhelming grounds to rule otherwise, the extension sought should be granted.

Question 2 - Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

The North-Eastern Circuit agrees with the response of the Bar Council (BC) and the Criminal Bar Association (CBA) to this question.

It is vital that there be one scheme for all advocates and that the standards of assessment are both rigorous and evenly applied.

The concept of the plea only advocate is, for the reasons advanced in the responses referred to, not in the public interest. This Circuit would go further and suggest that the idea is antithetical to the principles underlying the introduction of the scheme.

The research conducted by the SRA has not been appended to the consultation paper. There has been no opportunity for any other interested party to consider the validity of the research carried out. If research has been a factor in the promulgation of this proposal, it should have been published so that a critical review of its legitimacy could have been undertaken. The fact that a significant element of the scheme has been inserted upon the basis of unverifiable research causes the Circuit significant disquiet.

Question 3 - Are there any practical issues that arise from client notification?

All the consultation says is that there is a commitment by each regulator to have in place “clear regulatory arrangements” that permit the client to be aware of how far their advocate will be able to progress their case. It goes on to say that data will be gathered on the effectiveness of these arrangements to inform the full scheme review in July 2015.

Without knowing what the regulatory arrangements are, it is impossible to say whether they will be effective in achieving their goal. It is further impossible for the North Eastern Circuit to understand how a scheme can have reached the 4th and final consultation without the full regulatory arrangements having been announced so that all affected parties can comment upon their effectiveness in a clear and transparent manner.

This Circuit cannot understand how barristers can be expected to give their unqualified assent to a scheme in which such an important aspect has been left in this inchoate state.

We consider that this is a critically important aspect of the scheme since the precise

explanation afforded to lay clients about how their case is to be progressed and the level of qualification of the advocate will, in large part, determine whether the lay client will wish to have the advice of an advocate who is capable of conducting their trial at this stage or whether they will be content to have the advice of an advocate who does not have such an authorisation.

Importantly, the discussions concerning this aspect between the solicitor and client will be in private and difficult to police. Further, all the evidence suggests that criminal lay clients comprise a disproportionate number of those with low scholastic achievement and poor abilities to read and write. Peer reviewed research has also demonstrated that a disproportionate number have poor thinking skills. They are also likely to be in a highly vulnerable position at the time at which these decisions have to be made.

Given that there are significant financial inducements under the current system of payments for the solicitor to continue to conduct the case, there are clear risks that the choice available to the lay client will be insufficiently explained or glossed over.

In our view, all this militates in favour of a transparent and rigorous method by which client notification should be regulated.

To repeat, without any idea whatever of the regulatory arrangements, it is impossible to answer the apparently simple question posed. This is, for the reasons we have set out, the BC and the CBA have set out also, a highly sensitive and crucial area of the scheme.

It simply cannot be in the public interest to launch a scheme, which will have such a radical effect upon the manner in which criminal legal services are offered, without this aspect having been fully worked out, discussed and modified.

Question 4 - Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?

This Circuit agrees with the difficulties and complexities of attempting to fit the work of the Youth Court, so varied in its nature, into a scheme of quality assurance.

We disagree profoundly with the proposition that all work in this forum should be allocated to level 1 advocates. That cannot be in the public interest because the Youth Court has power to deal with very serious crimes.

The response, which initially suggested that an allocation of level 2 as a starting point, was apparently altered because of research that suggested that a substantial number of advocates would be prevented from appearing in the Youth Court if that starting level were adopted.

This Circuit is surprised and disappointed to note the concession mooted in the light of this information. The "research", the contents of which have not been published, so far

as this Circuit is aware, leads us to only one conclusion: that sectional interests have been placed above the public interest in coming to the conclusion that Level 1 advocates will be able to have untrammelled access to all cases in the Youth Court.

We note the proposals made by the BC and the CBA in their responses to this question. For our part, we propose that the BC suggestion be adopted. It must be right that, if advocates are currently conducting the more serious trials in the Youth Court, they should easily be able to satisfy the requirements of Level 2 grading. If they cannot, they should not be conducting such trials.

An aspect which has not received any consideration is who is to perform the assessments in the Youth Court. There will inevitably be advocates who appear almost exclusively before lay benches who will not be trained to perform advocacy assessments and who have neither the skill or legal knowledge necessary to accomplish the task.

DJs should be trained for this task and, if necessary, be required to sit in cases where assessments are being sought.

This will not be easily arranged but that is not the fault of the Bar. However inconvenient to the administration of these courts this is, strong measures will be required to ensure fairness and the availability of rigorous assessment in this forum.

Question 5 - Do you foresee any practical problems with a phased implementation?

Insofar as phased introduction is lawful, the dates upon which the scheme is to be phased in are in our view, entirely impractical when major aspects of the scheme have not yet been published, consulted upon or considered in the light of the consultation.

Further, when it comes to the practical aspects of how the scheme is to operate, given the proposed timetable, there is no opportunity for anyone to learn lessons or correct problems before, in effect, the scheme is implemented nationwide.

This Circuit wholeheartedly believes that there should have been a pilot operation of this scheme so as to iron out the inevitable difficulties that will arise in its implementation.

The scheme has been rushed into existence without an opportunity for full and mature reflection.

It marks a huge change in the way in which legal services may be offered and the public interest is engaged at every level of this scheme.

This Circuit considers it highly regrettable that no attempt appears to have been made to publish the "research" relied upon to support some of the most contentious and difficult areas of this scheme nor have the details of the scheme, in important areas,

been published either fully or at all.

This Circuit does not understand how the public interest is guarded by a rush to implement this scheme and before the Bar has been informed about how important safeguards will operate.

Question 6 - Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

This Circuit agrees with the BC and the CBA as to the critical status of this task in the scheme overall. A proper resolution of how fairly to allocate cases to appropriate levels is fundamental to the efficient working of the scheme and is also, together with the notification requirements, an area in which abuse of the system whether deliberately for financial gain or negligently because of the pressure of time or simple ignorance, is most likely. Such abuse would render the system hopelessly ineffective.

This Circuit completely rejects the proposition that the instructing solicitor and advocate should set the level of the case. Indeed, the naivety of such a proposal has caused great concern about the rigour of the system. The ability of an in-house advocate and a solicitor artificially allocating an inappropriate grade to the case and the reasons why such temptations would be difficult to resist should have been manifest to each of the regulators acting in the public interest.

It is our view that the scheme as proposed is deficient in dealing with the many difficulties applicable to this task. It is one of the areas of the scheme, which most needs further detailed work so as to incorporate an appropriate degree of flexibility whilst retaining the rigour of the scheme.

Whilst, as the CBA acknowledges, there remains much work to be done so as to produce an effective scheme, this Circuit inclines to support their proposals as to how the scheme should be operated initially.

We further recognise the lacunae in the scheme as proposed and identified in the BC response. We, too, consider that the public interest is not served by the proposals as drafted and that the sanctions for inappropriate case grading are simply inadequate to deal with abuses of the scheme. We are further sceptical of the wish of the judiciary to become involved in disputes about how cases should be allocated, particularly if the scheme remains as it is and places responsibility for allocation on the shoulders of the instructing solicitor and instructed advocate.

This is a further area which, we consider, indicates the need for further mature reflection rather than the imposition of the scheme upon the legal profession in its current state. Given the centrality of this part of the proposals to meeting the objective of the protection of the public interest, it is inappropriate to implement the scheme as it stands.

Question 7 - Do you agree that the offences/hearings listed in the above table have been allocated

to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

This Circuit agrees with the CBA response in relation to this question. In addition, the BC response highlights areas in which further classification is required or in respect of which a review is necessary.

Question 8 - Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

As to the technicalities of allocation, we consider that the table provided in the consultation document is far too simplistic to be of any significant value.

This circuit considers that the CBA response has much to commend it and we would support its adoption. As they say, the real dilemma here is to ensure that the system is sufficiently rigorous to achieve its public interest purpose without encumbering the scheme with so much technicality that it is unworkable.

This is an area in which a relatively detailed framework must be provided at the beginning. However, the Circuit recognises that it will only be experience that a true analysis will be possible about how allocation works in practice.

We repeat the observation that the short period available for this consultation, spanning as it has, a period when many members of the Bar are unavailable, has made it very difficult to provide a fully reasoned response to what is, on any view, one of the fundamental bases upon which the system will succeed or fail.

We also suggest that significant further work on this aspect of the scheme involving the interested parties may well have produced a measure of agreement, which could have been reflected in a much more coherent and helpful document than the table.

We would urge that such discussions take place.

Question 9 - Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

We agree with the proposals made by the BC and the CBA on this question. The instructed advocate must retain control of the case overall. There is such a wide variety of non-trial hearings varying so much in their complexity and purpose that no useful regulatory aspiration would be achieved by an over prescriptive requirement in relation to such hearings.

Question 10 - Are there any other types of hearings that you think should be specifically

addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

Newton hearings are an obvious area in which substantial differences in sentence are likely to result depending upon the outcome of, what is, to all purposes, a trial albeit of the issue under dispute. Indeed, by definition, such hearings only occur when it has already been determined that the sentence to be imposed is likely to depend upon the resolution of the disputed issue.

It is very frequently the case that there is a need to cross-examine witnesses in the course of these hearings and significant judgements need to be made about tactics and the admissibility of evidence.

For all those reasons, it is vital that, insofar as plea only advocates exist under the scheme, they should not be permitted to conduct these hearings.

They must, if the public interest is to be served, be dealt with only by advocates who hold a trial qualification at the level of the case in question.

Question 11 - Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible.

We agree with the CBA point in relation to leaders and juniors and the BC response about the need for policing of the “acting up” provisions.

Question 12 - Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

It is important to recognise that these provisions will apply to defence and prosecution advocates. The public interest is not served by hearings being conducted by advocates for the Crown who are simply not competent to deal with the case in which they are appearing.

Experience suggests that Crown advocates of insufficient experience or ability have a seriously damaging effect upon the public interest. In particular, they can waste substantial public funds by taking obstinate and unrealistic positions in relation to the acceptance of pleas. By contrast, they can accept ludicrously unrealistic bases of plea which may be approved by the court which, at that point, is often highly reliant upon the view of the Crown advocate who should be much more familiar with the case than the judge.

Further, their ability to understand the admissibility of evidence is vital to the task of efficient prosecution.

In addition, it is manifestly in the public interest to have serious crime prosecuted only by those with the required competence and experience.

Much of the response to the consultation has focussed on the position of the defence.

However, there are very real reasons, different from those applicable to the defence side, why there may be reasons for the prosecution advocates to seek to abuse the system of allocation. The CPS is under very significant financial restraint and it is not unknown for them to act in the interests of saving costs rather than ensuring that justice is done.

For all these reasons, it is vital that the allocation of grades is properly conducted on the Crown side as much as on the defence side.

It is equally important that assessments are conducted fairly and equitably and that the assessors realise the critical importance of cases being prosecuted to a high standard.

Question 13 - Do you have any comments on the proposed modified entry arrangement?

For the reasons given in the responses of the BC and the CBA to this question, we take the view that QCs should not be included in the scheme.

Question 14 - Do you agree with the proposed approach to the assessment of competence?

This Circuit agrees with the response of the CBA on this point. As we have indicated, it is vital that one standard is applied to all advocates, from whichever profession they come.

The difference between the codes of conduct highlighted in the CBA response is important. It cannot be right to have an obligation, which directly relates to the provision of legal services to the public, imposed upon one branch of the profession without an identical obligation upon the other.

In addition, it is vital that the regulators apply the same standards to the professions otherwise the scheme will utterly fail to achieve its objectives.

Question 15 - Are there any other issues that you would like to see included within the review? Please give reasons for your response.

Not at present.

Question 16 - Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

This Circuit agrees with the BC response on this point. Perhaps the proposed document should be vetted by the plain English campaign since it should be comprehensible to the general public.

Question 17 - Is there any additional guidance or information on the Scheme and its application that would be useful?

No.

Question 18 - Do you have any comments on the Scheme Rules?

Not at this stage

Question 19 - Do you agree with the proposed definition of “criminal advocacy”? If not, what would you suggest as an alternative and why?

Private prosecutions should undoubtedly be included.

Question 20 - Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

Largely we agree. However, there are a number of highly competent senior advocates who conduct a relatively small number of criminal cases. They prove their competence in their principal specialist fields as advocates and by the accumulation of CPD points.

The loss of such expertise would be a retrograde step and would not be in the public interest.

We would favour a relaxation of the period of assessment for such advocates so that they were permitted to conduct the assessments over a period of, say 2 years or be required to perform fewer cases. They would need to be able to satisfy the Regulator at the outset of the scheme that they have had substantial experience of criminal cases over, say the last 10 years as a result of which they would be placed in a separate category with the relaxation of requirements as set out before.

Question 21 - Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised.

We have set out the areas in which we foresee significant practical difficulties in the implementation of the scheme as proposed. In accordance with the fact that this is a consultation, the Circuit will await, with interest, such revisions to the scheme as are made as a result of a genuinely open, transparent and fair consultation.

We also agree with the reservations and concerns of the BC as expressed in their response to the scheme.

Question 22 - Do you have any comments on whether the potential adverse equality impacts identified in the draft EIAs will be mitigated by the measures outlined?

Question 23 - Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

Question 24 - Are there any other equality issues that you think that the regulators ought to consider?

Only the concerns we have expressed in relation to the inability of many criminal

defendants properly to understand their rights under the scheme given their total reliance on the cogency and clarity of the explanation of those rights given to them by those with a vested financial interest in promulgating one course of action.

ALISTAIR MacDONALD QC

LEADER NORTH EASTERN CIRCUIT

The Northern Circuit

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| Name: | Richard Pratt QC |
| Organization: | Northern Circuit |
| Role: | Leader |
| Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme? | |
| It is inevitable that advocates will in certain circumstances will need time to obtain the appropriate judicial evaluation and accreditation. There are practical difficulties but they are counter balanced by the need for fairness particularly to those at the earlier part of their careers. The 12 month period is, we believe a proportionate time period but we would have no strong views were the period to be extended to say 18 months. | |
| Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates? | |
| This question appears to be concerned with arrangements for the accreditation of "Plea Only Advocates". Such an entity of partially qualified advocates only able to deal with cases at a particular stage fundamentally contradicts the very nature of quality assurance and the 'safeguards ' which are proposed (eg notification) serves only to emphasise the point. If it is necessary to impose such safeguards why have POAs in the first place. Our understanding was that our Regulator was wholly against the very concept of POAs and it came as a surprise and disappointment to see that their role is maintained in the revised document. The arguments against POAs are so obvious that they scarcely need to be set out here but the main point is that it is wholly unrealistic to look at the stage a case is reached in isolation . How can an advocate with no experience of conducting a trial advise on the merits of contesting a case, properly assessing a defendant's chances of success (both questions which we will be asked by the lay client in every case). What is harder to discern is the argument in favour of plea only advocates. What do they do to enhance the system and make it better for their clients and the public at large ? | |

Q3: Are there any practical issues that arise from client notification?

It begs the very question : why have POAs in the first place. The purpose of informing a client is presumably to warn him/her that his current level of representation is not what it could be. How is it to be explained to the client that it could be to his advantage to be represented by a part-qualified individual.

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

Youth court work carries with it the need for special skills- serious cases and a sensitivity for the young clients that are represented. We agree with and adopt the proposal in the CBA response as to the criteria for Level 2 work.

Q5: Do you foresee any practical problems with a phased implementation?

No because we envisage that the obvious flaws in the system particularly with POAs will be highlighted in the early stages although we are bound to have fraternal sympathy for our colleagues on the Western and Midland Circuit who would have to bear those difficulties. However it is our understanding that there may even be a distinction within those who are circuit members who practise out of London (and who would not be subject to the regime if our understanding is correct) and those who practise in chambers based in circuit towns or cities who would be.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

We agree with and cannot improve upon the response to this question and Q8 in the response of the CBA

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

See above.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

There is no difficulty with a Level 2 advocate dealing with a Level 4 case at a non-contentious hearing (eg directions) provided that overall control and ownership lies with a Level 4 fully qualified advocate.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

Not that come to mind at present.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

None that come to mind at the moment.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

No

Q13: Do you have any comments on the proposed modified entry arrangement?

We agree with and adopt the response of the CBA insofar as it relates to the status of Queen's Counsel and the uncomfortable positioning of Silks within the Scheme.

Q14: Do you agree with the proposed approach to the assessment of competence?

We agree with the response of the CBA and cannot improve upon it.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

No

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

The section with regard to QCs does not appear on our reading to explain when those who qualified under the new scheme in 2006 and 2008 are required to be assessed. And given the work of the QC Appointments team the Handbook fails to explain why

further assessment beyond that which has already been vigorously and thoroughly carried out is either necessary or desirable.

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Not that can be identified at this stage

Q18: Do you have any comments on the Scheme Rules?

No

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

We agree with the response of the CBA to this question and adopt it.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

Yes

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

Yes - the scheme should be revised as follows 1. Abolish the notion of POAs 2. Abolish save in extreme circumstances the Assessment Centres 3. Adopt a central code applicable to all advocates 4. Make any decision as to the categorization of a case be subject to judicial scrutiny and intervention. 5. Remove silks from the scheme - if thought necessary and justifiable on available evidence, the QC appointments scheme could be amended to provide for a 5 year MOT on silks but if and only if there is evidence to suggest that the current system is producing either sub-standard silks or silks whose qualities deteriorate significantly with the passage of time.

We are awaiting Counsel's opinion as to the lawfulness of the scheme in the first place and reserve our position until that is obtained, but if as the CBA response suggests the scheme is ultra vires/unlawful then plainly wholesale reconsiderations will apply.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

No

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| Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper? |
| No |
| Q24: Are there any other equality issues that you think that the regulators ought to consider? |
| None that come to mind at the moment. |

The Property Bar Association (PBA)

Property Bar Association response to QASA consultation

I have been instructed by the committee of the Property Bar Association to respond to the current consultation on the Quality Assurance Scheme for Advocates.

The Property Bar Association has had the benefit of considering the response to be submitted by the Chancery Bar Association, and wishes to associate itself with its contents. We trust that you will note our response accordingly.

The Wales and Chester Circuit of the Bar

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| Name: | The Wales and Chester Circuit of the Bar |
| Organization: | The Wales and Chester Circuit |
| Role: | Representing the interests of 650 members. |

This response is provided by the Wales and Chester Circuit of the Bar and has been approved by its elected Committee. It has been prepared by a group of barristers who practise in criminal law, ranging across many different levels of seniority, and it is informed by numerous written and verbal submissions made to the authors. We are determined to ensure that the highest standards of advocacy is preserved and improved in the public interest. We currently undertake vigorous training and further education education at modest cost to the individual.

QASA in Principle:

We reject the proposition that QASA is inevitable.
We adopt the arguments of the CBA and the Western Circuit

We note that the scheme in effect abolishes the profession of barrister. The current qualification, by way of law degree, bar finals, pupillage and continuing professional development has hitherto allowed a barrister to practise in any court, subject to his professional duty not to take a case beyond his experience and expertise. QASA would put an end to this qualification and create a series of sub-professions each narrowly confined to practising in a prescribed selection of cases.

Judges have a duty to report poor performance - which they exercise from time to time. CPD could be “targeted” at any established “need”. A system as extensive and expensive as this proposed QASA (we believe it is presently uncoded) is wholly unnecessary.

A QASA in Practice:

We understand that regulating 3 different professions, which this QASA seeks to achieve, is an extremely difficult exercise.

However, the QASA scheme, as the Western Circuit submit, does not appear to us to be: **straightforward**, **proportionate** or **targeted**; nor does it create **consistent assessment** (because of the variety of routes and assessment models within it); it certainly does not **command the support of the Bar**; and, moreover, it compromises **the public interest** in favour of commercial interests in a number of vital areas (allowing practices which are not in the public interest to become embedded in the new regime, thereby implicitly treating them as acceptable by the regulators). The public interest should be the over arching consideration, not an after thought .

We agree with the Western Circuit that the wholesale rejection of this scheme by the Bar will be a disaster .

We agree that the offer of a review is an expensive waste of resources , only trying to remedy what we submit are the problems with the scheme currently exposed. ‘Review’ and ‘research’ will prove impossible to undertake for the reasons given by the Western Circuit.

We agree with paragraph 1.7 of this Consultation: “...*commercial imperatives are putting pressure on the provision of good quality advocacy. The economic climate, both generally and in terms of legal aid, has created a worry that advocates may accept instructions outside of their competence.*” These pressures have been with us now for several years and the consequences already observed. Any QASA system should achieve a reversal of practices which have developed under these pressures rather than entrench them.

Furthermore, the scheme is disproportionate if its necessity is based in the requirements of the public interest inspired by judicial concerns as to quality (para 1.7). It is disproportionate to impose a prescriptive and heavy-handed scheme on all, when the appropriate method to deal with any such judicial concerns is for the judiciary to express those concerns about an individual’s competence to his or her independent regulatory body.

Ongoing economic pressures on legal businesses (where remuneration has been slashed and continues to be cut) will compound the situation if not challenged now, because vested

interests will continue to oppose the necessary changes to the unacceptable draft proposals identified below. These must be addressed properly before any kind of QASA is introduced. If that means a delay in designing a QASA, so be it. Better to take further time to craft an acceptable QASA which works and fulfils its objectives from the beginning, than to embark on a lame scheme which will not attract the support of the Bar, will damage the interests of the public, and harm relations between the different branches of the legal profession.

We believe that at the heart of many of the problems we have identified with this scheme is that there is no definition of 'advocacy'. Whilst Question 19 of the Consultation asks about a new definition of 'criminal advocacy', it appears to be focussed more on the word 'criminal' rather than the word 'advocacy'. The nearest it gets is its reference to 'advocacy in all hearings'. This is far too narrow. Advocacy involves pleading another's case in a legal forum. It involves both written and oral skills in: advising clients, negotiation, presentation, factual analysis, legal argument, form filling (such as PCMH questionnaires) and finally persuasion. Quality in each of these can only be assured if the advocate has mastered the whole range of them, because otherwise his judgment and advice is restricted by a lack of experience and knowledge of the likely outcomes in the areas he has avoided handling.

Barristers, by definition, have sought to pursue a vocation which specialises in advocacy: pleading another's case in a legal forum. A vocation connotes a calling to serve others. Until relatively recently those studying and training for the Post-Graduate Degree of 'Barrister-at-Law' undertook the 'Bar Vocational Course' (now renamed the 'BPTC'). Students spend much of their year undertaking advocacy exercises and assessments. Then competition for the limited number of pupillage places which are created each year is hard-fought by the very best candidates from the law schools. In pupillage they undertake a practical apprenticeship in advocacy for 12 months, which includes audit and assessment by a large number of expert advocates. Only those who show a clear ability to succeed gain 'tenancies'. CPD requirements for advocates (which will soon be significantly increased) provide additional assurance through ongoing education. Finally, because it is a referral profession, those barristers who do not provide the quality of service demanded by the referring professions (employed barristers/solicitors/legal executives) discover that their work dries up and they do not progress as they had hoped. The legal market, therefore, has always historically contained a very practical in-built quality assurance scheme for advocates in its referral structure.

It is where a referral structure is not used that this historic in-built quality assurance scheme is absent and regulation needs to target it proportionately.

It is not possible to provide a lengthy description of the specialist advocacy training provided for those who decide to be solicitors/legal executives in their initial training at law school, or at the firms who give them training contracts, because (unlike the Bar) specialist advocacy training is not what they are seeking to achieve. Nonetheless, a significant number of solicitors and legal executives do choose to undertake advocacy of various kinds, starting in the lower courts and tribunals, but often undergoing further training and qualifying with 'higher rights' of audience. There is no question about the fact that those solicitors and legal executives who do decide to specialise in providing full advocacy services (rather than dabbling in them from time-to-time) often reach high standards and are also extremely effective.

If there needs to be any new assurance system, its design would have to satisfy the following criteria:

- applies an evidence-based approach to target the areas of greatest concern in the quality of advocacy

- has a 'light touch' and is not overly bureaucratic and time-consuming (the red-tape challenge)
- is based on the best interests of the lay-client
- is one under which targeted advocates are assessed consistently and on the same criteria
- takes into account the totality of the advocate's experience and prior attainment (which are currently completely ignored by the scheme)
- is one under which the only assessors are those best placed to make that judgment – i.e. those in front of whom the advocate pleads his client's case, namely the judges
- does not entrench practices which are undertaken for commercial advantage and/or personal choice if these are not in the public interest, and
- achieves its stated objectives.

Some, though not all, of these are expressed in the draft scheme handbook at Annex B paragraph 2.6.

We invite the Joint Advocacy Group to consider again their latest draft of the QASA scheme with these principles in mind, because we believe it fails on many of these counts.

To summarise our submissions on this draft QASA, it:

- Creates a complex system of registration, assessment and accreditation which would have no significant impact in upholding or improving standards of advocacy as a whole
- Seeks to impose significant compulsory regulatory burdens without any evidence-base for such a wide, untargeted, and comprehensive re-structuring of legal practice in criminal law in England and Wales
- Fails to meet the requisite statutory justifications for intervention by the regulators and is therefore considered to be an unlawful use of their powers
- Far from establishing an Assurance of Quality for the public, would instead provide a fig-leaf for many who could manipulate the rules under this proposed scheme (many of which have been very poorly thought through)
- Would entrench a class of practitioners - 'Plea only Advocates' (whose motivation not to conduct trials is purely financial) who would not have achieved the requisite standards to look after all aspects of their client's interests. They would nevertheless be accepted by the regulators as 'quality assured', notwithstanding this being contrary to the public interest
- Fails to create an adequate mechanism by which to ensure a client in the Crown Court is represented by a sufficiently qualified level of practitioner. The method proposed would enable economically-driven self-certification where a solicitors' firm chooses to use an employed in-house advocate and 'agrees' with him/her that he/she is at the level demanded by the case
- Does not adequately identify the features of a case which would properly categorise its level of complexity, so as to be able to match it with the correct level of advocate
- Seeks to erode yet further the types of case which should attract a QC, so that there would be none for which a junior level 4 would be inadequate
- Undermines the mark of excellence already separately regulated by the Queen's Counsel Appointments organisation, by seeking at the last moment of the sequence of consultations to incorporate QCs into QASA, there being no evidence-base for it. Indeed, demanding a higher number of assessments for QCs than for other advocates; and 'dumbing-down' QCs advocacy standards to the same as level 4 junior advocates

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12

months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme?

Yes there are many difficulties not overcome by an extension to 18 months

(a) for those who work principally through the year undertaking 'regulatory' criminal work defending cases brought by such as the Environment Agency, HMRC or HSE, but also undertake some mainstream criminal advocacy;

(b) for those advocates (generally who will already have been assessed by the CPS at Grade 4) who predominantly conduct substantial / long fraud cases involving a very long period of preparation and then lengthy trials. They are most unlikely to be able to conduct a sufficient number of cases in 12, or even 18, months. A scheme should not be set up which is inevitably going to require reliance upon discretionary extension for a particular category of applicant.

(c) if QCs were to be included within a QASA scheme, the dearth of mainstream criminal cases in which QCs are (/can be) instructed makes 12 months a wholly unrealistic period within which to obtain the requisite number of judicial evaluations. Furthermore there is a proposal that QCs obtain a higher number of judicial evaluations (Annex B: 4.12 & 7.27) which is utterly baffling in a regulatory regime that claims to be targeted and proportionate.

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of level 2 advocates?

Yes. there are no public interest grounds for embedding a category of advocates into QASA who have not attained the standards of advocacy required for representing a client in all aspects of his or her case.

There is no place for an assessed status of 'plea-only advocate', the so-called '*Level 2 full accreditation (route A) advocate*'.

All aspects of a client's case includes:

- addressing pre-trial preparation;
- assessing strengths and weaknesses of a case and in particular the weight of the evidence;
- considering and arguing admissibility issues;
- advice on pleas and alternatives;
- plea negotiations;
- SOCPA agreements and giving Queen's Evidence;
- requesting, drafting and arguing *Goodyear* rulings;
- considering, drafting, proposing and (as prosecutor) considering and advising upon bases of plea
- seeking s.40 CPIA 'binding rulings';
- Defence Statements;
- Bad Character applications;
- alibi;
- advising on the use of additional witnesses;
- deciding on fully/conditionally bound witnesses and giving time-estimates for the evidence of each of them;
- preparing and presenting mitigation;
- *Newton* hearings;

- confiscation issues;
- expert evidence;
- trial preparation;
- witness statement and interview editing;
- witness handling;
- effective cross-examination;
- advice on giving evidence;
- eliciting evidence-in-chief;
- speeches;
- written and oral legal arguments;
- confiscation hearings;
- completing PCMH forms in the light of all of the above; and
- advising on appeals against determining rulings, conviction and sentence.

It is only the advocate who is alive to and aware of how every aspect of a case may be handled, all the way through to trial and beyond, who can provide the required standards of advice to the client and act in his best interests.

There are no public interest grounds for a '*Level 2 full accreditation (route A) advocate*'.

An advocate must be fully capable of handling all potential areas of a client's case.

That advocate cannot properly choose to undertake all aspects of pleading a client's case except for representing him in a trial – so called 'plea-only advocates'.

The existence of POA's ignores, at least in spirit, paragraph IV.41.8 of the Practice Direction (Criminal Proceedings: Consolidation) as substituted by the Practice Direction (Criminal Proceedings: Further Directions) [2007] 1 WLR 1790 (Archbold 4-123): "The effectiveness of a PCMH hearing in a contested case depends in large measure upon preparation by all concerned and **upon the presence of the trial advocate, or an advocate who is able to make decisions** and give the court the assistance which the trial advocate could be expected to give". That this objective will be significantly undermined by the use of POAs is probably demonstrated by the figures cited in paragraph 3.11 of the consultation document.

It is breathtaking to read in the last sentence of paragraph 3.12 that the justification sought for this category is that these advocates "*would be prevented from undertaking criminal advocacy work solely because of their chosen pattern of practice*". No. These advocates would be prevented from undertaking criminal advocacy work only if they do not seek, or fail to achieve, accreditation as advocates who can undertake all aspects of a criminal case at that level. That is because it is in the public interest that they should be accredited as fulfilling the requisite Quality Assurance standards for an advocate. It is not because of their "*chosen pattern of practice*".

Such an approach runs counter to the regulatory objectives of protecting and promoting the public interest (RO1), improving access to justice (RO3), protecting and promoting the interests of consumers (RO4), promoting competition in the provision of services (RO5), and encouraging an independent, strong, diverse and effective legal profession (RO6) (set out at 3.1 of the Draft Handbook).

The Bar has always required that counsel take a case in its entirety (subject only to its being within one's competence and there being no conflict or other professional conduct issue). It is simply not open to a barrister to pick and choose to decline parts of it, such as a *Newton* hearing or a confiscation hearing (for example because he has something more rewarding financially).

A brief is a brief – warts and all, be there aspects of it which are adequately paid and others

which are not.

The heading above paragraph 7.22 of Annex B refers to a non-existent category which would currently result in a breach of professional conduct and lead to disciplinary proceedings: “*Accreditation at level 2 of barristers who don’t undertake trials*”. Therefore paragraph 27 of the BSB Rules (Annex C1) should not be brought in. Neither should any equivalent rules by the SRA or IPS.

What kind of specialist consultant surgeon (remunerated under medical insurance) advises you on the alternative interventions available for your medical condition, the different choices open to you, their respective levels of success, the side-effects and long-term sequelae, but then, if you reject his suggestions and choose complex surgery, tells you at the door of the anaesthetic room that he has never done such an operation and is getting someone else to do it?

You would immediately have no confidence about the value of his advice given his lack of experience in surgery.

You would be cynical about his motivation in having encouraged you to continue your treatment under his care without taking the complex surgical route.

You might ask his regulator about his status – but you would not receive the reply: “Oh yes, he has chosen to obtain the ‘Full Accreditation (Route A) Surgeon’ status, under which he is regulated as a Specialist Consultant Surgeon but may not carry out the surgery of which he is a Specialist Consultant”.

Matters are made worse still by paragraph 3.3 of the Consultation which asserts that Level 3 advocates who have chosen not to undertake trials can be accredited using an approved assessment organisation against Level 3 standards. Paragraph 8.36 of the Draft Handbook then states that all fully accredited advocates at level 3 can conduct all criminal advocacy at that level and below. These are thoroughly inconsistent and appear to us to reveal the conflicting interests being pursued by different groups within the JAG, with a half-baked compromise having been reached through trying to restrict this practice to Level 2 when it should not exist at all.

Q3: ARE THERE ANY PRACTICAL ISSUES THAT ARISE FROM CLIENT NOTIFICATION?

There should be no practical issues if the advocate, as should be the case, is accredited so as to be able to progress a client’s case through every part of its stages.

If the new category of plea-only advocate were to appear in a final QASA of course there would be huge issues. How can those with a financial interest in retaining a case with a ‘plea only’ advocate be left to notify a vulnerable client about the alternatives open to him in an objective and dispassionate way, without there being a significant risk of various kinds of express or implicit signals from the ‘plea-only’ advocate that he would like to continue to represent the client for as long as is feasible within his partial accredited status, notwithstanding that the client would be likely to be better served by a fully accredited advocate?

We believe that too many clients are not made fully aware at present that they are entitled to be represented by a Barrister.

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

Youth Courts deal with a wide variety of work including serious cases involving sexual allegations where the complainant is an even younger child.

It is our view that any scheme should properly classify these difficult cases in the same way as those in the adult court. They should not be downgraded to reflect the status quo.

Q5: Do you foresee any practical problems with a phased implementation?

What is the justification for a phased implementation? None is given. The assessments should be capable of being carried out in the same time span across England and Wales. If QASA is **straightforward** (para.2.6e of Draft Handbook) then there is no good reason why all areas should not start with Registration at the same time.

How is an advocate from an area coming within the first phase to be assessed, if instructed to do a case on another circuit for much of the year that follows?

Phased implementation followed by 'review' tends to indicate that no, or no sufficient, pre introduction assessments of the scheme have been undertaken before implementation. It is wrong to introduce a potentially flawed scheme when individuals' livelihoods are at stake.

The scheme fails to recognise the mobility of the Bar outside London.

Why should an advocate from one Circuit (where the scheme is not rolled out) be allowed to undertake work that member of "the host " Circuit cannot

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

Yes.

There is a potentially large overlap between different categories and substantial discretion for interpretation.

For example, what is the difference between "More serious dishonesty and fraud cases" (level 3) and "complex and / or high value dishonesty" (level 4)? What is the difference between "more serious sexual offences" (level 3) and "serious sexual offences" (level 4)?

We consider that it will be virtually impossible to achieve a more robust definition and that application is likely to be inconsistent – different judges will have different opinions.

Para 4.8 of the consultation document indicates that a prescriptive list of offences has been removed in favour of a more general description of the type of criminal cases that will feature at each level.

We question how the levels are to be policed - especially at the plea stage. Advocate x turns up and his client enters a plea - the judge hears the facts - then realises that the advocate is a level 2 but the case requires a level 4? How is this to be regulated by the disciplinary bodies? Are they to have access to the committal papers / instructions etc? Paras 4.12 – 4.13 of the consultation document indicate that the judiciary will not play a

formal role in deciding the level of the case. This demonstrates a fundamental flaw in the scheme.

We are of the view that judicial, or at least independent, oversight of categorization is essential otherwise the scheme will be rendered so obviously open to abuse that it will not fulfill the 'public confidence' criterion whether or it is in fact abused. The Instructing Solicitor may well have a commercial interest to serve

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

No, by way of examples, the 3rd 4th and 6th bullet point in Level 4 should not be there because they should be undertaken by QCs.

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

See answer to Q6 above.

What is required is robust criteria which are capable of general application. Examples may or may not be appropriate to individual cases the categorisation of which should be highly fact specific.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

This subject again highlights the consequences of trying to redraw, in a prescriptive fashion, a whole area of complex human activity. The existing flexible, fact specific, and generally effective system, cannot sensibly be replaced by a comprehensive rules-based one without creating a plethora of secondary interventions like this. Engaging with this is bound to result in the minutiae shown in the South Eastern Circuit's submissions. We support the flexibility which is proposed by the Criminal Bar Association's response.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

We agree with the response of the Criminal Bar Association.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

We agree with the response of the Criminal Bar Association.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

We agree with the response of the Criminal Bar Association.

Q13: Do you have any comments on the proposed modified entry arrangement?

This is a poorly drafted question since it is about QCs being drawn into the scheme.

Whenever a QC is instructed in a criminal case it is as a result of an exercise of the built-in quality assurance system that exists when a solicitor uses the referral route to choose a specialist advocate. There is no proportionate need for a QASA accreditation to be obtained on top of the existing mark of excellence that QC denotes. (At the very least it is not proportionate for any QC who achieved that merit through the QCA process unless and until they reach the national retirement age.)

It would be quite wrong for a QC to be assessed at level 4, if that is what is proposed. His or her advocacy should be at perhaps level 6 or 8. How could an assessment centre possibly adjudicate on this level of advocacy if the QC was not able to submit sufficient CAEFs in time?

Quite apart from the above, there is a proposal that QCs obtain a higher number of judicial evaluations (Annex B: 4.12 & 7.27) which is utterly baffling in a regulatory regime that claims to be targeted and proportionate.

12 months would be an inadequate time within which to obtain such evaluations – see the answer to Question 1.

Q14: Do you agree with the proposed approach to the assessment of competence?

No. With regard to the higher levels, it is fundamentally wrong to assess competence without any reference to experience and track record. It bases progression on specified cases and completely ignores prior attainment. What of the many years of cases conducted prior to the assessment period? They are plainly relevant but are to be wholly ignored. What of categorisation by other agencies? One might have attained CPS Grade 4 yet this is completely ignored. One might be at a high level on the A-G's list. This is plainly relevant to competence to conduct level 4 cases, yet it is seemingly wholly ignored.

An advocate may have conducted a large number of category 4 trials during his career and be highly competent to do so. If during what is effectively a random period of 12 months he does not have sufficient category 4 trials, a factor over which he has no control because of the Cab Rank Rule, he will subsequently be *prohibited* from conducting such trials despite the fact that he remains competent. This is wrong and anti competitive.

Furthermore, the assessment focuses entirely on actual work conducted rather than competencies. It assumes that a person can only be assessed for capacity to conduct a level 4 case whilst conducting a level 4 case. This does not necessarily follow. There may well be elements of a level 3 case which are highly complex and which could be taken into account, yet they are seemingly to be completely ignored. Similarly, a level 4 case may well be extremely serious yet relatively straightforward.

What is more, the method of assessment is potentially unfair to members of the Bar who do not control the nature of the cases in which they are instructed because of the Cab Rank Rule. On the other hand, an HCA in a large solicitors firm or an advocate employed by the CPS, where there is a large pool of work, is likely to be able to exert much more influence over the level of cases in which he or she is instructed – in particular during the period of assessment.

The scheme focuses on conducting trials without considering length. A single long trial should count for more than a single unit. Assessment should be counted in days or weeks rather than trials because of this.

At the lower level of progress, level 1 to level 2, assessment trials are likely to be shorter and in plentiful supply. But at level 4 trials are potentially much longer with greater lead-time. Rules 5.22, 5.36 and 5.52 speak of a minimum of 2, maximum 3 trials of the first 5 trials at the selected level. These are said to have to be consecutive. In particular for those specialising in fraud we consider that it is difficult to expect an advocate to complete 5 level 4 trials in 12 months, which may be what the scheme envisages.

Therefore, for level 4, we would suggest that the assessment period should be much longer.

Whilst there is provision for extension, the maximum is said to be 12 months. Whilst this would give an aggregate of 2 years, it requires burdensome applications for extension.

The scheme should not be set up in such a way that applications for extension are going to be inevitable.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

We agree with the response of the Criminal Bar Association: included in the review should be an assessment of whether the three regulators are responding to complaints and the administration of sanctions in precisely the same way. As has already been pointed out, there can be no confidence in the system unless they are.

Precisely the same regime must be imposed on all.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

No. The scheme is not straightforward and leads to duplication and unnecessary burdens on advocates.

Does paragraph 4.9 of the Draft Handbook mean that CPS in-house advocates will have to obtain accreditation in the ways set out (through an assessment organisation / judicial assessment) or is their quality assurance framework being 'passported' as yet another route to accreditation? If so, why is CPS (or accreditation by other government bodies – e.g. the Attorney-General) not taken into account in relation to advocates in independent practice?

The CPS has already conducted a significant grading exercise of criminal advocates who prosecute. QASA duplicates the work which those Prosecuting advocates have already

undertaken and spent an enormous amount of time applying for.

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

The whole scheme has to be rewritten in the light of its fundamental flaws outlined above.

Q18: Do you have any comments on the Scheme Rules?

There is a lack of clarity about being able to seek provisional accreditation repeatedly.

There does not seem to be anything to deter everyone applying for Level 4 and if ultimately unsuccessful in achieving full accreditation as a Level 4, then automatically being given provisional accreditation at Level 3, and so on, until eventually settling at the correct level.

Paragraph 27 of the BSB Rules is inappropriate. See above.

If an appeal were to be by way of review only, then the main test is inappropriately worded as: "no reasonable person would find comprehensible" (Rule 37.1). A decision may be entirely unreasonable yet nonetheless "comprehensible". Such an approach would instead require to be along the lines of: "no reasonable person could have reached."

However, because of the importance of the assessment, there should be provision for appeal on the merits by way of re-hearing in which all relevant factors can be taken into account.

There is a total inadequacy of rules in respect of what plainly appears to have been a last-minute tacking-on of QCs (Rule 52).

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

No.

Advocacy involves pleading another's case in a legal forum.

It involves both written and oral skills in: negotiation, advising, presentation, factual analysis, legal argument, form filling (such as PCMH questionnaires) and finally persuasion.

Quality in each of these can only be assured if the advocate has mastered the whole, because otherwise his judgment and advice is restricted by a lack of experience and knowledge of the likely outcomes in the areas he has avoided handling.

See above.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

First, criminal barristers are specialist practitioners. In that sense we agree that they need

not be regulated through a QASA system of this type.

However, using the definitions in the Consultation - why should specialist practitioners be excluded if QCs are included? Arguably, those who perhaps appear in the higher court less frequently because of the nature of their specialism might be regarded as a category in respect of which there is more need for the assurance of a QASA scheme because of lack of frequent practice.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

See our introduction and our specific answers, above.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

Q24: Are there any other equality issues that you think that the regulators ought to consider?

We re-iterate and emphasise what the Criminal Bar Association has said in its response.

All regulators in the JAG have ignored the devastating effect that cuts in legal aid have had on equal opportunities and diversity at the independent bar. The number of pupillages now available for some 1700 graduates of law school is less than 400. In Wales there are 96 students at the Cardiff Law School. There are unlikely to be more than 6 pupillages in Wales as a whole. This is as a direct result of the lack of recognition that the bar is one of the very few professions that supports the training of the next generation without subsidy. The BSB is contributing to this downward spiral by placing ever more demands, financial and otherwise, on the profession as it acquires more regulatory duties.

The Young Barrister's Committee of the Bar Council



YOUNG BARRISTERS' COMMITTEE

**Response of the Young Barristers' Committee of the Bar Council to the
Joint Advocacy Group's fourth Consultation Paper
On the Quality Assurance Scheme for Advocates**

Page 166 of 394

Introduction

1. The Young Barristers' Committee (YBC) is one of the Bar Council's main representative Committees and it represents barristers who are under 7 years' Call. Led by a Chairman and Vice-Chairman, it comprises elected members of the Bar Council (employed and self-employed barristers) under 10 years' Call, as well as barristers who are co-opted to ensure representation from different areas of practice and from all Circuits. Its membership is therefore diverse and representative.
2. This is the YBC's response to the Joint Advocacy Group's fourth consultation on the Quality Assurance Scheme for Advocates ("the Consultation").

Overview

3. It is plainly in the wider public interest for defendants, victims and witnesses alike that high standards of advocacy are maintained within the criminal justice system. Good quality advocacy prevents miscarriages of justice, mitigates the stresses associated with having to give evidence in trials and ultimately saves the public purse the expense of inefficient hearings and unnecessary delay. Good quality advocacy ensures that public confidence in the criminal justice system is maintained.
4. However, the YBC does not believe that the Quality Assurance Scheme for Advocates ("QASA" or "the Scheme") proposed is the proper vehicle to achieve the purported aim of ensuring good quality advocacy services. This is based on our real concerns that the Scheme is unlawful and furthermore that the Scheme as designed will not deliver higher advocacy standards in any event.
5. We endorse and adopt the submissions made by the Criminal Bar Association ("CBA") about the unlawfulness of the Scheme, and so it is not necessary to set out more than a brief summary of our concerns in this response.

There is no evidence that the Scheme is necessary

6. The General Council of the Bar (Bar Council) is the Approved Regulator for all barristers in England and Wales. Its powers derive from the Legal Services Act 2007 ("the LSA") and has appointed the independent Bar Standards Board (BSB) as the frontline regulator, regulating over 15,000 barristers in self-employed and employed practice.
7. The BSB must promote the regulatory objectives and professional principles set out in s(1)(1) and (3) of the LSA. The duty to promote the regulatory objectives is set out in section 28 of the LSA:

1) *In discharging its regulatory functions (whether in connection with a reserved legal activity or otherwise) an approved regulator must comply with the requirements of this section.*

8. Section 28(3)(a) states:

3) *The approved regulator must have regard to-*

a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed

9. The YBC notes that no evidence has been provided by JAG setting out why the Scheme is *necessary*. Indeed, In the LSC discussion paper of February 2010 it said “Without objective assessment of advocacy in place, there can be no substantive evidence of a decline in standards.” It was accepted in the paper that there was no mechanism for assessing such a decline, in place.

10. The YBC has been provided with no evidence of, for example, an increase in the number of appeals against conviction being lodged (and won) on the basis of lack of competent advocacy; indeed the number of such cases remains minute. Nor has the YBC been provided with any evidence of an increase in the number of complaints by judges to the various regulators of under-performing advocates.

11. In contrast, the only independent research that encompasses clients, solicitors and advocates was conducted by the BSB and said ‘*barristers are perceived to be competent, highly qualified and dedicated professionals. Specialist advocacy services set them apart*’ (Ipsos Mori, August 2007).

12. Indeed, the arguments put forward in favour of the Scheme completely overlook the fact that every time an advocate performs in court, they are under judicial scrutiny. Court proceedings do not happen in a vacuum; with very few exceptions, criminal proceedings are heard in open court, observed not just by the lay client, but by members of the public, other advocates and of course the judge. Few other professions are subject to daily scrutiny in the same way, which in itself should be sufficient protection for the public.

13. The judiciary are well able to report examples of incompetent advocacy to the regulators. Similarly, it is within the power of the judiciary to report examples of advocates taking on cases that are beyond their competence. Any and all such referrals could then be dealt with directly by the regulator concerned. Thus action can be taken without a Scheme of the sort proposed being imposed.

14. There has also been no evidence provided which would suggest that any problems with under-performance stem from the Bar, as opposed to other groups of advocates, so requiring specific targeted intervention from the Bar Standards Board. In order to comply with section 28(3)(a) of the LSA, the Scheme must do no

more than is necessary in order to effectively achieve the regulatory objectives. As can be seen from our responses to many of the specific questions posed in the Consultation, the YBC does not think the Scheme will achieve the aims that it purportedly sets out to.

15. As such, the YBC does not accept that the Scheme proposed is a necessary or proportionate mechanism for ensuring competent advocacy in the criminal courts.

The Scheme will not deliver higher standards of advocacy

16. The YBC agrees with the CBA that in order for any quality assurance scheme to work (whether the Scheme currently being consulted on, or any other) a number of fundamental principles must feature:

- 1) A common regulatory regime – a level playing field - for all advocates, be they barrister in independent practice, employed barrister, solicitor advocate or legal executive;

- 2) Accreditation of advocates to the higher levels by Judicial Evaluation (JE) in all but exceptional cases, and a regime of periodic re-accreditation that requires the advocate to demonstrate the acquisition and application of both the necessary competences and sufficient experience to continue to practise at the same level or to move up to the next level;

- 3) Case grading, not hearing grading, so no 'plea only advocates' (POAs);

- 4) Cases to be allocated to levels by reference to clearly defined criteria, and not by negotiation or agreement between litigator and advocate;

- 5) Recognition of the special position of QCs and Treasury Counsel.

17. The YBC believes that any assurance scheme that does not adhere to each and every one of these principles will do little to achieve that which it sets out to. Indeed, unless the Scheme is sufficiently robust, it will simply provide a system that perpetuates lower advocacy standards by promoting an official seal of approval to advocates who are not performing to a high standard. The Scheme as currently proposed will do just that.

18. The YBC is concerned about the limited time between the close of the consultation period and the date proposed for implementation of the Scheme. This leaves little time for the Joint Advocacy Group to consider the responses they receive, or address the concerns raised. The limited time period gives the impression that this consultation amounts to little more than window dressing; that the Scheme will be brought in, as proposed, irrespective of the submissions made. This does little to command confidence in the proposed Scheme, or the manner in which it has been introduced, from the young barristers that the YBC represents.

19. Turning to the specific questions posed in the consultation paper:

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme?

20. The YBC anticipates numerous difficulties arising from the proposal to allow advocates 12 months to obtain the requisite number of judicial evaluations and is of the view that a longer period of accreditation is required.

21. There are numerous reasons why junior barristers with a fledgling Crown Court practice will struggle to be accredited within 12 month period currently envisaged:

- i. It is well known that the amount of Crown Court work available to junior barristers has been shrinking for some time now. There are a number of causes of this. The number of cases progressing to the Crown Court is decreasing. More work that would traditionally have been undertaken in the early years of a barrister's practice is now being undertaken by Higher Court Advocates working in-house, either for the CPS or for firms of defence solicitors. As such, the frequency of instructions in Crown Court trials will for many not be sufficient to guarantee that they will have undertaken enough effective trials to become accredited within a 12 month period;
- ii. It is now increasingly common for junior criminal barristers to undertake one or more secondments in the early years of their practice. They range in duration from just a few weeks, to many months. Some may go on for more than a year. Although some secondments may involve working in some way within the criminal justice system, few provide opportunities for a barrister to be judicially evaluated. For example, secondments to the Serious Fraud Office are likely to be office based and involve questions of disclosure of documents in large fraud trials, not appearing in the Crown Court trial itself. Increasing numbers of young criminal barristers also seek to mitigate the harsh realities of a publicly funded practice by diversifying their practice and undertaking secondments in other areas of law. Again, such secondments would limit the opportunity for young barristers to be accredited on the QASA scheme within a 12 month period;
- iii. The types of cases that will be undertaken by junior barristers are more likely to be heard by recorders who are not able to undertake judicial evaluations. Even if a junior barrister does appear in 5 effective level 2 Crown Court trials within a 12 month period, it is probable that a number of those trials will have been heard in front of a recorder, and so would not be evaluated;

iv. The YBC also envisages problems for those seeking to progress from level 2 to level 3 (or indeed between levels 3 and 4) being accredited within a 12 month period. A level 2 advocate is not going to be briefed in level 3 cases straight away. It may take some time after an advocate announces they can now accept instructions a level above that which they normally practice before instructions at the higher level materialize. It will take longer still for those cases to progress to trial stage. This is exacerbated because there is no harmonization between the CPS panel system and the QASA levels. Unless an advocate is a level 3 CPS panelist, they will not receive instructions in level 3 cases.

Unlike with the QASA levels, the CPS panels consist of a finite number of advocates. Many barristers will have 'played safe' when applying for a panel position to ensure that they got on the panel at all. Others will have applied for example for a place on the level 3 panel, but been given a place on the level 2 panel. Although they may have the experience to be a level 3 advocate overall, they may only receive instructions at a lower level for their prosecution work, reducing the opportunities to be accredited at the higher level. Again, it is submitted that in reality, it may take more than a year to have appeared in a sufficient number of trials at the higher level within 12 months to be able to be accredited within that period.

22. It is the view of the YBC that an 18 month period of accreditation would be more suitable. This should provide sufficient time for young barristers to become accredited, and ensure that extensions to the period of accreditation are the exception rather than the rule.

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

23. The YBC cannot accept that it is in the public interest to have plea-only advocates within the scheme. Of course, advocates may choose to limit their practice to focus on certain types of hearings for financial reasons; that is a matter for them. However, for public confidence in the criminal justice system to be maintained, an advocate instructed to have conduct of a case must be able to deal with any aspects of that case as they arise, and the Scheme must be structured around public interest considerations.

24. The suggestion that plea only advocates be accommodated within the Scheme follows research conducted by the Solicitor's Regulatory Authority ("SRA") which suggests that 50% of solicitors with higher rights do not undertake trials (at paragraph 3.133 of the consultation paper). In fact, it was 50% of the solicitors who completed the survey that said they do not do trials, numbering 430 individuals. Thus, the notion of plea only advocates being in the Scheme is based on the responses of 430 solicitors, out of a pool of over 8000 advocates who have rights of audience in the higher courts. The fact that a very small proportion of

advocates do not at present undertake trial advocacy is not a public interest consideration around which the structure of the scheme should be based.

25. Inherent in the Criminal Procedure Rules is the expectation that cases are properly case managed, and that the instructed advocate is able to deal with every aspect of the case from the earliest stages until its conclusion. To have plea only advocates undermines this continuity. It is also questionable whether someone who will never undertake effective trials will be able to properly deal with questions of case management. How will they know how long a trial is likely to last, what legal arguments are likely to be raised, and be able to advise their client of the same?
26. Ineffective case management can cause unnecessary delay to cases, leading to avoidable adjournments. An advocate who is instructed in a case after the PCMH may not choose to conduct the case in the same way that was envisaged at the PCMH, when the directions for trial are set. For example, legal arguments not previously considered may be raised, adding to the length of the trial, or further witnesses may be required. This has knock-on effects on other trials due to be heard, and makes listing cases within a reasonable period very difficult. By not actively managing cases at PCMH the additional cost to the public purse is likely to increase considerably.
27. The YBC is deeply concerned that defendants represented by a plea only advocate may find themselves unduly pressured into entering a guilty plea. Experience tells us that it is not uncommon for a client to have given the impression that they wish to enter a guilty plea at the plea and case management hearing, only to change their mind on the day. There are a number of reasons why they may do so. Some may ultimately enter a guilty plea as planned, but others may decide that in fact they wish to take the matter to trial. Where a defendant is represented by an advocate who can only act for them in respect of the plea, they may feel unduly pressured into entering a guilty plea so as to avoid finding themselves without representation at a later stage.
28. It should also be noted that even where guilty pleas are entered, there may need to be a Newton hearing because the plea was entered on a basis. A basis of plea can make a big difference to the sentence a defendant receives. The client is best served by being advised on plea, and basis of plea, by the person who is intended to undertake the Newton hearing itself. Again, the YBC is concerned that defendants might feel pressured not enter basis of pleas in cases where to do so would be consistent with their instructions, if they are represented by an advocate who would not be able to represent them at the Newton Hearing.
29. This again runs the risk of further delay. A defendant who is not happy with the basis on which he has entered his plea will almost certainly tell this to the Probation Service as they are interviewed for their Pre-Sentence Report. This is then reflected in the Pre-Sentence Report itself, a copy of which is made available to the court at the sentencing hearing. Where it is clear that a defendant does not

accept his guilt on the basis advanced by the Crown, the sentencing hearing ought to be adjourned so that a Newton Hearing takes place. The cost of the aborted sentencing hearing will have been wasted.

