BAR COUNCIL and CRIMINAL BAR ASSOCIATION

Joint Response

To Joint Advocacy Group Consultation Paper

on proposals for a quality assurance scheme for criminal advocates

Dated August 2010

Introduction

1. [The Bar Council …….etc

2. The Criminal Bar Association represents about 3,600 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts; ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

3. The Joint Advocacy Group issued its consultation paper on proposals for a quality assurance scheme for criminal advocates in August 2010. The consultation period ends on 12th November 2010.

4. The Paper invites responses to twenty seven questions concerning the proposal to

introduce a scheme of quality assurance for all criminal advocates from three professions; the Bar, solicitors and legal executives.

5. The questions relate to -

- The need for such a scheme
- The timetable for introduction
- The need for a unified approach to training
- The structure and operation of the scheme
- The costs and impact of such a scheme on equality and diversity
- How the scheme would operate in cases requiring two advocates

6. This paper follows a previous consultation paper issued in 2009 on the general principle of such a scheme and the content of advocacy standards.

7. The scheme as described is intended to build on the existing education framework for entry into advocacy to develop a rigorous assessment process to ensure that adequate standards are attained at the start of an advocate's career. Advocates would be assessed at one of four levels reflecting increasing ability and experience. There would be a mechanism for advocates to be re-assessed if they wished to move up from one level to the next. Periodic re-accreditation will ensure that those standards are maintained as the advocate's career progresses.

8. The paper explicitly recognises that market forces will not, and do not, prevent less than competent advocates being instructed. Indeed the paper recognises that market forces have combined to bring about precisely the opposite. In the words of the Consultation Paper: -

> *"The economic climate, both generally and in terms of legal aid funds, has created a concern that advocates may accept instructions outside their competence. It is arguable that the funding mechanisms adopted by the Legal Services Commission*

(LSC) and the rates of pay are failing to secure the quality of advocacy expected and a scheme of regulation of advocacy may bridge that market gap.

Such is the level of concern that members of the judiciary have responded to these matters through judicial pronouncements on advocacy competence and performance.

Each profession is regulated by its own regulator, and so a central aim of the scheme is the development of a QAA scheme which secures a consistent approach across the regulators. Clearly if different standards apply to each profession it is not a level playing field. Common advocacy standards have now been approved by the respective regulatory boards and committees and are attached at Annex 3 to the paper. This consultation considers how best to achieve and maintain those standards."

Executive Summary

9. The first three questions deal with whether there is a need for the system and whether it should be implemented as described and reviewed after three years. The CBA and Bar Council ["We"] agree that such a system is needed and largely agree with the scheme as outlined.

10. Questions four to seventeen deal with the introduction of the scheme, the structure and operation of the scheme after introduction, with four levels and proposals as to how an advocate may move up the levels as they gain experience. We again agree with the general approach described.

11. Questions eighteen and nineteen are concerned with a system of reporting and sanctions for perceived failure to perform to the standard required.

12. Whilst we can understand why it should follow that the implementation for a new system of quality assurance should bring with it a new system of sanctions, we believe that the proposals are unnecessary. Instead we suggest that the introduction of the scheme should serve as a reminder that there is already in place a system for reporting an advocate who appears to be incompetent or inadequate and we propose that this system should be robust enough to provide the necessary sanctions to ensure that quality is maintained.

13. Questions twenty and twenty one address the difficult issue of who should monitor and report upon the quality of advocacy in the criminal courts. After due deliberation, and not without the reservations we mention, we agree with the proposal that the judiciary should perform this role, and for two reasons.

14. Firstly, judges are the only people who experience, or are the audience for, advocacy on a daily basis; they are thus best placed to judge what is good and what is poor advocacy based upon their exposure to it. To put it another way, no one else has such a huge amount of experience upon which to base their judgements.

15. Secondly, judges are, by virtue of their professional training and background, uniquely well-equipped to judge what is good and what is poor advocacy.

16. Question twenty two deals with the cost of the proposal and the need for it to be robust but cost-effective. However as there are no detailed proposals at present as to how the scheme would operate nor an analysis of potential costs it is impossible to offer any detailed comments on this aspect of the scheme.

17. Question twenty three addresses the equality and diversity issues raised by the proposal. No impact assessment has been carried out and so again any comments on the potential for unfairness are limited.

18. Questions twenty four to twenty six ask what proposals respondents have to deal with how advocates should be qualified to be led or to lead in cases requiring a leading and a junior advocate.

