THE COUNCIL OF THE INNS OF COURT

PRESERVING AND ENHANCING THE QUALITY OF CRIMINAL ADVOCACY

RESPONSE TO THE MINISTRY OF JUSTICE'S CONSULTATION PAPER

November 2015

INTRODUCTION

The Consultation Paper, *Preserving and Enhancing the Quality of Criminal Advocacy*, seeks to address serious problems in relation to defence advocacy in the Crown Court which have rightly caused concern and were identified by Sir Bill Jeffrey in his May 2014 report, *Independent Criminal Advocacy in England and Wales*.

The Inns of Court represent a unique and invaluable pool of experience in relation to advocacy and the operation of the Courts, comprising, as they do, both specialist advocates and the judiciary. The Inns are committed to maintaining and improving the standards of advocacy in the Courts and provide extensive training in furtherance of that object. Their members have a front row seat in seeing and recognising the various practices which have arisen in the past few years which, in the view of the Inns, seriously threaten both the quality and independence of the advocates appearing in the criminal courts.

We very much welcome the underlying spirit of the Consultation Paper; it seeks to address issues which have been highlighted by barristers repeatedly in recent years. We also welcome a change of tone and analysis on the part of the government which, it is to be hoped, shows a new willingness to listen to the experience-based advice of those who are involved in seeking to ensure that justice is done to the highest possible standard.

Before we move on to answering the specific questions posed by the paper, we feel that it is important to set out an analysis of where things are presently going wrong, to consider how

advocacy skills are acquired, and to look at the wider context of measures necessary to ensure that the selection of advocates is upon the basis of merit alone, and not upon the financial interests of the litigator (which presently seem to us to present a serious risk of being the reason for, or least the predominant factor in, the selection of advocate).

THE PRESENT SCENE

Criminal cases are dealt with, at first instance, in the Magistrates' Courts, the Youth Court and the Crown Court. Whilst it is quite clear that the most important cases are dealt with in the Crown Court, it is nevertheless the case that many decisions which can have profound effects upon individual citizens are taken in the Magistrates' Courts and the Youth Court. Where there is a serious risk that a citizen might be deprived of his liberty and/or his livelihood – or, indeed, his good character – we doubt whether the fact that the case is being dealt with in the Magistrates' Court, the Youth Court or the Crown Court should impinge upon the quality of advocacy which such cases merit. Accordingly, whilst we understand that there may be practical reasons why any scheme might, at first, be limited to the Crown Court, we would wish to see early implementation extended to cases of the type identified above, irrespective of the Court in which they appear.

The maintenance of the rule of law and access to justice are central to the compact between state and individual. We fear that this absolutely basic obligation has been lost sight of at times over the past two decades in the desire to reduce the costs of the justice system. The reduction of effective rates of remuneration, which in some cases have been huge, has undoubtedly created pressures whereby solicitors' firms have felt compelled to use in-house advocates in an attempt to ensure financial survival. The development of referral fees, often thinly disguised, is wholly contrary to the public interest, but they are clearly seen by some advocates as necessary to ensure their own survival. They do no credit to those who solicit or agree to them. The danger of these practices is that they breed a cynicism and dull the professional instinct whereby professionals should instantly recognise them as wrong. Whilst the question of the level of fees is not one addressed by the Consultation Paper, we feel it necessary to point out the obvious context in which the present problems have developed.

That there are serious problems should not be doubted. The regular choice of advocates wholly unsuited by experience or skill to conduct difficult cases is becoming more commonplace. The use of inexperienced in-house advocates as juniors in cases in which silks are instructed remains all too common and is capable of amounting to an abuse.

Whilst we can identify with little difficulty the clear conflict of interest where in-house advocates are instructed and referral fees paid, it must also be acknowledged that a culture has grown up whereby barristers encourage solicitors to instruct them as a reward for referrals by the barrister. This is, again, a serious departure from the principle that the most appropriate advocate must be instructed, irrespective of any financial interest, direct or indirect.

We echo the view of Sir Bill Jeffrey as to the criminal bar being a national asset. It is an undeniable fact, observed over years by experienced criminal practitioners (including the authors of this response), that the growing gap between incomes at the criminal bar and other areas of practice has had a significant negative impact upon the number of quality candidates applying for pupillages which include a major criminal element. In the long term this is unsustainable. This is aggravated by the fact that the successful candidates often find that they are not being instructed because unsuccessful candidates then turn up as in-house advocates who are instructed ahead of them for financial reasons.