Q3: Are there any practical issues that arise from client notification?

30. We submit again that there can be no place for plea on advocates in any credible quality assurance scheme. However, if they are to be accommodated within the Scheme in spite of the principled arguments against their inclusion, there must be robust requirements for clients to be notified in clear and transparent terms as to exactly what their advocate is able to do.
31. At the very least, the client must be informed orally and in writing that they are being represented by a plea only advocate, where applicable. They should also have to be advised that they are entitled to be represented by an advocate who can represent them at all stages of a case if they so wished, and that they are satisfied that they are happy being represented by a plea only advocate.
32. The title for plea only advocates must also be clear and accurately set out the limitations of the role. This is not a time for window dressing. If an advocate has not been accredited as being competent to undertake trial work, then this should be made clear in their title.

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

33. The suggestion that all Youth Court work be treated as level 1 is completely inconsistent with the Scheme's overall aims of protecting the public. There can be no rational basis for concluding that cases that would be categorized at level 3 if the defendant were an adult can automatically be treated as level 1 where the defendant is 17 years old. The young people who come before the youth court, either as defendants or witnesses should not be denied the protections said to be afforded by the introduction of the Scheme simply because of their age, which is what this proposal would do. Indeed, if anything, these vulnerable young people need greater protection from the Scheme, not less. To treat all Youth Court work as level 1, even if only temporarily, completely undermines the credibility of the Scheme.
34. Youth Court work epitomizes the difficulties associated with trying to categorise cases. The defendants are all children or juveniles. It is not uncommon for them to have educational difficulties, they are often not in mainstream education, and many have had difficult upbringings. Similarly, witnesses in Youth Court cases tend to be other young people, who are entitled by virtue of their age to special measures when giving evidence. It is noted that in accordance with the guidance for allocating cases at levels 2-4 in adult cases, these factors alone would be likely

to make a case that was otherwise factually simple be allocated to higher case level.

35. Many cases that are dealt with by the Youth Court can properly be categorized as level 1 cases; typically Youth Courts deal with very low level assaults, thefts or antisocial behavior. Such cases would be summary only if the defendant were an adult, and so would be level 1 cases, dealt with in the Magistrates' Court. The YBC can see no reason why these cases should not be categorized as level 1 when dealt with by the Youth Court, notwithstanding the young age of the defendant, and often, of the witnesses as well.
36. However, the suggestion that all cases before the Youth Court can be level 1 cases ignores the fact that some very serious offences can be heard before the Youth Court as well. With jurisdiction to try cases where a 2 year detention and training order could be imposed, Youth Courts are increasingly dealing with much more serious robberies, assaults and sexual offences, that, but for the age of the defendant, would be considered to be level 2 or level 3 cases.
37. The YBC submits that all Youth Court cases should be level 1, unless they fall into the following categories, in which case, they would be level 2:
 1. Any offence triable only on indictment in the case of an adult;
 2. Any offence triggering the notification requirements under section 80 of, and Schedule 3 to, the Sexual Offences Act 2003;
 3. Any case in which either the accused or any witness requires the use of an intermediary.
38. This is on the basis that the most serious offences involving juvenile defendants would in fact be treated as 'grave crimes' and so would be dealt with in the Crown Court by more experienced level 3 or 4 advocates in any event.

Q5: Do you foresee any practical problems with a phased implementation?

39. The YBC is concerned that phased implementation may be anti-competitive. The Midlands Circuit and the Western Circuit are proposed to be the first circuits for roll out of the Scheme. Phased implementation would permit advocates from other circuits to go to those circuits and practice without restriction (subject to the normal requirements of acting within one's competence, in accordance with the Code of Conduct). The same would be true for those circuiters who are in a London based chambers, but who practice on those circuits. However, junior barristers who are based on circuit would have limitations put on their practice that would not apply to their contemporaries in other circuits, who could still practice in the same court centres.

40. We note the incredibly short time frame between the end of the consultation period and first stage of implementation. The time frame is so short that it is difficult to see how any of the comments or recommendations made in this response (or the many others that will no doubt be submitted) can be properly considered and where appropriate, actioned. We would urge that the Scheme is not rolled out on any circuit, until the questions about its legality have been properly addressed and the outstanding problems have been resolved in a way that ensures the key principles set out by the CBA and supported by the YBC are accommodated.

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

41. The YBC is of the view that the process of determining the level of a case is crucial to the proper working of the scheme.

42. We do not accept that the level of the case should be determined by the instructing party. Although the instructing party will have an idea of the likely level of a case, and will instruct an advocate of that level, it is our view that the level should be set by the advocate who has been instructed, which should then be confirmed at the PCMH hearing. This could be by way of having an extra box on the PCMH form for the advocates to fill in, to then be considered by the judge as part of their ordinary case management responsibilities. The judge would not be setting the case level itself but would be able to question whether it has been properly set, and change the case level to one more appropriate if they were of the view that it had been wrongly allocated.

43. This independent judicial oversight will provide a powerful incentive to the instructed advocates to ensure the case is allocated to the correct level. By confirming the case level in open court, and if necessary calling on the instructed advocates to justify the level of allocation, the process of case allocation is open and transparent and subject to critical review.

44. The instructed advocate will be best placed to anticipate the complexities of a case, and the issues that are likely to develop as the case is prepared for trial. By approaching case allocation in this way, one can mitigate the concern that cases might be allocated the wrong level so as to ensure that the instructing advocate is able to keep the case, and the remuneration attached to it.

45. By incorporating the question of level allocation within the parameters of ordinary case management, it will not be necessary to have 'spot checks' on cases; the propriety of the level will already have been considered and sanctioned by a judge.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

46. The YBC accepts that, broadly speaking, the offences in the table are likely to have been correctly allocated. However, the table also demonstrates the inherent difficulty in trying to allocate cases to levels by reference to the type of offence. For example, a domestic burglary would appear to default to a level 2 case, but an aggravated burglary would be level three. Whilst there may be real differences in sentences imposed following convictions for these offences, there may not be any real difference in the level of complexity of the case. A simple domestic burglary may involve complex questions relating to, for example DNA evidence that could require cross examination of expert witnesses on complex scientific matters. An aggravated burglary, whilst a serious offence, may only concern a very straightforward issue of identification. To have the two cases in different categories simply because of the type of offence is unsatisfactory, and will have the knock on effect of taking out more serious but straightforward cases from the diet of a young criminal barrister unnecessarily.
47. We would invite further thought to be given to some of the terminology that has been used in the table. For example, in the column dealing with level 2 characteristics, terms such as 'straightforward Crown Court cases' for 'lesser offences' or 'less serious offences' are too vague. Without elaboration as to what a 'lesser offence' of theft is, the table is of little use. Would it be determined by value? Or by pages of evidence?
48. As for 'less serious' drug offences; would level 2 cover only cases concerning drugs of Class B and Class C? Or would it cover cases of simple possession only, rather than possession with intent to supply, which according to the table would be a level 3 case? Immediately, the difficulties in trying to grade cases without being overly prescriptive are apparent. Although Possession with Intent to Supply Class A drugs is a very serious offence, and more serious than Possession with Intent to Supply Class B drugs, the facts of such cases can vary widely, covering a vast range of seriousness. Would a case involving possession of just 2 wraps of cocaine (a Class A drug) with the intention of supplying those wraps to an undercover police officer, really be placed at a higher level than, for example, simple possession of kilograms of cannabis (a Class B drug)? Simple possession of cannabis would on the face of it be a 'less serious' drug offence; but would this remain the case where the amount possessed was large, and in the context of an international drugs importation ring? It is not immediately obvious what drug offences would fall within level 2 and level 3, and the use of terms such as 'less serious' and 'more serious' does little to assist.
49. The same arguments apply to the descriptions used for level 3. What is a 'complex' robbery? Is it a multi-handed street robbery where weapons were used

and the defendants are running 'cut-throat' defences? Or is it a high value, well organized commercial robbery, involving police intelligence, public interest immunity hearings and anonymous witnesses? Both could be said to be 'complex' but plainly there is a considerable degree of difference between the levels of complexity.

50. 'More serious' sexual offences are covered in level 3. What is a 'more serious' sexual offence, rather than a 'minor sexual offence' at level 2 and a 'serious sexual offence' at level 4?
51. Does arson, currently assigned to level 3 include cases of arson with intent to endanger life? Again there is a vast difference in seriousness and often in complexity between a case of criminal damage that happens to involve fire, and a case of arson with intent to endanger life, where there are very often psychiatric considerations of the defendant to consider.
52. It may be that reference to the Sentencing Council's Guidelines could assist in determining the level of a case. It may be for example, that a robbery case that would fall within the lowest sentencing bracket within the guidelines would be considered to be a 'straightforward' robbery and allocated to level 2, whereas a robbery case in the highest sentencing bracket would be allocated to level 4. Similarly, reference to the Sentencing Council's Guidelines in theft cases might assist with defining what 'high value' dishonesty is.
53. The YBC is strongly of the view that the criteria for allocating cases to levels must be sufficiently clear before any Scheme is rolled out, especially as a failure to allocate cases to the proper level could be considered to be a disciplinary offence.

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

54. As set out in answer to question 7 above, the wording is not sufficient to distinguish between those occasions where an offence might be e.g. level 2 and those where it might be e.g. level 3. The example is not especially helpful, and if anything demonstrates the real difficulties that will be associated with trying to create examples or apply the guidance to actual cases.
55. For example, it is not clear from the guidance whether a street robbery that involved the threat of a use of a knife would be level 2 or 3. Would it count simply as the threat of the use of force, or would the fact that the threat referred to a weapon make it a level 3 case?
56. When looking at the factors associated with determining case levels, it is also clear that they too will need to be developed and/or refined. However, the YBC favours

the move from the more rigid approach originally proposed for case allocation to this more flexible model.

57. We note that when considering trial characteristics, it is not accurate to conclude that because a defendant is last on an indictment, or plays a seemingly peripheral role, that that would necessarily have a real bearing on the case level. Although many of the questions that would be asked by their counsel are likely to have been covered by others before them, the final advocate would still need to know how those questions affect their case, and whether or not it is necessary to ask any further questions at all. It is also not uncommon for a defendant's role to become more involved or change as a case progresses. Their advocate would need to be sufficiently experienced to be able to anticipate such developments and respond accordingly. The alternative would see defendants in the middle of a trial represented by somebody who was potentially out of their depth.
58. We would also urge caution in placing too much emphasis on agreed facts determining a case. For facts to be agreed the advocate needs to have a real understanding of the case; a failure to properly comprehend the nature of the case, and what tactical decisions need to be made could completely change the nature of a case. At the very least it could lead to witnesses needing to be called who were originally agreed, or recalled if further aspects of their evidence was in dispute. The risks of a defendant not having their case properly put are real; the chances of a witness being caused increased distress by having to be recalled are increased. Although once the facts have been agreed the presentation of the case at trial can be simplified, the importance of doing this groundwork properly cannot be underestimated.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

59. We anticipate real practical problems developing if level 2 advocates are not allowed to conduct some level 4 non trial hearings. There is no reason why a level 2 advocate, having consulted the instructed advocate, could not appear in non trial hearings in level 4 cases.
60. This argument is of course subject to the usual considerations of only acting within one's level of competence. For example, a level 2 advocate ought not to argue an application to dismiss in a level 4 case; plainly such a hearing would be outside of the competence of a level 2 advocate. Similarly, there may be some section 8 CPIA applications that ought only to be argued by level 4 advocates, particularly where they concern questions in respect of large amounts of, for example, social services material. However, simple mentions, trial readiness hearings, jury -sitting and the like are all well within the competence of a level 2 advocate so long as they have been briefed as to what issues are likely to arise by the instructed advocate.

61. By enabling level 2 advocates to cover non trial hearings in level 4 cases, young barristers are given an opportunity to consider papers in cases that they will not yet be instructed in in their own right, facilitating career development.
62. On a practical level, the YBC also takes the view that the criminal justice system would struggle to cope if level 2 advocates were not permitted to cover level 4 non trial hearings. Such non trial hearings make up a considerable part of the practice of a junior barrister. This is because the more senior barristers, who would be level 4 under the Scheme, are often not available to attend all their own mention hearings because they are detained in long trials. If a level 4 advocate were to attend all their own non trial hearings, they would have to be released on a regular basis from their trials, causing considerable delay and additional cost to the system.
63. The YBC thinks that plea and case management hearings of any level should be undertaken by an advocate of that same level, to ensure proper case management is considered at an early stage in proceedings. As such, only level 4 advocates should do a plea and case management hearing in a level 4 case.
64. Similarly, we take the view that sentencing hearings should be reserved for advocates of the same level as the case.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

65. Newton hearings should be treated as trial hearings for the purposes of the scheme, irrespective of how many witnesses are called in the course of the hearing. This is because they are 'trials of issue' and can in reality still be complex. As such, they should only be dealt with by an advocate of the same level as the case.
66. Similarly, in respect of confiscation hearings, these should only be undertaken by the advocates of the same level as the case, as they too involve challenging the evidence put forward, in the same way as in the course of a trial.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible

67. The YBC agrees that as a general rule, an advocate who is being led ought to be no more than 1 level below leading counsel, so that they may be effective in the absence of their leader. It is accepted that there will be some cases, for example where a junior would be concerned more with disclosure issues than oral advocacy, where it may be appropriate to have a level 2 advocate as junior to a level 4 advocate. In our view, it is a matter for leading counsel, and the judge who

grants a certificate for a junior, to consider what the level of junior counsel should be, not the instructing solicitor. Leading counsel will have the best grasp of the type and level of support they will require from their junior, and will be best placed to determine what level they will need to be. The level of the junior to be instructed should form part of the initial application for 2 counsel, allowing judicial oversight of the practice, and limiting the possibilities of 'straw' juniors being appointed.

68. Being led in a case provides an excellent opportunity for junior advocates to get experience in more serious cases, under the supervision of leading counsel. It is an important part of career progression that should not be underestimated.
69. If the allocation of a case to a level is made with judicial oversight, it is submitted that it will be a rare occurrence for the complexity of a case to change to such an extent that case level would change. This is because, possibly with the assistance of the judge, the issues in the case will have been set out at an early stage, as part of the active management of the case. Significant developments in the case are likely to be anticipated by the parties and the judge.
70. The YBC agrees that where a client specifically requests the services of a level 2 advocate, that that advocate should be able to 'act up' and represent them in a level 3 case. However, this must be the exception rather than the rule. Like the CBA, we are anxious that this facility would not be open to abuse, and so would expect the Judge at the plea and case management hearing to openly question the defendant about their decision to have the particular advocate represent them in circumstances where they would ordinarily have a more experienced advocate.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

71. Nothing in addition to that which has already been raised above.

Q13: Do you have any comments on the proposed modified entry arrangement?

72. The YBC does not agree that Silks should be within the Scheme. The Scheme purports to assess competence. Those who have attained the kite mark of QC are not simply competent; the letters are marks of excellence, obtained after a far more rigorous process than the QASA accreditation system. It is no coincidence that the CPS panel scheme when introduced did not include Silks within its Scheme, for this very reason.
73. It is our understanding that the QCA are also able to remove the title of 'Queen's Counsel' where a QC is not performing to an acceptable standard.
74. The YBC endorses the position advanced by the CBA in this regard.

Q14: Do you agree with the proposed approach to the assessment of competence?

75. By looking holistically at an advocate's performance over a number of assessments, the regulator is likely to get a much more accurate view of the advocate's ability. This will also mitigate some of the concerns that exist concerning clashes of personality with judges, late returns or other factors which may affect an advocate's performance in a particular case which would not be demonstrative of their ability generally.
76. However, the YBC is deeply concerned that Rules 29-33 of the draft Quality Assurance Scheme for Advocates Rules ("the Rules") set out at Annex C1 of the consultation paper make no reference to a mandatory requirement of the Regulator to inform an advocate of its having received a Criminal Advocacy Evaluation Form ("CAEF") that raises concerns about the advocate's competence, and invite representations from that advocate before the regulator makes a finding in respect of it.
77. This is despite the fact that paragraph 5.62 of the Handbook states that '*if the regulator receives a properly completed ongoing monitoring referral it will seek comments from the advocate.*'
78. The YBC submits that the Rules should explicitly state that the advocate has the right to be informed of a complaint about their competence, and be able to make representations on the same. This is particularly important in the context of the holistic approach being taken to assessing competency. Without such a requirement, an advocate might never know if concerns have been raised about their performance, if they were deemed competent overall. Nonetheless, the complaint would remain on their file, and could be accessed at a later date. We take the view that this is of such importance that the right to be informed should not be referred to just in the Handbook, but should be set out in the Rules as well.
79. The YBC are also of the view that in order for the Scheme to be transparent, the regulator should maintain and provide lists of those people who are appointed as independent assessors under the Scheme, together with their relevant experience and qualifications. This aspect of the Scheme will only have credibility if advocates know the quality and identity of those who will assess them, and would mirror lists of assessors compiled by the CPS for their own in house assessment. This may also be necessary in order to avoid the possibility of conflicts of interest being raised.
80. We note that at paragraph 5.69 of the Handbook '*any other relevant information relating to the advocate*' can be considered by the regulator. In our view, the advocate should have notice of the kind of information that could be considered relevant to a decision on a negative evaluation, and this should be particularized in the Handbook. Furthermore, the Rules ought to explicitly state that other relevant information apart from the assessor's assessment will be taken into account by the regulator. This will inform advocates of their right to challenge all matters which have affected the regulators decision.
81. The Handbook should require the regulator to send a copy of the independent assessor's valuation to the advocate. This is necessary under due process.

Otherwise it is difficult to see how an advocate could appeal against the regulator's final decision, which has been based on that unseen valuation.

82. We observe that the 4 decisions that can be made by the regulator after a CAEF complaint about an advocate's competence are not the same as those set out at paragraph 5.69 of the Handbook. We can see no reason why the two lists should not be identical. The differences are confusing.

83. The YBC is concerned that there is apparently no mechanism to appeal against the outcome of a single evaluation, or decision to refer an advocate for remedial training. Given that these be taken into account as 'other relevant information', it is submitted that due process and transparency require those single evaluations to be capable of appeal.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

84. If plea only advocates are allowed under the Scheme, despite the principled arguments against their inclusion, we would wish to see further details about their numbers included within the review.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

85. We would ask for an executive summary to be prepared, so that busy criminal practitioners can concentrate on what they can and cannot do under the Scheme. The history of the Scheme and arguments put forward to justify its existence can be reserved for an appendix. The reality is that many criminal practitioners will only read the Handbook if the Scheme is actually rolled out. By that time, the history and the justifications for it will be moot points; the reality is that it would be in place, and the advocates would only need to know their responsibilities within it.

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

86. An executive summary would be appreciated, as would an easy to follow flow chart documenting the appeals process.

Q18: Do you have any comments on the Scheme Rules?

87. None that have not already been raised in response to earlier questions.

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

88. No. The definition should not be restricted to prosecutions brought by the police or SFO, it should relate to all proceedings before a criminal court in which a criminal sanction could ultimately be imposed.

89. If the Scheme is designed to protect the public, there can be no justification for having cases where a criminal sanction could be imposed outside of the Scheme, particularly as there are many other bodies (e.g. the RSPCA, the DWP, local authorities) that bring prosecutions in the criminal courts.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

90. No. The YBC thinks that in a hybrid case a judge could simply direct that a specialist practitioner would be able to appear without QASA accreditation because of the specific details of that case and the practitioners own practice area.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

91. The YBC considers the Scheme to be unlawful, for the reasons set out at the outset of this paper. Only a lawful scheme, that is necessary, and a proportionate response to the problems it seeks to address should be imposed.

92. If a scheme is still to be imposed, it should be lawful, necessary (based on evidence) and proportionate. The proposed Scheme would need to be revised to meet those criteria.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

93. No.

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

94. No.

Q24: Are there any other equality issues that you think that the regulators ought to consider?

95. No.

**Young Barristers' Committee
October 2012**

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The Youth Justice Board (YJB)

Youth Justice Board



Joint Advocacy Group QASA

Fourth consultation paper on the Quality
Assurance Scheme for Advocates
(crime)

Quality Assurance Scheme for Advocates
Natasha Richards, Youth Justice Board

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The Youth Justice Board for England and Wales (YJB) welcomes the opportunity to respond to this consultation on the development of the Quality Assurance Scheme for Advocates (QASA).

1. We met Chris Nichols and colleagues from the Bar Standards Board on the 17th September to discuss the consultation and agreed that as part of our consultation response we would provide a brief outline of the court improvement work the YJB is currently delivering.
2. The YJB and Her Majesty's Courts and Tribunals Service (HMCTS) jointly published 'Making it Count in Court' (MICC) 2010 (see attached) which focuses on the work of the court practitioners in court and provides a framework for improved partnership working to deliver effective and efficient court practice. The framework places expectations on Magistrates, District Judges, CPS, defence lawyers, YOTs, Police and legal advisors to ensure that victims, witnesses, young people, parents and carers receive the best service possible from the court. This piece of work was further supported by the Senior Presiding Judge Brian Leveson.
3. Following the MICC framework we launched the Making it Count in Court Toolkit 2011 <http://www.justice.gov.uk/youth-justice/courts-and-orders/making-it-count-in-court/toolkit> which supports the framework by providing templates and good practice examples of work that is being completed nationally for those working in the criminal justice system, of particular interest to you would be the work we did with the Law Society to ensure that YOTs provide advocates with key information; <http://www.justice.gov.uk/downloads/youth-justice/courts-and-orders/making-it-count-in-court/working-with-the-yot-from-a-defence-perspective.doc>. The toolkit also includes sentencing data, CPS LAC guidance note, and Gap analysis forms. This continues to be updated and can be found on the Justice website.
4. We have also been working with HMCTS and The Communications Trust to promote training for court practitioners when working with young people in court. The Royal College of Speech and Language Therapists research indicates that in excess of 60% of young people in the criminal justice system have a speech, language or communication need.
5. In partnership with HMCTS and the Communications Trust; we have delivered 4 workshops for court stakeholders in London, Wales and Nottingham these have included defence advocates. These were held to raise awareness on how criminal justice professionals communicate with young people, and the problems faced by young people with communication needs, and practical strategies to aid communication so that young people can engage and understand the court process. We are now planning to hold a further 7 workshops in the remaining 5 business areas in 2012/13 and look to further promote this area with defence advocates.
6. The implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) is expected to commence from December 12 – April 13 and is likely see further impacts in the numbers of young people entering court. This is due to changes to the Out Of Court Disposals that are currently available in particular removing the escalator that takes young people up to court, once they have received a reprimand or a final warning.
7. Also the Criminal Justice Act 2003 - Schedule 3: with reference to the Trials and Committal for Sentence will also introduce plea before venue proceedings which will see more serious youth cases being sentenced in a Youth Court. This will increase the opportunities for serious cases to be held and sentenced by the Youth Court.

8. These changes will increase the number of serious cases involving young people with the most complex needs appearing in the Youth Court, and will require specialised and experienced advocates to represent these youth cases. In particular the advocates would need to have working knowledge on the Sentencing Guidelines Council Overarching Principles - Sentencing Youths, published in 2009 and the ability to communicate with these young people who have complex needs.
9. **In response to Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?**
10. The Youth Justice Board welcomes the work of the Bar Standards Board in developing QASA to raise practice standards. We agree that within the QASA youth court work would naturally sit within Level 1. However our concerns with having advocates all at accreditation Level 1 are around their ability to provide appropriate and effective services to young people.
11. The current proposal for the advocate's levels clearly highlights for adult's cases the complexity of the variance of the degree as the adults move up the courts. We would like to see the levels table (pg15) identifies that levels 1-4 can apply both to adult and young defendants. Unfortunately the notion that the Youth Court is the place for inexperienced advocates to cut their teeth is still prevalent.
12. We would want the QASA to promote youth cases at all levels as a specialised area and that advocates would need a specialist skill set when representing young defendants who appear in court on their own or as a joint enterprise especially when appearing with adults in the Magistrates or Crown Courts at levels 1 - 4. The YJB welcomes your plans for more in-depth research to assess where the level should be pitched to accommodate vulnerable defendants and witnesses

Victim Support

| | |
|---|-------------------|
| Name: | Ellie Cumbo |
| Organization: | Victim Support |
| Role: | Policy Researcher |
| Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme? | |
| We have no position on this question. | |
| Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates? | |
| We have no position on this question. | |
| Q3: Are there any practical issues that arise from client notification? | |
| As an organization that supports victims only in criminal cases, who are not direct clients, we have no position on this question. | |

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

We are naturally concerned with the welfare of vulnerable defendants and witnesses in all courts, and would wish to see an explicit consideration of witnesses' needs in all cases before the level is set, as set out below.

Q5: Do you foresee any practical problems with a phased implementation?

We have no position on this question.

Q.6: Do you foresee any practical problems arising from the process of determining the level of the case? If so please explain how you think the problems could be overcome.

Whilst we recognize that the levels table is more flexible than in earlier incarnations, we remain worried by the risk that it may cause the needs of victims and witnesses to be overlooked. This is because, in our experience, there is little correlation between the vulnerability of victims and the type of crime or the complexity of the case.

In particular, witnesses in many of the cases currently given a starting point of level 2 may in fact be highly vulnerable and liable to undue distress if the advocates are insufficiently aware of their needs. This is a particular danger in respect of complainants in sexual offences, however minor, where there may be highly complex issues around power and consent, and a well-known problem with victim-blaming myths (most recently acknowledged by CPS London Chief Crown Prosecutor Alison Saunders, in her public lecture in January 2012). The risk is further enhanced where there is a background of domestic abuse between the complainant and the defendant.

In the current proposals, such matters would only be taken into account if the instructing solicitor and the advocates note of their own accord that a particular case might warrant a departure from the levels table, or "where the level of a case is not immediately clear" (4.19). But they "will need to be able to justify that decision if they are called on to do so by their regulator or by the judiciary" (4.20). We suggest this expectation will weight decisions towards leaving cases as categorised in the table, without any examination of witnesses' needs necessarily taking place.

We therefore suggest:

- a) There should be an explicit expectation on those setting the level of a case always to take into account the characteristics and needs of witnesses, and
- b) That sexual offence cases should not be included on the table at all, and instead always examined on an individual basis, to avoid the risk of being set at too low a level.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated

to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

Our answer to this question is set out in our previous answer. We do not believe that sexual offences should be included in the table at all but assessed on an individual basis.

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

We have no specific response to this question, except to say that in our view the categorisation of “minor” sexual offences is not a straightforward one. An offence of this nature may be minor in terms of the offender’s relative culpability and still have very serious effects on the victim /complainant. It is for this reason that we think the needs of victims and witnesses should always be considered by those setting the level of a case, and that sexual offences should not be included on the table at all to avoid the level being set too low.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

We have no position on this question.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

We have no position on this question.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

Even in cases where the witnesses are not especially vulnerable, there is always a risk of inappropriate cross-examination given the fact that victims, unlike defendants, are not legally represented in criminal proceeding. This is recognized in the Bar Code of Conduct as follows:

s.708 A barrister when conducting proceedings in Court:

(g) must not make statements or ask questions which are merely scandalous or intended or calculated only to vilify insult or annoy either a witness or some other person;....

(j) must not suggest that a victim, witness or other person is guilty of crime, fraud or misconduct or make any defamatory aspersion on the conduct of any other person or attribute to another person the crime or

conduct of which his lay client is accused unless such allegations go to a matter in issue (including the credibility of the witness) which is material to the lay client's case and appear to him to be supported by reasonable grounds.

We think this acknowledged risk would be better reflected if the process of setting case levels included a consideration of the nature of the defence, and specifically whether or not there is a risk of defamation or undue distress to witnesses resulting from it. This is a factor that is not currently mentioned in the scheme at all, for example as a relevant factor under **4.21**.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

We suggest that, in order to develop a fuller picture of how individual advocates affect the victim and witness experience, a system should be developed whereby feedback from victims and witnesses is used to supplement judicial assessments.

Feedback from victims and witnesses would not relate to the competence of the advocate to prosecute, but would address the skills of that advocate in relating to the victim or witness, including whether they were treated with courtesy and respect, and whether the advocate answered any questions they may have, for example at the pre-trial meetings provided for at paragraph 7.9 of the Code of Conduct for Victims of Crime.

Q13: Do you have any comments on the proposed modified entry arrangement?

We do not.

Q14: Do you agree with the proposed approach to the assessment of competence?

Aside from our suggested addition of feedback from victims and witnesses, as set out in our response to Q.12, we have no position on this question.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

There are no additional issues we would wish to see included other than those raised in this response.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

We have no position on this question.

Q17: Is there any additional guidance or information on the Scheme and its application that

would be useful?

We have no further guidance to suggest.

Q18: Do you have any comments on the Scheme Rules?

We do not.

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

We agree that the proposed new definition is appropriate given the revisions to the levels proposals.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

We have no position on this question.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

We have no position on this question.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

We do not.

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

We do not.

Q24: Are there any other equality issues that you think that the regulators ought to consider?

We have no further issues to raise.

YLAL response to the Fourth consultation paper on the Quality Assurance Scheme for Advocates (Crime)

This is the response of the Young Legal Aid Lawyers (YLAL) to the **Fourth consultation paper on the Quality Assurance Scheme for Advocates (Crime)**.

About YLAL

Young Legal Aid Lawyers (YLAL) is a group of junior lawyers who are committed to practising in those areas of law, both criminal and civil, that have traditionally been publicly funded. YLAL members number around 1,700 and include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales. We aim to represent the interests of those who are either working in legal aid or those wishing to pursue a career in it. We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law. One of YLAL's main objectives is to promote the interests of new entrants to the profession and junior lawyers.

Our response

Our response to this fourth and final consultation centres on the proposed changes to the way that Youth Court work is dealt with under the scheme. We accept that this is just one small part of the scheme but it is of particular relevance to our members who often undertake youth court work, both as barristers and solicitors, at the start of their careers. The consultation states:

3.20 Given the range and complexity of work undertaken within the Youth Court it has proven difficult to categorise all work within one level. The third consultation proposed that Youth Court work be at Level 2. However, responses suggested that this would prevent a substantial number of experienced advocates currently undertaking work in the Youth Court from continuing to do so. As a result of these responses, the Scheme has been revised so that the starting point for Youth Courts is Level 1. It should be noted that advocates will need to have regard to their overriding professional obligation not to undertake work outside of their competence.

3.21 Youth Court cases involve vulnerable defendants and witnesses. Specialist skills are necessary to manage these cases and the impact of incompetent advocacy is potentially serious. It is proposed that the regulators should conduct focussed research into the Youth Court in order to establish whether there are risks present and if so what, if any, additional measures (such as specialist training, for example) might be necessary to address these. JAG recognises the need for this research to be undertaken as a matter of priority so that recommendations may be made during 2013.

While we appreciate that there are good reasons for not excluding advocates who are experienced in the youth court but who may not be level 2 accredited, we are concerned about relying on advocates simply needing to 'have regard to their overriding professional obligation not to undertake work outside of their competence.'

As the consultation accepts, youth court work is often complex and sensitive. It is also often poorly paid and so is delegated to junior advocates. In the absence of an external quality assurance standard tailored to youth court work, there is a real risk that junior advocates will feel pressured to undertake complex work that requires a more experienced or senior advocate. For obvious reasons, it is very hard for junior advocates at the start of their careers to resist instructions to work. YLAL is committed to progressing opportunities for junior lawyers to provide a good quality service. External safeguards are essential to ensure that junior lawyers are not pressured into undertaking work beyond their expertise.

One possible way to reduce this risk would be to ensure that certain types of work in the youth court attract a level 2 requirement as suggested by Just For Kids Law. We also endorse the need for a quality mark for youth court work as suggested by Just For Kids Law.

We hope these concerns will be taken into account in the final scheme.

5 King's Bench Walk, The Chambers of Sarah Forshaw QC & Mark Heywood QC

QASA Fourth Consultation: Response of 5 King's Bench Walk

1. At the outset Chambers would like to recognise the tireless work done by the South Eastern Circuit ("SEC") and the Criminal Bar Association ("CBA") in preparing responses to this consultation which have in turn greatly assisted in the preparation of Chambers' own response.
2. Two recurring themes in Chambers' response are:
 - a. the need for rational, evidence-based decision making in relation to QASA; and
 - b. the proposition that the practical operation of QASA ought to be consistent with its objective (assurance of the quality of criminal advocacy) and justification (the perceived need for such assurance).
3. Chambers notes that there appears to be a marked lack of evidence provided by JAG as to the need for QASA. The main reasons given in the consultation document are that there is "a worry that advocates may accept instructions outside of their competence" and "concerns about advocacy" have been raised by the Judiciary²⁹. Whilst Chambers accepts that such concerns exist, they appear from the consultation document to be little more than anecdotal. Without reliable evidence and rigorous analysis thereof, it is difficult to see how rational decisions can be made in relation to QASA, including the decisions:
 - a. whether QASA should be implemented at all;
 - b. and if implemented,
 - i. in what form (in particular, please refer to the responses to Questions 2 and 4 for examples of this problem), and
 - ii. in relation to which advocates (in particular, please refer to the response to Question 13 for an example of this problem).

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme?

4. JAG appears to have arrived at the period of 12 months by looking "at trial statistics produced by the Ministry of Justice and based on the most recent set of annual data"³⁰. Such data may well give an indication of the number of trials an advocate might expect to undertake within a 12 month period. However, another important factor will be the number of judges who are both willing and able to evaluate the advocate. JAG have understandably not cited any data in relation to this factor in the consultation document as it is unlikely that any relevant data yet exist.
5. It is not clear from the consultation document how many judges (whether part-time or fulltime) are expected to be qualified to complete CAEFs (Criminal Advocacy Evaluation Forms) in the first 12 months following implementation of QASA. This is likely to depend on a number of factors, including but not limited to:
 - a. how long the training to become an evaluator takes;
 - b. whether part-time judges are likely to train to be evaluators;

²⁹ QASA Fourth Consultation para 1.7

³⁰ QASA Fourth Consultation para 2.6

- c. the extent of judicial support for QASA; and
 - d. the extent of any regional variations (see also the response to Question 5 below).
6. Given the lack of evidence as to the availability of judges to complete CAEFs in the first 12 months after implementation of QASA, it may well be preferable to allow a longer period, such as 18 months, to obtain the requisite number of judicial evaluations.
 7. On a separate but related point, in the current version of the QASA Handbook of July 2012 a several factors are cited at paragraph 5.85 which may be relevant to an application for an extension of time. Lack of availability of trials at the relevant level is such a factor³¹, but lack of availability of judges willing and able to complete a CAEF at trials at the relevant level is not currently a factor, and ought to be added.

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

8. In his 2006 Review of Legal Aid Procurement (the “Carter Review”), Lord Carter recommended that a “proportionate system of quality monitoring” be developed for “all advocates working in the criminal, civil and family courts”³². JAG explicitly relies on the Carter Review as justification for QASA³³.
9. However, another of Lord Carter’s recommendations was for “early identification of the trial advocate”³⁴. This recommendation was duly implemented in the Criminal Defence Service Funding Order 2007, which envisages that an advocate is instructed before PCMH and notified to the Court³⁵. Once instructed, an advocate must remain as instructed advocate at all times except where certain exceptions apply³⁶.
10. The logic behind this concept of the “instructed advocate” is well-explained by Andrew Hall QC in his article on the AGFS: “This is an attempt to encourage ‘case ownership’ in order to ensure effective preparation and to reduce the number of late returns. The mechanism is to ensure that one advocate takes responsibility for preparation and progression throughout the life of a case is the payment, to that advocate, of the case fee. No separate claim for fees due to any substitute advocate can be entertained by the Commission under the new Order. Acceptance of instructions as the ‘instructed advocate’ carries the implication that the advocate will be available to conduct the eventual trial and will ensure, within reason, that s/he is available for the PCMH and any other interim appearances”³⁷.
11. This rationale was also understood by the Government at the time which stated in its paper in response to the Carter Review: “It is essential that the lead advocate takes responsibility for the conduct of the case advocacy, and we will implement, with AGFS, the proposal to pay one advocate who will manage any sub-contracted payment. This lead advocate should be identified at the earliest possible stage (and ideally by the Plea and Case Management Hearing at the latest), so that they can take control of the critical pre-trial phase”³⁸.
12. It is recognised in the Bar Council’s Graduated Fee Payment Protocol July 2012 that “[i]t is in the public interest and in the interest of the professions that the same advocate should undertake all necessary work on a case. It is in the interests of the Bar as a whole, and the criminal justice system, that the advocate of choice should be able to undertake all aspects of the case for the client”³⁹.
13. Why then is JAG proposing to create a species of Level 2 Route A accredited non-trial advocate who necessarily cannot perform the role of “instructed advocate” which is envisaged

³¹ QASA Handbook July 2012 para 5.85(e)

³² Carter Review Recommendation 5.3

³³ QASA website: <http://www.qasa.org.uk/about-qasa.html>

³⁴ Carter Review Recommendation 4.14

³⁵ Paragraph 20(1) of Schedule 1 to the Criminal Defence Service Funding Order 2007

³⁶ Paragraph 20(9) of Schedule 1 to the Criminal Defence Service Funding Order 2007

³⁷ Archbold News 2007, 4, pp 7 – 9 at p 9

³⁸ “Legal Aid Reform: the Way Ahead”, Cm 6993

³⁹ *Ibid.* at para 17

under the AGFS⁴⁰? The principal reason appears to be that a significant number of advocates “would be prevented from undertaking criminal advocacy work solely because of their chosen pattern of practice”⁴¹.

14. Any advocate whose “chosen pattern of practice” involves earning remuneration under AGFS by doing only non-trial hearings has by implication chosen to not to perform the role of advocate envisaged in the AGFS. One of the goals of QASA is to “eliminate underperforming advocates”⁴²; do these advocates not fall to be eliminated under QASA as underperforming? The accreditation of such advocates under Route A is irrational. One might also consider what a defendant is likely to think when notified by their Route A accredited advocate that the advocate is not competent to conduct trials, but is somehow competent to advise them on whether to have a trial at all.
15. Another of QASA’s objectives is that it “will ensure that the performance of all advocates is measured against the same set of standards, regardless of an advocate’s previous education and training”⁴³. Having a double standard in the form of Route A and Route B accreditation for Level 2 advocates, justified by advocates having different levels of experience in trial work stands in direct contradiction to the spirit of that objective.
16. For all of these reasons Chambers rejects entirely the proposal for Route A accreditation for Level 2 non-trial advocates.

Q3: Are there any practical issues that arise from client notification?

17. One practical issue has already been identified above in relation to the proposal for Route A accredited Level 2 non-trial advocates. Aside from that, it appears from the current version of the QASA Handbook that “clients need to know what they can expect from their advocate or if the circumstances of the case change”⁴⁴. Does this include an obligation on the advocate to inform the client that the advocate is asking the trial judge to complete a CAEF and the effect that a negative evaluation could have on that advocate’s future livelihood?

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

18. In the consultation document it is already recognised that “Youth Court cases involve vulnerable defendants and witnesses ... and the impact of incompetent advocacy is potentially serious”⁴⁵. To then propose that Youth Court work be categorised at Level 1, even initially, is irrational.
19. In order to mitigate any potential “impact of incompetent advocacy”, JAG notes “that advocates will need to have regard to their overriding professional obligation not to undertake work outside of their competence”⁴⁶. This reasoning is incompatible with the underlying logic of QASA, viz the quality of advocacy cannot be assured merely by trusting advocates not to undertake work outside of their competence.
20. Currently there must exist a significant number of advocates who are competent to represent defendants at the Youth Court in serious matters but who are not competent to represent defendants at the Crown Court in what would be Level 2 matters because their practice involves only summary trials as opposed to trials on indictment. Such advocates should not be prevented from undertaking serious Youth Court work under QASA. If QASA is to accommodate such advocates then a new Level or sub-Level will need to be created for advocates who specialise in serious Youth Court work.

⁴⁰ If a non-trial advocate is instructed prior to PCMH and the defendant pleads not guilty upon arraignment then continuity in the instructed advocate to trial and beyond is obviously and foreseeably impossible.

⁴¹ QASA Fourth Consultation, para 3.12

⁴² QASA website: <http://www.qasa.org.uk/about-qasa.html>

⁴³ QASA website: <http://www.qasa.org.uk/about-qasa.html>

⁴⁴ QASA Handbook July 2012 para 5.59

⁴⁵ QASA Fourth Consultation para 3.21

⁴⁶ QASA Fourth Consultation para 3.20

21. One can foresee greater difficulty in implementing an appropriate scheme of evaluation for an advocate's performance in trials in the Youth Court as opposed to the Crown Court. However, if QASA be justified, then such evaluation must be necessary, especially given JAG's recognition of "the range and complexity of work undertaken within the Youth Court"⁴⁷. If Youth Court cases are categorised at Level 1, no evaluation of the advocate would be needed; how then is quality to be assured? Categorisation of Youth Court cases at Level 1 would not be consistent with the stated aim of QASA: "assuring the competence of advocacy in the criminal courts"⁴⁸.
22. JAG already recognises the need for further research in this area⁴⁹; if so, Chambers believes this research ought to be conducted before QASA is implemented and not after, even if this entails a delay to the proposed implementation dates. It would not be rational to implement QASA unless and until it is, in each of its parts and as a whole, properly justified by evidence.

Q5: Do you foresee any practical problems with a phased implementation?

23. The consultation document does not make clear the position for advocates whose primary practising address falls within the geographical area covered by one circuit but who practise primarily in a different circuit. Say, for example, a barrister is in chambers in Birmingham but practises primarily in London. That barrister would have to register in Phase 1, but would judges in London be able to complete CAEFs before Phase 2?
24. Conversely, if a barrister is in chambers in London but practises primarily in Birmingham, would that barrister not have an unfair advantage over local Midlands Circuit practitioners who have to register during Phase 1, by virtue of not having to register until Phase 2?

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

25. The principal justification for QASA is that the "economic climate, both generally and in terms of legal aid, has created a worry that advocates may accept instructions outside of their competence"⁵⁰. For that worry to be justified, there must be instructing parties and advocates out there who are unscrupulous enough to assign and take on cases which are beyond the competence of the advocate. These are precisely the instructing parties and advocates who will foreseeably abuse the system proposed by JAG for determining the level of case. An instructing party and Level 2 advocate might by-pass the need for accreditation at Level 3 by simply grading Level 3 cases as Level 2 cases.
26. If there be a need for QASA at all, this must be in part because the quality of advocacy cannot be assured merely by trusting that instructing parties and advocates properly assess the complexity and seriousness of each case and do not take on cases they assess to be outside of their competence. This is the underlying logic of QASA and it is not consistent with JAG's proposal that the level of case should be set by these same instructing parties and advocates; moreover it effectively allows QASA to be by-passed by under-grading cases.
27. Another principle which underpins QASA is the need for independent evaluation, e.g. by judges, in order to assure the quality of advocacy. If there be a need for such independent evaluation of the competence of the advocate to undertake cases, is there not equally a need for independent evaluation of the complexity and seriousness of the case to be undertaken?
28. JAG appears to have concluded that "it is impracticable for the judiciary to, for example through a separate hearing, be required to determine the level of the case"⁵¹. Obviously if grading cases routinely required a separate hearing this would be completely impracticable. However there is no reason why grading should require a separate hearing at all, if the allocation criteria were designed to be straightforward and objective.

⁴⁷ *Ibid.* at para 3.20

⁴⁸ QASA website: <http://www.qasa.org.uk/about-qasa.html>

⁴⁹ QASA Fourth Consultation para 3.21

⁵⁰ QASA Fourth Consultation para 1.7

⁵¹ QASA Fourth Consultation, para 4.13

29. With straightforward and objective allocation criteria, it would not place an unreasonable burden on the advocates or the Court for there to be an extra section on the PCMH form devoted to grading. The defence advocate would select a grade and briefly justify it with reference to the grading criteria. The prosecution advocate would agree or disagree (with reasons). The judge would then decide the grading; in a case where the grade is agreed between the defence and prosecution this is likely to be a quick process; in a case where there is disagreement, it is only right that submissions are considered and sufficient time is taken to decide the correct grade. It would be necessary for the judges who dealt with PCMHs to be fully QASA trained; that does not appear on the face of it to be unreasonable given the general need for judges to make evaluations under QASA.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

30. In response to Questions 7 and 8, Chambers gratefully adopts the responses of the CBA and the SEC, and in particular the CBA's invitation to further discussion with other stakeholders before the allocation criteria are finalised.
31. Chambers has already suggested in response to Question 6 that the allocation criteria must be designed to be straightforward and objective for the reasons given therein. One possible way of furthering that design goal would be for the allocation criteria to distinguish between levels by reference to the maximum penalties for certain classes of offences. This would not be suitable for distinguishing between, for example, "straightforward" and "complex" robberies, but could be a useful starting point in relation to some offences.
32. For example:
- a. Non-fatal offences against the person being tried in the Crown Court:
 - i. where the maximum penalty is 7 years' imprisonment or less: Level 2 (this would include, for example racially aggravated harassment with fear of violence, GBH without intent, ABH, racially aggravated common assault, assault with intent to resist arrest etc);
 - ii. where the maximum penalty is greater than 7 years' imprisonment: Level 3 (this would include, for example, GBH with intent, administering a poison so as to endanger life, kidnapping, false imprisonment etc).
 - iii. N.B. Where the victim or witnesses are children, or where the defendant has mental health issues, the level would be liable to be increased accordingly.
 - b. Drugs offences being tried in the Crown Court:
 - i. where the maximum penalty is 7 years' imprisonment or less: Level 2 (this would include, for example, simple possession of Class A, B or C drugs);
 - ii. where the maximum penalty is greater than 7 years' imprisonment: Level 3 (this would include, for example, possession of Class A, B or C drugs with intent to supply).
 - iii. N.B. In a straightforward case of cultivation or supply of cannabis, for example, a Judge ought to be willing to allow an application for a Level 2 advocate to handle the case what would otherwise be a Level 3 case according to these criteria.
 - c. Offences of damage to property being tried in the Crown Court:
 - i. where the maximum penalty is 14 years' imprisonment or less: Level 2 (this would include, for example, racially aggravated criminal damage, simple

- criminal damage, threats to destroy property, possessing an article with intent to destroy property etc)
- ii. where the maximum penalty is greater than 14 years' imprisonment: Level 3 (this would include, for example, criminal damage with intent to endanger life, arson etc).
 - iii. N.B. Where the damage is of very high value, the level would be liable to be increased accordingly.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

33. Chambers gratefully adopts the responses of the SEC to questions 9 to 12 for the reasons given therein.

Q13: Do you have any comments on the proposed modified entry arrangement?

34. As noted above in relation to the categorisation of advocacy in the Youth Court, it would not be rational to implement QASA unless and until it is, in each of its parts and as a whole, properly justified by evidence.
35. JAG unsurprisingly accepts that its approach ought to be evidence-based in light of its reasons for not offering any modified entry arrangement for Queens Counsel who were not appointed under the QCA process. The reasons given by JAG are that before QCA "there was no formal, independent or evidence based means of assessing applications for silk" and therefore it is not "possible to demonstrate that the pre-QCA process is comparable in any way to the QASA assessment framework"⁵².
36. However, is there not a preliminary issue which needs to be decided according to evidence before one needs to worry about a modified entry arrangement for Queens Counsel? The preliminary issue is whether QASA is required for Queens Counsel at all.
37. The purported justification for QASA appears to be as follows: "The economic climate, both generally and in terms of legal aid, has created a worry that advocates may accept instructions outside of their competence. The Judiciary has also raised concerns about advocacy performance. QASA has been developed to respond to these issues"⁵³.
38. Where is the evidence to suggest that anyone is even remotely worried that Queens Counsel are accepting instructions outside of their competence or are under-performing in criminal cases? Why should advocates who have been appointed Queens Counsel have to pay for QASA when there is no evidence that they need quality assurance? Unless and until such evidence is provided, it would not be rational to include Queens Counsel in QASA.

Q14: Do you agree with the proposed approach to the assessment of competence?

⁵² QASA Fourth Consultation para 4.35

⁵³ QASA Fourth Consultation paras 1.7 and 1.8

39. If the aim of QASA is to assure the quality of advocacy, then the independent evaluation which will be the instrument of such assurance must be an evaluation conducted by a judge of real advocacy before a court and not in some role-play scenario. What is a defendant to think when notified by an advocate that they have been accredited at Level 2 through an assessment centre but have never conducted trial on indictment but is somehow accredited to advise on whether to have a trial at all?

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Q18: Do you have any comments on the Scheme Rules?

40. Chambers gratefully adopts the responses of the the SEC to questions 15 to 18 for the reasons given therein.

Q19: Do you agree with the proposed definition of ‘criminal advocacy’? If not, what would you suggest as an alternative and why?

41. The principal justification for QASA is that the “economic climate, both generally and in terms of legal aid, has created a worry that advocates may accept instructions outside of their competence”⁵⁴. If there be such a worry, is it not present in cases such as prosecutions by the DWP or local authorities in relation to benefit fraud? After all those are cases where defendants are almost always impecunious and therefore legally aided if represented at all. Such cases would fall outside the proposed limited definition of “criminal advocacy” as they are not prosecuted by the CPS or SFO.
42. If there are indeed unscrupulous advocates who “may accept instructions outside of their competence”, the limited definition of “criminal advocacy” as proposed by JAG is going to be the perfect excuse for those advocates to take on cases in these specialised fields to escape the need for accreditation. This limited definition of “criminal advocacy” is therefore inconsistent with the underlying logic of QASA.
43. The proposed limited definition of “criminal advocacy” has been designed in order to allow specialist practitioners to fall outside of QASA⁵⁵. The definition turns on the identity of the prosecutor. Aside from the statement that “JAG believes that at the outset of the Scheme this is a proportionate way in which to deal with specialist practitioners”⁵⁶, it is not clear what is the justification for distinguishing between criminal cases on the basis of the identity of the prosecutor.
44. If the justification is that specialist practitioners might find it difficult to become QASA accredited is this a rational justification? If specialist practitioners frequently prosecute or defend in trials on indictment prosecuted other than by the CPS and SFO, they should have little difficulty in obtaining the requisite number of judicial evaluations. If specialist practitioners do not frequently conduct trials on indictment, surely the need for quality assurance by accreditation under QASA is greater than usual, rather than absent entirely? Specialist practitioners would also have the opportunity to apply for an extension to the period allotted for accreditation just like any other practitioner.
45. There are certain criminal cases where specialist practitioners ought to be allowed to appear, and in relation to whom QASA may well be unnecessary. These cases are dealt with in the response to Question 20, below.

⁵⁴ QASA Fourth Consultation para 1.7

⁵⁵ QASA Handbook July 2012 para 4.14

⁵⁶ QASA Fourth Consultation para 5.13

46. The following alternative definition of “criminal advocacy” is proposed as a starting point: “advocacy in all hearings arising out of an investigation into whether a criminal offence has been committed which is prosecuted through the criminal courts”. Such a definition would exclude proceedings which take place in criminal courts such as extradition, applications for ASBOs (otherwise than following conviction), applications for cash forfeiture, appeals against condemnation, licensing appeals etc.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

47. JAG has given an example of an “advocate [who] has been instructed to appear in a case in the criminal court within the definition of ‘criminal advocacy’ as a result of their specialism e.g. a special purpose junior brought in to advise and deal with the effect of trust law on a fraud prosecution”⁵⁷. Clearly it would not make sense to require such an advocate to become accredited under QASA: an advocate who spent enough time doing trials on indictment to become accredited is unlikely to be specialised enough in trust law to advise on whatever esoteric point is envisaged in the example. Moreover, that special purpose junior would not be conducting the trial. Therefore Chambers agrees with excluding such an advocate from QASA, given its focus on crime.
48. However, in any other case it does not make sense to distinguish between specialist practitioners and criminal practitioners. Even where a specialist practitioner “is appearing in a case with a hybrid indictment”⁵⁸, if that practitioner still has conduct of the trial s/he should be just as liable to accreditation as a criminal practitioner, for the reasons given in response to Question 19, above.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

Q24: Are there any other equality issues that you think that the regulators ought to consider?

49. Chambers gratefully adopts the responses of the SEC to questions 21 and 24 for the reasons given therein.

18 Red Lion Court

On behalf of my chambers at 18 Red Lion Court, we have seen the response of the Criminal Bar Association to the Fourth QASA Consultation. We agree with the content. Please record our response accordingly.

Max Hill QC

Head of Chambers
18 Red Lion Court
London

25 Bedford Row

⁵⁷ QASA Fourth Consultation para 5.12

⁵⁸ QASA Fourth Consultation para 5.12



**Response to 4th QASA Consultation
October 2012**

INTRODUCTION

1. 25 Bedford Row is a specialist criminal defence set. In a mere 35 years it has grown to number some 18 silks and 48 juniors and is widely regarded as the leading criminal defence chambers. We speak from the considerable collective experience of those who are always on one side of the court. We mention this because, before we respond to the specific questions in this consultation, we wish to make some general comments about a central feature of the scheme, namely judicial evaluation.

JUDICIAL INVOLVEMENT

2. In response to the August 2010 consultation which asked ‘Do you support the proposed central role that the judiciary will play in the QAA scheme?’ (question 20) we said this:

“We are concerned that a defendant’s confidence in the fearlessness and integrity of their advocate might be undermined if the defendant knew that the advocate’s professional career could depend upon the judge’s assessment of their ability. Some advocates feel that this is a change to the nature of the constitutional arrangement between counsel and judge that fundamentally alters the nature of the relationship between bench and bar and, risks tilting the balance too far in favour of the bench. If this fear is well founded, such a change is not in the interests of justice.

“We are concerned to prevent this being a case where the cure is worse than the illness – the failings of some advocates, particularly those who are insufficiently experienced for the cases they are driven to take on, is correctly seen as a problem for the criminal justice system but a scheme that hobbles the bar of its independence and ultimately its integrity, would be a Pyrrhic victory indeed.

“It might be that such a scheme would indeed raise advocacy standards but would it at the same time make advocates so fearful and anxious that they lose all effectiveness? Over the course of a generation would we see a new breed of advocate arise, perfectly competent in performing ordinary advocacy but unwilling to risk her or his professional advancement by pursuing hopeless defences or lines of cross examination in accordance with the client’s instructions. These are real concerns that the scheme must address.”

3. We have seen **nothing at all** in the last 2 years that makes us fear these consequences any the less or that causes us in any way to change our minds. Indeed, we are fortified in our view by what others have said about these topics. We cannot improve on the words of Moses LJ in the *Ebsworth Lecture* this year.

“As every jury advocate will tell you in a seemingly hopeless case, fulfilling a duty to persuade a jury may be at the cost of pleasing the judge. Do we really want a generation of criminal trial advocates who go into the court with the intention of pleasing the judge? Is that what quality assurance means? Of course there will be judges who appreciate where the advocate’s duty and loyalty lies...but by no means all, and it is expecting a great deal of young advocates who, as they will be required to do, have notified the judge in advance that they are seeking evaluation to stand up to the judge when he thinks that the cross-examination has gone on long enough.”

