



Joint Advocacy Group

Consultation paper on proposals for a quality assurance scheme for criminal advocates

August 2010

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EXECUTIVE SUMMARY

1. The Joint Advocacy Group (JAG) was established by the Bar Standards Board, the Solicitors Regulation Authority and ILEX Professional Standards to develop a scheme to quality assure criminal advocacy across the three professions.
2. This paper sets out the proposed scheme and invites comments.
3. Effective advocacy is fundamental to the justice system. Members of the public rely upon it for the proper presentation of their case and the courts are dependent upon it for the proper administration of justice. There is therefore a need for systematic and consistent quality assurance of advocates.
4. Central to JAG's consideration is the desire to develop a scheme which is cost effective, proportionate and straightforward. An unduly burdensome or bureaucratic scheme would not be in the interests of anyone.
5. The proposed scheme therefore builds on the existing education framework for entry into advocacy to develop a rigorous assessment process to ensure that adequate standards are attained at the start of an advocate's career. Periodic re-accreditation will ensure that those standards are maintained as the advocate's career progresses. This is complemented by an informal reporting arrangement for judges and others to refer poorly performing advocates for remediation or re-training. It is proposed that the scheme will be managed by an independent body, accountable to, and with oversight from, the three regulators of advocates.
6. JAG accepts that there is considerable work still to be done to bring the scheme in to operation, particularly in relation to financial planning, and this will continue during the consultation process. This paper seeks views on the proposed framework of the scheme and its component parts and responses will be taken into account as JAG develops the final scheme for introduction in July 2011.

PART 1: INTRODUCTION

The Joint Advocacy Group

1. The Joint Advocacy Group (JAG) was established in October 2009 by the Bar Standards Board (BSB), the Solicitors Regulation Authority (SRA) and ILEX Professional Standards (IPS) as the principal regulators of legal advocacy to develop means of quality assuring all criminal advocates.
2. JAG comprises representatives¹ from each of the three regulators. JAG's terms of reference are:
 1. *To develop, consult upon and implement common standards of advocacy;*
 2. *To build on existing quality assurance arrangements and advocacy expertise to develop a proportionate and consistent means to ensure that advocates meet and maintain those standards in the public interest;*
 3. *To report its findings to its respective regulatory boards and committees.*
3. JAG is committed to developing a quality assurance scheme for advocates in all three professions practising in criminal law, which is where the principal concerns about standards of advocacy have arisen. Further consideration will be given to the question of quality assurance in relation to other areas.

Context and the regulatory need for quality assurance

4. Advocacy is a vital part of an effective justice system. Those members of the public who are involved in litigation rely upon advocacy for the proper presentation of their case. Those who are involved in crucial decision-making whether as Judge or jury also 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 is a possible outcome of the decision-making process.
5. At present, those who undertake advocacy in the criminal courts may have qualified via different routes which use different methods of education, training and assessment to ensure that the advocates demonstrate that they meet the required

¹ Both executive and non-executive members of the organisations

standard. This approach has worked in the past but we are now at a stage where lawyers, their clients, the public, judiciary and those who are funding criminal litigation need to be satisfied that advocates who are appearing in the criminal courts are operating to consistent standards. We have previously consulted on the content of the advocacy standards (JAG Consultation December 2009) and this consultation now focuses on how a quality assurance scheme might work.

6. A key element of professional responsibility is the maintenance of appropriate standards. The changing face of the legal landscape coupled with competition and commercial imperatives are putting pressure on the sustained provision of good quality advocacy. The economic climate, both generally and in terms of legal aid funds, has created a concern that advocates may accept instructions outside their competence. It is arguable that the funding mechanisms adopted by the Legal Services Commission (LSC) and the rates of pay are failing to secure the quality of advocacy expected and a scheme of regulation of advocacy may bridge that market gap. The judiciary has responded to these matters through judicial pronouncement² on advocacy competence and performance.
7. Regulatory intervention into the advocacy market has long been argued as unnecessary as market forces should eliminate the under-performing advocate. However, whilst market forces can generally be relied upon to identify the competent advocate, it is not necessarily the case that the less competent will not be instructed. In addition, it is increasingly uncommon for an advocate to be observed by the selecting professional. It has become apparent therefore that natural selection through market forces is not the answer to assure the quality of all advocates. The public interest and consumer protection requires a more proactive approach to assuring advocacy competence.
8. The comments of the judiciary and others, the fallibility of relying on market forces and the need for consumer confidence all lead to the need for systematic and consistent quality assurance of advocates.
9. Under the Legal Services Act 2007, the regulators are responsible for setting and maintaining standards within their respective professions. This includes a requirement upon them to have in place effective quality assurance arrangements.

² See for example *R v A Defendant* – 30th October 2007 (HHJ Collier QC The Honorary Recorder of Leeds) and *Alexander Woodside v Her Majesty's Advocate* (18 February 2009)

10. JAG is mindful of the importance of testing the effectiveness of the operation of a QAA scheme for criminal advocates. To this end it will conduct a review of the scheme within three years of its inception. Further, evidence gathered through the scheme will be used to monitor the quality of advocacy performance and to ensure that the scheme remains proportionate and targeted to where risk dictates that there is the greatest regulatory need.

Q1: Do you agree that steps should be taken to address inadequate advocacy performance?

