

Quality Assurance Scheme for Advocates

1 October 2015

Summary

1. The Joint Advocacy Group (JAG), comprising CILEx Regulation, the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB) is responsible for the development and implementation of the Quality Assurance Scheme for Advocates (“QASA” or “the Scheme”). This consultation is on behalf of JAG.
2. The purpose of QASA is to ensure that all advocates undertaking criminal advocacy are competent to do so. This is achieved by:
 - a) self-evaluation by an advocate at level 1 (the lowest level of advocacy);
 - b) assessment of an advocate by an assessment centre at level 2; and
 - c) independent judicial evaluation of an advocate at Level 2 Trial, Level 3, Level 4 and Level 4 QC (the highest level of advocacy) in a minimum of two and a maximum of three of their first consecutive, effective trials at their selected level after registration. A Criminal Advocacy Evaluation Form is completed by the trial judge to record their evaluation of the advocate’s performance.
3. After first registration, advocates must be reaccredited every 5 years if they remain at their registration, or alternatively, they must seek accreditation at higher level should they wish to undertake more complex criminal advocacy work.
4. On 24 June 2015, the Supreme Court ruled that the QASA Scheme was lawful.¹ During the judicial review process, a number of minor recommendations were made to improve the operation and understanding of the Scheme. JAG is consulting on these suggestions and is not seeking views on any other aspect of the Scheme or its implementation beyond the proposals contained in this consultation document.
5. JAG is aware of the Ministry of Justice consultation paper on a package of proposals to maintain standards of criminal advocacy. Maintaining standards is a core regulatory responsibility and JAG welcomes the focus that the Ministry of Justice is giving to this issue. It is clearly critical that JAG ensures that QASA is ready to be implemented in order to complement any panel scheme that the Legal Aid Agency or other agencies such as the Crown Prosecution Service may need to operate from the perspective of purchasers

¹ <https://www.supremecourt.uk/cases/docs/uksc-2014-0272-judgment.pdf>

of legal services. This consultation is a key part to getting QASA ready for immediate implementation.

6. JAG welcomes feedback from all stakeholders on these proposals. This is a 12 week consultation, and will close on 24 December 2015. Details on how to respond are outlined in Section 4.

The need for consultation

7. The judgment handed down by the Divisional Court included recommendations for minor changes to be made to the Scheme to improve its operation and to ensure that obligations on individual advocates required to comply with QASA are completely clear. The recommendations raised in the judgment include:
 - a) An amendment to the CAEF to require an advocate to identify when they were first instructed;
 - b) An amendment to the CAEF to require an advocate to identify whether advice on evidence was provided;
 - c) An amendment to the Scheme Handbook, to permit a judge to decline to carry out an evaluation if they believe, because of the circumstances, it would not be fair to do so. In that event, the evaluation would be made at the next trial;
 - d) An amendment to the Scheme Handbook, to provide that in the event of a third judicial evaluation becoming necessary it should be carried out at the first trial conducted by the advocate in front of a different judge to those who conducted the first two assessments.
8. The Divisional Court also recommended that the Scheme's written material be reviewed to remove some areas of ambiguity. In addition, the Court of Appeal called for clarification of the right of appeal in the BSB's QASA Rules and the BSB's QASA appeal policy.
9. JAG has worked to maintain an open dialogue with all stakeholders during development of the Scheme. We now wish to seek views on the recommendations made by the Divisional Court and Court of Appeal so that we can identify and explore any issues or practical difficulties before considering whether to adopt them or not, and in relation to the appeal issues, the changes which might be required to the appeal rules of the BSB, SRA and CILEx Regulation to provide clarity on the scope of the appeal and how a challenge might be brought by an advocate against the content of a CAEF.

Proposal 1: Amendment to the CAEF to require an advocate to identify when they were first instructed

10. The purpose of this recommendation is to prevent an advocate being judged on a case in which s/he was instructed late, without the judge being aware of that fact. Implementation of this proposal requires amendment to the existing CAEF to accommodate an additional field that captures the date when an

advocate was first instructed. A revised CAEF highlighting the proposed change is at Appendix 1.