“Surely the last thing we want is defensive advocacy. The need to be marked, to move up a level or maintain one’s grade is, I believe, deeply inimical to the proper relationship between advocate and judge and, more importantly, the trust the client has in that relationship. The accused must believe that his brief will tell the judge to go to the devil, if that is what his case demands.”

4. This fundamental alteration of the relationship between bench and advocates is not taking place in a vacuum, it is occurring in an environment in which successive statutory and procedural changes have already effected a none too subtle shift in judicial involvement and attitudes. Again, we quote another, Professor Jenny McEwan who, in her address to the Law Society Criminal Law Conference in May 2012, pointed out that the Criminal Procedure Rules and surrounding case law typify a change in attitude to the role of the adversarial criminal defence lawyer. Recent cases have, through their interpretation of the Rules, substantially re-oriented the defence role. The Rules appear to have catalysed the judiciary, subtly reforming adversarial procedure via the courtroom, ushering in a significant culture change in English criminal justice. This has been achieved through much interpretation and extension; the Rules are littered with vague and malleable expectations. As Professor McEwan highlighted, the ‘identification of the real issues’ is a primary example, generating concern about flexible interpretation – something judges have embraced. The judiciary’s willingness to push such an agenda causes one to ask whether the ‘neutral arbiter’ role has been replaced by an inquisitorial-style investigating judge.
5. As a set that specialises in defence, we know only too well how hostile judges can be to fearless advocates who are prepared to fight hard on behalf of their clients. Many of us would not have succeeded to the extent that we have if our progress had depended on judicial evaluation and that fear is heightened by the sort of subtle shift in judicial, attitudes’ referred to above.
6. Solicitors and other advocates believe that the Bar’s enthusiasm for the original QASA was, in part at least, because it saw it as a means of restricting the upsurge of HCAs, following the introduction of the LGFS that cut the incomes of solicitors and forced them to do more and more advocacy. Inevitably, that meant there were very many more inexperienced advocates appearing in court and committing many of the mistakes of inexperience that one would expect. We do not recall there being widespread complaints about the quality of the advocacy or moves by the profession to introduce QASA before 2007. It is believed by many solicitors that the Bar felt it would be at a natural advantage with judges running the scheme since barristers appear so much more regularly in front of them than HCAs. The Bar’s enthusiasm for judicial evaluation was seen as neither principled nor free of self interest and it was because of this that the SRA have agitated, successfully as it turns out, for the alternative route of assessment centres.

7. So, in order to deal with a problem that may well be temporary – because advocates of all sorts will normally and naturally improve with experience - the Bar has saddled itself with a permanent constitutional re-balancing of the relationship between Bench and Bar; with a solution that may neuter the latter's most fearless and idiosyncratic advocates, in order to deal with a transient problem that would have resolved itself as HCAs inevitably became more skilful.
8. Independent fearless talented advocates are fundamental to the proper functioning of the CJS. Without them, the Bar will be reduced to uncritical time-servers who will not risk upsetting judges by pursuing unpopular lines of questioning or enquiry.
9. We cannot find anywhere that the BSB has acknowledged these very real concerns about the fundamental nature of the scheme. In Annex A of this fourth consultation, there is an analysis of the responses to the third consultation (on the regulatory rules underpinning QASA) where it is merely said that:
“Some of respondents noted the importance of judicial evaluation and the negative impacts on the public interest of allowing for accreditation that does not include live assessment by judges.”
10. And of the ‘negative impacts on the public interest’ of the neutering of advocates? Not a word.
11. Let us be clear, we are staunch believers that the criminal justice system should be staffed by advocates of quality. Let it not be forgotten that we are already a highly regulated profession with an emphasis on high professional and ethical standards. It is worth bearing in mind that most of the faults in the criminal justice system and most of the miscarriages of justice in recent years have not been caused by the lack of quality of the advocates, but by the systemic failures of the investigating or prosecuting authorities, as a stream of reports from Macpherson to Hillsborough illustrates. The failures are most, often those of other participants in the CJS; they are very rarely the advocates.
12. So, to be opposed to this scheme is not to be opposed to high standards of advocacy in the profession and it would traduce our views if they were misrepresented as such. It is simplistic to spin principled objections to this scheme as objections to the maintenance of high standards of advocacy. It is often the case that the wrong solution can be worse than the problem and we fear that this scheme is just such a case. To those who say that doing nothing is not an option, we respond that sometimes doing nothing is the best option and recent history contains many examples.
13. Although we do answer the questions posed we do so in an attempt to be positive and helpful. This should not be taken to approve the scheme as a whole. We believe that it is so flawed in principle that it ought not to be adopted in its present form.
14. Since drafting this response we have seen the response of the Criminal Bar Association, which differs from ours in its approach to judicial assessment. However, in the first part of its response, the CBA has expressed the view that there are serious doubts as to whether a scheme such as this is even lawful and in consequence whether a refusal to register or be accredited can have any regulatory or other consequences. We adopt and endorse the CBA response in this respect

THE QUESTIONS

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full

accreditation within the Scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?

15. There are a number of practitioners who would find it difficult to obtain the necessary number of judicial evaluations. In particular, juniors who are often and/or permanently led, in particular, in long-running fraud trials and similar areas of practice. It is likely that the extension of time proposed would not resolve the difficulties that arise for such advocates who might instead have to rely upon the assessment centres. If this would require that the assessment centre route be extended to encompass Levels 3 & 4 and progress through them not be the exclusive preserve of judicial evaluation, we would have no objection to such a course.
16. A further difficulty may arise for those who have taken a period of parental leave and return on a part-time basis, at least initially. An extension of the period would be of benefit in such cases.
17. Generally for those practitioners seeking to advance from, say, Level 2 to 3 or Level 3 to 4, a longer period to undertake three trials at the requisite higher level would be of assistance.

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

18. We do not foresee any serious difficulties arising from the revised proposals.

Q3: Are there any practical issues that arise from client notification?

19. There is a concern that those represented in the Youth Court, who often appear without an appropriate adult or indeed any other support, would be unable properly to understand the scheme. This concern is amplified by the proposal that Youth Court matters should start at Level 1 (see below).
20. Clients must appreciate and understand the extent to which non-trial advocates' limited rights of audience may affect their advice regarding prospects of success or otherwise at trial.

Q4: Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?

21. The paper recognises that Youth Court work involves vulnerable witnesses and defendants. The importance of these factors cannot be underestimated. The prosecution and representation of those under 18 facing criminal charges is some of the most demanding, serious and distressing undertaken by advocates. Be it defendants, young witnesses and/or the parents and carers; the trial and sentence of the young is always challenging. Often there are greater psychological and psychiatric factors in play than in the adult courts. The consequences of conviction and sentence for a young person are often far more serious, even for seemingly lesser offences, than for adults.
22. We welcome the intended research but we are concerned that in, in advance of any data and simply in order to extend the pool of "experienced advocates" it is proposed that those at the lowest level of advocacy should be the starting point for young defendants.
23. We understand that there may be some experienced advocates who would be excluded by maintaining the starting point at Level 2, but would suggest that this is not a good and sufficient reason for lowering the starting point as opposed to raising the standard of advocacy for the

most vulnerable. Experienced advocates at Level 1 should achieve Level 2 standards before representing those under 18, even in apparently “simple” cases.

Q5: Do you foresee any practical problems with a phased implementation?

24. Phasing seems to be catering for the practical needs of the regulators rather than any desire to assess the scheme in a pilot area before rolling it out nationally. Other than a concern over the lack of a pilot scheme, we foresee no practical problems with phased implementation.

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

25. The problem with giving instructing parties (defence solicitors and CPS) sole responsibility for determining the level of the case is that it risks conflicts of interest. There will inevitably be pressures to categorise cases above or below their true level for a variety of reasons.

26. Solicitors may be tempted to categorise cases that should be Level 3 as Level 2 so that an advocate employed by the firm is able to conduct the trial and thus obtain the advocate’s fee. Similarly, the CPS may do the same to allow a Level 2 Crown Advocate to conduct a trial rather than brief the self-employed bar.

27. The supposed safeguard of the advocate having to agree the level with the instructing party is no safeguard at all when both are employed by the same organisation. Similarly, in two advocate cases where a self-employed barrister is instructed to lead a solicitor-advocate employed by the instructing party, the leading counsel is unlikely to quarrel with the level of case set by the instructing party for fear of losing future work.

28. A further concern is that, on occasion, cases may be set artificially low so as to allow an advocate to be assessed at a high level than is justified. The problems could be overcome by:

- a. Simplifying the criteria by which cases are categorised in line with mode of trial;
- b. Requiring the judge hearing the PCMH to formally approve the categorization of any case as Level 4
- c. Pre-trial judicial approval prevents judicial objection being taken at trial and is necessary in the case of disagreement between the parties.

Q6: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

29. The offences listed in the table are broadly allocated to the appropriate level, however allocation should be simpler and take place in line with mode of trial. Furthermore, appeals against conviction or sentence should be the only hearings in the Crown Court that are categorized as Level 1.

30. Level 1: Magistrates’ Court work should be the only work allocated to Level 1. Cases that are committed to the Crown Court for sentence should not be Level 1. There is no justification for a sentence hearing in a serious case (eg. child pornography) being undertaken by a Level 1 advocate rather than a Level 3 advocate because the plea was entered in the Magistrates’ Court rather than the Crown Court. Similarly, cases sent to the Crown Court and listed for preliminary hearings in the Crown Court

should not be Level 1. It should always be the case and not the hearing that determines the level. Whether or not the advocate's firm has acted for the client in the Magistrates' Court is irrelevant to the level of the case.

31. Level 2: Level 2 should be reserved for Youth Court cases and for cases in which the Magistrates' Court has accepted jurisdiction. This is the simplest and most effective way of categorising straightforward Crown Court cases and avoids the possibility of argument between the parties over whether a case is 'straightforward' or 'more complex'.
32. Level 3: Level 3 should be reserved for all either-way cases in which the Magistrates' Court has declined jurisdiction and all indictable-only cases (excluding those that are agreed by the judge at PCMH to be Level 4).
33. Level 4: Level 4 should be reserved for all 'two advocate' cases and the most serious offences, e.g. murder, attempted murder, rape, kidnap and serious fraud except those in which the judge extends the representation order to silk

Q 8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

34. The wording used in the Levels table is insufficient to distinguish between levels because phrases such as 'straightforward' and 'more complex' are too wide and open to interpretation, abuse and potentially litigation. A simplified levels table in line with mode of trial procedure results in a simple, and straightforward system free from abuse by the financial and commercial motives of instructing parties.

Level 1: Magistrates' Court and Youth Court

Level 2: Either-way cases in which the Magistrates' Court accepts jurisdiction

Level 3: Indictable-only cases and either-way cases in which the Magistrates' Court declines jurisdiction

Level 4: All two-junior advocate cases and the most serious offences e.g. murder, attempted murder, rape, kidnap and serious fraud, except those in which the judge extends the representation order to silk.

QUESTION 9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

35. We are strongly of the view that there are sufficient Level 4 advocates and question the motive behind suggestions to the contrary. We feel that this question threatens to undermine quality assurance by falsely implying that lower quality advocates are needed to cover Level 4 cases owing to a mythical lack of demand.
36. It is never appropriate for the most serious cases (murder, attempted murder, rape etc) to be covered by Level 2 advocates. Any hearing in such cases requires at least a Level 3 advocate.

Q 10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you propose they are dealt with?

37. Confiscation hearings should be dealt with by trial advocates regardless of whether conviction was the result of a trial or a guilty plea. *Newton* hearings should not be undertaken by plea-only advocates. The proposed delineation between 'straightforward' *Newton* hearings and those that are 'more like a full trial' is not only unclear but misguided as all *Newton* hearings are like full trials because they require examination of witnesses, or of the defendant at the very least.

Q: 11 Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible.

38. 'Leader-junior' categorisation – All cases where there is a leading and junior advocate should be categorised as at least Level 4 because it is only in the most complex Crown Court cases that the CPS or SFO instructs two advocates or a circuit judge will extend the representation order to two advocates.

39. The junior advocate cases should always be at least a Level 3 advocate. It is never appropriate for a Level 2 advocate to take over the conduct of the most serious Crown Court cases.

40. We strongly disagree with the proposal that those instructing may seek to deviate from the 'one below' approach in any case with two advocates. Either the junior advocate is a 'full' junior, or the work should be done by the litigator. The only circumstance in which it will be appropriate for a Level 1 or Level 2 advocate to be instructed in a Level 4 case is when there are three advocates, e.g. a disclosure junior.

41. We agree that a significant change to the complexity of a case will require the categorisation of a case to be reconsidered. However, if the levels of case are simplified in the manner we suggest, such circumstances will be very rare and likely only occasioned by the laying of fresh charges. Changes to the level of a case will prove disruptive and costly and are another reason why differentiation between levels should be simplified.

42. The suggestion that a client may 'choose' to be represented by someone who is not assured to be of sufficient quality flies in the face of the entire scheme and is a loophole that may be its undoing. There is a real risk that instructing parties and advocates will seek to persuade longstanding clients to 'choose' to be represented by someone of lower quality in order that they can continue to be instructed.

43. Moreover, the suggestion that a client's consent removes the need for quality assurance is an injustice to the victims and witnesses that will be examined by incompetent advocates and a fraud on the public who are being told that they are assured quality.

Q 12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

44. We have already stated that we believe the proposed scheme to be objectionable in principle. Worse, we also take the view it is at great risk of being undone by the devil of its detail. Assuring quality for defendants, victims, witnesses and the public requires a simple and straightforward scheme, not one liable to argument and abuse. The JAG must not be naïve to the harsh market forces that will seek to unpick the scheme through such proposals as 'client choice' and 'deviating from the one below approach'.

Q13 [In relation to silks] 'Do you have any comments on the proposed modified entry arrangement?'

45. It is obviously sensible to acknowledge that the QC system changed in 2006 when it became more formalised and rigorous. Indeed, QASA itself seems to be derived from the QC application process.
46. But the idea of including silks themselves betrays a confusion of thought that has featured in every iteration of the QASA scheme; a mark of competence is not the same as a badge of excellence and to conflate the two is to devalue the latter.
47. The BSB seems not to have grasped this point. Thus in its Briefing Note of July 2011:
“12. The Scheme is not intended to supplant or undermine the QC system. This is a regulatory scheme designed to maintain and support basic competence not to identify or grant an award to an advocate performing above or well above the competence level we expect from our barristers. But as the scheme uses a similar system of assessment standards to the QC scheme it can be seen that the Scheme is complementary to the QC process and we believe therefore will assist advocates in the development of a better career structure.”
48. We remind the BSB of what we wrote on this topic in November 2010 in response to Q 17 of the Aug 2010 consultation:
“The inclusion of advocates who have already achieved a mark of excellence via rigorous selection procedures by an independent body, is not necessary for the credibility of the scheme. Rather, the compulsory inclusion in the scheme of those whose excellence, never mind mere competence, is beyond dispute is likely to tend to devalue the rank of Queen’s Counsel.”
49. We remain very firmly of this view, if anything we are more than ever sure that the inclusion of silks at the same level as Level 4 advocates will be the death of criminal silks and a further blow to the criminal bar.
50. It seems positively perverse that a scheme that is intended to raise standards should have the effect of lowering them, but that is what will happen if silks are to be in the scheme at the same level as Level 4 advocates. There will be no differential and before we know it the LSC will not pay any extra for silks, as they will insist that any Level 4 advocate can do the job. This will deter established barristers from applying for silk and in turn will deter newly-qualified barristers from coming to the criminal bar, as they know that they will have a very limited prospect of getting silk.
51. Within a generation, there may well be no more criminal silks and the quality of advocacy at the highest level of the criminal justice system may well have fallen rather than risen as the more able advocates are deterred from coming to the criminal bar by both the poor pay and the lack of career prospects.
52. We can do nothing it seems about the depredations visited on our profession by successive governments and their misguided attempts to reform legal aid by both cutting it to the bone and devising new business models that many feel will spell the end of the independent referral bar; but for our own regulator to devise a quality assurance scheme that threatens to drive to extinction the one internationally-recognised badge of excellence – not mere competence – is beyond ironic.

53. If the BSB has been driven to this by outside pressures, then at best it has been merely weak and ineffective. But if this has been a BSB initiative, then it has been suicidally careless of the best interests of the profession, the public and the criminal justice system.
54. History will judge the BSB to have failed miserably in its duty to protect the public and improve access to justice if the effect of the inclusion of silks is to lead to their demise, as it surely will.
55. Judicial evaluation and the inclusion of silks as the same as level 4, these two changes alone could spell the end of an independent vibrant bar. Of course, that in itself may not matter, no trade or profession has a god-given right to survive just because its practitioners feel it should, sergeants at law have gone and does anyone think the CJS is any the worse off? But this is different in kind and degree, these changes threaten the quality and integrity of the entire criminal justice system.

Q 14: Do you agree with the proposed approach to the assessment of competence?

56. We have a real problem with the proposed approach to the assessment of competence and it goes to the heart of the problem with this scheme. These so-called standards are full of jargon, matters beyond the knowledge of the judge to know or assess, or are simply by their nature incapable of assessment. Honestly, what do these mean? *"Had a robust case strategy"*? Level 3 2.11 *"Viewed case holistically from the outset"* 2.12 *"Understood the nuances of a case, situation or evidence"*

57. Again, we feel that what Lord Justice Moses said cannot be improved:

"Every known handbook on the art of advocacy has been culled for every phrase and epithet, synonym and tautology. The distinctions are eye-watering in their sophistication and subtlety...a level 3 advocate must comprehend the nuance of a case and readily offer sound solutions to situations as they arise...whereas a level 4 advocate must pass this standard, since the standards are cumulative and in addition demonstrate an astute and responsible approach throughout their advocacy. It is gratifying that judges are deemed to be endowed with an aptitude lacking in philosophers from the time of the Pre-Socratics in 6th Century BC to the present day, the ability to identify wisdom (Level 4 PI 13 demonstrates wisdom in all aspects of advocacy) and to distinguish it from the mere demonstration of a common sense approach, pursuing only important issues (Level 3 PI8.6)."

58. The assessment process seeks to be more rigorous when applying for progression to a higher level, as against when applying for provisional or full categorisation. In order to progress to a higher level, an advocate must receive an overall evaluation of 'very competent' at their current level. What this means is that the advocate may not be assessed as 'not competent' in any of the 9 identified standards.
59. As a consequence, particularly when applying for progression from one level to another, the practical ability of an advocate to pass muster under each of the standards is of particular significance.
60. Page 72 of the Handbook refers to there being *"different expectations to meet"* in reference the standards set out for the various levels. The Handbook does not, however, provide any details as

to how judges are expected to evaluate whether such expectations have been met by the advocate seeking judicial assessment.

61. Standard 1: A level 4 advocate seeking re-accreditation or a level 3 advocate seeking progression is expected to *“demonstrate wisdom in all aspects of trial advocacy”*. No guidance is provided on how such a quality is to be assessed as being present or lacking in an advocate. Indeed, as we have pointed out, this is a quality that defies definition in any meaningful sense
62. Where a judge assesses an advocate to have fallen short in this regard, it is difficult to understand how such a finding could be appealed in circumstances where there are no criteria for how an advocate may demonstrate a quality such as wisdom.
63. Standard 2: A level 4 advocate seeking re-accreditation, or a level 3 advocate seeking progression is required to demonstrate having *“pinpointed the essence of a case or issue without wasteful consideration of alternative issues”*.
64. How on earth a judge is supposed to assess this escapes us. The assessment of whether a case has been properly prepared, in reference to whether there has been wasteful consideration of alternative issues is often largely dependent on the result achieved or a judge’s ruling on the matter. Is a lengthy and laborious approach that achieves the desired result to be viewed by the judge who determined the matter as time well spent? Conversely, where a judge finds against an advocate, in such an instance, is there a very real risk that a judge will be inclined to reinforce his ruling, by assessing such an approach to have demonstrated a wasteful approach to case preparation, even if the advocate has been the very model of economy in presenting the case? These standards are too vague and subjective.
65. Standard 3: In respect of oral and written legal submissions, the requirement for a level 1 advocate to demonstrate a clear aim, logical structure, correct application of relevant authority... appears to be more demanding than the requirement that a level 2 advocate merely be *“coherent”*. Frankly, the public are entitled to expect coherence from every advocate, incoherence not being widely regarded as a merit.
66. There are certain categories of cases, particularly when defending, for example in cases alleging serious sexual offences, where it will be difficult for an advocate to satisfy the level 3 requirement that that submissions / speeches be *“attractive”*. Attractive to whom precisely?
67. The requirement that level 4 advocacy should be *“instinctive”, “intuitive” and “appear effortless”* are so subjective as to be impossible to assess and they are borderline gibberish.
68. Standard 4: The requirement that a level 3 advocate *“maintain control of a witness”* seems to suggest that the maintenance of order is a goal in itself, regardless of the difficulties faced by the witness. Is the advocate to be marked down where the witness cries or gets angry without provocation? Control is significantly more difficult to achieve in certain categories of cases – such as those involving the cross-examination of children, those with mental, psychological, addition or emotional difficulties. Is this now to be the advocates’ responsibility?
69. Standard 9: It would be inappropriate and well nigh impossible for a judge to *“infer”* whether or not an advocate had assisted a client in decision-making. It is often impossible to infer such matters from events in court and the risk of error is accordingly very high.

70. Even where the giving of advice can be observed albeit not heard (for example at the back of a court-room), this would provide the judge with an incomplete picture, as it is likely that the provision of such advice is in addition to advice already provided to the client outside court.
71. Furthermore, any challenge to an assertion that an advocate had fallen short in this regard would place an advocate in an impossible position with respects to privileged information.
72. We could go on and deconstruct these levels further but we feel the point has been made and we wouldn't wish to have failed to have *"pinpointed the essence of a case or issue without wasteful consideration of alternative issues"*.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

73. We would like to see the impact on silks made a specific matter upon which the review should focus. It is our view that the proposed inclusion of silks at the same level as Level 4 will have a deleterious effect and that ought to be tested. Are there fewer applications for silk to the QC Appointments Commission? Are fewer granted? Are fewer applications made to extend representation orders for silk in Level 4 cases? Are fewer granted? What reasons are given?
74. The JAG also needs to monitor the effect of these changes on new entrants to the profession. Are there fewer applicants to the criminal bar?
75. We would like the review to consider what if any sense it makes to have three different regulators administering the scheme and whether the time has then come for there simply to be one regulator for advocates. In our view that would have to be the BSB.

Q16: Does the Handbook make the application of the scheme easy to understand? If not, what changes should be made and why?

76. The Handbook makes a good attempt to explain how the scheme is to work. However, this is a complicated scheme, one that is not particularly 'easy to understand', notwithstanding how comprehensively it has been set out in the Handbook.

Q17. Is there any additional guidance or information on the scheme and its application that would be useful?

77. 'Core standards' should be clearly defined.

Q18: Do you have any comments on the Scheme Rules?

78. In the section headed 'Managing Underperformance' the Rules should provide that the advocate in respect of whom a criminal advocacy evaluation form (raising concerns regarding his competence to conduct criminal advocacy) is received by the BSB is entitled to see and comment upon it before the BSB considers what if any action to take.

Q19: Do you agree with the proposed definition of criminal advocacy? If not, what would you propose as an alternative and why?

79. No. The term 'criminal advocacy' should be defined to include all advocacy connected with the list of offences which have been used to define the scope of the scheme.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you propose an alternative and why?

80. The very concept of regulatory quality assurance for criminal advocates was borne from the desire to ensure there is effective advocacy for members of the public, so as to ensure that cases are properly presented, as well as to properly serve the interests of members of the public, be they serving as members of a jury or not, as well as serve the needs of the judiciary who rely on effective advocacy for the proper administration of justice.
 81. There is no argument in principle to suggest that the needs of the public and judiciary are not met by similarly safeguarding the quality of advocacy provided by specialist practitioners.
 82. This inconsistent approach to specialist practitioners (made up of a demographic quite different from those involved in general criminal practice), without any principled reason to justify it, serves to reinforce the idea that the scheme is designed to place regulatory burdens upon only that part of the profession in which women and BME members are well-represented.
 83. An appropriate alternative is to ensure that there is a consistent and uniform approach to quality assurance by requiring all those who practice in the field of criminal law to be subject to this scheme. The scheme can and should be tailored to meet the needs of specialist practitioner
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Blackstone Chambers

BLACKSTONE CHAMBERS' REPRESENTATIONS TO THE BSB ON THE QUALITY ASSURANCE SCHEME FOR CRIMINAL ADVOCATES

1. With over 80 Barristers, Blackstone Chambers is a substantial civil law set. Members of Chambers are all self-employed and in independent practice at the Bar. They are regularly involved in cases involving commercial law, employment, public law and human rights, EU and competition law and public international law as well as other specialist areas of civil law such as fraud and the environment.
2. The proposed Quality Assurance Scheme for Criminal Advocates does not directly affect the members of these Chambers. There are, however, a limited number of general points that these Chambers wish to make in response to the proposed scheme. This is not to imply that it is otherwise faultless.
 - (i) **the justification for the scheme**
3. It is plainly not in the public interest for clients to be represented by incompetent advocates. However, any regulatory scheme must adopt a proportionate approach to protecting clients from such advocates, recognising that no scheme will ever guarantee protection that is risk-free. Currently such protection is provided by:
 - a. initial qualification by an individual to exercise rights of audience and as a silk;
 - b. Market control of those who will be instructed in the light of their performance, given the need for subsequent recommendation to the client by a professional; and
 - c. Regulatory control in light of complaints about performance to the regulator.
4. Chambers welcomes what appears to be the acceptance by the judiciary that it will provide

continual monitoring of the performance of advocates and that it will report incompetent performance to the regulator, at least as part of the proposed scheme for criminal advocates. This will significantly strengthen the current element of regulatory control after qualification.

5. Chambers recognises that concerns that have been expressed about the standards of some criminal advocates. It also recognises that the system of market control described above may not exist in many criminal cases as advocates are often not observed in practice by the professionals instructing them and that there may be particular financial and other pressures that may further weaken the system of market control in such cases. If there is an effective system for the judicial identification of incompetent performance in practice, however, the question is then whether a system of prior accreditation, with its inevitable costs, can still be justified.
6. Chambers is concerned that there is no analysis presented in the Consultation Paper as to
 - a. The extent to which the risk of being represented by an incompetent criminal advocate will be reduced in practice by a system of prior accreditation compared with the risk if regulatory control is exercised in combination with an effective system for the judicial identification of incompetent performance in practice; and
 - b. The overall costs of the system of prior accreditation, including the costs to the regulator, the additional judicial time in completing forms showing competence, as well as the time and costs involved for competent advocates in meeting the requirements of the proposed scheme and the likely reduction in the choice of advocates available to clients to instruct in consequence.
7. Chambers recognises that the provision of such an analysis is complicated by the involvement of a number of regulators in addition to the BSB. But that is no justification for its absence. Absent any such analysis, the proposed scheme has not been justified as a proportionate response to the risk that clients may be represented by incompetent advocates.

(ii) Clients and judicial evaluation of their advocates

8. Given the absence of a proper proportionality analysis, Chambers has very grave concerns about the introduction of a system in which judicial evaluation will be the mechanism for career advancement as an advocate. Although such evaluation is necessary for some advocates at some stages of their career (e.g. for membership of the Attorney General's panels of advocates or when applying for silk), it is entirely possible for competent advocates to spend significant amounts of their career not needing to "please" Judges.
9. Indeed, there are strong constitutional benefits in Barristers being able to act with such independence. This is particularly the case in the criminal sphere where, in serious cases, it will be the jury and not a judge who will be the tribunal of fact. A very competent advocate may choose not to "please" a judge given the particular facts of the case; indeed legal history is littered with examples of advocates adopting positions fearlessly and independently, notwithstanding the views of the particular judge who was trying the case.
10. In those circumstances, to make career progression dependent on judicial evaluation represents a fundamental shift in the relationship between judges and advocates. We have not seen any evidence to justify this shift, particularly in circumstances where (as noted above) the judiciary will be urged to report incompetent advocates to the regulator. A system in which a judge may report incompetence is very different to a system in which

judges act as gate-keepers for any career progression by advocates.

11. Indeed, the proposal for judicial evaluation as a condition for career progression appears to contain inevitable conflicts of interest between advocates and their clients. Under such a system, advocates would need to be under a duty to inform their client whenever they intend to ask for any judicial evaluation of their performance in a case, and clients would need to have a right to instruct their advocate not to do so, in order to maintain the confidence of the client and of the public in the independence of any advocate. Under the proposed system, a judicial evaluation may result in an advocate losing his livelihood or a significant amount of the earnings the advocate might otherwise believe that he or she would receive. A client may well fear that the advocate will be more concerned to please the judge than to represent the client's interests fearlessly.
12. To maintain the client's and the public's confidence that, subject to his duty to the court, any advocate will represent his client fearlessly and without any regard to his own personal interests, any advocate would need to be under a duty to inform his or her client whenever he or she intends asking for any judicial evaluation of his or her performance and the client would need to have the right to instruct the advocate not to do so. This may make the accumulation of the necessary number of judicial evaluations very difficult. But it would be indispensable if confidence in an advocate's independence is to be maintained. The fact that this scenario is not foreshadowed in the proposed scheme, is indicative of a failure to conduct a proper proportionality analysis.
13. Chambers also considers that clients would need to have a right to be provided with the judicial evaluation which is provided to their advocate in their case if this shows any assessment that the advocate's performance was incompetent. No doubt this would increase the number of appeals that might be made based on the advocate's alleged incompetence. But it is scarcely compatible with an advocate's duty to their client – ie: not to disclose any material in the advocate's possession that may support an appeal.

(iii) How judicial evaluations are evaluated by the regulator and fairness to the advocate

14. If (contrary to the above), the proposed scheme were to be introduced, the proposed scheme appears (rightly) to recognise that, before the regulator takes any action, any advocate must be given the opportunity to comment on any adverse judicial evaluation of his or her performance in any case which the judge sends to the regulator on the judge's own initiative. That is the least that fairness requires.
15. By contrast, however, (i) the scheme does not appear to provide for any similar opportunity for an advocate to comment on any adverse judicial evaluation that was obtained on the advocate's initiative as part of the system of prior accreditation and (ii) the criteria by which it is proposed that the regulator will determine whether an advocate is competent require a finding of incompetence based on judicial evaluation, regardless of any comments that an advocate may make about that evaluation.
16. Given that what an advocate does may be dictated by factors of which a judge is not aware (including his client's instructions), (i) the apparent failure to give an opportunity to an advocate to comment on any judicial assessment (assuming that informative reasons will be provided for it, which they may not be), and (ii) the failure to provide for the regulator to take such comments (and indeed the absence of any informative reasons for any particular evaluation) into account when assessing competence, are both incompatible with fairness and an advocate's rights under article 6 of the ECHR.

(iv) Rights of appeal

17. In relation to appeals against decisions based on judicial evaluation, it is proposed that:

“An appeal may only be brought on the grounds that:

37.1 the decision reached was one which no reasonable person would find comprehensible; and/or

37.2 there was a procedural error in the assessment or decision-making process and that you suffered disadvantage as a result which was sufficient to have materially affected the decision, making it unsound.”

18. Even if a restriction on the grounds on which any appeal may be brought to irrationality and unfairness can be justified, these limitations cannot.

- a. A decision can be comprehensible but one no reasonable person could have taken in the circumstances. There can be no justification for allowing such a decision to stand.
- b. An assessment or the decision making process may have been unfair or have failed to comply with prescribed procedures with the result that the ultimate decision might have been different had such a fault not occurred. In such circumstances fairness requires the decision to be retaken, as the advocate will have been prejudiced by the fault. The apparent requirement to show that, as a result, the decision is “unsound”, apparently in the sense that it would have been different had the fault not occurred, is unjustifiable. That may not be something that it is possible to show. Unless the failure to act fairly or to follow the prescribed procedures can be shown not to have made any difference to the outcome, an advocate is entitled to be fairly assessed in accordance with the prescribed procedures.

(v) Leaders and led advocates

19. The proposed “starting point is that the junior should be no more than one level below the leader”. It is claimed that this represents “a balance [that] has been struck between an approach that is unduly restrictive (insisting a junior be of the same level as the case since they might need to take the case over) and one that is too flexible (so that the junior may be ineffective)”.

20. The approach adopted is disproportionate and contrary to the public interest. It means in practice, for example, that in trials a silk will only be able to lead a senior junior advocate. It is common in most higher courts, however, for silks to lead much more junior advocates. This is in the public interest. It reduces the cost and increases the availability of advocates to be led. It also provides more junior advocates with experience that will enable them to appreciate the difficulties involved in much more complex cases and to learn how such cases should be handled. This enables more junior advocates to progress more swiftly to deal with more complicated cases, thus providing a greater supply of more competent advocates than might otherwise be the case.

21. The risk that the junior advocate may have to act on his own, if (a) his or her leader is not available and (b) that leader cannot be replaced, is overstated. No evidence is provided about the frequency of its occurrence and the reasons why it may occur (if it does) and whether any risk of its happening (if it is significant) could be otherwise reduced. The starting point on the necessary accreditation of advocates who are being led, therefore, is disproportionate to the risks involved and contrary to the public interest.

Charter Chambers

[http://www.barstandardsboard.org.uk/media/1460445/qasa_crf -
_charter_chambers_barrister_s_chambers.docx](http://www.barstandardsboard.org.uk/media/1460445/qasa_crf_-_charter_chambers_barrister_s_chambers.docx)

Garden Court Chambers: Crime Team

**RESPONSE ON BEHALF OF GARDEN COURT CHAMBERS' CRIME TEAM TO QASA, THE FOURTH
CONSULTATION**

1. We have read the CBA response to the fourth consultation and agree with it.
2. We make the following particular observations:
 - 2.1 We agree that the evidence does not support a need for a Regulatory scheme to provide Quality Assurance. The Bar already provides an extremely high standard of service, which is widely recognised.
 - 2.2 The scheme will be very expensive to set up and to run. The cost will need to be met by the profession, which is already being squeezed to its maximum.
 - 2.3 The proposed judicial evaluations will place an additional burden on the scarce resources of the judiciary and create further cost to the public purse.
 - 2.4 If any system is required, we would adopt the CBA's proposed alternative 'Advocates Panels Scheme', akin to the CPS Panels scheme.
 - 2.5 We endorse the core principles as set out in the CBA's response, including:
 - (i) the same standards should apply to all advocates, who should all be assessed by the same independent system of evaluation;
 - (ii) there should be no 'Plea only advocates'. The categorisation should refer to a case, not a hearing;
 - (iii) the level of complexity should be assessed independently and not be open to manipulation;
 - (iv) in leader/junior cases, the juniors should be of an appropriate grade to be able to take over the case if need be;
 - (v) QCs should be recognised as being in a special and different position.

8.10.12

James Scobie QC

Judy Khan QC

Dafna Spiro

(Approved by Head of Chambers, Henry Blaxland QC)

Garden Court North Chambers (Chambers of Ian Macdonald QC)

| | |
|---|---|
| Name: | Mark George Q.C. |
| Organization: | Garden Court North Chambers, Manchester |
| Role: | Deputy Head of Chambers |
| Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme? | |
| The period should definitely be extended to 18 months for levels 2 and 3 and 2 years for level 4. There are sorts of reasons why an advocate might not be able to obtain the judicial evaluations within 12 months. | |
| Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates? | |
| | |
| Q3: Are there any practical issues that arise from client notification? | |
| Any suggestion that a client might be faced with a change of advocate because of the implementation of this scheme must absolutely be avoided. It shows a serious weakness in QASA if there is any real risk that this might happen because the structure is unable to allow for the degree of flexibility needed to ensure this does not happen. | |
| Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1? | |
| | |
| Q5: Do you foresee any practical problems with a phased implementation? | |
| | |
| Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome. | |
| | |
| Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to? | |
| Offences such as attempted murder if a firearm is involved and the offence of manslaughter should be included in level 4. | |
| Other firearms offences should be included in level 3 along with the offence of kidnapping. | |
| Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the | |

Levels guidance?

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

Yes. A PCMH in a case in Level 4 is certainly capable of being conducted by a level 2 advocate. There may be other such hearings which is should be within the responsibility of the instructed advocate to permit a level 2 advocate to cover.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

Q13: Do you have any comments on the proposed modified entry arrangement?

Q14: Do you agree with the proposed approach to the assessment of competence?

This is essential to deal with the potential but real problem of judicial bias. Some judges are probably not competent themselves to pronounce on the competence of advocates. In certain court centres some judges show clear favouritism to some advocates and are universally hostile to others. This usually has nothing to do with the competence of the advocate. It is crucial to avoid the possibility of this affecting an advocates chances.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Q18: Do you have any comments on the Scheme Rules?

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

The scheme should be scrapped. It is a useless exercise in additional bureaucracy to be loaded onto the already beleaguered criminal advocates profession. First of all it is a fig leaf to enable the government to pretend that standards in criminal advocacy are not being eroded by the continual attack on the fees paid for such work. This has already resulted in many able people leaving this field of work for better paid alternatives, some able people have left the Bar altogether and new recruits are put off from life as a criminal advocate because they perceive quite rightly that it is almost impossible now for a junior member of the Bar to build a criminal practice from the start of their careers.

The general public are being deceived. This scheme will give the pretence that quality is not suffering when the plain fact is that it is. In the real world no one expects to get Waitrose quality goods and service at Aldi or Lidl. If you go to those stores you save money and get what you pay for. You know the goods are rubbish but it's cheap and no one pretends otherwise. Why does anyone think it should be any different with legal services?

Secondly, does anyone at the BSB ever stop to think about the cost of being a criminal advocate these days? We have to pay for a practising certificate (hundreds of pounds), professional indemnity insurance, data protection cover, annual subscription for Archbold (approx £450) and now if you please we are being forced to pay for an exercise in assessing our ability! And all of this is to come out of fees which only ever go down in value year by year.

Finally this appears to be another attempt by what passes for the "leadership" of the Bar to pick a fight with the solicitors who are our suppliers of work. This minor detail appeared to slip the minds of our leadership when they tried to sell their previous ridiculous scheme called ProcureCo. This ill-thought out idea fell flat on its face as soon as solicitors got wind of it and promptly reminded (or threatened depending on your point of view) the Bar that it depends on the goodwill of solicitors in order to obtain work. Whilst it may be acknowledged that the BSB has been clever enough to offer a scheme that solicitors obviously felt they had to sign up to, since they could hardly be seen to oppose good quality advocacy, the reality is that this is a thinly disguised attempt to prevent solicitor advocates, some of whom are certainly as good in their advocacy as any barrister, from exercising their right to practice in the higher courts.

If the legal profession is to have any hope of combating further attacks by governments of all shades it is surely crucial that the Bar and Law Society should work together. The QASA scheme will do nothing to foster better relations.

Other than as stated, we support the submissions made by the CBA and our colleagues at Garden Court Chambers in London.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

Q24: Are there any other equality issues that you think that the regulators ought to consider?

Monckton Chambers

**RESPONSE OF MONCKTON CHAMBERS
TO THE FOURTH CONSULTATION PAPER ON
THE QUALITY ASSURANCE SCHEME FOR ADVOCATES (QASA)**

1. This is Monckton Chambers' response to the fourth consultation on the development on the Quality Assurance Scheme for Advocates ("the Consultation"). Monckton Chambers is a leading set of barristers' chambers, based in Gray's Inn. We practise across a wide range of commercial and civil law, with a particular focus on EU, competition, VAT, other indirect taxes as well as public law.
2. We have had sight of the response to the consultation prepared by the Criminal Bar Association. We wholeheartedly endorse the responses outlined therein, and commend them to the QASA's attention.
3. Although the Consultation relates to criminal advocates, public statements from the BSB have made it clear that a form of Quality Assurance Scheme for Advocates ("QASA") is intended to be rolled out across the advocacy profession.
4. We make this response to oppose the prospect of rolling out QASA beyond the criminal field and specifically to oppose any extension into specialist areas such as EU, competition or tax.
5. We agree with the BSB that there exists a general regulatory need for quality assurance. However, we do not agree that this need is best met by these QASA proposals. Further and in any event we would disagree with any suggestion that there existed either a need for QASA in specialist commercial and civil fields such as, e.g., tax, EU and competition law, or that QASA was a suitable quality assurance tool in such specialist fields.
6. There is no market or judicial concern about the standard of advocacy in these fields that we are aware of. On the contrary, in the European field English barristers appearing in the European Court of Justice generally receive praise for the standard of their advocacy.
7. There is also no evidence that, e.g., tax, EU or competition law advocates are accepting instructions outside their level of competence. The law in question is technical and complex and work will only be given to those with the appropriate knowledge and skills base.
8. Accordingly there is no need, perceived or actual, for a QASA in the fields of, e.g., tax, EU or competition law.

9. Importantly, in relation to potential judicial assessment in specialist areas such as tax, EU and competition law there would also be the specific concern that the assessor judges could themselves lack the expertise to make a valid assessment.
 10. We also have a general concern that judicial assessment will impair the fundamental principle of the independence of the legal profession. The duty of an advocate to act independently and on behalf of his/her client is likely to be compromised by an assessment regime operated by the judiciary. We are unaware of any similar system in any other EU Member State.
 11. Alternatively and in any event we see no need for any scheme that is brought in to apply to silks, or at least those silks who have been appointed under the Queen's Counsel Appointment system in operation since 2006, as the competences set out therein – which by definition must have been met if an applicant was successful – more than meet any assessment criteria for such a quality assurance advocacy scheme.
 12. In conclusion, whilst we do not support the specific proposals in relation to the criminal Bar, we make no further comment insofar as the Consultation relates to that practice area alone. However we would strongly oppose the extension of QASA beyond the criminal Bar, and specifically to specialist commercial and civil law areas such as, e.g., EU law, competition or tax.
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St Philips Chambers: Criminal Team

QUALITY ASSURANCE SCHEME FOR ADVOCATES

FOURTH CONSULTATION

RESPONSE OF THE ST PHILIPS CHAMBERS (BIRMINGHAM) CRIMINAL TEAM

RICHARD ATKINS QC
HEAD OF THE ST PHILIPS CHAMBERS CRIMINAL TEAM
FOR AND ON BEHALF OF THE ST PHILIPS CHAMBERS CRIMINAL TEAM

INTRODUCTION

The Members of the St Philips Chambers Criminal team are dedicated to providing and maintaining a high quality advocacy service. We have always been and remain prepared to co-operate with any scheme that has both the intention of improving standards of advocacy and the real ability to do so. We consider that it is the duty of the Bar to provide the public with such a service. If other advocates wish to exercise rights of audience in the criminal Courts, then they should be judged by precisely the same stringent standards as are applied to the criminal Bar.

We are of the opinion that anyone who exercises the right to practice as a criminal advocate should be able to deal with all areas of advocacy. There is no room in a quality advocacy service for a "plea only advocate" or a "trial ready advocate" who cannot actually conduct trials. The quality of the advice that such advocates can provide is limited by their lack of experience of what happens in a criminal trial. It cannot be in the public interest that such advocates are permitted to practice with the apparent badge of quality as is envisaged by this scheme.

Furthermore we submit that there is no place in a QASA scheme for silks. This is a scheme that should be designed to ensure minimum acceptable standards of advocacy and is therefore inappropriate for those whose advocacy and other skills have been found to be outstanding by a rigorous process of assessment (whether that process was pre or post 2006). The most that it is appropriate for any scheme to do is to monitor QCs and certify from time to time that they are still fit to practice. To put them in a category (presumably 4) which also contains junior advocates is to invite the ending of the silk system in criminal work; a system that is held in high regard as a badge of excellence in most jurisdictions of the world.

We therefore submit that the scheme as proposed is unfit for purpose and we cannot lend our support to a scheme that allows for plea only advocates, allows solicitors to fix the level of their cases and includes QCs in the general appraisal system.

We have answered the questions posed in this fourth consultation in an attempt to highlight the flaws in the scheme. In so doing it should not be taken that we agree with the implementation of the scheme, nor do we agree that the scheme is fit for purpose.

THE QUESTIONS

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?

We submit that 12 months is likely to be too short a period of time for accreditation, particularly if Crown Court Recorders are not to be trained in the accreditation process. Many advocates deal with very serious cases before Recorders and not Crown Court Judges. There is no control as far as the advocate is concerned as to who tries a case. It may prove to be very difficult for an advocate to obtain sufficient exposure to Crown Court Judges rather than Recorders. Furthermore, 12 months will definitely be too short a period of time in relation to levels 3 and 4 and should be for a minimum of 18 months if not 2 years. The more complex cases last longer and take longer to prepare. Some senior practitioners may only undertake one or two cases a year. If a case pleads unexpectedly it can leave a large gap in an advocate's diary, which may be very difficult to fill.

Q 2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

If, as the scheme professes to be, it is to ensure that there are advocates of quality in the Crown Court, it is impossible to see how the inclusion of "plea only advocates" (or however they are badged) fulfills this aim. An advocate who cannot advocate for his client at trial, is not really an advocate at all. It is for the advocate to choose what work he or she does and whether they limit themselves to certain types of work. The scheme should not countenance

the authorisation of “partial advocates”. If a person wishes to hold themselves out as an advocate then they should have to demonstrate that they are capable of conducting trials.

The issue of “plea only advocates must not be looked at in isolation. It must be remembered that in publicly funded cases, the brief fee is paid when a person either pleads guilty or a trial commences. It is hard to see how “plea only advocates” can possibly be in the public interest. How can it be in the public interest for an advocate who cannot conduct trials and who would benefit financially if the client were to plead guilty rather than pleading not guilty and going off for trial to be given an apparent badge of quality? There is a clear conflict of interest where a plea only advocate would have a financial incentive for the case to plead rather than for there to be a trial.

Furthermore, a plea only advocate is likely to have only a limited insight into the issues that are likely to arise at trial and thus will be less likely to be able to give accurate advice to the client when advising on plea. There is a real and genuine concern that unscrupulous practitioners who have insufficient advocacy skills will try to keep a case in house in the hope that it will plead, or will put undue pressure on a client to plead in cases where they should have a trial simply for financial reasons.

Q 3: Are there any practical issues that arise from client notification?

We are concerned that the very people that this scheme is said to being brought in to protect are the one most likely to be ill-served by it. To suggest that a client care letter is sent out which explains what level of advocate a client is being represented by ignores the fact that many of those appearing in the Crown Court are illiterate. A paragraph hidden in a letter explaining that an advocate is not actually able to represent the client at trial is unlikely to be read. The unscrupulous advocate will most likely explain that they are able to look after the client as they have done since the police station without explaining the true facts. We submit that at the Plea and Case Management Hearing the Judge should raise the issue of the level of the advocate and ensure that the client is aware of any limitations.

Q 4: Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?

Yes. The Youth Court is not simply the Magistrates Court for youngsters. It deals with very serious cases. Youth Court Work should be assessed in the same way as Crown Court work. To suggest that all Youth Court work can be treated as of the lowest grade is we submit not going to serve the public interest in any way.

Q 5: Do you foresee any practical problems with a phased implementation?

Yes. To bring in this scheme in phases will discriminate against those who are subject to the scheme at the early stages. It cannot be fair to implement a scheme by Circuit but to allow advocates from off that Circuit to practice without any of the restrictions imposed by QASA. This gives the advocate from off Circuit, not yet subject to QASA, a considerable advantage over the advocate from that Circuit.

The fairest way to implement this scheme if it is to be brought in is to implement it throughout England and Wales at the same time. If that cannot or will not be done, then at the very least it should apply not simply to an advocate on the particular Circuit, but for any advocate who comes to practice in Courts on that Circuit.

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

Q. 8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

If this scheme is to be introduced, then the allocation of cases to a particular level will be crucial. It is unacceptable to leave it to be determined by the Solicitor and advocate. Whilst there are many very good honest and scrupulous Solicitors, this proposal is clearly open to abuse. There has been a trend in recent years given the constraints of the Legal Aid budget for Solicitors to employ more in-house advocates. If the Solicitor who is employing the advocate is to agree the level of case, it is obvious that this is open to abuse. The financial incentives in keeping the case in-house may well lead to cases being “down-graded”. This cannot be in the public-interest. The public interest is in having the case graded properly and being dealt with by an advocate of the appropriate level.

The current bandings are we consider too broad. Consideration should be given to adding categories that would take a case out of one band and putting it into another. Such categories might include the fact that the case has very young children or people with learning disabilities who would need to be cross-examined which would move the case up a grade. Judges should be given the power to allow for down grading of a case if for example it is a multi-hander and the last person on the indictment, although charged with a similar offence as the others, has a minor role to play and there is little or no conflict with any other party.

The case should then be reviewed at the PCMH by the Judge to ensure that the appropriate grade and level of advocate has been allocated. Any application for a re-grade should be made orally before a Judge in the presence of the client.

Q 9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

Level 4 advocates should conduct level 4 trials. What must be ensured is that if a case is a level 4 case that a level 4 advocate is instructed from the start. The situation where a lower

grade of advocate is initially instructed and then the case is transferred at a later stage must be avoided. If the case is listed for a pre-trial hearing then it is submitted that a lower grade of advocate can be used providing the instructed level 4 advocate has approved it.

Q 10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

Newton hearings are trials and should be treated no differently from trials. They take place when there is an issue that will affect the level of sentence that will be imposed. It cannot be said to be in the public interest for advocates of a lower grade to deal with newton hearings when the liberty of the client is in issue. The level of advocate appropriate for the level of the case should be used in any Newton hearing.

Q. 11 Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible.

Q.12 Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

A junior in a case should only be one level below the leader, unless the leader is a QC in which case it is submitted that the junior may be either a level 3 or level 4 advocate. They must though be prepared and able to step into the shoes of the leader should the leader for any reason be unable to continue with the case.

We are wholly against the suggestion that client choice should play any part in determining the level of advocate who can be assigned to a case. The aim of the scheme is to protect the client, who in a large proportion of cases will have no idea as to whether or not his or her choice of advocate is competent or not. It is well known that clients will often comment on their advocate having done a good job when the reality is that the advocate has simply made a lot of noise without having delivered anything of quality. It is vital that any scheme protects clients from making ill-informed choices or being pressurized into accepting an advocate who is not up to the job.

Q 13: Do you have any comments on the proposed modified entry arrangement?

We are against the inclusion of silks in this scheme. The rank of silk has been acknowledged world wide for many years. There is no evidence to suggest that it has failed to deliver quality advocates. There is no need to include silks in the scheme when they have already shown that they are quality advocates. We are surprised at the apparent u-turn by the BSB who had given the impression at an earlier stage in the consultation process that silks would not be included from the outset, but that consideration would be given to their inclusion once the scheme was up and running.

If though silks are to be included in the scheme, we submit that they should have a separate category. To have simply one level that includes silks Treasury Counsel and senior Juniors is we submit inappropriate. Furthermore it is likely to lead to the extinction of the rank of silk

as it is highly likely, if not a certainty, that the Government will then use the single grade as an excuse to do away with paying for silks in publicly funded cases.

Q 14: Do you agree with the proposed approach to the assessment of competence?

The Bar has grave concerns that more stringent standards will be applied to Barrister advocates by the BSB than are applied to other advocates in the scheme by their regulators. It is imperative that all advocates, whoever their regulator, are assessed and graded according to the same standards. The Bar Code of Conduct makes it clear that Barrister's must not accept instructions or continue to act in cases that are beyond their competence. It is understood that no such corresponding principles apply to Solicitors or Legal Executives. If this is the case, then this is unacceptable and one code must apply to all.

Q 15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

We believe that the entire scheme should be the subject of a fundamental review.

Q16 Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

Q17 Is there any additional guidance or information on the Scheme and its application that would be useful?

We consider that the scheme is fundamentally flawed and could only be implemented with wide ranging changes. We do not propose to comment on the handbook at this time.

Q 18: Do you have any comments on the Scheme Rules?

The rules must be common to all branches of the legal profession and should be policed by all in a similar fashion.

Q 19: Do you agree with the proposed definition of "criminal advocacy"? If not, what would you suggest as an alternative and why?

No. We consider that the definition of "criminal advocacy" should cover precisely that, criminal advocacy. It should apply to all cases heard in the Magistrates Court and the Crown Court. If the professed aim is to ensure high quality advocacy then the exemption of certain advocates makes a mockery of the whole system. Why should advocates dealing with criminal Regulatory law not be subject to the same tests as advocates dealing with violence and dishonesty? Where is the public interest in that?

We submit that the following definition of criminal advocacy should be adopted: "Advocacy in all hearings involving the prosecution of a natural or legal person in the criminal courts who, if convicted, is liable to a fine, imprisonment or both".

If the intention is that the scheme will be rolled out to all areas of practice in time, there seems to be little rationale or advantage in excluding some areas of work at this stage.

Q 20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

If the scheme's 'definition' of criminal advocacy is given the definition we propose then all practitioners who are instructed to appear before the criminal courts will come within the terms of the scheme. Whatever charges may be on the indictment, the defendant faces the prospect of criminal sanctions. It is, therefore, just as important that all advocates who conduct these types of trials are accredited in the same way as other, more conventional, criminal practitioners.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

Please refer to our introduction.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

No

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

No

Q24: Are there any other equality issues that you think that the regulators ought to consider?

No.

Tooks Chambers

RESPONSE OF TOOKS CHAMBERS TO CONSULTATION ON QASA

This is the response to the consultation on QASA from Tooks Chambers. Tooks is a chambers with a sizeable Crime Team which practises at every level of the criminal justice system from major terrorist cases and complex appeals to every day cases in the Magistrates Court. We have consulted members of the team. They are strongly opposed to QASA for the following reasons.

First, we take the view that a system whereby barristers owe preferment to the judges in front of whom they appear is fundamentally flawed. It has always been a basic tenet of the independence of the Bar that barristers should fearlessly represent the interests of their client. It is crucial that advocates feel

able to stand up to the judge even if this makes them unpopular with that judge. It is equally crucial that clients have confidence in their advocate's capacity to do so. If they lack trust in their advocate's ability to represent them properly, the relationship between client and advocate is inevitably compromised. We agree with the rhetorical question posed by Lord Justice Moses: "Do we really want a generation of criminal advocates who go into court with the intention of pleasing the judge?"

Secondly we oppose a system which is designed to pave the way for the introduction of One Case One Fee (OCOF). We agree with the CBA that QASA is an unnecessary, expensive and cumbersome scheme which is a stepping stone to OCOF. The abolition of a ring fenced advocacy fee, which is at the heart of OCOF, will mean that solicitors are given every incentive to choose the cheapest advocates rather than the best.

Thirdly the concept of "plea only advocates" is a sham at the expense of the lay client. By definition such advocates will have limited experience or competence. They cannot properly advise on whether a client should plead if they are not qualified to appear in a trial. Allowing them to appear at a PCMH runs directly counter to the desire for the PCMH to promote case management of the case from PCMH to trial. It is difficult to see who will benefit from their involvement since it is plain that the lay client and the court will not.

As a chambers we pride ourselves on high standards of advocacy and commitment to our clients. It is regrettable that QASA will lower standards by introducing a new cadre of second class advocates while simultaneously undermining the independence of The Bar which has been one of the hallmarks of our criminal justice system.

8.10.12

Solicitor's Firms

Beaumonde Law Practice

Response of Beaumonde law practice to the consultation paper on the Quality Assurance Scheme for advocates (crime).

This response has been drafted by Sundeep Bhatia of Beaumonde law practice.