These issues require addressing; in our view, the government's proposals in the Consultation Paper will go some way to addressing them. However, in the wider context, we echo Sir Bill Jeffrey's recommendation of common training expectations for all advocates. Whilst we acknowledge that a good advocate is not made by training and experience alone, they are, nevertheless, prerequisites and it is essential that, by whichever professional body they are qualified, all advocates receive a substantial training in advocacy and that there is harmonisation of the amount and quality of training received prior to qualification. We remain of the view that the present system of pupillage, following a course which contains significant amounts of advocacy related instruction and training, represents an effective and pre-eminent way of providing the basic training required.

Any accreditation system which perpetuates the situation whereby the advocacy training of one set of advocates is more extensive and thorough than another will quickly lose public confidence. This must be an urgent priority.

This Consultation Paper addresses the quality of advocacy and our proposals are designed to assist in reversing the decline which is, in our view, apparent. However, these issues do not exist in a vacuum. It is a fact that a substantial majority of defendants in serious criminal cases come within the legal aid provisions and that there have been dramatic reductions in legal aid fees during the same period as that in which we have observed the decline in standards. This is no mere coincidence. We therefore call upon the Lord Chancellor, as an act of good faith, to acknowledge that further cuts will directly undermine the good which will otherwise be done by these proposed

reforms. We call upon him to look again at issues such as top-up fees as ways of easing the strain upon the public funds. But we are clear that further cuts will merely incentivise further the behaviour which the Lord Chancellor seeks to address through this consultation paper.

Finally, we recognise that the broad thrust of government policy is to broaden the ways in which legal services can be provided. We can readily see how this can be achieved in areas of the law which do not have the direct public interest that criminal litigation undoubtedly has, but we have seen little evidence to suggest that the changes in modes of practice of the past fifteen years have done anything to promote the public interest. We do not seek to turn the clock back in terms of any restrictive practices but we do seek to identify the present problems – where our analysis matches, to a large extent, that of the government – and to support any measures which are likely to be effective in dealing with them.

Q1 – Q4 PANELS

INTRODUCTORY COMMENTS

The concerns which we have identified in our introduction mean that some mechanism of ensuring high standards is required: one that will recognise experience and aptitude. Whilst there are some aspects of a panel system which cause us concern (costs and the administrative workload being prime amongst those concerns), we do not see any viable alternative system which has greater merit.

One of the concerns about QASA, and a potential concern about any panel scheme, is the question of independence. We take it as axiomatic that the public interest requires that advocates, and defence advocates in particular, are able to advance their clients' cases fearlessly and without any compromise upon their independence. We are satisfied that the elements of a panel scheme which we identify in this response will ensure that there is no threat to independence.

In our view, a panel scheme will work best if the following elements are contained in it:

i) The majority on the panel must be experienced practitioners, drawn from both sides of the profession;

ii) There should be a judicial element, from both the Crown Court and the magistrature. The judges and the justices see the abilities of advocates on a daily basis and this experience is invaluable. To preserve independence, however, they must be in a minority;

iii) There should be national standards; but

iv) They should be applied locally, with panels sitting in the circuits and for major court clusters.

Our proposal is that each panel should comprise the following:

One senior circuit judge; one magistrate; three QCs; three junior barristers; three HCAs or litigators. The proportion of barristers to HCAs broadly reflects the numbers practising in the Crown Court.

It will be important that the members of each committee are properly trained and, given the amount of time which it will be necessary to devote to the task, adequately remunerated.

We do not envisage that all the work of the panels will be done with all members contributing. We would suggest that screening work on applications could be done by smaller sub-committees, with the full committee ensuring consistency and overseeing the process.

We accept that there should be a system of grades. Since the system is initially restricted to advocacy in the Crown Courts,[1] it is our firm view that the bottom grade should not be extended to every advocate upon qualification. It is important that an advocate is able to demonstrate a track record in lesser cases in the magistrate's court and committals for sentence in the Crown Court before any wider accreditation. We recognise that this will be more restrictive than the current situation of newly qualified barristers, but we feel that the system must be applied to all advocates, irrespective of their route to qualification. All need to cut their teeth and acquire a basic level of experience before being qualified to take on Crown Court work other than committals for sentence.

The grade boundaries should be a matter for decision by agreement between the professional bodies and the LAA. A system which merely relates competence to the type of offence charged will, in our view, be too crude. It should be possible to devise a system of weighting of factors to arrive at a satisfactory scheme.

We are of the view, however, that it is important that certain specific types of case should require specific tickets: sex cases, terrorist cases and large scale frauds.

We would envisage that, in order to be graded, candidates will have to provide evidence of their experience and competence. They should be required to provide a list of cases which they have carried out in the period under review, identifying their instructing solicitor and the tribunal in question. They should also be required to produce relevant examples of written work. The panels will be expected to request a report, on a sample basis, from the litigators / tribunals in question, so as to have assistance in judging the quality of the applicant's advocacy.

