



Consultation response

Ministry of Justice: Preserving and Enhancing the Quality of Criminal Advocacy

Overview

1. **The Legal Services Consumer Panel is not in support of the proposals to create an additional quality assurance scheme by way of a defence advocate panel. We consider this to be a duplication of work, the burden on practitioners and that it will lead to increased cost in light of the forthcoming implementation of QASA.**
2. **The Panel is broadly in support of the ban on referral fees in publicly funded criminal cases but notes that enforcing the law may prove challenging .**
3. **Lastly, we do not support proposals to restrict referrals to in-house advocates in publicly funded criminal cases as we do not believe that this would achieve the ambition of widening client choice, rather we feel that with the development of barrister-led entities this could actually restrict client choice.**

The proposals

4. The government has stated that this consultation is in response to concerns identified in Sir Bill Jeffrey's review of independent criminal advocacy, and seeks to ensure that publicly paid for advocates procured by the Legal Aid Agency (LAA) are of sufficient quality, and that client choice is not unduly influenced by financial incentives.

5. As such, the government is proposing to introduce three proposals in order to effect improved standards of quality in criminal advocacy. These proposals include:
 - Defence advocacy panels;
 - A statutory ban on referral fees, including a request for views on how best to identify and prevent disguised referral fees; and
 - Stronger measures to protect client choice and safeguard against conflicts of interest.

The Panel's response

6. The Panel has considered the proposals using our consumer principles framework. What we want to see achieved as a result of this consultation is:
 - **Access:** Consumers are able to access a wide range of services, and choose those that best suit their needs and circumstances
 - **Choice:** Consumers have a wide choice of providers because regulation is proportionate to risk
 - **Quality:** Consumers access good quality legal services which meet the minimum required standards
 - **Information:** Consumers have the information they need to make good decisions and know their routes to

redress, and the boundaries of regulation are not so complex as to be incomprehensible

7. In addition, we have applied our overall regulatory philosophy of finding the right amount of regulation to enable consumers to truly benefit from open and fair markets.

Creation of a defence advocacy panel

8. The Panel recognises and supports the sentiment that there is a need for quality assurance. We have previously looked at the selection of voluntary quality schemes, such as the Criminal Litigation Accreditation Scheme, and found weaknesses. As such we were and remain keen to welcome the joint regulatory effort, the Quality Assurance Scheme for Advocates (QASA), in ensuring such standards in criminal advocacy for both publicly and privately funded cases, for both prosecution and defence.
9. The benefits for consumers include bolstering confidence in the quality of advocacy, helping them to choose the best advocate for their needs, clarifying what they can expect from their advocate and promoting competition between advocates on quality grounds. Further, as the scheme would be jointly funded by the regulators and supplemented by the advocates, there is no burden on the public purse.
10. The Panel has concerns therefore that the consultation's proposal to establish a defence advocacy panel scheme risks undermining the effectiveness of the long awaited and ready to roll QASA, as well as leading to considerable consumer confusion, and inconsistency in standards. There is also a risk of accreditation arbitrage; having two schemes for the same form of accreditation risks creating incentives for advocates to highlight higher accreditation from one at the expense of the other scheme – a particular risk if QASA, the more encompassing of the two schemes, ends up being undermined.

Creating unnecessary burdens

11. The consultation states that its objective is to enable the provision of a quality measure for government to use when procuring delivery services for defence advocacy at substantial public expenditure. We recognise that one of the recommendations from the Jeffrey review related to the possibility of a panel, similar to the CPS's panel of barristers briefed to represent the prosecution. However, QASA was designed to harmonise with the CPS approach so as to avoid any unnecessary burdens on advocates and, the Panel hoped, to potentially lead to a merger of the two schemes. We would expect a defence advocacy panel to be similarly harmonised, for the same reasons.
12. That being the case, we cannot see what value is added by having a third quality assurance scheme, which is aimed at a group of advocates already caught by QASA. We believe that this alone places an unnecessary burden on advocates, as it requires dual accreditation and potentially an additional cost to the advocate, which could either lead to a reduction in provision or increased costs to consumers.

Consumer confusion

13. One of the Panel's firm beliefs is that due to the specialist nature of advocacy services and their infrequent usage, consumers are not well placed to judge the quality of advocates or the services they offer. QASA addressed this information asymmetry by providing a clear indicator of an advocate's ability.
14. We have concerns that the creation of a secondary scheme in the form of a defence advocacy panel risks undermining consumer potential to make choices of advocates by simply adding a layer of confusion. Further, a scheme which is independently run is more likely to gain public trust, which is vital at a time when only 47% of the public trust lawyers.

