Re: BEG response to 4th consultation on QASA

DRAFT RESPONSE

Introduction

1. On 12 July 2012, the 4th consultation ("the Consultation") on the development on the Quality Assurance Scheme for Advocates ("QASA") in the criminal field opened. The Consultation will close on 9 October 2012.

2. Although the present consultation relates specifically to the Scheme for criminal advocates, public statements from the Bar Standards Board ("the BSB") have made it clear that QASA in one form or another is intended to be rolled out across the advocacy profession.

3. To that end, the Bar European Group ["BEG"], which represents barristers practising: (i) EU law (including EU human rights law whether under the EU Charter or otherwise) in both domestic and EU fora, i.e. the Court of Justice of the European Union ("CJEU,") General Court, EFTA Court and like institutions); (ii) appearing in the European Court of Human Rights ("ECtHR") (together "European Law" for convenience), makes the following submissions. For obvious reasons, this response does not deal with the detail of the criminal advocates' proposed scheme, save to the extent that: (i) it impacts upon European law practitioners; or (ii) raises questions of European law.

Summary

4. The starting point in the Consultation is that, in order for there to be a justification for introducing QASA in any particular field, there must be a public interest in or regulatory need for quality assurance. In the criminal field the reasons given for that perceived need are set out at paragraphs 1.6 to 1.9:

> "1.6: Advocacy is a vital part of an effective justice system. Members of the public involved in litigation rely upon advocacy for the proper presentation of their case. Those who are involved in decision making whether as Judge or jury rely on advocacy for the proper administration of justice. For defendants reliant on effective advocacy in the criminal courts the stakes are high: loss of liberty may be an outcome.
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> 1.7 A key element of professional responsibility is the maintenance of professional standards. The changing legal landscape coupled with competition and commercial imperatives are putting pressure of the provision on good quality advocacy. The economic climate, both generally and in terms of legal aid, has created a worry that advocates may accept instructions outside their competence. The Judiciary has also raised concerns about advocacy performance.
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> 1.8: QASA has been developed to respond to these issues. It will ensure that all advocates in criminal courts undergo a process of accreditation so that they only handle cases within their competence and that they are subject to assessment and monitoring of their performance against a common set of agreed standards.
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> 1.9 This approach is consistent with the regulatory objectives of the SRA, BSB and IPS. Under the Legal Services Act 2007, the regulators are responsible for setting and maintaining standards. This includes a requirement upon them to have in place effective quality assurance arrangements in order to benefit and protect clients and the public."

5. BEG understands that the case as to whether or not such regulatory need is demonstrated in relation to the criminal bar is highly controversial and that the CBA resists QASA as unnecessary and disproportionate. These are matters upon which the CBA is much better placed to comment than BEG. It should go without saying that good quality advocacy involving European law (in whatever field it arises) is extremely important to the legal process as whole. However, that does not mean (any more than in criminal law) that a QASA should be brought in for advocates in that field without proof of the necessity for action. Each specific field of legal activity requires, if there is to be lawful additional regulation of advocacy, a case by case investigation of the justification for such regulation.

6. Under the current proposals the QASA scheme applicable to criminal practitioners, to which this consultation is directed, does not apply to European law specialists instructed in response to the particular needs of a case. Such specialists need not be accredited. Putting aside questions about the overall necessity/proportionality of QASA for criminal practitioners, such exception makes good sense since situations do arise with some regularity where, in cases brought by the prosecuting authorities, substantial, even determinative questions of European law arise. Cartel offence charges, serious IP infringements (TV decoders) or other offences raising free movement issues are real illustrations. BEG thus supports the present rules carving such areas out from the scope of QASA. This must reflect the fact that the case of the need for regulatory intervention in other areas of specialist advocacy: (a) is not presently being made; and (b) raises substantial and distinct issues arising in a profoundly different context or market.

7. BEG is not aware of any judicial concern about advocacy performance in the specialist field of European law, whether domestically or internationally. Indeed, the evidence is very much the reverse, with advocates from England & Wales being praised for their advocacy skills in fora such as the General Court, the CJEU and the ECtHR. Indeed, English barristers are often instructed by the EU institutions in the EU courts.

8. There is also no evidence that EU/ECHR law advocates are accepting instructions outside their level of competence. The law in question is technical and complex and work will only be given to those specialists with the appropriate knowledge and skills base. Indeed, as indicated above, to a degree the market for European law services is a European (even international) one: there is no or no meaningful "must deal" element to instruction of such counsel of the kind provided in other areas by the presence of a dominant public funding model.

9. Accordingly there is no need, perceived or actual, for a QASA in the field of EU/ECHR law, nor (due to the specialist exemption) any case presently being made for its introduction.

