



The Law Society

**Fourth consultation paper on the Quality Assurance Scheme for
Advocates (Crime)**

Law Society response

October 2012



Fourth consultation paper on the Quality Assurance Scheme for Advocates (Crime)

The Law Society welcomes the opportunity to respond to the latest consultation paper on the Quality Assurance Scheme for Advocates (Crime) (QASA). The Society welcomes the significant improvements which have been made to the scheme and which will ensure that solicitor advocates who are competent to undertake advocacy in the best interests of their clients are likely to be better able to do so. We pay tribute to the willingness to listen that has been shown. However, there remain a number of significant reservations, which have not been addressed in the current consultation.

The Law Society supports measures which will maintain and improve the quality of advocacy. However, any scheme must be proportionate and based on evidence. As we have indicated before, we have considerable doubts as to whether the evidence base justifies the imposition of a scheme of this sort and we think that the substantial problems of principle and logistics associated with the scheme need to be considered carefully.

There remain a number of substantial concerns. Our fundamental objections have not been allayed and we consider that significant flaws in the scheme remain. Our concerns over the nature and methods of judicial evaluation have not been addressed. Our views were admirably reflected by the speech of Lord Justice Moses¹. To add to those concerns, we question whether there will be a sufficient number of cases before the Crown Court and above to enable all of the advocates to be judicially assessed. We are aware of many judges who have their own personal reservations about the process of judicial evaluation and have indicated that they do not wish to participate. That will further exacerbate the shortage of cases in which advocates' performance can be evaluated.

In addition, we still have no definite information as to the likely cost of accreditation under QASA. The process driven nature of the administrative arrangements indicated by the draft Handbook and Guidance suggests that a sizable staff will be necessary to manage the scheme. What those documents do state is that fees will be set at a level necessary to meet the costs of managing the scheme. It is frankly astonishing that regulators can develop a scheme with no consultation on the likely costs or an assessment of how these relate to the benefits that are likely to be achieved, and cannot, within six months of the likely implementation of the scheme indicate what the costs will be.

The effect of QASA will be to annul the historic rights of the majority of solicitors to appear before the Magistrates' Court, as only those who appear regularly will want to be recredited after the first five years of the scheme. This is a change of great significance to the profession and which may well have implications for access to

¹ <http://www.southeastcircuit.org.uk/education/seventh-ebsworth-memorial-lecture-looking-the-other-way-have-judges-abandon>

justice. In the Society's view it is a question that needs to be the subject of significantly wider consultation and to be considered in the context of ideas about activity-based regulation and the Legal Education and Training Review. We doubt that it is a proportionate response to any problems that exist.

The consultation paper does not deal adequately with the implications for level 1 advocates or the requirements for reaccreditation. This is not acceptable and we urge that the way in which level 1 is to work within the scheme be subject to a separate consultation. The Society has significant concerns about how this will affect the way many competent practitioners work and how relevant it is to their daily work. We will be writing further about this and hope that the SRA will be able to consider this further.

Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?

We are concerned that advocates will find it difficult to obtain the requisite number of judicial evaluations to achieve full accreditation within 12 months of registration – two or three evaluations from their first five effective trials. The number of cases coming before the courts has declined in recent years. The Law Society has obtained raw data on case throughput figures for each Crown Court from the Ministry of Justice which we have sought to analyse and would urge the Joint Advocacy Group to undertake its own analysis.

Spreadsheet 1: Trial Cases outstanding [attached] shows how, except for some isolated instances, year on year the number of outstanding trial cases carried forward has declined markedly over 2010-2012. These figures cause concern when applied to a market of some 9000 advocates. The figures of course do not indicate what levels the cases may fall into but it can be seen that the trial case loads going forward for both Southwark Crown Court and the Central Criminal Court (two of the major court centres dealing with serious crime cases) are down 33.1% and 27.4% respectively [NB columns E and F have been added by us]. This means that there is now a high likelihood of there being an insufficient number of Crown Court trial opportunities to accommodate the number of advocates needing to be assessed for accreditation.

The 12-18 month period to obtain judicial evaluations might suit a practice model as pursued by the self employed Bar where practitioners are arranged in sets of chambers which are in effect each supplied by dozens of firms of solicitors with work. Under that model, there is likely to be a greater incidence of cases at levels 3 and 4 than there would be inside a single firm of solicitors. It is commonplace for a firm not to receive a single level 4 case in an 18 month period that would ultimately end up being a trial. The current proposal is therefore possibly anti-competitive in law as its effect discriminates against the practice model used by firms of solicitors. There is a strong danger that the proposal will retard the practices and development of many higher court advocates. In fact it is also the case that with an 'over abundance' of QCs there is presently a scenario where many of them do not get a case for 12-18 months.

