

# Preserving and Enhancing the Quality of Criminal Advocacy

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LSB submission in response to the Ministry of Justice  
consultation on preserving and enhancing the quality of Legal  
Aid Agency-funded defence advocacy in criminal courts in  
England and Wales

17 November 2015

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## Introduction

1. The Legal Services Board (“LSB”) is the independent oversight regulator of legal services within England and Wales. It has eight statutory regulatory objectives, including the protection and promotion of consumers’ interests and the public interest, promoting competition in the provision of legal services and improving access to justice.<sup>1</sup> It is to further those objectives that the LSB submits this response to the consultation published by the Ministry of Justice (“MoJ”) on 1 October 2015.
2. The LSB’s functions include, but are not limited to, the approval of changes to the regulatory arrangements of the approved regulators.<sup>2</sup> There are currently three approved regulators able to authorise persons to undertake advocacy in the criminal courts.<sup>3</sup> In October 2009, they formed the Joint Advocacy Group (“JAG”) to develop and implement common criminal advocacy standards.<sup>4</sup>
3. Since its inception in 2009, the LSB has believed that systems of quality assurance should be embedded throughout the legal sector to give consumers confidence in the quality of advocacy that they receive. In making a submission to the Jeffrey Review in 2013, the LSB argued the provision of independent criminal advocacy services would be facilitated by greater liberalisation of the market and the implementation of the Quality Assurance Scheme for Advocates (“QASA”). This scheme had been approved by the LSB earlier in 2013, having been proposed by the JAG members. The scheme will be funded by the JAG members as well as the individual practitioners who will be accredited under it.
4. A series of unsuccessful legal challenges to QASA by members of the Criminal Bar Association have delayed the implementation of the scheme until early 2016. The Supreme Court, on 24 June 2015, dismissed a final challenge, which has allowed JAG members to consider what actions must be taken to implement QASA.
5. The LSB welcomes government’s interest in the quality of legal services. We agree with Sir Bill Jeffrey’s finding that effective advocacy is at the heart of our criminal justice system.<sup>5</sup> The focus should, in our view, be on the promotion of consumers’ interests, facilitating access to justice and protection of the public interest in an effective criminal justice system. This must take account of the

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<sup>1</sup> See section 1 Legal Services Act 2007.

<sup>2</sup> These are the bodies responsible for authorising individuals and businesses to carry on reserved legal activities, and include The Law Society, The General Council of the Bar, The Chartered Institute of Legal Executives. See the definition in section 20 Legal Services Act 2007.

<sup>3</sup> The Law Society, The General Council of the Bar, The Chartered Institute of Legal Executives, who have delegated the performance of their regulatory functions to the Solicitors Regulation Authority, the Bar Standards Board and CILEx Regulation, respectively.

<sup>4</sup> the members of JAG are the Solicitors Regulation Authority, the Bar Standards Board and CILEx Regulation.

<sup>5</sup> Independent criminal advocacy in England & Wales: A review by Sir Bill Jeffrey, May 2014.

range of potential service providers within the market for advocacy services – not just barristers - and involve a risk-based assessment of the levels of competence needed for specific services. We would urge government to have regard to the substantial amount of evidence gathering, analysis and consultation already undertaken by JAG on QASA. This is a scheme developed to apply across professional boundaries, which has withstood prolonged legal challenge. In our view, any additional governmental interventions relating to publically-funded criminal defence advocacy should be evidence-based, targeted and proportionate.

