QASA FOURTH CONSULTATION PAPER

INTERIM RESPONSE OF THE CRIMINAL BAR ASSOCIATION

July 2012.

This document is produced as the first, interim, response of the Criminal Bar Association to the fourth QASA Consultation Paper. The consultation closes on 9th October 2012, and the CBA will deliver a full, reasoned response in due course. This document represents 'work in progress' and has been prepared in order to provide a framework for the discussions that will follow during the consultation period, in a way that is intended to assist other stakeholders. It should not be taken as representing the CBA's final views, which will be informed by those discussions.

1. The Criminal Bar Association represents every barrister appearing in the criminal courts throughout 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. Their 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.

2. The CBA welcomes the principle of a Quality Assurance Scheme for Advocates (QASA). The objectives of such a scheme are set out in section 1 of the Legal Services Act 2007. In short, the scheme is designed 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. That is not just those accused of crime, but the wider public also, whose interest is in seeing criminal cases properly prosecuted. It is our commitment to these objectives that underpins our position with regard to QASA, and informs our submissions in response to the consultation.

3. The CBA has consistently said that, if the QASA scheme is to achieve these objectives, it must be founded upon the following core principles:

    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. 'Acting up' to be strictly and objectively controlled;

    5) Robust policing of the scheme – on a day to day basis by the judiciary – but overseen by the regulators applying a common code of standards and professional ethics;

    6) Recognition of the special position of QCs and Treasury Counsel.

    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. Such a scheme would not drive up standards, but, on the contrary, would drive them down whilst providing a fig-leaf of respectability to 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.

4. It is with these core principles firmly in mind that we offer the following observations upon the fourth QASA consultation paper (hereafter, "CP/4"). Unless otherwise stated, references to paragraph numbers are references to paragraphs in CP/4.

A. OVERVIEW.

5. In para. 2.2, the Joint Advocacy Group (JAG) recognises that "The changing legal landscape coupled with competition and commercial imperatives are putting pressure on the provision of good quality advocacy." This pressure has been created by the government's repeated cuts in fees for both the advocacy and litigation elements of publicly-funded criminal defence work, and in CPS fees scales. Proposals to consult on putting criminal defence work (litigation and advocacy combined – so called 'one case, one fee, or OCOF) out to competitive tender will only increase that pressure.

6. So far as the government is concerned, it is imperative that in such a climate, where the downward pressure on expenditure on professional fees is expected to continue, if not to accelerate, the quality of the services provided is not compromised to a degree that is thought to be unacceptable. The CBA has long been in the forefront of efforts to drive

up advocacy standards through its education programme, and welcomes any measure which has that as its aim. At the same time, the CBA is concerned that a weak, poorly-designed and badly-policed QASA scheme will have precisely the opposite effect, and will not only pave the way for cheap, bad advocates, but, worse, will con the public, by providing those bad advocates with a cloak of respectability beyond that which their skills and experience warrant. That cannot be permitted to happen, and the CBA is determined that it will not happen. The government should take heed, mindful of ministerial responsibilities enshrined in the Access to Justice Act 1999, placing the Lord Chancellor under an express duty to have regard to the need to ensure that there is a sufficient supply of competent providers when setting remuneration rates (section 25(3)).

7. Before turning to the detail of the scheme as set out in CP/4, and measuring its proposals by the yardstick of the core principles we have identified, we should first observe that CP/4 seems to regard much of the scheme as settled, or 'embedded': see para. 1.4. The CBA does not, and cannot, so regard a number of such matters. These will be discussed below. We also remind ourselves that this is only an interim response, not the final response, and our purpose in providing this document is not to set out our detailed, concluded, position with regard to each of the twenty-four questions asked, but to provide a general overview, and a framework for discussion, pending final submissions. We have, therefore concentrated in this document on those proposals in CP/4 which appear to most obviously conflict with the core principles we have identified.

