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TECBAR RESPONSE TO THE FOURTH CONSULTATION PAPER ON QASA (CRIME)

1. This is the response of the Technology & Construction Bar Association ('TECBAR') to the Joint Advocacy Group ('the JAG')'s Fourth Consultation paper on the Quality Assurance Scheme for Advocates ('QASA') (Crime).

2. TECBAR is the specialist Bar Association for barristers who regularly practice in the Technology and Construction Court ('TCC'), both in London and the provinces, or who do similar work before other Courts and Tribunals, including arbitration and adjudication. There are about 350 members of TECBAR.

3. In preparing this response TECBAR is conscious of two general matters which impose some limitation on the ambit of its response, namely that (i) this consultation is concerned with the development of a Scheme whose principle is regarded by the JAG as sound and established; and that (ii) the Scheme is confined to criminal advocacy as defined. In these circumstances a superficial reaction might be that TECBAR's comments both on the principle and the detail are redundant.

4. TECBAR indeed defers in large part to the views of the Criminal Bar Association and the Circuits who are generally in the best position to comment on the detail of the proposals. However, both the tone and the detail of the Consultation Paper give rise to wider questions, which are a cause for continuing concern and comment. For this reason, TECBAR welcomes the JAG's assurance that, aside from its request for

comment on specific matters, it will *'However…give proper consideration to all comments and responses received.'*[1]

5. At the level of general principle, the tone and terms of Consultation Paper fuel a continuing concern that the JAG is justifying and developing the Scheme on a basis which is the antithesis of the 'evidence-based' approach which it purports to follow. This can be seen in a number of unsupported, unevidenced assertions which underpin the Paper.

6. Thus, under the heading 'The regulatory need for quality assurance', the Consultation Paper states :

   "The changing legal landscape coupled with competition and commercial imperatives are putting pressure on the provision of good quality advocacy. 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.' (para.1.7).

7. These sentences provide a paradigm of haphazard unsupported assertions of the type which, if displayed by a candidate for Silk or for judicial office, would result in the immediate rejection of the application. What is the <u>evidence</u> of the supposed 'pressure' on good quality advocacy; or that the cited factors are responsible for any such pressure? Is it being suggested that 'commercial imperatives' and/or 'competition' put pressure on standards? If so, on what basis? What is the <u>evidence</u> which underpins the supposed 'worry' that advocates may accept instructions outside their competence; or which provides concrete examples of the supposed judicial 'concerns' about advocacy performance? Far from being 'evidence-based', this smacks of unattributable hunch and anecdote; and, indeed, must put in question the lawfulness of the whole Scheme and exercise.

[1] Para.1.17

8. A further example of unsupported assertion is provided in the observations on the accreditation of silks. In respect of the arrangements before the appointments process introduced in 2006, the Paper states :

   'Prior to this process there was no formal, independent or evidenced based means of assessing applications for silk. It is not therefore possible to demonstrate that the pre-QCA process is comparable in any way to the QASA assessment framework'. [2]

9. The assertion that the pre-2006 process was neither 'formal' nor 'evidence based' is a parody of the previous system; and itself has no proper evidential basis. The contrary is evidenced by a review of the 'Guide for Applicants' and the application form in (to take a random example) 2002 and by any fair review of the care taken by the Lord Chancellor's Department in the conduct of the previous process. Above all JAG's dismissal of the pre-2006 system confuses procedure and substance. Whatever the changes of procedure in the silk appointment system, the Consultation Paper provides no basis for any conclusion that those who were appointed to silk under the pre-2006 arrangements had not in fact satisfied the substantive criteria and attributes for appointment[3] *'to a degree which marks them out as leaders of the profession'*.[4]

10. Accordingly, the Consultation Paper's conclusion that *' It is not therefore possible to demonstrate that the pre-QCA process is comparable in any way to the QASA assessment framework'* rests upon false premises, but also misses the point. It provides no evidence-based support for the drawing of a distinction between the quality of silks appointed before and after 2006; nor therefore for a separate regime to apply depending on the date of appointment.

    Furthermore, it ignores the fact that the standard being assessed under the QCA system is different from the standard being assessed under the QASA system. The former requires candidates, in this case criminal practitioners applying, to establish

[2] Para. 4.35
[3] Advocacy, legal ability and practice, professional qualities of integrity, professional standing and maturity of judgement and balance (2002 Guide for Applicants)
[4] Guide for Applicants (2002)

that they satisfy a standard of excellence. The QASA system, by contrast, assesses whether practitioners have achieved an adequate standard of competence. In any event, we do not think it appropriate to have any system of QC accreditation which cuts across the QCA. There is no suggested evidence for QCs to be accredited/reaccredited or reconfirmed in their position.