Sundeep qualified as a solicitor in 1992 and has been practising criminal law since 1994.

Sundeep has been a criminal Duty Solicitor (at courts and police stations) since 1995.

Sundeep has held Higher Rights of Audience (criminal) since 2004.

From 1994 to 1999 Sundeep worked in the criminal law Department of Gupta and partners solicitors Harrow and rose to become head of the department.

From 1999 to 2006 Sundeep had his own criminal law practice called Brent Law Practice in Neasden.

The firm had conduct of a number of high-profile criminal cases and was a member of the VHCC (Very High Cost Cases) Panel of the Legal Services Commission..

Sundeep has been a committee member of the London criminal courts solicitors Association.

Sundeep is a member of the External Implementation Group of the Solicitors Regulation Authority.

That is a body which helps the SRA to review its implementation of the findings and recommendations of Lord Herman Ouseley's 2008 report on why it appeared that The SRA seemed to disproportionately target solicitors from a BME background in its regulatory enforcement work. From 2008 to 2010 Sundeep was the Chairman of the Society of Asian lawyers.

In 2010 Sundeep was appointed as one of the two Law Society Council Members for the Black Minority Ethnic constituency.

Sundeep sits on the Equality and Diversity Committee of the Law Society. He also sits on the Law Society's Employment Law committee and is a member of the Law Society's Regulatory Affairs Board.

The views expressed in this response are not made on behalf of the Law Society, Society of Asian Lawyers or any other body with the exception of Beaumonde Law Practice.

Q1 12 months is an insufficient period of time in which to conduct the requested number of judicial evaluations so as to achieve full accreditation within the scheme.

This is ,firstly,because the number of criminal cases passing through the courts is declining.

Secondly there are a number of trials which would not qualify for accreditation because they are heard by Recorders, because they crack or because they are dealt with other than by way of a contested hearing.

In some specialist fields, such as court martial, hearings would not count towards accreditation in any event.

Moreover one might also ask what would happen if an advocate were tied up in a case which lasted several months.

Anecdotal evidence from smaller Solicitor's firms suggest that they would not be able to secure a sufficient number of cases for their Solicitor advocates to qualify.

That would undermine the financial viability of such firms. This is because, in an era of fixed fees, where advocacy is better paid than litigation preparation, the only way in which criminal solicitors' firms can survive is by bringing advocacy in-house.

If a firm does not have a sufficient quantity of solicitor advocates, who achieve accreditation, then that would make it financially unviable for such firms to remain in practice..

That would be a disaster for diversity within the solicitors profession. This is because figures show that a disproportionate number of BME solicitors are employed by smaller firms.

The demise of such firms would result in there being less BME solicitors in the upper echelons of the profession.

If there were fewer BME advocates then this would not reflect society at large and would reduce public confidence and faith in the judicial system.

Increasing the time period from 12 months to 18 months would not be sufficient to alleviate this problem. It is suggested that the best time period, if there has to be a time period, would be one of three years.

Q2. This firm welcomes the fact that non-trial advocates will be allowed to continue to practice. Quite often it is the solicitor in the case who has the most detailed grasp of the issues involved. In many cases that knowledge is better than an advocate who has been instructed, at the last minute, to purely deal with an administrative hearing on behalf of the Trial advocate due to that Advocate's non-availability.

However this firm is concerned at the costs of that assessment and the fact that that is a cost which would need to be incurred every five years if that advocate did not start to conduct trial work.

The extra expense may mean that it would be financially unviable for many firms to remain in Practice in circumstances where there is already little or no profit margin in the vast majority of criminal Legal Aid work.

It cannot be said that this is proportionate in circumstances where there is no empirical evidence that the quality of advocacy in the criminal courts has declined.

Q3. Client notification is one of the most disturbing aspect of QASA.

Under the scheme firms and advocates are tightly regulated as to the cases they can or cannot take on and are likely to be subject to regulatory enforcement if they fall foul of those rules.

As any Lawyer, whether solicitor or barrister, knows the most important thing is that there should be an element of trust and confidence between a lawyer and his or her client.

The fact that an Advocate would be required to state their level would immediately undermine any trust and confidence that previously existed.

Defendants facing the simplest of theft matters, requiring the skills of a level two advocate, would demand that they be represented by a Level 4 Advocate..

The scheme will undermine both solicitors and barristers at Level 2 and three. Yet those kind of cases are cases that a level 4 Advocate would not wish to carry out, in any event.

To create any kind of barrier between a lawyer and his or her client is not in the interests of justice and is therefore not in the interests of the client.

Therefore notification provisions are likely to cause far greater problems than the spurious ones they seek to redress.

Q4. The problem here is that the qualification of solicitor is being undermined by the introduction of level one.

Historically solicitors have always had the right to practice in the magistrates court which includes the youth court.

In fact it is fair to say that the magistrates court and the Youths courts are mainly the preserve of solicitors and only the most junior of barristers.

The fact that Solicitors can have their rights of audience in the magistrates court and the youth Court taken away from them is a dilution of the qualification of solicitor and is a source of deep regret.

Q5. The phased implementation would affect those who practice in more than one circuit

Q6. The consequences of an organisation making an assessment of the level of a case which differs from that of a judge seem to be substantial and possibly catastrophic in circumstances where there is a genuine difference of opinion. The end result may be that the organisation making the assessment or the advocate appearing before the judge could be subject to Regulatory censure as the result of a genuinely held belief. That does not seem to be a desirable state of affairs.

Q7. The levels appear reasonable, so far as that is possible.

Q8. The guidance is helpful but is undermined by the fact that great emphasis is put on the fact that one has to justify a move from one grade to another to a regulator. This is likely to make organisations and advocates timid and conservative. The end result may be that an advocate refuses to act in such a case, where they may be the best person suited because they fear possible repercussions from the regulator.

Q9. The regulations relating to non-trial advocates are too restrictive. In relation to a level 4 Case the solicitor who has been busy preparing the case ,in the absence of the Trial advocate,would be the best person to conduct the administrative hearing whether they are qualified at level II or above. Such a person would, furthermore, be in a position whereby they could communicate with trial counsel regarding any specific issues that trial counsel feels should be raised at the administrative hearing.

Q10. This firm has no comment to make in relation to this question.

Q11. This firm makes the same comments regarding the fact that notifying a client of the level of the advocate is likely to undermine the Lawyer client relationship.

The requirement to constantly review the Level of a case could put advocates in a very difficult position.

If a matter becomes more complex shortly before trial, due to unforeseen circumstances, then an advocate could face a dilemma about whether to withdraw or whether to continue with the case on the basis that otherwise the clients position might be compromised. They would then have to justify their decision to their Regulatory body.

Q12. This firm has no further comments to make regarding this question.

Q13. There is no reason why silks should be treated in a different way from other advocates. If this scheme is to be truly valid then all advocates, regardless of rank, should be assessed in the same way. If this is not done then it would breed resentment within the professions .

Q14. Whilst this is an improvement it does not get over the very real problems that exist so far as Judicial assessment is concerned.

Advocates are often required, by their clients, to put forward arguments which may not find favour with a judge.

However the judge may mark down the advocate because he or she has put forward such arguments.

This is likely to result in advocates behaving in a way which they feel the judge will appreciate instead of acting on their client's instructions. That is clearly undesirable.

Moreover the vast majority of judges have been qualified barristers rather than solicitors.

There is a perception of bias on the part of solicitors which cannot be readily overcome.

Q15. The effects of QASA on diversity within the professions needs to be monitored.

As stated above it is the fear of this firm that QASA will lead to the demise of many smaller solicitors firms and barristers' Chambers.

BME Solicitors are, according to Law Society figures, disproportionately represented in terms of five partners or less.

It is therefore highly likely that QASA will result in many BME solicitors failing to reach the upper echelons of the profession or even leaving the profession.

Q16-18 This firm chooses not to comment on these questions.

Q19. The definition should include military court-martial work as well. The definition should also include reference to Investigations commenced by The Department of work and pensions.

Q20. The proposed approach to specialist practitioners is agreed.

Q21. The practical problems with the application of the scheme have been stated above.

The following amendments are needed.

- A. A timeframe of at least three years in which to complete the required quantity of assessments for accreditation.
- B. An end to restrictions on non trial advocates
- C. The cost of the scheme needs to be kept at an affordable level for small firms.
- D. An independent body should assess the level of a case in order to avoid friction between Judges and advocates and in order to remove fear of regulatory action as a result of mistakenly assessing the case at the wrong level.
- E. Level one should be an automatic lifelong qualification for all solicitors as is the present case.
- F. Advocates should not have to notify clients regarding their level as this undermines the solicitor client relationship and makes it extremely difficult or impossible to represent a client.

Q22 -24. This firm believes that the proposals will, even as presently drafted, severely undermine diversity within the profession.

This is because, as presently drafted, there is insufficient time for solicitor advocates in smaller firms to have access to the requisite number of cases required in order to obtain accreditation.

The absence of solicitor advocates within a firm, in an era of no fixed fees, will inevitably result in those firms becoming financially unviable..

The QASA cost of accreditation is also a concern which is likely to disproportionately affect sole practitioners and smaller firms.

Craigen Wilders & Sorrell Solicitors

RE: QASA Proposals

I gather that all Solicitors have been invited to respond to the QASA Proposals.

On my part I'm afraid what I have to say is not vastly complimentary towards you.

I have been appearing in the Magistrates Court since my very earliest in the law – early 1970's to begin with behind a Barrister and as from the time I was admitted in 1980 personally doing the Advocacy.

Criminal Law is not my main line of work but I have found on average I appear before the Magistrates Court probably once every 2-3 months. Sometimes I may have half a dozen cases on at the same time and then no cases before the Magistrates for many months.

I have to say for myself I feel rather offended that I am in a position whereby you could say I do not have recognition to appear before a Magistrate. Having done so for over 30 years I have never come across any major problems.

Of course by their very nature Court cases are not usually without their problems and/or being taking by surprise when it transpires ones client has not been 'economical with the truth'.

In my case I have spent five years in Articles training and it appeared to me by the time I was qualified – 1977 that it was the end of 'the classroom'. How wrong I was. None the less it is very disconcerting when one has done something for 30 years and suddenly one is told there are limitation on you.

Going through Articles (particularly long Articles) is a long and daunting process and if one has practiced for some thirty years without getting oneself into trouble then it seems wholly disproportionate and wrong to impose these new guidelines.

In any event part of my training is that I would not dream of taking something on which I thought was well and truly beyond me.

Though perhaps not in recent times I have found myself in the position whereby members of the public were desperate for representation and I could see at the time that what I was taking on was beyond me. I therefore told the client's this and they pleaded with me to at least accompany them to Court. This I did and I told the Chairmen of the Bench that the case was beyond me but my client could immediately find anybody to represent them and I asked for an adjournment so that we could refer my client to somebody who was competent. The Court very graciously gave an adjournment of six weeks.

Throughout my professional life it is not a question of merely doing that which is in my better interest or convenience but being an Advocate before the Court one often has to put oneself in a position where life becomes uncomfortable either in the sense of urgent ultimatums to comply with or otherwise putting myself in a position whereby I have to do the 'right thing'.

When all is said and done I did quality to be a Solicitors acting with integrity and it seems wrongs the rules would be so suddenly changed.

What I find very difficult to stomach is in today's climate no account seems to have been taken of no less than four decades of experience in the law. One of the managing clerks who taut me always used to say a man who never made a mistake probably never did anything positive in his life. Certainly I have learnt quite harsh lessons on occasions and I do feel during the last 20 or so years I have dealt with Advocacy in a fairly skilled manner.

Having said this I am not pleading I am perfect and everybody else has got it wrong, but it is frankly pretty degrading having to face up to the new system.

I hope the above does not in anyway appear rude, it is intended to be constructive criticism.

Yours faithfully
CRAIGEN WILDERS & SORRELL

Keogh's LLP

RESPONSE TO THE FOURTH CONSULTATION - QUALITY ASSURANCE SCHEME FOR ADVOCATES (QASA)

Name:

Organization: Keoghs LLP, Bolton

Role: Keoghs LLP provides defendant legal and handling services in connection with general insurance claims. Keoghs has a niche Crime and Regulatory Team, headed by Senior Equity Partner David Walton. This team defends prosecutions that are brought by some of the following bodies:

- Health & Safety Executive;
- Local Authorities;
- Environment Agency; and the
- Crown Prosecution Service.

The team are actively involved in a vast amount of cases from the initial investigative stage, including police station and PACE interview representation right the way through to proceedings being brought before the Magistrates or Crown Court.

The team consists of eight practising solicitors, who may conduct their own advocacy in such proceedings who can and do appear in the Magistrates Court. We also have one solicitor currently seeking to become a HCA and gain rights of audience in the Crown Court.

Therefore, we are not a firm who practice general Criminal practice and the new Quality Assurance Scheme for Advocates (QASA) may not apply in the same way to us as it would to most criminal firms.

We would still like to respond to the QASA consultation to outline our views for consideration to the particular areas that we feel may apply to our practice. To do this, we will address only certain questions raised by the response form.

Q1 - Q6: Not Requiring a Response

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

Generally speaking, the levels seem appropriate. However, our team does deal with Motor Crime and driving offences involving death, which would currently fall into Level 3.

If our Higher Courts Advocate (HCA) was to conduct only the initial either preliminary or plea and case management hearings or directions/reviews, would they need Level 3 status?

Could the actual hearing in such cases rather than the offence itself determine the level, so perhaps Level 2 for just these initial hearings, but trials to be conducted by a more senior advocate needing Level 3?

Q8 - Q13 Not Requiring a Response

Q14: Do you agree with the proposed approach to the assessment of competence?

Yes, we are satisfied with Level 1 only being assessed by Common Professional Development (CPD) and presume there will be further guidance on what aspects of CPD need to be covered in due course.

However, for Level 2 being organisation assessment, judicial evaluation or a combination of the two; we would submit that our HCA would not necessarily have enough practising cases (possibly initial hearings in Death by Careless Driving, Death by Dangerous Driving, Gross Negligence Manslaughter) to have judicial assessment.

Therefore, perhaps organisation assessment would be the better means of assessment in our circumstances for Level 2 status.

Q15 - Q18: Not Requiring a Response

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

We do agree with the definition, but with the understanding that the exclusions are strongly set out for 'specialist practitioners' because we would fall into this category (see our Q20 response.)

Could the definition not incorporate that exclusion as well? We foresee that the Court or other practitioners may initially question our type of practice without working out whether we would fall under the definition or not. If it was to be included in the definition, this would make it clearer that we would be excluded.

Q20: Do you agree with the proposed approach to 'specialist practitioners'? If not, what would you suggest as an alternative and why?

We do generally agree with the proposals for specialist practitioners.

We note your guidance states that this is an advocate who conducts criminal advocacy in the criminal courts but not in relation to typical criminal cases, such as advocates who specialise in regulation, planning and health and safety.

This approach would enable our solicitors to conduct hearings in the Magistrates Court with certain cases that are either 1) mixture of offences and primary offences do not fall within the definition of criminal advocacy or 2) the advocate is instructed due to their specialism in the field. Using your example, an advocate who is instructed in a manslaughter case where the issues are health and safety.

We note that JAG propose to keep this under review, however we would strongly suggest that regulating this area of practice would be difficult and the assessment process, due to the irregularity of the advocacy opportunities would be difficult.

We would raise whether the definition of ‘Specialist Practitioners’ could also apply to the area of our practice namely Motor Crime, including offences such as Driving without Due Care and Attention, Causing Death by Careless Driving or Causing Death by Dangerous Driving.

These are CPS brought prosecutions, purely raising criminal issues but road traffic / motor, and therefore would fall within the definition of ‘criminal advocacy.’

In our practice, we may just conduct the initial hearings in the Magistrates Court in these types of cases and trials would usually be briefed to Counsel, however would our advocates conducting such initial hearings in these Motor Cases still need to be QASA assessed? Could this not perhaps also fall within the exclusion of ‘specialist practitioners’ in motor crime work?

We raise this as a point for thought as to how this will affect our practice specifically. If our motor cases do still fall within the remit, then it would be CPD assessed in any event and going back to Q14, would need to specifically apply to Road Traffic / Motor Crime CPD and not just general crime.

Q21 - Q24: Not Requiring a Response

Thank You.

T V Edwards LLP

TV Edwards LLP
Response to the fourth consultation on QASA

We would wish to place on record our appreciation of the work that has been done between the third and fourth consultations. We had expressed considerable concern about the difficulties caused by certain of the proposals and the points made by us and others had been substantially adopted in this final consultation.

We believe that only detail now needs to be addressed.

We respond to those questions on which we have knowledge and experience only:

| | |
|---|----------------|
| Name: | |
| Organization: | TV Edwards LLP |
| Role: | |
| Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme? | |
| 12 month may prove too short a time for solicitor advocates to obtain the requisite number of judicial evaluations. The number of cases in the Crown Court is dropping significantly with recorded reductions between 10 and 20% in most areas. Furthermore, the procedures in place for early guilty pleas and the pressures created by the new fees regime are further reducing the number of effective trials. We appreciate that there must be some time limit on the obtaining the necessary qualification. We would suggest 18 months would be a better time with special provision for those who are taken ill or on maternity breaks. | |

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

The revised arrangements for the accreditation of level 2 advocates meet the earlier objections we had raised and are much appreciated by us. It will be important that the assessment organisations deliver their courses and assessments by reference to the work that is undertaken by the advocates who do not wish to undertake trial advocacy in the Crown Court.

Q3: Are there any practical issues that arise from client notification?

We can see no practical difficulties from the client notification and indeed it is a necessary step.

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

There are no practical problems from categorising youth court work at level 1. Indeed, the experience in the Youth Court is that it is the arrival of trial advocates with more trials experience, but no knowledge of the workings of the Youth Court system, that causes the major problems in that jurisdiction. This was an essential change if the clients appearing in Youth Court throughout the country were to have full access to justice.

Q5: Do you foresee any practical problems with a phased implementation?

We do have considerable doubt that the SRA will be able to match this phased implementation. They have failed on many of the initiatives they have taken to meet the timescales.

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

We see no practical problems arising from the process of determining the level of the case. Indeed we believe it is much to be praised. It allows sensible flexibility as the scheme develops.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

While the scheme does allow considerable flexibility we would suggest two small amendments to the table at level 3. We would suggest that the words in brackets in relation to the group 'more serious drug offences' should be removed. The social supply of drugs is common and need not be at the more serious level.

At level 4 we would suggest that the words and/or high value be removed from the category of 'complex dishonesty' as the value is often incidental and there can be very large thefts, for instance from an employer, which raise no particular difficulties and can be adequately dealt with as would be possible under the flexible arrangements at level 2, This firm has considerable experience of undertaking such work.

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

Subject to these issues we find the wording in the levels table perfectly clear and usable. For the reasons we have indicated we think the example is not appropriately added.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

It is only on this issue we continue to have concerns about the nature of the scheme. We do see considerable practical problems with allowing only level 3 advocates to act as a junior in a level 4 case. Both in relation to non-trial and trial hearings.

This firm has considerable experience of fraud cases in which the solicitor responsible as litigator undertakes all the preliminary advocacy in the absence of the leading counsel who will eventually lead at trial. At that point the litigator is the person best informed to make the decisions that are required during the preparation of a case. These lawyers are likely to be at level 2.

In addition, we anticipate considerable difficulties in identifying sufficient level 3 advocates. Advocates with this level of experience would much prefer to take on their own casework than to act as a junior, where in fact they will be asked to play little part in the advocacy. Those who remain are likely to be the less able advocates at the level 3 qualification. We on balance consider that more flexibility is required if the silk is content that a level 2 advocate should undertake all or any parts of the case. There is no reason why this should not be certificated by the silk and that certificate made available to the Judge appointed to conduct the case. The professional duty not to act beyond ones skills, remains notwithstanding the detail of the QASA scheme.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

Our response to this question is linked to our response to Q9. Experienced advocates with this firm, but at level 2 qualification, have undertaken the mitigation following conviction and in the absence of their leader there has been no criticism of the way this has been done and it is appreciated by the client to whom the solicitor is known well. The same observations apply to directions hearing as we make response to Q9.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

This additional freedom, so clients may make a free choice, is to be welcomed.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

We believe that the levels guidance produces an effective and workable scheme subject to issues around the level of junior for level 4 cases.

Q13: Do you have any comments on the proposed modified entry arrangement?

No.

Q14: Do you agree with the proposed approach to the assessment of competence?

Yes.

Q15: Are there any other issues that you would like to see included within the review?
Please give reasons for your response.

No.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

Yes.

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

No.

Q18: Do you have any comments on the Scheme Rules?

No.

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

Prosecutions by the Financial Services Authority should on balance be included within the list of criminal advocacy. These can involve the most complex criminal offences rather than regulatory crime. They will be of considerable length and should be included within the accreditation process. Similarly prosecutions by central government such as the Department for Work and Pensions and Local Authorities can involve significant advocacy issues in criminal law trials.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

We do however agree with the approach taken to specialist practitioners.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

Our only concern is the speed of implementation and the ability of the regulatory authorities to cope.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

Q24: Are there any other equality issues that you think that the regulators ought to consider?

Individual Barristers

Abbas Lakha QC

I have read the CBA Response to the Consultation (which I attach) and I am wholeheartedly in agreement with it. In the circumstances I would like to adopt the Response and urge you to act in accordance with it.

Yours,

Abbas Lakha QC

Alistair Mitchell

| | |
|--|-------------------------|
| Name: | Alistair Mitchell |
| Organization: | 49 Chambers, Bridgnorth |
| Role: | H.o.C. |
| Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme? | |
| 18 months or more would be a sensible period. | |
| Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates? | |
| <p>Judging by the JAG's own research, the vast majority of solicitor advocates do not have the requisite trial experience to properly represent the client's interests at pre-trial Crown Court hearings. There is no substitute for a fully-competent trial advocate at every stage of the crown Court process.</p> <p>The advent of 'Instructed Advocate' GFS single case payments acts as a financial incentive for solicitors (already in receipt of the Litigator's Fee) to 1. gain control of the legal aid payments and 2. regressively diminish payments to trial counsel who do the bulk of the work.</p> | |
| Q3: Are there any practical issues that arise from client notification? | |
| <p>Notification will echo the embarrassing situations caused by present BSB rules which tell barristers to present a letter of introduction with details of how to complain at the first meeting with the client. This can foster an atmosphere of mistrust at the very time counsel needs to gain the client's confidence. Notifying clients that they may not have the best-qualified advocate for the job is bound to create difficulties for all the legal professionals involved. The preferable option is that the client is provided with a fully-competent advocate in the first instance.</p> | |
| Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1? | |

I agree that more research is needed.

Q5: Do you foresee any practical problems with a phased implementation?

Many counsel practice from one geographical area, yet frequently appear in others. If the scheme is not nationwide there could be a situation where half the advocates appear unaccredited!

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

Allocation of cases under the existing bands is perfectly sensible. There is no need to revisit the matter as long as fully-competent advocates are available to conduct hearings at every level of case. The proposals un-necessarily complicate the administration of justice and will lengthen pre-trial hearings when one or other party requests that the level of case be changed.

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

The present banding of offences is sufficient provided fully-competent trial advocates represent the client.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

Hearings should be conducted by advocates who are competent to conduct the trial. There should be no short cuts unless a junior advocate is led.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

Q13: Do you have any comments on the proposed modified entry arrangement?

Q14: Do you agree with the proposed approach to the assessment of competence?

There should be one standard for both solicitors and barristers.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

'Plea –only Advocates' should not be permitted to appear in the Crown Court without being accredited as trial advocates.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Q18: Do you have any comments on the Scheme Rules?

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

There is widespread and trenchant opposition to the concept of 'Plea-only Advocates' at the criminal Bar. This is exacerbated by the abuse of the present 'Instructed Advocate' GFS payment system which has boosted solicitors' incomes to the detriment of the junior Bar, many of whom struggle to stay solvent as a direct result. The criminal Bar should not stand idly by whilst the profession is destroyed by lesser standards of advocacy allied to increased profits for solicitors.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

Many state-educated barristers, especially those sharing a BEM background, are already badly affected by changes to the GFS. Allowing even more under-qualified solicitor advocates to conduct pre-trial hearings will further erode the diversity of the profession.

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

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| |
| Q24: Are there any other equality issues that you think that the regulators ought to consider? |
| |

Bruce Holder QC, DL

Dear Sir

QASA response

1. I am a senior civil servant but a member of the Bar. I now work within the service justice system. I write however in a strictly personal capacity. I also remain a Recorder of the Crown Court and have been so for 21 years. I am not directly affected by QASA, nor will I be in the future, unless as a member of the public needing the services of a lawyer. If I was, I would be unimpressed by what this scheme proposes to protect my interests. I have already written to the SRA (copied to the BSB) expressing some of the views I express below on behalf of my own authority which is not, I have been assured, at present to be brought within any final scheme. It may be that our own detailed quality assurance scheme introduced in the last four years has assisted in this.

I hope it has had that affect, although I suspect the truth may be we just got missed as no one within the Service justice system was ever consulted about any such scheme, including the judiciary, unless they also had a role in the civilian system.

2. I have read and am actually appalled by the proposals being made, and hope very much that you will reconsider them in close cooperation with the legal profession, as well as informed members of the public. I am also a criminal tutor for the Judicial College. Conversations I made a point of having with members of the full time judiciary on two separate Judicial College 2-day courses, and a third one day course, failed to find a single full time judge (who I spoke to at any rate) who had much good to say at all about these potentially damaging proposals at any stage of their consideration. Too much goes forward with little account being taken of the response of those who know best. Neither they nor I understand why this is so. I hope they will be listened to on this occasion.

3. It seems to me that projects like the Bar's BQAP (Bar Quality

Advisory Panel) scheme of no-blame professional referral may be a better way of regulating the Bar at least. There are other self-regulation processes that could be put into effect that might achieve the same result now which might have been harder to achieve in former days. BQAP was not well adopted by the judges as I am told (retrospectively) that they failed to understand fully that it was non-reportable and was only designed to improve the standards of the Bar without punishing the miscreants. You will be aware of its terms as there was full consultation at the time - now some 6 years ago. I had the privilege of being BQAP's first Chairman. The process has largely fallen into disuse through lack of take up. It could be revisited, and I gather Michael Todd QC the Bar's Chairman may have discussed this prospect already. Something similar could be devised for solicitors. To do as your consultation document proposes with all its attendant cost, and the use of centres for an unrealistic assessment seems to me just ludicrous. There is not a convincing case made that it will actually work. Surely it is undeniable that it will be burdensome, and not quantifiable in terms of the result it will reduce for the public. It may also attract challenge by way of judicial review.

4. Carrot is always better than stick! The public are what matter. They are far better served by strengthening the professions' abilities to self-regulate from within, and not imposing more process on them from without. This just reduces morale, eventually makes people take short cuts, and makes professionals less inclined to go the extra mile (unpaid) for their clients. I gather (and observe myself) from all I hear from judges and members of the Bar that this is what they are increasingly being required to do. Worse still most criminal lawyers are seeking ways to remove themselves from publicly funded work. The best will leave first and many have done so already and are unlikely to return. You could not accuse these men and women of being other than committed lawyers who have principle, and the maintenance of fair trial, and the rule of law, at the heart of what they do. Too many of them have spent a long time doing publicly funded work for that accusation to stick for a moment. Too many however have decided that they have been misled for too long, and have had promises made to them which simply have not been kept by governments of any hue. They daily come to see exercises such as these to be just window dressing which can be sold politically without any real chance of achieving the real purpose of a quality assurance scheme. I have no doubt that genuine quality assurance is what is really intended by those who advance these proposals, but I suggest it will be otherwise in practice, as process becomes ever more important than principle, and the means seeks to justify an illusive end.

5. If you believe as I do that the professions know there must be changes from within to ensure quality. I urge you to let them work with you to achieve this.

6. Some of the simple facts above cannot be long denied, and left uncorrected. Good advocates will not simply enter a public salaried service to prosecute and defend as they one did. As talented men and women there are other things they can do. If they are not talented they should not be allowed to last long in this work. Unless the Government has decided that those who need representation are not entitled to the best from public funds, it needs to be accepted that this is the choice we are all being asked to make. It also needs to be explained to the public who need or might need that representation. Anything less would be wrong.

7. However it might be claimed that advocacy is a vocation, it is a vocation that is being crushed with almost every day that passes. For some it is or has become a vocation. I have myself decided that I have no stomach for a return to the chasm of lost morale that the bar has become since I left independent practice nearly 5 years ago. I will not now return to the Bar once I have completed my contract as DSP. The Bar is really beginning to look now as it really did know better, when it was allowed to act to see that its own defaulters were identified and driven from work by simple loss of reputation among their peers. I acknowledge times have changed, and we may not be able to put back the clock completely. I do find however that we have a profession that are willing to try, and can better trusted that you give them credit for. You really should try to work with them rather than against them.

8. I ought to add that I have recently read the full and thoughtful response of the Criminal Bar Association. They are in my informed experience far more than a lobby, and always try to speak from principle, albeit for their members as well. I do agree with what they have said as well. Please turn back from this before it is too late. It looks more like a job creation scheme than anything that will really bring about change. Whilst we need jobs, we do not need anyone more being paid from public funds for assessing other professionals. We need each and every advocate to raise their game by self-interested personal effort. Trebling the CPD requirement for advocates and making it a requirement that each hour is spent in a fresh area of research relevant to their particular or intended practice might be a far better start. This is one way of doing it in concert with others, at far less cost and more chance of success. It would also weed out those that do not take their profession seriously, as those who fail are notified for action by their professional bodies.

9. I urge you to consider these points and see that they are included in any paper to be considered before this all moves to an overly complex formal scheme of any kind. I know only too well from my time as a civil servant how hard it is to turn back from a bureaucratic process once it has gathered a head of steam. It takes courage of course. I hope you will try to do this by starting to talk with a real will to accommodate and reach agreement with those that have other ideas. Please do not let this be a consultation when the responses get ignored. This would not easily be forgotten, and would be unjust and unhelpful to the public, as well as unfair to the professions who support the system.

Yours faithfully

Bruce Houlder QC DL,

Director of Service Prosecutions, Service Prosecuting Authority, RAF Northolt, West End Road, Ruislip, Middlesex HA4 6NG. Tel: Mil: 95233 6100 Civ: 0208 842 6100 Email: DIIF: SPA-HQ-DSP or: bruce.houlder655@mod.uk

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| Name: | Bruce Houlder QC DL |
| Organization: | Ministry of Defence |
| Role: | Director Service Prosecuting Authority (NOT DIRECTLY AFFECTED BY QASA) |
| Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme? | |
| Yes. The judiciary is not sympathetic to these proposals from my enquiries, and this may act unfairly towards individual applicants if sufficient care is not taken by judges. A period of two years in some cases might be appropriate as work is not abundant for some of these advocates through not fault of their own. For level four advocates 2 years would be essential to give them time to clock up the judicial accreditations. Certainly at least 18 months would be needed for level 2 and 3. | |
| Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates? | |
| You are seeking to create a two tier professions and unduly restrict an advocates rise through the ranks of experience. The very idea of a plea only advocate is misconceived. It also suggests that advice on pleas requires less experience when the opposite is sometimes the case. I would also suggest that his responsibilities under CPR are emerged at an early stage and this cannot be cheese pared in its way, This is one of the worst proposals of the lot. If I was client I might think that advice t o plead guilty was being given as the lawyer wanted to keep the work for himself. Whilst this may not be the case, public trust is all here. It would be seen as a shameful | |

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| device to encourage pleas. The public should be very concerned about this proposal. |
| Q3: Are there any practical issues that arise from client notification? |
| See above. A fully informed client would rightly become a very concerned client! |
| Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1? |
| I am against this proposal. The vulnerability of these clients is of particular concern and requires specialist training. The idea that these youngsters should be represented by those who could not represent them if they were older is extraordinary and I just wait for the reaction when this is pointed out publicly. |
| Q5: Do you foresee any practical problems with a phased implementation? |
| How is this to be piloted and assessed/ How can it be right to discriminate and restrict the practices of those ready to exercise fuller rights. This highlights the flaws in the whole of the QASA approach. |
| Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome. |
| You can only achieve this by a supreme client and lawyer led flexibility. They will know best about the issues in the case. This highlights the danger by artificial and bureaucratic breaks in consideration of what is in the client's best interests. There will be all sort of factors that affect this assessment. Every case is different and the complexities cannot easily be shared outside the client lawyer relationship, |
| Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to? |
| No. This is a shallow approach and shows the flaws. See answer above. It might be that the judge should be left to make this decision at an early hearing of the case by way of mention if necessary. There is a real danger hereof injustice which will leave an complaining client at the end of the process. There must be room for advocates to act outside their level in many cases. |
| Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance? |
| See above, the answer remains No. There would need to be so many examples to reflect reality. This does not. |
| Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones? |
| The instructed advocate can still retain oversight of the case and should do so. There |

is no reason why there should not be flexibility here. I repeat my opposition to the idea of a plea-only advocate.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

Newton hearings should be conducted by the instructed advocate. Plea only advocates would need to conduct these as they are an integral part of the plea process. They do require the skills of a trial lawyer however. Once again the flaw of this scheme are exposed in your question.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

See separate email response sent on 8 October copied below:

QASA response

1. I am a senior civil servant but a member of the Bar. I now work within the service justice system. I write however in a strictly personal capacity. I also remain a Recorder of the Crown Court and have been so for 21 years. I am not directly affected by QASA, nor will I be in the future, unless as a member of the public needing the services of a lawyer. If I was, I would be unimpressed by what this scheme proposes to protect my interests. I have already written to the SRA (copied to the BSB) expressing some of the views I express below on behalf of my own authority which is not, I have been assured, at present to be brought within any final scheme. It may be that our own detailed quality assurance scheme introduced in the last four years has assisted in this. I hope it has had that affect, although I suspect the truth may be we just got missed as no one within the Service justice system was ever consulted about any such scheme, including the judiciary, unless they also had a role in the civilian system.

2. I have read and am actually appalled by the proposals being made, and hope very much that you will reconsider them in close cooperation with the legal profession, as well as informed members of the public. I am also a criminal tutor for the Judicial College. Conversations I made a point of having with members of the full time judiciary on two separate Judicial College 2-day courses, and a third one day course, failed to find a single full time judge (who I spoke to at any rate) who had much good to say at all about these potentially damaging proposals at any stage of their consideration. Too much goes forward with little account being taken of the response of those who know best. Neither they nor I understand why this is so. I hope they will be listened to on this occasion.

3. It seems to me that projects like the Bar's BQAP (Bar Quality Advisory Panel) scheme of no-blame professional referral may be a better way of regulating the Bar at least. There are other self-regulation processes that could be put into effect that might achieve the same result now which might have been harder to achieve in former days. BQAP was not well adopted by the judges as I am told (retrospectively) that they failed to understand fully that it was non-reportable and was only designed to improve the standards of the Bar without punishing the miscreants. You will be aware of its terms as there was full consultation at the time

- now some 6 years ago. I had the privilege of being BQAP's first Chairman. The process has largely fallen into disuse through lack of take up. It could be revisited, and I gather Michael Todd QC the Bar's Chairman may have discussed this prospect already. Something similar could be devised for solicitors. To do as your consultation document proposes with all its attendant cost, and the use of centres for an unrealistic assessment seems to me just ludicrous. There is not a convincing case made that it will actually work. Surely it is undeniable that it will be burdensome, and not quantifiable in terms of the result it will reduce for the public. It may also attract challenge by way of judicial review.

4. Carrot is always better than stick! The public are what matter. They are far better served by strengthening the professions' abilities to self-regulate from within, and not imposing more process on them from without. This just reduces morale, eventually makes people take short cuts, and makes professionals less inclined to go the extra mile (unpaid) for their clients. I gather (and observe myself) from all I hear from judges and members of the Bar that this is what they are increasingly being required to do. Worse still most criminal lawyers are seeking ways to remove themselves from publicly funded work. The best will leave first and many have done so already and are unlikely to return. You could not accuse these men and women of being other than committed lawyers who have principle, and the maintenance of fair trial, and the rule of law, at the heart of what they do. Too many of them have spent a long time doing publicly funded work for that accusation to stick for a moment. Too many however have decided that they have been misled for too long, and have had promises made to them which simply have not been kept by governments of any hue. They daily come to see exercises such as these to be just window dressing which can be sold politically without any real chance of achieving the real purpose of a quality assurance scheme. I have no doubt that genuine quality assurance is what is really intended by those who advance these proposals, but I suggest it will be otherwise in practice, as process becomes ever more important than principle, and the means seeks to justify an illusive end.

5. If you believe as I do that the professions know there must be changes from within to ensure quality. I urge you to let them work with you to achieve this.

6. Some of the simple facts above cannot be long denied, and left uncorrected. Good advocates will not simply enter a public salaried service to prosecute and defend as they one did. As talented men and women there are other things they can do. If they are not talented they should not be allowed to last long in this work. Unless the Government has decided that those who need representation are not entitled to the best from public funds, it needs to be accepted that this is the choice we are all being asked to make. It also needs to be explained to the public who need or might need that representation. Anything less would be wrong.

7. However it might be claimed that advocacy is a vocation, it is a vocation that is being crushed with almost every day that passes. For some it is or has become a vocation. I have myself decided that I have no stomach for a return to the chasm of lost morale that the bar has become since I left independent practice nearly 5 years ago. I will not now return to the Bar once I have completed my contract as DSP.

The Bar is really beginning to look now as it really did know better, when it was allowed to act to see that its own defaulters were identified and driven from work by simple loss of reputation among their peers. I acknowledge times have changed, and we may not be able to put back the clock completely. I do find however that we have a profession that are willing to try, and can better trusted that you give them credit for. You really should try to work with them rather than against them.

8. I ought to add that I have recently read the full and thoughtful response of the Criminal Bar Association. They are in my informed experience far more than a lobby, and always try to speak from principle, albeit for their members as well. I do agree with what they have said as well. Please turn back from this before it is too late. It looks more like a job creation scheme than anything that will really bring about change. Whilst we need jobs, we do not need anyone more being paid from public funds for assessing other professionals. We need each and every advocate to raise their game by self-interested personal effort. Trebling the CPD requirement for advocates and making it a requirement that each hour is spent in a fresh area of research relevant to their particular or intended practice might be a far better start. This is one way of doing it in concert with others, at far less cost and more chance of success. It would also weed out those that do not take their profession seriously, as those who fail are notified for action by their professional bodies.

9. I urge you to consider these points and see that they are included in any paper to be considered before this all moves to an overly complex formal scheme of any kind. I know only too well from my time as a civil servant how hard it is to turn back from a bureaucratic process once it has gathered a head of steam. It takes courage of course. I hope you will try to do this by starting to talk with a real will to accommodate and reach agreement with those that have other ideas. Please do not let this be a consultation when the responses get ignored. This would not easily be forgotten, and would be unjust and unhelpful to the public, as well as unfair to the professions who support the system.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

See above response in full

Q13: Do you have any comments on the proposed modified entry arrangement?

I do consider that this scheme is unlawful in many respects. I have re-read the CBA response and I consider that they have it right on this point.

Q14: Do you agree with the proposed approach to the assessment of competence?

See fuller responses above

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

See full response in email reproduced above.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

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| <p>You would need to start again acting in full cooperation with the legal professions. It would need to include their own regulatory ideas to give strength to any scheme. These could then be piloted first to see if QASA was necessary at all.</p> |
| <p>Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?</p> |
| <p>This is another way of asking the same question!</p> |
| <p>Q18: Do you have any comments on the Scheme Rules?</p> |
| <p>Abandon them.</p> |
| <p>Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?</p> |
| <p>Agreed. Any change to this would need a wider consultation and there would be many issues that would need to be addressed for e.g. the Service Justice System. which would fundamentally change the way that justice is delivered. In the example illustrated herein, It would also need changes to the Armed Forces Act 2006. Full consultation would be needed with ourselves (which has not taken place, the service judiciary and the Ministry of Defence and the Service legal branches who provide lawyers to the SPA (none of whom have not been consulted)</p> |
| <p>Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?</p> |
| <p>The CBA has addressed this issue correctly.</p> |
| <p>Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?</p> |
| <p>These have already been rehearsed above, The main problem will be the damage caused to a profession and client confidences by an overly bureaucratic process where the ideas are not to be trialed or tested outside the scheme itself. This is just daft.</p> |
| <p>Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?</p> |
| <p>See all above</p> |
| <p>Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?</p> |
| <p>These proposals are essentially discriminatory.</p> |
| <p>Q24: Are there any other equality issues that you think that the regulators ought to consider?</p> |
| <p>See above</p> |

Charles Miskin QC

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| Name: | CHARLES MISKIN QC |
| Organization: | |
| Role: | |
| <p>Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme?</p> | |
| <p>Yes there are. I shall take myself as an example!</p> <p>It is very likely that given my diary and the implementation dates (Phase 2: June-September 2013) that a 12 month period would prove impossible. Indeed 18 months may prove too short. There should be a general discretion vested in the BSB to grant accreditation in the case of senior silks prosecuting or defending long and difficult cases where the preparation time is measured in years. An example might enable the BSB to accept a CAEF from a single senior judge prior to the completion of the trial. There is no reason appearing on the face of the forms why the competency tests required cannot be satisfied prior to the conclusion of the trial. The various built-in exceptions do not satisfactorily address this problem and would, in individual cases, wreak unjustified unfairness.</p> <p>By a similar line of reasoning the re-accreditation window should be much longer. I did two trials in 2010 (both murder cases); another trial that became a plea and conducted an appeal in the Supreme Court (why is there no provision for CAEF's to be provided on a discretionary basis by the Senior Courts?). Last year as matters turned out I did one trial; another pleaded. I had to return another murder trial because of the intense pressure of work. This year so far I have done one (murder) trial. My time has been taken up with difficult and hugely time consuming preparation in very serious fraud cases, with extensive case management issues, before senior judges.</p> <p>The accreditation process is borne of the premise that the market for criminal advocacy is not sufficiently competitive to "assure the quality of all advocates" [paragraph 2.5 of the Handbook]. Whilst that may be broadly true, the market environment in which I work certainly does. Exceptions should be allowed to the general processes where the truth of the premise is capable of generally accepted challenge. This would represent an acceptable flexible response to the issue of assurance (see also below).</p> | |
| <p>Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?</p> | |
| <p>Q3: Are there any practical issues that arise from client notification?</p> | |
| <p>Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?</p> | |

Q5: Do you foresee any practical problems with a phased implementation?

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

The new published criteria are woolly and self-contradictory. The lists far too short. There is too much room for protracted and unnecessary debate about the distinction between level 3 and 4 and too many people who have a say in the determination: party, advocate, regulator and judge. Who is the party? Does this mean the defendant himself or herself? How is all this supposed to work in practice?

According to the list, Level 3 includes “more serious sexual offences” and Level 4 includes “serious sexual offences”! What is the difference? Where, for example, does rape actually fit? Where do cases involving fatality actually fit? Apart from driving related death, Level 3 is silent; Level 4 (now) speaks only of “substantial child abuse murder” (rather than the earlier published simple “murder”). Why has there been this change? Is it proposed to put murder/manslaughter cases of any description in Level 3?

That aside I remain strongly of the view that 3 grades only for Crown Court work is too few. The curve is too flat and fails to take account of the exponential difference between the serious and the very difficult. The Levels actually treat complexity and seriousness as if they are the same; whereas they are often very different.

I have watched systems of grading come and go over many years and they nearly always involve 5. The CPS has and for many years have had Grades 1-4 and then silks. This system is a product of long practical experience. Clear blue water usually flows between Grades 1, 2 and 3; 3 and 4 can in practice be blurred but the step up to silk is again normally clear to the user.

To ease the matter may I suggest a different approach? The grades should follow broadly those used in the classification of Crown Court Business [Practice Direction (Crown Court: Classification and Allocation of Business) [2005] 1 W. L. R. 2215. This would be modified in the following way:

Level (1) aside, Level (2) should include all Class 3 offences where a trial, if the defendant were tried alone, would be likely to last less than a week and where the likely sentence after trial is 3 years or less; Level (3) should be all Class 3 offences where a trial, if the defendant were tried alone, is likely to last more than a week or where the likely sentence is more than 3 years and all Class 2 offences; Level (4) should include all Class 1 offences save where Level (5) applies; Level (5) should include exceptionally difficult types of all the foregoing and commonly where a silk is necessarily required by one or other or both sides.

This classification would have the profound advantage of clarity and be founded in judicial experience and guidance. I would suggest the adoption of this system, or something closely allied to it) even if the 4 level system is adopted by QASA.

It seems to me that the Handbook in paragraphs 4.1- 4.28 gets bogged down in the

detail of the classification of individual cases (which my proposal addresses) whereas the object of QASA is simply to set minimum standards required for advocacy in the various levels. The question is not whether any hypothetical individual case is Level 3 or 4 but what are the qualifying skills for conducting the typical case. There is obviously a necessary case for permitting advocates some movement between the levels with properly informed client permission. But I should be slow to permit anything other than a Level (5) advocate to lead in such a case.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

No; please see Answer to Question 6

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

No; please see answer to Question 6

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

These are very long standing problems and there is no easy answer but as I say above QASA is principally about assurance, accreditation and entry levels. The best, historic and most practical solution is to allow water to find its own level and give the Level 4 advocate or solicitor the discretion to decide who holds the brief for him or her on the non-trial hearing. There is plenty of scope in place already for judicial intervention; micro-management of hypothetical cases by regulation is not going to solve an issue which is infinite in variety. What matters in the Crown Court on the day is that the defendant is represented; if someone is woefully inadequate to the task the Judge will adjourn.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

Please see Q9

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

Please see above

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

Please see the above

Q13: Do you have any comments on the proposed modified entry arrangement?

Please see the answers to Q1 and 9. Whilst I can see the obvious grounds for partial exemption of new silks who have recently been through a strict process of

accreditation, I remain firmly of the view that senior silks, unless the subject of judicial criticism, should also be exempt. The reasons are as follows

(1) the lack of market forces premise for the assurance scheme to the generality of advocates has little or no bearing on silks. They are few in number and all are well known. If they do not succeed they simply move on to other fields, if they can, and there is no firm evidence to suggest the contrary. If a silk survives 5 years in practice that is strong evidence of competence.

(2) A test that sets the bar as low as a minimum entry standard for Level 4 is no real test for a silk but the public will perceive it to be so; what has been the measured and measurable proportion of experienced criminal silks who have failed and not retired such as to justify the imposition of yet another regulatory requirement?

(3) silk's who practise principally in crime may still have a practice which is not easily amenable to the CAEF scheme; for example their principal focus may be crime-related in restraint and confiscation or appellate work with only the occasional trial; they cannot be simply be banished from the field by this requirement; simple advocacy is a skill which once acquired is not easily forgotten. The CAEF scheme unamended is unfair and likely to act in an arbitrary way as it fails to have an overriding discretion to deal with special cases which arise not out of health etc issues but out of the very nature of the individual's practice

(4) the scheme promotes the idea of the "criminal silk" namely one who habitually practises in that field. This acts as a drag on development into other fields of work and also prevents the gifted and obviously qualified leader in other fields from undertaking a criminal trial. These are anti-competitive tendencies. John Chadwick QC (later Chadwick LJ) who was instructed to lead in the Guinness trial by the SFO would not be able to do so next year as he, a chancery and commercial silk, would not be QASA accredited. I notice that the FSA is not so restricted as prosecutions brought by them fall outside the proposed definition of criminal advocacy.

(5) The statement at paragraph 4.34 of the 4th Consultation paper that "the regulators are firmly of the view that the validity and credibility of a regulatory scheme would be significantly undermined should a category of advocates be outside the reach of the Scheme" is frankly self-serving and unevidenced. In fact the Scheme as it stands makes exception for the "specialist practitioner" who can drop into certain types of criminal trials. The exception destroys the regulators view as a matter of principle. Silks are by definition specialist practitioners. Why should the specialist Health and Safety junior brought in to prosecute not be regulated where the experienced criminal silk defending have that requirement?

Q14: Do you agree with the proposed approach to the assessment of competence?

Q15: Are there any other issues that you would like to see included within the review?
Please give reasons for your response.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Q18: Do you have any comments on the Scheme Rules?

Please see the generality of the above with particular emphasis on the timetable for, the number and the contents of the CAEF. There should be an overriding discretion exercisable by the BSB in favour of established silks who are able to evidence issues arising from the nature of their practice as grounds for exemption and which take into account the general track record of the applicant and not just the number of trials done in the previous period. The provisions as to the extension of time should be modified to extend the period for accreditation and the window for re-accreditation and to allow for other criteria to be deployed.

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

Please see the generality of the above. It is not clear why some fraud prosecutions by the FSA or BIS (mostly insider dealing, boiler room fraud and insolvency) are exempt but not SFO cases. These are not really specialist areas. They are simply fraud prosecutions.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

Please see above generally.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

I do not see insurmountable problems with the broad reach of the scheme. The issue will be whether or not on a day to day basis the scheme will actually work. This kind of structured list scheme habitually falls foul of fast moving issues and resource availability. Provision could be made for ad hoc accreditation. Efforts to micro-manage should be resisted.

Amongst a hard pressed section of lawyers additional regulatory costs need to be kept to a minimum. There will be vociferous calls from the professions unless the scheme is administered equably or should the costs rise. The Government we are told is firmly committed to a reduction of red tape and this scheme would seem to cut across that policy.

Were this Scheme to have anything to do with remuneration I should have other submissions but it does not appear to do so.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

Q23: Do you have any comments about any potential adverse impact on equality in

relation to the proposals which form part of this consultation paper?

Q24: Are there any other equality issues that you think that the regulators ought to consider?

Chas MacLean Cochand

Monday October 8th

Re the proposals

There is little more terrifying than the Team with the new Agenda, the gleam of excitement in their eyes; but for my client in a North London court last week the current system worked well. He went down but thanked me.

- There is an enthusiastic cadre of committed members of the Bar able and willing for not much money; to go almost anywhere and slug it out in the highest tradition of English justice.
- I have seen Jonathon Djanogly M.P.'s churlish response to a member of the bar; where he sets out that there is no evidence that current rates of pay have had any effect on the ready supply of members of the Bar
- I have viewed with some concern the blithe CPS assumption that any defendant they have indicted must be guilty and is just wasting time and the tax-payers money when he or she stubbornly refuses to submit
- We have all watched bored judges waiting and hoping for the moment when the jury will agree with the CPS position
- And no doubt we have all seen the frustration when a jury has time after time raised a one fingered salute, and acquitted.
- All this time, I thought we were on the same side, that we all wanted the same thing.

Step back and look at the big picture? Did regulation and interference save the banks? Do we all thank and revere the team that pushed through the collectivization of Soviet agriculture?

Its a concern for me that the term 'professional' has been so eroded by governments of whatever political caste. Their only concern is re-election. No one is going to stand up for the criminal bar until they themselves are in trouble, and proposals like these hasten the day when a perfectly law abiding member of our community looks around and finds that as a result of glitch in the huge information gathering system that monitors phone calls, internet traffic and car movements; has made a tiny imperceptible error; and ensnared an innocent.

Many have heard of Kafka, but few have recently re-read him and considered how loathsome the huge panoply of government has become and how it has consistently eroded freedoms.

Where will the fair minded, independent and experienced judges come from when the Bar is reduced to wage earners? Where will the poor unfortunate caught up in mysterious and draconian regulation find the curmudgeonly man or woman who will stand up and as a 'professional' courageously bat all the balls the machine sends.

I came from abroad to practice here by choice. It may be that your Committee take what you have for granted and have no real appreciation of how terrifying it can be elsewhere. There's a simple exercise.

Imagine a European arrest warrant whisks you away tomorrow. Which current member of the EEC offers the best chance of you not 'festering in despair'?

I liked the idea that a proud professional body, relatively free of administrative constraints and civil service pensions; could both prosecute and defend in the criminal courts, do so honestly and with integrity. The rewards have been modest, but I stand proud.

Its all at risk.

What you do is unnecessary and unfortunate. This is political tinkering with a system that despite terrible cuts and pressures and avalanches of unnecessary complex legislation; can still still deliver a trial that leaves both the defendant and the observer with a sense that what happened was fair.

Don't lose it.

Yours sincerely

Chas MacLean Cochand

Christopher Hewertson

Re: QASA CONSULTATION AND RESPONSE

Dear Sirs,

I am writing to formally adopt and support both the Criminal Bar Association and the Western Circuit's written responses to the proposed QASA scheme.

It is my firm view that the scheme is fundamentally detrimental to ensuring the best possible representation for those who are sufficiently vulnerable and disenfranchised to have engaged the criminal justice system at all. The scheme is further abhorrent to the idea of the independent Bar or, more widely, independent advocates who are free from political, financial or otherwise vested interference and constraint. It is axiomatic that an advocate who has only his principal duties in mind- to "promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person" and to the Court, to do so "with independence in the interests of justice"- is better placed and more free, in every sense of the word, to protect his clients' best legal interests. It is equally self-evident that QASA both seeks to remove such necessary independence by imposing the government's political ambitions to "licence" barristers to practice and is a conspicuous, blatant forerunner to those efforts to make publicly-funded representation cheaper, and cheaper, and cheaper. QASA thus becomes the fig leaf "guarantee" of competence to justify less qualified, commercially-driven advocates conducting serious trials at the cheapest rates.

The scheme's means are no less problematic. One only need have regard to the analysis of Moses LJ's polemic to understand that the idea of a judge conducting an advocate's job interview when that advocate's lay client faces criminal conviction and lengthy imprisonment, engenders great unfairness to each corner of the triangle:

client, advocate and judge (it is submitted, in that order). Being able to tell the judge "to go to the Devil" if that is what the client's case demands is not, in the real world, conducive to an appraisal of excellence. Not, at least, by any other judicial monitor than the "thoroughly excellent". And that is the gravamen of the charge: how can inextricably linking a client's best interests and an advocate's job security possibly give rise to a good and fair scheme?

The fact that the scheme is proposed contrary to the available empirical evidence that defendants in English criminal trials both expect and receive (comparatively rare exception allowed) very strong standards of advocacy, demonstrates it is unnecessary in its ends and its means and is, thus- it may take the independent Bar to say it- unlawful.

Such a scheme as this should not be allowed to pass. It is wasting valuable public money which would be better used ensuring good quality criminal barristers stay put in the publicly-funded arena. Many are leaving, or at least considering when the tipping-point will be inexorably reached. Is this one of the tacit strategic aims of the scheme? Can those who number the JAG, or those leading policy in the Ministry of Justice, in all conscience answer that question in the negative? How many managing directors, bank chiefs, senior police persons or government MPs (perhaps those rare examples who cannot afford "civil" private fees to a shrunken, elite referral profession) finishing-up convicted of, for example, serious sexual offences or complex frauds in controversial circumstances, will it take to admit "we were wrong". Will some miscarriages of justice amongst the "criminal classes" who, to everyone's great surprise, are proved wrongly convicted months or years down the line be sufficient? One fears not.

What price, then, a fair criminal justice system? A fair price? It might be pointed out that independence costs no more than the courage to halt a damaging process. It should be pointed out that those who will receive this response and hundreds like it at least have the ability to decide these questions in the correct tense- the present- when something can still be done.