It will be possible, subject to the rules of professional conduct, in cases of necessity, for an advocate to be briefed in a case in the category other than that for which he or she is qualified. In such cases, the instructing litigator will be required to fill in a form explaining how the situation has arisen and reporting upon the results.

We feel that, properly administered, the scheme which we propose will be capable of replacing QASA for the advocates which it will cover.

We do not believe that it is necessary for the scheme to extend to cover QCs. The QC selections system is rigorous and there is a good supply of QCs practising in crime to allow for an effective

[1] We would, however, refer the reader to our views as to the desirability of the scheme being extended to all cases in which a loss of liberty, livelihood or good character is likely.

market based upon quality. The CPS scheme does not include QCs and we have seen no evidence that this has caused any problems or is having undesirable results.

ACCORDINGLY, our answers to Q1 to Q4 are as follows:

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 the defence panel scheme?

We agree that the development of a panel scheme is desirable. We have proposed a model which is, in our view, a significant improvement upon the CPS scheme. It is important that the panels are comprised principally of practitioners, as opposed to the judiciary, albeit with an important judicial component.

We do not believe that it is necessary for the scheme to extend to cover QCs.

We would like to see it introduced as soon as possible to extend to cases in the Youth and Magistrates Courts where loss of liberty, livelihood, or good character is at issue.

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

As indicated, whilst there should be national standards, it is vital that local knowledge is utilised and we strongly endorse a system of local committees, based upon the major court centres on the Circuits. Lesser court centres will be allocated to the nearest major centre.

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?

We agree that there should be a number of levels, not exceeding four. The boundaries are a matter for further consideration, but we do not believe that qualification should, per se, provide a passport into the lowest category. We also believe that specific case types, which we have identified above, should require special ticketing.

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.

We do not believe that it is necessary or even desirable to artificially limit the numbers in any grade. Competition should, under the system which we advocate, produce higher standards. The question to be addressed is the skill and experience of the advocate, not numbers.

Q5 – Q7 REFERRAL FEES

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

Yes.

There is reliable anecdotal evidence that referral fees are a small but significant problem in criminal defence work. Quite apart from the deplorable ethical side of the practice, in general terms it must be likely to be the case that less successful, which often means less able, advocates will enter into an arrangement for the payment of referral fees. Such arrangements compromise client choice, lower the standard of advocacy in our criminal courts and undermine confidence in the criminal justice system. Whilst we do not believe the practice to be widespread, it is wholly objectionable and tough action must be taken to root it out if the quality of advocacy in our criminal courts is to be maintained.

Accordingly, we welcome the tone struck and firm position suggested in the consultation paper. We are in no doubt that a statutory prohibition on referral fees in publicly funded criminal defence cases is both appropriate and desirable.

Section 56(1) of the *Legal Aid, Sentencing and Punishment of Offenders Act* 2012 ('*LASPO*'), which currently relates only to personal injury cases, defines a referral fee as a **regulated person referring or receiving prescribed legal business and a payment being made for the referral**.

This provision serves as a perfectly good definition of a referral fee and we would agree that it can and should be applied to criminal defence cases.

Another 'species' of referral fee of which there is anecdotal evidence is a 'fee sharing arrangement' between an advocate and a litigator, whereby an agreement is made that the advocate should pay a percentage of his or her fee to the litigator. It seems to us that the section 56(1) definition of a referral fee would catch such a fee sharing arrangement.

Section 56 of *LASPO* states that accepting a referral fee does not (a) make a person guilty of an offence, (b) give rise to a right of action for breach of statutory duty (section 56(5)) or (c) make anything unenforceable, save for the contract to make or pay the referral fee (section 56(6)).

The value of *LASPO*'s prohibition on referral fees lies in the following four provisions: Firstly, the

relevant regulator is required to ensure that it has appropriate arrangements for monitoring and enforcing the section 56 restrictions imposed on regulated persons (section 57(1)). Second, a regulator is empowered to make rules for these purposes (section 57(2)). Third, those rules may in particular provide for the relevant regulator to exercise in relation to breaches any powers that the regulator would have in relation to anything done by the regulated person in breach of another restriction (section 57(3)). Fourth and finally, where it appears to the regulator that a referral fee has been paid, the regulator may provide for the payment to be treated as a referral fee unless the regulated person shows that the payment was not a referral fee (section 57(7) and (8)); in other words, where there is a *prima facie* case, there is power to shift the usual burden of proof.