B. ACCREDITATION OF LEVEL 2 ADVOCATES/"Plea Only Advocates".

8. 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 the CBA has concerns that the breadth of complexity of work in the Crown Court, the skills required and the responsibility borne by the advocates who undertake it, is such as to

lead us to question whether all Crown Court work can be 'shoehorned' into but three levels, 2, 3 and 4. 'Three sizes fits all' may not be the right approach. This point is developed below, but assuming, however, for present purposes, that the final scheme contains but four levels, three of which cover all Crown Court work (the special, and difficult, position of Youth Court work is discussed below) the core issue of 'Plea Only Advocates (POAs) raised in paras. 3.9 – 3.17, and returned to at paras. 4.25, 4.26, is immediately confronted. This is a critical issue.

9. The CBA cannot accept the principle of 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.

10. The CBA maintains the view that either you are competent to appear as an advocate at the level for which you are accredited, or you are not, and if not, you should not be doing the job. It is as simple as that. The Client Notification proposals in paras. 3.18 and 3.19 expose the idea for the nonsense it is. The CBA could not countenance engagement with a QASA scheme which included POAs.

11. Whilst we reject outright the idea of POAs as such, the CBA accepts that there is scope for having, within the scheme, a properly structured framework for permitting an advocate, on application to the court, to accept instructions in a case beyond his/her level of accreditation – 'acting up': see below, where it is suggested that an advocate could, in

certain circumstances, apply to the court for leave to 'act up' one level. The circumstances in which such applications might be made would need to be carefully defined so as to prevent abuse.

12. 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 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 organised by Assessment Organisations (AOs) but these cannot be an alternative route to full accreditation at any level in the Crown Court.

13. **Youth Court (YC) work**. 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. The suggestion in paras 3.20, 3.21 is that all YC work be downgraded to level 1, which 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. The issue thus requires further careful consideration, and the CBA's submissions will be informed by those of the Young Barristers' Committee (YBC), whose members are most directly affected.

14. **Re-accreditation**. This is only touched upon in CP/4 itself with regard to level 2 advocates, and non-trial advocates: paras. 3.14 – 3.16, but is dealt with more fully in the Scheme Handbook, Annex B. Our detailed submissions about this Annex will follow, but we would observe only this at this stage. It is our view that there is no substitute for experience of actual trials, but further, that experience is gained and consolidated only over time. Accordingly, we will be submitting that there should be a more structured timescale for progression through the higher levels of accreditation, to overlay the requirement that a certain number of trials must form the basis of assessment. We are considering whether the time period for which an advocate ought to be required to remain within

one level before upward progression should be measured in years, and if so, how many years.

15. **Phased implementation**. We are very concerned about the proposed speed of implementation. The scheme is not to be piloted – there is no provision for any meaningful assessment/revision of implementation in the phase 1 areas before roll out in phases 2 and 3 – the timescales are too short.

C. ALLOCATION of CASES TO LEVELS.

16. This is dealt with in paras. 4.4 – 4.33 in CP/4. 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, and 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 offers nothing by way of reassurance and protection to the public, and becomes a fig-leaf of respectability for low standards. The CBA will, in its final response, bring forward detailed proposals that will, we believe, strike the right balance between these positions. What is offered here, in this interim response, is a necessarily brief critique of the proposals in the paper, and a broad framework for discussion – a discussion that the CBA invites with other stakeholders – of how a comprehensive structure of allocation principles might be designed.

17. It is one of the core principles we outlined in para. 3(4) 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. 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, as to make it utterly worthless as a guarantee of standards of

quality. This method of allocation is thus wholly unacceptable to the CBA. It may be difficult to formulate sufficiently clear and yet simple allocation criteria, but that is no reason for not trying. We believe the task is by no means impossible, and can be achieved; though whether 'three sizes' to fit all Crown Court cases is enough, we rather doubt. That is not to say that there is no scope for flexibility/discretion in the scheme. We have already made reference to one example – acting up one level, on application to the court. 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 to move a particular case down, rather than the other way round, or, worse, making classification a complete free-for-all.

18. This is 'acting up'. It would give the power to the court, on written application, to downgrade a particular case, for a particular defendant, by (we would suggest) one level, to allow the advocate to conduct the case. So, a 'tail-ender' in an otherwise serious case, or a defendant in a serious case where the issue is straightforward, may make such an application. If the defendant certifies that he has been advised of his right to an independent advocate of the requisite grade (i.e. one other than an in-house advocate employed by his litigator) and consents to the advocate 'acting up', the judge may, if satisfied, grant the application. We think that the defendant 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 the defendant 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).