We accept that clearly some form of rule is required. We would suggest the following:

Level 2	12 months [desirable]	18 months [acceptable]
Level 3	18 months [desirable]	24 months [acceptable]
Level 4	24 months [desirable]	36 months [acceptable]

The above suggestion is built on the fact, that whilst level 2 cases may abound, level four cases that go to trial do not abound in terms of the number of advocates seeking to prove they are level 4. The latter will be a bigger problem for the self employed Bar as a very high number of its members will hold themselves out as level 4 at the inception of the scheme.

Given the lack of necessary clarity and unanimity as to the level of a particular case, it maybe thought prudent to allow a greater flexibility in the early part of the scheme.

In addition, a large number of trials crack in the final third, sometimes because of a change of plea, but often because the CPS offer no evidence or accept a lesser plea. Defence advocates have little control over such developments. Spreadsheet 2 [attached] shows the cracked trial rate at each Crown Court. In many court centres it is over 50%.

Against a falling number of trials carried forward from year to year, it should also be noted that evaluation can only be carried out by a Circuit Judge who has undertaken the necessary training. A large number of trials are in fact conducted by Recorders, freeing the Circuit Judges to deal with lengthy trials and case management hearings. Spreadsheet 3 [attached] shows that in 2010 the percentage of trials undertaken by Recorders stood at 22%, in 2011 it was 23% whilst in the first 3months of 2012 [the last figures available] the figure was 29%. On these figures, anything between a fifth to nearly a third of trials will not count for the purposes of QASA evaluation.

It is notable that in the major Crown Court centres, certainly in London, a significant number of long and level 3 - 4 trials are presided over by experienced Recorders. This will lead to a situation where, on top of the paucity of trial cases, if a candidate does get a case at the right level, and even if it stands up as a trial, it will not count due to the fact of it being presided over by a Recorder.

As a minimum, the Joint Advisory Group should have mapped the number of advocates per circuit to the number of effective trials in that circuit conducted by judges who have not only signed up to judicial assessment but have undergone training for it. Only by undertaking this exercise can a properly extrapolated figure of the number of trials to be used for evaluation by an applicant be arrived at and over what period. Instead, a random number of cases over a randomly chosen period has been arrived at. This is a highly dangerous approach that may one day come to be seen as irrational in law if applicants, unable through no fault of their own to comply with a wholly contrived number of trials to be done over a certain period, start to present themselves in lawsuits against their regulators.

For all of the above reasons, we strongly urge the SRA to reconsider the time limit and to allow a longer period as suggested above for advocates to be assessed or to obtain judicial evaluations. In view of the statistics now available, there need not be a requirement for more than one case to be shown per candidate. The time limit can be revisited as part of the review of the Scheme and reconsidered in the light of the

experience of the advocates and the Scheme's administrators in the first round of accreditations.

These trial caseload statistics indicate, moreover, that there should always be an alternative route to judicial assessment as the alternatives can all be calibrated by the regulators so that a regulatory end can be achieved, albeit via assessment centres. Judicial assessment has been thrust forward without any feasibility study having been conducted hitherto. As things stand, it is a pure gamble to go ahead with judicial assessment as the only route to accreditation for trial advocates when it flies in the face of what is statistically achievable.

Q2: Are there any difficulties that arise from the revised proposals for the accreditation of Level 2 advocates?

The Law Society is grateful that the SRA has taken on board the results of the survey it undertook into the impact of QASA on solicitor advocates and has listened to the representations from the profession. It would not have been in the public interest to reduce at a stroke the number of solicitor advocates able to undertake non trial advocacy in the Crown Court by half. This will ensure that many very experienced solicitor advocates can continue to practice and provide service to clients. These appear to us to be significantly more proportionate.

In so far as further support is needed to show that objection to so called 'Plea Only Advocates' is wrong and driven by a protectionist agenda one only needs to consider the legal position. Most offences that are tried by the courts are classed as "either way" offences. We set out an example, theft of £1 million, a case that will inevitably end up in the Crown Court for disposal given the amount of money involved and a likely QASA level 3 / 4 case. When a suspect is arrested he is interviewed by the police. At that point the suspect is represented in the police station by a solicitor. The solicitor's professional responsibility is to advise the suspect about the best course and such advice maybe to admit the offence in interview.