Yours sincerely,

Christopher Hewertson

Daniel Bunting

| | |
|---------------|--|
| Name: | Daniel Bunting |
| Organization: | 2 Dr Johnson's Buildings (Barristers Chambers) |
| Role: | Personal Capacity |

Please Note – General Point

As stated in previous consultations, whilst there may be a problem with criminal advocacy (and I am of the view that there is), no attempt has been made to identify and quantify the

problems and the possible causes of it.

Further, there is no evidence to suggest that the proposed scheme will solve whatever problems may exist. Specifically, great emphasis is placed on Judicial Assessment, without any evidential foundation for saying that this is an appropriate, let alone the best, way of assessing advocacy, or that Judges are equipped, or even competent, to assess advocacy.

For that reason, whilst any scheme may or may not work, it is impossible to support it as it will cause great inconvenience and expense without any provable benefit. The whole scheme therefore fails the regulatory objectives (in particular points (c), (d) (f) and (g)). Further, there is real concern that this scheme will make this worse, not better.

I appreciate that the terms of the consultation say that certain points are fixed, but it bears repeating that the whole scheme is proceeding without an evidence base. The only substantive research that I am aware of is the QAA Report from Cardiff. This was a good start, but is now substantially out of date. As was made clear in that report, further research is needed. It is worth remembering that that report was not able to recommend Judicial Evaluation, noting that whilst there was not enough data, concerns were raised about both matters of practicality as well as principle. More research is needed on the whole scheme.

Q1: ARE THERE ANY PRACTICAL DIFFICULTIES THAT ARISE FROM THE PROPOSAL TO ALLOW ADVOCATES 12 MONTHS IN WHICH TO OBTAIN THE REQUISITE NUMBER OF JUDICIAL EVALUATIONS TO ENTER AND ACHIEVE FULL ACCREDITATION WITHIN THE SCHEME? WOULD THESE DIFFICULTIES BE ADDRESSED BY ALLOWING A LONGER PERIOD OF TIME, FOR EXAMPLE 18 MONTHS, IN WHICH TO ACHIEVE THE NECESSARY JUDICIAL EVALUATIONS TO ENTER THE SCHEME?

Clearly, the more time people are allowed the better. It is still not quite clear how the scheme will operate in relation to whether all Judges will be willing and trained to be involved in the scheme for example (and whether this will include Recorders and retired Circuit Judges – I would imagine not given the time involved in the training) – I have heard and read conflicting statements. Clearly if it is compulsory for Judges to be involved, and Recorders are part of the scheme, it will make matters easier.

If Judges are reluctant to participate, then this does raise the question of what concerns they have (and whether it would be sensible for an advocate to get an assessment from a Judge who does not wish to be part of the scheme).

The definition of 'effective trial' at para 5.73 could be improved: it is difficult to see how to show a proper attitude to 'equality and diversity' in most trials. Many Level 2 cases (and some more serious) do not have the opportunity to show the advocate can 'Present clear and succinct written ... submissions'. Similarly with 'Working with others' – this will be very difficult to assess.

For someone with a Level 2 practice, there should be fewer concerns about obtaining the necessary trial experience, but it is easy to see that there will be people who are properly registered at Level 4 who have difficulty obtaining the necessary number of trials.

A separate issue is the requirement to have two or three of the first five trials (at their level) assessed. Many advocates would legitimately wish to not be assessed by certain Judges due to past experiences with them. Further, some cases are clearly less suitable than others. An advocate who was instructed the night before (or even the day of the trial) may feel that it is an inappropriate case to be measured against the criteria. Even if the case is returned long before the trial date, how will Judges assess an advocate where some of the preparation and written work was conducted by another advocate? The client may be 'difficult' (or refuse to let the advocate be assessed – see below), or the advocate may take the view that a half time submission will succeed and therefore she would not be able to properly show her skills across the standards of competencies (albeit it can still count as an effective trial).

In summary, more time should be given. More importantly, the requirement to have the assessment on two or three of the first five trials is unduly onerous.

Q2: ARE THERE ANY DIFFICULTIES THAT ARISE FROM THE REVISED PROPOSALS FOR THE ACCREDITATION OF LEVEL 2 ADVOCATES?

I think that this question is asking about accreditation via an assessment organization rather than Judicial assessment? On that basis :

In the absence of any evidence that Judicial assessment is better than other assessment, or evidence that Judges are properly equipped to assess advocacy, and will do so consistently, it is clearly right that there should be as many other routes to accreditation as possible. It is certainly possible that, given the greater transparency, assessment by an organization is likely to be fairer and more accurate.

The only difficulties that arise are due to the fact that the assessment organization route is not open to full trial accreditation at all levels and that the different methods of assessment as outlined in the Cardiff 'Pilot Scheme' have been abandoned.

Q3: ARE THERE ANY PRACTICAL ISSUES THAT ARISE FROM CLIENT NOTIFICATION?

Will the requirements be identical between the three regulators (they clearly should)?

One issue that has not been covered is whether an advocate should inform her client that this is a trial that she will be seeking to be assessed? Will she have to seek her client's permission? Although one would hope that the fact an advocate is being assessed would not impact on their performance, many clients would be concerned that this would mean that their advocate would not properly stand up to the Judge. This view would not be one that is obviously irrational, and it is the appearance of matters that is of course the key.

Further – will a defendant be entitled to see the completed form? The guidance at para 3.14 is vague in the extreme, and offer little reassurance for any advocate as to how the forms will be used. If the forms revealed that the advocate was not competent, then that would probably trigger an appeal in the event of a conviction. Even if the advocate is competent, the form may show that the trial Judge felt the advocate was not competent in certain areas, which could again give rise to an appeal. What remedy would an advocate have if an appeal hearing found that the representation was competent? Whilst the Court

of Appeal may rule that an adverse assessment form cannot, of itself, found a ground of appeal, it would be surprising if this does not lead to more complaints and a loss of confidence in the professions.

Q4: ARE THERE ANY PRACTICAL PROBLEMS THAT ARISE FROM THE STARTING CATEGORISATION OF YOUTH COURT WORK AT LEVEL 1?

Youths, being generally more vulnerable and less able to make informed decisions than adults, are in need of more protection than an adult, rather than less. Further, the consequences of bad advocacy may be felt at a greater level for youths.

For that reason, it is hard to see why a case that would be graded at 2 or higher in the case of an adult should be given a grade 1 rating for a youth. Whilst the venue for the trial is different, and different skills required, the Advocacy Standards apply the same criteria. The statement that more research is required (para 3.21) is to be welcomed, but until that is done, the default position should be that the grading for a youth case is the same as it would have been given if the case was in the Crown Court.

Q5: DO YOU FORESEE ANY PRACTICAL PROBLEMS WITH A PHASED IMPLEMENTATION?

No. It is however very surprising that this is being rolled out nationwide without a pilot scheme being run to see if the genuine fears that are held can be allayed (a staged introduction, with no assessment, is not a pilot scheme).

Q6: DO YOU FORESEE ANY PRACTICAL PROBLEMS ARISING FROM THE PROCESS OF DETERMINING THE LEVEL OF THE CASE? IF SO, PLEASE EXPLAIN HOW YOU THINK THE PROBLEMS COULD BE OVERCOME.

Yes. This will clearly be a very difficult area. The scheme requires consistency throughout the country as well as between different Judges in the same Court centre. For that reason, if Judges are to assess advocates, they should set the level of the case. This should be done at the PCMH.

It is straightforward to add a box on the PCMH form where the defence and prosecution both indicate which level they feel the case is. If there is disagreement, or the Judge takes a different view, this can be discussed then.

This would also be valuable in assessing consistency throughout England and Wales between Courts and Judges, as well as having the additional benefit of allowing concerns and teething problems to be identified quickly. This would include inadvertent, and good faith, over or under-grading. It would protect defendants (and advocates) in ensuring that the gradings are clear and transparent.

It may well have the additional benefit of assisting with case management.

Q7: DO YOU AGREE THAT THE OFFENCES/HEARINGS LISTED IN THE ABOVE TABLE HAVE BEEN ALLOCATED TO THE APPROPRIATE LEVEL? ARE THERE ANY OFFENCES/HEARINGS WHICH YOU BELIEVE SHOULD BE ADDED, AND IF SO, WHAT ARE THEY AND WHICH LEVEL DO YOU THINK THEY SHOULD BE ALLOCATED TO?

The list is relatively vague and whilst it is almost impossible to divide Crown Court cases into three groups, there are no groups of cases that are obviously 'out of place' in Levels 2-4. The use of adjectives such as 'serious' introduce either welcome flexibility, or undermines the integrity of the whole scheme, depending on ones point of

view. The problem in trying to shoehorn all the Crown Cases into three levels is clear. The problems created by this can be ameliorated to some extent by having the PCMH Judge 'sign off' the level agreed by the advocate.

Specific points:

It is not clear why Committals for Sentence and appeals are Level 1 only if done by the advocates firm (and how this relates at all to the independent bar and freelance solicitors and solicitor-advocates). I cannot see how who undertook the case in the Magistrates' Court makes any difference. I assume that this the scheme will be for all such cases to be Level 1?

Further, given that appeals will include appeals from the Youth Court, there will be a fair few cases that would be Level 3 cases if tried on indictment and some of Level 4 (I have experience of such a case that would probably be Level 4). It seems wholly unjust that such an individual can be represented at their trial, then on an appeal – which is effectively a Crown Court trial - by an advocate who, under the premise of the scheme, is not competent to do so.

An Appeal should be allocated a Level commensurate with the level it would be if it were a trial. Committals for Sentence raise different issues, but given these can be cases that would often be Level 3 (drug importation), again, they should be dealt with by an individual who is the same grade as (or *possibly* one grade below) that which the case would be if tried on indictment.

I am of the view that appeals and committals for sentence are two categories of cases that can be properly assessed by the parties, subject to the ability of the Judge to enquire and overrule if felt necessary.

Q8: IS THE WORDING USED IN THE LEVELS TABLE SUFFICIENT TO DISTINGUISH BETWEEN THOSE OCCASIONS WHEN AN OFFENCE MIGHT BE E.G. LEVEL 2 AND THOSE WHEN IT MIGHT BE E.G. LEVEL 3? DO YOU FIND THE EXAMPLE HELPFUL? WOULD IT BE USEFUL TO INCLUDE SIMILAR EXAMPLES WITHIN THE LEVELS GUIDANCE?

I am of the view that the wording is hopelessly vague. The example of robbery provides a good illustration of this and many, if not most, cases could probably (legitimately) be placed into either Level. This confusion will be compounded by the fact that the level can often change (up or down) from the PCMH to the trial, and during the course of the trial.

Given that there will be legitimate disputes over grading, this may well result in a loss in confidence in the scheme.

This shows why every case should be graded by the Judge at the PCMH : it brings certainty to all involved and ensures that the grading is determined by somebody independent of the scheme.

Q9: DO YOU FORESEE ANY PRACTICAL PROBLEMS WITH THIS PROPOSAL, PARTICULARLY IN RELATION TO AVAILABILITY OF ADVOCATES, ARISING IN RELATION TO LEVEL 4 CASES? IN PARTICULAR, ARE THERE ANY LEVEL 4 NON-TRIAL HEARINGS THAT A LEVEL 2 ADVOCATE SHOULD BE ABLE TO UNDERTAKE? IF SO, WHICH ONES?

It is difficult to answer this question without knowing how many Level 3 and 4

advocates there will be. Whether there will be any problems may depend on to what extent the Crown Court listings department will accommodate requests to allow the instructed advocate, or a suitably graded replacement, to attend.

Whatever compromise is made in relation to advocates conducting non-trial hearings at the level above their own grade, Grade 2 advocate should not cover a Grade 4 case.

Q10: ARE THERE ANY OTHER TYPES OF HEARINGS THAT YOU THINK SHOULD BE SPECIFICALLY ADDRESSED IN THE GUIDANCE? IF SO, WHICH ONES AND HOW WOULD YOU PROPOSED THEY ARE DEALT WITH?

Some non-trial hearings are more complex and/or significant than others. If a case requires, for example, a Grade 3 advocate, then it is wrong for the sentencing hearing to be conducted by anyone other than a Grade 3 or 4 advocate. A defendant would legitimately feel 'short changed' by that.

Other hearings, a routine PTR to confirm trial readiness for example, could easily be done by any advocate, and the idea of an advocate acting one grade below is acceptable.

If the spirit of QASA is to be honoured, then the following hearings should always be conducted by an advocate of the Grade that the case is allocated to:

- Sentences
- Hearings where an advice on plea is generally required and
- Newton Hearings.

I have phrased it as 'hearings where an advice on plea is generally required' rather than PCMH as, for either way cases, a plea can be entered in the Magistrates' Court (and at the Preliminary Hearing for indictable only matters). This does not seem to have been considered in the consultation paper, but given the increased emphasis on early guilty pleas, and the fact that where a plea can be entered in the Magistrates' Court then it should be (see, by analogy, **Chaytors [2012] EWCA Crim 1810**).

If the scheme is to be coherent then, either the first appearance in the Magistrates' Court and any Preliminary Hearing should be subject to the same rules as PCMHs, or the Court of Appeal be invited to rule that only when an individual is represented by an advocate of the requisite grade can the 'credit clock' start ticking (my preferred option).

Until there is such a change to the credit rules, either any advocate can cover pre-trial hearings (including PCMHs), or only those of the required level. Either way, the trial and any sentencing or confiscation hearing should be covered by an advocate of the requisite Level. My view is that as it is the case as a whole that attracts the grading rather than the hearing, there should be no provision to permit anyone below the required Level to conduct any hearing from the first one where an advice on plea is required (even if that includes the Magistrates' Court where a provisional grading can be created by the solicitor).

On a separate matter, the Court of Appeal has given specific guidance in terms of representation where a defendant has been found unfit to plead (**R v Norman [2008] EWCA Crim 1810**) and this should be incorporated into the scheme. I would suggest that in a case where there is such a finding, the case is Level 3 (or 4 if that is what the

case of itself warrants).

Q11: ARE THERE ANY ISSUES NOT ADDRESSED IN THE ABOVE GUIDANCE, OR NOT ADDRESSED IN SUFFICIENT DETAIL, WHICH YOU BELIEVE SHOULD BE ADDRESSED? IF SO, PLEASE PROVIDE AS MUCH DETAIL AS POSSIBLE

The question of client choice is a difficult one. What requirements will the regulators impose to ensure that the decision of the client is a properly informed one? Will solicitors or advocates be allowed to suggest to a client that their case is a suitable one for the application of the exception in para 4.33?

I would dispute the suggestion that 'normally a case will remain at the same level for the duration of the case' as experience shows that many cases fluctuate. The guidance highlights some of the absurdity of the scheme – if a Level 2 advocate is dealing with a Level 2 case that becomes a Level 3 case, and they continue to act as they are competent to do so, this would tend to suggest that they are a Level 3 advocate. If they are properly a Level 2 advocate, then they should not be 'acting up' and conducting a Level 3 case.

It seems that it will be the advocate who is ultimately responsible for determining the level of the case, subject only to the regulator taking disciplinary action? Whilst a Judge can decline to assess an advocate on a case where they feel the grading is wrong, will the Judge have a power (or obligation) to stop, for example, a Level 2 advocate from taking on a case which the Judge believes is Level 3 if it is not put forward for accreditation? What standard of review will the regulatory bodies apply to a litigators or advocates decision (if it is not determined to be in bad faith) which they disagree with?

Further, to what extent would a client be able to make representations to the Court as to the Level separate to her advocate? Given there is scope for genuine disagreement as to levels, will a Judge be allowed (or required) to hear from a defendant who thinks it is a Level 3, but where the advocates think is Level 2? If a Level 2 case becomes more complicated on the day of trial, what would happen if a client sacks his advocate because he reasonably believes that it is a Level 3 case?

The above, I believe, show why it is vital that the Judge at the PCMH states the Level of the case and there is no provision for an individual below that Level to be instructed (with an adjournment being granted if necessary). If the nature of the case changes so that it may be 'upgraded', then it will be the responsibility of the advocate to bring this to the attention of the Court to suggest that it be reclassified.

Whatever the final appearance of the scheme (if one is adopted), the regulators should invite the LSC to amend the Funding Order to make clear that returning a case because of a Grading Issue (potentially only if it is one that the trial Judge determines was not reasonably foreseeable) amounts to a valid withdrawal under para 15(1)(c) Schedule 1. Further, in those circumstances, the restrictions in para 15(2)(a) and (b) are disapplied. For the avoidance of doubt, this should apply in all cases, irrespective of whether Part 3A applies or not. This is vital in ensuring that the regulatory objectives are complied with, and the scheme's implementation should be conditional on these, or similar, changes.

Q12: DO YOU HAVE ANY OTHER COMMENTS ABOUT THE LEVELS GUIDANCE, OR PRACTICAL SUGGESTIONS AS TO HOW IT CAN BE IMPROVED OR CLARIFIED?

To re-iterate : as the scheme is based around the assumption (correctly or otherwise) that Judges are best equipped to assess advocacy (and at the higher levels this is the

only method) then it **must** be the Judges that determine the level of every case.

Q13: DO YOU HAVE ANY COMMENTS ON THE PROPOSED MODIFIED ENTRY ARRANGEMENT?

It is absolutely vital that QCs are included in the scheme (as is currently envisaged). The suggestion by some, (see the Criminal Bar Association's response for example) that they should be exempt must be resisted. Nothing would be more damaging to the effectiveness of the scheme than that, as it would remove a whole class of people from scrutiny and undermine confidence in the scheme (both with the public and with other advocates).

Further, it would be wholly unfair that the highest earners should not have to contribute to the cost of QASA, thereby increasing the costs for other advocates.

The proposed approach with respect to QCs seems a sensible one.

Q14: DO YOU AGREE WITH THE PROPOSED APPROACH TO THE ASSESSMENT OF COMPETENCE?

No. The proposed method appears to be better than that suggested in previous consultations. I would, however, take issue with the assertion that the new approach "*removes any suggestion that the judiciary have direct responsibility for an advocate's continued ability to practice and places the responsibility for such decisions rightly on the regulators*".

Whilst it is strictly correct, the current proposal does not remove direct judicial responsibility from the proposals and the above statement would appear to be misleading. An assessment of competence is still based wholly on judicial assessment. The role of the regulator appears to be to collate the judicial evaluations and then make a finding of competence or not by the application of a formula, there is no suggestion in the proposal that there will be any element of discretion in the hands of the regulator.

Further, the consultation indicates that the decision would be based on "*all of the evidence available*" which is, again, strictly correct, but misleading. There would of course be other sources of evidence that could be collated that the regulators will not have – skeleton arguments and transcripts of the trial (both of which would have the advantage of being capable of being 'anonymised' and ensuring they can be assessed without risk of bias or the appearance of bias. Other obvious sources of evidence that are ignored (even in a borderline case) are feedback from defendants and other advocates in the case.

Q15: ARE THERE ANY OTHER ISSUES THAT YOU WOULD LIKE TO SEE INCLUDED WITHIN THE REVIEW? PLEASE GIVE REASONS FOR YOUR RESPONSE.

Firstly, the JAG must be willing to assess the whole of the scheme and that it is scrapped, or heavily amended if the evidence warrants it. On the review, nothing should be sacred.

Secondly, on a review, consideration should be given to whether there should be one body that regulates advocacy instead of the three (I am not suggesting that that should be the case, merely that it should be considered and would be useful in assessing how the scheme is being implemented between the three regulators.

Q16: DOES THE HANDBOOK MAKE THE APPLICATION OF THE SCHEME EASY TO

UNDERSTAND? IF NOT, WHAT CHANGES SHOULD BE MADE AND WHY?

The Handbook does the best that it can with the material provided.

Q17: IS THERE ANY ADDITIONAL GUIDANCE OR INFORMATION ON THE SCHEME AND ITS APPLICATION THAT WOULD BE USEFUL?

A much smaller and clearer document should be prepared for clients to give an overview of the scheme.

Q18: DO YOU HAVE ANY COMMENTS ON THE SCHEME RULES?

None.

Q19: DO YOU AGREE WITH THE PROPOSED DEFINITION OF 'CRIMINAL ADVOCACY'? IF NOT, WHAT WOULD YOU SUGGEST AS AN ALTERNATIVE AND WHY?

The definition of 'criminal advocacy' refers back to the 'criminal courts'. This obviously covers the Magistrates' (including Youth) Courts and Crown Courts, but would also appear to include appeals (either direct to the Court of Appeal and Supreme Court, or by case stated to the Administrative Court) as being a 'hearing arising out of a investigation ... prosecuted in the criminal courts'. I would suggest that it is not sensible or practicable for the scheme to apply to those hearings (if that was the intention).

It is not clear why private prosecutions (which include those brought by public and quasi-public authorities, for example local councils, which can often include complicated and lengthy benefit frauds, as well as completely private prosecutions that include, for example, rape – R v Davies, Maidstone Crown Court - 1996) should be outside of the scheme. I assume that that is not intended?

I would suggest as an alternative definition - "Criminal advocacy' means advocacy in all hearings in a Magistrates' or Crown Court that are governed by the Criminal Procedure Rules".

Q20: DO YOU AGREE WITH THE PROPOSED APPROACH TO SPECIALIST PRACTITIONERS? IF NOT, WHAT WOULD YOU SUGGEST AS AN ALTERNATIVE AND WHY?

At para 2.1 of Annex B, Lord Carter is quoted "*There is a client-driven need for the quality assurance of advocacy to be more than a reactive mechanism addressing complaints of concerns*". If that is correct, and there is a need for quality assurance in the Crown Court, then it should apply to all cases. No evidence has been given to show that there is less of a risk of poor quality advocacy in these sorts of cases and no reasons given why the same regime should not apply.

With cases falling within para 4.15(b) I would agree with the approach. For those within 4.15(a), if QASA is an appropriate scheme for the criminal courts, then it should apply to all those conducting criminal cases in the courts.

Clarification would be helpful of whether the exception under 4.15(b) would apply for accredited advocates as well unaccredited – if a Level 2 advocate has a mixed practice and has a particular speciality (for example mental health) could they be instructed on the basis of their specialism in a Level 3 or 4 case?

Q21: DO YOU FORESEE ANY INSURMOUNTABLE PRACTICAL PROBLEMS WITH THE

APPLICATION OF THE SCHEME? IF SO, HOW WOULD YOU SUGGEST THAT THE SCHEME BE REVISED?

I hope it is clear from the responses above that I consider the scheme to be fundamentally flawed. Any proposals should have a proper evidential foundation.

Q22: DO YOU HAVE ANY COMMENTS ON WHETHER THE POTENTIAL ADVERSE EQUALITY IMPACTS IDENTIFIED IN THE DRAFT EIA WILL BE MITIGATED BY THE MEASURES OUTLINED?

Q23: DO YOU HAVE ANY COMMENTS ABOUT ANY POTENTIAL ADVERSE IMPACT ON EQUALITY IN RELATION TO THE PROPOSALS WHICH FORM PART OF THIS CONSULTATION PAPER?

Q24 : ARE THERE ANY OTHER EQUALITY ISSUES THAT YOU THINK THAT THE REGULATORS OUGHT TO CONSIDER?

I will answer these three questions together, and on the assumption that all of the Judges who take part in the scheme will not be biased.

Others have written about the potential disadvantages to ethnic minorities due to unconscious bias and I won't repeat that, save to say that I agree with it. Training of the Judges is imperative if the scheme is to have any credibility, but as is well recognized in the psychology literature, an awareness of unconscious bias is not enough to combat it. The best Judge, acting from the best motives, and trying their hardest to ensure they approach their task in as neutral a way as possible, is still likely to exhibit some form of bias. The only remedy for that is to introduce some form of 'blind marking' (the various studies conducted concerning the anchoring effect on judicial sentencing make clear that it is extremely difficult to overcome matters such as unconscious bias; see - http://social-cognition.uni-koeln.de/scc4/documents/PSPB_32.pdf for a review of the literature and further research).

It is not clear from the consultation whether a judge, when making an evaluation, is supposed to confine themselves to this case only, or is permitted to consider what she knows of the advocate from previous experiences with them. The purpose of the scheme would seem to indicate the former, but clarification of that is required.

Either way, it is likely that if the Judge is familiar with the advocate, then they are more likely to be sympathetic to the advocate, and thereby (unconsciously) rate the advocate higher. This would accord with common experience. Whilst there is not, I accept, an evidential basis for that assertion, the same can be said of much of the scheme.

This raises the question of whether the scheme is discriminatory against barristers in chambers (and to a lesser extent, freelance solicitor-advocates), particularly those in London. In-house advocates (whoever they are regulated by) are more likely to appear in the same Court building and will have a much greater rapport with the 'local' Judges. This would have the consequence that that Judge will know them quite well, and may be more likely to overlook a poor performance. Further, they would know that a finding that an advocate is not competent would resonate in the local community, and as that advocate will continue to appear in front of them on a regular basis, it could make matters quite uncomfortable. I am not suggesting that a Judge would consciously allow themselves to do that, but there is a high chance of this being an unconscious factor. A barrister in a London chambers however may well regularly cover 20 court centres and encounter hundreds of Judges. In the last 18 months for example, I have conducted 23 trials, all of which have been in front of different Judges. If I were in house and thereby going to one or two different Court buildings, this would not have been possible,

For this reason, I am concerned that the scheme discriminates against freelance advocates (barristers and solicitors) in London and the London area.

Concerns have also been expressed that Judges, who were overwhelmingly barristers rather than solicitors, are likely to be biased (consciously or unconsciously) against solicitor-advocates. This is a legitimate concern and one that appears not to have been covered in the current handbook, other than by general reference to training. It is vitally important that all advocates have confidence in the scheme and this should be addressed.

Addendum Note

1. This was written largely before the publication of the CBA response. Whilst there are some points with which I would disagree, I fully endorse the views of the CBA in paras 3-20 and 27-32. I would re-iterate what is stated at para 28 that the scheme is fundamentally flawed. It is to be hoped that the regulators take heed of the message of the body that represents the largest group of advocates in the Crown Court (where the scheme is primarily targeted) and recognize that it is irresponsible to proceed with a scheme without a proper evidential foundation.
2. Whilst this is drafted as my personal response, Sarah Read, Kakoly Pande and Garry Willmott from my Chambers have stated that they endorse my views and wish to be associated with the comments made in it.

Daniel Lister

Dear Sirs,

I have read the CBA response to the fourth consultation and I wholeheartedly agree with it.

Daniel Lister

Gareth Underhill

I have read the CBA response to the fourth consultation and agree with it, commend it to you and invite you to treat the CBA response as my own personal views on the consultation.

Gareth Underhill

Hannah Kinch



**Response of Hannah Kinch
to the Joint Advocacy Group's 4th Consultation Paper
On the Quality Assurance Scheme for Advocates**

Introduction

1. I am a tenant at 23 Essex Street. I am 6 years call, and am a criminal barrister. I both prosecute and defend, at court centres all over the country. The views expressed in this response are my own.

Overview

1. Good quality advocacy prevents miscarriages of justice, mitigates the stresses associated with having to give evidence in trials and ultimately saves the public purse the expense of inefficient hearings and unnecessary delay. Good quality advocacy ensures that public confidence in the criminal justice system is maintained. I believe that the criminal Bar provides good quality advocacy day in day out all across the country, and that this is recognised by the public at large.
2. I do not believe that the Quality Assurance Scheme for Advocates ("QASA" or "the Scheme") proposed is the proper vehicle to achieve the purported aim of ensuring good quality advocacy services.
3. I endorse and adopt the submissions made by the Young Barristers' Committee ("YBC") of which I am the Vice-Chairman, and also those of the Criminal Bar Association ("CBA") about the unlawfulness of the Scheme.

There is no evidence that the Scheme is necessary

4. I have not seen any evidence provided by JAG setting out why the Scheme is *necessary*. Indeed, In the LSC discussion paper of February 2010 it said "Without objective assessment of advocacy in place, there can be no substantive evidence of a decline in standards." It was accepted in the paper that there was no mechanism for assessing such a decline, in place.
5. I am not aware of any increase in the number of appeals against conviction being lodged (and won) on the basis of lack of competent advocacy; indeed the number of such cases remains minute, nor of an increase in complaints about advocacy from judges, or an increase in reports to the regulators of the same.

6. In contrast, the only independent research that encompasses clients, solicitors and advocates was conducted by the BSB and said '*barristers are perceived to be competent, highly qualified and dedicated professionals. Specialist advocacy services set them apart*' (Ipsos Mori, August 2007).
7. Indeed, the arguments put forward in favour of the Scheme completely overlook the fact that every time an advocate performs in court, they are under judicial scrutiny. Court proceedings do not happen in a vacuum; with very few exceptions, criminal proceedings are heard in open court, observed not just by the lay client, but by members of the public, other advocates and of course the judge. Few other professions are subject to daily scrutiny in the same way, which in itself should be sufficient protection for the public.
8. Furthermore, criminal barristers operate under intense competition. If they are not able to do a good job, they won't get work; it is as simple as that. The age old adage 'you're only as good as your last brief' rings true.
9. The judiciary are well able to report examples of incompetent advocacy to the regulators. Similarly, it is within the power of the judiciary to report examples of advocates taking on cases that are beyond their competence. Any and all such referrals could then be dealt with directly by the regulator concerned. Thus action that is proportionate to any concerns can be taken without a Scheme of the sort proposed being imposed.
10. There has also been no evidence provided which would suggest that any problems with under-performance stem from the Bar, as opposed to other groups of advocates, so requiring specific targeted intervention from the Bar Standards Board. In order to comply with section 28(3)(a) of the LSA, the Scheme must do no more than is necessary in order to effectively achieve the regulatory objectives.
11. I don't think that the Scheme proposed is a necessary or proportionate mechanism for ensuring competent advocacy in the criminal courts, and I do not think that it will improve advocacy standards.

The Scheme will not deliver higher standards of advocacy

12. I agree with the CBA that in order for any quality assurance scheme to work (whether the Scheme currently being consulted on, or any other) a

number of fundamental principles must feature:

- 1) A common regulatory regime – a level playing field - for all advocates, be they barrister in independent practice, employed barrister, solicitor advocate or legal executive;
 - 2) Accreditation of advocates to the higher levels by Judicial Evaluation (JE) in all but exceptional cases, and a regime of periodic re-accreditation that requires the advocate to demonstrate the acquisition and application of both the necessary competences and sufficient experience to continue to practise at the same level or to move up to the next level;
 - 3) Case grading, not hearing grading, so no ‘plea only advocates’ (POAs);
 - 4) Cases to be allocated to levels by reference to clearly defined criteria, and not by negotiation or agreement between litigator and advocate.
 - 5) Recognition of the special position of QCs and Treasury Counsel.
13. I am concerned about the limited time between the close of the consultation period and the date proposed for implementation of the Scheme. This leaves little time for the Joint Advocacy Group to consider the responses they receive, or address the concerns raised. The limited time period gives the impression that this consultation amounts to little more than window dressing; that the Scheme will be brought in, as proposed, irrespective of the submissions made.
14. It has been suggested by the BSB that all that is required in January 2013 is registration. This is not clear in the consultation paper, and would appear to be a result of the fact that there is a tacit acknowledgement that the Scheme will not be ready to go ahead in January. This does little to command confidence in the proposed Scheme, or the manner in which it has been introduced.
15. Turning to the specific questions posed in the consultation paper:

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme?

16. An 18 month period of accreditation would be more realistic, as articulated by the YBC. I do not rehearse their arguments here.

Q2: are there any difficulties that arise from the revised proposals for the accreditation of level 2 advocates?

17. It is not in the public interest to have plea-only advocates within the scheme. Of course, advocates may choose to limit their practice to focus on certain types of hearings for financial reasons; that is a matter for them. However, for public confidence in the criminal justice system to be maintained, an advocate instructed to have conduct of a case must be able to deal with any aspects of that case as they arise, and the scheme must be structured around public interest considerations.

18. The suggestion that plea only advocates be accommodated within the scheme follows research conducted by the solicitor's regulatory authority ("sra") which suggests that 50% of solicitors with higher rights do not undertake trials (at paragraph 3.133 of the consultation paper). In fact, it was 50% of the solicitors who completed the survey that said they do not do trials, numbering 430 individuals. Thus, the notion of plea only advocates being in the scheme is based on the responses of 430 solicitors, out of a pool of over 8000 advocates who have rights of audience in the higher courts. The fact that a very small proportion of advocates do not at present undertake trial advocacy is not a public interest consideration around which the structure of the scheme should be based.

19. Inherent in the criminal procedure rules is the expectation that cases are properly case managed, and that the instructed advocate is able to deal with every aspect of the case from the earliest stages until its conclusion. To have plea only advocates undermines this continuity. It is also questionable whether someone who will never undertake effective trials will be able to properly deal with questions of case management. How will

they know how long a trial is likely to last, what legal arguments are likely to be raised, and be able to advise their client of the same?

20. Ineffective case management can cause unnecessary delay to cases, leading to avoidable adjournments. An advocate who is instructed in a case after the pcmh may not choose to conduct the case in the same way that was envisaged at the pcmh, when the directions for trial are set. For example, legal arguments not previously considered may be raised, adding to the length of the trial, or further witnesses may be required. This has knock-on effects on other trials due to be heard, and makes listing cases within a reasonable period very difficult. By not actively managing cases at pcmh the additional cost to the public purse is likely to increase considerably.
21. I am concerned that defendants represented by a plea only advocate may find themselves unduly pressured into entering a guilty plea. Experience tells us that it is not uncommon for a client to have given the impression that they wish to enter a guilty plea at the plea and case management hearing, only to change their mind on the day. There are a number of reasons why they may do so. Some may ultimately enter a guilty plea as planned, but others may decide that in fact they wish to take the matter to trial. Where a defendant is represented by an advocate who can only act for them in respect of the plea, they may feel unduly pressured into entering a guilty plea so as to avoid finding themselves without representation at a later stage.
22. It should also be noted that even where guilty pleas are entered, there may need to be a newton hearing because the plea was entered on a basis. A basis of plea can make a big difference to the sentence a defendant receives. The client is best served by being advised on plea, and basis of plea, by the person who is intended to undertake the newton hearing itself.
23. A defendant who is not happy with the basis on which he has entered his plea will almost certainly tell this to the probation service as they are interviewed for their pre-sentence report. This is then reflected in the pre-sentence report itself, a copy of which is made available to the court at the sentencing hearing. Where it is clear that a defendant does not accept his guilt on the basis advanced by the crown, the sentencing hearing ought to be adjourned so that a newton hearing takes place. The cost of the aborted sentencing hearing will have been wasted.

Q3: are there any practical issues that arise from client notification?

24. There can be no place for plea only advocates in a credible scheme.

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

25. The suggestion that all Youth Court work be treated as level 1 is completely juxtaposed to the Scheme's overall aims of protecting the public. There can be no rational basis for concluding that cases that would be categorized at level 3 if the defendant were an adult can automatically be treated as level 1 where the defendant is 17 years old.

26. I adopt the YBC's arguments in response to this question.

Q5: Do you foresee any practical problems with a phased implementation?

27. Phased implementation is anti competitive for those whose practices will be restricted.

28. The Scheme should not be rolled out on any circuit, until the questions about its legality have been properly addressed and the outstanding problems have been resolved in a way that ensures the key principles set out by the CBA and supported by the YBC are accommodated.

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

29. I do not accept that the level of the case should be determined by the instructing party. Although the instructing party will have an idea of the likely level of a case, and will instruct an advocate of that level, it is our view that the level should be set by the advocate who has been instructed, which should then be confirmed at the PCMH hearing. This could be by way of having an extra box on the PCMH form for the advocates to fill in, to then be considered by the judge as part of their ordinary case management responsibilities. The judge would not be setting the case level itself but would be able to question whether it has been properly set, and change the case level to one more appropriate if they were of the view that it had been wrongly allocated.

30. This independent judicial oversight will provide a powerful incentive to the instructed advocates to ensure the case is allocated to the correct level. By confirming the case level in open court, and if necessary calling on the instructed advocates to justify the level of allocation, the process of case allocation is open and transparent and subject to critical review.
31. The instructed advocate will be best placed to anticipate the complexities of a case, and the issues that are likely to develop as the case is prepared for trial.
32. By incorporating the question of level allocation within the parameters of ordinary case management, it will not be necessary to have 'spot checks' on cases; the propriety of the level will already have been considered and sanctioned by a judge.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

33. Broadly speaking, the offences in the table are likely to have been correctly allocated. However, the table also demonstrates the inherent difficulty in trying to allocate cases to levels by reference to the type of offence. For example, a domestic burglary would appear to default to a level 2 case, but an aggravated burglary would be level three. Whilst there may be real differences in sentences imposed following convictions for these offences, there may not be any real difference in the level of complexity of the case. A simple domestic burglary may involve complex questions relating to, for example DNA evidence that could require cross examination of expert witnesses on complex scientific matters. An aggravated burglary, whilst a serious offence, may only concern a very straightforward issue of identification. To have the two cases in different categories simply because of the type of offence is unsatisfactory, and will have the knock on effect of taking out more serious but straightforward cases from the diet of a young criminal barrister unnecessarily.
34. Further thought needs to be given to some of the terminology that has been used in the table. For example, in the column dealing with level 2 characteristics, terms such as 'straightforward Crown Court cases' for 'lesser offences' or 'less serious offences' are too vague. Without

elaboration as to what a 'lesser offence' of theft is, the table is of little use. Would it be determined by value? Or by pages of evidence?

35. As for 'less serious' drug offences; would level 2 cover only cases concerning drugs of Class B and Class C? Or would it cover cases of simple possession only, rather than possession with intent to supply, which according to the table would be a level 3 case? Immediately, the difficulties in trying to grade cases without being overly prescriptive are apparent. Although Possession with Intent to Supply Class A drugs is a very serious offence, and more serious than Possession with Intent to Supply Class B drugs, the facts of such cases can vary widely, covering a vast range of seriousness. Would a case involving possession of just 2 wraps of cocaine (a Class A drug) with the intention of supplying those wraps to an undercover police officer, really be placed at a higher level than, for example, simple possession of kilograms of cannabis (a Class B drug)? Simple possession of cannabis would on the face of it be a 'less serious' drug offence; but would this remain the case where the amount possessed was large, and in the context of an international drugs importation ring? It is not immediately obvious what drugs offences would fall within level 2 and level 3, and the use of terms such as 'less serious' and 'more serious' does little to assist.
36. The same arguments apply to the descriptions used for level 3. What is a 'complex' robbery? Is it a multihanded street robbery where weapons were used, and the defendants are running 'cut-throat' defences? Or is it a high value, well organized commercial robbery, involving police intelligence, public interest immunity hearings and anonymous witnesses? Both could be said to be 'complex' but plainly there is a considerable degree of difference between the levels of complexity.
37. 'More serious' sexual offences are covered in level 3. What is a 'more serious' sexual offence, rather than a 'minor sexual offence' at level 2 and a 'serious sexual offence' at level 4?
38. Does arson, currently assigned to level 3 include cases of arson with intent to endanger life? Again there is a vast difference in seriousness and often in complexity between a case of criminal damage that happens to involve fire, and a case of arson with intent to endanger life, where there are very often psychiatric considerations of the defendant to consider.

39. It may be that reference to the Sentencing Council's Guidelines could assist in determining the level of a case. It may be for example, that a robbery case that would fall within the lowest sentencing bracket within the guidelines would be considered to be a 'straightforward' robbery and allocated to level 2, whereas a robbery case in the highest sentencing bracket would be allocated to level 4. Similarly, reference to the Sentencing Council's Guidelines in theft cases might assist with defining what 'high value' dishonesty is.
40. I am incredibly concerned, as are many other junior barristers that my practice is going to change markedly for wholly arbitrary reasons under the Scheme, because it is not possible to simply pigeon hole cases as suggested under the guidance.

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

41. As set out in answer to question 7 above, the wording is not sufficient to distinguish between those occasions where an offence might be e.g. level 2 and those where it might be e.g. level 3. The example is not especially helpful, and if anything demonstrates the real difficulties that will be associated with trying to create examples or apply the guidance to actual cases.
42. I prefer the move from the more rigid approach originally proposed for case allocation to this more flexible model.
43. I would also urge caution in placing too much emphasis on agreed facts determining a case. For facts to be agreed, the advocate needs to have a real understanding of the case; a failure to properly comprehend the nature of the case, and what tactical decisions need to be made could completely change the nature of a case. At the very least it could lead to witnesses needing to be called who were originally agreed, or recalled if further aspects of their evidence was in dispute. The risks of a defendant not having their case properly put are real; the chances of a witness being caused increased distress by having to be recalled are increased. Although once the facts have been agreed the presentation of the case at trial can be

simplified, the importance of doing this groundwork properly cannot be underestimated.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

44. I anticipate real practical problems developing if level 2 advocates are not allowed to conduct some level 4 non trial hearings. There is no reason why a level 2 advocate, having consulted the instructed advocate, could not appear in non trial hearings in level 4 cases.
45. This argument is of course subject to the usual considerations of only acting within one's level of competence. For example, a level 2 advocate ought not to argue an application to dismiss in a level 4 case; plainly such a hearing would be outside of the competence of a level 2 advocate. Similarly, there may be some section 8 applications that ought only to be argued by level 4 advocates, particularly where they concern questions in respect of large amounts of, for example, social services material. However, simple mentions, trial readiness hearings, jury baby-sitting and the like are all well within the competence of a level 2 advocate so long as they have been briefed as to what issues are likely to arise by the instructed advocate.
46. By enabling level 2 advocates to cover non trial hearings in level 4 cases, young barristers are given an opportunity to consider papers in cases that they will not yet be instructed in in their own right, facilitating career development.
47. On a practical level, the criminal justice system simply could not cope if level four advocates had to cover all their own hearings. There would be considerably more delay and cost to the public purse as a result.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

48. Newton hearings should be treated as trial hearings for the purposes of the scheme.

49. Similarly, in respect of confiscation hearings, these should only be undertaken by the advocates of the same level as the case, as they too involve challenging the evidence put forward, in the same way as in the course of a trial.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

50. As a general rule, an advocate who is being led ought to be no more than 1 level below leading counsel, so that they may be effective in the absence of their leader. It is a matter for leading counsel, and the judge who grants a certificate for a junior, to consider what the level of junior counsel should be, not the instructing solicitor. Leading counsel will have the best grasp of the type and level of support they will require from their junior, and will be best placed to determine what level they will need to be. The level of the junior to be instructed should form part of the initial application for 2 counsel, allowing judicial oversight of the practice, and limiting the possibilities of 'straw' juniors being appointed.

51. Being led in a case provides an excellent opportunity for junior advocates to get experience in more serious cases, under the supervision of leading counsel. It is an important part of career progression that should not be underestimated.

52. If the allocation of a case to a level is made with judicial oversight, it is submitted that it will be a rare occurrence for the complexity of a case to change to such an extent that case level would change. This is because, possibly with the assistance of the judge, the issues in the case will have been set out at an early stage, as part of the active management of the case. Significant developments in the case are likely to be anticipated by the parties and the judge.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

53. Nothing in addition to that which has already been raised above.

Q13: Do you have any comments on the proposed modified entry arrangement?

54. Silks should not be within the Scheme. I endorse the CBA's position in respect of this point.

Q14: Do you agree with the proposed approach to the assessment of competence?

55. By looking holistically at an advocates performance over a number of assessments, the regulator is likely to get a much more accurate view of the advocate's ability. This will also mitigate some of the concerns that exist concerning clashes of personality with judges, late returns or other factors which may affect an advocate's performance in a particular case which would not be demonstrative of their ability generally.

56. I am concerned that Rules 29-33 of the draft Quality Assurance Scheme for Advocates Rules ("the Rules") set out at Annex C1 of the consultation paper make no reference to a mandatory requirement of the Regulator to inform an advocate of its having received a Criminal Advocacy Evaluation Form ("CAEF") that raises concerns about the advocate's competence, and invite representations from that advocate before the regulator makes a finding in respect of it.

57. This is despite the fact that paragraph 5.62 of the Handbook states that *'if the regulator receives a properly completed ongoing monitoring referral it will seek comments from the advocate.'*

58. The Rules should explicitly state that the advocate has the right to be informed of a complaint about their competence, and be able to make representations on the same. This is particularly important in the context of the holistic approach being taken to assessing competency. Without such a requirement, an advocate might never know if concerns have been raised about their performance, if they were deemed competent overall. Nonetheless, the complaint would remain on their file, and could be accessed at a later date. We take the view that this is of such importance that the right to be informed should not be referred to just in the Handbook, but should be set out in the Rules as well.

59. In order for the Scheme to be transparent, the regulator should maintain and provide lists of those people who are appointed as independent assessors under the Scheme, together with their relevant experience and

qualifications. This aspect of the Scheme will only have credibility if advocates know the quality and identity of those who will assess them, and would mirror lists of assessors compiled by the CPS for their own in house assessment. This may also be necessary in order to avoid the possibility of conflicts of interest being raised.

60. I note that at paragraph 5.69 of the Handbook '*any other relevant information relating to the advocate*' can be considered by the regulator. In our view, the advocate should have notice of the kind of information that could be considered relevant to a decision on a negative evaluation, and this should be particularized in the Handbook. Furthermore, the Rules ought to explicitly state that other relevant information apart from the assessor's assessment will be taken into account by the regulator. This will inform advocates of their right to challenge all matters which have affected the regulators decision.
61. The Handbook should require the regulator to send a copy of the independent assessor's valuation to the advocate. This is necessary under due process. Otherwise it is difficult to see how an advocate could appeal against the regulator's final decision, which has been based on that unseen valuation.
62. The 4 decisions that can be made by the regulator after a CAEF complaint about an advocate's competence are not the same as those set out at paragraph 5.69 of the Handbook. The differences are confusing.
63. I am concerned that there is apparently no mechanism to appeal against the outcome of a single evaluation, or decision to refer an advocate for remedial training. Given that these be taken into account as 'other relevant information', it is submitted that due process and transparency require those single evaluations to be capable of appeal.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

64. If plea only advocates are allowed under the Scheme, despite the principled arguments against their inclusion, we would wish to see further details about their numbers included within the review.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

65. An executive summary should be prepared.

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

66. An executive summary would be appreciated, as would an easy to follow flow chart documenting the appeals process.

Q18: Do you have any comments on the Scheme Rules?

67. None that have not already been raised in response to earlier questions.

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

68. No. The definition should not be restricted to prosecutions brought by the police or SFO, it should relate to all proceedings before a criminal court in which a criminal sanction could ultimately be imposed.

69. If the Scheme is designed to protect the public, there can be no justification for having cases where a criminal sanction could be imposed outside of the Scheme, particularly as there are many other bodies (e.g. the RSPCA, the DWP, Local Authorities) that bring prosecutions in the criminal courts.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

70. No. A judge can simply direct that a specialist practitioner would be able to appear without QASA accreditation because of the specific details of that case and the practitioners own practice area.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

71. If the Scheme is unlawful, for the reasons set out at the outset of this paper, that is an insurmountable problem.

72. If a scheme is still to be imposed, it should be lawful, necessary (based on evidence) and proportionate. The proposed Scheme would need to be revised to meet those criteria.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

73. No.

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

74. No.

Q24: Are there any other equality issues that you think that the regulators ought to consider?

75. No.

HANNAH KINCH
23 ESSEX STREET
8 October 2012

Ian Wade QC

Dear Sirs,

I confine these submissions to the narrow issue of the proposal to incorporate Queen's Counsel within the QASA scheme. I am otherwise content to adopt the many criticisms of others as to the wisdom, practicality and intentions of the scheme generally – in particular I agree with the trenchant observations of Moses LJ and regard the scheme as both too bureaucratic and at risk of undermining independent and fearless advocacy.

However my objection to the inclusion of QCs in the scheme is based on principle, in that the scheme is fundamentally in conflict with the structure of the profession and the existing arrangement whereby the mark of the highest quality assurance is already awarded by an unimpeachable independent scrutinising body.

The claim for the need for a QASA scheme is derived from aspects of the conclusion of the Carter Report, that consumers required to be satisfied that they were receiving competent professional performance from a body of service providers to whom it was paying substantial sums of public (especially) and private funds. As a general concern this is proper and laudable – I am prepared to assume for the purposes of my response to the consultation that the existing safeguards in the training and ongoing supervision of barristers may not meet the needs of a regulator. However it is inconceivable that this broad policy aspiration could have found fault with (and I do not believe that it did find fault with) the rigorous QC appointment regime.

The award of a mark of excellence sufficient to merit the rank of Queen’s Counsel is not bestowed on the goodwill and appreciation of two judges after observing the performance of a stranger in two cases. I am sure that I need not set out in detail the qualities and characteristics, the accomplishments and track record, the references and appraisals, which must be proven before the QCA Board recommend the grant of royal letters patent, and the rank itself is bestowed by none other than the head of the entire British legal system, the Lord Chancellor. To be permitted to address the court from the inner bar is in itself an endorsement that would satisfy any consumer that quality assurance in advocacy was both evident and upheld.

The QASA scheme proposes to assess advocates at four levels of competence – quite apart from the thoroughly dangerous notion that some sort of junior lawyer should be deemed to be competent enough to handle pleas only, as if the skills and experience required for a plea were significantly less than those called for in any other kind of case. Perhaps the consumer about to lose his liberty has been asked if he is content to be represented by such an under-qualified advocate, and has raised no objection, but that strays beyond my immediate purpose. The QASA scheme proposes that all advocates will be “licensed” to undertake work at that level to which they have been approved, and that all advocates must be so licensed before they can act in a case at that level. The scheme makes no distinction between types of lawyer, and the levels are determined by case and not by reference to the status of the legal professional. Payment (most often, publicly funded) is determined by case. It follows that the whole scheme is skewed to focus on the level of case which is to be allocated to the corresponding grade of advocate, who will therefore be qualified to receive that level of remuneration.

It must therefore have come as no surprise when the LSC perceived that the lawyers were re-assessing the system, and that the graduated fee scheme should be adjusted accordingly. It is exactly the way in which consumers will perceive the scheme. In due course it is how lawyers themselves will perceive the scheme.

In a scheme which makes no allowance for the already superior award of QC, but which lumps all advocates together at one of four grades, and then dictates which level of case they are permitted to accept, it will not be long before the consumer asks why he or she is being asked to pay more for one type of level 4 advocate over another; before the government asks why it is necessary to rank one type of level 4 advocate over another; before the lawyer asks why it is worth the bother and expense (and worry) of applying for silk if he is already approved at level 4, and thereafter why silks are entitled to more than he or she is.

The practical considerations are that there remains a category of case which calls for lawyers of a particular competence and experience; and that consumers will continue to demand that such lawyers are available, are recognised and are comprehensively assessed before they are so labelled. There must therefore be provision in any advocate ranking system for that top flight of advocate to be and to remain unique. The CPS recognise that by exempting QCs from their own highly developed and regulated advocacy grading scheme. The rank of Queen's Counsel, and the QCA regime, was re-introduced in 2006 precisely because the legal world and the consumer demanded that the long admired rank had real worth and utility, and must be re-instated. The proposed QASA scheme, if it persists in including QCs, demonstrates a failure to consider the consequences and it will undermine the existing structure of the Bar.

Assuming as I have done that some sort of scheme is appropriate, there are two ways by which QASA could be amended to make it fit for purpose. Either QCs are allocated a distinctive level 5, or they are specifically excluded. If they are to be retained within QASA at level 5, then they should not be subject to ongoing judicial assessment, that being otiose. The consequence of creating a level 5 might be more far-reaching than is intended, especially if other branches of the judicial system adjust case-based levels of grading. The inclusion of QCs within QASA at level 5 will make that part of the scheme look nugatory – ideally the more sensible option is to exclude QCs altogether.

I doubt if the potential impact of the currently proposed scheme has been appreciated across the whole Bar. In particular it is almost inevitable that those Queen's Counsel not exposed to the implications of universal non-exclusive grading, which will determine their rights to practice and therefore affect their freedom to trade, have simply not expressed a view. For my part I take the incursion into my professional status and my right of audience so seriously that I will have to consider to what extent I will feel compelled to obey the cab rank rule whilst continuing to practice in the criminal courts.

Ian Wade QC

Ian West



**QUALITY ASSURANCE SCHEME for ADVOCATES
FOURTH CONSULTATION PAPER**

**RESPONSE of IAN WEST
barrister**

**FOUNTAIN CHAMBERS
CLEVELAND BUSINESS CENTRE
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MIDDLESBROUGH
TS1 2RQ**

October 2012

1. I am a self-employed barrister in independent practice, undertaking publicly-funded criminal work. I prosecute on behalf of the CPS, and represent legally-aided defence clients for firms of solicitors. I am a member of the Criminal Bar Association, and one of the NE Circuit representatives on the CBA Executive Committee. The views I express in this document are my own, and do not necessarily represent or coincide with the views of either the CBA, or other members of Fountain Chambers.
2. That said, I wholeheartedly support the Response to the fourth QASA Consultation Paper (I too shall refer to it as CP/4) that the CBA has submitted. I would wish to add only a few paragraphs of my own beyond what is said in the CBA's paper.
3. I do not accept the contention advanced in CP/4 that there is a need for regulatory action so far as barristers are concerned to deal with falling standards of criminal advocacy. There are approximately 7,000 barristers in independent practice (BIPs, to use the CBA's term) such as myself, doing criminal work, and we compete with each other for every single brief, prosecution or defence. No-one could have any doubt that it is a fiercely competitive market. Because the fees, for both prosecution and

defence work, are not open to negotiation but paid by reference to fixed scales, there is no price-competitive element in the market; all barristers cost the same, so the competition between them is based on quality alone. Bad barristers cannot make themselves competitive by offering to act for lower prices, though I am sure that some do, by the use of unlawful referral fees. The simple fact is that, in 2012, work is scarce for the referral bar, and barristers who do not deliver a high quality service to their customers – prosecution or defence - simply do not get work. Either they improve, or they leave the independent bar. It is as simple, and as brutal, as that.

4. Consequently, the standard of work provided by BIPs is, by the operation of the market thus described, of an extremely high standard. No BIP can afford to be complacent. And for so long as the independent referral bar continues to exist in the form that it does, this position will remain.
5. There is a problem with the standard of some criminal advocacy, but it is a problem almost exclusively to do with not BIPs, but with employed 'in-house' advocates (IHAs). On the prosecution side, the CPS employs in-house Crown Advocates (CPSCAs) to prosecute cases in the Crown Court. In the area in which I practice – the north-east of England - the standard is variable. Some CPSCAs are very good, and would attract work if they practised at the independent bar. Others are less good, and would struggle if they had to compete for work, but CPS training is good, the pay structures are reasonable (by north-east standards anyway) and the standard of CPSCAs is undoubtedly improving.
6. The real problem is with IHAs employed by firms of solicitors doing publicly-funded criminal defence work (PFCDW). Since the introduction of the Litigators' Graduated Fee Scheme (LGFS) in 2008, firms doing PFCDW have decided that the way forward is to try to collect the Advocates' Graduated Fee (AGF) as well. It is simple economics. Instead of outsourcing the advocacy, and thus foregoing any part of the advocate's 'ring-fenced' fee, to a BIP, the firm 'instructs' a salaried IHA, and collects both the AGF and the LGF. The cases in which firms with IHAs retain the advocacy in-house are, typically, those cases they regard as 'easy pickings' – principally guilty pleas, some straightforward trials, and junior briefs in 'two-counsel' cases. Only cases – or clients - which are regarded as difficult or awkward are outsourced to BIPs, and even then often at the very last minute before trial in the hope that the client can be prevailed upon to plead guilty. The 'two-counsel' certificate cases are a particular area of abuse, with solicitors firms 'instructing' their IHAs to be led juniors in cases where the court has granted a 'two-counsel' certificate, either for QC and junior, or for two juniors. The IHA will collect the led junior AGF for doing no more than sitting behind the leader and taking a note, when they would never be able, as is the intention where the certificate is for two 'full' advocates, in case of necessity to take over the case if the QC or leading junior – usually an experienced BIP – were suddenly incapacitated or otherwise unable to continue. Solicitors firms with IHAs regard 'two-counsel' certificates as nothing more than a 'cash cow'. This causes a good deal of resentment at the bar, particularly among QCs, who often find themselves saddled in murder trials with IHAs who have never conducted a Crown

Court trial of any description, and who are unable (and unwilling) to perform the duties of a junior barrister in such cases.

