

<b>To:</b>	Legal Services Board	
<b>Date of Meeting:</b>	27 October 2014	<b>Item:</b> Paper (14) 56

<b>Title:</b>	Court of Appeal ruling on QASA	
<b>Workstream(s):</b>	Workstream A Regulatory performance and oversight	
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<b>Status:</b>		

<b>Summary:</b>
This paper summarises the Court of Appeal's ruling on the appeal to the judicial review of QASA. It also sets out what we know of the Joint Advocacy Group's intentions moving forwards, and what the LSB's next steps should be.

<b>Recommendation(s):</b>
The Board is invited to note the contents of this paper.

<b>Risks and mitigations</b>	
<b>Financial:</b>	[Redacted]
<b>Legal:</b>	[Redacted]
<b>Reputational:</b>	[Redacted]
<b>Resource:</b>	[Redacted]

Consultation	Yes	No	Who / why?
<b>Board Members:</b>			

<b>Consumer Panel:</b>			
<b>Others:</b>			

<b>Freedom of Information Act 2000 (Fol)</b>		
<b>Para ref</b>	<b>Fol exemption and summary</b>	<b>Expires</b>
All of risks and mitigations section, 12, 13, 14, 15, 16, 17	Section 36(2)(b) - information likely to inhibit the exchange of views for the purposes of deliberation	N/A
7, 10, 11	Section 42 – information subject to legal professional privilege	N/A

## LEGAL SERVICES BOARD

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### Court of Appeal ruling on QASA

#### Executive summary

1. The Court of Appeal's ruling was strongly in favour of the LSB. It raised a number of points that had wider application to the exercise of the LSB's powers, including a discussion of proportionality. We do not yet know if the initial tub-thumping comments from the Criminal Bar Association represents the appellants' considered intentions with regard to further appeal, but continue to push the members of the Joint Advocacy Group (JAG) for swift implementation.

#### Core features of the judgment

##### *In relation to the scheme*

2. The Court rejected all of the claimants' challenges to the lawfulness of QASA and stated that it was 'no part of the Court's function to express any view about the merits of the scheme'. The Court added that it could only interfere with the LSB's decision to approve the scheme if that decision was unlawful [para 112].
3. The Court concluded that QASA did not pose a sufficient threat to the independence of the advocate to render the scheme unlawful. The Court further added that if it were necessary for it to decide whether QASA undermined the independence of the advocate, it would have concluded that it does not [para 30]. The appellants had focussed a great deal on the distinction between the actual and the perceived risk caused by QASA to the independence of both the advocate and the judiciary. However, the Court did not attach the same level of importance to this. It stated:

"for the purposes of making this judgment, it is unnecessary and unhelpful to distinguish between the actual risk and the perceived risk. They are one and the same" [para 53]; and

"there is no difference between actual and perceived risk when it comes to making predictions about the systemic risk posed by QASA to the independence of the judiciary. No fair-minded informed observer would consider that there was a real risk that (i) the possibility of the judge being sued or (ii) the fact that the assessment would be communicated to the advocate would have any impact on the way in which the judge conducted the proceedings" [para 66].

4. The Court rejected the claim that the LSB's decision was unlawful because it did not consider whether there was a perceived threat to the independence of advocates. The Court was satisfied that the LSB did consider this question and did assess the risk of the scheme undermining the independence of the advocate [para 57].
5. The Court referred to the LSB's independence from the BSB. It felt this was 'well illustrated' by the LSB's rejection in November 2012 of the BSB's proposal to modify the scheme [para 46]. It was also held to be 'clear that the LSB would not have approved a scheme which it considered to be disproportionate'. The Court expressed its satisfaction that the LSB had addressed the issue of proportionality and was entitled to conclude that QASA was proportionate [paras 111-112].

*Wider implications for LSB and our powers*

6. The Court's ruling raised a number of points that have implications for the LSB beyond QASA, and for how it exercises its powers:
  - Assessing compatibility with the regulatory objectives is a matter for the LSB, not the Court. These objectives are "to some extent aspirational" and require an exercise of judgment on the LSB's part [para 19]
  - There is a public interest in the competence of advocates [para 20]
  - It was clear that the LSB considered relevant information even where it was not contained in the BSB's application [para 44]
7. The Court did not accept that a proportionality test was required by domestic law, on the basis that such a test would be inconsistent with s3(3)(a) of the Act. The principles in section 3 (i.e. transparency, accountability, proportionality, consistency, targeting) to which LSB must have regard are aspirational. They are not legally enforceable objectives that the LSB is obliged to achieve [para 84].

[REDACTED]

[REDACTED]

[REDACTED]

8. It was also held that it was not for the Court to substitute its view of a proportionate policy for the view of the LSB. The LSB enjoys a wide margin of discretion in this respect. A measure does not become disproportionate merely because an alternative measure could have been adopted [paras 102-103]. However, it is worth noting that the Court considered it was right to subject the LSB's decision to a "heightened standard of review" because the Court has a high level of institutional competence in the subject [para 86].

## Possibility of further legal action

9. The appellants can wait until after the appeal hearing on costs, which takes place on 30 October, before deciding whether to seek the permission of the Court of Appeal to appeal that Court's findings. If permission is refused, the appellants could seek leave to appeal to the Supreme Court on a specific point of law. Therefore, we cannot yet be sure about the appellants' intentions in this regard. Although the Criminal Bar Association continues to [state](#) that QASA is a bad scheme, the Court of Appeal's judgment is strong and the costs for circuits are mounting.

10. [REDACTED]

11. [REDACTED]

12. The Bar Council has not yet issued a statement advising its members not to seek to appeal the Court of Appeal's findings, [REDACTED]

## How the regulators may respond

13. The SRA has confirmed its intention to press on with implementation following the judgment. [REDACTED]

14. At the moment we are less sure of the BSB's intentions. The Board is discussing the issue on 23 October, but its Director-General has cautioned against expecting a decision at that stage on the pace of implementation. [REDACTED]

[REDACTED]

More information may become available once we know whether leave will be sought to appeal the decision of the Court of Appeal.

15. [REDACTED]

16. [REDACTED]

#### **LSB's stance**

17. We continue to encourage JAG to collaborate and to make good on its intentions of implementing a joint scheme. [REDACTED]

[REDACTED]

18. Our position on seeking costs in relation to the appeal hearing remains unchanged with the LSB's approach currently being to seek a 70:30 split with the BSB. However, were the BSB not to seek its costs in relation to the appeal hearing, we would then seek to recoup the entirety of our costs within the £65,000 cap imposed by the Court for the appeal hearing and £112,500 for the initial High Court Proceedings.

#### **Compatibility with the strategic plan**

19. The new strategic plan will have a heading of 'protecting consumers and the public interest' under the 'breaking down barriers to competition, growth and innovation' strategic theme. Our work to promote the assessment and maintenance of the quality of legal services – of which the competency of advocates is a part – plays into this work area, particularly as competition increases in the market and barriers between the traditional branches of the legal profession break down.

## **Next steps**

20. We will continue to seek updates from the JAG regarding any possible appeal and the intentions of its members at relevant stakeholder meetings. More should become clear after the costs appeal hearing on 30 October. After this date we will write to the JAG members asking for their views on implementation, with a view to orally updating the Board at the 26 November meeting.

15.10.2014