

# Quality Assurance Scheme for Advocates

## Fourth consultation response

### Executive summary

The Joint Advocacy Group (JAG) received a large number of responses to its fourth consultation on proposals for a Quality Assurance Scheme for Advocates (QASA or the Scheme). Many responses contained substantive and constructive suggestions for revisions to the Scheme and in the light of these JAG has delayed the implementation of QASA in order to allow for consideration of the issues that were raised.

When considering responses, JAG had in mind the regulatory objectives set out in the Legal Services Act and in particular the need for the Scheme to be in the public interest. QASA is a joint Scheme designed to assure the quality of all advocates. With that in mind, the regulatory principles in the Act have been at the heart of the development of the Scheme.

This consultation response is issued by JAG and summarises the main points raised by the consultation responses. It also sets out JAG's analysis and comments in relation to the responses received on each question. The response identifies areas in which JAG has agreed to amend the Scheme as well as areas that it believes require further consideration before the Scheme is finalised. It also sets out areas which JAG believes will be more usefully considered as part of the wider review of the Scheme in 2015 when comprehensive evidence of the operation and the impact of the Scheme and the advocacy market will be available.

JAG remains committed to implementing a Scheme in 2013.

### 1 Background

The Quality Assurance Scheme for Advocates (QASA or the Scheme) has been developed by the three main regulators of advocacy – ILEX Professional Standards (IPS), the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB) – working together through the JAG.

This paper provides an overview of the responses received to the JAG's 4th QASA consultation, as well as the revisions that JAG has agreed to make to the Scheme in the light of responses.

The 4th consultation was launched on 12th July 2012 and closed on 9th October 2012. The consultation sought views on revisions made to the Scheme as a result of the 3rd QASA consultation (August-November 2011) and further policy and operational developments. The latter had not, in some cases, been the subject of previous formal consultation. The consultation covered:

- Revisions to the Scheme
- The revised guidance to setting the level of the case
- The proposals for the offences to be included at each of the four levels
- The competence framework for judicial evaluation (how competence is determined based on the evaluations undertaken)

- The accreditation of Queen’s Counsel (QC)
- The Scheme Handbook and the Scheme Regulations/Rules
- The scope of the proposed 2 year review

The full consultation document can be found at <http://www.qasa.org.uk/consultation.html>.

## 2 Analysis of consultation responses

A total of 148 substantive responses were received, 200 further emails were received from barristers and Chambers confirming agreement with the CBA’s and/or a particular circuit’s response. There were therefore 148 responses which addressed the questions raised in the consultation.

The table below provides a breakdown of responses:

| Type of respondent             | Total number of responses received | % of total responses |
|--------------------------------|------------------------------------|----------------------|
| <b>Solicitors</b>              | <b>34</b>                          | <b>10%</b>           |
| <b>Barristers and Chambers</b> | <b>269</b>                         | <b>77%</b>           |
| <b>Representative Groups</b>   | <b>39</b>                          | <b>11%</b>           |
| <b>Equality Groups</b>         | <b>2</b>                           | <b>1%</b>            |
| <b>Others</b>                  | <b>4</b>                           | <b>1%</b>            |

The "other" category refers to those responses that failed to indicate whether they were a barrister, solicitor, set of chambers, law firm or representative body.

## 3 Analysis of responses to individual questions

**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?**

The vast majority of respondents agreed that 12 months was not sufficient time in which to expect advocates to obtain the required number of evaluations. The key challenges raised were length and complexity of trials at higher levels, the absence of recorders as trained assessors under the Scheme, decreasing number of trials and the fact that self employed or part time advocates face difficulties in obtaining trials.

A few respondents mentioned the risks of increasing the length of time that advocates could be carrying out work at a level at which they are not fully accredited.

Some respondents used the perceived difficulties in obtaining sufficient assessment in trials as evidence of the shortcomings of judicial evaluation and the need for alternative methods of assessment or as evidence that the proposed Scheme is unworkable.

