Analysis of responses to Joint Advocacy Group consultation paper on proposals for a quality assurance scheme for criminal advocates

Joint Advocacy Group

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Why we consulted

The Joint Advocacy Group (JAG) was established in October 2009 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.

We consulted on the content of underpinning advocacy standards[1] in 2009. This subsequent consultation[2] on the proposed Quality Assurance for Advocates scheme (the QAA) sought views on the scheme's proposed framework and component parts, aiming for introduction of the final scheme in July 2011.

The current position

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.

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. 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.

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. The judiciary has commented on its perception of the current situation through judicial pronouncement[3] on advocacy competence and performance.

Regulatory intervention into the advocacy market has long been argued as unnecessary as market forces should eliminate the underperforming 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 – for example, those instructing the advocate may have little or no information about the advocate's capability and reputation. In addition, it is increasingly uncommon for an advocate to be observed by the selecting professional. Therefore, 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.

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.

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[1] December 2009 consultation - http://www.barstandardsboard.org.uk/consultations/closedconsultations/

[2] August 2010 consultation - http://www.sra.org.uk/sra/consultations/joint-advocacy-group-quality-assurance-scheme.page#skip

[3] 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)*.

There is therefore a need for systematic and consistent quality assurance of advocates.

What we consulted on

The consultation put forward proposals for a framework for a scheme which is cost effective, proportionate and straightforward, and asked for views.

We asked questions on the overall need for such a scheme, on the proposed high-level framework, and on detailed aspects.

During the consultation period

The consultation was intended to initiate a conversation with the extensive range of stakeholders who have views and interests in a QAA scheme. We had already consulted on the proposed advocacy standards and the second consultation aimed to set out proposals on how those standards would be implemented and assessed. At the time of its publication, we were aware that our work on many aspects of the scheme including assessment, operational detail and governance arrangements, was work in progress. We have continued to work on all of these areas during the consultation period and as a result feel confident that we have already addressed many of the issues raised in responses. We have set this out in the summary below.

We have held meetings with a wide range of stakeholders to discuss the proposals with them and obtain their views. This includes legal executives, solicitor advocates, barristers, judges and the Judicial Studies Board. In many instances the feedback we received from those informal meetings has informed our ongoing development of the scheme. We have also retained additional assessment expertise and conducted workshops to unpack the advocacy standards and map them across the four levels of the scheme.

Our work throughout this project has been informed by the need to ensure we produce a valid and reliable assessment framework which is fit for purpose. A valid assessment is one which is capable of measuring the knowledge/skills or behaviours which need to be tested; in other words, a valid assessment of writing skills is one which requires a candidate to write something. In the case of QAA, for our assessments to be valid they need to test performance advocacy skills.

A reliable assessment is one which is capable of producing a substantially similar result on retest. The way in which we will ensure the reliability of the scheme will to some extent depend on the method of assessment which is being used. For example, where we use judicial assessment, we will use training to ensure that our assessors understand the standards and are able to benchmark and rate performance so that an advocate being evaluated by one judge should receive a substantially similar evaluation from another. We intend to use a range of assessment methods to test advocates against the standards; what they will have in common is the requirement that they are valid and reliable measures of what we seek to test.

As above, we are working with the Judicial Studies Board to develop the training package and approach we will use which will include opportunities for moderation.

The Traffic Light system as a planned feature of the scheme will also provide further and alternative evidence of performance to enhance the rigour of the overall process.

One of the issues we raised in the consultation was the ongoing governance of QAA. At the time of the consultation, we proposed that QAA would become the responsibility of the Performance of Advocacy Council (PAC). Although we did not ask you to respond directly to a question on this, we received helpful feedback during the consultation and the governance arrangements have been altered in response. In particular, the governance arrangements we are now finalising, place ongoing responsibility including for operational matters, with JAG. JAG will be assisted in its work by an expert advisory group, the QAA Advisory Group (QAA AG) which includes practitioners, representatives of the regulatory bodies and lay representatives reflecting consumer interests and will be chaired by Thomas LJ. We believe this will provide a more robust and cost-effective governance model for the scheme.

Profile of respondents

70 people/organisations responded. A full list of respondents appears at the end of this report. The largest group of respondents was of individuals; the other respondents were organisations and they have been grouped into categories as listed below:

Individual	22
Barristers chambers	10
Association	6
Non-departmental agency	6
Inns of court	4
Representative body	4
Academic institution	3
Circuit	3
Firm of solicitors	3
Judiciary	3
Central government department, in house Legal team	2
Local law society	2
Regulatory body	1
Committee of a representative body	1

Key themes/findings and future action

The key themes and findings of the consultation are set out below. The quotes which appear in boxes are taken from the responses received. Our response and future actions are set out under the heading “JAG response”.