19. We propose that because of the over-riding rationale that lies behind the need for two counsel in the most difficult and grave cases – the input required from the junior advocate, up to and including the ability to take over running the case, either in specific areas or in the absence of the leading advocate - the junior advocate in any two-advocate case must, by definition, share a similar level of qualification as the leading advocate.

20. Question twenty seven invites the respondents to mention any other issues that have not been mentioned in the consultation. The most pressing issue which is not addressed is whether cases are to be 'graded' in the same way as advocates, and if they are, how and when this should be done.

21. It appears to us that the system of quality assurance would be meaningless if it did not mean that those who were under-qualified would be unable to conduct a case that had been deemed beyond their competence. The consultation paper is silent upon the method by which the case would be assessed as one that should be conducted by an advocate of a certain level, at what stage this assessment would be made and whether all hearings in that case would have to be conducted by an advocate of the same level. We therefore can not comment upon this vital aspect of the scheme.

Responses to the Questions

Question 1: Do you agree that steps should be taken to address inadequate advocacy performance?

22. We agree with the view of the JAG that the changing face of the legal landscape coupled with competition and commercial imperatives are putting pressure on the sustained provision of good quality advocacy and that the economic climate, both generally and in terms of legal aid funds, has created a concern that advocates may accept instructions outside their competence. In particular the effect of the introduction of the Litigators' Graduated Fee Scheme, has produced an irresistible pressure upon solicitors to employ advocates and extract as much profit from the fee paid for the advocacy. It is the fact that this is possible which leads to the use of under-qualified advocates in cases beyond their experience or ability.

Question 2: Do you agree that the scheme should be implemented and operated as described?

23. We largely agree with the basic structure of the scheme, with the comments and reservations set out in the answers to specific questions.

Question 3: Do you agree that there should be a review of the final QAA scheme after three years of its operation?

24. We agree there should be such a review. It would be sensible and desirable for the PAC to issue annual reports on the progress of the scheme.

Question 4: Do you agree that there should be a unified approach to the training and assessment process of all advocates from Level 1 upwards? If so, how quickly do you think the regulators should move towards this goal?

25. We agree that there should be such a unified approach. It is obvious that in practical terms the introduction of a scheme such as this into a market which, if not exactly mature in terms of the extremely rapid growth in the numbers of HCAs and the use of employed advocates generally, is already in operation requires a fairly robust approach to the

certification process at the outset. We can therefore see how the proposal to map the Level 1 and Level 2 standards onto the existing educational pathways for each of the three branches of the professions is possibly the only practicable way to introduce the scheme.

26. The Consultation Paper states *"In due course it may be possible that the training and assessment process could be rationalised across the three branches so that there is a unified approach to supporting the attainment of Levels 1 and 2."*

27. However, we would submit that not only is it possible but essential that this is done as quickly as reasonably practicable. The scheme will have no credibility if it is possible for advocates to achieve the same level of accreditation by completely different and unequal routes. In our view, it is unarguable that the route to qualification at the Bar is more thorough, sophisticated and time-consuming than the – at present – equivalent procedure to acquire Higher Rights as a solicitor.

28. We would also submit that, assuming it is accepted that the method of training at the Bar that has evolved over many years of experience and which utilises the expertise of senior barristers is the minimum necessary to train an advocate properly, the rationalisation should ensure that standards are not reduced or diluted.

Question 5: Do you think advocates should complete a minimum period of practice at Level 1 before being able to move to Level 2?

Question 6: If so, what period would be most appropriate?

29. We do not consider it is necessary for advocates to remain at Level 1 for nine months before being eligible to apply to move to Level 2. The reasons for this are threefold.

30. Firstly, all applicants seeking to move to Level 2 would be required to pass either the New Practitioner's Programme ('NPP') or the Higher Rights of Audience Assessment ('HRA assessment'). The public would therefore be protected from inferior advocacy in the Crown Court because only those advocates who have reached the required level of expertise (regardless of how long they have been practising in the lower courts) would

pass this stage and therefore be eligible to carry out Crown Court advocacy. In our opinion, the public interest is better served by ensuring that the standard required to pass the NPP or HRA assessment is sufficiently high and that the two forms of assessment are comparable and robust.

31. Secondly, this would limit the earning potential of pupils and junior tenants at a time when fees are decreasing, debts are increasing, less work is available for pupils, fewer pupillages are available and access to the profession is under scrutiny. Pupillages in sets which primarily conduct publicly funded work are not well remunerated. The minimum pupillage award is £12,000 and it is not common for sets specialising in criminal law to offer higher awards than this. Furthermore, entrants to the bar typically carry significant debts and to delay their ability to repay any loans is likely to raise the barriers to entry to this profession and will affect the ability of the bar to attract applicants from diverse backgrounds.