## Comment

It is important that the Scheme requirements are practical and achievable for criminal practitioners. In the light of responses, JAG has agreed to extend the period of time in which advocates can obtain the judicial evaluations required to gain initial accreditation under the Scheme. Advocates will now be given 24 months to obtain the required number of judicial evaluations, rather than 12 months. Evaluations must be obtained in the first two effective trials at the advocate's level i.e. in front of a trained judge participating in the Scheme and in a trial which enables assessment against the core standards. Only those advocates who do not demonstrate the required level of competence through these evaluations will be required to obtain a third assessment. Upon satisfactory demonstration of competence, an advocate will be awarded full accreditation at their chosen level by their regulator.

Advocates will still be able to apply for an extension, in line with the original proposals in the Scheme Handbook, if they have not completed two trials in which they can be assessed at their level within 24 months.

The process for applying for progression will continue to comprise two phases but the number of evaluations required will be reduced. Advocates seeking progression will now be required to demonstrate that they are very competent at their current level in two evaluations (out of a maximum of three trials) in order to be provisionally accredited at the higher level. They will then have to obtain two evaluations (out of a maximum of three trials) that demonstrate that they are competent at the higher level. These evaluations must be obtained in the first effective trials that the advocate undertakes at their new level.

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

There was strong support for these proposals from solicitors and solicitors' groups and some other large organisations.

Some responses stated that assessment centres would provide a more robust and consistent method of assessment than judicial evaluation.

Some responses cited current practice patterns of non trial advocates and noted that 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 without controversy.

A number of responses suggested that the requirement to be accredited by approved assessment centre may have a disproportionate impact on some advocates, for example, part time and women advocates.

Amongst barrister and Bar respondents, there was widespread concern expressed in relation to proposals to allow advocates to be accredited at level 2 without undertaking trials.

The following concerns were most commonly mentioned:

- Some respondents believed that having different methods of assessment for different categories of advocate had the potential to undermine consistency in the Scheme.

- Some respondents considered that clients benefit from being represented by a trial advocate and that trial experience is necessary to be able to effectively advise upon the merits of a defence or the prospects of challenging evidence.
- Some respondents considered it necessary for there to be continuity of representation in cases which do proceed to trial. It was noted that this is consistent with statutory intention.

As a result of these concerns, many Bar respondents suggested that the Scheme as proposed is not in the public interest.

### Comment

JAG has considered the responses in relation to allowing advocates to enter the Scheme via an assessment method other than judicial evaluation. The views expressed in the responses have identified both support and opposition for these proposals and the issues identified were largely consistent with those that had been raised with the regulators prior to the 4th consultation. These views had been factored into the development of the proposal outlined in the consultation document as well as the scope of the review of the Scheme. Therefore JAG remains committed to providing a route for advocates to be assessed at an assessment centre in order to obtain level 2 accreditation for the reasons set out in the consultation paper and will not be making any change to the Scheme in relation to assessment options at level 2. Assessment centres will be accredited by JAG to deliver evaluations under the Scheme. JAG will monitor the centres to ensure that the advocacy standards are applied consistently and that the assessment is valid and reliable.

There are a variety of advocates undertaking criminal advocacy and it is in the public interest that they are all subject to assessment. The review of the Scheme will assess the risk of all types of criminal advocacy and consider whether the assessment methods meet those risks as well as whether the Scheme adequately ensures the competence of all criminal advocates. The Scheme is therefore designed to ensure that those advocates undertaking criminal advocacy are competent to do so and that this has been confirmed by reliable and rigorous assessment. The Scheme will put in place quality assurance mechanisms, where currently there are none, to assure the competence of all criminal advocates.

JAG recognises the issues raised by advocates across the profession regarding potential negative equality impacts of accreditation by assessment centre on certain categories of advocate. This is in part addressed by the availability of alternative means of assessment through judicial evaluation (which will also be a less expensive option). In addition, each regulator has produced an Equality Impact Assessment which details all equality risks and the measures that will be taken address these. These will be updated as a result of responses received to this consultation paper. Once the Scheme is launched, individual regulators will monitor the impact of assessment centres on advocates.

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

This question relates to the proposals in relation to an advocates obligation to notify their client of how far they can progress their case.

A number of respondents supported the concept of client notification, including a consumer group.

