RESPONSE OF CHANCERY BAR ASSOCIATION TO JAG'S FOURTH CONSULTATION PAPER ON THE QUALITY ASSURANCE SCHEME FOR ADVOCATES (CRIME)

Introduction

1. This is the response of the Chancery Bar Association ("the Association") to the above-named Consultation Paper ("the Paper"). It is submitted to the Bar Standards Board on behalf of JAG.

2. The Association is one of the longest established specialist bar associations and represents the interests of over 1,100 barristers. It is recognised by the Bar Council as a senior specialist bar association. Its members handle the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but the Association also has academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

3. Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. These days, much Chancery work is disposed of in specialist tribunals and in the County Courts.

4. Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property and business law, including (with particular relevance to this Paper) financial disputes,

fraud, asset tracing, search and seizure and other restraint orders, receivership and professional and financial regulatory matters.

5. We refer to the responses submitted by the Association to the previous Consultation Papers on the QASA scheme. Although the architecture of the scheme has now changed, we maintain the general criticisms of QASA that we made in those Responses, which remain relevant and valid.

6. The particular subject matter of the Paper will not directly affect the interests of the majority of our members. It will, however, directly affect the interests of some, who practise as specialist practitioners in some cases in the Crown Court relating to the fields of practice identified in para 4 above, and in confiscation and related proceedings under the Proceeds of Crime Act 2002. It also indirectly affects all our members, in that a regulatory justification for a detailed and bureaucratic scheme of accreditation is being advanced which may (though we would suggest it should not) become seen as a template for accreditation schemes in other areas of practice.

7. We therefore seek to address the issues of principle raised by the Paper, with their larger potential significance in mind, before turning to the specific questions. We do not seek to respond to every question relating to the intricacies of the scheme for criminal advocates on the basis that others are better qualified to comment on those matters. We are, however, aware of the detailed criticisms of QASA made by the Criminal Bar Association and others.

The regulatory approach

8. As originally envisaged, a scheme of accreditation for criminal advocates was a term of a procurement agreement brokered by Lord Carter of Coles and the then Chairman of the Bar, Geoffrey Vos QC. The Carter Review recommended to Government an increase in the fees for publicly-funded criminal advocacy work in return for an assurance of the quality of the advocate briefed. The agreement to increase advocacy fees was then reneged on by successive Governments. Instead, a significant reduction in legal aid fees for criminal work has been introduced. The procurement justification for an accreditation scheme for criminal advocates is therefore no longer present. In language that would be used by members of this Association, there was a total failure of consideration.

9. Moreover, the procurement justification existed because there was a need to guarantee quality to those paying the fees of advocates where no open market in their services operated. The sole purchasers of such services were the Crown Prosecution Service and the Legal Services Commission. Where a highly competitive open market in advocacy services exists, there is no similar justification for a scheme to guarantee quality. The market itself will identify quality and lack of quality and those purchasing services will act accordingly.

10. The scheme now put forward is unequivocally on a regulatory basis. In the introduction to the Paper, the JAG comment that:

> "The economic climate, both generally and in terms of legal aid, has created *a worry* that advocates may accept instructions outside of their competence. The Judiciary has also raised *concerns* about advocacy performance. QASA has been developed to respond to these issues".

11. Although the Association recognises the public interest in high standards of representation and advocacy in the Crown Court, it has serious doubts that any proper regulatory basis exists for the Scheme. By virtue of section 28 of the Legal Services Act 2007, intervention by the BSB needs to be justified by evidence of a need for intervention, and the intervention needs to be, among other matters, targeted and proportionate.

12. As far as the Association is aware, judicial concerns about advocacy performance are limited to two cases: one in Scotland and one in Leeds, where the Recorder of Leeds, Peter Collier QC, criticised the performance of the solicitor advocates involved in the case. The BSB has always espoused an evidence-based approach to regulation and the other regulators in the JAG should have the same approach, bearing in mind best regulatory practice and the terms of the Act of 2007. There seems to us to be no hard evidence of poor standards of work of barristers (certainly not barristers in independent practice) that could justify such a burdensome and bureaucratic scheme as QASA. A "worry", one case north of the Border, one case involving solicitor advocates and a lot of anecdotal material relating to solicitor advocates accepting briefs outside their competence is no evidential basis whatsoever for a scheme of this nature for the Bar.

13. The true position is that the BSB was persuaded by the Criminal Bar Association to espouse such a scheme many years ago in the belief that a single scheme of accreditation for advocates in the Crown Court would serve the public interest and, incidentally, enable barristers to dominate the market for Crown Court briefs. There might have been a regulatory justification of a kind in that the survival of the independent Bar is clearly in the best interests of customers and the public alike; but no more specific regulatory justification ever existed. Now that it seems clear that the Scheme, in its current incarnation, will not serve those interests, for the reasons that the Criminal Bar Association has explained, and will serve only to support a cadre of "plea only advocates" that the BSB recognises are not in the public interest, that original regulatory justification has disappeared.

