# Criminal Bar Association Response to the Joint Advocacy Group's consultation paper entitled "Quality Assurance Scheme for Advocates"

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


| | |
|---|---|
| Mark Fenhalls QC (Chairman) | Francis FitzGibbon QC (Vice Chairman) |
| 23 Essex Street | Doughty Street Chambers |
| London WC2R 3AA | 53-54 Doughty St, London WC1N 2LS |
| 020 7413 0353 | 020 7404 1313 |
| markfenhalls@23es.com | f.fitzgibbon@doughtystreet.co.uk |


**The Criminal Bar Association ("CBA")**

1. The CBA represents the views and interests of practising 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 consultation 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 over 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.

4. We have seen and agree with the substance advanced in the Bar Council Response. We add our own views below.

**Overview**

5. The profession and its members have no confidence in QASA. It is a poor scheme that will prove to be disproportionately burdensome on the profession and the judiciary. The Regulators' success in the Supreme Court does not remedy the inherent failings of the scheme. It will fulfil no public good. What is being foisted upon us is a far cry from the original conception and does not fulfil its stated aims.

6. The Regulators will undoubtedly have observed that the profession supports the Government proposals to create a purchaser's panel scheme. This is because that scheme will enshrine excellence whereas QASA sets its sight far too low to give the public confidence in the ability of criminal advocates to work to the highest standards – which is what the public rightly expects. QASA by contrast works to the lowest common denominator.

7. The Regulators have still not properly addressed the issue of appeals and the quality of judicial assessments that will be generated. We foresee wholly bland and neutral assessments coming from the Judiciary. If our fears are borne out, this will demonstrate the inherent weakness of the scheme and that it serves no public good at all.

8. The proposed panel scheme is not an alternative to QASA. No one has ever suggested it is. But unlike QASA it is intended to be fair to all advocates (solicitor or barrister) and will provide far better protection for the public. It is simple, transparent, and relies on a fair and sensible assessment process.

9. The Regulators should register the disquiet that QASA has generated, and have the wisdom at least to pause, await the introduction of the government's panel scheme, and assess the eventual shape it takes. There is no need to rush through a bad scheme, at a time when the profession is undergoing profound and radical changes in its working practices, notably with the introduction of Better Case Management and all-digital working. These changes may make QASA redundant before it comes into effect.

10. At that point the Regulators will be sufficiently informed to be able to answer both key questions that emerged from the Supreme Court in the recent litigation:

    - is the scheme "…suitable or appropriate to achieve the objective pursued?" and
    - is the scheme "…necessary to achieve that objective?"

11. The CBA considers that the Government's proposal is designed to give a positive answer to both questions. QASA is not.

12. We turn to the specific questions, but we do not accept the premise on which they are based. We urge the Regulators to reconsider the whole scheme, and not to feel that QASA must go ahead no matter what.

**Proposal 1: Amendment to the CAEF to require an advocate to identify when they were first instructed.**

**Question 1: Do you see any practical difficulties arising from amending the current CAEF to include this proposal?**

The CBA does not see any practical difficulties arising from this amendment.

We would hope that our regulator would understand that no barrister should ordinarily accept instructions if they have insufficient time (rC21.9) and that barristers are duty bound to inform their clients if they either do not, or may not, have enough time to carry out their instructions (rC18).

If there is assumption on the part of the regulator(s) that late instruction necessarily indicates some shortcoming in performance, then this is misconceived. Of course it may, but this could not be determined without much fuller enquiry.

**Proposal 2: Amendment to the CAEF to require an advocate to identify whether advice on evidence was provided.**

**Question 2: Do you see any practical difficulties arising from amending the current CAEF to include this proposal?**

The CBA does not see any practical difficulties arising from this amendment. The answer will be "yes" or "no".

But if there is an assumption that the presence or otherwise of written advice is any indicator of quality then this is misconceived. Bad advice is bad advice, whether written or oral. There is no magic in writing it down. Is there to be a qualitative assessment by someone? How can this be done without manifold difficulties relating to privilege?

**Proposal 3: An amendment to the Scheme Handbook to permit a judge to decline to carry out an evaluation if they believe, because of the circumstances, it would not be fair to do so. In that event, the evaluation would be made at the next trial.**

**Question 3: Do you see any practical difficulties arising from a judge declining to complete an evaluation if they believe, because of the circumstances, it would not be fair to do so?**

If a Judge thinks it would not be "fair" to complete an evaluation, then s/he should not "do so". We do not understand what mischief the Regulators are trying to remedy. The Regulators should explain themselves to illustrate what circumstances they consider might give rise to unfairness. One assumes that given the assessment is intended to be fair to the public interest that Judge should disqualify himself for liking an advocate as swiftly as he should for disliking one.

**Proposal 4: An amendment to the Scheme Handbook to provide that, in the event of a third judicial evaluation becoming necessary, it should be of the first trial conducted by the advocate in front of a different judge to either of the judges who conducted the first two assessments.**

**Question 4: Do you see any practical difficulties arising from a requirement that, in the event of a third judicial evaluation becoming necessary, it should be of the first trial conducted by the advocate in front of a judge other than either of the judges who conducted the first two assessments?**

We have no objection to these proposals, provided that the Regulators are alert to the problems that can easily arise in smaller court centres and in particular to over familiarity breeding partisan assessment.

**Proposal 5: Removal of some areas of ambiguity from Scheme's written material.**

**Question 5: Are there any practical difficulties that arise from these amendments to the Scheme Handbook?**

None we can perceive.

**Proposal 6: Clarification of BSB and SRA QASA rules**

**Question 6: Do you see any practical difficulties arising from the changes to the BSB or SRA Appeal rules?**

We note that the Bar Council 'has attempted to identify the proposed changes to both the BSB QASA Rules and the SRA QASA Appeals Policy from the consultation materials and other online material, however have not been able to do so. It is therefore impossible to answer this question using the materials that the BSB and SRA have made available.'

We do not propose to reinvent the wheel but simply observe that the question is therefore impossible to answer in any meaningful way.

December 2015