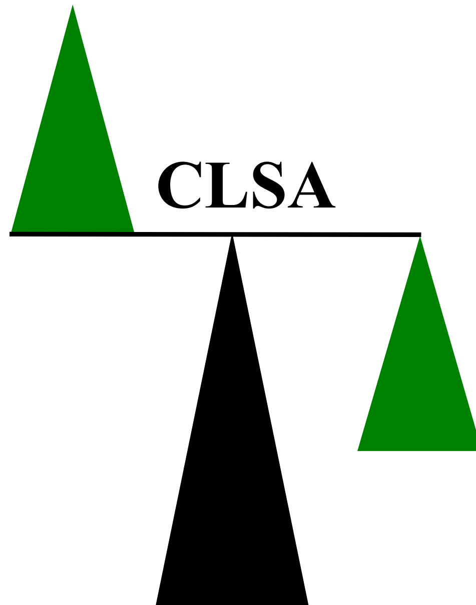

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CLSA Response to Assuring Advocacy Standards Consultations

Background to the consultation.

The Criminal Law Solicitors Association ('CLSA') is a national association representing Solicitors. Our aims are:

(1) To encourage and maintain the highest standards of practice in the criminal courts in England and Wales;

(2) To participate in discussions on developments in the criminal process;

(3) To represent and further the interests of the members on any matters which may affect those who practise in criminal law and their firms; and

(4) To improve, develop and maintain the education and knowledge of those actively concerned in the practice of criminal law in those Courts and those who are in the course of their training.

In responding to this consultation, the CLSA has spoken to its members, a number of members of the Bar Council and several members of the Judiciary in an attempt to establish how serious is the problem of poor or inadequate advocacy in the Courts.

It is acknowledged by the CLSA that advocacy and the presentation and preparation of any case are so fundamentally important, that those regulating the profession have the utmost confidence in those who undertake such litigation. How a case is both prepared and presented is often the difference between Justice and Injustice. However, in preparing this response, the CLSA believes that the SRA is misguided in its attempts to move forward, and have approached this subject with a somewhat knee jerk response to a problem which it can neither quantify, nor justify.

Whilst it is a correct observation that poor advocacy is detrimental to the client, it is not for the SRA to take on the role of justice administrator and state "Wrongs may go unpunished". That is both a social and moral observation and has nothing to do with advocacy. The independence of the Judiciary and the Jury system determine whether a "wrong" has been committed and it is not for a regulatory body to highlight such a term.

The Bar Council teaches barristers that "The client is to be represented fearlessly". Why does the SRA therefore presume that Solicitor Advocates should not follow the same path? It appears that the SRA seems to underestimate just how stressful litigation of every type is for the client being represented. Solicitors for many decades have had to evaluate, manage expectations and deal with client vulnerabilities, so what does the SRA say has changed now? There is no direct or even anecdotal evidence in the consultation and accompanying papers that Solicitor Advocates are letting clients down in Court, in fact the evidence on the contents of the SRA's own documents supports an entirely different view. The limited data that is available appears to suggest on average less than one complaint each year is made despite the high volume of advocacy conducted by solicitors in the Youth Court. Perhaps a more realistic starting point would be that every Court attender is vulnerable, that each client will have been properly assessed by those representing that client and that the client will be represented competently.

Dealing with a non-existent problem

Let us deal with the evidence of falling standards. The VRC document is 6 years old. Upon what evidence is the SRA now relying before it micro manages Solicitors further? The proposal to limit Youth Court advocacy to Higher Court Advocates and Barristers only would have a wholesale detrimental effect on the provision of representation and on the access to justice and yet appears to have taken little account of this.