32. The third point is a practical concern. This proposal would result in large numbers of pupils and junior tenants applying to their respective Inns in order to undertake the NPP at the same time. It is likely that over time, there would be a waiting list to undertake the NPP which would result in applicants having to wait more than 9 months before they are able to undertake advocacy in the Crown Court.

33. One of the central aims is to develop a scheme which is proportionate. In our view of the public interest would be protected by robust assessment through the NPP and HRA assessment and therefore the proposed measure would have a disproportionately negative affect on pupils, junior tenants and entry to the bar in general.

34. The solution we propose is that while advancement to level 2 does not depend on a minimum period, no advocates can remain at level 2 if they have not passed the NPP/HRA assessment within 3 years of call/admission.

Question 7: Do you agree that advocates applying for Levels 3 or 4 should be required to submit additional evidence of their competence? If so, what form do you think this evidence should take?

35. We agree that it might be helpful to require advocates applying for Levels 3 and 4 to submit written evidence of competence. We note that the Common Standards for Criminal Advocacy require an advocate to present clear and succinct written submissions. It might therefore assist if advocates were required to provide a specified number of anonymised examples of recent written work such as skeleton arguments and advices on evidence.

36. The PAC may also be assisted by references from two advocates who have appeared in the same case as the applicant (see also the response to question 12 below). However, in our view, references should not be provided by colleagues in chambers or by members of the same firm.

Question 8: Do you agree with the Levels approach to the QAA Scheme?

37. We agree that the 'levels approach' provides a useful benchmark against which to assess the competence of an advocate to appear in a particular case. We note that it will be for the PAC to decide on the precise definition of each Level and it our view that this is a matter of such central importance to the scheme that the definitions should be separately consulted upon at a future date.

38. In our view, it would be sensible to adopt a flexible approach to categorising cases at certain levels. It is inevitable that some cases will border two levels where, for example, the offence might appear very serious but, either due to the evidence or the role of the particular defendant, the case is not very complex. The converse may also be true. It is likely that the criminal bar will require guidance on the approach to be adopted by solicitors, clerks and barristers in such cases.

39. We do not agree that it is appropriate to include Queen's Counsel within the scheme as presently outlined. Queen's Counsel is an internationally recognised badge of excellence, not mere competence and it is achieved by a well-established, rigorous and

transparent scheme administered by the QC Appointments Commission. It is our view that the levels should reflect the various degrees of gravity and complexity in the cases which come before the Crown Court. Our view is that an additional Level 5, or 'Queen's Counsel' level would be appropriate. This is because there are some cases which require representation by an advocate who has reached the level of Queen's Counsel and this is therefore the minimum acceptable standard of representation in that case.

Question 9: Do you support the approach to accreditation at each level?

Levels 1 and 2

40. We broadly support the approach to accreditation at each level.

41. In relation to Levels 1 and 2 we agree that mapping accreditation onto the existing educational pathways is both sensible and straightforward. However, if the scheme is to command public confidence, then the training and assessment provided by each branch of the profession needs to be equally comprehensive and robust.

42. For example, in order to qualify as a barrister at Level 1, an advocate is required to complete the Bar Professional Training Course ("BPTC") which is a full time one year course or a part time two year course. In order for the BSB to approve a particular BPTC, advocacy must consist of 25% of the total assessment with each student being required to undertake a minimum of 12 advocacy exercises in front of a tutor, three of which must be assessed. Typically, examination in chief, cross-examination, opening and closing submissions are separate assessments. All staff teaching advocacy must be ATC accredited. The pupil barrister is thereafter required to complete six months pupillage during which time that barrister will be required to attend all possible hearings that they may experience themselves as practitioners: from a preliminary hearing to a dismissal application, from a Crown Court trial to an appeal against conviction and sentence. Both pupil and pupil supervisor are required to sign a checklist confirming the above. The first six months of pupillage are intended to provide intensive training in advocacy and the preparation of cases.

43. By way of contrast, the Legal Practice Course requires advocacy to be assessed once and the training contract does not require attendance at any hearings nor does it include compulsory advocacy training. ILEX fellows are required to take a six day course focusing on advocacy skills, the final day of which involves assessment in advocacy skills and the law of evidence.

44. In order to qualify at Level 2, barristers are required to undertake 9 hours of compulsory advocacy training through the NPP. The NPP has always included practical advocacy exercises followed by feedback, however we note that this course is being re-visited so that it contains a pass/fail assessment.