The JAG approach

11. At the heart of JAG's discussions on the development of a QAA scheme is the objective of a consistent approach across the regulators and to produce a QAA scheme which is proportionate to the perceived regulatory need. This need for proportionality has driven our thinking in the development of the scheme; the scheme must not only be proportionate to the perceived need but must also be proportionate in terms of its cost and administration. This need has encouraged us to develop a scheme which makes pragmatic and practicable use of the resources which are currently available whilst producing a structure which can be adapted in the future. We have identified some key principles that the scheme must demonstrate. These are:

- i. Applicable to all criminal advocates
- ii. Accountable to the regulators and independent from the representative bodies
- iii. Proportionate and targeted
- iv. Economic and cost-effective
- v. Straightforward
- vi. Carry the confidence of the public and the professions and be in the public interest
- vii. Consistent and fair assessment
- viii. Common advocacy standards

12. JAG has had regard to the regulatory objectives of the Legal Services Act 2007³ and has also reviewed existing quality assurance arrangements for advocates and in particular the approach adopted by the Crown Prosecution Service (CPS). The CPS has a comprehensive quality assurance framework for its prosecutors and it is in the interests of those involved in the provision of advocacy services that any regulatory scheme is compatible with the CPS approach, does not lead to duplication or avoidable or unnecessary burdens upon advocates, and facilitates harmonisation.

Consultation on advocacy standards

13. Common advocacy standards are the foundation upon which the QAA scheme will be built. JAG consulted on proposed standards in December 2009. A broad range of responses were received which have now been analysed. In the light of these responses, the proposed standards have been revised. A copy of the responses can be found on the websites of the BSB, SRA and ILEX. The revised standards have been approved by the respective regulatory boards and committees and are attached at Annex 3. The QAA scheme will continue to refine these standards and advocates will be assessed against them at the outset and throughout their career.

Next steps - towards implementation

14. JAG is committed to developing a QAA scheme which can be introduced in July 2011. There are a number of significant steps that must be undertaken to bring any QAA scheme into operation. An independent body will need to be established and a clear constitution and governance structure drawn up; its Chair and members will need to be appointed and it will need to be properly resourced. A programme of education and publicity will be embarked upon to ensure that all advocates, those who employ advocates, and the judiciary are aware of the scheme and how it will operate and training will be given to those involved in the assessment process.

15. The current timetable for introduction of a QAA scheme by July 2011 is:

Activity	Date
Consult on proposals for a QAA scheme	August - November 2010

³ Part 1, paragraph 1 LSA 2007 and included at Annex 2

Develop proposals for the financial operation of the scheme	August – November 2010
Analyse responses to consultation paper	November/December 2010
Agree final structure of the scheme with respective regulatory boards and committees	January 2011
Report on financial proposals	January 2011
Publicise scheme, educate professions and training providers	January 2011 – June 2011
Introduce scheme	July 2011

16. This timetable represents the principal activities that must be undertaken before introduction of the scheme in July 2011. In addition, there are a number of tasks that must be achieved in order for the scheme to commence smoothly. Discussions will be held with all relevant interested parties. Guidance for advocates and guidelines for assessors⁴ will also need to be prepared.

17. Responses are welcome from anyone who has evidence or views about the questions raised in this paper. A full list of questions can be found at Annex 1. JAG will summarise and discuss the responses received. Responses will be published on the relevant websites. If you do not want your response published please make that clear when you reply.

18. Once responses have been analysed and considered, the scheme will be revised as appropriate.

19. Responses should be sent either to any or all of the three regulators by **12 November 2010**. Unless respondents indicate otherwise, part or all of responses may be published by the regulators in their report of the consultation.

⁴ This will fall to the central assessor body (see paragraph 36– 42) with oversight from JAG

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PART 2: THE SCALE OF THE TASK

Numbers of advocates

20. A helpful starting point when considering the shape and scope of a quality assurance scheme for advocates is to determine the scale of the task in question.
21. The total number of advocates that potentially would fall within the remit of the scheme is high. Whilst it is not possible to give precise numbers, the number of advocates with criminal higher court rights of audience is approximately 8,500.
22. As the proposed scheme will cover all advocates with rights of audience the total number will be significantly higher. However, the weight of assessment and accreditation will be greater for advocates with higher court rights, which makes the above figure particularly pertinent when seeking to find a practicable and proportionate solution.
23. The proposed scheme will encompass all criminal advocates with rights of audience in courts in England and Wales.

Present position

24. ILEX advocates have rights of audience in open court in the Magistrates' and County Courts, Coroner's Courts and most tribunals according to whether they hold a criminal, civil or family proceedings certificate.
25. Upon admission, solicitors have automatic rights of audience in the lower courts. In order to appear in the higher courts, solicitors must hold the Higher Rights of Audience qualification.
26. Upon successful completion of the Bar Professional Training Course (BPTC) and the first six months of pupillage barristers have full rights of audience in all courts.
27. It is recognised that in some courts non-regulated advocates can appear. The Ministry of Justice recognises the need for QAA and will no doubt wish to consider

this issue in the future. JAG will co-operate as required but can make no proposals in this regard in this paper.

The future of advocacy

28. As the legal market changes to reflect the new opportunities arising under the Legal Services Act so the range of advocates will alter to meet demand. Any QAA scheme must have sufficient flexibility to 'future-proof' it. It is likely that ILEX advocates will increase in numbers and there is a growing cohort of solicitor Higher Court Advocates. At the same time, the number of barristers exercising rights of audience via alternative business structures and in-house will increase as firms develop their own advocacy capability. Each of these brings its own challenges to the effective operation of a QAA scheme and JAG has had regard, when developing its approach, to how the scheme will meet the changing shape of advocacy practice.

PART 3: THE PROPOSED SCHEME

29. Oral advocacy is a performance skill. As such, it must be both taught and assessed in a manner which reflects this. It follows that any system of quality assurance must focus on the assessment of actual performance if it is to provide an effective and rigorous assessment and accreditation of oral advocacy which addresses and tests the standards of the key requisite skills. In the case of criminal advocacy these are principally preparation of skeleton arguments, oral submissions and speeches, examination-in-chief and cross examination⁵. All of these must be assessed in the context of a case, or cases, which the advocate has been required to prepare and analyse.

