

Preserving and Enhancing the Quality of Criminal Advocacy

A response by
The Chartered Institute of Legal Executives

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For further details

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Introduction

1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 Chartered Legal Executives. Associate Prosecutors employed by the Crown Prosecution Service (CPS) to conduct non-trial cases in the magistrates' courts are members of CILEx, and regulated by CILEx Regulation. They are authorised as advocates and litigators under the Legal Services Act 2007 (the 2007 Act).
2. As an Approved Regulator we can grant practice rights in relation to litigation, advocacy, probate, reserved instrument activities and the administration of oaths. We have delegated our regulatory functions to CILEx Regulation to ensure compliance with section 29 of the 2007 Act.
3. We have been training and regulating criminal advocates since 2006 through our CILEx Advocacy Qualification Scheme. As vocationally trained lawyers, our criminal advocates are highly skilled and experienced in their area of practice, and must comply with a robust regulatory regime provided by CILEx Regulation. Chartered Legal Executive advocates who specialise in criminal practice have rights to appear in criminal cases in the magistrates' courts; in the crown court before a judge in chambers to conduct bail applications; and in the crown court on appeals from the magistrates or youth courts or on committal for sentencing where their firm has appeared for the defendant in the lower court.
4. We welcome the opportunity to respond to this consultation, and our response is submitted following an engagement exercise with our criminal advocate members.
5. We have 56 Chartered Legal Executive criminal advocates, around half of these criminal advocates are accredited under the Law Society's Criminal Litigation Accreditation Scheme (CLAS). This allows them to undertake publically funded Duty Provider work.

Executive Summary

6. Notwithstanding the increase in opportunities for our criminal advocates, the consultation incorrectly presumes that solicitors and barristers are the sole providers of criminal advocacy in England and Wales. There is a diversity of criminal advocates, including Chartered Legal Executives advocates, who contribute to the provision of good quality legal advice and criminal representation. The standard of training provided to CILEx criminal advocates was recognised and complimented by Sir Bill Jeffrey in his recent review of criminal advocacy. Sir Bill Jeffrey observed CILEx criminal advocates are an ‘increasingly significant part of the scene, particularly in the magistrates’ courts.....and are ‘distinguished by their enthusiasm’.¹ Despite the proposals relating to crown court cases, CILEx criminal advocates should be fully considered.

Enhancing Quality

7. The quality of advocacy is particularly important in the criminal field where the stakes are so high, especially where a person’s liberty is at stake. It is also in the public interest there is confidence in a legal system in which access to justice is, and is seen to be, a fundamental right; where criminal trials are conducted fairly and in accordance with the law. In an adversarial system, this fairness inevitably depends upon the abilities of the advocates on both sides to present their cases properly.
8. As Sir Jeffrey observed reliable information about the quality of advocacy is elusive and compounded by ‘remarkably little research evidence’.²
9. We are concerned the proposed policy should not be designed around one particular part of the legal profession and should recognise and take account of the different types of providers of advocacy services in the market.
10. The implementation of the Quality Assurance Scheme for Advocates (QASA) will introduce a common set of standards applying to all criminal advocates. QASA

¹ Independent Review of Criminal Advocacy in England and Wales; Sir Bill Jeffrey May 2014 at page three.

² Ibid paragraph 2.1

identifies the skills and behaviour expected of a criminal advocate. QASA will bring a level playing field and for the first time provide a relatively objective means of assessing quality, providing commonality of standards between advocates, and informing the debate with much needed evidence enabling measurable outputs to be demonstrated.

Defence Panel

11. We support the proportionate measures to improve and assure the quality of advocacy. It is not clear from the consultation paper what a defence panel for advocates would achieve that QASA would not. We would be concerned if the implementation of a defence panel restricted the number of advocates able to seek accreditation on the said panel, as this would restrict client choice, which the Government is trying to promote.

Referral Fees

12. As mentioned in the consultation, prescribed referral fees are already prohibited or restricted by the regulators and the Legal Aid Agency's (LAA) existing contracts. We would be interested to see the evidence of consumer detriment supporting the introduction of additional regulation that warrants a further restriction. Evidence based regulation has much more authority than that based on anecdotal evidence. Whilst we have no objection to a referral fee ban it is important to ensure legitimate business practices are not inadvertently prevented.

Client Choice

13. A defendant should be able to make an informed choice of criminal advocate. We are concerned the proposals to restrict in-house advocates may have a detrimental impact on client choice.