45. We acknowledge that the Solicitors' Higher Rights of Audience regulations were amended in 2010 so that the HRA assessment would test procedure, evidence and ethics and include a compulsory advocacy assessment. However, there is no mandatory training or experience requirement and therefore the assessment can be undertaken by someone who has just completed the Legal Practice Course.

46. We would welcome a more unified approach by all three regulators so as to ensure that the training and standard required of Level 1 and 2 advocates is not merely the same across the board but reaches the level of Bar training.

Levels 3 and 4

47. In respect of levels 3 and 4, we are broadly supportive of a scheme which is driven by judicial evaluation. We note that the structured form to be completed by the judge is to be developed by the PAC. We hope that the precise detail of the form will be consulted on in due course. However, should that not prove possible, it is suggested that in addition to providing training to all judges, judicial references must:

- Be evidence based;
- Provide reasons;

- Be preserved and collated so that they can be monitored for fairness, consistency and equality and diversity.

48. We would propose that when applying to move into level 3, the advocate should request up to nine judicial assessments over the course of a 12 month period and submit six of those judicial references to the PAC. Each reference should assess a substantive hearing (i.e. not one in which the advocate merely appeared). We considered whether notification of assessment should occur before or after the hearing, or whether there should be constant assessment. On balance, it was considered that the judge should receive prior notification that the advocate wishes to be assessed as the judge may not recall a level 2 case some weeks after it took place. Constant assessment was considered and rejected as overly burdensome.

49. When moving to level 4, we propose six assessments over the course of two years.

50. Our view is that re-accreditation at each level would require a smaller number of judicial references.

51. Finally, we suggest that in addition to the above, applicants should submit two references from advocates with whom the applicant has appeared in court in the same case (provided the reference is not provided from someone at the same chambers or firm).

52. However, we would urge a flexible approach. Provision should be made for those unable to submit the required number of application forms for good reason (e.g. illness or maternity leave). The scheme should also take account of the nature of practice at the Crown Court which can be unpredictable. A number of cracked cases or trials failing to come into the warned list can affect the number of substantive hearings that the advocate may have expected to conduct. Equally, an advocate may find themselves doing a small number of relatively lengthy trials which may limit the number of forms he or she may be able to submit during that period.

53. We agree that an appeal process is necessary. It is suggested that a separate appeal committee, independent from the PAC and convened on an ad hoc basis should decide appeals. Our view is that the PAC should ensure that appeals are decided upon within a

maximum of two months in order not to have a disproportionately negative impact upon an advocate's practice.

54. We hope that the important detail of the scheme will be further consulted upon. However, should that prove to be impracticable, we would invite the JAG to give serious consideration to piloting the scheme. It would be preferable for all concerned to have a well thought out scheme, rather than one which has been shoe-horned into operation with a view to resolving difficulties in three years time.

Question 10: Do you have any comments on the proposed arrangements to bring existing criminal advocates within the levels?

55. We agree that the proposed arrangements to bring existing criminal advocates within the levels are reasonable and proportionate.

56. However, we are strongly of the view that self-assessment should be evidence based. That evidence should be reviewed by the PAC who should then certify whether the advocate has self-assessed at the correct level. Examples of the required evidence could include examples of cases that the advocate has undertaken at that level (together with 'T' numbers so that a random selection of cases can be verified with the court), written submissions such as skeleton arguments (again with the relevant 'T' number so that the submission can be verified); as well as two references from advocates with whom the applicant has appeared in court (provided the references are not provided by colleagues in the same chambers or firm).

57. As for the accreditation and re-accreditation routes, an appeal mechanism will be required.

Question 11: Do you think that an advocate's 'level' should lapse after a period of time?

58. The answer to this difficult question lies in determining the length of period spent away from practice after which it is to be assumed that the advocate will require a form of re-training and assessment before they should be permitted to practise.

59. Our view is that it might be reasonable to require an advocate to undergo re-training and assessment after a period of five years away from practice.

60. However, it would not be reasonable to suggest that an advocate should have to be re-assessed after twelve months. Firstly, this is not a lengthy period of time and secondly in our view, any scheme which posed an obstacle for those returning from maternity or paternity leave, or long term illness, or even secondment, would not be proportionate and would not be in the public interest.

61. Assuming that the advocate would be required to practise at a level below that which they had previously practised, or even prevented from practising advocacy until they had been re-assessed, then inevitably, the economic impact of this proposal would make it harder for such advocates to return to the Bar. We believe that the Bar should be doing everything it can to foster diversity, to encourage retention at the Bar and in particular, to help working parents. To require re-accreditation after taking maternity or paternity leave might be viewed as a significant step backwards. Particularly, if an extra fee is required if assessment has to be by means other than by judicial evaluation.