Numerous Bar responses emphasised the importance of strict and well enforced notification requirements, particularly in relation to those advocates who have not been accredited through assessment in trials. It was argued that it was important that the client was aware of the limitations on such advocates and their ability to undertake trials. Some suggested that the regulators should prescribe the content of what exactly must be communicated to clients and that this could be policed through requiring the client to confirm that they have been informed either in writing or in court.

However, some responses noted practical issues that could arise from client notification. These included:

- Notification might come too late for some defendants if it takes place at the PCMH, where they may feel that they have no opportunity to instruct an alternative advocate.
- Many advocates might find it difficult to express information in an objective and dispassionate way, so as to allow the client to make an informed decision.
- It could be confusing to clients and undermine their confidence at a time when they need reassurance.
- Clients are often vulnerable (illiterate, mental health or with drug and alcohol dependencies) and will not understand client notification nor are able to exercise independent judgement.
- It could lead to clients demanding more highly qualified advocates than their case requires, with financial implications as well as implications for junior advocates.

There was also support from many for a public register of all advocates under QASA, with details of their accreditation status, to complement notification.

#### Comment

JAG has taken into account all consultation responses and the potential limitations in relation to client notification that have been raised. Each regulator will need to develop clear and appropriate regulatory arrangements to ensure proper communication with and disclosure to individual clients about how far the individual advocate will be able to progress their case. Such arrangements need to be in a form susceptible to monitoring and audit.

JAG is also committed to developing an online register of all QASA accredited advocates which will be publically accessible.

#### **Q4: Are there any practical problems that arise from the starting categorisation of youth court work at level 1?**

A number of groups supported the starting categorisation of Youth Court work at level 1 suggesting that the majority of youth court work is relatively straightforward.

Some responses raised a range of issues about the appropriate categorisation. Of these, some responses focussed on the issue of Level and drawing parallels with the wider Scheme and suggested that the level of advocate required should be determined by the

level of offence, as will be the case with Crown Court work. Other respondents focussed not on level (and suggested that a higher level of advocate was no guarantee of someone who could do Youth Court work) but on the match-up between QASA and the skills needed to be an effective Youth Court advocate in an environment where the defendant and witness are often vulnerable and may struggle to communicate effectively.

A number of responses noted that all advocates would still be under a duty not to act beyond their competence and pointed out that level 1 was only the starting point for case categorisation.

There was strong support for the proposed research into Youth Court advocacy.

### Comment

JAG notes that some responses identified potential negative impacts in relation to all Youth Court work being graded at Level 1. Equally, some responses identified the negative impacts of requiring higher level advocates to undertake the work without reference to their experience or skills in relation to youth court work. JAG believes that, at the outset of the Scheme, the proposal that Youth Court work should be considered Level 1 as a starting point (with certain more complex cases requiring a higher level advocate) balances these risks.

JAG has already committed to undertaking targeted research into the Youth Court as a matter of priority. Consultation responses have highlighted some of the specialist skills that might be required in order to undertake effective advocacy in the youth court and the research will test and build upon these.

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

A large number of responses recognised the operational need for phased implementation and were therefore broadly supportive of the proposal outlined in the document.

Some responses raised issues about a perceived competitive disadvantage for those in the first circuit area(s) to become operational. Others thought that the system was open to abuse both from advocates from non-live circuit areas and from instructing parties and others asked about arrangements for advocates who move during an accreditation window as well as those advocates who are registered to practise in a live circuit but spend the majority of their time in another circuit.

A few respondents criticised the timetable for implementation. Specifically in relation to the 3 month window between Phase 1 and Phase 2; this was not thought to be sufficient to properly assess the operation of the Scheme in order to make any necessary changes before Phase 2.

### Comment

Phased implementation is a practical necessity given the number of advocates that each regulator will need to bring into the Scheme. For example, the SRA conducted a notification

exercise in 2012 that indicated that over 11,000 solicitors will need to register. The BSB is predicting that between 5,000 and 6,000 barristers will register.

Phasing by circuit is preferred to the other options suggested as it allows for judicial training to also be phased by geographical area. Alternative approaches to advocates entering the Scheme will require all judges to be trained across all circuits by the time the first advocates are required to register. JAG does not consider this a practical alternative.