11. Quite aside from there being no evidence to support the proposed inclusion of QCs within QASA, the approach ignores those safeguards which already exist. These include the existence of the Legal Ombudsman, and the ability of clients to make complaints to him if there are concerns regarding unsatisfactory service, the high professional standards imposed by the Bar Code of Conduct and enforced by the Bar Standards Board and the ability to remove the rank of QC from a barrister for cause shown as expressly provided for in the QCA scheme.

12. In these circumstances there is neither need nor value in requiring QCs appointed under the current system to undertake accreditation under QASA as well, or to undertake periodic reaccreditation under QASA and it **would not be proportionate to do so**If, however, the Scheme is taken forward and QCs are included within it, TECBAR agrees with COMBAR and the Chancery Bar Association, that the only possible basis on which this could reasonably be done, would be to permit judges to complete judicial evaluations of their own initiative if there are concerns about an advocate's performance.

13. TECBAR has a further underlying concern about the whole process of judicial evaluation of practising barristers, particularly when the consequence may be to debar a practitioner from carrying out work at a 'level' in which s/he has previously practised. It is, of course, recognised that judicial evaluation has played an historic and continuing role in the 'upward' appointment to silk and to the judiciary; and that judges may on occasion feel the need to report examples of egregious behaviour or standards. However, TECBAR considers that there are real and constitutional dangers in the extension of judicial evaluation in the way proposed.

14. Judicial independence is of course fundamental to our system of justice; and for good measure is now expressly enunciated in the Constitutional Reform Act 2005.[5] However the independence of the practising advocate is of equal importance; and itself finds statutory support in the Legal Services Act 2007, namely that advocates and litigators have a duty*'…to the court in question to act with independence in the interests of justice'*[6]. Furthermore, the advocate's duty to comply with relevant conduct rules[7] imposes the obligation on the barrister to *'…promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person…'*[8].

15. Combined with the cab-rank rule these duties may require the criminal (and indeed civil) advocate to present highly unattractive cases for highly unappealing clients; and for that purpose if necessary to 'stand up to the Court' with appropriate vigour. There is a real concern, striking at the very root of the advocate's duties, that the requirement of judicial evaluation may have the effect that the advocate may, even unconsciously, 'pull his punches' before a judge who will be evaluating his performance. This is a particular concern in the context of a small provincial trial centre where the advocate may routinely appear before the same one or two judges; or indeed in a specialist court such as the TCC.

16. A stock response will be that any Judge will necessarily admire and approve of an advocate who demonstrates those duties of independence and fearlessness. In our view that is an argument that owes more to theory than to reality. As Lord Justice Moses observed in his Ebsworth Memorial Lecture (2012) :

'As every jury advocate will tell you in a seemingly hopeless case, fulfilling a duty to persuade a jury may be at the cost of pleasing the judge. Do we really want a generation of criminal trial advocates who go into court with the intention of pleasing

[5] Section 3
[6] Section 188(2); which reflects para.302 of the BSB Code of Conduct
[7] Section 176(1)
[8] Code of Conduct Para.303(a)

the judge? Is that what quality assurance means? Of course there will be judges who appreciate where the advocate's duty and loyalty lies…but by no means all, and it is expecting a great deal of young advocates who, as they will be required to do, have notified the judge that they are seeking evaluation to stand up to the judge when he thinks that the cross-examination has gone on long enough.'

He continued :

'Surely the last thing we want is defensive advocacy. The need to be marked, to move up a level or maintain one's grade is, I believe, deeply inimical to the proper relationship between advocate and judge and, more importantly, the trust the client has in that relationship. The accused must believe that his brief will tell the judge to go to the devil, if that is what his case demands.'

17. In our view these principled arguments – which have received no satisfactory answer - fundamentally undermine the very proposal of judicial evaluation for these purpose.

18. A further concern is the effect of the proposals on 'client choice' in circumstances where the client wants an advocate whose QASA 'level' is below that required for the case in question. The Paper's attempt to carve out a limited exception, so that the advocate may 'act up' one level if certain conditions are met (para.4.33), only emphasises the problem. We can see no good reason why a client – and especially a criminal client – should be so restricted in his choice of advocate. He and his solicitor may properly believe that the 'level 4' case demands a particular advocate – e.g. one who will truly be fearless and independent - and notwithstanding that the QASA system has demoted him to level 2. The client and solicitor may well be better judges of the advocate they need to defend their cause. They should not be deprived of that right.