62. A more proportionate solution might be to permit those who have been away from practice to return but to require those who have been absent for two years or more, to re-accredit within 18 months of their return to practice.

Question 12: Do you have any views on the proposed arrangements for movement between levels?

63. We support the proposal for movement between the levels as set out at paragraphs 65 to 69 of the consultation paper. It is sensible to permit the PAC to concentrate on assessing advocates at Levels 3 and 4 and permitting advocates to apply to move between the levels when they believe they have sufficient experience to do so is proportionate.

64. It is crucial to the success of the scheme that advocates are able to move up the grades when they are competent to do so and that the scheme does not become a bureaucratic road block. The CPS scheme was widely criticised on this count.

Question 13: Do you think that judges should be given the discretion to allow advocates to act up a level?

Question 14: If so, do you think the safeguards suggested are sufficient? Are there any other safeguards that should be considered?

65. We believe this is a sensible proposal which will minimise any disruption to the efficient dispatch of court business and, with proper safeguards, it is not one which will pose an unacceptable risk to the public.

66. Such an approach would be proper where, for example a case borders two levels, or where, the charge(s) might mean the case is considered a level 4 but the evidence in the case or the role of the particular defendant is relatively straightforward.

67. We suggest that the judge who is asked to exercise his or her discretion in this way, should ask the advocate for a short advice setting out why he or she is competent to undertake the case. The advocate will be subject to a duty, under the code of conduct not to undertake a case which is outside their competence. An application in writing to the judge would reinforce that duty.

68. We agree that it would be sensible to require judges to record their decision and to make it available to the PAC. Equally, the number of such applications made by any advocate in a twelve month period should be monitored. We do not agree there should be a pre-determined number of times an advocate should be permitted to make such an application as it is difficult to envisage all eventualities, particularly at this early stage. In our view, if there is to be a limit of sorts, it would be preferable that (say) more than three decisions to permit an advocate to 'act up' a level in any twelve month period would require cogent justification over and above the requirement for the advocate to demonstrate competence.

69. It is not clear in the consultation paper whether an application to 'act up' a level would be required in order that an advocate might be able to cover a bail application, mention, preliminary hearing, plea and case management hearing or disclosure hearing in a case classed above their level. Our view is that it should not be necessary to make such an application in order to cover straightforward hearings. Were it to be otherwise, we fear

that court business could be significantly disrupted and chambers may find it difficult to provide advocates at the required level to cover mentions and similar hearings, particularly for cases at the higher levels.

Q15: Do you agree with re-accreditation every five years?

70. Yes. We acknowledge that re-accreditation is necessary to maintain confidence in the accreditation system. A period of 5 years is sensible. It is important, however, that provision is made for those taking career breaks for reasons such as maternity or paternity leave.

Q16: Do you have any comments on the proposed approach to re-accreditation?

71. We strongly encourage the adoption of alternatives to judicial evaluation for re-accreditation at levels 1 and 2. We would welcome the opportunity to comment further on proposals that the PAC should decide on appropriate alternative methods of assessment, once those methods have been identified and costed. Is it anticipated that such alternative assessments would be administered by the PAC or within the professions' existing educational structures?

72. The proposal that re-accreditation for levels 3 and 4 should be by judicial evaluation raises practical issues as to the number of forms required. By way of example, if the period for evaluation is, say, six months, then an advocate working at level three and four cases may not complete more than one or two cases in that period. The process may then rely on one or two judicial evaluations with, consequently, a greater risk that an advocate is wrongly refused accreditation as a result of a single judicial evaluation which may not be typical of a wider sample of evaluations.

73. If judicial evaluation is to be adopted, clearly judges would be required to have appropriate training in advocacy assessment.

Q17: Do you agree that QCs should not be exempt from the re-accreditation process?

74. We have already voiced our objection to the incIusion of QCs in the proposed grading scheme at level 4. In principle, if it is correct that QCs are included in the QAA scheme as level 5, then we see the argument that they should undergo re-accreditation. However, we would make two comments.

75. Firstly, the process of 'accreditation' to become a QC is more detailed, stringent, thorough and robust than any possible process to become accredited as a Level 4 advocate. It therefore follows that any advocate who has achieved QC status must, by definition, have demonstrated a level of experience and ability far in excess of that presumably required to achieve Level 4. In other words, it is necessary to become a QC to have demonstrated excellence, not mere competence.

