THE COUNCIL OF THE INNS OF COURT

Quality Assurance Scheme for Advocates

Response to the Joint Advocacy Group's QASA Consultation

December 2015

By way of essential preface to our response to the questions posed in this consultation paper, we attach hereto the Council of the Inns of Court's response to the consultation paper, *Preserving and Enhancing the Quality of Criminal Advocacy*. We strongly support the introduction of the grading scheme ('PEQCA scheme') that we have outlined in that response. Further, it seems entirely right that the PEQCA scheme **alone** be enacted in place of the proposed QASA scheme. The PEQCA scheme has a number of significant advantages over the QASA scheme (which we do not rehearse here) and there is unnecessary expense and a real risk of duplication and confusion if the two grading schemes for advocates are run simultaneously.

Against that background, we turn to address the specific issues raised and questions asked in the current QASA consultation paper.

Proposal 1: Amendment to the CAEF to require an advocate to identify when they were first instructed

Question 1: Do you see any practical difficulties arising from amending the current CAEF to include this proposal?

We are opposed to the imposition of a requirement upon an advocate to identify when they were first instructed.

We consider that this proposal is, at best, unnecessary. There is no legitimate defence and little or no mitigation in an advocate's advocacy being lower than the required standard on the grounds that he or she was instructed late. No advocate should accept a case in which he or she cannot provide a proper professional service, which of course includes the advocacy within the case. If an advocate accepts a case in good faith and discovers that he or she cannot provide a proper

professional service, the advocate must either (i) return the case or (ii) apply for a short, sometimes a more long-term, adjournment of the case. In the course of such an application we anticipate that the lay and professional client will authorise the advocate to disclose to the judge the stage at which he or she was instructed. Anything less than this would mean that the lay client will be left to suffer less than adequate representation.

In the unlikely event that the judge declines an adjournment application and compels the advocate to continue in the case, we expect that the judge will make due allowance for the difficulty the advocate finds him or herself in when preparing the QASA assessment.

We consider that, at worst, the proposal would give the judge the power or an opportunity to interrogate the advocate about not just **when** they were instructed but also **why** they were instructed when they were. The proposal risks opening up sensitive and/or potentially legally privileged matters and risks placing the advocate under pressure or in an embarrassing position before the lay client and other parties to the case. Such an enquiry by the judge could force an advocate to reveal matters which carry with it a criticism of their professional client, in circumstances where the professional client would argue their entitlement to be present to hear what is said of their conduct in order to agree with or to contradict it. This would inevitably lead to 'trials' as to the professional conduct of the relevant advocate and litigator at an inapposite time and in an inappropriate environment. If it is required, the proper time and place for such assessments is by the respective professions' regulatory bodies.

Further, this proposal may lead to court time being wasted in unnecessary enquiries by the judge.

Proposal 2: Amendment to the CAEF to require an advocate to identify whether advice on evidence was provided

Question 2: Do you see any practical difficulties arising from amending the current CAEF to include this proposal?

We do see practical difficulties with this proposal. It seems to us that a requirement upon an advocate to identify whether advice on evidence was provided would be an unnecessary and unwelcome encroachment by the judge into the arena which is the sole preserve of the advocate and litigator. It will be time-consuming and, without going into more detail about the advice or the reason that no advice on evidence was provided, the exercise will be meaningless.

As with proposal 1, we anticipate that it would not be uncommon for a judge to blur the line between an enquiry about **whether** advice on evidence was provided and extend into an enquiry as to **what** advice on evidence was provided. In any event we have concerns that the proposal risks opening up sensitive and/or potentially legally privileged matters and risks placing the advocate under undue pressure or in an embarrassing position before the lay client and other parties to the case.

Further, this proposal may lead to court time being wasted in unnecessary enquiries by the judge.

Proposal 3: An amendment to the Scheme Handbook to permit a judge to decline to carry out an evaluation if they believe, because of the circumstances, it would not be fair to do so. In that event, the evaluation would be made at the next trial

Question 3: Do you see any practical difficulties arising from a judge declining to complete an evaluation if they believe, because of the circumstances, it would not be fair to do so?

We do not see any practical difficulties with this proposal; indeed it appears to us to be perfectly sensible. We go further and suggest that it should also be open to the advocate to invite the judge not to assess him or her on the same basis.

Proposal 4: An amendment to the Scheme Handbook to provide that, in the event of a third judicial evaluation becoming necessary, it should be of the first trial conducted by the advocate in front of a different judge to either of the judges who conducted the first two assessments

Question 4: Do you see any practical difficulties arising from a requirement that, in the event of a third judicial evaluation becoming necessary, it should be of the first trial conducted by the advocate in front of a judge other than either of the judges who conducted the first two assessments?

This proposal seems sensible to us. We recognise there may be practical difficulties in small court centres where there is potential for a limited pool of available judicial assessors and an allowance must be made for this eventuality.

Proposal 5: Removal of some areas of ambiguity from Scheme's written material

Question 5: Are there any practical difficulties that arise from these amendments to the Scheme Handbook?

We express no views on the proposed amendments to the Scheme Handbook.

Proposal 6: Clarification of BSB and SRA QASA rules

Question 6: Do you see any practical difficulties arising from the changes to the BSB or SRA Appeal rules?

We do not see any practical difficulties arising from the changes provided that there is a clear and expeditious route of appeal.