When this suspect is charged, and brought before the Magistrates' Court, there is a mandatory procedure prescribed by statute which is named Plea Before Venue (PBV). Every defendant charged with an either way offence must enter a guilty plea or a not guilty plea or give 'no indication' as to plea in the Magistrates' Court. Again at this procedure, which has been undertaken for years in thousands of cases each week, representation is provided by solicitors, normally level 1 advocates.

Those objecting to Plea Only Advocates completely overlook the above procedure whereby solicitors already advise and act at the point that a guilty plea is entered – in the Magistrates' Court – even for cases destined for the Crown Court. Having entered a guilty plea in the Magistrates' Court and having then been committed to the Crown Court for sentence, it is entirely logical that the lawyer who represented the client at the point of the guilty plea being entered is able to represent that client in the Crown Court when he is sentenced. The objections to Plea Only Advocates are self-serving and also in the process seek to add to the cost of litigation in a wholly unnecessary way.

In conclusion, non-trial advocates have been advising on pleas of guilty, without referral to level 3 / 4 advocates, by way of a statutory scheme for many years without any controversy.

Q3: Are there any practical issues that arise from client notification?

We do not understand what a requirement for client notification has to do with QASA. The proposal appears to be based on a fear by the Bar that solicitors will seek to influence clients to instruct them, rather than a barrister and then seek to influence the client's choice of plea. Aside from the fact that this is insulting to a highly regulated group of professionals, it is irrational.

Solicitors are governed by precisely the same duties to act only where they are competent and to act in the best interests of clients as barristers and, in terms of dealing with clients directly, have significantly stronger duties. In deciding who is the most appropriate advocate, a solicitor will inevitably have in mind the interests of the client, the nature of the case and the likely outcome and the existing Code of Conduct requires them to do so. There is no need for such a requirement any more than it would be appropriate for a barrister to warn a solicitor in writing that there was a significant chance that, owing to court listing procedures, he or she might not be able actually to appear. Moreover, there is no evidence to suggest that, in fact solicitors are acting in a way which requires such notification.

The proposal will intrude into the relationship between the client and the litigator who instructs an advocate. The litigator is at all times under a duty to instruct an advocate of the right level for the case. It is imposing an unnecessary burden on an advocate to have to write to each client setting out what they can and cannot do for them. This proposal in fact is a manoeuvre designed to get the advocate to project the notion that a Plea Only Advocate is somehow a second class advocate.

For the SRA or any regulator to agree to any such notion as detailed rules of notification would be rightly ascribed as regulatory overreach.

Q4: Are there any practical problems that arise from the starting categorisation of Youth Court work at level 1?

The Law Society notes that the SRA has listened to representations from practitioners with experience of work in the Youth Court and has decided that to appear in the Youth Court the advocate should not need to be accredited higher than level 1. The Law Society considers this is the correct decision and sees no practical difficulties arising from it. If the nature of the case is more complicated, the overriding obligation not to undertake work outside of an advocate's competence will resolve any difficulties.

99% of all Youth Court matters occur at level 1. On the rare occasion that the Youth Court matter becomes complex, there are provisions for the parties to apply for and for the Court to exercise a power to grant a Certificate for Counsel which then allows for the instruction of a level 2 equivalent. If the matter is even more complex then the case is usually heard in the Crown Court anyway as the lower court declines jurisdiction.

There is therefore no practical problem that arises from starting categorisation of Youth Court work at level 1. That is the level at which it has always been.

Q5: Do you foresee any practical problems with a phased implementation?

We accept that administrative convenience dictates that the implementation of the Scheme will have to be phased. Indeed there is the advantage that any problems encountered in the first phase can be ironed out before subsequent phases but we draw attention to the statistics that are now available and the conclusion from which should lead to a requirement for judicial assessment on only one case.

However, during the implementation stages, significant anomalies will arise in that advocates who have been assessed on one Circuit will find themselves at a significant disadvantage as against those who have not been assessed on another and rules will need to deal with the position of an advocate who normally works within a Circuit due for later implementation appearing on one where the Scheme has already been applied.

Q6: Do you foresee any practical problems arising from the process of determining the level of the case? If so, please explain how you think the problems could be overcome.

The proposal that the level of a case should be determined by the instructing party in practice reflects the position at the present. An instructing solicitor will contact a chambers to discuss with the clerk the seriousness of a case and the level of experience which a barrister should have in order to undertake the particular case.