We support the adopting of these provisions in criminal defence advocacy cases.

However we go further and suggest that the *LASPO* provisions in relation to the payment of a referral fee should also extend beyond actual **payment** of a referral fee to a statutory prohibition on **offering or requesting** a referral fee. This extension of the prohibition would help to curtail the spread of referral fees by deterring advocates and litigators from **enquiring** into setting up a referral fee arrangement. Presently, an advocate could offer a referral fee or a litigator request a referral fee without fear of being reported to a regulator and without being guilty of a regulatory offence. We understand that this sort of practice takes place; it must be stopped.

Finally, we recommend that the professional bodies responsible for issuing quality marks, accreditation, legal aid contracts, etc. should consider adverse findings in relation to referral fees against a member of an advocates' chambers or litigator's firm (including a member of staff such as a clerk or practice manager) in making a decision whether to issue/re-issue the quality mark, accreditation, legal aid contract, etc. In our view, this will encourage chambers and firms to ensure that all of its members operate in compliance with the statutory prohibition on referral fees.

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?

We agree that the government's proposal to introduce a statutory prohibition on referral fees in criminal defence advocacy cases would send a strong message as to how seriously this conduct is viewed. That, in turn, may encourage the greater reporting of breaches.

We are in no doubt that action against referral fees must be firm and profession wide. We consider that the Bar Standards Board ('BSB') and Solicitors Regulation Authority ('SRA') should create a

positive obligation upon their members to report knowledge of an offer of, request for or payment of a referral fee, and in turn make a failure to report such conduct itself a breach of their respective Code of Conduct.

It is only with steps such as these that referral fees or approaches to enter into referral fee arrangements, which practitioners are currently slow to report and which would be otherwise difficult to detect, can be effectively uncovered and eliminated.

There is an analogy to be drawn with other statutory provisions that place a positive obligation on an organisation or the individual. The *Proceeds of Crime Act* 2002 ('*POCA*') requires regulated employees such as lawyers and other regulated professionals to disclose knowledge or suspicions of money laundering and provides for an offence when *an individual* fails to disclose suspicions of money laundering. Section 7 of the *Bribery Act* 2010 ('*BA*') – which is apt since a referral fee is essentially a bribe – makes it an offence for a commercial organisation to fail to prevent persons associated with it from committing bribery on their behalf.

We do not go so far as to suggest that there should be a requirement to report on the basis of **suspicion** or a positive obligation upon an advocate or litigator's chambers or firm **to prevent** referral fees from being offered, requested or paid. The *POCA* and *BA* provisions serve to illustrate how appropriate it is to create a positive obligation upon advocates and litigators to report an offer of, request for or payment of a referral fee, and in turn make a failure to report such conduct itself a breach of their respective Code of Conduct.

An option for ensuring that a statutory ban on referral fees is most effective is to create a specific criminal offence for the payment or receipt of a referral fee. We invite the government to give consideration to this option.

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?

Disguised referral fees are described in the consultation paper as "**payments… made which effectively amount to referral fees**" (para. 4.8). Examples are given of 'administration' or 'management' fees paid by advocates for services provided by litigators.

Disguised referral fees are harder to define and identify than the more 'routine' non-disguised referral fee arrangement but are equally pernicious.

Examples of disguised referral fees might include (but are not limited to) the following:

1. An agreement by an advocate's chambers or firm not to charge or to pursue the fees for junior advocates who have undertaken work from a litigator in return for more senior advocates receiving work from that litigator;

2. A clear pretence by an advocate that the litigator was undertaking a quantity of administrative work for the advocate but which the advocate would ordinarily be expected to perform in return for which the advocate pays a 'kickback' fee or percentage of the fee to the litigator;

3. An agreement between an advocate (and/or their chambers or firm) and litigator that the advocate will be instructed as the leading advocate in a case in return for an unfit advocate of the litigator's choice acting as the junior advocate; and

4. An agreement whereby an advocate or their chambers or firm arranges for cases to be sent to a litigator in return for the instruction of the advocate/ or their chambers or firm in that or another case or cases.

The example given at paragraph 4 above of an improper disguised referral fee agreement must be distinguished from legitimate recommendations, based on merit and the needs of the client, by an advocate or their chambers or the firm of a litigator with whom there is a proper working relationship.

We are of the view that disguised referral fees, **properly defined**, should be subject to the same statutory prohibition, sanctions and professional obligations that we have recommended for non-disguised referral fees.

Part of the answer to defining disguised referral fees – and in the process drawing an appropriate line between permitted and illicit financial arrangements – lies in section 56(8) *LASPO*, which provides that, "Payment includes **any form of consideration** whether any benefit is received by the regulated person or by a third party (but does not include the provision of hospitality that is reasonable in the circumstances)."