30. It is with this in mind that JAG now puts forward its proposed QAA scheme.

31. This section of the paper explains the fundamentals of the proposed scheme. JAG proposes the establishment of a central body which will be responsible (with oversight from the regulators) for the implementation and operation of the scheme and it will fall to this body to resolve some of the finer detail of the scheme. This paper highlights the shape and structure of the scheme which the central body would operate.

32. The proposal was developed following a number of JAG meetings and input from Lord Justice Thomas, other senior members of the judiciary, the Advocacy Training Council and the Legal Services Board. JAG believes that the proposed scheme represents a proportionate and practical approach to quality assurance.

33. The scheme proposals are explained and justified and views on each element of the scheme are encouraged. Where an alternative approach may be possible this has been highlighted.

34. The proposed scheme can be broken down into the following sections:

- i. Central assessor body
- ii. Joint Advocacy Group
- iii. Levels

⁵ All of which are central limbs of the common advocacy standards

- iv. Movement between the levels
- v. Re-accreditation
- vi. 'Traffic light' system
- vii. Judicial involvement
- viii. Common advocacy standards

35. Dealing with each in turn:

THE CENTRAL ASSESSOR BODY

36. JAG believes that a body should be established by the regulators to implement and operate a consistent system of assessment. The title of this body has yet to be determined but its working title for the purpose of this paper will be the Performance of Advocacy Council (PAC). The membership of PAC, appointed by the regulators according to public appointments principles, will comprise lay members alongside broad representation from across the whole legal profession, including the Bar, the solicitor's profession and ILEX. In line with the proposed functions of PAC (below), members will need to demonstrate particular expertise in the performance and assessment of criminal advocacy.

37. A constitution will be drawn up which gives the PAC appropriate delegated authority from the regulators and makes it answerable to them, initially through JAG. It will have clear terms of reference, rules and objectives and will be entirely independent in its operation from the representative bodies.

38. The functions of PAC will include:

- Managing the accreditation and reaccreditation process against the common advocacy standards agreed by JAG;
- Setting assessment requirements and issuing guidance to assist advocates and assessors;
- Validating the routes by which advocates are accredited and re-accredited;
- Dealing with referrals under the traffic-lights scheme (see paragraphs 74-82 below) and onward transmission of information to the advocate's regulatory body;

- Quality assuring the assessment scheme including the development of moderation procedures and systems to measure and evaluate inter-rater reliability;
- The development of guidance and guidelines for judges to assist them in completing judicial evaluation forms and to encourage even application of the system.

39. The PAC will identify to the regulators any issues regarding underperformance. It will be for the regulators to decide how to proceed in each case.

40. The results of this consultation paper will be provided to PAC (once established) and will be instrumental in their determination of the finer working details of the scheme.

41. The set up costs will be met by the regulators as will the costs of its operation (at least initially). It is anticipated that the PAC will have to become self-financing over time.

42. JAG recommends that the first Chair of the PAC should be a senior, and experienced criminal judge. Senior judicial lead will secure the support of the wider judicial community and help to give the scheme credibility from the outset. JAG considers that the subsequent Chair could come from another field.

Q2: Do you agree that the scheme should be implemented and operated as described?

JOINT ADVOCACY GROUP

43. JAG was established to develop means of quality assuring all criminal advocates. It is proposed that JAG will continue to have a supervisory role in the establishment of the scheme and thereafter in its implementation. Once the scheme is established, JAG will receive regular reports from the assessor body and will act as a conduit between it and the respective regulatory bodies. This will allow all important issues to be discussed at JAG in the first instance by representatives of all of the regulators and agreed decisions to be presented to the respective boards of the BSB, SRA and ILEX. Direct reporting to three separate Boards would make it considerably more difficult to reach consensus.

44. It is proposed that JAG will also be responsible for conducting a review of the scheme after three years of operation. The review will look at all elements of the scheme and consider whether it remains the most effective and proportionate approach to quality assurance of criminal advocacy.

Q3: Do you agree that there should be a review of the final QAA scheme after three years of its operation?

LEVELS

45. JAG proposes that the QAA scheme should include four levels of criminal advocate, similar to the levels used by the CPS in allocating advocates to cases. The final defined levels will be determined in the light of consultation responses and after discussions with the CPS in order to assist with harmonisation.

46. JAG believes that it is a fundamental element of any regulatory scheme to be able to confirm the quality of advocates throughout their careers. Such an approach ensures that there is clarity over what level each advocate operates at and the maintenance of appropriate standards. Advocates will be assessed to minimum standards of competency at each level. Levels in a regulatory QAA scheme are not therefore a means of recognising excellence but are present to ensure that advocates are operating at a level at which they are competent. Advocates will be assessed against the common advocacy standards at each level.

47. For implementation in July 2011 it is proposed that we map the Level 1 and Level 2 standards onto the existing educational pathways for each of the three branches of the professions. In due course it may be possible that the training and assessment process could be rationalised across the three branches so that there is a unified approach to supporting the attainment of Levels 1 and 2.

Q4: Do you agree that there should be a unified approach to the training and assessment process of all advocates from Level 1 upwards? If so, how quickly do you think the regulators should move towards this goal?

Level 1

Level 1 will cover advocacy in the Magistrates' Court as well as appeals from cases heard at first instance in the Magistrates and bail applications before a judge in chambers in the Crown Court and High Court. Advocates will attain Level 1 status by successfully demonstrating for the time being via the existing training and assessment requirements that they meet the required standard. There will be a summative assessment of performed advocacy against the common standards of advocacy.