In future an instructing solicitor will be asking chambers to provide them with, for example, a level 3 barrister (if they themselves do not know the levels to which individual barristers are accredited) rather than asking for a barrister by name / reputation. This may lead to debate between the parties as to the level of the case, its complexity or the experience of the barrister offered whatever their accredited level may be. What facility will there be for instructing solicitors to verify for themselves the accreditation level of a barrister offered to them?

The onus will be on the instructing party to be fully informed of the levels to which particular types of case have been allocated under the Scheme.

Q7: Do you agree that the offences/hearings listed in the table have been allocated to the appropriate level? Are there any offences/hearings which you believe should be added, and if so, what are they and which level do you think they should be allocated to?

We welcome the adoption of more generic case levels rather than the detailed case specification adopted in previous iterations of the levels framework. On a point of detail, we consider that complex and/or high value dishonesty should be level 3 rather than level 4.

Q8: Is the wording used in the Levels table sufficient to distinguish between those occasions when an offence might be e.g. Level 2 and those when it might be e.g. Level 3? Do you find the example helpful? Would it be useful to include similar examples within the Levels guidance?

Levels guidance will be necessary at the start of QASA to enable advocates to familiarise themselves with the Levels table and the additional factors that can be

taken into account in determining a case level. An advocate's own professional judgment of their experience and capability will be a factor in this process.

It is a matter of some concern that a Scheme which set out to protect the client's best interests by assuring advocacy standards has resulted in a framework which could interfere with the choice of advocate available to a client. A client may have instructed an advocate in the past and may want to employ the same advocate in a subsequent case. If the advocate does not have the requisite accreditation to the Level of that case, that choice is removed from the client.

Q9: Do you foresee any practical problems with this proposal, particularly in relation to availability of advocates, arising in relation to Level 4 cases? In particular, are there any Level 4 non-trial hearings that a Level 2 advocate should be able to undertake? If so, which ones?

The facility for advocates to undertake non-trial hearings in cases one level above their accreditation is dependent on the advocate having demonstrated competence to act at that level. That additional requirement will inevitably reduce the number of advocates able to take advantage of the provision to appear in non-trial hearings. The number of advocates who will be able to take non-trial hearings at level 4 may, therefore, be problematic. Provision may have to be made to allow level 2 advocates to undertake level 4 non-trial hearings such as mentions, plea and case management hearings. The complexity of the case will determine whether a level 2 advocate is able to appear in that situation.

Q10: Are there any other types of hearings that you think should be specifically addressed in the guidance? If so, which ones and how would you proposed they are dealt with?

For the sake of clarity, it would be helpful to list further examples of the types of non-trial hearings in the guidance.

Q11: Are there any issues not addressed in the above guidance, or not addressed in sufficient detail, which you believe should be addressed? If so, please provide as much detail as possible.

The Statement of Standards ought to appear in the Handbook: users should not be referred to the Criminal Advocacy Evaluation Form to be issued to the judiciary to find this significant information.

Q12: Do you have any other comments about the levels guidance, or practical suggestions as to how it can be improved or clarified?

The section on levels guidance in the draft Handbook is blank, referring readers to the consultation paper. Allocating cases to levels is going to be a difficulty for practitioners, especially at the outset of the Scheme, and more guidance than that provided at paragraphs 4.18 – 4.21 will be necessary. More worked examples like those provided in paragraph 4.22 would be helpful.

Q13: Do you have any comments on the proposed modified entry arrangement for QCs?

It is essential that any scheme for quality assurance of criminal advocacy must encompass all practitioners whatever the length of their experience or their seniority within the professions and that includes silks. We accept that it is appropriate for some provision to be made for QCs who have taken silk recently. Their competency will have been tested rigorously and at considerable expense to themselves. There are also administrative advantages in reducing the number of advocates that need to be assessed at the inception of the Scheme.

The Law Society welcomes the fact that a similar modified entry arrangement will be available for those solicitors who have attained Higher Rights of Audience – a solicitor who became a higher court advocate in 2010 would not need to be re-accredited under QASA until 2015 etc. unless they wished to progress to accreditation at Level 3. That provision is buried in the draft Scheme Handbook and needs to be better advertised.