That being the case we would expect the SRA to have provided detailed evidence and statistics setting out precisely why it has concluded there is a problem that needs to be fixed. How many Court sittings and assessments have those preparing this consultation actually witnessed? The evidence for micromanagement is at best anecdotal, but even in the SRA's own report, less than 3% of the 89 cases of complaints against Solicitor Advocates in 3 years was due to advocacy failures. That is an average of one per year! Paragraph 9 of the report. This has the feel of a witch hunt and a sop to the Bar Council instead of promoting the positive aspects of Higher Court Solicitor Advocates, a sad state for our regulatory body to become embroiled in.

There has been historically and there remains a mechanism to ensure that very complex matters requiring counsel or an HCA are dealt with appropriately in the form of a Certificate for Counsel which would provide for counsel or an HCA under a publicly funded case. In a publicly funded case the proposal risks denying a private individual the right to have an advocate of their choosing. It is not uncommon for a Youth to have the same representative from police station through to trial and if need be sentence. It is equally common for the same individual to have the same solicitor for multiple matters. This proposal would terminate that relationship and to all intents and purposes means that another advocate, who paternally neither knows anything about the young person or indeed Youth Court practice would have to be instructed merely due their status as an Advocate trained to appear in Higher Courts.

Irrationality of the proposal

(a) Incorrect Assumptions

The proposal on Youth Court Advocacy is entirely misconceived and irrational. If its aim is to ensure a high quality of advocacy for youths in the Youth Court it fails to achieve those aims. In particular, it makes a number of incorrect and dangerous assumptions:

1. That there is presently a lack of proper representation and advocacy being provided;
2. That the procedure and conduct of Youth Court proceedings for serious matters are identical or not dissimilar from those in the Crown Court
3. That counsel or HCAs by virtue of their training in higher Courts are better placed to provide that quality advocacy; and
4. That counsel or HCAs, by virtue of their training higher Courts, have a better understanding of practice and procedure in the Youth Court than experienced Youth Court solicitor practitioners.
5. That the seriousness of the charge is the only measure of seriousness or complexity of the case

In each case, these assumptions are wholly incorrect for the reasons set out below.

Assumption 1:

We have set out above that the data does not reflect the assumption at (1) above.

Assumption 2:

In relation to (2) it appears trite, but nonetheless must be said, that Youth Court trials take place in the Youth Court. The Youth Court is a Magistrates Court (a creature of statute) with specific jurisdiction. The practices and procedures in the Youth Court are therefore the same or largely the same as the Magistrates Court, where 97% of all cases are heard, the vast majority of which are conducted by solicitors. The fact that the underlying allegation is more serious does not change the procedure so that the rules of the Crown Court apply. There is no jury. The trier of fact and law remains the Magistrates. It is one of the most basic of skills taught to advocates that advocates should 'know their audience'. Jury advocacy is not the same as Magistrates Advocacy. Many of our practitioners report experiences of highly experienced, no doubt capable and respected learned counsel appearing in the Magistrate court and being so unfamiliar with practice and procedure so as to offer very poor representation.

Assumption 3:

As to assumption (3) we agree that serious youth court work requires specific skills and sensitivity, as well as experience in dealing with very vulnerable clients. Solicitors routinely deal with vulnerable clients whether that vulnerability be due to age, illness or disability, but in our view this proposal will exclude many solicitors who have significant experience and skill in this area, but who are not High Court Advocates. As we set out elsewhere, we often receive reports of experiences of highly experienced, no doubt capable and respected learned counsel appearing in the Magistrate court and being so unfamiliar with practice and procedure so as to offer very poor representation.

In the workshops held by the SRA in 2018 on the HRA assessment suggestions were made including a module on vulnerable defendants. These suggestions were rejected on the grounds that the skills needed for youth court work were completely different to those needed for Crown Court advocacy. The current proposal is completely inconsistent with that assertion made by the SRA just 12 months ago.

Indeed it would appear that HRA training and that for counsel in fact teaches the opposite skills to those required for youth court work. They teach, as one might expect, '*Higher Court' Advocacy.* The Youth Court is not such court, regardless of the seriousness of the charge.

