'ADVOCACY AGAINST THE ODDS'

WORLD BAR CONFERENCE SPEECH ON QASA 1ST JULY 2012.

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The criminal Bar in England and Wales has taken an enlightened and positive stance on QASA. We say that QASA has a place, but only if it is introduced with sufficient rigour to preserve our workplace for those who do criminal casework best, and therefore to expel those who do not belong. We have set out the essential tenets of a regulatory scheme. These tenets are:

1. Those who appear in our criminal courts must be fit for purpose. Criminal cases have the greatest impact upon the lives of those embroiled. If you are a criminal advocate, you must be capable of dealing with every aspect of the case in question. Therefore, we say that QASA is for trial advocates, not for part-time or part-competent advocates. There is no such thing, we say, as a plea-only advocate, nor a pre-trial hearings only advocate, nor a trial-ready advocate. Either you can do the job, or you do not belong.

2. If we are to be regulated, in addition to the existing lifelong training and development which all criminal barristers undertake, then those who appear in court must do so on a level playing-field. In a modern world where advocates are not limited to barristers, but include solicitors and legal executives, we say that all three groups or professions must have a common regulatory code which applies to all. The Bar maintains its own high standards, because criminal cases demand nothing less. Others are welcome provided their regulators apply the same high standards.

3. Policing the standard must be done by someone, if we are to have a workable scheme at all. Because there is no substitute for appearing in court, if you do this job properly, we say the policing will have to be done by the judges, who are the daily observers of what we do. Solicitor bodies fought hard to be allowed to pay for their members to be 'policed' by out of court assessors or assesssment centres, on a purely mock-trial model. After a battle, the principle of judicial evaluation of all

courtroom advocacy has been won. Pause for a moment to consider what a concession this is for the independent barrister who fights fearlessly and without favour in every case. We do not lightly concede judicial evaluation, when the hallmark of the Bar is independence from the judiciary. But the alternative is unthinkable, so we have to settle for judges marking advocacy, and all must do the same.

4. For QASA to be a proper quality assurance scheme, there must be judicial evaluation; there must be the means for courts to ensure that competent advocates appear in cases at all levels. Therefore, judges who routinely conduct pre-trial hearings must have the ability to question the QASA level of the case, and therefore to set the level of advocate who will conduct the case. It would make a nonsense of it all if individual advocates could simply decide for themselves what level the case in question might be, perhaps in order that the same individual might self-appoint himself to conduct it.

5. Our legal system, and that of our Commonwealth counterparts, takes pride in the fact that we have a unique badge of excellence – not competence but excellence – which applies to the top tier of those amongst us. This is the Queen's Counsel system. A badge of excellence that is recognised and respected the world over. In England and Wales, we are talking about the top 10 percent of the Bar, no more than that. For those who meet that mark, the QASA scheme is simply unnecessary.

Those are our principles. The scheme is now almost upon us. If the principles are in, we will support QASA. If not, we cannot. It is as simple as that. Our regulator, the BSB, is at pains to say they support the independent Bar. So how are we doing with the principles?

To my great regret, we find that of the main principles, one is in place but is looking weak, and the others are all in peril. Let me list them again:

1. Full advocates only need apply. Not in place. Our regulator tells us that it is necessary to accept a sub-category, the so-called 'plea only advocate' or 'trial ready advocate', for at least the first two years of QASA. Why? I

have heard no satisfactory answer to this question, save that it is necessary to keep the other regulators and professions happy. But I do have an answer from almost 90% of the hundreds upon hundreds of criminal barristers who answered the CBA online survey in March and April ; they will not accept QASA with plea only advocates on board. That is the issue of principle. We should uphold it.

2. A common regulatory code. There are still practices rightly outlawed by our Code but permitted by others. One example? Our Code forbids the payment of kickbacks out of public funds in order to secure instruction in the case. Solicitors allow it. The government thinks it is fine. There is an impasse, but we are correct as to the principle. There should be no bartering with public funds.

3. Judicial evaluation. Yes, this one appears to be 'in', but will it be rigorous enough? Judges who evaluate must eliminate those who are not fit for purpose. That would include incompetent barristers, of course it would. I greatly fear that the evaluation system will not go far enough, and will amount to toothless grumbling about bad advocacy, and nothing more.

4. Scrutiny of case levels. Without a rigorous system for applying cases to levels, judicial evaluation itself is worthless. Yet I am hearing that the judiciary will <u>not</u> look at case levels for the first two years of QASA. Why not? Representation in court is falling. Cases are not even reaching the Bar when it is obvious that experienced counsel is a must for the case to be done properly. This is a crisis issue.

5. QC or silk accreditation. The evidence suggests that our regulator is intent upon forcing silks into QASA. This is unnecessary over-regulation.

So where are we now? The BSB continually says that the Bar has nothing to fear from QASA. Their mantra is that most barristers will easily satisfy the standard, so what are we complaining about? The BSB completely misses the point. QASA is pointless, if all it does is allow the steady decline in standards where the criminal justice system needs it most, in court. I urge you to think about the five principles I have attempted to explain. I urge the

BSB to firm up, and get the principles right. We have a government which cares about money and only money, and is wilfully prepared to sacrifice quality for cheap justice. They have stripped £350 million out of the legal aid system, but have not saved a penny because of delay and inefficiency elsewhere through staff shortage and an over-stretched, underfunded infrastructure. If we do not get it right, QASA as currently formulated will play right into their hands.