7. Of course, the economics of the situation dictates that salary and bonus package offered to defence IHAs is usually pretty low, in order to ensure a profit for the firm. The consequence is that the individuals recruited are often inexperienced, newly-qualified (i.e. cheap) barristers straight out of pupillage who have been unable to secure a tenancy in chambers, or solicitors fresh out of a training contract who have acquired higher court rights of audience at a weekend course. The standard of advocacy that these individuals deliver is, unsurprisingly, low, sometimes dismally low.
8. Practising in Teesside and Durham Crown Courts, I see defence IHAs every day. I prosecute them, co-defend with them, and watch them perform while I am waiting in court to do my own cases. Frankly, many of them are an embarrassment, and I cringe when I hear them speak. But the fact is that the solicitors' firms that employ them don't care how bad they are, so long as they make a profit for the firm. They take the cynical view that the client doesn't know how bad the service is that he or she is getting, and even if they do, so long as they don't actually make a complaint, it doesn't matter – there will be another client along tomorrow.
9. In short, there is not a general problem with the standard of criminal advocacy. There isn't a problem with prosecution advocacy; there isn't a problem with privately paid defence advocacy – the client gets what he pays for. There is a particular problem with the standard of criminal defence advocacy delivered by cheap, bad, IHAs. And let's be clear about why there is a problem. It is entirely the result of the government's desire to save money by cutting the fees for PFCDW. The LSC, and the public, gets what it pays for. Put bluntly, if you pay peanuts, you get monkeys.
10. The problem of falling standards is going to become acute, nay critical, if the government, in its relentless pursuit of saving money on criminal legal aid, decides to change the structures within which PFCD services are delivered. At present the LGF and the AGF are ring-fenced, and paid separately to the solicitor and the barrister (at least where a BIP is instructed). The proposal is to move to a 'one case, one fee' (OCOF) procurement method. If that happens, it is, for reasons which I need not go into here, pretty much inevitable that the OCOF contracts under which those PFCD services are provided in future will be awarded to solicitors' firms, not barristers' chambers, and that the independent referral bar (and those solicitors firms that fail to win a contract) will wither and die. The pressure to keep in-house a smaller pot of money – the single case fee - will become even more acute than at present, will drive down further already low salaries for IHAs, and thus lead to even lower standards.
11. This is, as the CBA correctly identifies, the true driver for QASA. It is not concern that existing standards are low, and must be raised. So far as BIPs are concerned, standards are not low, but high. It is simply a fear that the structures to be put in place in the future will drive standards down to a point where the government's obligation under the ECHR to provide a properly-funded system of criminal legal aid

is no longer being met. QASA is intended to do no more than provide a fig-leaf of respectability for the cheap, bad, IHAs that OCOF will deliver.

12. Such problem as presently exists with poor defence advocacy by IHAs is essentially a procurement issue for the LSC. As such, it is a problem that is as easily dealt with for PFCDW, as it has been by the CPS for prosecution work. The CPS has always negotiated with the bar – its major supplier – service standards that it requires to be met in order to ensure the quality of the service provided. Most recently it has done so by the establishment of the CPS Panels scheme, under which advocates – BIPs, solicitor-advocates and CPSCAs, apply for appointment to an advocates’ panel to do work at one of four levels, according to their skill and experience.
13. The CPS Panels scheme provides the model for a framework within which the public, through the LSC, can achieve higher standards of advocacy in PFCDW. It is, I repeat, a procurement issue; one for negotiation between the procurer of those services, the LSC, and the service providers – barristers and solicitor-advocates. It is not a regulatory/disciplinary issue at all, and nothing to do with the BSB.
14. Make no mistake, barristers have confidence in the quality of the service they provide, and have no fear about sitting down with other service providers – solicitors - and the LSC, and constructing a framework within which quality can be assured for defence work as it is for prosecution work. And the best elements of the QASA scheme can be cherry-picked as a basis for that structure. My problem with QASA, as proposed in CP/4, is twofold: (a) it is a bad scheme, and will not deliver quality, and (b) it is unnecessary to impose it via a regulatory framework. So far as the latter is concerned, I would not add anything to the CBA’s reasoning, save to confirm that if it comes to the CBA calling for BIPs to boycott the scheme by not applying for accreditation, I for one will support that call, and I would expect my colleagues to do likewise. Barristers know what the government is up to in trying to impose this scheme. They know that it is a sham, and they are not about to sign their own death-warrant by lending their aid to a bad - still less, to an unlawful - scheme and thereby pave the way for OCOF, and oblivion.
15. All of that said, the basic idea at the heart of QASA is sound – allocating cases to different levels according to their complexity, and the skills and experience needed to deal with them; and grading advocates accordingly, certifying, on the basis of independent, evidence-based assessment, that they possess those skills and experience. I say that QASA as proposed in CP/4 is a bad scheme, and will deliver not higher standards, but the reverse, for two principal reasons. First, the method of allocating cases to levels by reference to loose guidance, but ultimately by negotiation and agreement between the litigator and the advocate is a nonsense. If the problem is correctly identified to be with solicitors firms self-instructing their own IHAs in pursuit of profit, the scope for abuse in such a case-allocation method is obvious. Public confidence, and that of the hapless client, will hardly be inspired by knowing that the solicitor and the newly-qualified IHA employed by him, have, after no doubt anxious consideration, concluded that, despite the apparent seriousness of the case, he doesn’t need a BIP; the IHA will do a perfectly fine job.

16. The second, fundamental, flaw in QASA as proposed in CP/4 is ‘plea-only advocates’ (POAs). If the idea truly is to raise standards and inspire confidence, there can be no place for POAs. How can a person accused of a crime, not knowing whether he has a defence, and seeking independent and impartial advice whether he should plead guilty or have a trial, have confidence in advice that he should plead guilty given by someone who has a direct financial interest in him accepting that advice? Far from promoting the regulatory objectives and professional principles in s. 1 of the Legal Services Act – designed to protect the public, and to promote an independent legal profession – embedding such a conflict of interest (whether in a regulatory structure or a procurement scheme) would run entirely counter to these entirely laudable objectives. “I advise you to plead guilty. That way I can continue to represent you.” The very idea is preposterous (as well as unlawful). The drivers for POAs are, of course, those criminal defence firms who have cheap, poorly-performing IHAs that they would not trust to do a trial, or anything **really** serious, but are quite happy to use to ‘cream off’ the ‘easy money’ for guilty pleas and led work.
17. That said, there is much good to be said of QASA. Barristers such as myself would welcome a scheme that actually worked, and did deliver higher standards. I personally would offer my services to help design such a scheme. It would genuinely deliver what the public wants – higher standards – and, I am not ashamed to say it, would deliver something for barristers like me too. It would stop the poorly-performing IHAs I presently see doing work beyond their competence that they are only doing because (a) they (or their masters) have the unfair competitive advantage of direct access to clients that I do not have, and (b) because they are cheaper than me. If those solicitors presently ‘instructing’ such poor performers were no longer able to do so, the public would benefit, and so would those barristers, such as myself, who compete on the quality of the service we offer.
18. I repeat, barristers such as myself do not oppose QASA, or any genuine attempt to raise the standards of advocacy. Unlike some others, we survive, and thrive, on quality, and have nothing to fear from a scheme which assures the public of high quality advocacy. But this QASA scheme is not it. If implemented as proposed in CP/4, it will, as the CBA says, do no more than provide a cloak of respectability for cheap, bad, trial-shy, plea-only IHAs. That would be to perpetrate a fraud upon the public, and I for one will stand with my colleagues at the independent bar and have nothing to do with it. The government should think again.
19. Higher standards of criminal defence advocacy can be delivered, not within a regulatory framework, but within the framework of a procurement agreement between the bar, solicitors and the LSC, modelled upon the CPS panels scheme and the General Criminal Contract under which solicitors provide their services to the LSC. Barristers would welcome such a measure, and we will engage in a process of negotiation with other interested parties to deliver it, but those interested parties do not include the professional regulators. It is none of the BSB’s business.

20. Finally, there must be a realisation in government that such problem as presently exists with regard to the standards of criminal defence advocacy has been entirely caused by the drive to reduce the legal aid bill. If quality really, genuinely, does matter, then the downward pressure on fees for PFCDW must cease. The system of ring-fenced fees for criminal defence advocates has thus far ensured that the independent referral bar has survived and thrived, and the competitive market in which it operates has delivered real quality. If that is to continue, and quality is to be assured for the future, plans for OCOF must be abandoned.

Ian West

October 2012

James Bourne-Arton

QASA RESPONSE

Question 1 - Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?

No. 12 months is sufficient.

Question 2 - Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

Yes. They call into question the validity of the entire scheme. They exist as a benefit to solicitor's firms and their employed advocates, or those employed by the CPS, who simply lack the ability to do any other (e.g. trial) work.

Question 3 - Are there any practical issues that arise from client notification?

Yes. Please see the answer to Q2 above. I do not believe that lay clients will be told about the lack of experience/ability of their plea-only advocate. This is demonstrated by the information currently provided by solicitors to clients in the standard client care letter that often makes no mention of the possibility that a barrister could be instructed but instead refers only to their own in house team.

Question 4 - Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?

The Youth Court should be exempt from this categorisation because it deals with a wide variety of cases; from straightforward to extremely complex.

Question 5 - Do you foresee any practical problems with a phased implementation?

No.

Question 6 - Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

Yes. This issue is the second major problem with the scheme. Allowing the plea only advocate to decide the category of case is an obvious flaw. I believe it is also open to abuse. I suggest a simple approach. All cases in the Magistrates' Court are determined as level 1 and 2. All cases committed to the Crown Court are determined at level 3 and 4. Level 3 offences to be either way offences. Level 4 offences to be indictable only.

Question 7 - Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

See answer to Q7 above. The category table is unnecessary. It is an over complication on the part of the bureaucracy.

Question 8 - Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

See the answers to Q7 and 8 above.

Question 9 - Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

No. The appropriate level of advocate should deal with the case throughout.

Question 10 - Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you propose they are dealt with?

No. My approach does not require any further complication.

Question 11 - Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible.

No.

Question 12 - Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

Plea only advocates cannot and must not be allowed to happen. They make a nonsense of the whole scheme. Simplicity is the key to success.

Question 13 - Do you have any comments on the proposed modified entry arrangement?

No.

Question 14 - Do you agree with the proposed approach to the assessment of competence?

Yes. However, this question is less important than the issue of plea only advocates and decisions as to grading.

Question 15 - Are there any other issues that you would like to see included within the review? Please give reasons for your response.

No.

Question 16 - Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

No. It is too complex. As set out in the Handbook, I do not believe that the scheme can achieve its' aims.

Question 17 - Is there any additional guidance or information on the Scheme and its application that would be useful?

No.

Question 18 - Do you have any comments on the Scheme Rules?

No.

Question 19 - Do you agree with the proposed definition of "criminal advocacy"? If not, what would you suggest as an alternative and why?

No.

Question 20 - Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

No.

Question 21 - Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised.

The introduction of plea only advocates, and decisions as to grading, represent the potential for insurmountable practical problems to the Scheme. Please see my answer to Q6 as to how the Scheme could be revised.

Question 22 - Do you have any comments on whether the potential adverse equality impacts identified in the draft EIAs will be mitigated by the measures outlined?

No.

Question 23 - Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

If plea only advocates remain this will have a detrimental effect on equality as the client will not be given appropriate choice of qualified advocate.

Question 24 - Are there any other equality issues that you think that the regulators ought to consider?

See answer to Q.23

James Bourne-Arton
St Pauls Chambers

James Dennison

Response to consultation

Whilst I have no objection to ensuring that those who practice in Court should be competent, I have severe concerns about the current proposals. I shall not address the generalities but, rather, the specifics as they pertain to specialist counsel.

I was called in 1986 & practised at the criminal bar, exclusively, until circa 1999. I was then "headhunted" by the CPS to conduct confiscation proceedings. I have been instructed by the CPS, SFO, HMRC, local authorities and Receivers in this area since then. I have conducted lecture tours and training for Prosecutors and the Judiciary abroad.

Yet, so far as I can see, the last 13 years of my career will count for little in the current grading exercise since I will be unable to garner the requisite judicial approval of my jury trial skills, given that I have undertaken few such trials.

I am frequently instructed to act for Foreign Governments in multi-million pound restraint / receivership cases; those do not appear to be counted in this exercise. I am also frequently instructed to appear in the Court of Appeal (both civil and criminal divisions) post conviction / confiscation order. Again, those appearances do not seem to count. I advise pre-arrest; this does not seem to qualify me as a "proper" advocate.

The general point that I seek to make is this. There is a cadre of professional, specialist counsel working in the area of confiscation. The current proposals appear to pay no heed to those people but, rather, discount them down to the level of those under (say) 5 years call.

When applying for the CPS list I was unable to apply for Grade 4 given my lack of trials; those who instruct me in confiscation hold me as Grade 5.

On the QASA grading I apparently slip to Grade 2.

Frankly, this is lunatic; there are a lot of specialist counsel, in different areas, who are instructed in aspects of criminal law - yet who are not criminal advocates. The current proposals appear to rate those as (if at all) competent simply to conduct shoplifting trials.

All that said, I have conducted 3 jury trials since 2003. Yesterday (after a 2 week jury trial) I secured the conviction of the organiser of two importations of cigarettes into the UK; 15.5M cigarettes in total. According to the QASA guidance I should have been utterly incompetent to do same. I clearly was not.

I would urge you to re-consider the position of those who perform a specialist and important role in the criminal justice system of this country. I believe that submissions have been made by PoCLA and I would adopt those submissions.

In short, I believe that your proposals are unworkable and completely deleterious to the aim that I would imagine that they seek to achieve. If, however, the aim is to get rid of experienced, competent and specialist counsel then that will be achieved - as is currently being done via the alternative route of slashing fees for specialist counsel.

As I began, I have no doubt but that those who practice should be more than competent - but the current proposals are not going to achieve that aim.

One final example.

I was recently against a QC. He had no idea about confiscation law. I am writing a book on it. He needs no QASA. I achieved the right result. In the future, apparently, I will be assessed at a ridiculously low level so would henceforth be unable to appear to either (a) put the QC right and/or (b) make sure the Court reaches the correct conclusion. Result = either (1) no confiscation order (loss to State) or (2) wrong confiscation order & expensive CACD hearing.

I urge you to re-consider the "one size fits all" approach that is currently proposed. It can never be the right approach.

Please feel free to quote, in context, any of this email.

Yours sincerely

James Dennison

James Normington

NORTH-EASTERN CIRCUIT QASA RESPONSE

Question 1 - Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?

There may be considerable difficulties, for a number of reasons, in advocates being able to perform sufficient cases within a twelve-month period. By way of example, there may be those who are involved in a small number of longer cases or defendants in potentially long trials may plead guilty. There will inevitably be those who become ill or indisposed for a time during the assessment period and all this has to be considered against the background of a reduction in the number of instructions received by the Bar generally.

Accordingly, the Circuit considers that the period of assessment should be increased to one of 18 months. However, even with that period, it is considered that there should be considerable flexibility and that the period should be extendable on good cause shown. Whilst there should be a degree of rigour in determining whether a sufficient reason for extension has been

advanced, there should be a general presumption that, if an advocate advances an explanation, unless there are overwhelming grounds to rule otherwise, the extension sought should be granted.

Question 2 - Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

The North-Eastern Circuit agrees with the response of the Bar Council (BC) and the Criminal Bar Association (CBA) to this question.

It is vital that there be one scheme for all advocates and that the standards of assessment are both rigorous and evenly applied.

The concept of the plea only advocate is, for the reasons advanced in the responses referred to, not in the public interest. This Circuit would go further and suggest that the idea is antithetical to the principles underlying the introduction of the scheme.

The research conducted by the SRA has not been appended to the consultation paper. There has been no opportunity for any other interested party to consider the validity of the research carried out. If research has been a factor in the promulgation of this proposal, it should have been published so that a critical review of its legitimacy could have been undertaken. The fact that a significant element of the scheme has been inserted upon the basis of unverifiable research causes the Circuit significant disquiet.

Question 3 - Are there any practical issues that arise from client notification?

All the consultation says is that there is a commitment by each regulator to have in place “clear regulatory arrangements” that permit the client to be aware of how far their advocate will be able to progress their case. It goes on to say that data will be gathered on the effectiveness of these arrangements to inform the full scheme review in July 2015.

Without knowing what the regulatory arrangements are, it is impossible to say whether they will be effective in achieving their goal. It is further impossible for the North Eastern Circuit to understand how a scheme can have reached the 4th and final consultation without the full regulatory arrangements having been announced so that all affected parties can comment upon their effectiveness in a clear and transparent manner.

This Circuit cannot understand how barristers can be expected to give their unqualified assent to a scheme in which such an important aspect has been left in this inchoate state.

We consider that this is a critically important aspect of the scheme since the precise explanation afforded to lay clients about how their case is to be progressed and the level of qualification of the advocate will, in large part, determine whether the lay client will wish to have the advice of an advocate who is capable of conducting their trial at this stage or whether they will be content to have the advice of an advocate who does not have such an authorisation.

Importantly, the discussions concerning this aspect between the solicitor and client will be in

private and difficult to police. Further, all the evidence suggests that criminal lay clients comprise a disproportionate number of those with low scholastic achievement and poor abilities to read and write. Peer reviewed research has also demonstrated that a disproportionate number have poor thinking skills. They are also likely to be in a highly vulnerable position at the time at which these decisions have to be made.

Given that there are significant financial inducements under the current system of payments for the solicitor to continue to conduct the case, there are clear risks that the choice available to the lay client will be insufficiently explained or glossed over.

In our view, all this militates in favour of a transparent and rigorous method by which client notification should be regulated.

To repeat, without any idea whatever of the regulatory arrangements, it is impossible to answer the apparently simple question posed. This is, for the reasons we have set out, the BC and the CBA have set out also, a highly sensitive and crucial area of the scheme.

It simply cannot be in the public interest to launch a scheme, which will have such a radical effect upon the manner in which criminal legal services are offered, without this aspect having been fully worked out, discussed and modified.

Question 4 - Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?

This Circuit agrees with the difficulties and complexities of attempting to fit the work of the Youth Court, so varied in its nature, into a scheme of quality assurance.

We disagree profoundly with the proposition that all work in this forum should be allocated to level 1 advocates. That cannot be in the public interest because the Youth Court has power to deal with very serious crimes.

The response, which initially suggested that an allocation of level 2 as a starting point, was apparently altered because of research that suggested that a substantial number of advocates would be prevented from appearing in the Youth Court if that starting level were adopted.

This Circuit is surprised and disappointed to note the concession mooted in the light of this information. The "research", the contents of which have not been published, so far as this Circuit is aware, leads us to only one conclusion: that sectional interests have been placed above the public interest in coming to the conclusion that Level 1 advocates will be able to have untrammelled access to all cases in the Youth Court.

We note the proposals made by the BC and the CBA in their responses to this question. For our part, we propose that the BC suggestion be adopted. It must be right that, if advocates are currently conducting the more serious trials in the Youth Court, they should easily be able to satisfy the requirements of Level 2 grading. If they cannot, they should not be conducting such trials.

An aspect which has not received any consideration is who is to perform the assessments in the Youth Court. There will inevitably be advocates who appear almost exclusively before lay

benches who will not be trained to perform advocacy assessments and who have neither the skill or legal knowledge necessary to accomplish the task.

DJs should be trained for this task and, if necessary, be required to sit in cases where assessments are being sought.

This will not be easily arranged but that is not the fault of the Bar. However inconvenient to the administration of these courts this is, strong measures will be required to ensure fairness and the availability of rigorous assessment in this forum.

Question 5 - Do you foresee any practical problems with a phased implementation?

Insofar as phased introduction is lawful, the dates upon which the scheme is to be phased in are in our view, entirely impractical when major aspects of the scheme have not yet been published, consulted upon or considered in the light of the consultation.

Further, when it comes to the practical aspects of how the scheme is to operate, given the proposed timetable, there is no opportunity for anyone to learn lessons or correct problems before, in effect, the scheme is implemented nationwide.

This Circuit wholeheartedly believes that there should have been a pilot operation of this scheme so as to iron out the inevitable difficulties that will arise in its implementation.

The scheme has been rushed into existence without an opportunity for full and mature reflection.

It marks a huge change in the way in which legal services may be offered and the public interest is engaged at every level of this scheme.

This Circuit considers it highly regrettable that no attempt appears to have been made to publish the "research" relied upon to support some of the most contentious and difficult areas of this scheme nor have the details of the scheme, in important areas, been published either fully or at all.

This Circuit does not understand how the public interest is guarded by a rush to implement this scheme and before the Bar has been informed about how important safeguards will operate.

Question 6 - Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

This Circuit agrees with the BC and the CBA as to the critical status of this task in the scheme overall. A proper resolution of how fairly to allocate cases to appropriate levels is fundamental to the efficient working of the scheme and is also, together with the notification requirements, an area in which abuse of the system whether deliberately for financial gain or negligently because of the pressure of time or simple ignorance, is most likely. Such abuse would render the system hopelessly ineffective.

This Circuit completely rejects the proposition that the instructing solicitor and advocate should

set the level of the case. Indeed, the naivety of such a proposal has caused great concern about the rigour of the system. The ability of an in-house advocate and a solicitor artificially allocating an inappropriate grade to the case and the reasons why such temptations would be difficult to resist should have been manifest to each of the regulators acting in the public interest.

It is our view that the scheme as proposed is deficient in dealing with the many difficulties applicable to this task. It is one of the areas of the scheme, which most needs further detailed work so as to incorporate an appropriate degree of flexibility whilst retaining the rigour of the scheme.

Whilst, as the CBA acknowledges, there remains much work to be done so as to produce an effective scheme, this Circuit inclines to support their proposals as to how the scheme should be operated initially.

We further recognise the lacunae in the scheme as proposed and identified in the BC response. We, too, consider that the public interest is not served by the proposals as drafted and that the sanctions for inappropriate case grading are simply inadequate to deal with abuses of the scheme. We are further sceptical of the wish of the judiciary to become involved in disputes about how cases should be allocated, particularly if the scheme remains as it is and places responsibility for allocation on the shoulders of the instructing solicitor and instructed advocate. This is a further area which, we consider, indicates the need for further mature reflection rather than the imposition of the scheme upon the legal profession in its current state. Given the centrality of this part of the proposals to meeting the objective of the protection of the public interest, it is inappropriate to implement the scheme as it stands.

Question 7 - Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

This Circuit agrees with the CBA response in relation to this question. In addition, the BC response highlights areas in which further classification is required or in respect of which a review is necessary.

Question 8 - Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

As to the technicalities of allocation, we consider that the table provided in the consultation document is far too simplistic to be of any significant value.

This circuit considers that the CBA response has much to commend it and we would support its adoption. As they say, the real dilemma here is to ensure that the system is sufficiently rigorous to achieve its public interest purpose without encumbering the scheme with so much technicality that it is unworkable.

This is an area in which a relatively detailed framework must be provided at the beginning. However, the Circuit recognises that it will only be experience that a true analysis will be

possible about how allocation works in practice.

We repeat the observation that the short period available for this consultation, spanning as it has, a period when many members of the Bar are unavailable, has made it very difficult to provide a fully reasoned response to what is, on any view, one of the fundamental bases upon which the system will succeed or fail.

We also suggest that significant further work on this aspect of the scheme involving the interested parties may well have produced a measure of agreement, which could have been reflected in a much more coherent and helpful document than the table.

We would urge that such discussions take place.

Question 9 - Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

We agree with the proposals made by the BC and the CBA on this question. The instructed advocate must retain control of the case overall. There is such a wide variety of non-trial hearings varying so much in their complexity and purpose that no useful regulatory aspiration would be achieved by an over prescriptive requirement in relation to such hearings.

Question 10 - Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

Newton hearings are an obvious area in which substantial differences in sentence are likely to result depending upon the outcome of, what is, to all purposes, a trial albeit of the issue under dispute. Indeed, by definition, such hearings only occur when it has already been determined that the sentence to be imposed is likely to depend upon the resolution of the disputed issue.

It is very frequently the case that there is a need to cross-examine witnesses in the course of these hearings and significant judgements need to be made about tactics and the admissibility of evidence.

For all those reasons, it is vital that, insofar as plea only advocates exist under the scheme, they should not be permitted to conduct these hearings.

They must, if the public interest is to be served, be dealt with only by advocates who hold a trial qualification at the level of the case in question.

Question 11 - Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible.

We agree with the CBA point in relation to leaders and juniors and the BC response about the need for policing of the “acting up” provisions.

Question 12 - Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

It is important to recognise that these provisions will apply to defence and prosecution

advocates. The public interest is not served by hearings being conducted by advocates for the Crown who are simply not competent to deal with the case in which they are appearing.

Experience suggests that Crown advocates of insufficient experience or ability have a seriously damaging effect upon the public interest. In particular, they can waste substantial public funds by taking obstinate and unrealistic positions in relation to the acceptance of pleas. By contrast, they can accept ludicrously unrealistic bases of plea which may be approved by the court which, at that point, is often highly reliant upon the view of the Crown advocate who should be much more familiar with the case than the judge.

Further, their ability to understand the admissibility of evidence is vital to the task of efficient prosecution.

In addition, it is manifestly in the public interest to have serious crime prosecuted only by those with the required competence and experience.

Much of the response to the consultation has focussed on the position of the defence. However, there are very real reasons, different from those applicable to the defence side, why there may be reasons for the prosecution advocates to seek to abuse the system of allocation. The CPS is under very significant financial restraint and it is not unknown for them to act in the interests of saving costs rather than ensuring that justice is done.

For all these reasons, it is vital that the allocation of grades is properly conducted on the Crown side as much as on the defence side.

It is equally important that assessments are conducted fairly and equitably and that the assessors realise the critical importance of cases being prosecuted to a high standard.

Question 13 - Do you have any comments on the proposed modified entry arrangement?

For the reasons given in the responses of the BC and the CBA to this question, we take the view that QCs should not be included in the scheme.

Question 14 - Do you agree with the proposed approach to the assessment of competence?

This Circuit agrees with the response of the CBA on this point. As we have indicated, it is vital that one standard is applied to all advocates, from whichever profession they come.

The difference between the codes of conduct highlighted in the CBA response is important. It cannot be right to have an obligation, which directly relates to the provision of legal services to the public, imposed upon one branch of the profession without an identical obligation upon the other.

In addition, it is vital that the regulators apply the same standards to the professions otherwise the scheme will utterly fail to achieve its objectives.

Question 15 - Are there any other issues that you would like to see included within the review? Please give reasons for your response.

Not at present.

Question 16 - Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

This Circuit agrees with the BC response on this point. Perhaps the proposed document should be vetted by the plain English campaign since it should be comprehensible to the general public.

Question 17 - Is there any additional guidance or information on the Scheme and its application that would be useful?

No.

Question 18 - Do you have any comments on the Scheme Rules?

Not at this stage

Question 19 - Do you agree with the proposed definition of "criminal advocacy"? If not, what would you suggest as an alternative and why?

Private prosecutions should undoubtedly be included.

Question 20 - Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

Largely we agree. However, there are a number of highly competent senior advocates who conduct a relatively small number of criminal cases. They prove their competence in their principal specialist fields as advocates and by the accumulation of CPD points.

The loss of such expertise would be a retrograde step and would not be in the public interest. We would favour a relaxation of the period of assessment for such advocates so that they were permitted to conduct the assessments over a period of, say 2 years or be required to perform fewer cases. They would need to be able to satisfy the Regulator at the outset of the scheme that they have had substantial experience of criminal cases over, say the last 10 years as a result of which they would be placed in a separate category with the relaxation of requirements as set out before.

Question 21 - Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised.

We have set out the areas in which we foresee significant practical difficulties in the implementation of the scheme as proposed. In accordance with the fact that this is a consultation, the Circuit will await, with interest, such revisions to the scheme as are made as a result of a genuinely open, transparent and fair consultation.

We also agree with the reservations and concerns of the BC as expressed in their response to the

scheme.

Question 22 - Do you have any comments on whether the potential adverse equality impacts identified in the draft EIAs will be mitigated by the measures outlined?

Question 23 - Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

Question 24 - Are there any other equality issues that you think that the regulators ought to consider?

Only the concerns we have expressed in relation to the inability of many criminal defendants properly to understand their rights under the scheme given their total reliance on the cogency and clarity of the explanation of those rights given to them by those with a vested financial interest in promulgating one course of action.

James Normington

New Park Court Chambers

John Butterfield

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| Name: | John Butterfield |
| Organization: | 5 Fountain Court Chambers, Steelhouse Lane, Birmingham |
| Role: | Barrister |
| Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme? | |
| There are some practical difficulties for “senior Junior” members of the bar who may be in a small number of substantial cases in the 12 month period. (Particularly if one or more of those cases is listed before the same Judge.) The 12 month period should be extendable to 18 upon successful citing of exceptional circumstances. | |
| Q2: Are there any difficulties that arise from the revised proposals for the accreditation of level 2 advocates? | |
| The concept of a ‘plea-only’ advocate should be regarded as abhorrent and impermissible. It is a corruption of what should define an advocate and hence amounts to a deliberate, systemic lowering of standards. It can only lead to the late return of cases which do not crack, a position utterly contrary to the entire construction of the Criminal Procedure Rules (for example) It also deprives a client of the right to advice from someone with an appropriate knowledge of the trial process. That should be beyond contemplation. A ‘plea-only’ advocate should be considered an anathema and not be | |

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| countenanced. |
| Q3: Are there any practical issues that arise from client notification? |
| Yes. That solicitors will decline to provide it for in-house advocates. If advocates can be asked on the PCMH form whether they have advised as to credit (and bail) they can be asked whether (i) the client has received notification of his advocate's Level and (ii) whether those serviced by in-house advocates are aware they have a right to representation by a member of the Independent Bar. This would be a cheap, transparent way to ensure notification and enable monitoring by the Judiciary |
| Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1? |
| These can be some of the most difficult and delicate cases. The enhanced sentencing powers, alone, indicate that parity of grading with Magistrates' Court cases is inappropriate. The Youth Court cases should be graded in a way comparable with what the grading would be if they were heard in the Crown Court. |
| Q5: Do you foresee any practical problems with a phased implementation? |
| No comment. |
| <u>Q6 has been omitted from this form, which is disturbing as it is one of the most important questions facing the Bar. The question is supposed to be:</u> |
| <u>Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.</u> |
| The concept is utterly flawed. Solicitors with an available in-house advocate of Level 3 would be sorely tempted to down-grade a Level 4 case and notify it only as a Level 3. There needs to be objective criteria which can be applied without any discretionary element or external assessment of the case, such as by the Judge. |
| Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to? |
| No comment. |
| Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance? |
| No comment. |
| Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones? |
| It is fraught with difficulties. There should be objective criteria with no element of |

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| <p>discretion involved. The last thing the criminal justice system needs is a further layer of contentious decision-making/bureaucracy.</p> <p>In particular –no.</p> |
| <p>Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?</p> |
| <p>No comment.</p> |
| <p>Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible</p> |
| <p>No comment.</p> |
| <p>Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?</p> |
| <p>No comment.</p> |
| <p>Q13: Do you have any comments on the proposed modified entry arrangement?</p> |
| <p>The proposed inclusion of Silks within this scheme <i>at all</i> is an outrage. If an individual is granted Silk, they have successfully demonstrated competence under an extremely onerous qualification scheme and it is a disgrace to suggest any further form of quality mark or grading is required for them. If their award of Silk pre-dates the modern QCA requirements their demonstration of competence is in the market-place. It is demeaning and insulting to require them to be subject to QASA and benefits only an agenda which seeks to do away with payment at Silk-level.</p> |
| <p>Q14: Do you agree with the proposed approach to the assessment of competence?</p> |
| <p>I place more store in the view of a Judge than of a Regulator.</p> |
| <p>Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.</p> |
| <p>Whether this inherently flawed, expensive, unnecessary scheme should be bought into existence at all.</p> |
| <p>Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?</p> |
| <p>No comment.</p> |
| <p>Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?</p> |
| <p>No comment.</p> |
| <p>Q18: Do you have any comments on the Scheme Rules?</p> |
| <p>Please see the answer to Q15.</p> |
| <p>Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would</p> |

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| you suggest as an alternative and why? |
| No comment. |
| Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why? |
| No comment. |
| Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised? |
| No comment. |
| Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined? |
| No comment |
| Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper? |
| No comment. |
| Q24: Are there any other equality issues that you think that the regulators ought to consider? |
| No comment |

Jonathan Elystan Rees

Dear Sir/Madam,

I write to formally endorse the response of the Criminal Bar Association dated October 2012 to the QASA Fourth Consultation Paper. I have read the CBA document and agree with it in its entirety. Please accept this email, together with the CBA response dated October 2012, as my own response to the fourth consultation paper.

Regards,

Jonathan Elystan Rees

Kate Lumsdon

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| Name: | Kate Lumsdon |
| Organization: | 23 Essex Street |
| Role: | BARRISTER |

I am a criminal barrister of 19 years' call. I have been in independent practice since then. I have been a Grade 4 CPS advocate for a number of years.

I support and endorse the responses of the Criminal Bar Association and the Western Circuit.

I oppose the QASA scheme.

I note that the fourth consultation proceeds on the basis that a QASA scheme for is inevitable. I do not accept this. I have grave concerns about the legality of the scheme as a whole and adopt the position of the Criminal Bar Association.

The LSA s.28 makes clear that regulatory activities should be "**targeted** only at cases in which action is **needed**."

The fourth consultation sets out the alleged **need** in para 1.7 in vague terms:

- *The changing legal landscape coupled with competition and commercial imperatives **are putting pressure on** the provision of good quality advocacy.*
- *The economic climate, both generally and in terms of legal aid, **has created a worry** that advocates may accept instructions outside of their competence.*
- *The judiciary has also **raised concerns** about advocacy performance.*

The paper provides no evidence of poor advocacy at the Bar. The paper does not mention a BSB commissioned Ipsos Mori Research Study "Perceptions of Barristers" (November 2007), "an extensive research exercise amongst barrister, clients, solicitors and other instructors and others with an interest in the delivery of legal services". That study concluded: "Barristers are perceived to be competent, highly qualified and dedicated professionals providing a high quality service. Specialist advocacy skills set them apart".

As there is no evidence of **need** for a QASA, to impose it would be wrong in principle and, it is submitted, illegal.

The scheme in effect abolishes the profession of barrister. The current qualification, by way of law degree, bar finals, pupillage and continuing professional development has hitherto allowed a barrister to practise in any court, subject to his professional duty not to take a case beyond his experience and expertise. QASA would put an end to this qualification and create a series of sub-professions each narrowly confined to practising in a prescribed selection of cases.

Judges have a duty to report poor performance - which they exercise from time to time.

CPD could be “targeted” at any established “need”. A system as extensive and expensive as this proposed QASA (which appears to be uncosted) is wholly unnecessary.

I am concerned that the Bar has been told by the BSB that if they do not co-operate with the scheme, the LSB will impose “something worse”. The LSB has no power to tell the BSB what to do, and the BSB has no power to impose something which fundamentally contradicts the principles upon which it is supposed to operate.

I am further concerned that the Bar has been told that there is nothing to fear from this scheme, rather providing them with a way to prove their skill in advocacy. This is clearly far from the truth. It is apparent that the LSC has purported to “require” the LSB to “require” this system for one reason alone: to ensure all “advocates” are rubber stamped as a necessary pre-cursor to contracting. No-one disputes that contracting would mean the end of the independent criminal bar, and with it the end of many hundreds of years of excellence in not only advocacy, but other qualities which are perhaps even more important: to quote Lord Woolf, “They included complete integrity, never taking an unfair advantage of a colleague, never misleading the court, always preparing your case meticulously and, when necessary, ensuring that so far as possible justice was done for your client whatever the odds against him.”

The vital constitutional role of the independent Bar, and the judiciary drawn from that pool, cannot be overstated. The destruction of the Bar cannot, on any view, be said to be in the public interest.

The Bar has begun to understand the political motives that have been driving this process. I am sure that, like me, they will fight to save the institution they value so highly and the country needs so badly. Once again to quote Lord Woolf, speaking about the administrative destruction of the Oxford Circuit:

“...if you prize an institution of which you are part, even a modest part, you have to be prepared to fight for its continued existence. Fight for it, not to protect it from necessary reform, but fight for it to avoid it being unjustifiably damaged or destroyed.”

Kevin Leigh

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| Name: | Kevin Leigh |
| Organization: | No5 Chambers |
| Role: | Barrister |

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme?

For those of us that do not appear regularly in the relevant court, because our specialisms

do not always take us there, then there might be time limit problems.

This answer, as with others, is made on the basis that the revised definition of “criminal advocacy” is altered to include specialisms. If the proposed definition survives the consultation then my comments are not relevant where my points rely on the assumption that specialist counsel is required to undergo QASA.

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

Q3: Are there any practical issues that arise from client notification?

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

Q5: Do you foresee any practical problems with a phased implementation?

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

The offences do not relate to any specialist areas such as planning enforcement, environmental crimes, licensing etc.

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

See answer to Q.7.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much

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| detail as possible |
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| Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified? |
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| Q13: Do you have any comments on the proposed modified entry arrangement? |
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| Q14: Do you agree with the proposed approach to the assessment of competence? |
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| Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response. |
| There will always be an impression (at the very least) in clients that counsel is performing for the court when being assessed and not for the client. This is especially so where counsel is not a regular criminal generalist but appears ad hoc in specialist cases (such as planning, environmental or licensing crime). |
| Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why? |
| Frankly the whole scheme is overly prescriptive and yet another administrative burden that needs to be mastered as part of trying to practice. |
| Q17: Is there any additional guidance or information on the Scheme and its application that would be useful? |
| --- |
| Q18: Do you have any comments on the Scheme Rules? |
| See answer to Q.16. |
| Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why? |
| If this definition stands then my concerns do not arise. I have included them for thoroughness in case the definition alters. |
| Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why? |
| Yes (assuming the exclusionary definition as regards specialisms stands). |
| Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised? |
| See answer to Q.15 re clients observing counsel being assessed. |
| Q22: Do you have any comments on whether the potential adverse equality impacts |

identified in the draft EIA will be mitigated by the measures outlined?

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

Q24: Are there any other equality issues that you think that the regulators ought to consider?

Michael Harrison

I am a member of 23 Essex Street Chambers.

I support the C.B.A 's response to the Consultation.

I would add only this. I have practised at the Criminal Bar since 1980 in legal aid cases. It was only in recent years that Compulsory Professional education was required, prior to that a Barrister would only thrive if his or her Instructing Solicitor believed that they provided a good service. This remains the position even more so now that there are considerably more Barristers in practice.

I fail to understand why it is necessary to have an artificial categorisation of so called quality.

I spent 5 years qualifying, I undertake compulsory education. I work 48 weeks a year. How on earth are a few Judicial assessments a sure test of ability any more than observing 2 or 3 Sheffield United matches in the course of a season to determine their success.or quality.

This proposed scheme will not carry the support of the practitioners at the sharp end of criminal work and will further antagonise the demoralised Criminal Bar.

I apologise for not giving my response in a more formal way but I hope you can take this view into account.

Michael Harrison

Michelle Heeley

I have read the CBA response to the fourth consultation and agree with it, I would particularly be against any "Plea only" scheme whereby a solicitor can deem themselves competent to take a guilty plea but not conduct the trial, if the offence is of a serious nature then a defendant deserves a competent advocate who can fully represent and advise them at every stage of the proceedings, not simply when a solicitor decides he can't make any more money out of the case or it is too difficult for him. The system should be about justice, not about cutting costs to the bone.

Michelle Heeley

Nicholas Lumley QC

I have seen the response of the North Eastern Circuit to the above consultation. I endorse the response and wish to be associated with it. Please accept this email accordingly.

Yours sincerely,

Nicholas Lumley Q. C.

Paul C. Reid QC

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|---|---|
| Name: | PAUL C. REID Q.C. |
| Organization: | LINCOLN HOUSE CHAMBERS, TOWER 12, MANCHESTER M3 3BZ |
| Role: | BARRISTER |
| Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme? | |
| I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION | |
| Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates? | |
| I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION | |
| Q3: Are there any practical issues that arise from client notification? | |
| I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION | |
| Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1? | |
| I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION | |
| Q5: Do you foresee any practical problems with a phased implementation? | |
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Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q13: Do you have any comments on the proposed modified entry arrangement?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q14: Do you agree with the proposed approach to the assessment of competence?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE

CRIMINAL BAR ASSOCIATION

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

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Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q18: Do you have any comments on the Scheme Rules?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q24: Are there any other equality issues that you think that the regulators ought to consider?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Rob Griffiths

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|---------------|---|
| Name: | Rob GRIFFITHS |
| Organization: | Chambers of Nicholas Haggan QC, 12 College Place, SOUTHAMPTON |
| Role: | Barrister |
| Comment | This is my personal response to the consultation. However I have read and adopt in their entirety the submissions made by the Criminal Bar Association and the Western Circuit and my comments should be read in conjunction with those submissions. |

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme?

Like many criminal barristers, mine is a mixed practice including prosecution and defence work. I am regularly instructed by a criminal defence solicitor who likes to use me for the majority of her work and that can vary from committals for sentence up to lengthy trials.

Because of the Cab Rank rule, I cannot restrict myself to doing higher level cases, but I make myself available to meet the needs of the professional client. For that reason, in any given 12 month period I could be doing a lot of lower grade work, a few high grade cases or a mixture somewhere between the two.

Over my career I have done a lot of work that would be categorised at the higher levels, and a fair amount that would be categorised at the lower levels. Such is practice at the Bar. But under the random lottery that seems to underpin these proposals, my ability to do higher level cases must be demonstrated in a fixed period of time, against cases over which I have no control.

For those wishing to be graded at level 4, the prospects of obtaining sufficient judicial evaluations in a 12 month period must be slim. As currently defined, level 4 includes the sorts of case where one would expect Queen's Counsel to be instructed, as well as cases which will never be heard on Circuit, where I practice. How often are cases involving issues of national security heard anywhere outside the Old Bailey?

In addition, such cases require a great deal of investigation and preparation. They aren't simply listed 'back to back' and advocates working at that level will be doing other work in between such cases, probably at lower levels.

Level 4 cases are few and far between outside London or the large cities, but some very experienced barristers who are currently quite capable of dealing with such cases may not have done one in the last 12 months. If their ability to practise at that level is determined by a 'snapshot' during which they have been doing cases that are properly categorised at level 3, you could reach the ludicrous position that they are unable to 'prove' something which is self-evident from their long and distinguished career.

The period of time for accreditation should be considerably longer for the higher levels.

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

The essence of this scheme is essentially said to be to ensure that clients are properly represented and properly represented at all times.

Under the BSB Rules, "Criminal advocacy" means advocacy in all hearings arising out of a police or SFO investigation, prosecuted in the criminal courts by the Crown Prosecution Services or Serious Fraud Office.

Hence, by definition, an advocate representing a Defendant must be competent to deal with **all** hearings, not just PCMH's, or mentions, or sentences. If you are not competent to deal with a trial, then you are not competent to deal with other hearings. You wouldn't expect a surgeon to begin an operation if s/he was not able to take steps to deal with unexpected complications. By the same token, it ill serves the needs of a Defendant to be represented by someone who is not competent to deal with the entire case.

To separate advocacy from the other aspects of the job of a legal representative is to misunderstand the nature of the job. You have to be able to give proper advice and to do that, you have to be able to assess the evidence in a case and be able to understand how that evidence is likely to be perceived by a Court. You have to know the rules of evidence. In short, you have to be experienced in the conduct of a case at trial. If you can do that, you can represent someone properly. If you can't, you can't.

If cases are to be graded and advocates permitted to represent clients in cases within their grade, then it makes no sense to permit someone graded at level 2 to do non-contentious hearings at level 3, not least because what may appear to be a non-contentious hearing may turn out to be quite the opposite. What if, at sentence, the case requires a Newton hearing that can be conducted there and then with the Defendant giving evidence? A level 2 advocate, acting in all conscience, would have to admit that they were not up to it. Such situations can and do arise frequently. There is a need to ensure that the person who is instructed is capable of dealing with anything that may arise. And that, presumably, is the reason for the definition of criminal advocacy above.

Q3: Are there any practical issues that arise from client notification?

The only way to police it is for the client to be asked, in open court, whether he has been informed that his advocate is only capable of dealing with certain types of hearing. What confidence would be expected to have in his advocate when he discovers then, for the first time, that in the event of a contested hearing, he will have to be represented by someone else?

Simply trusting the lawyer to tell the client is fraught with danger. If someone has taken on a case which is above their ability, they are not going to tell the client that. If the lawyer is a properly qualified advocate who is competent to do *any* potential hearing in the case, he doesn't need to tell the client that.

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

Magistrates who sit in the Youth Court should only commit a 'grave crime' to the Crown Court if the Defendant is likely to get more than the two year maximum period of detention open to them in the event of conviction. Simply looking at the description of cases in level 2, you can see that a

level 2 case involves a matter where the Magistrates accepted jurisdiction in an either way case (hence a case meriting less than 6 months imprisonment) or non fatal road traffic cases, which presumably covers things like dangerous driving (two years). Why should Youths be represented by people who are incapable of dealing with cases of that seriousness?

Q5: Do you foresee any practical problems with a phased implementation?

I foresee many problems with implementation full stop. The main problem with the phasing is that advocates in the earliest tranche will have their ability to practise potentially curtailed by their grading whilst the later ones will not. It should be introduced nationally at the same time.

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

Trying to reduce criminal law to a tick-box selection list is fraught with danger. An allegation of shoplifting is straightforward. An allegation of shoplifting where the defence is automatism is not. Experienced solicitors know which Counsel to instruct: they don't need to try and assess it against some vague and unhelpful criteria.

The overlap between grades is likely to be wide and the suggested definitions are difficult to understand. In level 3, we find 'more serious sexual offences' and in level 4, 'serious sexual offences'. What is the difference?

Another obvious practical problem is that to ensure progression, you will have to do cases which are slightly above your grade to demonstrate that you are competent to move up. Who is to say whether it is slightly above, or well above?

As to practical solutions, I adopt the suggestions of the Criminal Bar Association in paragraph 54 of their response.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

See above

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

See above

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

Provided the level 4 advocate remains in close supervision of the case, there may be some hearings which can be conducted by someone of a lower level, but only uncontentious matters such as custody time limit extensions. Sentences should be conducted by the trial advocate and most legal arguments will require the trial advocate as well. In RASSO cases, the CPS expects the prosecution advocate to attend all hearings wherever possible and that is a reflection of the need for continuity in serious cases. All Crown Court cases at level 4 are serious by definition.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

Newton hearings should be treated in exactly the same way as trials.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

I adopt the response of the Criminal Bar Association.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

I adopt the response of the Criminal Bar Association.

Q13: Do you have any comments on the proposed modified entry arrangement?

I adopt the response of the Criminal Bar Association.

Q14: Do you agree with the proposed approach to the assessment of competence?

I adopt the response of the Criminal Bar Association.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

I adopt the response of the Criminal Bar Association.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

I adopt the response of the Criminal Bar Association.

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

I adopt the response of the Criminal Bar Association.

Q18: Do you have any comments on the Scheme Rules?

I adopt the response of the Criminal Bar Association.

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

I adopt the response of the Criminal Bar Association. I cannot see why cases prosecuted, for example by Local Authorities (such as Trading Standards) should be treated differently.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

I adopt the response of the Criminal Bar Association.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

I adopt the response of the Criminal Bar Association. The scheme is in my view unnecessary,

expensive and unworkable.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

I adopt the response of the Criminal Bar Association.

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

I adopt the response of the Criminal Bar Association.

Q24: Are there any other equality issues that you think that the regulators ought to consider?

I can only give an example from my own experience. I was called in 1988, having studied for a law degree and undertaken the BVC at the Inns of Court School of Law. I come from a modest background (grammar school, Reading University). My parents were retiring from business as I was undertaking my studies.

My tuition fees at University were paid and I got a maintenance grant. My tuition fees at Bar School were paid and I got a half maintenance grant. I wasn't able to earn anything in my first six months of pupillage but was assisted by a generous and supportive bank manager. It took me many years to pay off that debt.

In the years since I was called to the Bar, I have seen a sea change in the robing room. The number of white, Oxbridge educated males has diminished. There are more women and more people from ethnic minorities. The pool of people from whom the Judiciary are chosen has widened and hence the Judiciary itself has become more diverse. Instead of the old 'tap on the shoulder' there is open and fair competition and whereas 25 years ago, I would never have dreamed of becoming a Judge, I believe now that there is a genuine equality of opportunity for people like me.

All this good work is at serious risk. The cost of simply practising at the Bar has risen inexorably at a time when the fees are plummeting. Good, enthusiastic people are being driven away from the Criminal Bar.

I have nothing against the idea of a Quality Assurance Scheme. The CPS has introduced one with its Panel Scheme, although some of the results were surprising and it resulted in a flood of appeals. Of course, the Judiciary declined to become involved. They are now 'on side'. This scheme as currently drafted is going to achieve nothing at all and will lower standards by permitting under-qualified 'plea only advocates' to represent people for their own financial reasons rather than in the interests of Justice.

Robert M. Kearney

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|---------------|---|
| Name: | ROBERT M KEARNEY |
| Organization: | LINCOLN HOUSE CHAMBERS, TOWER 12, MANCHESTER M3 3BZ |
| Role: | BARRISTER |

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme?

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Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

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Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

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Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

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Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

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Q14: Do you agree with the proposed approach to the assessment of competence?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

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Q18: Do you have any comments on the Scheme Rules?

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Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

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Q24: Are there any other equality issues that you think that the regulators ought to consider?

I TOTALLY AGREE WITH, AND ADOPT IN ITS ENTIRETY, THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION

Robert Rhodes QC

I write in response to paragraphs 4.34-4.40 and Q13 (pp.20-21) of the fourth QASA consultation paper. I reject the mere assertion in paragraph 4.34, unsupported by argument or evidence, that:

...the validity and credibility of a regulatory scheme would be significantly undermined should a category of advocates be outside of [sic] the reach of the Scheme."

The appointment to silk is itself a benchmark of excellent and high reputation, and I regard it as both unnecessary and, in many instances (dealt with below) impractical for Queen's Counsel to be required to seek re-accreditation under the scheme. Moreover, I am unconvinced by the justification for not requiring Queen's Counsel appointed since 2010 to seek re-accreditation after 5 years, while requiring those appointed before 2010 to seek re-accreditation with the introduction of the QASA scheme. I note the purported justification for that distinction, but would point out that there was a far lower percentage of successful applicants for silk (c17%) when I was appointed in 1989 then now (c44%).

Accredited advocates must apply for re-accreditation at least once in every five year period. Advocates accredited at level 2, 3 or 4 must submit the following evidence to demonstrate their competence to conduct criminal advocacy at their accredited level:

- 1 Judicial evaluation forms in respect of no less than three and no more than five consecutive court appearances undertaken in the 12 months preceding the application, confirming their competence to conduct criminal advocacy at their current level; or
- 2 Evidence of satisfactory completion of an assessment by an approved assessment centre of their competence to conduct criminal advocacy at their current level together with^[1] one judicial evaluation form completed in respect of a court appearance undertaken in the 12 months preceding the application, confirming their competence to conduct criminal advocacy at their current level.

What concerns me most about these proposals is that, although suitable for juniors and criminal silks who do relatively short cases, they seem to be thoroughly unsuitable, and unfair, for silks who have different practices. One obvious example is very large fraud cases which can take over a year to prepare. I have defended in such cases. In those circumstances, it would be impossible for the silk either to obtain accreditation (because he had not undertaken any case or hearing in the 12 months preceding the date of his application) or, if already accredited, to obtain re-accreditation (because although he might have been able to go to the time, trouble and expense of interrupting his preparation in order to be assessed at an approved assessment centre, he could not have a judicial evaluation form in respect of a court appearance undertaken in the 12 preceding months).

There are other examples: eg a silk who happens not to have done a criminal case in the previous 12 months, or has worked abroad, or has been on maternity leave. There is provision for the BSB to apply a different period, but that strikes me really as tinkering with the problem.

As indicated above, the appointment of silk is itself a mark of acknowledged competence. I do not understand the need for silks to be subjected to the accreditation scheme. The public are protected by existing provisions of the Code of Conduct, in particular paragraphs 603(a) and 608(a) which require a barrister not to accept any instructions, and to cease to act and to return any instructions which he has accepted, if he lacks sufficient experience or competence to handle the matter. Moreover there are well-known instances where distinguished non-criminal counsel have been instructed in heavy criminal cases: Lord Justice Chadwick and Mrs Justice Gloster, when they were at the Bar, in Guinness; Lady Justice Arden, when at the Bar, was instructed in Barlow Clowes; Mr Justice Park, when Chairman of the Revenue Bar Association, led me in defending in a capital allowances tax fraud.

In those circumstances, I would ask that Queen's Counsel be exempted from the QASA Scheme.

Robert Rhodes QC

Sarah Mallett

Dear Sir,

I have read the response prepared by the Criminal Bar Association, and it accurately reflects both my views and the strength with which they are held. I hope very serious consideration will be given to it. This is a matter of vital importance to the effective operation of the criminal justice system (itself a mark by which any civilised society should be judged), a system which is - presently - there to protect all of us, potentially at any time and in any capacity.

^[1] Emphasis added

Yours faithfully,

Sarah Mallett

KBW Chambers, Leeds

Simon Baker

| | |
|---------------|-----------------|
| Name: | Simon Baker |
| Organization: | Argent Chambers |
| Role: | Barrister |

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme?

For advocates such as myself, who specialise in very large fraud cases (which can last 3 to 4 months each), it is far from certain that I will do more than 1 or 2 criminal trials in a year. This is a function of the length of the trials and the time needed properly to prepare such a trial. For example, the last trial I conducted lasted 4 months and had in excess of 150,000 pages of prosecution evidence. Needless to say, it took several months of full time preparation during which I was not conducting other trials.

It goes without saying that the type of advocates instructed in such cases tends to mean that one is dealing with those who would be looking at the top level of accreditation.

The scheme needs either to have a substantially longer period to acquire the requisite number of judicial evaluations or, more sensibly, it needs to have a degree of flexibility to allow advocates undertaking very substantial cases (in which the Judge is likely to be able to form a very clear evaluation over the course of the trial) to require fewer judicial evaluations.