19. The problem is further emphasised by our concerns with the criteria for competence. The sub-competencies set out in the Criminal Advocacy Evaluation Form[9] provide a high (and inevitable) degree of imprecision and subjectivity. As one example amongst many others this includes the difference between having a *'thorough knowledge of law and practice'* (level 2), a *'deep understanding of law and practice'* (Level 3) and a *'superior grasp of law and practice'* (level 4). On these and similar distinctions may turn the ability of a client to have the advocate of his choice; or the ability of an established practitioner to pursue his career.

20. As to Plea Only Advocates (POA) we do not understand how a system, whose purpose must be to serve the public interest and to provide quality assurance, can justify the accreditation of advocates who are permitted to give advice on the fundamental question of a plea but who do not have the experience or quality to conduct a contested trial. Whilst the CBA is obviously in a better position to judge, we consider that any useful advice must surely be informed by an experience and understanding of what may happen in the course of a contested trial, e.g. the legal arguments which may or may not appeal to the judge; or the evidence which may or may not find favour with a jury. We conceive that this may well lead to the unconscious imposition of pressure on a defendant who at Court has 'second thoughts' about a plea of guilty.

21. By way of analogy with our work in the TCC, we do not believe that a 'CMC[10]-only' advocate would be able to give satisfactory advice to his client or assistance to the Court on procedural or substantive issues (e.g. the need for expert evidence; or for specific disclosure) if (s)he did not have the experience or ability to conduct the trial. The problem would become particularly acute if, as so often happens, such a point were to arise in the course of a CMC.

22. In making these comments TECBAR of course recognises the central importance of quality in advocacy, so as to give the public the best possible service of advice and

[9] Annex B to the draft Handbook
[10] Case Management Conference

representation. However, TECBAR considers that the best means of achieving this objective is through the continuing development and enhancement of the training which is currently provided by the Advocacy Training Council, the Inns of Court and the Circuits, including advanced courses such as that provided by the South Eastern Circuit at Keble.

23. TECBAR's conclusion is that the QASA Scheme has not been justified on objective evidence-based grounds; that its implementation through a process of judicial evaluation is at odds with the principle of advocates' independence; that the problems with the Scheme are only highlighted by the attempts to deal with the issues of client choice and POAs; and that quality in advocacy is best achieved through a development and expansion of the advocacy training provided by the ATC the Inns and the Circuits. The QASA Scheme should be abandoned.

24. As previously noted the questions of detail are best answered by the Criminal Bar Association and the Circuits. However in the light of its comments of principle TECBAR makes the following particular responses.

Non-trial hearings

Q 9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

We consider the proposal to permit POAs to be misconceived and against the public interest. The public interest requires that a client should receive properly informed advice and representation; not least on a matter of the fundamental importance of a plea to a criminal charge. We do not understand how this can be achieved through advocates who so not have the qualification or experience to conduct a contested trial. The proposal is likely to increase the prospect of miscarriages of justice through inappropriate pleas.

<u>Client choice</u>

Q 11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible.

In our view the Scheme and the Paper seriously underplay the importance of 'client choice'; and rest on the misguided belief that the regulators (and those who carry out judicial evaluation) 'know best'. The proposed allowance of some limited 'deviation' from the authorised case level demonstrates an inherent problem in the Scheme and provides an inadequate relief for the client.

<u>The accreditation of silks</u>

Q 13: Do you have any comments on the proposed modified entry arrangement?

We see no justification for silks to be introduced into the QASA Scheme. There is no good, evidence-based, reason to believe that either the present or pre-2006 QC appointment processes have failed to achieve their objectives of identifying and appointing a cadre of advocates who have demonstrated the requisite level of excellence; nor therefore that a distinction should be drawn between appointments under the two QC regimes.

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

We agree with the exclusion of specialist practitioners/advocates from the scheme where such advocates have been instructed in criminal cases because of their specialism.

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?

Yes, see above. Further, we have very serious concerns about the very limited rights of appeal proposed. We share the concerns set out in detail in the COMBAR response

to this consultation. We agree with the conclusions concerning appeals set out in the Bar Council response to this consultation in particular, given the serious consequences for a practitioner who fails to satisfy the QASA requirements, that nothing less than a full review of the decision on the merits, at a hearing at which the barrister is entitled to appear and, if he or she so wishes, to be represented, is required.

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