QUALITY ASSURANCE SCHEME for ADVOCATES

FOURTH CONSULTATION PAPER

RESPONSE OF THE CRIMINAL BAR ASSOCIATION

October 2012

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.28[1]. This section both 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;

[1] Sections 1 and 28 are set out in full in Appendix 1.

- 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.[2] 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

[2] Para. 603(a).

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.[3] 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."[4]

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. <u>Specialist advocacy services set them apart</u>"

[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

[3] 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

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

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 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).[5]

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 courts[6] .

[5] Attached, Appendix 2

[6] 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

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 case[7] when asked about the failure to appoint silks in serious cases. He stated that high 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:

[7] [NCN: [2012] EWCA Crim 2]

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,[8] 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

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

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 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.

Trial Opportunities

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, it 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, Chairman

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