76. Secondly, if that is accepted, it might therefore be argued that for a QC to be re-accredited at Level 4 is pointless. Any QC whose professional ability had fallen so far as raise the question of whether they were fit to operate at Level 4 would be most unlikely to be able to continue to practice at all. If re-accreditation for QC is to mean anything, it must be more rigorous than level 4, even if it less than was required to achieve QC in the first place.

Question 18: Do you have any comments on the proposed "traffic lights" system?

77. The thinking behind the proposed traffic light system is easy to discern and the desire to make the scheme responsive to the performance of advocates in real situations and in real time is commendable but it does in some way exemplify the problems with judicial involvement that we identify below in answer to question 20. It is unclear exactly what constitutes *"... an advocate who appears not to be meeting the required advocacy standard in court..."* (Paragraph 75). It is assumed it will be by reference to the common standards for criminal advocacy set out in Annex 3 of the paper. So much of those standards are subjective and many of them (e.g. A2 1 and 2 B2 1 and 2) may depend upon material that is simply outside the judges' knowledge.

78. Furthermore, two warnings creates a further pressure on advocates, rather like the footballer who has received the yellow card spends the rest of the game trying to avoid getting his second and being sent off. Such a level of judicial control over the performance of advocates might produce the outcomes discussed below.

79. We are of the view that, provided the grading scheme is robustly designed and rigorously implemented, there is no need for such a traffic light system. We suggest that the need to introduce such a system should be assessed after the trial period of three years but not before.

Question 19: Do you think that non judicial references should be permitted by a. clients, b. solicitors/barristers or c. other professionals?

80. We do not consider that it should be open to other parties to make referrals about an advocate's performance as set out in Paragraph 77 of the paper. There are already existing steps that clients and instructing solicitors can take and to give such a power to unqualified persons such as clients would appear to run counter to what is to be the essence of the scheme, namely, that advocates are being judged by experts i.e. the judges. In these circumstances, to allow the advocate's professional performance to be judged by a non specialist sets at naught the expertise of the judge. We are wholly opposed to this.

Question 20: Do you support the proposed central role that the judiciary will play in the QAA scheme?

81. We accept that it seems natural, practical and sensible for the judges to be involved in any QAA scheme, most especially in the assessment of advocacy performance, since almost by definition advocacy is carried out in court before a judge. Moreover, since the vast majority of judges were themselves formerly advocates, they almost all have the necessary expertise to assess the performance of advocates, the more especially if they have received specific training in such assessment. Finally, since the judges are in court listening to the advocates in any event, it seems to make sense that they should be the persons to assess the quality of the advocate.

82. However, giving this role to judges does raise a number of issues that we believe will be of proper and serious concern to all practitioners and will have to be addressed by any proposed model scheme.

83. It is the very essence of our criminal justice system that advocates not only are independent but are seen to be independent of the judiciary. With the exception of applications for silk, counsel have never depended for their professional success upon the opinions of the judges before whom they appear. While counsel's overriding duty to the court means that she must always be utterly candid and honest within the bounds of privilege, her duty to her client means that she must set everybody else's interests below that of her client and if that means upsetting the judge because of the unpopularity of the cause or the issues that are being pursued in a trial then that unpopularity has to be confronted.

84. 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.

85. 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.

86. 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 clients instructions. These are real concerns that the scheme must address.

87. It was noted earlier that application for silk is an exception to the rule that an advocate's career does not depend on judicial approval. Applications for silk involve a high degree of judicial involvement as applicants have to seek references from up to twelve judges before whom they have appeared. The knowledge that the judge before whom one is appearing has the power to influence such an application can indeed have an impact on the way the advocate behaves in court.

88. Even so, this only applies to a relatively short period in an advocate's life and both before and after that period the advocate's performance is unconstrained by judicial input. We believe this is as it should be if advocates are to be truly independent. Great care must be taken to ensure that the central role that the judiciary will play in the QAA scheme does not, over the course of succeeding years, compromise the independence, integrity and effectiveness of the criminal bar and especially the criminal defence bar.

Question 21: Do you agree that only circuit judges and above who have successfully completed formal training the QAA system, should be part of the advocacy assessment process?

89. Subject to that the reservations that have been voiced above, we agree that only circuit judges and above who have successfully completed formal training in the QAA system should be part of the advocacy assessment process. It does not appear to be sensible to allow this power to be given to recorders who may themselves not even be at level 4 and are in any event still training to be judges themselves. The circuit judges who are so appointed should themselves have been formally assessed to ensure that they are widely and correctly perceived as being fair minded and free of bias or favouritism.

