Consultation on Preserving and Enhancing the Quality of Criminal Advocacy

Response of the Criminal Bar Association

Any questions in relation to this response should be referred to either:

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The Criminal Bar Association

1. This is the response of the Criminal Bar Association (the "CBA") to the Consultation on the Preserving and Enhancing the Quality of Criminal Advocacy. The CBA represents the views and interests of practicing members of the criminal Bar in England and Wales.

2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultations undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

3. The CBA is the largest specialist Bar association, with around 4,000 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The 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 all guarantee the delivery of

justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

Overview

4. This is a precious moment, when all those with an interest in restoring the reputation of criminal justice in England & Wales are aligned in their ambitions: the judiciary, the Ministry of Justice, and the lawyers all want to see positive and durable reforms, and they are within reach. This moment must not be wasted.

5. The availability of independent advocates of the highest quality to defend and prosecute criminal cases is the key to a fair and efficient criminal justice system. Measures that support them are to be welcomed; fetters on their independence and loss of skills are to be deprecated. The CBA believes that the proposals are an important step on the road to maintaining the former and preventing the latter.

6. The critical elements for reform are:

    a. The introduction of a simple and powerful online platform for all cases across the system, from police station prosecutor to solicitor's office to advocate to defendant to Court and to prison: the Digital Case System (DCS) that is now being introduced, to be followed by the "common platform".
    b. A more sensible procedure for managing cases, Better Case Management, maximizing the benefits of the DCS.
    c. A panel scheme for defence advocates assessed as fit to take on legal aid work at different levels of seriousness.
    d. A revised fee scheme that uses the same categorization of cases as the panel scheme.
    e. The ending of all anti-competitive practices, including the payment of referral fees and disguised referral fees, so that advocates from the Bar and the solicitors' profession can compete on equal terms, on merit.
    f. The ending of warned lists, which inhibits client choice, reduces the quality of service of the CJS to witnesses and complainants and discourages those with family responsibilities from entering or staying in practice as advocates. Human nature and the uncertainty inherent in warned lists mean that witnesses, police officers, lawyers and defendants are all less likely to focus on a case in a warned list that might not be listed, or that they might not

conduct.

7. All these things are achievable, and all need to be achieved in order to bring about the ambitions of those who want to make the system fit for the 21st Century. The Consultation Paper is concerned with points c, e and f and so is this response, but they are only part of the bigger reform programme and should not be isolated from it. The reform process is holistic and the elements reinforce one another. Furthermore the scope of this consultation does not extend to other crucial parts of the CJS and so it follows that our response does not address some of the wider issues. However we observe that durable and successful reform must take proper account of the crucial role performed by litigators in the Crown Court.

8. The existing reform programme allows for substantial sums of money to be spent on the DCS and common platform; but it will fail if resources are not made available to match ambitions across the whole programme. That includes ensuring that prisons and Courts have sufficient, working video conferencing facilities; that remand prisoners can use the online system and are kept as close as possible to the Courts their cases are heard in; that they are brought to Court on time; that their representatives have time to see them in prison and in Court. In this regard the CBA welcomes Government proposals to sell off Victorian prisons for much needed housing, provided that the money yielded is ploughed back into the Criminal Justice System. It should, for example, be used for building new prisons in which people are held fairly on remand with access to family and lawyers and, if convicted, serve sentences in humane places where they can be effectively rehabilitated/ educated wherever possible.

9. This overall programme does not necessarily require additional funding for legal aid in the short term (though that would be desirable). In the medium term it will be essential, at the very least, to make sure that fees stay indexed to inflation so as to avoid the long term erosion of standards of advocacy.