48. Level 1 is achieved for the Bar by the completion of the Bar Professional Training Course and the first six months of criminal pupillage. For solicitors, Level 1 is currently attained upon admission to the Solicitors' Roll which follows advocacy training and assessment during the Legal Practice Course, Training Contract and Professional Skills Course. ILEX advocates will attain Level 1 by successfully acquiring the criminal proceedings advocacy certificate. Each regulator will need to ensure that their education and training arrangements provide for advocacy assessment against common advocacy standards.

Level 2

49. Level 2 covers entry into advocacy in the Higher Courts as well as appeals from cases heard in these courts in the first instance. Advocates will attain Level 2 by demonstrating for the time being via the existing training and assessment arrangements that they meet the required standards. This will include assessment of performed advocacy against the common advocacy standards.
50. Level 2 will be achieved by barristers by successfully passing the compulsory advocacy element of the New Practitioner Programme⁶ (NPP). The current advocacy training arrangements during the NPP are at present a 'stop-check' system where trained practitioners of considerable experience will take new practitioners through a number of assessments giving tuition using the Hampel Method⁷. Whilst poor performance is always a possibility during NPP the course cannot easily be failed

⁶ The New Practitioners Programme is completed by barristers in their first three years of practice and involves nine hours of compulsory advocacy training as well as other continuing professional development requirements.

⁷ A structured means of advocacy training developed by Professor George Hampel QC

outright⁸. It is proposed that this course be revisited so that it is more distinctly pass/fail. A New Practitioner who does not make the grade will be offered support and re-training but ultimately if they cannot achieve the requisite standard they will be limited to advocacy at Level 1 only. It would be open to the failing advocate to re-apply for accreditation at Level 2.⁹

51. It is expected that barristers could undertake the additional advocacy training within the first 15 months of commencing pupillage but could not move to Level 2 until they have served at least nine months at Level 1. This would mean that the earliest a barrister could practise at Level 2 in the higher courts would be three months after the completion of a 12 month pupillage.

52. Level 2 will be achieved by solicitor advocates upon demonstrating that they meet the required standards. At present this is achieved via successful completion of the Higher Rights of Audience assessments which are pass/fail. A solicitor who does not meet the Level 2 standard will not be able to practise at that level until such time as they have met the standard.

53. ILEX advocates do not have rights to appear in cases ascribed to Level 2, other than in appeals from decisions of the Magistrates Court and Bail applications in Chambers. Currently extending eligibility to Level 2 cases would require an application under the Legal Services Act. Any application would need to take into account the QAA scheme then in place.

54. JAG has considered the case for setting a minimum period to be spent at Level 1 before an advocate is allowed to apply for accreditation at Level 2. This would ensure that advocates have had the opportunity to acquire a reasonable level of experience of advocacy in the Magistrates Courts before practising in the Higher Courts. As a consequence it would delay the ability of junior advocates to exercise higher rights. By way of illustration, if JAG were to set a minimum period of 9 months' practice at Level 1 before acquiring the ability to move to Level 2, barristers would not be able to exercise higher rights until 3 months after the completion of pupillage. The earliest that solicitors would be able to attain Level 2 rights would be 9 months after admission to the Roll.

⁸ If a student is of poor quality and not meeting the standard required they are requested to attend one to one teaching and review sessions and can also be required to repeat the course

⁹ It will be for the PAC to consider whether there should be a time period between failure and re-application or whether there should be a limit on the number of re-applications over a given period of time

Q5: Do you think advocates should complete a minimum period of practice at Level 1 before being able to move to Level 2?

Q6: If so, what period would be most appropriate?

Levels 3 and 4

55. Level 3 will cover more complex advocacy in the Crown Court and above, and Level 4 the most complex Crown cases and appeals. The PAC will be responsible for setting the levels more precisely and for providing guidelines to assist advocates to determine their level.

56. Levels 3 and 4 will be achieved by assessment by the PAC. It is at these higher levels that the impact of underperformance is the greatest and therefore accreditation and reaccreditation at these levels will need to be particularly robust. The proposal is that advocates will be subject to judicial assessment. We think it would also be helpful for advocates applying for Levels 3 and 4 to submit some other form of evidence of their competence as this may assist for example with consideration of borderline applications. This additional evidence could for example be in the form of other evaluations of the advocate's competence provided by senior colleagues, instructing solicitors and other advocates. We would welcome your views on what other forms this additional evidence could take.

57. JAG believes that judicial evaluation of advocates is particularly relevant in accreditation at Levels 3 and 4. It is a practical and cost-effective solution to devising a workable system of accreditation and is critical to the integrity of the scheme.

58. A straightforward, cost-effective and manageable system of judicial assessment will also enable judges to discharge their duty to ensure that high standards of advocacy are maintained, commensurate with the good administration of justice.

59. JAG suggests that the method by which judges will assess advocacy will involve completion of a structured form¹⁰ which focuses evaluation on the key advocacy skills as set out in the common advocacy standards. Judges will receive training (as part of the Judicial Studies Board programme) on assessing advocacy performance as well as the QAA scheme and their role within it. Only those judges who have participated in the training will be able to participate in judicial assessment of

¹⁰ To be developed by the PAC

advocacy. Advocates will be required to obtain an agreed number¹¹ of completed judicial evaluation forms.

Appeals

60. The PAC will need to develop an independent appeal process for those applicants who do not meet the level they have applied for. Appeals at Levels 1 and 2 should be dealt with by the relevant regulator as they are responsible for the training and education programme for entry at those levels.

Q7: Do you agree that advocates applying for Levels 3 or 4 should be required to submit additional evidence of their competence? If so, what form do you think this evidence should take?