10. In view of this fact, BEG will not engage with the multifold problems of applying a QASA system to a specialist area of law like European law that cuts across and informs so many other discrete areas of practice. It merely notes that so far as any attempt is made to roll out a QASA system to European Law then (as indicated above) the evidence necessary to justify such a step is presently lacking. BEG also notes that there may be jurisdictional difficulties in requiring members of the judiciary appointed to supra-national courts such as the CJEU and ECtHR to conduct appraisals of English advocates appearing before them. We do not know whether any attempt has been made to see whether these Courts would voluntarily undertake a monitoring or appraisal role.

11. BEG will not reiterate the concerns expressed by other SBAs about QASA as applied to criminal advocates. However, BEG does feel well qualified to comment on two features of the QASA scheme in its present format (which will no doubt form the blue print for any proposed roll out to other practice areas).

12. **First**, as a matter of general principle, BEG is concerned that the QASA scheme for advocates that is centrally predicated on continuing and intrusive judicial assessments may be found to be inconsistent with the fundamental concept of an independent legal profession as developed at a European level by the Council of Bars and Law Societies of Europe ("CCBE"). BEG understands that concerns have already been raised by members of the legal profession in both the EU and

further afield about the impact such a scheme would have on that fundamental concept of professional independence and those concerns could eventually translate into fundamental difficulties in the relationship between the English legal professions and the CCBE. This is all the more concerning since not only the *adequacy* of legal representation (the only potentially proper concern of QASA) but also its independence from, amongst others, the state and the Court, which is a key component of a fair hearing under Article 6 ECHR and the equivalent EU Charter right, particularly a fair *criminal* hearing falling in Article 6.3, would be adversely affected.

13. **Secondly**, BEG is concerned that the QASA proposals seem to take little if any account of the phenomenon of dual qualified or re-qualified advocates, whether: (i) those who have undergone full training in England but also practise abroad; or (ii) those who exercise their rights to practice in England pursuant to the various Lawyers Directives. This is a phenomenon of which BEG is obviously well aware: advocates specialising in European law tend for professional and personal reasons to be highly mobile. BEG would anticipate that there is a minority of criminal practitioners (no doubt not as high as advocates specialising in European law) who also fall into this category. Additional regulatory hurdles like QASA, applied to such practitioners (already facing a double regulatory burden) need particularly careful justification because they will in practise operate to disadvantage advocates who do not practice full time in criminal law in the English Courts. BEG is troubled by the lack of any system for the mutual recognition of experience and competence: an advocate experienced at handling murder cases in, say, Ireland or Germany must surely be entitled, if entitled to practice in the United Kingdom through full qualification or mutual recognition of qualifications and experience under the Lawyers Directives, to full account being taken of that parallel experience. QASA seemingly contains no means to do so.

14. Finally, BEG members see no need for any scheme that is brought in to apply in the same way to silks, or at least those silks who have been appointed under the Queen's Counsel Appointment system ("the QCA") in operation since 2006, as the competences set out therein - which by definition must be met if an application is to be successful – more than meet any assessment criteria for a quality assurance advocacy scheme. Any periodic review of silk status should be a matter for the QCA.

15. Further specific answers to the Consultation are provided in the final section.

Independence of the legal profession

16. Independence of the legal profession is a key ingredient to a client having and seeing him or herself as having a fair hearing. If their lawyer is seen to be susceptible to personal pressure as to

how they conduct the case from either the prosecution (direct or indirect) or the Court the client is likely to believe they have not been fearlessly represented.

17. Such thinking lies at the heart of Article 1.1 of the Charter of Core Principles of the European Legal Profession, unanimously adopted by the CCBE on 25 November 2006, provides as follows:

> "In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defence and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society. ..."

18. In its commentary on the Charter, the CCBE notes the following in connection with the core principle of the independence of a lawyer:

> "A lawyer needs to be free – politically, economically and intellectually – in pursuing his or her activities of advising and representing the client. This means that the lawyer must be **independent of the state** and other powerful interest, and must not allow his or her independence to be compromised by improper pressure from business associates. The lawyer must also remain independent of his or her own client if the lawyer is to enjoy the trust of third parties and the courts. Indeed without this independence from the client there can be no guarantee of the quality of the lawyer's work. The lawyer's membership of a liberal profession and the authority deriving from that membership helps to maintain independence and bar associations must play an important role in helping to guarantee lawyers' independence. Self-regulation of the profession is seen as vital in buttressing the independence of the individual lawyer. **It is notable that in unfree societies lawyers are prevented from pursuing their clients' cases**, and may suffer imprisonment or death for attempting to do so."

19. The first of the general principles listed in the Charter relates to independence:

> "The many duties to which a lawyer ins subject require the lawyer's absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge**. A lawyer must therefore avoid any impairment of his or her independence and be careful not to compromise his or her professional standards in order to please the client, the court or third parties**."

20. Article 4.3 of the Charter provides as follows with regard to the demeanor of a lawyer in Court:

> "A lawyer shall while maintaining due respect and courtesy towards the court defend the interests of the client honourably and fearlessly **without regard to the lawyer's own interests** or to any consequences to him or herself or to any other person."