14. In our view, no other regulatory justification exists. There is no evidence of a widespread problem that could justify the imposition on all criminal advocates of a regulatory burden of this nature; even if there were, the Scheme proposed is not targeted at where the problem lies and is not proportionate to the extent of the problem. It is spectacularly burdensome and expensive: consider the time required of individual barristers to comply with the scheme from year to year; the cost of setting up and administering the scheme, which will have to be borne substantially by those who use it; the cost of setting up an Article 6 compliant appeals procedure, which will fall on users or subscribers of the Bar Council generally; and perhaps most of all the significant burden to fall on Judges at a time when judicial resources are limited and reducing and demands on their time are increasing.

15. There also remains the residual, niggling concern that reliance on good assessments by Judges may, in some cases, get in the way of a barrister's duty to act fearlessly in the best interests of his or her client.

Queen's Counsel

16. So far as the inclusion of Queen's Counsel in the Scheme is concerned, there is not a jot of evidence to support a conclusion that there is a problem with the quality of performance of silks that needs to be addressed by QASA. Given the likelihood that the Scheme as proposed will destroy the rank of silk among criminal advocates, contrary to the public interest that justified its re-introduction in 2006, there can be no regulatory justification for the inclusion of Queen's Counsel in QASA.

17. In our view, the argument that "it is only fair and reasonable" to include silks in the same scheme is wrong in principle. The Scheme is a significant regulatory burden and should only be imposed in areas where there is a need for a proportionate remedy. Since the Scheme does not include a separate category for silks and does not purport to assess them at any higher level, the problem (established by evidence) would necessarily have to be that silks are failing to perform at the level to be expected of junior barristers who conduct the most demanding cases. Does the JAG have any such evidence?

18. If the Scheme is to proceed and Queen's Counsel are to be within it in some form, the Association agrees with COMBAR that the appropriate basis of their inclusion (indeed, the appropriate starting point for any such scheme) would be to permit (as the Scheme does) Judges to report to the

Regulator under-performance of particular advocates on an ad hoc basis, with particulars of their failings. Given (a) the absence of any evidence to date of under-performance by silks and (b) the inherent unlikelihood that those excellent enough as advocates to obtain the rank of silk in criminal practice would seriously under-perform or be under-qualified, an approach that allows evidence to be gathered over time in the suggested way is the most appropriate basis on which to bring within the Scheme those who are least likely to require its attention. Indeed, if properly established and implemented more systematically, such a reporting structure would be entirely appropriate and sufficient to identify and deal with those of any rank or experience who perform below par in the Crown Court.

Future Accreditation Schemes

19. In this regard, we have heard many comments to the effect that the QASA Scheme might be some kind of precedent for future accreditation schemes in family or civil work. We have specifically enquired of the BSB previously and been told that no such plan currently exists for the family and civil Bars. Nevertheless, we would make the following observations. First, there is (so far as we are aware) no evidential basis for concluding that there is a significant problem with the under-performance or under-qualification of advocates in these courts. Before the BSB and other Regulators are minded to extend the QASA Scheme, they should go to the trouble of investigating whether there is a significant problem, and if so in what areas of practice, by making relevant and detailed enquiry of the judiciary and others. Secondly, if there is a sufficient evidential base for taking some action, that action should be targeted and proportionate, and

there should be no assumption that the QASA Scheme should be a template for any further accreditation scheme. There is no indication that a more modest "traffic light" scheme would not address any problem equally effectively, and probably more quickly and much more cheaply, without creating a substantial regulatory burden on those who are perfectly competent advocates. In any event, given the vast range of types of case litigated in civil practice, the adoption of a scheme with four levels of case, summarised in a table on one page, could not possibly form a basis for such a scheme in the civil courts.

Non-specialist advocates

20. In our response to the Third Consultation Paper on QASA, we suggested an amendment to the definition of "criminal advocacy" designed to prevent the unfair exclusion of non-specialist criminal practitioners from certain types of case conducted in the Crown Court. At that time, the definition of "criminal advocacy" was by reference to the Tables of Offences. The Paper has abandoned that approach and instead defines "criminal advocacy" by reference to the identity of the prosecutor, such that specialist prosecutions are automatically excluded from the definition. There is then a further exclusion, described in paragraph 5 of the Handbook and defined in Rule 3 of the BSB Rules, in relation to hybrid indictments and specialist advocates.

21. We are pleased to see that in principle the terms of that exclusion follow the drafting that we previously suggested. We agree with the principle. However, some drafting matters arise.

22. First, we take it to be implicit in the definition of "criminal advocacy" that it relates only to hearings in criminal courts. What it says is:

> "Criminal advocacy" means advocacy in all hearings arising out of a police or SFO investigation, prosecuted in the criminal courts by the Crown Prosecution Services or Serious Fraud Office.

We suggest that, to avoid any ambiguity, the words "in a criminal court" should be stated expressly after "hearings" and that the words ", prosecuted" should be replaced by "and prosecution". We are unsure whether this definition is intended to include or exclude confiscation proceedings, but suggest that in principle they could be excluded (since they are essentially civil proceedings) by a further amendment, as follows:

> "Criminal advocacy" means advocacy in all hearings in a criminal court arising out of a police or SFO investigation and taking place in the course of a prosecution by the Crown Prosecution Services or Serious Fraud Office.