Arrangements for current practising criminal advocates

61. JAG believes that it would not be practical to require all currently practising criminal advocates to be assessed and assigned a particular level at the inception of the scheme, especially given that we propose that all such advocates should be reaccruited within three years. Any risk of not undertaking initial accreditation will be mitigated not only by reaccruitation but also by the 'traffic light' system explained in detail at paragraphs 73 -81 and by the underlying professional conduct requirement on all advocates to undertake cases within their competence. JAG therefore proposes, as happened when the CPS grading scheme was first set up, that advocates should self-assess against the common advocacy standards and the prescribed levels, and then decide on the level at which they believe they currently practise. JAG proposes that all criminal advocates will need to have formally accredited or re-accredited at a certain level within three years of their initial self-assessment. This would tie in with the proposed three year review of the system.

Absence from practice

62. JAG recognises the risks in applying a levels-based system on those who have been absent from practice for a prolonged period. In these circumstances it would not be possible to assess advocacy based on judicial evaluation. PAC will have to address this risk to ensure that it does not have a negative impact on equality and fairness

¹¹ To be determined by the PAC but at a level which will ensure consistency and enable anomalies to be ironed out whilst remaining simple and inexpensive to operate

63. Further, the PAC will need to decide whether there should be a minimum amount of time that an advocate has been away from practice after which their 'level' is deemed to have lapsed and they must then be re-assessed, and pass, at their respective level before they are permitted to re-commence advocacy at their original level.

Q8: Do you agree with the levels approach to the QAA scheme.

Q9: Do you support the approach to accreditation at each level?

Q10: Do you have any comments on the proposed arrangements to bring existing criminal advocates within the levels?

Q11: Do you think that an advocate's 'level' should lapse after a defined period of absence from practice?

MOVEMENT BETWEEN THE LEVELS

64. Advocates will be free to apply to move between the levels when they believe that they have sufficient experience and competence to do so.

65. The regulators will be responsible for determining applications for movement between Levels 1 and 2 as this will be achieved by successfully passing the training requirement to undertake higher court advocacy.

66. The PAC will manage the process for movement into and through Levels 3 and 4. Accreditation at these levels will be achieved by the provision of satisfactory judicial evaluation forms supported by a demonstration of performance through the submission of a performance portfolio. Applicants will be assessed against the common advocacy standards. Advocates will need to show how in the context of the work they are undertaking at their current level, they are meeting the required standard for the next level. It is proposed that they will need to gather a number of judicial evaluation forms over a prescribed period of time to demonstrate this.

67. Again, the PAC will need to ensure that there is an adequate appeal process for unsuccessful applicants.

68. The PAC will also need to consider whether there should be judicial discretion to allow an advocate to act up a level for one particular case, for example, because the client is insistent that they have a certain advocate to represent them or where there is a late change of charge. Discretion would only be exercised if the judge was confident that the advocate had sufficient competence to take on the case. Such discretion would allow the judiciary a degree of flexibility to ensure that the court process can continue to operate smoothly and efficiently. That said, should such discretion be allowed there is a danger that it could be used by advocates to routinely undertake cases above their accredited level. Should such arrangements be permitted it may well be wise for judges who exercise discretion in this way to be required to record their decision and make it available to the PAC. Equally, it would be sensible to limit the number of requests that an individual advocate can make for discretion. This would guard against misuse and abuse of the exercise of the discretion itself as well the ability of an advocate to seek judicial discretion. Training on the circumstances when discretion would be acceptable would need to be included in the Judicial Studies Board programme.

- Q12: Do you have any views on the proposed arrangements for movement between levels?**
- Q13: Do you think that judges should be given the discretion to allow advocates to act up a level?**
- Q14: If so, do you think the safeguards suggested are sufficient? Are there any other safeguards that should be considered?**

RE-ACCREDITATION

69. JAG proposes that all advocates at all levels should be subject to compulsory re-accreditation every five years. JAG acknowledges that as well as many advocates who wish to progress through the levels from 1 to 4, there will be many who will wish to focus their practice at Levels 1 or 2. There will also be advocates for whom advocacy will be a small part of their practice and who having achieved a particular level, may not undertake a significant amount of advocacy at that level. Any reaccreditation process must therefore anticipate these possibilities and operate on one of the key principles of the QAA scheme which is that any advocate who meets the required standard for a level may practise at that level.

70. Reaccreditation at Levels 1 and 2 may be achieved by judicial evaluation. However, at these levels it will also be possible for re-accreditation to be achieved in other ways; where for example an advocate does not have sufficient exposure to judicial assessment (cases at Level 1 will tend to be considered before lay Magistrates). Alternative assessment routes might include portfolio assessment or live assessment or a refresher course for Levels 1 and 2. It is suggested that the PAC should decide (and validate) the types of alternative assessments that would be appropriate to ensure rigorous and proportionate re-accreditation.

71. It is anticipated that at Levels 3 and 4 re-accreditation will be determined by the submission of an agreed number of judicial evaluation forms.

72. Queen's Counsel will not be exempt from the re-accreditation process. JAG believes that it is important for the credibility of the scheme for QCs to be involved. The award of a mark of excellence by an independent body is separate from a regulatory quality assurance scheme which is assessing threshold standards. It is therefore entirely proper for QCs to apply every five years for reaccreditation at the level at which they seek to work.

Q15: Do you agree with re-accreditation every five years?

Q16: Do you have any comments on the proposed approach to re-accreditation?

Q17: Do you agree that QCs should not be exempt from the re-accreditation process?

'TRAFFIC LIGHTS' SYSTEM

73. The proposed QAA scheme creates formal measures to ensure that advocates meet agreed advocacy standards at entry into each level and that every five years all advocates will be subject to formal re-accreditation. It does not however pick up incompetence or poor performance outside of these processes.