21. QASA as presently constituted will operate uniquely by way of an intrusive and continual judicial assessment for the more serious categories of criminal cases. It is to be contrasted with other systems (the QCA process for instance) in which judicial references are but one (albeit important) component for decision-making by an independent body, and in which such references are considerably removed (both in time and by capacity of the applicant to select referees) from cases in progress. By contrast the QASA process requires prospective judicial referees (who have

central importance) being approached *before* the trial in question (a CAEF assessment form must be provided by the advocate to the judge) so as consciously to start the process of evaluation during the hearing.

22. The duty of an advocate to act independently and on behalf of his/her client seems inevitably be at risk from by an assessment regime operated by the judiciary. The risk (or, as bad, the client's perception) is that arguments that could otherwise be put to a Court could be altered or excluded completely so as to ensure that the interests of the advocates in terms of assessment were advanced. Any such system would fundamentally damage the healthy and disinterested relationship between bar and bench with the potential for infelicitious conduct, in the sense of conduct not being in a client's best interests and worse. Any system like QASA embedding such judicial role front and centre in an advocate's career progression risks structural incompatibility with the demands of CCBE Charter of Core Principles, a Charter most likely to be drawn upon as a source by either the ECtHR and/or CJEU when developing their case-law on fair hearings.

The fundamental freedoms under EU law

23. It is clear that any QASA would impact adversely upon criminal lawyers: (a) coming from other Member States (e.g Ireland, Cyprus, Germany) or indeed other jurisdictions within the United Kingdom (Scotland, Northern Ireland), whether they fully requalify here or obtain full integration under the Lawyers Directives; and (b) English qualified advocates who pursue at least part of their practice abroad. Such practitioners are disadvantaged by the fact they do not pursue an English legal advocacy career full time, even if they are undertaking comparable or even more complex work abroad. Needless to say, because of this, the QASA proposals are likely to be indirectly discriminatory on grounds of nationality.

24. So far as BEG can discern the QASA system contains no mechanism for comparable comparative experience to be taken into account. Yet without such flexibility in place any attempt to impose a QASA advocacy service providers working in multiple jurisdictions must be regarded as open to serious question under EU law. Whatever QASA's good intentions it will, for those advocates, operate as a substantial barrier to their pursuit of a legal career in England or in other jurisdictions; and it will be an unjustified barrier if not flexible enough to take account of relevant and comparable advocacy experience abroad. EU law demands mutual recognition of experience; indeed the Lawyers Directives seek to harmonise the qualification and experience requirements upon which a state may legitimately insist for "full integration" of foreign lawyers. Thus to build a further practical process of experience based qualification applicable to criminal lawyers

without a mechanism for recognition of experience seems to create (in effect, if not by design) an area to which foreign lawyers or those regularly pursuing practice abroad cannot easily gain access whatever their demonstrable ability.

Miscellaneous

25. **Questions 1 to 5:** BEG has no comment.

26. **Questions 6 to 12 (levels)**: BEG has no comment

27. **Question 13**: **accreditation of silks**. See section C above.

28. **Question 14-15, 21, 22-24:** See Section A and B above for BEG's concerns as to how assessment of competence works and the potential incompatibility with multi-jurisdictional practice and unjustified indirectly discriminatory effects on grounds of nationality given the absence of any mutual recognition mechanism.

29. **Question 16-17:** BEG has no comment.

30. **Question 18**: Scheme Rules. BEG can see no reason for the standard of substantive review formulated in Rule 37.1 in terms of whether or not a decision is one " *which no person would find comprehensible"*. That conforms to no recognised test of rationality. Indeed, comprehensibility and rationality are quite distinct concepts. An irrational decision (e.g. to victimise red haired teachers) can be perfectly comprehensible. Equally at odds with first principle is the requirement to demonstrate that a procedural error in the assessment process also was one from which "*you suffered disadvantage as a result ... sufficient to have materially [affected] the decision"*. This additional criterion of materiality is bad as matter of domestic administrative law. There are sound reasons for not requiring a party to demonstrate a procedural error affected the result, not least of which is that it is routinely impossible to predict how a panel unaffected by the procedural error would have decided a case. Grounds of appeal formulated on such narrow grounds (narrower by far that conventional judicial review) are unlikely to find favour with the Courts, with the result that the Administrative Court is may well consider such appeal route need not be exhausted before judicial review is a permissible option.

31. **Question 19: the definition of criminal advocacy**. The definition as presently formulated extends to advocacy in the CJEU (on a preliminary ruling) and ECtHR in a case arising out of a

prosecution. This seems inappropriate and the definition should be modified to limit its scope to purely domestic proceedings.

32. **Question 20: the approach to specialist practitioners**. BEG supports this approach (subject to its overall and overarching reservations about QASA above). European lawyers having expertise reasonably required in a criminal trial should not be required to have QASA accreditation.

BEG