‘Preserving and Enhancing the Quality of Criminal Advocacy’

25 BEDFORD ROW

Response to MoJ Consultation Paper

Our Chambers

1. 25 Bedford Row is one of the very few specialist criminal defence sets at the Bar. Its ranking as a leading set has been achieved through the high standards of advocacy and professionalism of its members. In addition, it has developed a justifiable reputation as progressive and efficiently run. Many of its members have been actively involved at a high level in the Criminal Bar Association and the Bar Council. Chambers has thus been engaged for the best part of the last decade with the sort of professional issues with which this MoJ paper once again deals.

The Paper

2. As the Executive Summary of this latest consultation makes clear, it stems from the findings of the Jeffrey Review, which reported in May 2014. We quote from the Summary:

> “In his Review of Independent Criminal Advocacy, Sir Bill Jeffrey found a level of disquiet amongst judges and practitioners about the standards of criminal defence advocacy, and found that the market was not operating competitively so as to optimise quality. The government shares a number of Sir Bill Jeffrey’s concerns, and

is therefore consulting on a package of measures to preserve and enhance the quality of publicly funded criminal defence advocacy.

The government, via the Legal Aid Agency (LAA), is the largest single procurer of criminal defence advocacy services, and has a responsibility to ensure that, where such advocacy services are being paid for with public money, they are of a good quality. The government also wants to ensure that the client's choice of advocate is preserved and not unduly influenced by financial incentives.

In light of this, we invite views on:

- *The proposed introduction of a panel scheme – publicly funded criminal defence advocacy in the Crown Court and above would be undertaken by advocates who are members of this panel;*
- *The proposed introduction of a statutory ban on referral fees;*
- *How disguised referral fees can be identified and prevented; and*
- *The proposed introduction of stronger measures to ensure client choice and prevent conflicts of interest. "*

Our Perspective

3. The twin drivers of the most damaging changes to the criminal justice system have been an almost ideological commitment to the Carter Review of 2006 and the desire to slash public spending. These changes have not only been damaging to the criminal justice system as a whole, they have been extremely divisive to the professions, as everyone involved in the system knows. We do not intend to rehearse the measures that successive governments have imposed on us since 2007 and their well-known consequences. What we will say is that the result is that government has, by its own actions, substantially impaired the structure of a market for legal services which provided the taxpayer with the best value for money in the provision of publicly funded criminal defence work.

4. It is against that background that the Consultation Paper attempts to "*enhance the quality of criminal advocacy*". There is no doubt that the paper is well-intentioned and we welcome that new tone but the MoJ must commit to a properly funded criminal defence service if it is genuine in its desire to enhance standards of advocacy.

Questions and Answers

Q1: Do you agree that the government should develop a Panel scheme for criminal defence advocates, based loosely on the CPS model already in operation? Are there particular features of the CPS scheme which you think should or should not be mirrored in a defence panel scheme?

5. Unhelpfully, this is not one question but two.

6. In respect of the first question, our answer is **'Yes but if and only if it were instead of QASA, not in addition to it.**

7. 25 Bedford Row has been a consistent opponent of QASA on both principled and practical grounds and we will not weary the reader with our reasons. If and when it is finally imposed, QASA will not only represent a significant burden on both practitioners and the judiciary, it will act as a yet another disincentive to newly qualified lawyers to practice publicly funded law. Bearing in mind that the government has demanded specialised training for advocates in cases involving vulnerable witnesses and victims (currently in an advance stage of design by the Rook Committee) if QASA stays, a panel scheme would be a third tier of post-call qualification. One is bound to ask what the BPTC and a year's pupillage is worth if we have to keep jumping all these additional hurdles in order to practice, let alone progress?

8. However, the proposed panel scheme applies only to publicly funded defence advocates and it is hard to see how the three regulators of QASA could agree to it replacing a scheme that applies to all advocates, whether they prosecute or defend and whether they are publicly or privately funded. Still, it is never too late to see sense and if QASA is abandoned, we would be in favour of a panel scheme of this type.

9. From our necessarily limited knowledge of it, the CPS scheme appears to be a good model and it appears to be relatively cheap and effective. Prior to its introduction, there had been disquiet within the profession, but it does not now appear to attract any opprobrium from those who prosecute.

.

Q2: If a panel scheme is to be established, do you have any views as to its geographical and administrative structure?

10. Paragraph 2.24 of the paper says: "*The overall administration of the scheme would be for the LAA, which would oversee and support the operation of the regional and/or national panels. The LAA would set the criteria against which applications would be assessed.*"

11. To ensure equality of outcomes, any panel scheme must be national but it has to be responsive to local needs and thus administered at a regional level.

12. We have no strong views on what that regional structure should be. It would make sense for it to be congruent with an existing structure that fulfils an important role within the CJS. The CPS model is circuit based and so a similarly structured defence panel would make good practical sense. However, such a circuit-based scheme might be seen by some to be rather too bar-centric. We can see the merit in a scheme based more broadly on other regional structures.

Q3: If we proceed with a panel, do you agree that there should be four levels of competence for advocates, as with the CPS scheme?

13. Yes

Q4: If we proceed with a panel, do you think that places should be unlimited, limited at certain levels only, or limited at all levels? Please explain the rationale behind your preference.

14. There should be no limits at any level. There is no practical or legal justification for limits. It would give the LAA far too much power and would be a real disincentive to juniors in bands 2 & 3. Entry to the panel should be merits-based: having arbitrary maxima – and the Paper is silent on how such maxima would be selected - is anti competitive. Once a person is a member of a panel then the traditional methods of instruction follow.

Q5: Do you agree that the government should introduce a statutory ban on "referral fees" in publicly funded criminal defence advocacy cases?