Overall, most respondents agreed that we should address advocacy performance, and identified the problems of inadequate advocacy, risks of wrong/unfair convictions, unwarranted acquittals, wasting court time, and reducing confidence in

the criminal justice system. The market for criminal advocates was also seen as 'imperfect' and incapable of forcing out bad advocates.

"it is essential… It is the only way in which all advocates can compete on an equal footing."

"… objective quality assurance should be an absolute requirement to safeguard professional good reputation and protect the public."

Some respondents suggested that:

- a voluntary scheme would be more desirable
- there was an issue with the amount of supporting evidence and whether the scheme was a proportionate solution
- the scheme contradicted the independence of the advocate; the advocate's professional duty is to pursue fearlessly the interest of their clients, which may conflict with their personal interest in gaining a judge's approval of their skills and conduct.

Q1. Should the QAA scheme be implemented as described?

There was support for implementation of the scheme as described and the role to be played by the judiciary. Some thought the scheme appeared complex, insufficiently flexible, and expensive.

JAG response

We are encouraged by the positive response to the proposals for the scheme. In designing the scheme we have given substantial consideration to the issue of proportionality in producing a scheme which is not only fit for purpose but which will be cost-effective for all those involved. An assessment framework which is based on real-time and workplace assessment will support this. A key advantage of introducing a scheme such as this is the opportunity it provides to introduce greater flexibility for a number of advocates, including those who have had lengthy career breaks, to refresh their skills and demonstrate to themselves and others their fitness to return to practice. There will also be flexibility for many in the assessment routes available to them.

Q2. Should the scheme be reviewed after three years?

Respondents suggested a pilot scheme, with full evaluation before the scheme's implementation. Others thought that ongoing review to address issues as they arose would be crucial. It was suggested that a review would be needed sooner than three years – others that it was the minimum time for such a scheme to bed-in.

"... an evaluation of the QAA scheme should take place at the earliest opportunity and data should be collected with evaluation in mind from the outset."

"Ideally, the first year would be considered as a pilot and review would take place at its end…"

JAG response

We anticipate that the formal evaluation will need to be linked to full implementation of the scheme and should ideally include information on those advocates who have had an opportunity to progress through the levels. In the meantime, we will collect and analyse interim data and through our governance arrangements, conduct ongoing thematic evaluation on particular issues that arise.

Q3. Unified approach to training of all advocates

Most respondents agreed that a unified approach should be introduced. Uniformity was seen as being in the public interest and would allow candidates to move through the levels and between professions. There were calls for:

- rights of audience to be granted to trainee solicitors, bringing them into line with pupil barristers
- the pre-qualification elements of the professions to be revisited to create equivalence of advocacy training
- assessment to be unified, but not training.

"…long overdue… To have a situation where there are two main professional bodies with identical powers to grant rights of audience and the right to conduct litigation but any form of common training is not permitted borders on the scandalous."

"[yes] At present there is inequality of experience and assessment below level 1, particularly when the LPC +PSC + training contract is compared to the BPC + pupillage."

JAG response

We believe that the introduction of a common set of standards will be beneficial for all advocates in creating a transparent system for the recognition of competence. Whilst we do not intend initially to address issues of rights of audience in developing this scheme, we agree that the current routes to qualification need to be revisited to ensure that they provide sufficient opportunities for candidates to meet entry level standards.

Q4. Should advocates complete a minimum period of practice at level 1?

Those who agreed that a minimum period was necessary tended not to give reasons but some suggested periods ranged between 6 and 9 months. Some thought that appearances rather than time period would be more appropriate. One respondent suggested that rights of audience for trainees – in limited circumstances – should be brought in to allow experience to be gained at an equivalent stage to pupil barristers.

Those who disagreed gave reasons including:

- the levels are not related to the complexity of advocacy but to the venue

- quality is not driven by the amount of experience – competence demonstrated through performance and/or testing should determine levels
- there is a lack of work for junior barristers in the magistrates' courts, which could limit the opportunities for gaining experience.

"Every day experience in the magistrates' courts for three or six months will be better preparation than one appearance each month for twelve months."

JAG response

We agree that the development of competence is not necessarily linked to a period of time. Advocates will develop at different rates and move between the levels accordingly. Rather than prescribing a minimum amount of time to be spent at each level, we will issue guidance to advocates on a typical period of time which it might take to meet the criteria used to determine competence at the next level. We have also developed the descriptions of competence at each level to include performance indicators. These will provide advocates with a clearer understanding of the standard required at each level and help them to identify when they are ready to move between them.