Responses have identified a number of practical issues that require clarification in relation to phased implementation particularly in relation to those advocates who practise in one circuit but whose Chambers is in another circuit. It is proposed that the Scheme will be revised to make it clear that the implementation of the Scheme will be determined by the principal circuit of practice as opposed to the principal practising address of the advocate. This, and other practical issues relating to phased implementation, will be addressed in guidance to be issued with the Scheme Handbook.

**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.**

Responses recognised that the proposed approach reflects current patterns of working, is flexible and that regular monitoring and review by regulators should highlight any abuse of the rules and regulations.

Other responses suggested that the decision may be affected by financial considerations and that the role given to instructing parties in setting the level of the case will require efforts to inform and educate them in the operation of the Scheme.

A number of alternative proposals were made, including:

- A number of responses suggested the involvement of judges in the determination of the level of a case. This ranged from those who believe that the judge should proactively set the level at the PCMH to those who believed that more formal and structured oversight by the judiciary is required.
- Others suggested that a prescriptive list of what cases are at what level would avoid problems that arise from discretion (see Q7 below for further comments on this). This could be combined with the ability to seek deviation through judicial approval.
- Some thought that the CPS should set the level and the presumption would be that the Defence would need a similar level.
- A few responses suggested that the allocation of a level should always fall at the higher potential level. This could be complemented by the ability of a lower level advocate to apply to a judge to “act up” and take on a higher level case.

### Comment

JAG has noted the importance that respondents placed on this process and the alternative proposals made.

A number of responses proposed greater judicial oversight to prevent cases from being graded incorrectly. The grading of cases is a means of ensuring that the competence of the advocate can be assessed at the right level by the judiciary. It is therefore part of the assessment process and does not serve any broader, more general, purpose in the allocation of cases. With this in mind, JAG believes that the approach set out in the consultation paper provides an acceptable degree of judicial oversight.

Judges will also be able to make monitoring referrals if the advocate before them has not reached the level of competence required for the case; this will also identify instances in which the grading system has been abused.

At this time any further involvement in the setting of the level of the case was seen, by the judiciary, as being too burdensome and likely to interfere with the criminal justice process. This will be kept under review.

Outside of the formal assessment process, the level of the case will routinely be determined between the instructing party and the advocate. The decision as to the level of the case and the reasons for it should be recorded and will be subject, where necessary, to monitoring by the regulator. Any evidence of abuse will be taken seriously and could result in disciplinary action.

JAG does not believe that a prescriptive list would be able to achieve sufficient flexibility and might result in advocates being prevented from undertaking certain cases that they are competent to handle. Similarly, providing for the CPS to set the level would not take into account the fact that the complexity of the case might differ between prosecution and defence.

The grading of cases will be an area covered by the two year review.

**Q7: Do you agree that the offences/hearings listed in the above 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?**

The revised Levels Table proposed in Question 7 was welcomed by the majority of respondents who favoured the move away from a prescriptive list of cases and agreed that offences on the revised table had been correctly allocated.

A few responses mentioned specific offences that could be added to the table and some asked for clarification in relation to terms such as “lesser”, “minor” and “more serious”.

Some respondents noted that complexity and seriousness may conflict. In addition, some alternative methods of grading were proposed, including basing the level on the skills needed.



## Comment

The majority of responses welcomed revisions to the Levels Table and therefore JAG does not believe that significant amendments are required. However, a number of recommendations were suggested to the Levels Table and these are being considered and some minor technical amendments will be made before the Scheme is finalised.

**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?**

A large number of responses to Question 8 felt that the wording used in the Levels Table was sufficient to distinguish between those occasions when an offence might fall between two levels. However, some respondents felt that the descriptors used to define cases (for example, "more serious", "more complex", "substantial") are vague and not a helpful proxy for determining when a case should move up or down a level. Further clarification and guidance was requested.

Some responses therefore focussed on additional factors that could be considered in assessing what level a particular case should be at such as vulnerability of the defendant or a witness and whether the victim is at risk of harm.

## Comment

Responses were generally supportive of the wording used in the levels table. However, JAG is currently considering what technical amendments may be required in order to reflect specific comments around the descriptors used to determine whether a case should move up or down.

There was little support for worked examples and therefore these will not be pursued.