Replies to Questions

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

(i) Yes. A panel based on assessing the quality of advocates will increase

public confidence in the criminal justice system. It will ensure that advocates are prevented from taking cases for which they are not qualified. It must be linked to a reform of the Advocates Graduated Fee Scheme, so that the seriousness and complexity of the case determines the fee rather than the number of pages of evidence. This will enable advocates to move to better paid cases as they rise through the grades on the panel, will weed out the incompetent, and will re-introduce a clear upward career path that does not presently exist for junior advocates. It will help the profession to recruit and retain young practitioners.

(ii) A panel and a revised AGFS are two sides of the same coin, and must be introduced together.

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

(i) It should be regionally based, but with common national standards. The existing Circuit structure could be used, but the divisions will have to be acceptable to solicitors as well as barristers. The CBA considers that regional assessment, based upon rigorous national criteria, is most likely to achieve fair and appropriate results that will best serve the public interest.

(ii) There should be no geographical limitation on where an advocate may practice. A solicitor anywhere in the country must be free to select the best available advocate who has reached the appropriate grading.

(iii) The Legal Aid Agency is well equipped to administer the scheme, but they should not have a role in the assessment of advocates, which should be done independently, perhaps overseen in each area by a Judge or recently retired Circuit Judge with a panel of assessors drawn from local professional leaders (barristers and solicitors) and judges. In keeping with the profession's public service ethos, practitioners who perform the assessments should not expect payment, and the system need not be expensive. We understand from the experience of those who participated in the setting up of the CPS scheme that the initial process is of course time consuming, but thereafter can run smoothly with relatively low levels of commitment.

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

(i) Yes, but the word 'competence' is not helpful. The standard should be

excellence at each level. This is about identifying the best people, not the good enough.

(ii) We endorse the MoJ's policy aim of reducing unnecessary regulation of the profession, while preserving high professional and ethical standards. The purchaser of advocacy services (the LAA on behalf of the public) is entitled and should have a credible and robust panel scheme that assures the excellence of advocates. Such a scheme is of far more utility to the public than any alternative. Such a scheme may (or may not) make the regulators' QASA scheme redundant, but that is not our concern.

(iii) Silks and Treasury Counsel should be outside the scheme, having already passed far more rigorous assessments.

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

Unlimited. The market will decide who succeeds. Quotas are not needed. The business needs of the CPS, which has limits, are different in defence practice. Numbers can be reviewed (perhaps in 3 – 5 years) once the system beds in.

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

(i) Yes. There is already a ban on outright referral fees in the professional codes of conduct, and implicitly in the Bribery Act 2010, but this is a serious enough problem to call for a specific targeted ban. It is just as necessary to take measures to prevent referral fees that are disguised as 'administration fees' and suchlike. These are said to be incurred when a litigator instructs an advocate. There is no need for barristers to pay such fees in any event, but they are commonplace when solicitors instruct other solicitors.

(ii) There must be an outright ban of disguised referral fees (see answer to Q7 below).

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

(i) There should be a requirement when advocates are instructed that the litigator and the advocate make a declaration that no payment of any kind has been made by the advocate to the litigator or an intermediary in

connection with the receipt of instructions. High-risk advocates (barristers and solicitors), chambers, and litigators should be subject to spot checks of their accounts by the LAA, without notice. Where contractual relationships exist between advocate and litigator the terms should be declared and/or open to inspection. Payment of fees should be withheld where such checks disclose suspicious activity, until matters are resolved. Suspect activity should be referred to HMRC to ensure that VAT and other applicable taxes are being paid. Should enquiry by the LAA prove the existence of such arrangements, the payer and payee should automatically be forced to repay the gross fees for the case concerned and precluded from receiving any more public funds.

(ii) The Bar Code of Conduct should be amended specifically to include entering into a referral fee (as defined here) in the scope of 'serious misconduct', which barristers have a positive duty to report (Rule of Conduct rC 66-69, and guidance therein). A report to the BSB/Bar Council should go to the Solicitors' Regulatory Authority, for an immediate investigation into the litigator in question.