11. If adopted, an advocate will be required to complete this field along with existing fields on the CAEF before submitting the form to a judge prior to each required evaluation. No negative impacts have been identified with the adoption of this proposal.

Question 1

Do you see any practical difficulties arising from amending the current CAEF to include this proposal?

Proposal 2: Amendment to the CAEF to require an advocate to identify whether advice on evidence was provided

12. This recommendation is designed to ensure that, when the trial judge makes their evaluation, s/he is aware of the extent to which the advocate has been involved in the case prior to trial. Implementation of this proposal requires amendment to the existing CAEF to accommodate an additional field that captures whether advice on evidence was provided by them. A revised CAEF highlighting the proposed change is at Appendix 1.
13. If adopted, an advocate will be required to complete this field along with existing fields on the CAEF before submitting the form to a judge prior to each required evaluation. No negative impacts have been identified with the adoption of this proposal.

Question 2

Do you see any practical difficulties arising from amending the current CAEF to include this proposal?

Proposal 3: An amendment to the Scheme Handbook to permit a judge to decline to carry out an evaluation if they believe, because of the circumstances, it would not be fair to do so. In that event, the evaluation would be made at the next trial

14. The current QASA Handbook outlines scenarios under which it is inappropriate for an advocate to be evaluated by a judge. This includes assessment by an advocate's husband, wife, civil partner, or any current or former partner. It also states that if an advocate has a connection with a judge, this must be disclosed to the regulator when the advocate submits their evaluation. The recommendation made by the Divisional Court is designed to provide a necessary further safeguard for the advocate, in permitting flexibility for a judge to decline to conduct an evaluation where there are other circumstances which they consider would make the assessment unfair, thereby helping to maintain the integrity of the Scheme.
15. We set out the proposed wording to give effect to this recommendation in paragraph 2.74 of the Scheme Handbook (Appendix 2). We recognise that implementation of this proposal could make it difficult for some advocates to

meet the accreditation, progression and reaccreditation requirements of the Scheme. This may be particularly the case for advocates who have limited access to evaluations by different judges because they are involved in long trials or they undertake only a small number of trials.

16. This risk is not new and we have not identified any further negative impacts from adoption of the current proposal. We have already agreed to support those advocates who experience difficulties in getting access to the required number of judicial evaluations by recruiting and retaining a pool of independent assessors who can be deployed in circumstances where the requisite number of judicial evaluations cannot be achieved². An individual advocate will not bear the cost of requesting an independent assessor. Independent assessors will receive the same training as the judiciary to ensure consistency.
17. In addition, the Scheme gives advocates at Levels two, three and four, 24 months from the date of provisional accreditation in which to apply to their regulator for full accreditation. Extensions to this period are available. We believe this approach gives advocates long enough to obtain the necessary evaluations even where a judge declines an evaluation request.
18. If this proposal is implemented, JAG will monitor the exercise of judicial discretion to decline to conduct an evaluation and its impact on the operation of the Scheme.

Question 3

Do you see any practical difficulties arising from a judge declining to complete an evaluation if they believe, because of the circumstances, it would not be fair to do so?

Proposal 4: An amendment to the Scheme Handbook to provide that, in the event of a third judicial evaluation becoming necessary, it should be of the first trial conducted by the advocate in front of a different judge to either of the judges who conducted the first two assessments

19. Assessment in a third trial is required if the advocate does not demonstrate the required level of competence at the first two trials. The current Scheme permits this evaluation to be obtained from one of the judges who has undertaken the first two evaluations or from a third judge. The purpose of the proposed change is to ensure that the third and final evaluation to determine an advocate's competence is unaffected by the judgements made about the quality of their performance in previous assessments. Draft wording which gives effect to this proposal by an amendment to paragraph 2.74 of the Scheme Handbook is attached at Appendix 2
20. We have not identified any negative impact from the implementation of this proposal. We do recognise that for some advocates access to a third judge

² QASA Scheme Handbook page 21

may be difficult. We have outlined in paragraphs 15 and 16 how the existing Scheme can support advocates in this situation.