**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 proposal in the question relates to whether an advocate should be able to undertake non-trial cases at the level above their accredited level

Responses were divided on this issue. Some noted that non-trial hearings have fewer complexities and less serious implications for defendants and therefore did not require the same level of advocate as trials. Others stressed the importance of continuity and the potential complexity of non-trial hearings in serious cases.

There was no clear consensus on the issue of whether level 2 advocates should be permitted to undertake non-trial hearings in level 4 cases. However, the majority of responses seemed to agree that there will be circumstances where another advocate might

need to be brought in due to listing problems. Many responses also noted the dangers of treating all non-trial hearings similarly, when some types of hearing are more complex than others.

Some Bar responses proposed that an “instructed advocate” of the requisite level should have conduct of a case and would be able to consent to a lower level advocate undertaking a non-trial hearing if it is appropriate.

#### Comment

JAG has considered all consultation responses to this question. It believes that the approach outlined in the consultation document is appropriate. Therefore level 2 advocates should not be permitted to routinely appear in level 4 non-trial hearings.

JAG will review all necessary guidance in order to determine whether further clarification or detail is required as a result of responses.

**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?**

The most commonly referred to hearings under this question were Newton Hearings. Respondents accepted that they may vary in complexity, although there was no overriding consensus on how they should be treated; many believed that they should usually be treated as trials whilst a number of others suggested that some or all Newton hearings should be considered to be non-trial hearings.

In addition, a number of responses noted that Confiscation and Proceeds Of Crime Act hearings should be undertaken by an advocate of the same level as the overall case.

#### Comment

The majority of responses to this question commented on the trial status of Newton Hearings rather than suggest additional hearings that should be addressed in the guidance. Responses appear to support the fact that Newton Hearings should not always be considered as a trial or always be considered as a non-trial.. What would distinguish a more complex hearing would be if the hearing was capable of being judicially evaluated (so would for example include witness handling and cross-examination) and would therefore only be capable of being undertaken by an advocate accredited to do trials. JAG will include this guidance within the Scheme Handbook.

**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**

**AND**

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

Three issues were consistently raised in relation to this:

- (i) The standards against which an advocate will be assessed are subjective.
- (ii) Some responses suggested that QASA should not specify the level of junior counsel in two counsel cases and that a level 2 advocate should still be able to be a junior on some level 4 cases. Other responses noted the importance of juniors being able to play a full part in case preparation and presentation and to handle the advocacy if the leader is indisposed. They therefore argued that the one below rule should never be deviated from unless the junior is only there in a noting capacity or unless agreed to by the judge.
- (iii) Client choice and the potential ability for clients to choose to have an advocate of a lower level represent them. It was suggested that the safeguards set out in the guidance might be insufficient given the power imbalance between lawyers and clients. As a result, some suggested that this must not be permitted.

A number of responses also felt that the guidance on changes in complexity as a case progresses was sufficiently high level to allow for abuse.

#### Comment

Work has already been undertaken by JAG during the consultation period to review the performance indicators for each QASA standard so that they are clear for advocate and assessor.

JAG believes that the responses in relation to “leader-junior” categorisation are broadly supportive of the approach that was consulted upon, which provides that the starting point should be that the junior should be no more than one level below the leader but that in certain circumstances a lower level junior might be required. This flexibility is seen as desirable for certain cases but will need to be monitored to ensure it is not being abused. It should be noted that this proposal is not a regulatory requirement but merely guidance. It is accepted that in some circumstances special purpose juniors at a level lower than one below could be retained, for example, to review and analyse dense material or evidence.

In relation to client choice, JAG has considered the concerns expressed in responses and has agreed to remove the client choice provisions from the Handbook. Advocates should not be able to appear beyond their competence and to justify this on the basis that a client has requested them.

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

The majority of responses to this question were from barristers who suggested that silks should not be included within the Scheme. The following points were made:

- Silks have been assessed to have reached a level of excellence through a rigorous assessment process and should not therefore be required to prove minimum acceptable competence.

- It was argued by many that the referral system is working for silk level work and therefore poor quality silks will not be instructed.
- There is already a mechanism for removal of silk if concerns are raised. QCA have considered re-accreditation and decided that the “removal for cause” mechanism was more sensitive and therefore preferable.
- There is no evidence that there are any issues with silks or with the QCA process.
- Including silks would devalue the kite mark, which is in the public interest (having been discussed and debated recently before it was re-established) and assists consumers to identify the highest quality advocates.
- If silks are to be included in the Scheme they should be at a level above 4.