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

(i) A disguised referral fee is a payment made by the advocate to the litigator that is in reality an illegitimate payment for receiving instructions (a bribe), but is labeled an "administration fee", or some such misleading form of words.

(ii) It is misleading because the litigator fee already includes all services by instructing solicitor to advocate that might be described as 'administration'. There is no justification for the litigator to charge an extra fee for instructing an advocate. There is no justification for any arrangement between solicitor and advocate which permits the payment of a percentage or fee of any sort in return for instructions. Such conduct in whatever form it may take is an improper and wasteful use of public money. It is a referral fee by another name. If barristers do not pay one for their instructions, solicitor advocates should not either. No "top-up" can be justified. Likewise, the advocacy fee should be confined to advocacy, save for expenses necessary for the discharge of advocacy responsibilities (such as travel and other essential expenses). Where solicitors choose to employ in-house advocates, different considerations may apply (see answer to Q. 11 below).

(iii) If the single term 'referral fee' is to be used to cover the outright bribe and the disguised referral fee, the CBA would define it as any payment, charge or financial arrangement by the advocate to the litigator in connection with the securing, receipt or discharge of instructions by the advocate, whether entered into by the advocate directly or on his/her behalf.

(iv) The wording must be crystal-clear to prevent disguised referral fees.

(v) The mischief is two-fold:

(a) These payments are an improper diversion of public funds from the purpose for which they are intended.
(b) They encourage the selection of advocates on the basis of commercial advantage to the litigator, not the best available service to the client.

(vi) The so-called administration fee is normally charged as a percentage of the whole advocacy fee. The CBA does not accept that a *percentage* could ever be justified in terms of any service even notionally provided. In a substantial case, the amount will far exceed the reasonable costs of any 'administration' that the litigator may supposedly undertake. It is simply a method for increasing the litigator's profit (and for the advocate to guarantee himself a supply of work). If it is true that real additional services are provided – such as an electronic subscription to a research resource, occasional use of a desk space, or even a bill chasing service – then it is hard to see how anything other than small fixed charges can be justified.

(vii) Some freelance solicitor advocates call themselves 'consultants' to one solicitors' firm or a very small number of them, and pay a percentage for all the work they receive. Individuals may be highly competent and may be appointed purely on merit, but the system is open to abuse because of the incentive to maximize income by the litigator.

(viii) There is a genuine distinction between the so-called administration fee paid by solicitor advocates to instructing solicitors, and clerk's fees and rent that barrister pay to their chambers. Each barrister is self-employed and incurs legitimate expenses necessary to maintain their practice and comply with professional requirements. Unlike solicitors' firms receiving 'administration fees', Chambers are not commercial enterprises designed to make profits for their members. They are akin to group practices in which the members pool their expenses while remaining in competition with one another. There are no partners or owners who benefit

financially from rent and clerks' fees. Hence, no incentive to demand fees as a condition of getting work. It should also be remembered that it is chambers across the country who largely train the advocates of the future for the public. The value of this training process and the resource created for the public (definitively described in the Jeffrey and Rivlin reports) must not be underestimated.

(ix) There must also be a ban on sweetheart deals in which firms routinely exchange cases with one another, otherwise than when there are genuine professional reasons for doing, but solely to generate income and to the exclusion of other advocates who may be able to provide a better service.

(x) It is sometimes said that the Bar exaggerates this issue, or that it is a non-issue, or that it is an expression of hostility to solicitor advocates in general. This is not true. The CBA has no objection to solicitor advocates and wants a panel system that will be fair to all advocates. We observe that such a system should give comfort to solicitor advocates who had reached the higher grades by removing any residual misplaced perception that being a solicitor advocate somehow renders them inferior. Many of our members have worked alongside solicitor advocates who outshine their barrister colleagues. However there are idle and incompetent people who are a disgrace to both branches of the profession. Referral fees, disguised or otherwise, nurture such practitioners.