74. To cope with the risk of underperformance in court outside of the accreditation and re-accreditation process, JAG proposes that advocates will be subject to a traffic light system of warnings or concerns. The advocate who appears not to be meeting the required advocacy standard in court will be the subject of a formal report from the trial judge. If the advocate receives an agreed number of such reports (JAG suggests

at least two)¹² then the PAC will make recommendations to the regulator on how that advocate could be retrained in order to meet the required standard for their particular level. It will be for the regulator to decide how to act upon this recommendation. In cases where there appears to be a serious public risk, the PAC may refer the matter to the appropriate regulator at any stage.

75. JAG has held discussions with senior judiciary on the operation of the 'traffic lights' system and has received support for its inclusion in any QAA scheme. That said, the judiciary will have to be encouraged to participate in the scheme. Historically, the judiciary have been reluctant to identify to the regulators advocacy which does not appear to meet the required standard. Now, the judiciary have made it clear that any QAA scheme will only be credible to the courts if it has substantial judicial involvement. JAG believes therefore that a programme of education and publicity coupled with senior judicial direction will lead to wide and constructive participation by the judiciary in the 'traffic light' system.

76. JAG has also considered whether it should be open to others to make referrals about an advocate's performance, for example, instructing solicitors, other advocates or even clients. JAG has not formed a view on this. It can see the benefit in permitting other references but equally recognises that it would be open to abuse and misuse or used for tactical or other reasons. JAG would welcome views on this.

77. Clear thought will have to be given to the advocates who appear only in one court centre. Similarly, steps will need to be taken to guard against the potential for judicial misuse in respect of a particular advocate or type of advocate. The latter will need to be the subject of training in the Judicial Studies Board programme. Records of referrals will also assist to gather evidence of the patterns of reports made by individual judges. Equally there must be systems in place to cope with the advocate who has been the subject of the reports and access provided to regulated providers of any training or re-education.

78. Another benefit of the referral scheme will be its ability to gather hard evidence of where and in what ways advocates are not meeting the standards. By the time of the first round of re-accreditation there will be five years' worth of judicial references.

¹² At least two are vital to protect advocates from a single episode of underperformance or a 'problem' judge but three may be subjecting the public to a known risk

79. The referral scheme, if operated effectively, will create a mechanism through which referrals can be made and as a result a bank of information and data on advocacy performance can be built up. This data can be used to identify training needs across professions and will be invaluable in the future development of the scheme. Importantly, this information will be used to ensure that the accreditation and re-accreditation processes are proportionate and targeted at where the greatest risk dictates.
80. Judges will make referrals to the PAC through the submission of an agreed judicial assessment form. The PAC will make recommendations to the relevant regulator on how the advocate should be remediated or re-trained and it will then be the responsibility of the regulator to take the necessary steps. Ultimately, if the remediation or retraining is unsuccessful, it would be open to the PAC to demote the advocate if they cannot demonstrate that they meet the required standard of their current accredited level. Further, gross incompetence identified could result in disciplinary action by the regulator. JAG believes that this approach is the most cost effective and pragmatic resolution of performance problems. To place the responsibility solely in the hands of the PAC would be likely to lead to an over-bureaucratic system.
81. JAG believes that the proposed 'traffic lights' system complements the more formal elements of the QAA scheme and ensures full coverage of criminal advocacy performance.

Q18: Do you have any comments on the proposed 'traffic lights' system?

Q19: Do you think that non-judicial references should be permitted by a) clients, b) solicitors/barristers or c) other professionals?

JUDICIAL INVOLVEMENT

82. JAG is clear that judicial involvement in the QAA scheme is critical to the credibility and successful operation of the scheme.
83. Despite existing in an era of increased and proactive case management, to date, it is fair to characterise the role played by judges regarding standards of advocacy experience in their courts as largely non-interventionist. They have reported feeling increasingly constrained and frustrated at their inability to deal with advocacy standards.

84. One of the functions of the new system is to set a framework which enables judges to have the ability to ensure that proper advocacy standards are maintained, consistent with their duty to give effect to the Overriding Principle in the Criminal Procedure Rules. This principle includes the need to ensure that cases are dealt with, amongst other things, justly, expeditiously and fairly.
85. The proposed QAA scheme therefore sees a key role for the judiciary in maintaining advocacy standards. Judicial evaluation will be mandatory in accreditation and re-accreditation at Levels 3 and 4. The proposed 'traffic lights' system gives the judiciary a continuing advocacy evaluation role and a senior judicial chair of the PAC will help to encourage the participation of the wider judicial community.

Training and safeguards

86. It is essential that all elements of the assessment and reaccreditation processes which will make-up the QAA scheme are valid and reliable. Judicial involvement will require a substantive training programme to be added to the current Judicial Studies Board programme and discussions will be held with the Board in due course.
87. JAG has discussed the level of the judiciary to be involved. Its view is that it should be limited to Circuit Judges and above where the relevant rights are exercised. Consideration may have to be given to Recorder involvement.
88. Further, PAC will consider and evaluate whether a level has been achieved in borderline cases, by reference to the common advocacy standards.

Q20: Do you support the proposed central role that the judiciary will play in the QAA scheme?

Q21: Do you agree that only Circuit Judges and above, who have successfully completed formal training in the QAA system, should be part of the advocacy assessment process?

COMMON ADVOCACY STANDARDS

89. JAG consulted in December 2009 on common advocacy standards for crime. Responses to the consultation have been analysed and the standards revised as appropriate. These standards have now been approved by the regulators and the agreed version is attached at Annex 3.

90. It will however ultimately be for the regulatory bodies, on the recommendation of the PAC, to approve the standards that will be used in the assessment process. For example, the standards will need to be developed further so that they can be applied at each of the four levels.