Q5. Should level 3 or 4 advocates submit additional evidence?

There was agreement that additional evidence should be required – relying on judicial assessment alone would miss important factors such as planning, preparation and written advocacy. Those against submission of additional evidence either:

- saw judicial assessment as satisfactory
- considered peer review as the only reliable assessment method
- objected to additional burdens being placed on advocates to further evidence their competence, or
- thought that it should only be submitted in borderline cases.

"The views of the independent judiciary, properly trained, will be the most objective and useful in determining competence at levels 3 and 4. "

JAG response

We agree that we will need to use a range of assessment methods of measure the standards. Wherever possible, we consider it will be more cost-effective and proportionate for the advocate if a single assessment can be used to test as many of the standards as possible. This is subject to our over-arching requirement that assessments are valid. We are considering where and how we can use assessed CPD and simulated assessment to test the standards. At levels 3 and 4, judicial assessment will be an important but not the sole means of assessment.

There will be circumstances in which it will be necessary for advocates to use alternative assessment methods. As stated in the consultation, these must not only be seen to be but must be as robust as judicial assessment, and of course judicial assessment itself must assure reliability through the training of assessors and provision of moderation opportunities.

Q6. Do you agree with the levels approach?

There was general agreement with a levels approach. There were some doubts expressed that the levels adequately reflected the skills used as they concentrated on the venue, not the complexity of the work or the frequency with which it is undertaken. There was also concern around judicial involvement in evaluation of advocates at levels 3 and 4.

"The levels provide a clear and objective standard of grading."

"… the levels should not include the most serious work which is only appropriate for Queen's Counsel…"

JAG response

We have been continuing to work on the levels to differentiate between them. We have added performance indicators and are finalising the criteria to be used in determining which level of advocate will be required for a particular case. In developing these criteria we have focussed much more on complexity of work. Read together, the advocacy standards, illuminated by the performance indicators and guidance on the kind of work associated with each level, will provide a clear picture of what is expected of the advocate at each level. We intend to use a range of assessment methods, including judicial evaluation, across the scheme.

Q7. Do you support the approach to accreditation at each level?

Some supported the proposals for level 1 and 2, but thought that an alternative means of assessing level 3 and 4 advocates was needed. We were asked to include the Magistrates' Courts Qualification – one element of the Law Society's Criminal Litigation Accreditation Scheme – in the proposals.

Potential issues were identified, including:

- cost, practicality and viability
- training all judges in evaluation
- that practitioners who operate mainly in one court may be reliant on a small number of judges for their evaluation
- that it is a scheme aimed at assuring a minimum standard of competence, not quality or 'excellence' which the QC scheme aims at.

"yes, advocates should not be able to self-accredit without evidence at level 3 or 4."

"… there needs to be earlier and more robust assessment for practising advocates becoming accredited at [level 1 and 2]."

JAG response

As stated above, the development of a realistic and cost-effective scheme has been a key consideration in our work. The use of real-time and work-based assessment will contribute significantly to ensuring the scheme is viable and maintaining the cost of this scheme at a realistic level. It is essential that for the scheme to be reliable, we train all those assessors who will be involved in work-based assessment of advocacy

performance. This will provide us with the consistency of approach which the judicial assessors will need to have. We have so far spoken to more than 50 judges who would be involved in the scheme. They have been almost universally supportive of the scheme and the need for the training which they will be required to undertake. Other valid and reliable assessment methods will be available for all advocates for whom judicial evaluation is not viable or appropriate.

Q8. Should 'level' lapse after absences from practice?

Some saw this proposal as reasonable, others that it could not be justified objectively and could discriminate against women in particular. Some suggested that skills would be unaffected by breaks in practice, whereas knowledge of law, rules of evidence and procedure would require updating training.

"Yes – re-accreditation, provided it can be fast-tracked, should be seen as mechanism to allow the previous level to be re-attained rather than as a penalty."

JAG response

A scheme which involves periodic re-accreditation must anticipate the needs of those who will not practise at the level for a period of time and provide opportunities for them to satisfy themselves that they have retained the requisite competencies. We have commenced a full equality impact assessment on all aspects of the scheme to understand and respond to the equality issues.

Q9. Views on movement between levels

There were views expressed that the proposed arrangements particularly the early levels did not guarantee experience in the criminal courts and so were potentially restrictive. The mechanisms for movement into the higher levels were felt not to be sufficiently detailed for comments. Probationary periods or provisional licenses were suggested as remedies.