(xi) For all these reasons the improper arrangements that we describe above must be banned. If the problem does not exist, there is nothing to worry about. But the howls of protest in anticipation of restrictions on such improper conduct give an implicit but clear indication that such conduct exists and must be stopped.

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

Yes. The CBA agrees with and adopts Bar Council's views on this.

We consider that the "warned list" system damages the efficiency of the CJS. It has a profoundly negative impact on complainants and witnesses and is the single largest bar to proper client choice.

The *Jeffrey Report* recognised the shortcomings of the warned list system. If the warned list could be shown to make the system more efficient our position might

be harder to sustain, but the delays that are manifest almost everywhere suggest it does not.

Warned lists are not simply bad for client choice. Uncertainty as to listing causes distress to witnesses and victims alike. The ICPR report 'Out of the Shadows' highlighted the negative impact on the lives of those asked to attend court to give evidence because of the uncertainty around the listing of fixed trial dates.

"Cancellations and adjournments of court hearings are frustrating and stressful for victims and witnesses. More needs to be done to reduce this and all possible steps should be taken to minimise delays. Consideration should be given to limiting the number of times any case can be put on a 'warned list'"[1]

Put to one side for a moment client choice, modern standards of case management and Leveson's "duty of engagement" and focus for a moment on complainants and civilian witnesses. Consider the effect that such uncertainty and distress creates in the lives of the witnesses who are seeking justice as the complainants in assaults, burglaries and sexual offences.

In *Sir Brian Leveson's Review on Efficiency in Criminal Proceedings*, following an analysis of problems caused by warned lists he concluded [at paragraph 144] "[I] recommend that steps are taken to enable the courts to move towards single/fixed listing."

He was right to so conclude and we must pursue this aim vigorously. Such a reform would not only permit for greater case ownership and so drive up efficiency, but would also allow the clients preferred advocate to plan and to be available and hence have a huge impact on making client choice real, as distinct from illusory.

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

Yes. We believe that the vast majority of hard working litigators who believe in quality and the good reputations of their firms would wish to give such advice to their clients as a routine step. The CBA agrees with the proposals at 5.5 & 5.6 of the Consultation Paper.

[1] Hunter, G., Jacobson, J. and Kirby, A., Out of the shadows: Victims' and witnesses' experiences of the Crown Court (London, 2013).

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

The CBA agrees with the proposal at 5.7 of the Consultation Paper.

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

(i) The routine or automatic use of in-house advocates for all work is problematic and anti-competitive. It can create significant conflicts of interest and can work against quality. The conflict of interest arises because the financial interests in using an in-house advocate may prevail over the use of the best qualified advocate for the case in question. Hence, the interests of the client will be subordinated to the commercial needs of the litigator.

(ii) Good solicitors allocate cases with care, not giving their in-house people work that is above their level of competence. There can be no principled objection to using an in-house advocate, provided the decision to use this advocate is not influenced by financial considerations and the lay client is fully informed of the opportunity to choose someone who is not employed by the firm in question, or indeed by any other entity, where there are improper arrangements to swap work, while purportedly briefing independent advocates. The introduction of panels that ensure excellence at the appropriate level for all advocates will make the allocation process easier and should ensure that under-performers (barristers and solicitor advocates alike) are weeded out across the whole sector.

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

The CBA agrees with the Bar Council's response. We repeat and rely upon what we have said in the Overview. We would wish to stress that our anecdotal evidence is that the use of warned lists in the Crown Court is a significant barrier to those carers of young children who wish to return to practice. By way of illustration should a parent returning to practice be instructed in a reasonable case where s/he knows that the PTPH will be adjusted to allow him/ her to attend and then that case is given a fixed date, then s/he can make the appropriate child care arrangements that will probably make all the difference

as to whether or not that case is economic. Without such steps the sheer uncertainty is a huge barrier to returners and there will be substantial damage done to the diversity of our cadre of advocates and the pool from which future Judges are often chosen.

The Criminal Bar Association
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