PART 4: COSTS

91. JAG is committed to developing a system which is economic both in terms of its operation and in respect of the financial burden that it places on advocates seeking accreditation or re-accreditation. JAG plans to undertake detailed financial planning in order to work up substantive costs for the initial set up and the operation of the scheme as well as the likely costs to individual advocates in respect of training, accreditation and re-accreditation. The regulators will be responsible for the set up and initial operation of the PAC. Individual advocates will be responsible for the cost of their own accreditation or re-accreditation.

92. The financial planning work will involve:

- i. Review of the current cost of advocacy training for the Bar, ILEX and solicitor advocates;
- ii. Discussions on the form of the PAC – for example, should it, like the Queen's Counsel Appointments Panel, be a company limited by guarantee or is there another more appropriate formation;
- iii. Consideration of the resourcing and cost of the PAC¹³. This will include determination on the office and IT requirements for the PAC;
- iv. Likely cost to each regulator for the initial set up of the PAC;
- v. Future financial forecasting for how the PAC will be financed.

93. Given the current economic climate, JAG is alive to the need for the scheme to be cost effective and not unduly burdensome on advocates. A scheme which is expensive to operate and prohibitively costly for those being assessed will be in no-one's interests and could result in becoming a barrier to entry into advocacy. That said, any scheme must be sufficiently rigorous to be effective and carry confidence. It is clear therefore that any scheme will have cost implications for the regulators and in turn their members.

94. JAG will publish detailed financial proposals by 31 January 2011.

Q22: Do you have any comments on the financial cost of developing a QAA scheme?

¹³ Both in terms of staff and Council member costs

PART 5: EQUALITY AND DIVERSITY

95. As part of the consultation process, a full equality impact assessment will be undertaken to ensure that the proposed scheme does not unduly and adversely impact on any group of advocates.

96. JAG has however given some initial thought to what impact, positive or negative, the scheme might have for advocates. JAG has identified the following positive consequences:

- i. Common standards of advocacy and consistency of assessment across the three professions will assist in ensuring that there is a level playing field which will mean that no specific group is disadvantaged;
- ii. Those returning to practice from parental leave or long term sickness could be subject to independent assessment before they are permitted to perform advocacy;
- iii. Compulsory judicial training in assessment will address concerns over the evaluation role.

97. In particular we recognise that the proposed scheme has the potential to have a negative impact where:

- i. Advocates practising in a geographical location where there are only a small number of judges and are therefore limited in the range of those who can assess them;
- ii. The introduction of formal accreditation and re-accreditation throughout criminal practice will have a cost impact for advocates. Crime is an area where professional fees are already giving rise to economic concern and additional financial burdens will impact on some advocates more than others.

98. JAG will need to ensure that the negative impacts identified above are mitigated as far as possible. The Equality Impact Assessment will set out proposals in this regard.

99. In addition to the specific questions set out in this consultation paper, please could you let us know if any issues arise from the proposed QAA scheme which you consider might have implications for equality. This includes discrimination on grounds or race, gender, disability religion or belief, sexual orientation and age. We would

welcome feedback on whether there are likely to be any negative consequences for any group arising from the proposals and how these could be mitigated, or if there are opportunities to promote greater equality.

Q23: We have identified some potentially positive and negative consequences for equality in putting in place the proposed QAA scheme. Are there any other positive benefits? Are there any other negative consequences for any group? How can we further promote equality and diversity? How can we mitigate any negative consequences?

PART 6: FURTHER CONSIDERATION

Junior Counsel

100. This consultation has set out a number of issues which will need to be resolved by JAG or the PAC before a scheme can become operational. One such area which JAG recognises will require further consideration is the position of junior counsel, who are led in higher level cases (likely to be Level 3 or 4 under the scheme). The role that junior counsel takes can vary from case to case but crucially, in most circumstances junior counsel are expected to take over a case where the leader becomes unable to continue for any reason.

101. The introduction of a QAA scheme requires a review of how the current system with junior counsel operates. It needs to be decided what level an advocate would need to be at in order to be junior counsel on cases at each level, bearing in mind the fact that under the current system junior counsel are liable to become lead counsel in certain circumstances.

102. JAG intends to investigate this matter further during consultation through focus groups with interested parties. It will be interested to receive suggestions on how junior counsel should be catered for by a QAA scheme.

Q24: How should 'juniors' be dealt with under the scheme?

Q25: What level should be achieved before advocates can be led? Should it be possible for the facts or circumstances of a particular case to alter this to enable someone not at the required level to be led?

Q26: What level should be achieved before advocates can lead?

Q27: Are there any other issues that have not been mentioned in the consultation paper and which require further consideration at this stage?

PART 7: CONCLUSION

103. Competent advocacy is crucial to the effective delivery of legal services and the upholding of the rule of law and the proper administration of justice. Clients depend upon effective advocacy to ensure that they are treated fairly within the criminal justice system. An agreed and consistent approach to quality assuring advocates is fundamental to ensuring that advocates continue to be held in high regard throughout the legal profession and the wider community.

104. JAG believes that the approach set out in this paper represents a practicable and proportionate QAA scheme that is capable of being introduced by July 2011. It meets the regulatory objectives of the Legal Services Act 2007 as well as JAG's own overriding principles for an effective scheme. Furthermore, preliminary discussions with senior judiciary, practitioners, advocacy training providers and other interested parties have led to encouraging support for the proposed scheme.

105. A scheme which has the judiciary at its heart, has independence and consistency of assessment, involves compulsory accreditation and re-accreditation of all criminal advocates and which will be straightforward to administer and to go through is now an achievable and realistic goal.

106. JAG accepts that there is still considerable work to be done to bring the proposed scheme into operation and this will continue during the currency of the consultation process and once the PAC is established. JAG will report on progress in these areas on respective regulator websites and directly to the key interested parties.