6. Below, we comment on each of the MoJ's proposals.

## LSB submission

### *Introducing a panel for publicly funded criminal defence advocacy*

7. The LSB believes that the introduction of a panel for publicly funded criminal defence advocates could be facilitated by the operation of QASA. Concerns over the quality of criminal advocacy are long-running. The Supreme Court recently noted that there is general acceptance of the need for some form of quality assurance scheme.<sup>6</sup> From 2009 to 2013, members of JAG developed QASA to, “assess and assure the competence of all advocates conducting criminal advocacy in the courts of England and Wales.”<sup>7</sup>
8. Government is currently the single largest purchaser of advocacy services for criminal defence work, through the operation of the Legal Aid Agency (“LAA”). As with the procurement of any services, the LSB would expect the LAA to seek to specify its quality requirements to those providing services on its behalf, above the minimum standards required by regulation. This is consistent with the approach recommended by Lord Carter in 2006.<sup>8</sup>
9. In the LSB’s view, the interests of clients will be best met, and access to justice improved by regulatory arrangements that are designed to ensure that providers are competent to deliver the particular advocacy services that clients need. The MoJ’s consultation refers alternatively to “high quality advocates”, “good quality” and the need to “optimise quality”. Distinguishing levels of competence appropriate for different advocacy needs will enable policymakers to promote the public interest in effective criminal proceedings as well as value for money.
10. The approved regulators that authorise advocates to practise in the criminal courts are currently implementing QASA, which is designed to ensure the competency of all advocates at a number of levels of activity. In the LSB’s view, government should have confidence in QASA to ensure that publicly funded advocacy in the criminal courts is of a competent standard. Having confidence in QASA would avoid the need to introduce new regulatory or contractual burdens designed to achieve “optimum” quality, which is, as yet, undefined.
11. The legitimacy of QASA is well established. In the course of its development, the scheme underwent four public consultations. Stakeholder views were analysed and incorporated into the scheme where they were consistent with the statutory regulatory objectives. The lawfulness of QASA has been established in the High Court, Court of Appeal and the Supreme Court.

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<sup>6</sup> Lumsdon –v- LSB, <https://www.supremecourt.uk/cases/docs/uksc-2014-0272-judgment.pdf>

<sup>7</sup> Application to the LSB for approval of QASA by the approved regulators forming JAG, [http://www.legalservicesboard.org.uk/Projects/statutory\\_decision\\_making/pdf/final\\_lsb\\_submission\\_1\\_4.05.13.pdf](http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/final_lsb_submission_1_4.05.13.pdf)

<sup>8</sup> Lord Carter of Coles, Legal Aid: A market-based approach to reform (July 2006).

12. By design, QASA will be subject to review after two years of application. That will provide an opportunity to review whether the standards required at each level of competency are appropriate and whether or not they are being achieved. By focussing on standards in relation to advocacy services, rather than the education requirements for entry into the different legal professions, QASA will ensure that the market for advocacy services neither advantages nor disadvantages any particular professional group. For example, solicitors routinely provide advocacy services in magistrates' courts, and nearly 5,000 solicitors have Higher Rights of Audience.<sup>9</sup> The MoJ's observation that, "a good advocate requires constant practice to build skills,"<sup>10</sup> should not, in our view, limit membership of a panel to only those lawyers who do nothing but advocacy.
13. The interests of consumers will be promoted by competition for services of a specified standard, rather than a market being foreclosed on the basis of arbitrary regulation. For example, the creation of regional panels and limits on the numbers of panel members at particular levels of the scheme have the potential to artificially foreclose the market to service providers who are capable of delivering services to the specified standard.<sup>11</sup> We believe that the MoJ acknowledges this difficulty in paragraph 2.21 of the Impact Assessment published with the consultation paper. Parallels with the CPS Panel Scheme should be drawn with caution, given that the CPS is by far the largest purchaser of criminal prosecution advocacy. This should be seen in the context of a much larger privately-funded market for criminal defence advocacy. We would expect the impact – both intended and unintended – of any proposed prescriptive arrangements for a panel scheme to be subject to careful economic analysis.
14. In summary, the design of any panel for publicly funded criminal advocacy should make use of the regulatory outcomes delivered by QASA and should not attempt to duplicate or undermine it. Additional obligations should only be introduced with an evidenced based assessment of risk.