Inconsistency of standards

15. The plans suggest that a defence advocacy panel could be modelled on the existing CPS scheme, however there is already some inconsistency between the CPS scheme and QASA in that Queen's Counsel are excluded from CPS, but are still required to use QASA. This is in recognition of the fact that a good advocate requires constant practice to build their skills, and in responding to feedback on this point there is a special level, 4QC, which recognises such an attainment.
16. Ultimately, the Panel cannot see that the creation of a defence advocacy panel would be beneficial, nor would it add value either to raise standards or to bolster public confidence in the system.

Introducing a statutory ban on referral fees

17. Government proposes to initiate a statutory ban on referral fees in publicly funded criminal defence cases in order to address the anecdotal evidence that referral fees are frequently paid and received. We recognise that it is well within Government's power to decide how publicly funded services are managed, and that despite referral fees in publicly funded criminal defence cases already being prohibited in Bar Standards Board handbook, the Solicitors Regulation Authority handbook, and the LAA's contracts for service, banning this practice in law sends out a very unambiguous message, designed to encourage a change in behaviour.
18. In considering the proposal for a statutory ban in publicly funded criminal defence cases, we are very aware that our former report on referral fees was confined to conveyancing and personal injury cases, neither of which are publicly funded areas. As such we have looked to other sectors and the consumer principles to guide our response, along with our response to an earlier consultation from the SRA where they put forward the question about relaxing a ban on referral fees in criminal and publicly funded cases.
19. One of the most compelling arguments in favour of a statutory ban is the protection it offers for vulnerable consumers. The cases affected by this proposal are by their nature likely to involve the most vulnerable consumers. In our own research into vulnerable consumers, we identified that people with learning disabilities are statistically more likely to come into contact with lawyers than the general population because they are more likely to suffer harassment or bullying or be victims of crime.
20. There is also the potential impact on legal aid funding. The perceived risk identified 15 years ago was that the availability of referral fees would spur criminal and other publicly funded cases which would otherwise not have been brought, thus costing the taxpayer more. In today's context, where legal aid is considerably more difficult to obtain, this risk is amplified.
21. Looking to financial services, the Financial Services Authority undertook the Retail Distribution Review, first announced in 2006, which was aimed at improving the way the retail investment market engaged with consumers, raising standards of financial advice and, banning commission payments paid to advisers. This ban on commission, which is in essence the equivalent of a referral fee, was designed to ensure that customers received advice which was not influenced by the amount of commission paid to advisers, and that product providers competed on the price and quality of their products. All the research post RDR has shown that it has been very successful, where regulated advice is concerned consumers are now clearer on the costs and transparency has been improved in general. Over all it was needed to address poor culture, opacity,

and complexity. Of course there have been businesses trying to circumvent the rules, and the FCA has addressed this with robust guidance and then enforcement action – in one instance an adviser network was fined over £1.5million for trying to circumvent the ban on commission¹.

22. We recognise that policing such a ban in legal services is already very difficult, and although guidance around whistleblowing exists, we recognise that the very nature of the agreements means that it can be difficult to identify and report from outside the referral relationship. There is scope to mimic other sectors, such as financial services, in providing robust guidance. We would ask government to recognise that any ban will prove challenging in this regard, however the regulators are there to enforce the rules, and should be equipped with the tools and the powers to do so. The Panel cannot suggest how to increase reporting of breaches, however we are fully supportive of more research being carried out in this area.

Protecting client choice and safeguarding against conflicts of interest

23. Choice is one of the seven consumer principles which the Panel uses to inform its work. We want to see that consumers have a wide choice of providers because regulation is proportionate to risk. In this proposal, Government suggests restricting the ability of defence firms to instruct in-house advocates in publicly funded criminal cases would reduce the influence of financial incentives on choice of advocate.
24. We cannot see that this is proportionate to the risk posed, and would actually lead to inhibit client choice rather than improving it. Under new ABS structures and the ability

for barristers to now create entities, one-stop-shop firms are being created to provide litigation and advocacy services, sometimes focussing on niche areas of law such as immigration, or criminal. These are positive developments and innovation is key in what is still an under-competitive market – yet the proposal outlined would directly undermine and potentially disrupt these sorts of innovations. We recognise the potential risks involved, however we do not think that a proportionate response is to restrict in-house referrals.

25. Further, once QASA has been implemented, we expect that clients will have a clearer idea of the level of quality on offer, and will of course be open to selecting another, potentially more experienced, advocate should they be dissatisfied with in-house offerings.

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¹ <http://www.fca.org.uk/your-fca/documents/final-notices/2014/sesame-limited>