15. Yes.

16. There may be a good argument for saying that the request for, and the payment of, referral fees are already criminal offences under the Bribery Act 2010.

17. However, the argument would centre upon seeking to prove that the payment had been intended to bring about the improper performance of a relevant duty or function – that duty being to instruct the best advocate for the job.

18. It would be far simpler and more effective to simply statutorily ban referral fees. Lest it be overlooked, there can be no proper basis whatsoever for paying or receiving such a fee and it not only creates an incentive for both parties not to provide best value for money to the taxpayer who is paying for the provision of the legal service, but also extracts value from the publicly-funded system and thus wastes that part of the resource.

Q6: Do you have any views as to how increased reporting of breaches could be encouraged? How can we ensure that a statutory ban is effective?

19. Again, two questions in one.

20. The short answer to the first question is to impose a professional obligation on both solicitors and barristers to report to their respective regulators any evidence of such fees being demanded or paid. That would not eradicate collusion between willing parties to such an arrangement but it would make it harder to risk suggesting them to a new party.

21. The equally short answer to the second question is to enforce it by action. It would take no more than one or two prosecutions to make the practice too hazardous for all but the most determinedly dishonest.

22. We add this. In law-making there is a principle often referred to as the declaratory principle that holds that passing a law requiring or banning something achieves part of its aim by simply existing. In a civil society, laws will be observed by many simply because they exist. A statutory ban would also achieve its aim in part by outlawing the more elaborate arrangements that exist to achieve the aim of a referral payment without the actual direct payment of such a fee.

Q7: Do you have any views about how disguised referral fees could be identified and prevented? Do you have any suggestions as to how dividing lines can be drawn between permitted and illicit financial arrangements?

23. The familiar two questions.

24. The paper sets out two of the ways that such fees are disguised and identifies the problem as turning on the honesty of the arrangements, by which we take it the paper means the genuineness of the arrangement. If money is being paid or demanded for a genuine service that provides real value, there can be no objection to it but we have no suggestions as to the mechanism for sorting the honest wheat from the dishonest chaff.

Q8: Do you agree that stronger action is needed to protect client choice? Do you agree that strengthening and clarifying the expected outcome of the client choice provisions in LAA's contracts is the best way of doing this?

25. The current provisions of the Codes of Practice for the professions make clear that all instructing solicitors should make client choice a reality. It is very difficult to see how this choice could be further protected without it appearing to be a slight on the *bona fides* of the solicitors' profession in general.

26. Client choice is protected at the moment irrespective of whether or not there is a financial incentive to brief 'in-house'. If a client wants a member of the independent bar, then they can have them, named or otherwise. Otherwise a solicitor is free to brief whomever they choose.

27. We do not agree that the LAA contract is the place to address any quality issues.

28. If the panel scheme is introduced then it would operate to ensure that clients are only represented by an advocate of suitable ability. It matters not if that advocate is in house or not. There does need to be a mechanism whereby clients who are not getting an adequate service are able to complain and change representative if need be.

Q9: Do you agree that litigators should have to sign a declaration which makes clear that the client has been fully informed about the choice of advocate available to them? Do you consider that this will be effective?

29. We are not in principle opposed to this suggestion but query its effectiveness of the necessity for it. It smacks of being largely a gesture with negligible practical benefit.

Q10: Do you agree that the Plea and Trial Preparation Hearing form would be the correct vehicle to manifest the obligation for transparency of client choice? Do you consider that this method of demonstrating transparency is too onerous on litigators? Do you have any other comments on using the PTPH form in this way?

30. No. The PTPH form is one authorised by the Lord Chief Justice under his power to make Practice Directions. It could be construed as creating an impression that judges would be perceived as being biased against the solicitors' profession which would be most undesirable and, for the reasons set out above, largely ineffectual in any event.

Q11: Do you have any views on whether the government should take action to safeguard against conflicts of interest, particularly concerning the instruction of in-house advocates?

31. We do not believe there is any action that the government should take or lawfully could take. It is extremely difficult to envisage any further actions which would not be unlawful for being anti-competitive and a restraint of trade.

32. There is no conflict of interest where firms and the in-house advocates obey their ethical standards and Codes of Conduct. As long as the advocate has sufficient training and experience, then we see no reason why measures should be introduced to prevent solicitors from briefing in-house.

Q12: Do you agree that we have correctly identified the range of impacts of the proposals as currently drafted in this consultation paper? Are there any other diversity impacts we should consider?

33. With all due respect to the Impact Assessment, it is extremely vague in terms of identifying any actual impacts, other than to point out that a ban on referral fees will impact adversely upon those who currently receive them!

Q13: Have we correctly identified the extent of the impacts of the proposals as currently drafted?

Q14: Are there any forms of mitigation in relation to the impacts that we have not considered?

34. See above answer.

Q15: Do you have any other evidence or information concerning equalities that we should consider when formulating the more detailed policy proposals?

35. As we have already observed, the reason the profession and the Criminal Justice System generally is in a mess because of a chronic lack of adequate funding, both in terms of "pay" and the court system itself. As the publicly funded professions are squeezed financially they attract less able candidates, and those with talent leave, as would any

person in a profession where the equivalent alternative route is more secure and better remunerated.

36. The Criminal Justice Alliance has very recently released a 28 page report concerning the experiences of a creaking justice system. In large part, these are due to underfunding.

37. There ought to be no objection to raising standards and ensuring quality. A ban on referral fees is long overdue and perhaps a quality check such as the CPS model would be of some use. However, these are 'sticking plaster' solutions for a more fundamental problem of an under resourced and underfunded Criminal Justice System.

25 BEDFORD ROW
London
WC1R 4HD

27 November 2015