### ***Referral fees and disguised referral fees***

15. The decision to introduce a statutory ban on the payment of referral fees and disguised referral fees, is a matter for government. The LSB acknowledges that government must balance a number of competing public interest factors in deciding whether or not to prohibit specific behaviour.
16. The LSB can only contribute to the debate by highlighting relevant research. The LSB's 2011 report on referral fees in the personal injury, conveyancing and

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<sup>9</sup> [http://www.sra.org.uk/sra/how-we-work/reports/data/higher\\_rights\\_of\\_audience.page](http://www.sra.org.uk/sra/how-we-work/reports/data/higher_rights_of_audience.page)

<sup>10</sup> Paragraph 3.1, Preserving and Enhancing the Quality of Criminal Advocacy Consultation Paper.

<sup>11</sup> We were particularly concerned with the suggestion at paragraph 2.31 of the consultation document that a restriction on the number of advocates at certain levels in any panel scheme could be achieved by flexing the quality standard to be applied. This risks undermining the idea of a quality standard being an objective assessment of the skills and competencies that are required to provide services at that level.

criminal advocacy markets did not conclude that there was sufficient evidence of consumer detriment for an outright ban on referral fees.<sup>12</sup> Research commissioned by the LSB for that report noted that referral fees could have undesirable incentive effects, but that these could be mitigated by a regulatory scheme to underpin the quality of advocacy. The LSB would welcome the publication of any further evidence of the impact of referral fees, relevant to MoJ's proposals.

17. Given that the regulatory arrangements of the approved regulators already prohibit the payment of referral fees, it is not clear from the consultation document why a statutory ban will prove more effective than the current arrangements, given the existing low levels of reporting<sup>13</sup> and the ongoing possibility of disguised referral fees.<sup>14</sup>

### ***Protecting client choice and safeguarding against conflicts of interest***

18. The LSB agrees that consumers should be able to make informed choices between the options for advocacy services. In the absence of a quality assurance system there is an information asymmetry between the consumer and the advocate as to the quality of the offered services. Choices of this nature are best informed by the operation of a clear and transparent quality assurance system, identifying providers competent to deliver services to a specified standard. In our view, QASA is intended to achieve this.

19. In the absence of evidence, it cannot be assumed that an additional administrative obligation on those commissioning advocates under LAA contracts can be justified. This obligation will add costs to providers without necessarily assisting consumers to make better choices when choosing an advocate. The SRA's Code of Conduct,<sup>15</sup> for example, currently contains detailed obligations regarding the handling of conflicts of interest. The LSB has not seen evidence to suggest that these provisions are ineffective so as to justify the imposition of additional regulatory obligations. Clearly, any new obligation would require additional resources to ensure its effective enforcement; these have yet to be quantified (as the Impact Assessment acknowledges).<sup>16</sup> The proposal to prohibit a litigator instructing an in-house advocate could restrict innovation in legal businesses that aim to provide a range of legal services, including advocacy, as a "one-stop shop." In the LSB's view, proportionate regulatory arrangements are

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[http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/closed/pdf/20110525\\_referral\\_fee\\_decision\\_paper\\_final3.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/20110525_referral_fee_decision_paper_final3.pdf)

<sup>13</sup> Ibid

<sup>14</sup> Paragraph 4.11, Preserving and Enhancing the Quality of Criminal Advocacy Consultation Paper.

<sup>15</sup> <http://www.sra.org.uk/solicitors/handbook/code/part2/rule3/content.page>

<sup>16</sup> Paragraph 3.3, Impact Assessment to Preserving and Enhancing the Quality of Criminal Advocacy Consultation Paper.

designed to ensure that regulated persons manage conflicts of interest as they arise, rather than to eliminate them altogether.

## **Conclusion**

20. The LSB welcomes a focus on quality assurance for legal services and acknowledges government's legitimate interests in ensuring the adequate quality of services it procures on behalf of consumers. Poor advocacy risks having a detrimental impact on victims, witnesses, the accused and on public confidence in the rule of law and the administration of justice. As such the LSB will continue to work with the approved regulators to improve the quality of criminal advocacy.

21. The LSB encourages the MoJ to make use of the quality assurance that will be delivered by the approved regulators once QASA is implemented in early 2016. Any additional regulatory obligations imposed in the name of quality assurance should:

- neither hinder nor duplicate the operation of QASA;
- be proportionate; and
- be targeted at those areas which evidence shows to be of highest risk.