19. Erring on the side of allocating cases of a given category to the higher of possible levels, but with a 'top down' discretion to reclassify one level down would, we think, offer sufficient flexibility to avoid the problem of advocates not being able to cut their teeth on more serious cases, whilst offering the necessary protection to the public, and giving sufficient

weight to client choice. We would not favour a discretion in the court to re-classify a case up a level (or more than one level) if, in the opinion of the judge, the case had 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. It is not necessary, in order to deal with such a rare case, to give the power to the judge to effectively 'sack' an advocate. So long as the regulatory code for the advocate requires him or her not to take a case beyond his/her competence, and the judge is not afraid to remind the advocate of that fact, that will suffice.

20. 'Three sizes' of Crown Court case? We do not think that it is possible to group together all of the many and varied cases that are tried in the Crown Court into three levels. If the aim is to raise standards, 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. If this 'hard case' is not to be dealt with by a discretion to upgrade (which we do not favour) it is suggested that criteria other than the offence code need to be built in to the allocation criteria. So, 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 level 4 (assuming that there are only four levels):

a. the need to cross-examine a child witness under (say) 10 years, to make a case level 4, aged 11 – 15, up one level;
b. the need to cross-examine a witness of any age through an intermediary – to level 4;
c. any case in which a life sentence would ordinarily follow on conviction (the 'two-strikes' rule being re-introduced) to level 4;
d. any case in which the particular defendant is charged with a 'lifestyle offence' under s.75, POCA, to be at least level 3, unless the defendant plainly has no assets;
e. any offence prosecuted by the Serious Fraud Office, to be level 4;

It may be that other criteria/proxies for complexity can be identified, or that the scheme has to have more than four levels. The CBA's final submission will provide a framework for allocation which meets the overarching objectives of the scheme.

21. **Non-trial Hearings** – paras. 4.25, 4.26. 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 Funding Order. That, allied to the robust exercise of powers of judicial oversight – the right of the judge to insist that the IA attends the main hearing (the trial, the plea) and the sentence hearing (subject always to the court's power to permit 'acting up' one level) should provide the necessary assurance to the public that the defendant (and the prosecution – the scheme will apply to prosecutors too) is properly represented at all times.

22. **Newton Hearings** – para. 4.27. We do not agree that there are categories of Newton Hearings that can be aligned with non-trial hearings, and conducted by any advocate with Crown Court rights. Subject to acting up, Newton Hearings are trials, and should be conducted by the IA, or another advocate of the same grade.

23. **Leader/Junior** – para. 4.28 We repeat the point made above. Where the two-counsel certificate provides for a leading counsel and a junior counsel, except where the junior is a noter, the junior should be no more than one grade below the leader. 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.

24. **Changes to complexity** – paras. 4.30 and 4.31. If our submissions about erring on the side of over-classifying are adopted, we think that the circumstances in which a case becomes more complex as it develops will be rare. We think that the advocates professional obligation not to take on (or, in this case, continue in) a case beyond his or her competence, allied to the judge's power to make observations, will suffice to deal with to the few cases that will arise.

25. **Client Choice** – para. 4.33. 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.

26. **The accreditation of silks** – paras. 4.34 - 4.40. 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. Whilst we acknowledge that there is an argument that silks should not be excluded altogether, and in perpetuity, we are of the view that the hallmark of quality the 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.

D. COMPETENCES AND REGULATORY FRAMEWORKS

27. It is, as we have observed, 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 a serious concern, and one which will require to be addressed as the consultation progresses, as will the formulation of a common code of sanctions.

E. CONCLUSION.

28. The CBA has serious concerns about the scheme as presently formulated; concerns that will need to be addressed if the scheme is to actually deliver a real, credible, assurance of quality in advocacy standards. A scheme that does deliver is to be welcomed, and the CBA is committed to playing its part, over the coming months, in shaping such a scheme. If the finished product is truly fit for purpose, we will embrace it warmly, but we will not lend our endorsement to a scheme which 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. We engage in the consultation process in good faith, determined to succeed in delivering a QASA scheme that works.

Max Hill QC, Chairman

Michael Turner QC, Vice-Chairman

Ian West, Committee member and N.E. Circuit representative

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