23. Secondly, paragraph 5.5 of the Handbook needs the words "Subject to paragraph 5.4 …" at its start, in the same way that paragraph 5.3 has. Thirdly, Rule 3 of the BSB Rules seeks to encapsulate the wording in paragraph 5.4 of the Handbook but uses slightly different language. We cannot see why there should be a slight difference between the wording of the Handbook and the wording of the BSB Rules; indeed, it is clearly preferable not to have such differences, which could give rise to issues of interpretation. We suggest that the wording of paragraph 5.4 of the Handbook is preferable and that Rule 3 of the BSB Rules should be brought into line with it.

The Particular Consultation Questions

24. In view of the general commentary above, we do not seek to answer all the specific questions of the Paper, in relation to many of which we are not well equipped to do. However, for convenience, we set out below a summary of our views in relation to those Questions where we feel able to contribute.

Q3: Are there any practical issues that arise from client notification

25. We would have thought the practical issue that will arise is the enduring problem of requiring a human being to act contrary to his own best interests. Unless the content of the notification is expressly prescribed and the requirement to notify strongly enforced, effective notification will often not occur.

Q4: Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?

26. We are surprised that offences that, in the case of adults, would be at Level 2 or above in the Crown Court should be treated as Level 1 cases in the Youth Court. We would have thought that with vulnerable defendants, requiring greater experience and sensitivity from the advocate, the movement in Levels should if anything be in the opposite direction.

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.

27. The practical problem that we foresee is that, given the porosity of the border between Level 2 and Level 3 cases, as revealingly shown by the

Table on p.15 of the Paper, there will be no effective means of ensuring that cases that ought to have Level 3 advocates are determined at that level, rather than at Level 2. The only way to resolve this problem seems to us to be for the judge at the PCMH to review the allocated level of the case independently. Once judges are used to the Levels of the Scheme, which they will have to be, this will be the product of a few seconds' work.

Q9: Do you foresee any practical problems with this proposal?

28. We struggle to see in what circumstances it might be thought appropriate that an advocate who is only accredited to conduct Level 2 trials could be thought to be suitable to advise on evidence, advise on plea, draft defence statements, etc for offences at higher levels, when that advocate does not have the requisite experience to conduct a trial at that level. It is only through preparing and conducting trials that an advocate develops the instinct, judgement and expertise to advise how the defence might be conducted, or whether the defendant should plead guilty, and whether a basis of plea less than the full facts should be offered and can be establish if not agreed.

Q13: Do you have any comments on the proposed modification entry arrangement [for silks]?

29. We regret the comparatively dismissive approach taken to those who took silk before 2006. Contrary to what is said in paragraph 4.35 of the Paper, there was a formal, independent and evidence-based means of assessing applications for silk made before 2006. It was conducted by the Lord Chancellor's Department based on evidence given by judges and senior

practitioners. The only pertinent criticism would be that it lacked the transparency of the new system. Nevertheless, does the JAG have any evidence that the standard of silks appointed after 2006 is higher than those appointed before, or that there are fewer "surprising" appointments or omissions after 2006?

30. For the reasons explained previously, we do not agree that silks should participate in the Scheme in the same way as juniors, on the basis that there is no evidential basis for such an imposition. We agree with the Criminal Bar Association that the ability of the QCA to revoke an award of silk for cause shown is sufficient, given the complete absence of any evidence of a problem with performance. If silks are to be monitored in any way within QASA, it should be by ad hoc report under the Scheme by judges to the silk's Regulator.

Q14: De you agree with the proposed approach to the assessment of competence?

31. We are a little surprised that the BSB should consider itself qualified to make a decision on an advocate's competence in place of Judges or a specialist body comprising those with substantial experience of advocacy. The decision of the BSB could affect the livelihood of the barrister. Even in the case of conduct complaints, where the BSB should have some expertise, the decision-making in any serious contested case is done by a specialist tribunal appointed by COIC. Further, the system proposed is bureaucratic, cumbersome and bound to be expensive. It will also inevitably give rise to inconsistencies between different regulators in the way that they appraise

the material provided by judges or by assessment centres and make decisions. There also does not appear to be an Article 6 compliant appeals process.

Q19: Do you agree with the proposed definition of "criminal advocacy"? If not, what would you suggest as an alternative and why?

32. We do agree, for the reasons given above.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

33. We do agree, as explained above, subject to the points on drafting of the Handbook and the BSB Rules mentioned in para 17 above.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

34. We foresee a great financial and casework burden on practitioners and the BSB respectively. The Scheme is much too bureaucratic and the BSB does not currently have the resources or the expertise to fulfil the role of making a decision on every criminal barrister's level of competence. The Scheme should be abandoned and, if and when there is evidence of a significant problem with the under-performance or under-qualification of barristers in the Crown Court, a simpler and more economical "traffic light" scheme should be established to identify and remove those whose performance is unsatisfactory.

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