107. We look forward to receiving your comments.

Joint Advocacy Group

August 2010

Annex 1 List of questions

- Q1: Do you agree that steps should be taken to address inadequate advocacy performance?**
- Q2: Do you agree that the scheme should be implemented and operated as described?**
- Q3: Do you agree that there should be a review of the final QAA scheme after three years of its operation?**
- Q4: Do you agree that there should be a unified approach to the training and assessment process of all advocates from Level 1 upwards? If so, how quickly do you think the regulators should move towards this goal?**
- Q5: Do you think advocates should complete a minimum period of practise at Level 1 before being able to move to Level 2?**
- Q6: If so, what period would be most appropriate?**
- Q7: Do you agree that advocates applying for Levels 3 or 4 should be required to submit additional evidence of their competence? If so, what form do you think this evidence should take?**
- Q8: Do you agree with the levels approach to the QAA scheme.**
- Q9: Do you support the approach to accreditation at each level?**
- Q10: Do you have any comments on the proposed arrangements to bring existing criminal advocates within the levels?**
- Q11: Do you think that an advocate's 'level' should lapse after a defined period of absence from practice?**
- Q12: Do you have any views on the proposed arrangements for movement between levels?**
- Q13: Do you think that judges should be given the discretion to allow advocates to act up a level?**
- Q14: If so, do you think the safeguards suggested are sufficient? Are there any other safeguards that should be considered?**
- Q15: Do you agree with re-accreditation every five years?**
- Q16: Do you have any comments on the proposed approach to re-accreditation?**
- Q17: Do you agree that QCs should not be exempt from the re-accreditation process?**
- Q18: Do you have any comments on the proposed 'traffic lights' system?**
- Q19: Do you think that non-judicial references should be permitted by a) clients, b) solicitors/barristers or c) other professionals?**

- Q20:** Do you support the proposed central role that the judiciary will play in the QAA scheme?
- Q21:** Do you agree that only Circuit Judges and above should be part of the advocacy assessment process?
- Q22:** Do you have any comments on the financial cost of developing a QAA scheme?
- Q23:** We have identified some potentially positive and negative consequences for equality in putting in place the proposed QAA scheme. Are there any other positive benefits? Are there any other negative consequences for any group? How can we further promote equality and diversity? How can we mitigate any negative consequences?
- Q24:** How should 'juniors' be dealt with under the scheme?
- Q25:** What level should be achieved before advocates can be led? Should it be possible for the facts or circumstances of a particular case to alter this to enable someone not at the required level to be led?
- Q26:** What level should be achieved before advocates can lead?
- Q27:** Are there any other issues that have not been mentioned in the consultation paper and which require further consideration at this stage?

Annex 2 Regulatory objectives of the Legal Services Act 2007

Part 1 paragraph 1

- (a) Protecting and promoting the public interest;
- (b) Supporting the constitutional principle of the rule of law;
- (c) Improving access to justice;
- (d) Protecting and promoting the interests of consumers;
- (e) Promoting competition in the provision of services by authorised persons (lawyers)
- (f) Encouraging an independent, strong, diverse and effective legal profession;
- (g) Increasing public understanding of the citizen's legal rights and duties; and
- (h) Promoting and maintaining adherence to the professional principles.

Annex 3 Common standards for criminal advocacy

Preliminaries and preparation

A1	Has the appropriate level of knowledge, experience and skill required for accepting a case
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A2	Is properly prepared
1	Has a clear strategy for the case.
2	Understands client's and opponent's case and identifies the issues
3	Understands the relevant law and procedure for the matter in hand

A3	Provides a proper contribution to case management
1	Complies with appropriate Procedural Rules and judicial direction
2	Is aware of the requirements regarding disclosure in the case and how they affect the client's case
3	Provides appropriate disclosure of evidence
4	Keeps or ensures that the court is kept promptly informed of any timings problems/delays
5	Complies with court imposed timetables

Case presentation/advocacy

B1	Presents clear and succinct written and oral submissions
1	Drafts clear skeleton arguments which:
1.1	<i>Show clarity of purpose and expression</i>
1.2	<i>Have a logical structure and identify the issues</i>
1.3	<i>Make appropriate reference to authorities and documentary reference to external materials</i>
2	Makes relevant and succinct submissions by reference to appropriate authority
3	Uses materials appropriately
4	Communicates clearly and audibly
5	Maintains appropriate pace throughout the course of the trial

B2	Conducts focussed questioning
1	Conducts examination-in-chief appropriately
2	Conducts cross examination appropriately
3	Observes restrictions and judicial rulings on questioning
4	Questions to witnesses are clear and understandable
5	Questioning strategy relevant to issues
6	Avoids introducing irrelevant material

B3	Handles vulnerable, uncooperative and expert witnesses appropriately
1	Gives clear guidance to own witnesses
2	Deals appropriately with vulnerable witnesses
3	Deals effectively with uncooperative witnesses
4	Uses and challenges expert evidence effectively

B4	Understands and applies sentencing guidelines
1	Makes appropriate factual representations to the court on sentencing
2	Takes appropriate steps to ensure that relevant legal materials necessary for sentencing are before the court

Working with others (where applicable)

C1	Assists clients in decision making
1	Any advice given to a client is clear and accurate
2	Takes all reasonable steps to help the lay client understand the process
3	Ensures that the decision making process is adequately recorded

C2	Establishes professional relationships in court
1	Observes professional etiquette and ethics in relation to the client and to third parties
2	Is professional at all times

Integrity

D1	Observes professional duties
1	Observes duty to act with independence
2	Advises the court of adverse authorities and, where they arise, procedural irregularities
3	Assists the court with the proper administration of justice

Equality and diversity

E1	Has a demonstrable understanding of equality and diversity principles
1	Recognises the needs and circumstances of others and acts accordingly
2	Treats clients, colleagues and parties fairly and does not discriminate against them