THREE RAYMOND BUILDINGS
BARRISTERS

RESPONSE TO THE LEGAL SERVICES BOARD'S CONSULTATION ON REFERRAL FEES, REFERRAL ARRANGEMENTS, AND FEE SHARING

1. This response to the LSB's consultation paper is submitted on behalf of the members of the Chambers of Alexander Cameron QC at 3 Raymond Buildings. We are a leading criminal set, with a national and international reputation for advising and representing individuals, corporations, and governments in matters of serious and commercial crime, extradition and mutual legal assistance, public and administrative law, licensing, regulatory enforcement, inquests and public inquiries, and professional discipline.

2. Our response relates only to the LSB's proposals concerning criminal advocacy. We do not have any experience of the other areas addressed in this consultation paper (the "LSB Paper") upon which to base a sufficiently informed response.

Q3. Do you agree with our analysis of the operation of referral fees or fee sharing arrangements in criminal advocacy?

3. No. Nor does it reflect the more nuanced analysis of the report prepared by Charles River Associates, entitled *Cost benefit analysis of policy options related to referral fees in legal services*, upon which report's findings the LSB Paper is substantially based.

4. Whilst it may be true (LSB Paper, paragraph 6.1) that "*[t]here is no systematic evidence that fee sharing is reducing quality in criminal advocacy*" (emphasis added), *no systematic*

evidence is not the same as *no evidence*. There is a wealth of evidence. The economic explanation of the behaviour in question is simple and uncontroverted.

5. The LSC acknowledges as much in its guidance, issued earlier this month with the title *Fee Sharing/Referral Fees*, in which it states not only that "*[i]t is not appropriate to designate an Instructed Advocate where there is no intention for that advocate to actually undertake the trial*", but also that "*quality will…be put at risk where an in-house advocate (acting as IA) seeks to retain a disproportionate proportion of the AGFS fee and so instructs an advocate of a lower quality than is required…*" (emphasis added).

6. Just as QAA is not necessary to assess the impact of fee sharing, nor is it sufficient to correct the detriment caused: for it is self-evident that, *ceteris paribus*, the most able advocate available at 100% of an administratively-set fee will be superior to the most able advocate ready and willing to accept the case (say) at 70-80% of that fee.

7. As the Joint Advocacy Group makes clear at paragraph 46 of its consultation paper issued in August 2010:

> "*Advocates will be assessed to minimum standards of competency. Levels in a regulatory QAA scheme are not therefore a means of recognising excellence but are present to ensure that advocates are operating at a level at which they are competent.*"

QAA will not alter the economic incentives in play: and it is likely only to diminish (rather than to eliminate) the impact of those incentives through reducing the number of HCAs and barristers (whether employed or self-employed) accredited to act in Levels 3 and 4 cases. Thus it does not hold that a solicitor is acting in the best interests of his client when he instructs an in-house advocate or a freelance HCA simply by virtue of those individuals' having complied with *minimum* standards of competency, when there are self-employed barristers available who can deliver *above-minimum* standards of competency. It should be emphasized that the litigators' fee paid by the LSC covers the selection of external counsel, and unlike CMCs, instructing solicitors are not performing any other function that justifies fee sharing.

8. Accordingly QAA is not sufficient in this regard to underpin the regulatory objectives of improving access to justice, or of protecting the interests of consumers, or thus of promoting the public interest. We submit that it is neither credible nor creditable for the LSB to assert that fee sharing is not causing any detriment, or that because such detriment is not being measured, it cannot be assessed or regulated.

9. The fact that the LSC does not appear to be prepared to intervene where detriment is caused by the behaviour in question does not relieve the LSB of its duty to act in accordance with the regulatory objectives or to "*have regard to (a) the principles under which regulatory activities should be…targeted only at cases in which action is needed*" (emphasis added) as required by section 3(3) of the Legal Services Act 2007.

10. We submit that similar principles should be applied to criminal advocacy as are being proposed by the LSB in the context of personal injury and conveyancing work. Before an in-house HCA or barrister is instructed, the litigator should be required to explain to the lay client that he is entitled to be represented by a freelance HCA or self-employed barrister and to disclose any associated fee-sharing arrangements.

Q4. Do you have additional evidence about the operation of referral fees or fee sharing arrangements that should be considered by the LSB?

11. No, save for instances that would corroborate the evidence already before the LSB.

Q5. In particular, do you have evidence about the impact of referral fees or fee sharing arrangements on the quality of criminal advocacy?

12. The graduated fees system rests on the principle of "swings and roundabouts". The use of in-house advocates and freelance HCAs as Instructed Advocates to conduct only the early parts of the case, and the use of straw juniors, subverts this principle

since it reduces the effective hourly rate of remuneration of self-employed barristers. Our experience is that this is thus exacerbating the existing trend of the more able self-employed barristers' diversifying their practices away from legally-aided work, and the overall quality of advocacy can only diminish over time. However, as QAA is focussed upon only *minimum* standards of competency, regrettably this trend will no doubt pass undetected.

Three Raymond Buildings

21 December 2010