"The CPS quality framework is designed to support continuing improvement and progression, and the JAG scheme lacks this element of added value."

JAG response

We agree with the responses received and have been working on proposals for movement between the levels, particularly between levels 1 and 2. We are exploring a "green plate" scheme which would be used in conjunction with either way offences being dealt with in the Crown Court to enable level 1 advocates to begin the process of movement to level 2.

10. Views on judicial discretion to allow acting-up

Many thought that judges should not have such a discretion, except in exceptional circumstances – selection of advocates should be solely down to the client and not be open to influence by the judiciary. Others thought that the discretion should be

there, but exercisable by the instructing solicitor and the client – not the judge – to ensure the independence of advocates.

"… a sensible safe guard"

"… without that flexibility, the scheme would risk offending Article 6(3)(c) of the European Convention on Human Rights which stipulates as a 'minimum right' the right of the accused to defend himself 'through legal assistance of his own choosing'…"

JAG response

JAG believes that the QAA scheme must have flexibility to be able to adapt to the changing nature of criminal cases. Properly managed judicial discretion by trained judges will enable advocates to continue to undertake cases that change in complexity during the currency of their instructions.

JAG will ensure that judicial training will include guidance on when and how judicial discretion should be exercised and this will be monitored as part of the ongoing review of the scheme.

11. Re-accreditation

Some saw re-accreditation as cumbersome and unnecessary; others saw it as necessary but that it should happen over longer periods. Opinion leant towards not exempting QCs from re-accreditation, as all higher courts advocates should re-accredit, but there was recognition it would be costly.

"… re-accreditation is necessary to maintain confidence in the accreditation system."

"Re-accreditation may not need to be as formal as initial accreditation as it should serve principally to pick up problems."

JAG response

A scheme based on the quality assurance of advocacy competence through its demonstration, maintenance and ideally enhancement, must include periodic checking that the required standard is continuing to be met. As above, all advocates will be included in the scheme and wherever possible, we will look for synergy with existing assessment schemes.

12. "Traffic lights"

Respondents were generally supportive of the traffic lights system, seeing that it was desirable, proportionate, practical, and cost effective. However, there were concerns around potential judicial control or influence, and that the proposals were not detailed enough to comment upon

"This is where QAA can make its biggest impact: not simply in the accreditation by levels but in targeting individual advocates in precisely the areas where they need help."

JAG response

We agree that it is important for the traffic lights scheme to be proportionate and practical. The further development of the traffic lights scheme is linked to our governance arrangements. These are now finalised and so can inform the detail of the traffic lights scheme. We are clear that referrals under the traffic lights scheme will ultimately be referred to the individual regulators for resolution and action. We are currently developing the detail including triggers, number of referrals which may be permitted and over what period of time and range of available regulatory actions. We are also looking at the question of who may initiate a referral under the traffic lights scheme and the possibility that this will extend beyond the judiciary.

Q13. Non-judicial references

References were seen as appropriate from instructing solicitors, senior colleagues, peers and regulators, but not from lay clients or judges who had not been trained. By contrast, at least one respondent saw the absence of client feedback in particular as a key weakness in the scheme.

"They must though be from people who are able properly to assess the quality of advocacy, rather than the results gained from that advocacy."

JAG response

A central objective of the scheme has been to address the needs of consumers of advocacy services. To this end JAG considers it would be helpful, if not practicable at this stage, to obtain the views of lay clients. We are finalising the ways in which references from other parties can form part of the overall assessment of the advocate.

Q14. Central role of the judiciary

The role of the judiciary in assessment was supported by many respondents. There were also those who supported the role of the judiciary in the traffic lights system, but not in the assessment of level. Those who did not support the judiciary's proposed role raised concerns about the relationship between judicial evaluation of poor advocacy and appeals from trial verdicts, conflicts of interest or bias, and workload.

"… judicial assessment and re-assessment will be more effective, efficient and manageable than any available alternative."

JAG response

The use of judicial assessment is, for a range of reasons, crucial to the scheme. Not least of these will be the number of advocates who will be subject to assessment. The judges to whom we have spoken are supportive and desirous of training so that

they understand the standard required at each level and how to determine when an advocate has met the standard. Training will also address what the assessment is not about i.e. verdicts, conflicts and bias.

Q15. Should only Circuit Judges and above be part of the advocacy assessment process?

Some respondents thought that High Court and Deputy Circuit Judges, District and Deputy District Judges, Recorders and appropriately trained lay magistrates could make valuable and credible contributions. Training and monitoring was seen as vital.