The Society requests the SRA to consider providing a similar arrangement for members of the Criminal Litigation Accreditation Scheme (CLAS). That Scheme enables both solicitors and FILEX to qualify to apply for inclusion on local duty solicitor rotas under the Legal Services Commission's Criminal Defence Service Duty Solicitor Arrangements. CLAS has two levels of qualification – Police Station and Magistrates' Court. For the latter applicants must submit a portfolio to demonstrate their experience of cases in the Magistrates' Court. The portfolio must contain short notes on 20 cases and detailed summaries of 5 further cases, all of which must have been conducted in the last 12 months. Applicants also have to undertake role play exercises of an interview with a client and of appearances in the Magistrates' Court involving representations and/or submissions on 3 cases. Assessment organisations undertake the assessment of applicants against competence criteria. Members of CLAS are required to devote at least 6 of their annual CPD training to criminal law, litigation and procedure. To reinforce the robust nature of the Scheme the Law Society is in the process of introducing reaccreditation every 5 years for CLAS members.

Membership of the Criminal Litigation Accreditation Scheme ought to passport solicitors and FILEX to Level 1 QASA accreditation. That would remove the need to pay two fees for accreditation under both CLAS and QASA (and remember that legal aid practitioners can ill afford additional expenses), it would ease the administrative burden on the SRA when it comes to instituting QASA at Magistrates' Court level, and it would have the added bonus of applying to two of the three professions covered by QASA.

Q14: Do you agree with the proposed approach to the assessment of competence?

The competence framework and assessment against it are important and need to be available in one place. The footnote on page 21 of the consultation paper directs users to paragraphs in the Handbook which do not appear to be correct and that makes it difficult to comprehend the assessment of competence.

Q15: Are there any other issues that you would like to see included within the review? Please give reasons for your response.

We agree that the Scheme must be subjected to an early review, with ongoing monitoring to ensure there is suitable data to feed into that review. The precise scope of the review must at this point remain flexible as issues will certainly only arise once the Scheme comes into operation. At this stage the Law Society's priorities would be: whether the Scheme has forced many criminal advocates out of this field of practice; the cost implications of the Scheme for practitioners (there is still no indication of the cost of accreditation to the practitioner); and judicial assessments both in terms of their robustness and of their fairness as between advocates of different professional backgrounds.

Q16: Does the Handbook make the application of the Scheme easy to understand? If not, what changes should be made and why?

The draft Handbook is reasonably easy to use and would appear to be comprehensive. The specification of requirements applicable to the three professional groups under separate headings is a sensible way of presenting the information. As for the Bar and CILEX, an explanation of the appeals process for solicitor advocates ought to be included at paragraph 8.116 in the Handbook and not just in the SRA Regulations.

Q17: Is there any additional guidance or information on the Scheme and its application that would be useful?

The FAQ for solicitors ought to be included in the Handbook, as they are for barristers and FILEX, rather than directing users to the SRA website.

Q18: Do you have any comments on the Scheme Rules?

We support the decision to have separate BSB and SRA Rules. There is no reference to any penalty which a solicitor advocate will incur should they practise criminal advocacy without QASA accreditation.

Q19: Do you agree with the proposed definition of "criminal advocacy"? If not, what would you suggest as an alternative and why?

Yes we accept the proposed definition of criminal advocacy provided that arrangements are in place so as not to exclude completely specialist practitioners from criminal proceedings.

Q20: Do you agree with the proposed approach to specialist practitioners? If not, what would you suggest as an alternative and why?

We welcome the fact that the Regulators have listened to representations in relation to the position of specialist practitioners under QASA. We support the proposal that in certain circumstances specialist practitioners should be allowed to undertake criminal advocacy without QASA accreditation. The Regulators must ensure that specialist practitioners are aware of the saving provision and the circumstances in which they will in future be allowed to appear in a criminal court. Clearly this arrangement must be kept under review.

Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?

We have referred above to the problems with judicial assessment requirements and we suspect that these will provide considerable problems, which may be insurmountable. We believe that some form of assessment centre would address the concerns.

Q22: Do you have any comments on whether the potential adverse equality impacts identified in the draft EIAs will be mitigated by the measures outlined?

The research undertaken by the SRA among solicitor advocates revealed the fundamental problem with QASA as far as equality impact is concerned. It will impact disproportionately on women and BAME practitioners. The revisions to the Scheme adopted this year will go some way to alleviate that problem (particularly access to non trial work in the Crown Court and the allocation of Youth Court work to Level 1) but this underlying issue remains a matter for concern.

Q23: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper?

We remain concerned that QASA is going to impact disproportionately on women and BAME lawyers as the SRA's own research last autumn indicated.

Q24: Are there any other equality issues that you think that the regulators ought to consider?

No not at this stage.