Assumption 4:

Whilst many HCAs may have the skills and experience to deal with serious youth court cases, the proposal does not actually require any experience whatsoever in this area. It could thus allow HCAs and counsel who have no – or limited - experience of youth court work to undertake very serious cases at the expense of more familiar, capable and experienced solicitors.

The requirement to hold the HCA qualification or being counsel will therefore not ensure that these cases are being dealt with to a high standard. There is limited training for either in their qualifications at present. Apart from a reference to the inclusion of 'young or vulnerable witnesses' in the syllabus, there is no detailed training on youth court work or vulnerable defendants mentioned in the HCA assessment. There is a similar absence in training for counsel. Pupil barristers are further highly unlikely to witness their pupil masters conducting advocacy during their training.

Assumption 5:

Whilst the seriousness of the charge is a major factor in the seriousness and complexity of the case, that is in itself is not the only factor. A case may be more complex for a variety of reasons:

1. Complex facts
2. Complex legal arguments

3. Impact of the charges on the particular offender (e.g. might it stop them working in a chosen field, travelling, registering on the Sex Offenders Register etc)
4. Vulnerable witnesses
5. Vulnerable defendant
6. Nature of evidence including expert evidence

(b) Irrational as to its aims:

If the aim of the proposal in relation to Youth Court advocacy is to improve the standard of quality or representation, it should also be borne in mind that continuity of representation is extremely important when dealing with highly vulnerable young people. The fact that solicitors are able to advise and represent clients all the way from the police station to trial creates a level of trust on the part of the young person that is crucial in the smooth and effective running of the case.

The proposals are poorly defined and potentially unworkable in any event. The proposals themselves are unclear regarding which cases this would apply to and how that would be decided. The impact assessment refers to 'serious triable either way offences', but it is not clear what is meant by 'serious' in this context. It does not set out how an either way offence that could still have been dealt with the Magistrates Court would be dealt with, nor does it deal with cases where a defendant elects but where a Magistrates Court would have been a suitable venue. More information is needed before we can respond to this element of the proposal.

Impact on Public Expenditure

The proposals have a potentially wide-ranging impact on Legal Aid. Under current fee schemes, should this proposal go ahead, changes to the legal aid contract will be necessary. Existing provisions would discriminate against solicitor advocates employed by their own firms. As the contract is presently drafted an in-house solicitor advocate cannot claim the same rate as self-employed counsel or a solicitor advocate from another firm.

If higher court advocates are required to undertake this work then clearly they should automatically be granted certificates for counsel (assigned counsel).

Impact on Access to Justice

The impact assessment does not include any research, statistics or in-depth assessment of these potential impacts on the supply of legal advice across England and Wales. It includes no proper analysis of the impact of these proposals on the solicitor market beyond simply asserting 'we do not consider' that the proposal presents a 'significant risk to the supply of solicitors'. No evidence, cost benefit analysis or statistics are provided to support this assertion.

Recently the Law Society carried out an extensive piece of research on the supplier base. The 'duty solicitor heat map' reveals the looming crisis in the supply of criminal solicitors. The average age of a criminal duty solicitor across the whole of England and Wales was 47 and indeed the data showed that in 5 to 10 years' time there could be insufficient criminal duty solicitors in many regions, leaving many individuals in need of legal advice unable to access justice.

Under the current scheme there is a mechanism to ensure that very complex matters that require counsel or an HCA are dealt with appropriately in the form of a Certificate for Counsel which would provide for counsel or an HCA under a publicly funded case. However, under these proposals firms would be faced with a choice : (1) Deploy HCAs to Youth matters at the expense of Crown Court cases; (2) require further staff to undertake training at great expense; (3) pay counsel from the fixed-fee legal aid fees received in the Youth Court. All of these add a financial burden on the firm

and given the vulnerable state of the market, any steps that increase the cost for solicitors to conduct court advocacy will have a negative impact on this already fragile market. It is likely firms will either collapse or make the decision to cease to carry out Youth Court work at all as it would be unremunerative. This would have the effect of denying access to legal advice and hence justice for young people and would be intolerable in a civilised society.