"Recorders are essential within a traffic light scheme, because much of the inadequate advocacy appears in their courts."

JAG response

We agree with those respondents who identified the benefit of including district judges and recorders in the scheme. We have asked our QAA Advisory Group to consider the logistics of judicial involvement as one of its first tasks.

Q16. Financial cost of development

There was concern that no costing work had been undertaken, and many respondents thought it was likely to be expensive

"It should not be skimped if the objective is to ensure that advocates at each level have the necessary competences."

JAG response

As ever with a scheme such as this, it is difficult to provide accurate and therefore meaningful information about the financial implications until the detail of the scheme is fully developed. We have, as stated elsewhere in this document, been mindful of the need to produce a scheme which is proportionate in cost, as well as impact, in all our work. We expect to be able to circulate financial information in April 2011.

Q17. Equality impacts

There was concern expressed that an equality impact assessment had not been carried out. Respondents raised a risk of disadvantaging women who take maternity leave or work part-time, and cost implications for practitioners from minority backgrounds as a greater proportion work in criminal legal aid. Assessment by single assessors, rather than independent and collective assessment, was seen as leading to risks of subjectivity and accusations of discrimination.

"We cannot comment on this when an equality impact assessment has yet to be carried out."

JAG response

The equality impact assessment has commenced and will be published in April 2011.

Q18. Junior Counsel and lead advocates

It was broadly felt that junior counsel should be able to take over a case where leaders were absent at short notice. Other respondents felt that the scheme should play no role in junior advocate selection at all, or that juniors have to be capable of taking over if the leader is absent – the role of junior is not simply to take a note or gain experience.

Level 4 was suggested frequently as the minimum level for lead advocates although level 3 was also suggested, in less serious cases, to allow experience to be gained.

"The lay and professional client should decide in every case."

"Determination as to the level of advocate or advocates required for particular cases should be by trial judge on written application for amendment to the certificate of representation."

JAG response

How led juniors are managed within QAA is a particular practical issue which JAG needs to resolve. The use of juniors in criminal cases is an area under close scrutiny and JAG needs to ensure that the QAA scheme complements any wider policy initiatives to address this matter. JAG has and will continue to engage with the judiciary and other interested parties to find a practicable and pragmatic solution.

Other issues

Other issues put forward by respondents that were not covered by the consultation included:

- the potential impact on the independence of the advocate
- the position of Queens Counsel within the scheme
- there must be a system of grading of cases
- considerable effort is needed in explaining the scheme to the professions, and convincing them of its value
- there is a lack of public demand for this system
- consumers (that is, the LSC, MoJ, CPS) need to be involved in the design, evaluation and future development of the scheme
- there should be a further consultation when more details are available.

"… there is a significant difference between representing a client on a known guilty plea and having a trial."

JAG response

We have addressed most of the above in this document. In view of the timetable for the scheme, we do not anticipate there will be time for a formal third consultation but we are embarking upon an extensive round of publicity and meetings to ensure that those affected continue to have opportunities to contribute to and inform the scheme.

List of respondents

Armed Forces Criminal Legal Aid Authority (AFCLAA)
Bar Council and Criminal Bar Association
Cardiff Law School
Chambers:
- 12 College Place
- 2 Pump Court
- David Fisher QC and David Perry QC
- Citadel Chambers, Birmingham
- Crown Office Chambers
- Doughty Street Crime Team
- Three Raymond Buildings
- Tooks Chambers

Chancery Bar Association
City of London Law Society
Clifford Chance
Complaints Committee of the Bar Standards Board
Criminal Law Solicitors' Association
Criminal Sub Committee, Council of HM Circuit Judges
Crown Prosecution Service
Employed Barrister's Committee
Equality and Human Rights Commission
Grays Inn
ILEX
Inner Temple
Institute of Barristers Clerks
Law Society
London Courts and Criminal Solicitors Association
Legal Adviser's Office, Health and Safety Executive
Legal Services Commission
Legal Services Consumer Panel
Lincoln's Inn
Liverpool John Moores University
London Common Law and Commercial Bar Association
Martin Murray & Associates
North Eastern Circuit
Nottingham Law School
Devon and Somerset Law Society
Planning and Environment Bar Association
President of the Family Division and Head of Family Justice
Prosecution Division team of the Department for Work and Pensions/Department of Health
Queen's Counsel Selection Panel
Solicitors Association of Higher Courts Advocates
South Eastern Circuit
Western Circuit
Young Barristers Committee

The names of the 22 individual responses have not been published as, in some cases, it was unclear whether they wished to be named.