Another part of the answer to defining disguised referral fees is to focus on whether the consideration from the advocate (be it monetary or otherwise, direct or indirect) is a **condition** or a **requirement** for the receipt of instruction from the litigator. If it is, it will amount to an illicit disguised referral fee.

Accordingly, our draft definition of a disguised referral fee, closely related to the wording of sections 56(1) and (8) of *LASPO*, would be this: "a regulated person referring or receiving prescribed legal business and a **requirement of any form of consideration** being made for the referral."

It is apparent that in the case of disguised referral care must be taken to guard against the risk of improper reporting, investigation and findings against legal professionals who are engaged in perfectly proper practices. For this reason, we recommend that the section 57(7) and (8) *LASPO* provisions concerning shifting the usual burden of proof ought not to apply to disguised referral fees. Further, we recommend that the positive obligation to report disguised referral fees should be limited to a duty to report **an offer or a request** for a disguised referral fee, since the advocate or litigator concerned would be in no doubt that an illicit offer or request has been made and the risk of an improper report is thus kept to a minimum. At the same time, we hope that retaining this aspect of the positive obligation will help to curtail the spread of disguised referral fees by deterring advocates and litigators from **enquiring** into setting up such an arrangement.

Q8 – Q11 CLIENT CHOICE

Q8: Do you have any suggestions as to how dividing lines can be drawn between permitted and illicit financial arrangements?

Our position is that client choice is important but, in reality, the client is very often going to be guided by a solicitor or someone close to them. In our view, the position of clients will be significantly better protected by the measures we have already identified under the sections headed "Panels" and "Referral Fees". We support any reasonable measures which clarify the expected outcome of client choice provisions in LAA contracts.

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

We support the idea that there should be transparency in the methods used by litigators to choose their advocate. We propose that, rather than a mere declaration, there should be a form upon which the litigator should indicate the name of the advocate instructed and give reasons why that advocate was selected. Whilst such a form should not be overly bureaucratic or burdensome, it should contain upon it a clear declaration that the client has been informed of their options regarding choice of advocate. These forms could be subject to ad hoc inspection by the local committee (as set out in previous sections) and, in exceptional circumstances, the judge. The declaration could also require confirmation that no fee sharing, fee or improper inducement has been involved in the choice of advocate. We consider that the ad hoc inspection of these forms plays a vital role in ensuring their effectiveness.

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?

We strongly disagree with the proposition that the PTPH form is the correct vehicle for this purpose. Such a form is almost invariably completed by the instructed advocate at court, who will not have the appropriate information and would be in an invidious position should they be required to complete

that section. Moreover, the PTPH is not the appropriate forum in which to discuss the choice of advocate. It is embarrassing for the advocate concerned and, importantly, the litigator will very often not be at court.

We take the view that judges should not be involved in this monitoring save in exceptional circumstances (e.g. where a real problem manifests itself or the client complains to the court that he/she is not being permitted his/her choice of advocate). We suggest that the monitoring of the litigator's choice is best done by an area committee, as described above.

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?

This is a vexed question. It is clear to us that there are a number of solicitor's firms who have policies only to instruct in-house advocates. Those individuals are, very often, not the most appropriate person for the task. The decisions are being made for economic reasons, rather than in the best interests of the client. On the other hand, there are some firms with excellent in-house advocates who are perfectly suited to the task required.

We submit that the government ought to state, in the clearest terms, that no decision to instruct an advocate may be based solely or substantially on the financial interests of the litigator. We believe that, if allowed to instruct in-house advocates, firms must expect their decisions to be subject to scrutiny by the local committee.

We are concerned that, if forbidden, litigators will merely "swap" instructions with another firm, therefore maintaining a different but equally objectionable restrictive practice. A clear set of "unacceptable practices" must be identified and openly stated.

Q12 – Q15 IMPACT

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?

Yes. There *might* be an initial dip in representation of those with protected characteristics if they are represented more heavily as "in house" advocates who *might* have been allocated work beyond their expertise. This might be considered an "acceptable" side effect of the proposals.

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

Yes. Transparency of allocation of work and "levelling the playing field" by banning referral fees can only improve the fairness of distribution of work for groups who have protected characteristics.

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

In light of the responses above N/A.

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

Further to the answer to question 12 above, it may be useful to have statistical data on the protected characteristics of "in house" advocates. The proposals for a panel and transparency of client choice could most directly affect "in house" counsel. The proposals may therefore have disproportionate effect on equalities initially, though they are not directly discriminatory and might be deemed proportionate.