Breach of SRA Mandate

The proposal would be inconsistent with the statutory objectives which include improving access to justice. The consultation paper and impact assessment acknowledge that there will be a disproportionate impact on BAME solicitor advocates, given that they are 'over-represented' in the criminal solicitors' profession. This seems to be in direct opposition to the SRA objective of 'encouraging an independent, strong, diverse and effective legal profession'. The Consultation appears to seek to over-reach insofar as it goes beyond regulating solicitors and appears to impact upon Counsel as well.

Responses to questions

The Youth Courts are special. A different level of expertise is required in the Youth Court and also in dealing with vulnerable witnesses. It is right that appropriate training should be undertaken by all who appear in these Courts. However, again, the anecdotal evidence to which the consultation document refers is at least 4 years old. That is not to say that the CLSA underestimates the need for proper training in order to effectively represent. On the contrary. The author of this document spent some time discussing youth courts with a number of Judges, Youth workers, Social Services and lay magistrates. It is clear that vulnerable witnesses need to be accorded appropriate treatment, however, where is the evidence that Solicitors regularly fail to adequately represent youth clients? It is often raised that Counsel who step into the Youth Court have no idea as to procedure and protocol, has this been considered by the SRA?

It seems to be accepted by the SRA that they are unable to establish any evidence, let alone robust evidence to identify how widespread advocacy problems are. The reality appears to be that there is no evidence to substantiate further interference.

Solicitors have specified duties, one of which is not to take on a case beyond their level of experience. The SRA, if they are of the view this happens should be dealing with this as an ethics issue. The CLSA would like to see any evidence of this, if it exists.

The CLSA note with some concern in paragraph 10 of the document, "failure rate" What is meant by failure rate? Has the SRA considered a comparative of figures between Solicitor Advocates and the Bar? If not, why not? If so, could they kindly disclose those figures?

Q.1 Do you agree with our proposal not to change existing practise rights, and to rely on the obligation of Solicitors not to undertake witness handling where they are not competent to do so?

Solicitors have several professional duties in dealing with all clients. They should never undertake work that they are not competent to do. This is a basic requirement, it should never be changed, the response is of course, Yes!

Q.2 Do you have any comments on our revised HRA standards?

Yes. The assessment of standards is at best speculative. There is a danger of creating a monopoly of one provider. If their standards fail, how does the SRA intend to remedy the lacuna in the market. The SRA seems to be unaware that it is possible to become an HCA by being assessed and

recommended by 3 independent Crown Court Judges. Would this assessment not be a far better measure of competence?

Q.3 Do you agree that we should introduce a single assessment organisation for the H.R.A. qualification.

No. The reasons are outlined in the answer to Q.2

Q.4 Do you agree with our proposal that the HRA assessment can only be attempted by admitted Solicitors?

Yes. Advocacy experience and managing expectations are not learned in college, they are learned in real life.

Q.5 Do you agree that we should impose a new youth court requirement that Solicitors practising in the youth courts must hold the criminal HRA qualification where they are acting as advocate in any case which would go to the Crown Court if it involved an adult?

This suggestion makes little sense I am afraid. Once Jurisdiction is declined, why should it make a difference who represents the youth in the Youth Court? No.

Q.6 The C.L.S.A. find this question to be at odds with where the SRA wishes to regulate the profession. Either there is competence, or there is not, the Bar Council do not have resources to ensure high standards are met. Adequate training and assessment added to ability should suffice.

Q. 7 The CLSA have nothing to add.

Q. 8. As there is less than 1 case per year of poor HCA advocacy, why is the SRA setting itself up to enable all reporting of HCAs ?

There seems to be so much proposed without having regard to the actuality of the situation. 4000 plus HCAs, one case of incompetence per year! Has the SRA requested or undertaken an FOI enquiry as regards the same problems within the Bar? If so, please provide the comparative figures, if not, why not?