Question 22: Do you have any comments on the financial cost of developing a QAA scheme?

90. Given that the scheme has yet to be costed and no proposals have been published, it is difficult to comment other than to agree with the JAG view that: -

"a scheme which is expensive to operate and prohibitively costly for those being assessed will be in no-one's interests" but "any scheme must be sufficiently rigorous to be effective and carry confidence."

91. On balance we believe that the need for sufficient rigour outweighs the need to make the scheme as cheap as possible. There may be a point at which a QAA scheme which became too simple in order for it to be affordable became so ineffectual as to be not worth operating.

Question 23: We have identified some potentially positive and negative consequences for equality in putting in place the proposed QAA scheme. Are there any other positive benefits? Are there any other negative consequences for any group? How can we further promote equality and diversity? How can we mitigate any negative consequences?

92. Again, no equality impact assessment as been carried out and so it would be premature to try to judge the outcome. Of the three potential positive impacts set out in the consultation paper we would comment as follows.

- Common standards of advocacy and consistency of assessment across the three professions will assist in ensuring that there is a level playing field which will mean that no specific group is disadvantaged;
- Those returning to practice from parental leave or long term sickness could be subject to independent assessment before they are permitted to perform advocacy;
- Compulsory judicial training in assessment will address concerns over the evaluation role.

93. We believe that appropriate judicial training and monitoring of assessments is vital to ensure that the proposed level playing field is achieved. It should be relatively simple to devise some form of monitoring of assessments and assessors to ensure that any bias for or against any specific group is picked up and acted upon.

94. Given that more women than men take prolonged parental leave the Bar Council has some concerns that the cost of re-accreditation could unfairly impact upon women. It

should be possible to devise a way of costing the scheme that mitigates or even removes that disadvantage, for example by making re-accreditation in such circumstances either free or very inexpensive.

95. Of the two potential negative impacts set out in the consultation paper we would comment as follows.

- Advocates practising in a geographical location where there are only a small number of judges are therefore limited in the range of those who can assess them;
- The introduction of formal accreditation and re-accreditation throughout criminal practice will have a cost impact for advocates. Crime is an area where professional fees are already giving rise to economic concern and additional financial burdens will impact on some advocates more than others.

96. We recognise the concern that a geographical location could be such that the number of judges is so small that there is a disadvantageous limit in the range of those who can assess them, but in practice it is difficult to identify any location where the numbers are so small as to create a real practical problem.

97. The cost impact is of course unwelcome, but the Bar as never been afraid to spend money where it is necessary to do so to maintain the highest of standards. This is evidenced by the fact that members of chambers currently devote a considerable proportion of their income to funding pupillages, as well as devoting even more unpaid time to training. Further, senior and junior members of the criminal Bar also voluntarily contribute to the educational work of the CBA. It is regrettable that 'commercial imperatives' elsewhere should contribute yet more to the financial burdens on criminal advocates.

Q24: How should 'juniors' be dealt with under the scheme?

98. We consider that a useful starting point from which to consider the question of cases involving two counsel should be approached is the direction handed down on the 30th October 2007 by the Recorder of Leeds Peter Collier QC on this subject: -

"The starting point when considering the level of competence required of a led junior was to acknowledge that there was no automatic entitlement to either Queens Counsel or two counsel in any case including murder and that the level of junior instructed should be that he or she will be capable of dealing with the case should the order not be amended: (paragraph 28).

The junior instructed needs to be a senior and experienced jury advocate capable of taking over in absence of his leader should his leader be required in the Court of Appeal or in another court or is taken ill: (paragraph 29).

If the timetable of a trial has to be rearranged to cater for the absence of a leader because of the inability of the junior to "step up to the plate"" (paragraph 29), then in reality the junior is no more than a noting junior and the Representation Order should be amended accordingly."

99. At paragraph 31 the Recorder said that the Regulations clearly anticipated that a case which "cannot be adequately presented except by a Queens Counsel and junior counsel" is one in which the Queens Counsel and Junior are a team working together at the preparation and presentation of the case and does not permit what used to be called a "straw junior".

100. (Save for the exceptions below) any case sufficiently serious to require two advocates, will normally require a level 4 advocate as junior. There is no anomaly in a case requiring two "juniors", one no doubt of more experience than the other).

101. We have already commented upon the desirability of there being some flexibility in the scheme allowing advocates to act up a level provided the court was satisfied that it was in the interests of justice for that to happen. It would therefore be both appropriate and desirable that the same flexibility would allow an experienced level 3 advocate to act as a junior to a level 4 leader. We would however maintain our view that in a case requiring a QC as leading counsel, the junior should be a level 4 advocate. The court granting the certificate of representation should identify the level of advocate required at both leading and junior level.