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

I do not accept the fundamental premise of the proposal at paragraph 3.9 which states that accreditation at level two ought not be limited to those conducting trials. The theory that it is possible to be competent to conduct a PCMH, administrative hearing or a plea but not a trial is fundamentally flawed at both a practical and principled level.

In order properly to conduct a PCMH or directions hearing, it is necessary to understand the tactical decisions that affect the conduct of the trial and to understand the implications of decisions made at those hearings (possibly excluding or undermining submissions which will need to be advanced at trial). It is simply not credible that an advocate who has never undertaken a Crown Court trial will have the degree of experience and tactical awareness to make those sorts of decisions. The result is that the lay client is put at risk of decisions being taken at a preliminary stage which may negatively impact on his or her interests later in the proceedings.

The same concerns arise in relation to “plea only advocates”. It is difficult to see how an advocate who has no experience of conducting trials will properly be able to advise a lay client on the strength or otherwise of his or her case.

There are also serious concerns that allowing plea only advocates would create the impression (at the very least) that the advocate may advise a client to plead guilty so that they are able to conduct the case rather than surrender the case (and the attendant fee) to someone qualified to represent the defendant through to trial. Even if the advocate’s professional obligations were to offer a safeguard against such conduct, the perception is a very dangerous one likely to prove a recipe for complaints and appeals (and therefore a substantial waste of public funds and court time).

The simple fact is that an advocate is either competent to undertake work at a particular level or they are not. The interests of the lay client are paramount and they must be entitled to representation by an advocate who is properly qualified and experienced so as to represent their interests no matter what their instructions may be.

Q3: Are there any practical issues that arise from client notification?

The whole premise of “client notification” demonstrates the absurdity with plea only advocates. The scheme effectively recognises that an advocate is not competent to undertake the case yet is allowed to do so subject to notification.

Otherwise, I have no comment as to this proposal.

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

I would think that a degree of nuance would be useful in relation to Youth Court work. To have a single grade covering all work in the Youth Court seems somewhat perverse.

Much of the case-work in the Youth Court is analogous to that undertaken in the Magistrates’ Court and for that work there is no reason why it should not be treated as level 1. However, the Youth Court does deal with cases which, if they involved adults, would be dealt with in the Crown Court and probably treated as level 3 cases.

I would suggest that work in the Youth Court should be treated as level 1 save where the offence is one which would ordinarily be tried in the Crown Court if the defendant were aged 18, in which case an advocate of at least level 2 should be required.

Q5: Do you foresee any practical problems with a phased implementation?

I have no objection to the principle of phased implementation, but do not consider the proposed timescale to be realistic.

It appears wholly irrational that there is no pilot scheme to identify and remedy the inevitable flaws in the system before it starts to “go live” and affect an already burdened criminal justice system.

It is equally absurd that, given the absence of a pilot scheme, there is no meaningful gap between phase 1 and phase 2 to enable phase 1 to perform the role of pilot scheme.

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

I would make the following observations and suggestions:

- Three levels for Crown Court work is almost certainly too few for a meaningful allocation such as to protect the interests of the lay client. It is completely counter-productive to permit the level to be set either by the instructed party or the advocate (or by the CPS for that matter given their own interests in reducing the level!).
- The only party to proceedings with the necessary degree of impartial interest and experience to set the level properly and reliably would be the Judge.
- A set of guidelines ought to be drawn up, with the assistance of the JSB and Council of Circuit Judges which would specify which offences would ordinarily fall into which level.
- Where an offence could fall into one of two (or more) levels, the guidelines should specify which factors would determine which level was applicable.
- The guidelines would also specify which features would “aggravate” or “mitigate” the appropriate level under the guidelines. For example, a case may have to go up a level if it raises unusual or novel points of law. Another example might be where the facts of the case may be a simple assault (level 2) yet if the defendant or the victim were a vulnerable person (through age or capacity) then the case may require a higher categorisation.

Alternatively, it may be that the advocate representing a “tail ender” in a multi-handed trial may need less experience than the advocate for the main defendant.

- The Judge would need to take a more pro-active role in ensuring that the case was set at the correct level. It should therefore become a standard feature of the PCMH for the Judge to set the level (in accordance with the guidelines).

Advocates could make representations at the PCMH as to why the case was of a lower or higher level than other similar cases under the guidelines and the Judge would have a degree of discretion to ensure that the interests of the lay client were properly protected through the setting of the correct level.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

As I have made clear in my answer to q.6, I do not think that the role of setting guidelines is one for which the regulators are qualified. Rather, the guidelines should be drawn up with the approval of the JSB and the Council of Circuit Judges.

I also do not feel that only 4 levels are sufficient adequately to protect the interests of lay clients.

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

The wording on the levels table is insufficient to provide the necessary degree of clarity and certainty that is necessary to ensure a consistent and helpful application of the

categorisation.

The examples provided are helpful but are also inadequate. There would need to be substantially more detailed guidelines (of the sort that the JSB and Council of Circuit Judges are used to providing in relation, for example, to sentencing guidelines) than appears to be envisaged within the consultation.

Other examples of relevant features would include (and this list is purely for example and is far from exhaustive):

- Where a defendant is a youth or a vulnerable person (e.g. under a psychiatric disability), then the level should automatically be no less than 3 and possibly 4 depending upon the age/disability;
- Where the victim/witness is a youth or a vulnerable person (e.g. under a psychiatric disability), then the level should automatically be no less than 3 and possibly 4 depending upon the age/disability;
- Any case which gives rise to a minimum sentence of life/IPP (e.g. under a 2 or 3 strikes rule) should be level 4 automatically;
- Any case which would give rise to a “criminal lifestyle” under POCA would be an automatic level 3 or 4;
- A multi-handed cut-throat case should automatically qualify for level 3 at least;
- Where a “tail end” defendant faces substantially lesser charges and/or less complex evidence than for those further up the indictment, a lower level may be needed for them;
- In any case in which a certificate for 2 counsel has been given, the junior should be no less than level 3 (on the basis that it is a condition of the granting of a 2 counsel certificate that the junior should be competent to take over should the leader be incapacitated)

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

My opposition to plea only advocates is set out above and I raise it again here.

The allocation of level should primarily be determinative of who can be the instructed advocate (“IA”) and the trial advocate (if the IA is not available for the trial). Clearly, practicality dictates that there will be some pre-trial hearings that the IA may not be available for.

My observations are as follows:

- As a general principle, the IA should attend all hearings and the Court should facilitate this through practical listing wherever possible (list officers need to be directed that hearings should be listed for the IA’s availability wherever possible, particularly in relation to the key hearings such as PCMH, legal arguments, plea, sentence, Newton hearing & confiscation);

- If the IA is unable to attend a key hearing (e.g. PCMH, legal arguments, plea, sentence & confiscation), then the substitute advocate (SA) covering should be of suitable experience to step in. This should mean that the SA should be no more than one level below the case level and should certainly be experienced as a trial advocate given that the decisions that need to be taken at such hearings often impact upon the trial;
- It may be that for certain pre-trial hearings (e.g. a hearing listed solely to fix a date), the nature of the hearing is such that a level 2 advocate could adequately represent the interests of the defendant.
- I would have thought that the only occasions when a level 2 advocate could properly cover a hearing in a level 4 case would be where the matter is listed for a non-controversial hearing (at which there is to be no legal argument). In order to ensure that the defendant's position is properly protected, this will only be where all parties (including the Court) agree in advance that the hearing is suitable for a lower level advocate.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

A Newton hearing is a trial and therefore should be undertaken only by advocates with suitable trial experience. Hence, a Newton hearing should be conducted only by an advocate of the appropriate level for the case.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

Re Leader/junior – The guidelines issued to resident judges make clear that the days of straw juniors are over and certification ought not to be granted for two counsel in a case where the junior is not competent to step into his or her leader's place should the leader become unable to continue.

Accordingly, no advocate should be able to be instructed as a junior unless they are sufficiently competent and experienced to conduct the trial. Accordingly, a junior should never be more than one level below the leader.

Complexity – A combination of the judicial involvement in setting the case level (see above) together with the professional obligation to withdraw should a case develop such as to take it outside of an advocate's competence, should be sufficient to protect the lay client.

Client choice – I would agree with paragraph 4.33 of the consultation subject to the fact that an additional requirement should be added. Any client must be informed that they are entitled to representation by an advocate of their choosing including from outside of the instructed firm (including independent solicitor-advocates and the independent Bar). A standard letter to this effect should be drafted in consultation with the SRA/Bar Council which any client must be provided with.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

See above

Q13: Do you have any comments on the proposed modified entry arrangement?

The whole point of the QC appointments process is to ensure an independently verified hallmark of quality.

The new proposal for the inclusion of silks within QASA is misplaced and unjustified.

Q14: Do you agree with the proposed approach to the assessment of competence?

The primary obligation of the QASA scheme is to protect the interests of the lay client. This means that the standards imposed must apply to all advocates irrespective of the regulatory body.

There are excellent solicitor advocates and poor ones, just as there are poor barristers as well as excellent ones. Any scheme must apply the same standard to any advocate appearing in the criminal courts.

Although there is a specific regulatory conduct requirement on barristers not to accept instructions beyond their experience/competence (with sanctions to enforce the rules), no parallel provisions apply under the SRA or ILEX rules. This is clearly contrary to the interests of the consumers, who deserve the highest standards and proper protection.

There is therefore no room for fudging the question of competence. An advocate is either competent or they are not, irrespective of the branch of the profession from which they come. As such, there is no room for plea-only advocates.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

A proper consideration of the purpose of QASA (which must be one of raising standards and ensuring a guarantee of quality for the protection of all users of the criminal justice system).

It is only if one keeps the purpose in mind and measures proposals against that yardstick, that one can realistically justify the scheme.

A proper consideration of the proposals in light of the objectives will reveal the perverse consequences of allowing the accreditation of plea only advocates.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

Yes

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Not at this stage

Q18: Do you have any comments on the Scheme Rules?

I simply repeat the observations made elsewhere in my responses.

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

Yes

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

Yes

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

Removal of plea only advocates. Whilst this anomaly is maintained, QASA lacks any moral or practical authority as it perpetuates a situation where users of the system receive a lesser standard of representation than they are entitled to.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

No

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

No

Q24: Are there any other equality issues that you think that the regulators ought to consider?

No

Stephen Bailey

Dear Sir/Madam,

I have read the CBA's response to QASA consultation paper 4. I entirely agree with it, and support the CBA's response.

I object in particular to a proposed scheme whose aim appears to be to undermine - ultimately to destroy - the independent Bar which serves the public and the interests of justice so well, and at the same time to force the Bar to bear the costs of that aim.

Please acknowledge receipt of this e-mail.

Yours,

Steven Bailey
No 5 Chambers
Birmingham

Steven Coupland

QASA
RESPONSE TO FOURTH

CONSULTATION PAPER

Having seen the Fourth Consultation Paper on the Quality Assurance Scheme for Advocates (Crime), can I make the following comments:

I am opposed to the scheme as presently proposed. Elements of the scheme are flawed and create the real risk of cases being conducted by advocates who are not appropriately qualified. This will have a negative effect on the justice of cases taking place, and will inevitably lead to greater delays and greater costs.

The Scheme is not one that has been accepted by the Bar for the reasons above. Despite numerous responses, real concerns have not been addressed. Those include:

Question1

The allowance of time for assessment will be insufficient for those dealing with the heaviest cases, which inevitably involve lengthy periods of preparation (time not spent conducting trials) and few lengthy trials within the assessment period.

Question 2

The suggestion that advocates who do not presently conduct trials should be allowed to receive accreditation via an assessment organisation, creates a two tier system, with ill-specified criteria for accreditation.

The suggestion that there may be "plea only advocates" (advocates who are allowed to conduct cases for preliminary hearings above their own level of experience) is fraught with danger. Allowing advocates who do not conduct trials to participate in preliminary hearings and PCMHs would create occasions where justice is hampered, causing costs in both time and money - for example: Bearing in mind the far more rigorous nature of preliminary hearings and PCMHs, and the requirement to make more decisions at an earlier stage, such an advocate's inability to deal with the making of a binding ruling at an early hearing (or allowing such a ruling to be made when not appropriate) would inevitably lead to injustice at worst, and added cost at best; The need for further hearings/ applications to vacate hearings if matters crucial to the proper conduct of the trial have not been dealt with at an early stage (the early recognition of the need for expert evidence; the ability to make proper witness requirements; unrealistic time estimates).

Questions 6-8

The present proposal that the level of a case should be set by the instructing party then agreed with the advocate, creates a real risk that financial factors will shape the selection rather than the proper selection of an appropriately experienced advocate - either by the pressure not to instruct a QC (when the reality may be that if a certificate for two counsel is not ultimately granted, the junior brief is lost); or pressure to set a lower level for a case to allow the work to be done by an in-house advocate who lacks the experience to conduct the case. The schedule attached to the Consultation Paper is too blunt an instrument and the requirement for instructing parties to remain independent is not likely to occur in reality.

The alternatives are equally unsatisfactory - either requiring Judges to set the level of a case or the CPS. On balance, having recently undergone a rigorous quality assurance scheme of their own, allowing the CPS (who have a relatively rigid allocation scheme, and as a public body have public accountability for their decisions) to set the level of cases is preferable.

Questions 13-15

The proposal that the more experienced QC's (appointed before 2010) should be included because their appointment did not take place under a recognised quality assurance scheme, fails to recognise their demonstrable experience and expertise. It is difficult to reconcile this proposal with the suggestion (Question 4) that an reduction in the level required to appear in the Youth Courts may be made to allow those with considerable experience to continue.

I have read both the Circuit Response and the CBA response to the Consultation Paper and agree with the comments expressed in both about the scheme and its flaws. For the above reasons, I have profound concerns about the merits and the validity of the proposed scheme.

Steven Coupland
1 High Pavement Chambers
Nottingham
6.10.12

Steven Gee QC

Dear Consultation,

I agree with the CBA that the present proposed scheme is neither necessary nor desirable.

I would add the following:

1. The advocate should appear before any court without seeking any favour or personal advantage. This is so that the advocate can conduct the case in the best interests of his client. This liberty operates to further the due administration of justice.
2. Regrettably there are cases in which advocates act in accordance with the highest standards but nevertheless very serious errors are made resulting in a miscarriage, a successful appeal and serious adverse consequences for the parties and young children. An illustration is the recent decision of the Court of Appeal in *K (Children)* [2011] EWCA Civ 793. The proposed scheme would operate so as to make it more difficult for an advocate appearing in such a case to protect the public interest. In criminal cases there can be circumstances in which an advocate should be free and feel free to address a jury without fear of repercussions for his personal position as an advocate. As is illustrated by *K (Children)* [2011] EWCA Civ 793 once the damage is done it may be irreversible even by appeal. Miscarriage in a criminal court may take years to correct and the remedy may come too late.
3. The BSB has not produced objective evidence demonstrating that the proposed scheme would be in the public interest. Furthermore the tension between the Scheme and the principle in 1 above would tend to operate contrary to the public interest, and there could be circumstances where it would produce serious, adverse consequences for the public and the due administration of justice.

Yours sincerely,

Steven Gee QC

Individual Solicitors / Solicitor Advocates

David Chimes

Dear Sir/Madam,

I am contacting you in my role as Chair of the CPS Disabled Staff Network. I am also a full-time Prosecution Advocate in the Crown Court.

Please would you point us to any provisions in the QASA Scheme which relate to disability?

We are particularly concerned about the apparent requirement to appear in trials at a given level in order to be able to appear in other hearings at that level. We are aware of advocates at all levels who have the experience and ability to appear in the full range of hearings apart from trials, but who are unable to appear in trials due to disability or impairment which could be due to a visual impairment or for other reasons. Please would you indicate how such advocates would be dealt with under QASA? For instance, if an advocate can just about manage to appear in a level 1 trial, but their disability means that they can't appear in Crown Court trials at Levels 2 or 3, but they have the ability and experience to deal with other hearings, such as sentencing and plea and case management hearings at levels 2 and 3, should they apply to be at Level 1 or Level 3? How would their application to be classed at Level 3 be dealt with?

From a disability perspective, there is a concern that, if QASA is applied rigidly and disabled advocates who currently deal with complex non-trial work at higher levels are prevented from doing so in the future, there may be a breach of Section 19 of the Equality Act 2010, in that a "provision, criterion or practice" is being applied which puts disabled advocates at a disadvantage – i.e. indirect discrimination.

We assume that an Equality Impact Assessment (EIA) has been carried out regarding QASA. Please would you send us a copy of this EIA? If an EIA hasn't been done yet, please would you inform us of the plans and timetable for doing so?

Thank you for your anticipated assistance. We look forward to hearing from you.

Regards and Best Wishes,

David
David Chimes
Chair – CPS Disabled Staff Network

Fedon Philip Kazantzis

| | |
|---|-------------------------------|
| Name: | Fedon Philip Kazantzis |
| Organization: | |
| Role: | Consultant Solicitor Advocate |
| Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme? | |

It will be difficult to ensure the availability of the correct level of case during any specified period and for such a case to proceed to trial. Furthermore, one will have to appear before a suitably trained judge for assessment which may also prove difficult. If one is in a multi-handed trial representing someone towards the end of the case then there may be limited opportunity to show one's abilities before that judge. This is likely to be the case where one's career focuses on the larger fraud type cases. It may be that having conducted numerous preferential trials before non-qualified assessor judges, the only trial before a suitably qualified assessor judge will be the one where instructions do not allow the advocate to present the case in the best possible way.

I agree that the proposed timing set out in the CBA October 2012 response may be more suitable.

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

No. I do NOT agree with the CBA October 2012 response. I see no difficulty in those that simply wish to deal with preliminary matters or mitigate and not conduct trials.

Q3: Are there any practical issues that arise from client notification?

No.

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

I see no practical problem with starting youth court work at level 1. The current system whereby both counsel and solicitor's ensure their own competence before the courts continues to work in

Q5: Do you foresee any practical problems with a phased implementation?

No.

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

Taken in conjunction with the proposed levels table and requirement to justify departure upon enquiry then this should work.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

I agree with complex dishonesty being in Level 4 but do not believe that because an offence is of a high value dishonesty it should automatically fall within Level 4. A case could be quite a simple one but of high value and so should allow representation by those at the lower levels.

Q8: Is the wording used in the Levels table sufficient to distinguish between those

occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

The wording in the levels table seems sufficient although I do not agree with the example given. I do not see how a street robbery with the simple use of a weapon to threaten would justify such a case falling into Level 3 as it makes it no more complex than a robbery without the use of a weapon to threaten. The only impact will be upon sentence.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

Save for sentencing hearings, I do not see a need for this restriction. However, I do not oppose it in principle.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

No.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

No.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

“Where the two-counsel certificate provides for leading and junior counsel, except where the junior is a noter only, and subject to acting up, the junior should be no more than one grade below the leader. Where the leader is a QC, the junior should, subject to acting up, be at least level 3. The days of the ‘straw junior’ are over. If the certificate is for a full junior, s/he must be of capable of taking over conduct of the case if needed. This is of fundamental importance for the protection of the public.”⁵⁹

Q13: Do you have any comments on the proposed modified entry arrangement?

Having worked their way up in a profession to establish themselves as silk it is rather insulting to require them to be re-accredited. However, the same could be said for those having obtained level 4 at QASA requiring re-accreditation after 5 years. As I am generally opposed to the QASA scheme many of my answers are necessarily quite artificial. “This scheme would make silks compete for the category 4 work with juniors who would then have to compete with category 3 juniors for that work. The system of advocacy would be skewed, against the interest of the public, for a generation.”⁶⁰

Q14: Do you agree with the proposed approach to the assessment of competence?

⁵⁹ Paragraph 58 of the CBA October 2012 response adopted.

⁶⁰ Paragraph 25 of the CBA response adopted.

It is my understanding the bulk of the material upon which regulators will ultimately be making decisions on will still come from the judiciary and as such the suggestion of the judiciary having direct responsibility for an advocate's continued ability to practise will remain.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

Has any consideration been given to the loss of value to being a qualified solicitor or barrister? Both barristers and solicitors have already gone through a significant amount of training, indeed solicitors will have taken further training in order to obtain Higher Rights of Audience, this process now dismisses all that training and hard work as being worthless. This whole process is a fundamental attack upon both professions. The judiciary already has the ability to refer those before it to their regulators; QASA is an unnecessary knee-jerk reaction to a problem that does not exist. QASA will simply impose additional burdens upon an area of the profession already under immense pressure due to the reduced availability of work and the increased amount of work required to be undertaken for the ever reducing fees that are paid.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

I choose not to comment on the handbook as I generally oppose the QASA regulatory scheme.

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Q18: Do you have any comments on the Scheme Rules?

I agree and adopt paragraph 67 of the CBA October 2012 response.

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

I agree and adopt paragraph 68 of the CBA October 2012 response.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

I agree and adopt paragraph 69 of the CBA October 2012 response.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

Yes. There is a distinct natural prejudice against solicitors in the Crown Court. Having practised as both counsel and as a solicitor-advocate I have noted this reducing over recent years but it is still likely to have a significant impact upon the assessment of any advocate by the judiciary as there is still likely to be a natural bias towards counsel. The scheme as a whole amounts to a removal of both solicitor and counsel qualification rights.

Both solicitors and barristers will no longer be able to do what they had previously been able to by virtue of being a solicitor of the superior courts or a practising barrister subject to their own evaluation of competence. The qualification as a solicitor or barrister will have lost its value.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

No comments on this point.

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

No comments on this point.

Q24: Are there any other equality issues that you think that the regulators ought to consider?

I adopt paragraph 72 of the CBA October 2012 response. We are becoming an old profession with fewer people able to enter the profession and as more regulation is placed upon us and our income reduced less people are able to or will want to enter the profession.

Gareth Davies

Hello,

I have been a Higher Courts Advocate (Criminal Advocacy) only since the 28 February 2012. Before embarking on the course to lead me to this qualification, I thought long about which I would need - criminal or civil.

As an in-house lawyer for a police force, the vast majority of my work has for the past 17 years been dealt with by criminal courts, considering what are essentially civil applications by the Chief Constable which come about as a result of investigations of criminal behaviour. Good examples are the nearly defunct ASBO. Also, under the Sexual Offences Act 2003 - Sexual Offences Prevention Orders, Foreign Travel Orders, Risk of Sexual Harm Orders, Notification Orders. Add to that Crack House Closure Orders and Closure Orders. Also Dog Control Orders under the Dogs Act 1871. In fact, anything that may be dealt with by way of a Complaint. All these are dealt with in the magistrate's court at first instance, but are appealable to the Crown Court. The Respondent needs representation. Some may have been granted by a Crown Court and may be varied or discharged only there. Once again, the respondent needs to be represented. One may then add to this list appeals that may be made by certificate owners under the Firearms Act, which are dealt with in the Crown Court.

These all give a practice which is full of advocacy in the magistrates' courts, with some work in the Crown Courts. One may also add circumstances when police officers and staff are called to the Crown Court by judges in the course of a trial to give explanatory evidence and need an advocate to represent them.

I feel sure you will realise that all sorts of advocacy takes place in the Magistrates and Crown Courts which cannot be said strictly to be 'criminal' in nature, but which comes about as a result of criminal investigation.

Taking all this into account, I asked myself whether I needed to acquire Civil Higher Rights, training me to work in the High Court, or Criminal which would allow me to deal with matters in the Crown Court. The answer is obvious.

Having obtained this qualification, it is now necessary for me to honestly answer the question that is put to me on the SRA Notification Form regarding my in-house practice both there and in the magistrates' courts.

In drafting the definition, I think that nobody has considered fully all the 'other work' that takes place in the criminal courts that cannot be said to be purely criminal in its nature.

I would ask therefore that consideration be given in the course of this consultation to alter the JAG definition of criminal advocacy presently being used slightly to clarify and allow for the work done by those who never prosecute or defend criminal matters, but nevertheless must be highly skilled in their level of advocacy to deal with matters they place before the 'criminal' courts.

I hope that this helps and can be a useful part of the consultation.

In the meantime, I shall be saying on my Notification that the work I do comes about as a result of criminal investigation, the reason for this being that I work for a police force. However, I do believe that this committee could clarify matters,

Yours,

Gareth Davies
Solicitor Advocate
Legal Services

Geyve Walker

Dear Sir,

In response to your formal consultation on the QASA scheme the directors of this firm wish you to note their strong opposition to your proposals. We believe that our present rights of audience in criminal matters are an important component of our qualification rights as solicitors and that we should continue to be allowed to exercise them subject to our own evaluation of our competence. We feel that this is entirely compatible with the philosophy of Outcomes Focused Regulation which you have recently introduced as the basis of our Code of Professional Conduct. As the first paragraph of your Code states:

“The SRA Code of Conduct sets out our Outcomes Focused Conduct requirements so that you can consider how best to achieve the right outcomes for your clients taking into account the way that your firm works and its client base. The code is underpinned by effective, risk based supervision and enforcement.”

We support the principle of Outcomes Focused Regulation and feel that the proposals for QASA undermine that principle.

Please acknowledge receipt.

Yours faithfully,

Geyve Walker

Graham Stewart Hills

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| Name: | GRAHAM STEWART HILLS |
| Organization: | ELVIN & CO solicitors (East Leake, Loughborough LE12 6PG) |
| Role: | SOLICITOR-ADVOCATE <i>specialist regulatory – Health & Safety Executive and the Department of Business Innovation & Skills – prosecution only.</i> |
| Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme? | |
| <p>I am a specialist advocate. I am cautious about entirely relying upon the proposed specialist advocate exemption, in case it is amended or revoked.</p> <p>I have successfully conducted a jury trial, but this was 2 years ago and the opportunity for trial experience in regulatory work is very limited, with 12 months being too short to gain Crown Court judicial assessment.</p> <p>I fear that I may be excluded from the assessment centre (route A) as that is for criminal advocacy as proposed excluding regulatory work.</p> <p>I would have reasonable prospects of achieving judicial assessment if the period of assessment were extended to 18 months with the possibility on application of extending this to 2 years.</p> | |
| Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates? | |
| | |
| Q3: Are there any practical issues that arise from client notification? | |
| | |
| Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1? | |
| | |
| Q5: Do you foresee any practical problems with a phased implementation? | |
| | |
| Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome. | |
| There is a danger that the level of a case agreed by the instructing lawyer and advocate | |

may turn out to be wrong at trial. The level of a case should always be set by its facts. There will be pressure for it to be set by reference to fees.

The level of a case by reference to its difficulty or seriousness (admissibility, character, hearsay, abuse arguments) frequently changes at trial (4.30).

It is too late then for an advocate to decide that a more senior advocate should be instructed.

The level of difficulty does not depend solely upon the nature of the matters charged. A person of good character facing an allegation of dishonesty is arguably at no less risk (and may be at greater risk) from poor advocacy than an experienced criminal charged with very serious offences. That is why on occasion very experienced advocates are instructed in what may appear to be 'minor' cases.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

I am afraid that I think that trying to squeeze the myriad circumstances of criminal advocacy into levels is likely to fail. The difficulty of a case can sometimes be in inverse proportion to what is at stake. I think this scheme may cause serious problems at trials when difficult issues arise.

Currently there is great freedom for instructing lawyers and advocates to agree between themselves who is best to conduct a case. In my view to restrict this freedom by reference to levels (which are blunt instruments) will not be in the public interest.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

Q13: Do you have any comments on the proposed modified entry arrangement?

Q14: Do you agree with the proposed approach to the assessment of competence?

Q15: Are there any other issues that you would like to see included within the review?
Please give reasons for your response.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Q18: Do you have any comments on the Scheme Rules?

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

I would welcome a clear statement that specialist practitioners may continue to undertake trials in the Crown Court within their specialism.

I would like to see any scheme that is implemented make provision for specialist practitioners to join the scheme by assessment centre and/or with an extended period for judicial assessment, as we prosecute few trials, but many plea cases.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

Q24: Are there any other equality issues that you think that the regulators ought to consider?

Hywel Lloyd Davies

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|---|---------------------|
| Name: | Hywel Lloyd Davies |
| Organization: | Hywel Davies & Co |
| Role: | Principal Solicitor |
| Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme? | |
| I have no problem with Higher Rights Qualifications, for Solicitors, as they stand in relation to Crown Court Advocacy, but do not consider Quasa to be necessary to add to that qualification in the Crown Court. Quasa is completely unnecessary in the Magistrates Court. 18 months necessary for evaluations to be completed, if the scheme is rolled out | |
| Q2: Are there any difficulties that arise from the revised proposals for the accreditation of level 2 advocates? | |
| Judicial time and inclination to be involved in QUASA | |
| Q3: Are there any practical issues that arise from client notification? | |
| Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1? | |
| Quasa is completely unnecessary in the Magistrates Court and Youth Court. Youth Court advocacy should not be categorised higher. | |
| Q5: Do you foresee any practical problems with a phased implementation? | |

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

By abandoning Quasa

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you propose they are dealt with?

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

Q13: Do you have any comments on the proposed modified entry arrangement?

Q14: Do you agree with the proposed approach to the assessment of competence?

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not,

what changes should be made and why?

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Q18: Do you have any comments on the Scheme Rules?

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

The proposals are bound to have greater impact on racial minorities and those living in rural areas. Why impose this additional requirement on Solicitors in any event, in relation to advocacy in the Magistrates Court and Youth Court. Quasa belittles the qualification of a Solicitor to practice in those lower courts. Qualification as a Solicitor ought to suffice in relation to advocacy in those courts.

Q24: Are there any other equality issues that you think that the regulators ought to consider?

Micahel Robinson

SRA

QASA

The idea that QASA is required to ensure that standards of advocacy are maintained is a lie. I asked the SRA to provide details of complaints made by Judges, Magistrates and Magistrates' clerks about advocacy by Solicitors. That data is not collected by the SRA. Likewise the same question of HMCTS provided the same response. No-one has bothered, notwithstanding that QASA was first mooted by Lord Carter in 2006 to gather evidence from Judges, Magistrates and Magistrates' Clerks about the standard of advocacy before the Court. The Bar Standards Board recent survey of Courts and Advocates is an example of the true intentions of QASA. It is clear from that document that the main concern for the Bar is the reduction in work and the consequent reduction in fees.

"Plea Only" advocate is an example. The real concern of the Bar is that an "HCA" will attend at Court and enter a not guilty plea and only if the trial proceeds will Counsel be instructed. Thereafter the Instructed Advocate receives the fees and shares the same with Counsel. Barristers wish to be instructed at the very start so that they can earn the fees when the defendant pleads. That is why the Bar was so against Plea Only Advocates and for no other reason. It is all to do with money. The Regulators then have gone into "public interest" overload and instead of recognising the truth which is that the Emperor is as naked as can be (ie the true motivation of the Bar is to preserve and enhance its own position to ensure fee income)-have gone along with the praise of the Emperor's fine clothes (and bought into the quality argument).

I have not experienced poor advocacy in Court by any person that was devastating to a prosecution or to a defence. Maybe I am not in Court often enough. However I have heard Crown Advocates and barristers and Solicitor Advocates and not wondered "oh my gosh!!". What does annoy me is Counsel not attending at conferences or at Prison for conferences or cancelling the same. But then QASA won't take account of client facing aspects of competence and ability such as that.

I understand that Judges when consulted about QASA indicated that they were concerned about the quality of advocacy. Well if they were did they complain to the SRA or BSB or to the Senior partner or Head of Chambers or to the Solicitor or Barrister? Did they complain at all.

What is very strange is the assertion that how the Bar trains its advocates is superior to anyone else. What evidence is there of that? If that is the case why does QASA not reflect and enhance that good practice for all advocates? Why not create a College of Advocates to which all advocates can seek membership and by whom all advocates will be regulated. That would be fair, transparent and useful. Then a barrister would not be able to look down upon a Solicitor Advocate, Crown Advocate or Associate Prosecutor.

Introducing QASA simply because the Legal Services Board insists upon it is no reason to introduce QASA or for the SRA to be the LSB's poodle and to be seen to be doing the right thing. A better system would be to invite every Judge and Magistrate of Magistrates' clerk to provide an end of trial report or an end of case report upon the conduct of all the advocates involved. This information should then be shared with the advocate and with the advocate's regulator and with the LSB. The regulator and The Law Society and SAHCA should have in place a system of identifying a need to intervene and support an advocate through training and assessment alternatively to offer praise and encouragement and to support an advocate taking on more serious work. It is only through these methods that advocates can hope to obtain the relevant support, training, feedback, encouragement and mentoring that would allow the advocate to progress or stop. Only in this way would the assessment system be fair. The regulator would report to the LSC about how the advocate was supported. In this way those who do not need intervention or support and mentoring would be left alone. Those who do would receive what they need. Those who need the support would pay for the privilege of being an advocate. Those who don't need support should not pay. The advantage of this system is that it would apply to all advocates in all tribunals. What you have not addressed at all is:

1 how will you ensure competency to conduct proceedings in the Youth Court. The idea that a level 3 barrister is competent to conduct a Youth Court trial is wrong.

2 how will you address the issue of non-qualified advocates, McKenzie Friends etc acting in County Court chambers cases and in Tribunals. If advocacy is so important and if the public need to be assured then it is not just the legal aid public and not just those who appear in criminal courts who need to be assured of the quality and competence of the advocate.

The current format for QASA is a nonsense. It is open to abuse by Judges who are eager to protect the independent Bar and their colleagues from Chambers. Judges are still connected to Chambers and will attend Bar Mess and Inns of Court dinners. The idea that the SRA will help ensure that assessments are without bias is not a comfort to most Solicitors.

You have introduced QASA at a time of falling cases in the Criminal Courts, of cuts to legal aid and with a myriad of changes in legal aid. You appear to have no grasp of the reality that Solicitors in practice actually face.

I have a feeling that QASA will end up as effective as Peer Review or Unit Fines. Eventually you will realize that which the LSC fails to realize that only when you consult openly with Solicitors, instead of telling us what is going to happen and consult only upon implementation, will you actually develop reforms of the Justice systems that will work.

Proceed with QASA as it is currently drafted and it will soon fall into disrepute. Talk to Solicitors about the reforms that are required and you will create something that will work.

Arthur Michael Robinson
156136
Emmersons Solicitors

Paul Crome

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|---------------|---------------------------|
| Name: | Paul Crome |
| Organisation: | Crown Prosecution Service |
| Role: | Specialist Prosecutor |

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme?

There are difficulties that arise in relation to more experienced advocates.

During the early stages of a criminal solicitor's career the solicitor will appear in court daily and undertake trial work.

With experience a solicitor moves into management and works on serious cases when the opportunity to appear in court is less frequent.

There is much confusion with my colleagues about what is being asked of them and what will be required to undergo in assessment. The cost of running this scheme will be a burned on the Law Society and members of the profession. Public funding is the main source of funds. This is being reduced and not available when POCA restraint is in place. This makes it difficult to find the funds to meet the costs for further regulation. The scheme appears onerous and an unfair burden on practitioners.

Why is the current method of obtaining HCA no longer an adequate measure of skill? What will happen to this assessment system?

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of level 2 advocates?

The cost and time in attending an assessment centre is a barrier to the success of the scheme. Where will the assessment centre be located? How will this interfere with delivering an effective service to the CJS and complying with assessment? Attending an assessment centre will have a negative effect on profits and impose higher costs.

Will level 1 advocates be able to attend mentions and other hearings in the Crown Court which do not involve trials? I conduct specialist hearings for applications for restraint which require different skills than trial advocacy. I would not see it necessary to be assessed at a trial to undertake this level 2 in the Crown Court. (I don't undertake trials as this is not in my job description)

Q3: Are there any practical issues that arise from client notification?

Clients are already confused as to the difference between solicitors and barristers. There is a blurring of the professions which was then delineated between HCA advocates and non HCA advocates. Introducing 4 levels of advocate is not going to assist client's in choosing legal representation, but introduce concerns by a defendant in the Magistrates' Court that a level 1 solicitor is not good enough to deal with their work. Public funding would not pay for a level 4 in the Magistrates' Court.

It will lead to a sense of dissatisfaction and confusion.

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

It is the right categorisation. Solicitors are aware of their professional obligations and only undertake work in which they are competent.

Q5: Do you foresee any practical problems with a phased implementation?

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the

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| Levels guidance? |
| |
| Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones? |
| |
| Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with? |
| |
| Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible |
| |
| Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified? |
| |
| Q13: Do you have any comments on the proposed modified entry arrangement? |
| |
| Q14: Do you agree with the proposed approach to the assessment of competence? |
| |
| Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response. |
| |
| Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why? |
| |
| Q17: Is there any additional guidance or information on the Scheme and its application that would be useful? |
| What will happen to the current HCA scheme |
| Q18: Do you have any comments on the Scheme Rules? |
| |
| Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why? |

Clarification is needed in relation to cases that are in the Admin Court of the High Court for enforcement of confiscation orders and restraint order s that arise from Drug Trafficking Act 1994 and Criminal Justice Act 1988 prosecutions

These are civil cases. Would the scheme apply?

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

I think the specialist advocate needs to be extended or clarified to include advocates that appear in matters in which they have a specialism.

I am employed in a specialised unit in CPS with over 30 advocates. There are other specialist Units in CCD.

I do a very specific role. My job title is 'Specialist Prosecutor'. I prosecute in restraint and confiscation matters. In this role I make applications in Magistrates' Court, Crown Court and High Court which is level 4 work. My work is outside normal criminal advocacy, in that I do not do trial work. I would not pass an assessment for level 2 based on experience in trial advocacy as I have not done a trial for over 6 years. I have more knowledge in my field than most QC's. I would be unable to do my job if I could not appear in these Cts to make these applications.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

The scheme is over burdensome and expensive to run.

I doubt it will have the support of practitioners.

In speaking with colleagues I have found no support.

I ask whether advocates have been asked their views by their professional bodies, I speak as a solicitor that I have not been asked my view on the scheme from the Law Society.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

There are adverse impacts on equality. It will be difficult for the more experienced advocates to undertake assessment as trials crack and last 3 months. Our trials take years to come to court thus there is little opportunity for assessment.

Assessment favors those with time ie without family or career commitments that have little time to attend and prepare for assessment.

Q24: Are there any other equality issues that you think that the regulators ought to consider?

Shelagh Lyth

Thanks for this.

Please could you point me to the link to the fourth consultation?

I do not agree with the definition of criminal advocacy and believe it should be wider. You say that the need for a QASA qualification does not depend upon where I work. On the contrary this is precisely what it does depend upon. This is because there are a number of prosecution lawyers throughout the country employed by organisations other than the police or CPS. These organisations are largely central government organisations such as the HSE, BIS, Environment Agency and the Information Commissioner, to name but a few, all of which have legislative functions to enforce the law and undertake investigations and prosecutions. The definition of criminal advocacy you propose excludes them.

Your definition also excludes all prosecutors working for local authorities whose instructions to prosecute arise from local authority enforcement functions. Local authorities prosecute such cases as housing benefit fraud, education welfare (truancy), fly tipping and other environmental enforcement such as Environmental Health Act and Town and County Planning Act e.g. as breaches of enforcement notices; Trading Standards prosecutions such as under age sales of alcohol. These prosecutions take place without any police involvement.

I have conducted numerous contested hearings in the magistrates' court relying on my considerable experience of the ability to draft skeleton arguments and advocacy over the years in relation to matters that are complex but which arose from the enforcement functions of local authorities and more recently in the Central Government regulatory body namely the Information Commissioner's Office.

I have a huge list of examples which I can give to support my submissions as can the many other prosecution lawyers who are in the same position as I.

To use this definition of criminal advocacy is to create a system whereby I and large numbers of my local government and central government colleagues despite being qualified solicitors, would not be qualified to aspire even to level 1 which would be both demeaning and derisory.

I am sure many of us would not be prepared to submit to being part of a 'sub class' of advocates and I am going to write in the same vein to various groups and to the Gazette to try to whip up some additional support.

I want also to add that I am rather ashamed to be regulated by a body that commits its members to join a scheme whose terms are not yet known. No lawyer worth his salt would ever advise a client of theirs to commit to anything blind. I agree with the Bar Council on that.

Regards,

Shelagh Lyth Prosecution Solicitor

Terry Medcalf

Dear Sirs,

I qualified as a solicitor in 1968 and have ever since exercised my rights of audience before Judges at all levels in the Public Law arena. I have been a member of the Law Society's Childrens Panel since its inception.

I was very concerned when I read about the proposals that there should be further vetting and unnecessary further testing to see whether or not I should be allowed to have rights of audience.

I consider it to be quite insulting to be so subjected and am writing to lodge the most serious objection to the proposals.

What is the point of qualifying as a solicitor which gives me the right to practice and have rights of audience . I consider it to be quite inappropriate.

Yours faithfully.

Terry Medcalf

Others

Andrew Argyle

As a personal view, I agree with the response from the NE Circuit a copy of which is attached.

I stress this is a personal view and not necessarily the view of Zenith Chambers although I submit my view as its Chief Executive.

Regards

Andrew Argyle LLB
Chief Executive
Zenith Chambers

Ann Crighton

Very well said. I'm still catching up having had a week off, London reorganising from 43 offices to 3, T3 & impact on Londoners even though it hasn't even rolled out in our Crown Courts yet and so on but I do agree with your sentiments.

Best
Ann

Gaon Hart

| | |
|--|---------------------------|
| Name: | Gaon Hart |
| Organization: | Crown Prosecution Service |
| Role: | Senior Crown Advocate |
| Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme? | |
| Yes. I work in a specialist high level prosecution Division: Special Crime and Counter Terrorism Division. Our work involves reviewing corporate manslaughter cases, deaths in custody and large scale public corruption. What is not considered in the current proposals is the need to be flexible for Divisions such as ours that reviews hundreds of thousands of papers a year and prosecutes very few cases per year. Our cases are high profile and long term. We may not get a case for prosecution in a year. | |
| Q2: Are there any difficulties that arise from the revised proposals for the accreditation of level 2 advocates? | |

This scheme should not be called an 'advocacy' scheme as it is entirely a court trial scheme and is inherently flawed. This is such a significant flaw that I am considering, if it is introduced in challenging the scheme in judicial review as a potential breach of trade. Due to the nature of my work I do not conduct many Crown Court trials as the majority of my work is undertaken by a QC and the CPS/Farquharson guidelines make it extremely difficult for me to take time from my primary role to sit at trial for two months plus as Junior. However, I conduct high profile, serious and senior advocacy in complex legal arguments before the Crown Court and Court of Appeal. This is not referenced as a measure of advocacy in the guidelines as is incorrect.

Q3: Are there any practical issues that arise from client notification?

No

Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?

no

Q5: Do you foresee any practical problems with a phased implementation?

no

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

It is the level of the work that will be difficult to assess under the current proposals.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

No issue

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

Yes

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

Yes as it does not allow for the following issue: This scheme should not be called an 'advocacy' scheme as it is entirely a court trial scheme and is inherently flawed. This is such a significant flaw that I am considering, if it is introduced in challenging the scheme in judicial review as a potential breach of trade. Due to the nature of my work I do not conduct many Crown Court trials as the majority of my work is undertaken by a QC and the CPS/Farquharson guidelines make it extremely difficult for me to take time from my

primary role to sit at trial for two months plus as Junior. However, I conduct high profile, serious and senior advocacy in complex legal arguments before the Crown Court and Court of Appeal. This is not referenced as a measure of advocacy in the guidelines as is incorrect.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

This scheme should not be called an 'advocacy' scheme as it is entirely a court trial scheme and is inherently flawed. This is such a significant flaw that I am considering, if it is introduced in challenging the scheme in judicial review as a potential breach of trade. Due to the nature of my work I do not conduct many Crown Court trials as the majority of my work is undertaken by a QC and the CPS/Farquarson guidelines make it extremely difficult for me to take time from my primary role to sit at trial for two months plus as Junior. However, I conduct high profile, serious and senior advocacy in complex legal arguments before the Crown Court and Court of Appeal. This is not referenced as a measure of advocacy in the guidelines as is incorrect.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

The advocacy assessment should not be limited to trials and should take into account complex arguments before the court and the advocacy demonstrated during these hearings. There si too great a focus on trials.

Q13: Do you have any comments on the proposed modified entry arrangement?

Q14: Do you agree with the proposed approach to the assessment of competence?

Yes, it is based on trial advocacy which is incorrect and marginalizes other complex difficult advocacy. It is as difficult, if not more, to undertake a complex legal argument before a court as it is to undertake a trial.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

This scheme should not be called an 'advocacy' scheme as it is entirely a court trial scheme and is inherently flawed. This is such a significant flaw that I am considering, if it is introduced in challenging the scheme in judicial review as a potential breach of trade. Due to the nature of my work I do not conduct many Crown Court trials as the majority of my work is undertaken by a QC and the CPS/Farquarson guidelines make it extremely difficult for me to take time from my primary role to sit at trial for two months plus as Junior. However, I conduct high profile, serious and senior advocacy in complex legal arguments before the Crown Court and Court of Appeal. This is not referenced as a measure of advocacy in the guidelines as is incorrect.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not,

what changes should be made and why?

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Q18: Do you have any comments on the Scheme Rules?

This scheme should not be called an 'advocacy' scheme as it is entirely a court trial scheme and is inherently flawed. This is such a significant flaw that I am considering, if it is introduced in challenging the scheme in judicial review as a potential breach of trade. Due to the nature of my work I do not conduct many Crown Court trials as the majority of my work is undertaken by a QC and the CPS/Farquharson guidelines make it extremely difficult for me to take time from my primary role to sit at trial for two months plus as Junior. However, I conduct high profile, serious and senior advocacy in complex legal arguments before the Crown Court and Court of Appeal. This is not referenced as a measure of advocacy in the guidelines as is incorrect.

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

It should be focused on the phrase 'advocacy' and not on the current focus on trial advocacy, which is, after all, only a single element of advocacy.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

The scheme should absorb and incorporate specialist advocates in the manner referenced in this response.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

I consider that the scheme as currently defined and assessed is 'unreasonable' and only truly reflects those currently practicing outside of the CPS as specialist trial advocates. This prejudices against those of us who undertake complex, high level and high profile advocacy at level 4, but not at trial. We appear at hearings and courts that require organization of paperwork, knowledge of the law and technical presentation skills all around the country. However, this scheme virtually excludes us as we are unable to demonstrate or provide a Judicial reference of our ability at trial. The Judge would only be able to indicate that during one hearing they found us competent.

I consider this an attempt to marginalize and restrict my personal practice and will be prepared along with many others to challenge this accreditation in the courts if it continues in its present format.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

No. It prejudices against in-house advocates who undertake complex work but due to family arrangements are unable to undertake the long trials required of their work. This is a significant issue under the Equality Act 2010.

There are further issues with the scheme as well.

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

See previous answer

Q24: Are there any other equality issues that you think that the regulators ought to consider?

The entire stance of the scheme prejudices unfairly against those who do not work in trial advocacy permanently which is where a significant number of individuals with family and disability issues work due to the nature of the work undertaken in-house and the benefits to the disabled and elderly.

Geoffrey Pimm

I am a member of the Bar, called by Gray's Inn in 1954 (or thereabout), and I subscribe to the Bar Council. I have practised in the UK, Zambia, Kenya, and the Gilbert Islands (Kiribati). In the course of my career I appeared before Lord Goddard at the Old Bailey. I also prosecuted the first black riot in Bermuda. I am responding to the article by Griffin at Large published in "Grays News" number 19, to raise my concern that the Quality Assurance Scheme, if introduced, will harm the profession. As the Chief Insolvency Registrar of the High Court in London I heard more cases presented by counsel and solicitors over about 15 years than could be counted. The scheme, if pursued, will do harm to the public as well as to the profession. Geoffrey Pimm

Anonymous Responses

Anonymous 1

| |
|--|
| Name: |
| Organization: |
| Role: |
| Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the scheme? |
| <ul style="list-style-type: none">• The requirements will disproportionately affect part-time workers, especially parents who work part time. If an advocate has been practising for years, but only does a few trials a year but is competent on each occasion, it does seem unnecessary to have a large number of evaluations. There may be a practical difficulty for some groups to comply, so shutting such advocates out of the legal market. Why not be assessed once either in court or in a mock trial? If the courts are there to report lack of competence, then that should be the most cost-effective safeguard. |
| Q2: Are there any difficulties that arise from the revised proposals for the accreditation of level 2 advocates? |
| <ul style="list-style-type: none">• The same reply as Q1, in that the number of evaluations may not be realistic for some workers who are wholly competent however few cases they do a year. What also if someone is a common law lawyer who is competent in many areas. If this is too burdensome then quality advocates will just not sign up. That in itself must be contrary to the public interest as there will be fewer advocates. |
| Q3: Are there any practical issues that arise from client notification? |
| <ul style="list-style-type: none">• Many clients will just not understand, and they will start to doubt the quality of their advocate if they are only evaluated to a certain level. There are many occasions where issues of complexity will arise at all levels, unrelated to the seriousness of the charge. |
| Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1? |
| <ul style="list-style-type: none">• This seems entirely appropriate. We have much experience of youth work and it is not as complex as people lead others to believe. Yet complexities that arise in cases can arise anywhere at any level. We do feel that the overarching scheme is a do-gooders failed attempt at regulation. |
| Q5: Do you foresee any practical problems with a phased implementation? |

- **We see problems with the whole implementation, whether it is phased or otherwise. We believe the whole thing to be flawed.**

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

- **A case in the magistrates court can be more complicated than a murder case in the Bailey. We feel that this has been wholly ignored by those who are constructing this scheme. So yes, we do. Cases of complexity can be related to the finer detail, that is not clear at first glance, which no scheme can ever make provision for.**

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

- **We believe that there are too many levels in the first place. We feel that a scheme like this should not be rolled out in this multi-levelled way. We feel that there should be only magistrates and crown court evaluation in the first instance. Anything else is just too cumbersome at this stage, and unrealistic if it intends to enable all minority groups to demonstrate appropriate competence. What about the openly gay, black barrister who has few criminal cases under their belt because of prejudice in their district. Is competence alone not sufficient? The more evaluations required for each level (taking into account the offences) will cause great difficulties for some individuals.**

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

- **This really is so very cumbersome. Advocates may well get things wrong and potentially open themselves up to disciplinary action for not being able to properly allocate many cases. There are just too many levels, and the guidance is not going to remove the complexity when the overarching system is flawed.**

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

- **Currently advocates of many levels of experience are competent most of the time at most of the suggested levels. We therefore do feel some concern that there is yet further distinction being made, which is again overly complex. The truth is that until someone has fully digested the case they cannot say whether they are sufficiently competent. We wonder therefore how such distinctions will work when briefs are allocated so late in the day (usually the day before). It is the court system that causes this with warned lists and so on.**
- **We see a significant likelihood that there will be a lack of advocates the greater the restrictions.**

Q10: Are there any other types of hearings that you think should be specifically addressed

in the guidance? If so, which ones and how would you proposed they are dealt with?

- **We feel that the more guidance that needs to be given the stronger is the evidence that the proposed overarching system is too complicated in the first place. Can we not just have a simpler system in the first place? One that can easily be understood and policed? While a lot of work has gone into the scheme, we feel that it could be further simplified.**

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? if so, please provide as much detail as possible

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

- **We would suggest reducing the number of levels from four to two.**
- **We would also ask for some common sense being applied to the difficulties that common law lawyers who do not regularly practice crime will have in complying with the evaluation requirements. That is a large body of competent advocates, that seldom do crime, perhaps only appearing in court once or twice a year, because of their specialist knowledge in a field that touches on a criminal matter only occasionally, and the nature of a particular case.**
- **We believe that the proposed provisions are likely to discourage such talent from appearing in the criminal courts. The more burdensome the process and considerations, the less likely such people will be available. Further, perception over time may discourage such people from agreeing to do any criminal work whatsoever. That cannot be in the public interest. We feel that the whole focus has been on advocates that specialise in crime rather than the realities that many common-law lawyers that practise crime. It would be wrong to think that because someone practises every day in crime that they are going to be more competent than a common-law lawyer who seldom practises crime.**
- **The public interest is best served by ensuring that the largest number of competent advocates is available in the pool. Removing red tape is part of that process.**

Q13: Do you have any comments on the proposed modified entry arrangement?

- **We feel that trial evaluations may be difficult to obtain and would ask that mock trial evaluation be available. The modifications do not go far enough.**

Q14: Do you agree with the proposed approach to the assessment of competence?

- **No. There are some highly competent advocates that could take a case through all the courts but whom undertake only a few criminal cases a year because they are either common law lawyers or because they are part time lawyers.**
- **If we are to act in the public interest, ensuring that there is a large pool of talent, representative of society, it is so very important to ensure that even common law practitioners and part time people can pass through each stage.#**

- **The current proposals for assessment are too limited**

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

- **We feel that the public interest has been interpreted much more narrower than it ought to be. We feel that the review should look at the difficulties highly competent common-law lawyers will have in obtaining evaluations.**
- **So, for example, a Trusts law lawyer does civil cases mostly, but then is instructed in a criminal case of great complexity concerning Trusts, for which they are wholly competent, even if they have to remind themselves of the law and procedure. It cannot be in the public interest to make the evaluation process wholly reliant on evaluations in the criminal division.**
- **Very competent advocates who do only a few cases may be locked out of criminal law work in the future. That cannot be in the public interest.**

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

- **The handbook is trying to put forward in simple terms how a complex system works. It is difficult to see how it can be anything less than a lengthy guide**

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

Q18: Do you have any comments on the Scheme Rules?

- **We feel that the rules are overly complicated and run the risk of causing people to give up on a career that in part is in the criminal division. We would ask for a much more simple scheme than the one proposed, necessitating fewer rules.**

Q19: Do you agree with the proposed definition of 'criminal advocacy'? If not, what would you suggest as an alternative and why?

- **We feel that the definition will cause problems because it may cause difficulties to separate certain work (where someone is not accredited) from work where someone does not need to be accredited. We fear**

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

- **We would like to see greater opportunity for any competent person to do work. We do not feel that the pool should be artificially narrowed. Competence and specialisms need to be reconsidered. If we want a diverse bar we must ensure that entry is achievable.**

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

- **We feel that currently the failure to provide alternatives to courtroom advocacy evaluations will cause an insurmountable difficulty for minority groups, part-time workers, and common-law lawyers. The scheme risks creating a very**

narrow pool of advocates. That cannot be in the public interest.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIA will be mitigated by the measures outlined?

- **Reduce the number of levels. Alter the way that people can be evaluated, so that a single trial or mock trial can lead to a certificate of competence.**

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

- **We believe that this will hugely impact on equality. We have addressed this in our responses. However, in summary, many part time workers will find it difficult if not impossible to obtain sufficient evaluations.**
- **It would surely be fairer and increase diversity to have a fairer and simpler process of assessment, where an individual can attend a centre to run a single assessed trial and be assessed in it. Or be signed off as competent after one real trial, rather than have multi-evaluations.**
- **The head of the GMC spoke to the Bar about not needing to emulate the medical revalidation process. Little seems to have been taken on board. Advocacy is operating in such a different environment, without the NHS training framework and supervision. We therefore think the scheme as proposed does not have the infrastructure to provide fair and equitable opportunities to minorities who may be passed over by solicitors and clients, so decreasing the number of cases they can do to be evaluated.**
- **The limits of the criminal justice system has led the architects of the currently proposed scheme to think mostly in a narrow pre-determined frame. The scheme has been built within the limits of the current creaking structure. Too little has been done on finding other ways to evaluate practitioners, outside of the courtroom itself.**
- **Our greatest concern is that the number of evaluations and the time-frame will directly impact on such groups. This cannot be in the public interest.**

Q24: Are there any other equality issues that you think that the regulators ought to consider?