Question 4

Do you see any practical difficulties arising from a requirement that, in the event of a third judicial evaluation becoming necessary, it should be of the first trial conducted by the advocate in front of a judge other than either of the judges who conducted the first two assessments?

Proposal 5: Removal of some areas of ambiguity from Scheme's written material

21. The Divisional Court identified certain areas of ambiguity in the Scheme's written material and called for steps to be taken to ensure that requirements are completely clear to all called upon to comply with it.
22. The QASA Handbook is designed to provide guidance to all advocates to help them understand the requirements of the Scheme. We acknowledge the Divisional Court's recommendations and as a result propose a number of minor changes to the Handbook to ensure greater clarity, to take into account delays to implementation of the Scheme as a result of the judicial review litigation and to reflect minor administrative changes in the SRA QASA regulations exempted by the Legal Services Board on 31 March 2015. Appendix 2 provides full details of these amendments. However, in summary they are:
 - Removal of the registration timetable and reference to registration phases see paragraph 2.11 appendix 2;
 - Clarification on how to complete the CAEF see paragraph 2.76 appendix 2;
 - Clarification on where an advocate can reapply for provisional accreditation at a higher level see paragraph 2.47 appendix 2;
 - Clarification on transitional arrangements for recently appointed QC's see paragraph 2.37 appendix 2;
 - Clarification on the period of full accreditation on registration for those solicitors that have recently obtained their Higher Rights of Audience qualification see paragraph 2.38 appendix 2.

Question 5

Are there any practical difficulties that arise from these amendments to the Scheme Handbook?

Proposal 6: Clarification of BSB and SRA QASA rules

23. The judgment handed down by the Court of Appeal called for the BSB to address its QASA Rules so that the scope of the advocate's right of appeal

and how it will work in practice is clear. Appendix 3 outlines proposed changes to the Appeals section of the BSB QASA Rules so that the circumstances and process by which a barrister can appeal to the BSB are clear. Minor changes have also been made to these rules relating to transitional arrangements to reflect changes to the registration timetable. No negative impacts have been identified with implementation of this proposal.

24. To address concerns raised by the Court of Appeal regarding application of the appeal policy, the SRA also proposes to make minor amendments to Regulation 20.3 of its QASA Regulations 2013. The change provides greater clarity on their application and the circumstances in which an advocate may challenge a judicial evaluation of their competence. The change clarifies that there is no appeal to the SRA against the decision of an assessment centre, because the assessment centre has its own internal appeals process. In addition, an appeal against a judicial evaluation can be brought on the grounds of procedural error or irregularity. This wording reflects the arms length nature of our appellate role, given that we are not present during a live judicial evaluation, however will consider challenges such as bias or unfairness in the judge's approach. Appendix 4 contains the proposed rule. No negative impacts have been identified with this proposal.

Question 6

Do you see any practical difficulties arising from the changes to the BSB or SRA Appeal rules?

How to respond to this consultation

Online

Use our online consultation questionnaire to compose and submit your response. (You can save a partial response online and complete it later).

Email

Please send your response to consultation@sra.org.uk. You can download and attach a Consultation questionnaire. Please ensure that:

- you add the title "QASA" in the subject field
- you identify yourself and state on whose behalf you are responding (unless you are responding anonymously)
- you attach a completed About You form

Please note we will be publishing all responses, unless a respondent indicates that they do not wish their response to be published.

By post

If it is not possible to email your response, hard-copy responses may be sent instead to:

Solicitors Regulation Authority
QASA consultation
Regulation and Education
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Deadline

Please send your response by 24 December 2015.

Confidentiality

A list of respondents and responses may be published by JAG after the closing date. Please express clearly if you do not wish your name and/or response to be published.