14. Subject to the above, we address the issues in the order raised.

Defence Panel Scheme Questions 1 to 4

15. The setting of standards and quality assurance are matters for the regulators (which are members of the Joint Advocacy Group, and which developed QASA). The 2007 Act supports the principle, as one of the statutory objectives is that Approved Regulators should promote and maintain adherence to the professional principles. QASA is a robust and proportionate scheme developed across the profession. It applies to all criminal advocates and has been subject to judicial scrutiny, including from the UK Supreme Court. Following the conclusion of the current consultation being conducted by the Joint Advocacy Group, it is vitally important QASA is implemented without further delay. QASA standards will apply to all advocates, whether acting for the prosecution or defence, and whether or not it is publicly funded. It will provide valuable quality assurance and enable the Government to make use of evidence of quality arising from the scheme. It is unclear what a defence panel scheme will achieve that QASA would not. A defence panel scheme could create unnecessary duplication and add to the burden of regulation disproportionately.
16. There needs to be assurances that the CPS Prosecution Panel scheme is robust and proportionate prior using it as a model for a defence panel scheme. Feedback from our advocates show us that legal aid firms are already running at very tight margins, more so for those without a duty contract, and the imposition of further fees could impact on a firm's ability to deliver services and provide access to justice.
17. Advocates may incur increased costs as a result of any new accreditation requirements, due to any fees which might be charged to applicants to the panel, and as a result of any additional work required to comply with the application process. For example, the additional time in obtaining reviews of their work from colleagues and/or members of the judiciary and any additional peer review requirements, over and above those already required.

18. Whilst there may be an argument for geographical panels, it would be far easier to administer a scheme where once an advocate is on the panel, s/he can practice anywhere.
19. There is no real justification for limiting the number of advocates at any level in the event the Government is minded to set a defence panel. There is also a concern that this could lead to different standards of quality in different areas. It must be recognised by Government that legal practices operate differently to the CPS and restrictions will not only undermine competition but restrict client choice.
20. QASA will only limit accreditation by assessment of competence, which is appropriate, when ultimately an advocate instructed if they are the best advocate for the case, and are competent to undertake the advocacy.

Proposals to prevent abuse of the system – Question 5 to 11

21. In principle we support a statutory ban on criminal referral fees. Such payments can undermine the justice system and create the possibility of poor advocacy, in addition to restricting client choice. A statutory ban referral fees must ensure, however, legitimate business models are not inadvertently caught and prevented from developing if they are honestly sought and provided. If they, however, are exchanged to secure instructions, they are wholly unacceptable.

Client Choice

22. We agree that client's must be given clear and impartial advice in order to be able to make an informed choice of advocate when their case requires advocacy. Statutory intervention must be based on evidence of consumer detriment for it to be risk based and proportionate. Without such evidence, it is difficult to assess consumer detriment. Chartered Legal Executives and other lawyers are already under a duty to act in the best interests of their clients, and avoiding conflicts between their financial interests and the client's best interests, and only to take on work if they are competent to do so. If a client is dissatisfied with the service provided, an appropriate complaint can be made and dealt with by the regulatory body.

23. Clients may find advantages in selecting in-house advocates. If the litigator and advocate is the same person, they will have built up a relationship of trust, understanding and confidence. Moreover, the client will save time and will have gained a comprehensive understanding of the client's previous history and facts of a case. However, it is important not to confuse the role of the litigator and the in-house advocate. The litigator is the person in the firm who has conduct of the matter on a day to day basis and the in-house advocate undertakes the advocacy on the instructions of the litigator.
24. As regards the choice of advocate declaration, 'a tick box' exercise will not be meaningful and may not provide adequate protection, and at the same time will impose a disproportionate burden on litigators. It is essential that the right balance is struck.
25. Litigators are under an obligation to act in the best interests of clients. This extends to the provision of impartial advice on the choice of appropriate advocate. This is best left to the front line regulators following an assessment of consumer detriment (if any) by the Legal Services Board.
26. We are not convinced the change to the Plea and Trial Preparation Hearing (PTPH) form is a proportionate method of demonstrating transparency. This is a view reinforced by one advocates feedback:

"...this is a matter for the regulatory bodies and if a client is dissatisfied with the services provided, then an appropriate complaint can be made ... A "tick box" exercise does not properly protect the client, or indeed deal with the issue that the Government intends to deal with. It is a very difficult issue to properly control (and police)...the best way forward would be for the regulatory bodies to deal with it in the normal way..."

Equalities

27. As the impact assessment expressly states those from Black, Asian and Minority Ethnic (BAME) groups make up a much higher percentage of those advocates operating as 'sole practitioners' compared to self-employed or employed barristers. These sole practitioners are at higher risk of significant impact should they fail to gain panel accreditation as they would be less resilient to a change in their ability to work within the criminal Legal Aid market.
28. The proposed panel policy has the potential to disproportionately impact on the access of these groups to the criminal defence market, particularly their access to the higher levels of the profession as without accreditation it would be more difficult to gain experience and advance their careers, thus limiting social mobility and career aspiration. We are not convinced this particular disadvantage is justified bearing in mind the regulatory objective under section 1 of the Legal Services Act 2007 of encouraging an independent, strong, diverse and effective legal profession.
29. We will be happy to work with the MoJ further on the issues identified, and will be happy to respond to any queries arising from above.