- **Equality comes around from a fair and equitable system of evaluation, and the provision of multiple ways outside of the courtroom to prove competence. We feel that this has been wholly ignored. We would want to see greater opportunities to be assessed outside of the courtroom: mock courts. We know it is expensive, but that is the cost of delivering diversity. It should not be discounted because of the cost. We should not be making do with the creaking criminal justice system, that can barely cope as it is with the daily diet of criminal cases. We should be being inventive about finding ways to enable all persons to be signed off in the simplest way.**
- **Also, the whole scheme is dependent on judges being reasonable and acting without prejudice. There are occasions when judges do not like an advocate. Some judges we know give certain counsel a harder time than others, due to we feel something personal, a grudge, or a dislike, a prejudice. This is not sufficiently built into the scheme. There remain people who are prejudiced and**

who discriminate. We feel that in relation to private school versus state education, that there is a prejudice toward people who speak with certain dialects. They sometimes get a harder time from judges. We do fear that this could creep into the evaluation process. Independent adjudication centres would overcome this to some degree.

Anonymous 2

Dear Sir or Madam,

A submission is a simple one, under any other observations and under the diversity sections:

We have been high quality advocates practising in the common law, including crime, for some years. We deliver a quality service by any measure, with a diverse membership of Chambers meeting the needs of diverse clients. We object to the new structure being imposed and we will not participate in it. We believe that it is inevitable to fail because there will be too few advocates willing to jump through so many proposed hoops. We consider this a step in the wrong direction. One that will affect the number of women and minorities from being in sufficient numbers at all levels, and one which will destroy the common law Bar as we know it. That cannot be right for justice.

We endorse and stand by the Criminal Bar's submission. We think that the scheme should be scrapped now.

Anonymous 3

****TO BE ADDED SHORTLY****

Response to QASA consultation 4
8 October 2012

Introduction

I write as a barrister in independent practice of 16 years call whose predominant practice is crime and I write knowing that what I write will be seen as, and indeed is to some extent) special pleading. I write as a specialist criminal practitioner (in the sense that my services are called upon because of my specialist knowledge and approach in specific areas within the general practice of crime) who sees the implementation of QASA as being one of a series of measures which will have the inevitable effect of driving people such as myself out of crime meaning a diminution of the standard of criminal advocacy and choice to the lay and professional clients. I should say that nothing I write means that I regard HCAs or in-house advocates as inherently incapable of conducting Crown Court advocacy or that I do not consider that the system may re-balance itself over a decade or so, but I do have genuine and evidence-based (though mostly anecdotal) concerns about the service offered to all lay clients of the criminal justice system by the current proposals which I regard as lowering the bar.

I will address my concerns in four parts:

1. My role as a specialist criminal barrister;
2. The general criticisms of QASA;
3. The discriminatory effects on current users of the CJS;
4. Specific problems including 4th consultation questions;
5. Conclusion

1. My role as a specialist criminal barrister

Most of my work over 16 years has been as a criminal practitioner (over 90%). Before I started studying law I was already aware of high end discussions of DNA identification techniques. I also have a background in physics and methodology of science at University. My interest and aptitudes always were, therefore, the forensic and technical aspects of evidence and over the years these have become my known specialities. By this I mean that not only do I get instructed on the basis of my basic abilities as an advocate, but also on my specific knowledge of scientific and technical issues affecting evidence in cases to the extent that I advise on other barrister's or lead advocates' cases where I am not instructed by the solicitor.

In terms of technical aptitudes I have they are as follows (more detail is on my website – all can be expanded on if people have further questions as to what my expertise consists of such that it is specialist and how I have applied it):

General

1. Scientific methodology – I am an expert on whether scientists have followed the correct scientific methodology. While this could be dealt with by an expert, I tend to evaluate it myself before I instruct an expert, and then only on the specific areas required. This is currently one of the most important areas of law as highlighted by the recent case of **R v T [2010] EWCA Crim 2439** and a general move towards an approach more modelled on the American one of **Daubert v. Merrell Dow Pharmaceuticals (92-102), 509 U.S. 579 (1993)**.
2. Statistics or dual methodologies – I am an expert on the application of statistics in science and how it is used and misused in English Courts and have had exchanges with Dr Ben Goldacre (Bad Science, The Guardian) and others interested in the misapplication of mathematical and scientific methods generally as well as in law.

Specifics

3. DNA – I am an expert on DNA issues and associated problems in methodologies and application of DNA identification techniques;
4. Computers – I am an expert on evidence from computers and how its presentation may be misleading to juries or Courts;
5. HOLMES and police forensic tools – I am an expert on the workings of HOLMES and other criminal justice forensic tools (such as questionnaire based medical/psychiatric/sentencing evaluations, etc);
6. Accounts – I am an expert on financial evidence and how its presentation may be misleading to juries or Courts including the use of so-called forensic accounts analysis.
7. Techniques – I have developed my own analytical tools (in part through my previous experience prior to the Bar) to analyse the following kinds of evidence (non-exhaustively):
 - a. Computer;
 - b. Financial;
 - c. Video;
 - d. Audio;
 - e. Email and electronic records (including from paper records).

All of the above have meant that my practice has been different to that of most barristers or Crown Court advocates in that I tended to do less cases of a more specialist nature. All of the above has also meant that I am successful as a Crown Court advocate barrister if success is defined by what I was taught in pupillage and Bar School was success – winning cases. Over my career I have won over 80% of my Crown Court cases where I was instructed to trial (winning being defined as not guilty on the main count or counts) including cases as a leading junior, serious violence, rape, indecent assault (including on children), fraud, money laundering, serious public disturbance cases, pornography, etc and this win rate is consistent over any period of my career. Of these, in the past 10 years, at least 50% of my acquittals have been the result of my technical or scientific knowledge or analysis (I am happy to give examples if asked including reported cases).

2. The general criticisms of QASA

There is an implicit assumption in everything I have written here which is that QASA is intended to produce a transparent, fair and comprehensible system of assessing all advocates acting in the criminal justice system of England and Wales such that all users of the Court system are best served by the best advocate that can be provided within the accepted financial constraints and pool of available advocates. Of course, this assumption could be wrong as it could be argued that QASA is simply a scheme to continue the devaluing of criminal advocacy for various reasons, the main one of which is to reduce the cost of the system, partly by making advocacy, and therefore properly trained, experienced and knowledgeable advocates, less important.

Leaving aside the numerous specific criticisms of QASA's approach in this document and elsewhere, the most basic concern can be put simply in one question – **how much research about actual advocacy and actual results has been made available or investigated in implementing QASA?**

A consistent criticism I have made of the court system or varying governments is the failure to legislate or regulate on the basis of evidence – a criticism I am not alone in making (cf Dr Ben Goldacre and others recent Cabinet Office commissioned paper on evidence based legislation - <http://www.cabinetoffice.gov.uk/resource-library/test-learn-adapt-developing-public-policy-randomised-controlled-trials>). Please note this is specifically about implementing RCTs to evaluate policies but the underlying principles apply to all policies – test, learn, and adapt). If there is going to be wholesale change in the criminal justice system such that it affects hundreds of thousands of victims, witnesses, defendants, etc then there should be an obligation to base that on a sound evidence gathering exercise under the guidance of appropriately qualified academic researchers including specialist statisticians. Obviously this is based on my belief, from the QASA literature that this has not been done, and instead the chosen governmental route of the past 15 years, the random consultation, has instead been used with no controls on qualities, representativeness, knowledge, objectivity or submissions (such as this one for example). I have attached as an example of the criticisms of a random consultation an exchange of emails with the Home Office about one they launched 56 years ago into statutory presumptions on warrants for bail (Appendix 4). I suggest that that could take place as follows:

1. Analysis of conviction rates from various studies of Crown Courts done over the past 40 years (there are at least four that I know of) with an analysis of reasons for variations in conviction rates by statistical methods such as double regression;

2. Analysis of representation of various offences by year over the past decade (should be easily obtainable from HM Courts Service/LSC as it will all be AGFS data as has been done in another context already by Professor Cheryl Thomas) and comparison where possible with results in cases;
3. Analysis of possible reasons for variation in conviction rates relating to representation by statistical methods such as double regression;
4. Anonymous surveys/polls of legal representative's users (victims, witnesses, defendants, police, etc) on quality and choice of representation on the basis of agreed facts;
5. Anonymous surveys/polls of legal representative's users (victims, witnesses, defendants, police, etc) on their actual representation;
6. Surveys/polls of the public on quality and choice of representation on the basis of agreed facts;
7. Sample Surveys/Test (based on Bar School MCTs) of actual knowledge in crown court advocates;
8. A survey of advocates (and maybe Crown Court Judges) on the qualities of successful advocates (see specific criticisms below). NB – there is currently research being conducted by academics on all aspects of criminal cases including what makes a good witness which are using surveys to evaluate competing and/or complementary methods in terms of their individual qualities (<https://www.surveymonkey.com/s/witnessevidencequestionnaire>) and statistical methods to analyse the results. The advocates survey could include the advocate's call, number of trials, most serious trial in a few categories (violence, sex, dishonesty, etc), results (easy for those accustomed to designing these questionnaires to correct for misreporting), etc so this data too could be analysed;
9. A proper and full comparison of training, experience and knowledge of law and advocacy between HCAs and independent barristers such that QASA grades are properly indicative of all the qualities of an advocate;
10. A genuine analysis of ability against frequency of cases (see below e.g. if one has successfully done a serious drugs importation case 4 years previously could that make you a worse advocate than someone who has done a 3g Cannabis PWITS 6 months ago).

3. The discriminatory effects on current users of the CJS

When I speak of discriminatory effects I should make it clear that, save for one matter, I am not talking of statutory discrimination as defined by the Equality Act 2010 or other statutes. I am talking about the following discriminatory effects on independent barristers in terms of quality assessment and fairly obtaining work:

- (1) The lack of any academically rigorous research and analysis of criminal advocacy and its effects, in particular with respect to quality standards;
- (2) The lack of any criterion of success (as defined above) being applied in the choice of advocate;
- (3) The reduction of work available to specialist barristers due to solicitors retaining work "inhouse";
- (4) The failure to give information or choice to lay clients about specialist barristers;

- (5) The difficulty of specialist/sole barristers offering economies of scale of larger chambers or firms of solicitors;
- (6) The inability of lay clients (on the whole) to complain effectively or even know what they could complaint about.

I will address these in turn.

(1) No Academic Research

This has been dealt with above.

(2) Success

When I started at the Bar the criterion I was told was the single most important was one's ability to win cases (or not to lose too many if more senior). Obviously there were other attributes but the main one, the one that meant lay and professional clients wanted, was to win their case. Obviously the harder the case, the more likely it was that one would lose, but on the whole clients understood this and measured accordingly. Solicitors in those days applied fairly brutal criteria to Counsel, despite it being generally a zero sum game (i.e. for every won case there had to be a lost case depending on how one counts multi-handers). Therefore it was a pretty reliable rule of thumb that the length someone survived the Bar was a measure of one's ability to win cases, or not to lose too many, expressed by the saw "if you keep losing, you won't eat". I have not met a junior HCA who understands that getting and keeping tenancy in most common law sets relied on proving one's ability to win cases (older ones do). I have met very few in house advocates who consider their win record to be of major importance to their chosen profession or their clients and this may have potential and actual knock on effects on how these cases are looked at by advocates.

In fact, I would say, that winning was such an explicit part of my training in pupillage and the Bar that I was expected to win a proportion of "unwinnable" cases, both by my peers and my solicitors. As a result there was another rule of thumb then that if a case went to trial two-thirds won (i.e. got an acquittal on the main count/s). This of course was self-selecting to an extent in that many cases did not go to trial having been advised on by Counsel, and figures from 2000 bear this out in that 58% of all cases resulted in guilty pleas meaning trials only happened in 42% of cases, of which therefore 28% of all cases resulted in acquittal on some or all charges.

The most recent figures appear to show a major shift. The study by Professor Cheryl Thomas (Are Juries Fair? 2010) of jury verdicts in 2007 indicated a conviction rate of 64% in jury trials on all charges (the guilty plea rate was roughly the same as previously at 59%). This appears to reverse the earlier rate of conviction in jury trials. This could be due to:

- a. differences in counting mechanisms or underlying evidence; and/or
- b. changes in the law, such as in the CJA 2003; and/or
- c. greater forensic evidence techniques; and/or
- d. less experienced and specifically trained advocates.

Anecdotally the first two reasons have had no impact on my conviction rate though arguably the latter has had an impact in terms of being prosecuted by

clearly inexperienced and inadequate in-house CPS advocates (sometimes in cases where it was impossible to conceive that they did not know that they did not understand how complex and serious the case was).

As far as I know there has been no study or reference to any studies which may give an indication, of the effect of opening up advocacy in the Crown Courts to non-independent barristers. Given the dangers involved in exchanging a proven system (whatever its shortcomings) on clients this is somewhat surprising, particularly given the other factors below, the clear differences in training between non-independent barristers and independent barristers (see Appendix 2 as submitted to the first QASA consultation) and the differences in incentives/penalties to the two groups. It is even more surprising that the people who have most to lose from not having an appropriate advocate, lay clients and victims, are given the least information, particularly given how vulnerable many of them can be.

- (3) The reduction of work available to specialist barristers due to solicitors retaining work “in-house”;

The progressive reduction of fees, particularly since Carter, has meant that solicitors have retained work in-house in order to retain the advocates’ fees. This followed a long period of a “phoney war” since the 90s when freelance HCAs were giving kick-backs of up to 40% to firms to get work which was denied to the Bar because of the Bar’s Code of Conduct.

Barristers, and in particular specialist barristers such as myself, find that there are very few cases, if any, however much a specialist barrister would know more about it than an in-house advocate could, that would be briefed out by many firms. As the financial legal squeeze gets greater this is likely to get worse. Yet there has been no study of the qualitative and quantitative (in terms of numbers of verdicts/pleas) effects of this on cases. Further there, has been no information to clients, actual or potential, or the public, about this or the inevitable effect – reduction in the general level of criminal advocacy.

It should be pointed out that there may be an unfair competition element of this discrimination in favour of solicitor’s firms in that barristers work in a referral profession, and have been trained and had all their experience as that. The effect is that the balance that existed before where one had side of the profession had exclusive access to the client, and the other to the courts has been disturbed but only on one side. Of course, much of that is due to the Bar’s professional bodies retaining those rules, but if there was to be a fair playing field the distribution of work from source could have been more fairly regulated, particularly given the effect on the lay client of denying specialist advice and advocacy.

- (4) The failure to give information or choice to lay clients about specialist barristers;

Much about this form of discrimination has been given above but supposedly the Law Society has specifically said that lay clients should be given a choice between an independent barrister and an in-house one. Anecdotally I would say this hardly ever happens, but there has been no study again of this. Nor has there been any study or survey of what the public would think of the move away from specialist criminal advocates as represented by the criminal bar, if given a few facts (such as the difference in training).

Lay clients (I include the police and victims in this) can also be substantially affected by the loss of the supervisory role of barristers as detached advocates whose primary duty is the lay client rather than their professional client, and very few, if any are told of this duty which protects them from incompetence or bad representation (both ways as of course the solicitor can dis-instruct Counsel who he considers is doing a bad job). One area where defendants are particularly ill-served is conflicts of interest, particular with interviews. No study I am aware of has been done of whether solicitors follow guidelines about acting as advocates in cases where a solicitor from the same firm has acted in interview. This is such an obviously difficult area that lay clients should be informed that the advice they have received in interview may be wrong (especially in a no comment interview), or the solicitor not acted as they should to protect the client’s interests (as stated by the Court of Appeal in trenchant terms in **R v Paris, Abdullahi and Miller (1993) 97 Cr.App.R. 99**). It does not take a wild leap of the imagination to believe that an independent advocate is far more likely to do this than an employee of the same firm, if that employee has thought of it in the first place. I am aware of

numerous examples of this happening, not least because I have met many HCAs and solicitors who believe that the interview is the most important part of the criminal process as they appear to believe that an unfavourable interview is determinative of the case in any event, whatever happens at trial.

A further example of the problems caused by not using independent barristers is that of firms tending to be tied to particular Courts and so not wanting to alienate the judges there. This is not fanciful as I have explicitly been warned about it and also been told (by staff in Courts) of the tendency of specific judges to pick on advocates or their firms if they feel they have been difficult in the past. Obviously this is almost impossible if a barrister is appearing different Courts all the time.

- (5) The difficulty of specialist/sole barristers offering economies of scale of larger chambers or firms of solicitors;

This is self-evident but nonetheless important in that while quality is always to be weighed against financial imperatives, the consequence of it swinging one way too much is potentially to deny justice. A perfect example of this is the HMCPSI's repeated judgments on the CPS's strategy being too geared towards financial savings at the expense of advocacy. This is also a perfect example of a monopoly provider of a service being able to ignore its constituents (victims, police, etc) even when explicitly criticised for its strategy in an analagous way to that suffered by lay defence clients. Of course, I have always argued that equality of arms between the prosecution and defence could be achieved by both sides' representatives being equally bad, but apart from the moral/justicial issues raised by this, the two certain consequences are that criminals who know the system will be able to take advantage of it and the number of occasions when uninformed victims and defendants are ill-served by the criminal justice system will increase.

Another example of the market being skewed by economies of scale are widespread practices of using size to get advantage such as offering cheaper rates for more junior advocates as a loss leader to get better cases for the more senior advocates, or doing deals which are effectively allowing solicitors to retain a proportion of the advocates' fees or other schemes which militate against sole practitioners.

One of the issues is that I am unaware of whether any study or survey has been done on the number of BME sole practitioners/small chambers and whether an equality impact assessment has been made of how it will affect them. I have not done such a study but anecdotally there appear to be a larger proportion of BME sole practitioners/small chambers than would be expected, and so a larger impact on BME chambers and barristers of these changes.

- (6) The inability of lay clients (on the whole) to complain effectively or even know what they could complaint about;

Again, this has been dealt with above but it is astonishing that it seems throughout this whole consultation exercise no-one has asked the public or the clients what they think. A few examples will assist.

- a) Police – anecdotally police officers complain about in- house CPS advocates making obvious mistakes on cases and not getting experienced Counsel to advise;

- b) Victims – In-house CPS advocates will keep sensitive cases which clearly should be briefed to experienced advocates – I am informed by my mole in rape prosecution that this is because they do not have the Bar culture of refusing to accept cases they are not competent to undertake though it is also affected by pressure of budgets.
- c) Defendants – no-one appears to understand that they are in fact customers of the advocates of the Criminal Justice and Legal Aid systems, or that many of them are very vulnerable. They rarely make any choice of representation (save for experienced criminals) and in my experience, rarely have the knowledge to be able to differentiate between a good and a bad advocate, though obviously the end result will give an indication.

4. Specific problems including 4th consultation questions;

As is indicated from above there are several issues I have with the whole exercise, not least because I can see that I may be forced out of criminal advocacy in favour of someone who could not produce the results I do because of the extreme limitations of the QASA process indicated above.

My particular concerns are:

1. Why does there appear to be no process whereby persons who have proved themselves in the recent past or over their career can have this as a factor in any (or at least the preliminary one) QASA assessment as to competence or grade (i.e. a questionnaire carrying weighting in the overall assessment)?
2. How can someone who has a proven track record but cannot get sufficient cases in a year at the appropriate grade because solicitors prefer to use less qualified and experienced in-house advocates be excluded from representing on cases?
3. How can someone who is a proven specialist advocate and therefore tends to get less cases in a year be excluded from any genuine advocacy assessment programme?
4. How can someone who is a sole practitioner get sufficient cases in a year at the grade they operate or can operate at given the constraints now in place?
5. If I am between grade three and four and cannot get enough cases to qualify for either or both does that mean I should not be able to practice in both thereafter? Or grade 2?
6. If a lay or professional client wishes to instruct me on the basis of an evaluation of my previous record and/or specialist status are they to be prevented from doing so?
7. If a lay or professional client wishes to instruct me privately on the basis of an evaluation of my previous record and/or specialist status are they to be prevented from doing so?
8. Why is the CAEF so limited (see next paragraphs)?

The CAEF

The CAEF is designed for non-advocates as far as I can see and appears not to be based on any rigorous academic research. Almost every question, in my opinion, is designed for someone operating at such a low level of advocacy they have to be measured in straightforward presentational or understanding terms rather than efficacy of advocacy. They are also almost all tests I would expect to have been taught and tested at Bar School as basic skills before they could commence a pupillage. Of course, it is an inherent problem with questionnaire or tick-list based assessment exercises that they tend to operate to the lowest common denominator but surely it is not supposed to eliminate the most important elements of the things being assessed. A few simple examples from Bar School and shortly afterwards may assist:

1. **Knowledge** - Bar School MCTs are a much more accurate way of finding out knowledge and ability about criminal practice and procedure than any tests I have seen for HCAs whose guidance and training is pitched at an incredibly low level, unsurprisingly given that it is a very short course (see Crimeline and CLT training for example). I have lots of examples of qualified HCAs who have made mistakes with no sanction that would have meant they would have been told their pupillages would not lead to tenancy. I also have lots of examples of HCAs whose knowledge of law (especially on procedure) was way below what was expected from Bar School.
2. **Clearly mapped the central issues in the case** - A basic of advocacy is to try to conceal your point (from your opponent) until it is most effective. Most judges do not like this and many would mark you down for it, even if you win (there are good reasons – prosecution witnesses interfering with witnesses/evidence is one of the most basic – again I can give examples). The CAEF appears to think this approach is bad advocacy which it is not (I have examples).
3. **Drafted clear Skeleton Argument** - A skeleton argument is not intended to give the other side all the ammunition they need to shoot it down. Hence you should always keep something back as a judge will always allow you to elucidate if it is on point.
4. **Made relevant and succinct submissions by reference to appropriate authority** – any successful advocate will tell you that there are occasions when you need to make irrelevant, rambling submissions (or cross-examination) for very good reasons (I have examples – lots of them). The judge may not like it but if it achieves the best result for your client then it is good advocacy.
5. **Responded to opponent's points** – the most basic thing that was taught to me at Bar School and by other advocates is you win by taking the agenda, even if you do not let anyone else know that you have done so until the end. Sometimes this means utterly ignoring the opponent's points to give greater emphasis to your points.
6. **Questions were efficient and effective** – I have no idea why this is Level 4 and not level 1. It should be pointed out that the basis of a theory of the case is to establish through evidence of several witnesses points one can make in a closing speech – often this involves trying to conceal

which questions and answer are relevant to one's closing speech and that the most effective way of doing this is to ask lots of irrelevant, seemingly relevant, questions around the only question relevant to you.

By the way an earlier reference to academic studies of good witnesses also is a reference to studies of questioning techniques and effectiveness, mainly of examination in chief, but also relevant to cross-examination. The techniques (the main ones are cognitive, phased, conversation management, free recall, question and answer) are evaluated using evidence based techniques. Could not this approach be used with academics to have an evidence based list of effective advocacy techniques?

7. **Appeals** – The CAEF takes no account of:
 - a. The possibility the judge thought you made a bad point but in fact it founds a successful appeal;
 - b. The possibility that you deliberately have a backhand strategy to create an appeal point which subsequently wins (as taught to me at Bar School and FRU long before I ever appeared as a criminal advocate – I would think it was Level 2 of advocacy training in my own scheme).
 - c. The possibility you have deliberately by using confusing submissions on various points tried to confuse the judge so he produces the wrong answer which you can appeal (e.g. Geoffrey Cox QC in the Hoogstraten case where the wrong charge was thrown out at half time leaving a conviction on a charge that was successfully appealed).
8. **Courage** – when I was at Bar School the first lecture we attended Michael Hill QC told us the single most important quality a successful advocate needed was courage – to almost universal disbelief. The longer I have practiced the more I have understood this. I have not met an HCA who really understood what this meant. It should be on the CAEF list.
9. **Flexibility** – One of the most basic tools of being a criminal advocate is flexibility. Many advocates liken it to being a boxer in that one has to be able to manufacture an/or take opportunities as soon as they present themselves (and also that one knows one is going to get hit even if one tries to avoid it).
10. **CAEF** - Why is the CAEF seemingly the only tool of assessment where many proven advocates will tell you that they have to argue against judges who often take against an advocate for that reason, or simply because they want (in an impartial judicial way) a defendant convicted? There should be alternatives and supplements – at least for certain kinds of proven advocates in terms of previous success.

QASA 4th consultation questions

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would

these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?

See above – there should be a weighting taking into account people’s actual experience and a longer time period or an alternative which permits testing or assessing based on experience and knowledge as the initial QASA assessment for experienced and proven advocates.

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

It is a basic requirement of an advocate in a Crown Court that they can conduct trials as otherwise they will have little or no idea what they need to do in interlocutory hearings (a few years ago they attempted to make it a requirement that the trial advocate attended the interlocutory hearings – it has always been my practice to try to do this as it means you have much better control of the case (I can give examples where it has made a crucial difference to the eventual outcome)).

A survey could establish what I notice which is that CPS advocates now rarely (never in my experience) accept a sensible plea at PCMH as they refuse to negotiate as many have no idea how to evaluate the prospects of success at trial meaning many cases go to trial that do not need to (meaning the end result is the same as the offer or worse for the CPS). I am amazed a system could exist where someone could be graded the same for not doing trials as for doing them purely on the basis they have not been trained properly or got the experience. Does the public know this? Or that the CPS accepted lower standards of prosecuting cases to save money (e.g. less convictions of criminals)?

Q3: Are there any practical issues that arise from client notification?

See above. There should be a clear regulation as to telling a client in the solicitor’s client care letter and in person about the differences in training and experience between types of advocate and the client’s entitlement to advocate of choice (within reason). The details should also include a short sentence about how to look up different types of advocates on the internet (e.g. by chambers and firm so they can compare properly).

Q4: Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?

Yes.

1. Many Youth Court cases, being ones that can be sentenced up to two years in a YOI are much more serious than low-level Crown Court cases, many of which there is no chance of a custodial sentence. Youths are also particularly vulnerable and many have learning difficulties/mental health problems as well. Any Youth Court crime that may mean a custodial sentence (which are restricted by law anyway) or involve vulnerable children should be dealt with by a higher level advocate.
2. Where cases have been given an assigned counsel certificate (grievously abused at present) they should be represented by Counsel of at least grade 2.

Q5: Do you foresee any practical problems with a phased implementation?

1. What is the model for assessment of the success or otherwise of a phase?
2. Is Phase 1 not a pilot for the full implementation?
3. If there are major problems with Phase 1, will implementation be paused or stopped pending resolution of those problems?

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

If one is an inexperienced or less trained advocate one would not know the level of complexity a case may assume. A perfect example is that of the HCA criticised by Michael Gledhill QC who had not obtained his client's previous convictions and relied on his client's instructions leading to his client's form coming in issue. The easiest way is the judge (or Court clerk) indicates the starting point using the AGFS table at PCMH and this is revisited at the end of the trial/proceedings unless the judge decides the advocate is incompetent.

Q7: Do you agree that the offences/hearings listed in the above table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

Given the starting point, and main indicator, is the nature of the offence it is surprising that the AGFS categories have not been used. However, there are a great deal more to cases than are included as factors including difficult clients, first time custodial, admissibility and evidential difficulties, etc. How are these to be applied? Also please see my CAEF section for the judge's role.

If QCs/leading juniors are to be included in the scheme (though it is difficult to see who is supposed to be judging them and how) then it is essential that the much abused system of juniors is evaluated properly so that juniors can conduct all aspects of the case if needed including interlocutory applications and the trial in an emergency. At present there is wholesale abuse of the system by HCAs who have refused to represent clients where the leader has been ill, and cannot adequately represent their clients, in some cases at any stage of proceedings. This is of course another example of a conflict of interest affecting the client's representation which he should be informed of in advance so he can make a proper choice about his advocates based on what they actually can do. I should also say it is amazing that no-one has surveyed this as it is a scandal (well-known but swept under carpet by all concerned) that there are juniors in serious cases who are not expected to do anything on a case, and in actuality do nothing.

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

Use the AGFS tables as a starting point – every advocate should understand those. The example is extremely unhelpful as tail-end Charlie still may have a difficult case whereas Number one may have an easy case to an experienced advocate (e.g.

simple evidential lacuna meaning successful half-time submission). It would be more helpful to have a series of factors which may move a case up or down.

There should not be different levels of advocates in the same case as even if tail-end Charlie has a simple case, almost certainly he will get a qualitatively similar sentence to number one if convicted.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

Provided the advocate is competent to act and can actually act – of course it is now the norm that the advocate at PCMH will not take responsibility for any decision on the case which means they are not competent to conduct the case. Judge's should be encouraged (as in the past) to force advocates to act and not be dummies in robes holding cases for other advocates, particularly where it compromises a client or the Court by having unnecessary hearings or trials.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

All hearings should addressed by the guidance as they all need competence at the level of understanding what may happen at trial (how else could they operate?). Disclosure hearings are very important to a case, as are PCMHs. As for the suggestion for Newton Hearings they must be conducted by a trial advocate at the right trial level as they are factual and so always in my experience involve live evidence, winning or losing a Newton is likely to take a case to a different threshold or custodial starting point if it has been asked for by a competent advocate as otherwise there is no point in risking losing credit. Again has anyone surveyed real advocates about this.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

See the rest of what I have written.

5. Conclusion

I realise that politically the criminal Bar is a dead duck as the agenda is to create a cheaper fused profession with rump of very specialist criminal advocates and QCs in chambers (see my briefing paper to an unnamed criminal QC from 2005 – Appendix 2). I also realise that QASA is part of this by pretending that someone with 20 hours and an HCA course could possibly have the equivalent advocacy training of someone with hundreds of hours (see my comparison of training and hours of advocacy from 2008/9 – Appendix 1).

The inevitable result of this is a criminal justice system which serves its principal clients, victims and defendants, worse –which all affected should be told of. Already, the single highest recorded cause of miscarriages of justice, failures to disclose relevant material as decided by the Crown, is a matter of course in the Crown Court due to untrained or uncaring Crown advocates routinely not disclosing anything (and I mean anything) and untrained or uncaring defence advocates not asking for anything or not insisting it be served if it is asked for. The inherent bias of the system against defendants (“they must be in the dock for some reason”), and the nature of the adversarial system, means even the most fair-minded of judges are hamstrung – and very few judges are ever going to openly say an advocate is incompetent in front of their client.

As I said at the beginning, this document may appear to be, and probably is, special pleading for me (and the criminal Bar) as a successful advocate in Crown Court trials at the top end of the range as I face the imminent demise of my criminal practice (I have diversified into employment). I would hope however that it could be regarded as something more than that in that it is meant to be a plea that any Quality Assurance system should at least attempt to preserve the best elements of pre-existing quality by having objective evidence-based measures of quality which include historical evidence when assessing quality. Especially for something as important as criminal advocacy where bad advocates may mean rape victims suffering more or innocent people spending years in prison or on a more prosaic level a young person getting a minor conviction which means they will not be able to follow their chosen profession. In other words, what may be just another appropriately QASA graded case to an advocate may be life-changing to the person at the centre of the case.

9 October 2012

Note: Owing to time pressures various references have been made without attributions (or with partial ones). I can expand on these if needs be and am more than willing to answer any questions from anyone on the points raised in this document (if they interest anyone). I would be grateful if this document may appear in public for some reason that it is not released without my agreement (for obvious reasons). Truth can cost.

Appendix 1

QA Advocacy Training-Experience comparison (2009)

| <u>Independent Bar</u> | <u>Solicitors/HcAs</u> |
|---|--|
| BVC – 80-100 hrs (min) Advocacy teaching and supervised exercises (1) | LPC – 7-12 Hrs Advocacy Teaching (2) |
| Pupillage – 1 st six no criminal advocacy but follow pupilmaster 2 nd six – 300 hrs min in Court (3) | Training Contract –No criminal advocacy 3 day advocacy course (4) |
| Average extra to become tenant/1 st Crown court trial – 300 hrs (5) | HCA – 20 hrs advocacy, 5 hrs mentored, 5 day training course (6) |
| Average Court hrs per year as tenant – 1000 (7) | HCA/In-house Counsel – unknown (8) |
| Average Court hrs before get 1 st complex trial (3wks+) – 5 yrs – 5000 hrs (9) | HCA/In-house Counsel – unknown (10) |
| Estimated average Court hrs before leading junior – 10 yrs – 10,000 hrs | HCA/In-house Counsel – unknown |
| Estimated average hrs before Silk – 20 yrs – 10,000 hrs | HCA/In-house Counsel – unknown |

Notes

- (1) This is variable but based on my, and colleagues', experience. There are also several assessments, both as exams and practicals. It is understood that estimated hours of advocacy experience and/or assessment do not mean that an advocate is good but this can also be measured in the more traditional terms of wins and losses and more particularly in the Bar context, unexpected wins (particularly as a defence advocate).
- (2) SRA Advocacy training comparison - <http://www.sra.org.uk/securedownload/file/103>. There is only one assessment.
- (3) This is variable but based on my, and colleagues', experience (based on being in Court 4 days a week for an average of 4 hrs a day with 4 weeks holiday – BTW that is less than I, or anyone I know, actually did) and is in all levels of Court. I would estimate that in pupillage trials will be about 25% of one's practice, Squatter/3rd six/1st year tenant it rises to about 50%, after 5 years it will be 80%+ and over 10 years 90%+. There is also a requirement of 48 hrs formal CPD within 3 years of call.
- (4) SRA Advocacy training comparison - <http://www.sra.org.uk/securedownload/file/103>. The mentoring element tends to be in police stations and Magistrates Courts.
- (5) This is variable but based on my, and colleagues', experience, as many pupils go on to a third six or squat before becoming a tenant and regular Crown Court work.
- (6) SRA guidance on HCAs - <http://www.sra.org.uk/sra/regulatory-framework/1554.article>
- (7) This is variable but based on my, and colleagues', experience (based on 42 weeks at 5 hrs a day for 5 days a week – this does not include preparation which though variable and subject to experience, I would estimate at approximately 100 -120 hrs per four week trial which is done outside hours spent in Court.

- (8) It is not known at any level how many hours on average an HCA is actually in Court. However, it should be borne in mind, particularly in the public sector that preparation hours are encouraged to be in working hours and within the Working Time Directive as both they and in-house Counsel are employees.
- (9) This is very variable including as to what would be called a complex trial. The 3 weeks plus is an indication that any trial over 3 weeks would be considered complex to some degree.

There are no figures on this and it is not known if any have been gathered or are planned to be gathered. However Her Majesty's Inspectorate of the CPS report [2009] stated "the increased use of in-house resources delivers financial savings for the CPS but there is a need to ensure that deployment practices are balanced and take account of broader issues, including quality and impact on other aspects of casework." (Summary

http://www.hmcp.si.gov.uk/documents/services/reports/EAW/ADV_thm_Jul09_ExecSum.pdf

Appendix 3

Note on Legal Aid and the Criminal Bar

These are a few of my minion-like thoughts (in a vague sort of order) on issues facing the criminal bar.

1. The Government has the power and the money and ultimately need not keep any promises.
2. The only thing the Government can be said to pay attention to is public opinion, or its reflection through the media.
3. The Government can be levered by certain groups or actions by the Bar, but these are a double-edged sword as they can affect the quality of the criminal justice system at the time and could make the Bar unpopular.
4. The Criminal Bar is generally unpopular with the general public being seen to be overpaid, under-worked and responsible for the freeing of otherwise guilty people (despite the obvious fact that the Criminal Bar is responsible for prosecuting as well as defending). This is partly because the Bar do not use the media as well as the government or a lobbying group.
5. The Criminal Bar has been naïve in the past in negotiating with Government e.g.
 - a. allowing the CPS to “double-track” preferred prosecution sets resulting in progressively reducing fees to the extent that at one point prosecutors could be receiving a third of the fee of the their defence opponents which in turn resulted in less senior prosecutors doing cases which in turn arguably lead to less convictions;
 - b. believing the DCA when it said last year in response to the VHCC strike that it would address 1-10 day graduated fees by May 2005 and apparently convincing the Bar’s representatives that they would do so;
 - c. not using the fact that the DCA does not have figures on fees and fees distribution as provided and used by Martin Chalkley when negotiating with the DCA – obviously this indicates they are not interested in actual balanced targeted reductions in the legal aid budget;
 - d. Not pushing and publicising the proposed criminal fraud insurance scheme for directors asap to cover the 1% of cases that cost 48% of the budget (though this needs to be costed fully for premiums – it could also be extended to cover

company and company-related prosecutions such as environmental pollution, etc). Martin Chalkley estimates that if these were taken out of the system then a 10% across the board increase in graduated fees could be done (not sure if this is all grad fee or 1-10 – I can ask him);

- e. Not pressing for technological solutions for long cases such as done by the commercial court about 5 years ago where a case listed for three years was reduced to one of six months by the simple expedient of the judge ordering all the documentary evidence and papers to be scanned (could only be done in the USA at the time) and available to all parties on computers in the court (meaning the Court (St Dunstan's I believe) had to be completely re-fitted) with the cost to be born by the loser. In criminal cases the DCA could do this – Lawrie West-Knights QC has been on about this for years though more in civil cases. (The technology is relatively easy and much cheaper now – a medium volume scanner 5-10,000 A4 pages a day costs about £5000). NB – the one case the public is outraged about the cost and unfairly blames defence barristers for (with the help of government spin) is the jubilee line case which cost £65m and which could have been managed by a variety of means much better so as to be much shorter and cheaper.
 - f. 90%+ cases are in the 1-10 day bracket that is the least remunerated for both prosecution and defence and are the case which are most likely to concern the general public and the government (being robberies, public violence, burglaries, low level drug dealing, etc);
 - g. The junior bar have taken a hammering in the past few years and are the ones who live on the 1-10 day cases. In 1996 a Times article estimated it costs £22,000 to get a person to the end of their second six and full practicing certificate which is a cost that has to be built in to the early years of practice (e.g. loan charges if you have no money) . As I remember it this is only for Bar School and pupillage + ordinary living expenses and does not include law degree expenses or student loans. It could be argued that the Government is deliberately discouraging the poorer members of society from the criminal Bar;
6. The Government is more likely to listen to Prosecution barristers (in the interests of addressing crime and convictions), barristers who represent the Government and public interest barristers (e.g. planning enquiries) as these are all areas where the Government is sensitive to public opinion;

7. The Criminal Bar (and in particular the junior Bar under 7 years call) faces a three fold threat from the Government:
 - a. Reduction in fees forcing barristers out of the independent Bar;
 - b. Solicitors increased advocacy and ability to control work (including e.g.
 - i. solicitors being forced to do progressively larger amounts of their own Magistrates Court advocacy as part of their contracts (not allowing pupils and junior tenants to cut their teeth)– I think it is 75% now but it may still be 50% (this is despite advocacy being only 6 hours on the LPC course (I am pretty sure of this and the progressive advocacy training of the pupillage and Chambers system not being available to solicitors for at least another 15 years by which time they may have the depth of experience of a set of Chambers));
 - ii. More and more solicitors taking higher rights (after only 20 hrs of advocacy in Court));
 - iii. More and more solicitors doing the junior role in cases with a QC where the person can be salaried or a solicitor advocate offering as much as a 40% kick-back on the fee payable);
 - iv. Solicitors poaching barristers earning less and less to be in house salaried barristers;
 - c. Quality Mark as a precursor to franchising/contracting and bulk contracting;
8. The aim is a “rump” of specialist criminal advocates and QCs (as in Australia or New Zealand) or very large bulk-contracted sets (i.e. a set amount for servicing a certain amount of cases by Chambers as has already happened to solicitors over the past 5-6 years). The aim is to have most barristers employed in a fused profession lead by solicitors which will be:
 - a. Much cheaper;
 - b. Much more predictable financially;
 - c. Much more conviction-friendly;.
9. The service to the public will be reduced as specialist advocates will be at a premium with less experienced advocates representing the bulk of people and not being independently responsible to the lay client;
10. The reduction of the publicly funded criminal bar will have an effect on the rest of the Bar in that it will be perceived by the public and Government to have less of a “public

interest” role and so less relevance and influence generally (though this is unquantifiable and may not be desired in any event by what is left of the Bar – the criminal Bar is the majority of the Bar I believe).

13 July 2005

Appendix 4

Emails on consultation about bail warrants

----- Forwarded message -----

From: **Wilkie Aidan OCJR JEU** <Aidan.Wilkie@cjs.gsi.gov.uk>

Date: Tue, Feb 27, 2007 at 10:39 AM

Subject: RE: Backed for Bail

To:

Thanks for your response. I do not want to get into a debate about the nature of policy development or the purpose of consultation. However I am happy to answer your points:

The broad policy area of defendant attendance and this specific piece of work do follow general policy development principles. This is overseen by robust governance arrangements.

You raised a question regarding who the CJS agencies were who raised the concerns - these have been fed in from Police forces and HMCS areas directly and via Local Criminal Justice Boards. Indeed, as the consultation document highlights, some CJS areas have recognised that backed for bail warrants cause a problem and sought to deal with it themselves. These assertions have been verified by analysis of area warrant management systems and interviews with front-line professionals. This is not to say that legislation is the correct option. Indeed it could be argued that this problem, if you accept there is one, can be dealt by a 'best practice' approach which, as the consultation document outlines, is something we are currently doing.

Defence views are regularly canvassed. Indeed, the Law Society and Criminal Law Solicitors Association are represented on the Defendant Attendance Steering Group, which oversees this programme of work.

Regarding your 'PS' point - Unfortunately this is not my policy area but I have contacted the relevant team and they inform me they have nothing further to add to their previous two letters to you. They advise me that the Magistrates Courts guide and Archbold mention maximum penalties and/or sentences available for particular offences including reference to which piece of legislation they come under.

Thank you again for your response and I can assure you all the points you have raised will be considered fully.

Kind regards

Aidan Wilkie

Defendant Attendance Team

Justice and Enforcement Unit

☎: 020 7035 8459

✉: Aidan.Wilkie@cjs.gsi.gov.uk

-----Original Message-----

From:

Sent: 19 February 2007 1:18 PM

To: 'Wilkie Aidan OCJR JEU'

Subject: RE: Backed for Bail

Sorry about the delay in replying. I have a few questions as I think you may have misunderstood my root concerns.

1. Being brought up on science and rationality (before I was a lawyer) I always thought that what one did, even in the societal area was have a hypothesis, test such hypothesis according to accepted scientific principles and then suggest remedies. Only then should you be consulting. Am I wrong in thinking you have not followed this time-worn formula?
2. The corollary of the above, if one accepts it is that if you have an idea (hypothesis), one then tries to ascertain if it is in fact true. In this case the hypothesis is that defendant's non-attendance is causing more than trivial problems to the Court. When one has the results of the research on this (expressed perhaps using Court days lost, agency time lost, money lost, etc) - then one can then consider the possible remedies.
3. The possible remedies could involve any number, but these amount to hypotheses as well which could be evaluated in terms of Court days served, agency time saved, etc PLUS all the reasonably envisageable knock-on effects of that remedy such as prison cells overfilled, police cells overfilled, Court days wasted on hearings wear a person provides a medical certificate (now normally done on a conditional bail condition of producing such certificate on the next occasion), etc. Obviously at this stage the costs of evaluating such a strategy would be done by those commissioning the research (and in fact should really have been done before).
4. Only at this stage should the remedies, if apparently justified by the research lead to the formulation of possible legislation which can then be consulted on.

5. I suspect none of the above stages have been followed.
6. When you say "of the major messages we have received from CJS agencies is that backed for bail warrants are a major blockage to improving defendant attendance at court " who are these people and has any quantitative (and/or qualitative) analysis of these messages been done?
7. When you say "defence views are crucial" does this mean defence views have not been canvassed since 2004 when you say you have been doing work on this?
8. When you say "defence views are crucial and ones which we cannot access as readily as..." does this mean you have not approached the Criminal Bar Association (verily easily accessed) or the LCSSA or the Law Society? They are all easily accessed - you phone them or email them.defence views have not been canvassed since 2004 when you say you have been doing work on this?

My basic view is your methodology is fundamentally suspect because it is policy lead and not CJS needs lead. This is a fundamental problem with criminal legislation over the past 10 years and it has repeatedly caused problems in the CJS. I see that another knee-jerk policy statement was made by Tony Blair yesterday about firearms offences which was again misleading and ignored the fact that there is in fact a minimum mandatory sentence for those under 18 of 3 years. I should say that due to a cock-up with the passing of legislation these provisions may not be lawful in any event - but that is because people are just writing "good ideas" down and getting them passed in Parliament because of a press release by the government rather than thinking them through. BTW in this regard I believe it may be possible to sentence a juvenile to 3 years minimum for a CS canister but I haven't checked this.

I would be very grateful for an answer to any of the above.

Anonymous 4

QASA Fourth Consultation: Response

I have read the Responses prepared by:

- The Bar Council;

- The Criminal Bar Association;
- The North Eastern Circuit.

I am a barrister in self employed practice and member of all the above organisations. I practise predominantly at the Criminal Bar doing prosecution and defence work in approximately equal proportions (I am accredited at Level 4 of the CPS quality assurance grading scheme). I also practise regularly in Coroner's courts doing inquest work; and in the Court of Protection.

I agree with, and endorse, the views expressed in the Consultation responses prepared by the above organisations.

I support the principle of quality assurance for all advocates appearing in higher court jurisdictions dealing with the more serious cases in the criminal calendar, all of which tend to have substantial public interest elements with important consequences for both the victims of (and witnesses to) crime, and the accused (and their families).

However, I fear the manner in which the proposed scheme will operate in practice is likely, overall, to be more problematic than beneficial, and may undermine rather than serve the public interest (for the reasons identified and expanded upon within the aforementioned responses).

Please do not hesitate to contact me should you require any further information, or clarification concerning any aspect of the above.

Anonymous 5

Response to the Fourth Consultation on the Quality Assurance Scheme for Advocates

1. My understanding of the Quality Assurance Scheme for Advocates, having read the fourth and final consultation, leads me to believe that the purported rationale behind the inception of such a scheme is to monitor the standards of all court advocates by way of a single regulatory mechanism.
2. Having considered the proposals at some length, I cannot concur with the provisions laid down by the scheme and I wholeheartedly back Michael Turner QC's response on behalf of the Criminal Bar Association. I believe the scheme to be ill-thought out, lacking in genuine transparency and motivated by an unidentified and unjustifiable need to further control members of the Bar who are already subject to high levels of regulation. Notwithstanding the many sub-arguments, including the vast cost and practical difficulties in running such a scheme, I disagree with the provisions of QASA for two main reasons:

Regulation

3. The Criminal Bar of England and Wales is an ancient and honourable profession which is revered the world over. For centuries, the word barrister has been synonymous with standards of excellence. I can think of no other profession which is so heavily self-regulated, and to such a high standard.
4. Barristers are, by their very nature, specialists in advocacy. Unlike other legal professionals who follow a general legal education, trainee barristers are focussed upon court oratory from the very start of their intended career. First, trainees spend a number of years qualifying via either a three or four year degree in substantive law, or a non-law degree

followed by the one-year Graduate Diploma in Law (the same route that trainee solicitors take). Trainee barristers must then complete the intensive, advocacy-heavy Bar Vocational Course or Bar Professional Training Course. During this course, students practice mock trials, cross-examination, evidence in chief, pleas in mitigation (etc.) over and over again, whilst being filmed and appraised by qualified barristers. A trainee barrister must then join an Inn of Court and complete a number of qualifying sessions in order to be called to the Bar. The now part-qualified barrister must obtain and complete pupillage. In the case of a criminal pupil, this can mean spending five days per week in the Crown Court for six months; doing nothing more than observing and learning the skills of advising clients, through to trial advocacy and sentence, from a highly experienced senior barrister. A pupil will then have six months' 'on their feet' under the care of their pupil supervisor, before the supervisor decides whether to confirm to the Bar Council that the pupil is competent to practise independently. Finally, a pupil must complete compulsory advocacy courses with their Inn of Court prior to qualification, just as a newly qualified practitioner must complete compulsory advocacy training courses following qualification. Ultimately, this now qualified barrister must secure a tenancy in chambers; in itself, highly competitive. This rigorous training costs many thousands of pounds and takes many hundreds of hours to complete. In my opinion, there can be no shortcut or substitute for such training; especially when one considers that criminal advocates are responsible for the conduct of cases involving peoples' liberty.

5. Once in practice, an independent criminal practitioner's performance and competence will be scrutinised by members of the judiciary, solicitors, clients, professional peers, members of the public, and, on occasion, the press. We are regulated by a strict Code of Conduct and by the Bar Standards Board. We complete a self-funded continuing professional development program annually. Simply put, if a criminal practitioner in independent practice was anything less than excellent, they would very quickly find themselves out of work. On the basis of everything thus so far asserted, I cannot comprehend why criminal barristers require any further regulation, and certainly not alongside those who receive what can only be inferior training in the key specialism that this scheme was devised in order to regulate: i.e. advocacy. Owing to the undeniable amount of self-regulation to which barristers are subject, I believe the QASA scheme to be duplicitous and completely unnecessary.

Plea-Only Advocates

6. The idea that POA's can effectively usurp the skills, experience and specialised knowledge of a qualified trial barrister to 'advise' at the most crucial part of a client's case is so ill-thought out, it is inconceivable to think that any criminal barrister has had any part in this scheme's inception, let alone supports it. Imagine a medically qualified doctor being replaced by a 'diagnosis only nurse'. Unlike a triage nurse in an A&E hospital setting, this nurse is responsible for diagnosing and treating the patient until such time as a fully qualified doctor is permitted to be drafted in; possibly months later and only a few days before the patient's surgery (such being recommended by the nurse and not the doctor). The nurse has not completed a medical degree or foundation years in a live hospital settings and possesses very little hands-on experience; however his or her services are cheap. Shortly before the patient's planned surgery, the suitably qualified and experienced doctor looks at the patient's notes and realises that particular tests have not been done and another form of treatment was more appropriate. By this time, however, many people have been involved and much cost has mounted. The doctor now has much work to do, effectively un-doing many months' of work, disappointing the patient and possibly having missed vital opportunities which should have been seized upon months ago.

7. A worse situation would be this: the diagnosis-only nurse believes that they can successfully treat the patient without the doctor's help. They recommend a particular course of medication which they are permitted to prescribe. Unfortunately, unlike success with patients (which can be measured via recovery rates), the CJS would have no way of measuring whether clients had been sent to prison unnecessarily via a recommended guilty plea, when a fully qualified and suitably experienced trial lawyer could have identified a suitable defence or recommended that more evidence was sought. For these reasons, I do not support POA's in any format.
8. At the Young Bar Conference this weekend, Mr. Sam Stein QC suggested that the present scheme, whereby advocates might be financially motivated to advise a trial when a plea would be best advised, is much more dangerous. He suggested that plea-only advocates, being involved only in a very limited and early part of the case, would have no such motivation; therefore the client was likely to receive the best advice on plea. This is controversial for two reasons:
 9. Firstly, Mr. Stein's very general and somewhat oblique suggestion that practitioners might go against the Code of Conduct and misadvise a client in order to obtain a pecuniary advantage is so deeply offensive and insulting to every hardworking member of our profession, that I cannot quite believe it was said. Such a premise has been averred yet again, with no direct or indirect evidence that barristers regularly overlook clients' needs in order to earn more money. At a time when the Criminal Bar has already weathered some truly horrendous adversity, it is perplexing that our credibility and integrity are being indirectly called into question, let alone used in this way to bring about a change that will, ironically take yet even more work away from us. Further, if this premise is to be believed, the converse hypothetical argument could also be true: a POA might decide to retain work via inappropriate advice in order to retain the client through PCMH and any subsequent sentence hearings. Frankly, neither of these arguments holds any water whatsoever. Practitioners are guided by their own personal moral compass and inherent integrity: in the absence of any evidence to the contrary, I do not believe that greed guides the vast majority of criminal practitioners when advising clients. If it did, they would not be criminal practitioners; arguably the poorest paid area of work!
 10. Secondly, plea only advocates will be ineffective as advisors, as they are not experienced in trial advocacy, so cannot possibly advise on what is likely to happen during a trial. It might be more effective (both in terms of cost and sheer practicality) to employ a psychic medium or group of laypeople to speculate as to what is in the clients' best interests, as it is to employ a wholly inadequate POA. Just because a person is qualified or experienced in a particular area of the law, it does not make them an expert in trial advocacy and advice.
11. Mr Stein QC advised the conference yesterday that there was 'no reason to believe that plea-only advocates would not work'. In my opinion, this line of reasoning is retrograde and deeply flawed. Such proceeds on the premise that there is an identified, justified, ostensible need for plea-only advocates, and the suggested scheme is a welcome solution. I would very much like to see the unadulterated objective evidence which has given rise to such a premise, as in my opinion, it does not exist. The only conceivable notion that I can imagine has given birth to such an ill-thought out and unsound idea is economy. Such will result in an inevitable dilution of standards, which in my opinion is completely unacceptable.

Summary

12. I do not support the QASA scheme in its present format, and resultantly, I cannot see a way in which I could positively engage with it. I fully support the Criminal Bar Association's view already submitted by Mr. Michael Turner QC.

Anonymous 6

I have watched your webinar and read through the proposed handbook on how this might affect those of us who conduct criminal advocacy in the Magistrates court including trials for local authorities or indeed what is known as 'non CPS prosecutions'. None of which falls into the definition proposed of what purports to be 'criminal advocacy'. However, the facts of the matter are, is that it is, [criminal advocacy] and if this is about competency standards then surely it should apply to **all** who conduct criminal advocacy of whatever nature. Local authority offences do attract significant potential fines and in some cases imprisonment.

I am at a loss, because as it stands many of my criminal cases would not come from either the police or SFO, but are nonetheless as important, not only to the local authority but to the defendant/accused who then faces receiving a criminal conviction.

QASA then clearly does **not** apply to all solicitors/REs as it stands and this needs to be made clear. It only applies to solicitors/REs who undertake criminal advocacy as accorded by the proposed definition of criminal advocacy. So the message is inconsistent and misleading. The message needs to be either it applies to all solicitors/REs or it doesn't. To leave out a huge sector of the profession (those of us who conduct criminal advocacy on behalf of Local Government or 'non CPS' bodies) does not give the public 'confidence' and misleads.

I am also concerned that this would further an attitude of there being a tier system or hierarchy. Most solicitors are already concerned about the Bars influence on 'assessment' and it is common knowledge those solicitors with 'higher rights' are seen as less than their counsel counterpart regardless of competency.

There has also been a long held attitude perceived by those in private practice that being a local authority lawyer somehow means you are 'not as good' as them... I do not and never have held this view. However, this scheme as it stands would perpetuate such views all round. How divisive is that! In my view it would seek to rate 'non CPS' lawyers as somehow being third rate because by the nature of their work they do not even qualify to enter the scheme whether they are considered competent or otherwise.

I think JAG/SRA needs to re-think this, as this may well be an unintended consequence of said scheme, and denies 'non CPS prosecutors' some form of accreditation for the work they do.

I for one, do not agree with this as it stands, and clearly can't even register as being seen as 'competent' at any level.