Q25: What level should be achieved before advocates can be led? Should it be possible for the facts or circumstances of a particular case to alter this to enable someone not at the required level to be led?

102. Normally level 4. However there are bound to be cases where by reason of volume of material, or for some other reason, a case not of the utmost severity or complexity will require two counsel. In these circumstances a junior of level 4 might be an appropriate leading counsel to lead a junior of level 3. Given the absence of detail in the consultation paper it is difficult to be more specific, but the central purpose of the scheme – to ensure only advocates of appropriate experience are instructed in every case – must be kept well in mind. The determination should be by trial judge on application for amendment to the certificate.

Q26: What level should be achieved before advocates can lead?

103. Level 4 or QC. Determination as to the level of advocate or advocates required for particular cases should be by trial judge on written application for amendment to the certificate of representation. We have already explained why QCs should be exempt from the accreditation process

104. We repeat that due consideration must be given to the fact that a successful application for Silk requires the most arduous, complex and complete process of evaluation imaginable: the thoroughness of the procedure is reflected in the cost. The QAA system must recognise that this is a badge of excellence. It is, in our opinion, highly unlikely that any Level 3 applicant could successfully apply for Silk [see below], but perhaps it should formally be acknowledged that the achievement of Silk is an automatic qualification at Level 4.

105. We see no reason why the new system should not be seamlessly welded on to the QC system so that certificates for two counsel could specify, as they do now, whether Silk and junior [at the appropriate level] should be granted, or whether two junior counsel were adequate.

Q27: Are there any other issues that have not been mentioned in the consultation paper and which require further consideration at this stage?

106. The consultation paper fails to deal with the position of QCs. Silk is open to both sides of the profession, is the subject of intense annual competition, independent assessment assisted by rigorous independent peer and judicial references and detailed interview. All QCs have necessarily shown themselves to be of the very highest advocacy standards and legal competence. The most serious, grave and complex criminal cases will continue to call for the instruction of a QC. Silk could be regarded as a "level 5", and will inevitably meet all standard criteria at level 4. Indeed the achievement of level 4 QAA should be a necessary precursor to application for and appointment as QC.

107. In the introduction of the QAA scheme, all QCs should be regarded automatically to have met qualification as level 4 (and will effectively be a level 5).

108. We remain concerned that the use of self-assessment (as opposed to judicial or independent assessment) could bring the system of QAA rapidly into disrepute. As the JAG have observed, the changing face of the legal landscape coupled with competition and commercial imperatives are putting pressure on the sustained provision of good quality advocacy and the economic climate has created a concern that advocates may accept instructions outside their competence. If that is correct there is no reason to suppose that those same imperatives would lead to irresistible pressure to exaggerated self assessment. The success of any QAA scheme depends upon rigorous independent assessment involving third party judicial referees at all levels. This should be the cornerstone of the regime.

109. The scheme explains in detail how advocates would be graded at the various levels and makes it clear that attainment of a certain level would be necessary before an advocate would be permitted to conduct a case requiring an advocate at that level.

110. There is nothing in the consultation paper indicating how a case would be graded, when that would take place, by whom or by what criteria. Clearly it could not depend solely upon the offence charged; theft covers a huge range of offences, some grave some trivial.

The graduated fee scheme classifies cases but recognises that payment for the case should be base not just upon it's classification but also it's complexity, hence the uplift payments.

111. Until detailed proposals are made as to how the classification of cases is to take place so that an appropriately qualified advocate can be allocated to a case of appropriate complexity or seriousness we are unable to comment upon that part of the scheme.

Conclusion

112. The Bar has always contributed time and money to training advocates to meet the high standards for which the Bar in England and Wales is renowned. The Chambers' system has ensured that all members of the Bar who obtain tenancy are subject to a degree of oversight and control that, in the main, maintains those high standards.

113. It is therefore no accident that barristers trained by us are held in high regard not only in this country but in the various international courts and tribunals around the world where they practise. We therefore welcome any attempt to ensure that such standards of advocacy are maintained and safeguarded.

114. The referral system for briefing counsel, together with ring-fenced advocacy fees and the ban upon referral payments, means that solicitors have no reason to instruct as counsel anyone other than the best person who is available for the job. Any system of quality assurance for criminal advocates will only serve to reinforce a system whereby an advocate should be instructed on merit, and for no other reason.

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