A large number of responses from across the profession recognised the need for the Scheme to apply to all practitioners undertaking criminal advocacy. These responses noted that all advocates are vulnerable to the deterioration in performance and that the objectivity, effectiveness and public confidence in the competency of criminal advocates, would be undermined if the Scheme was not applicable to all criminal advocates.

Those responses that specifically commented on the modified entry arrangements did not raise any clear objections. Responses recognised that recent assessment to take silk would be sufficient to demonstrate competency and that advocates in these cases should not incur "duplicate" costs. Other comments recognised the practical and administrative advantages of the proposed approach.

#### Comment

JAG has considered the arguments about the inclusion of silks within the Scheme. JAG remains of the view that it is vital to the reliability and credibility of the Scheme that silks are included and therefore it does not intend to exempt silks from the Scheme’s requirements. However, in order to differentiate silks from other level 4 advocates there will be a separate category created for QCs; “Level 4 QC”.

The regulators have also agreed to open discussions with Queen's Counsel Appointments (QCA) on whether there is scope for any continuing quality assurance role for their Office in the re-accreditation of QCs in the future.

There were no significant objections raised concerning the specific entry requirements and therefore the position set out in the consultation will be adopted and recently appointed QCs (those appointed since 2010) will enter the Scheme for up to five years from the date that they were awarded silk. QCs appointed before 2010 will register in the Scheme as QCs and be assessed against the standards and criteria for their chosen level through gaining two judicial evaluations over two years.

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

A large number of respondents welcomed the proposals. Two issues were raised by some respondents in relation to arrangements for Level 1 accreditation. Firstly, there was a call for further clarification and guidance on proposed accreditation requirements and secondly;

whether advocates at Level 1 (who would be given full accreditation at registration) should be reaccredited earlier than 5 years. There were also concerns from a small number of solicitors that the introduction of the Scheme may result in a restriction of solicitors' Rights of Audience.

Some respondents suggested that a conflict would arise between an advocate's ability to effectively represent their client and the need to obtain a positive assessment.

Others raised issues about the reliability of judicial evaluation as a means of assessment and the fact that a trial is a variable unit of assessment as they differ greatly in length.

A few responses suggested that other experience and achievements should be factored into assessment and there were some proposals to include consumer or victim input into the assessment.

### Comment

JAG is encouraged that there was significant support for the proposals from a number of responses. As a result, it does not believe that the overall framework for the assessment of competence requires significant amendment.

It is clear from responses that further guidance and clarification on the accreditation requirements for Level 1 advocates is required and therefore this will be issued shortly.

JAG also recognises the issues raised about the need for valid and reliable forms of assessment. A Scheme which involves judicial evaluation with personal bias on the part of the assessor is likely to impact on the credibility, validity and reliability of QASA and may disadvantage or penalise certain groups of advocates. JAG is committed to judicial evaluation as the primary means of assessment for advocates at Levels 2, 3 and 4. A number of measures designed to limit the opportunities for personal bias within judicial evaluation will help ensure that QASA is fair, objective and does not disproportionately impact on any particular group or protected characteristic. These include:

- All judges will be required to undertake training in order to assist them to make evidence based evaluations
- Only those Judges that have successfully completed the training will be able to undertake assessments
- Individual regulators will undertake regular sampling of completed CAEFs and will analyse emerging data. JAG will retain a pool of independent assessors who can be used where appropriate to provide further evidence on the competence of an advocate before any action is taken.

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

Responses to this question suggested a diverse range of issues to be included in the review. The key themes focussed on:

- the operational effectiveness of the Scheme;
- whether standards of advocacy have improved;
- the assessment methods and the ability to assess each of the advocacy standards;
- increasing consumer involvement in the Scheme;
- monitoring the impact of the Scheme on advocates and access to competent representation.

#### Comment

JAG welcomes these proposals and will consider those suggestions raised and whether they can be incorporated into the architecture of the proposed review. The review specification will be updated once the Scheme is finalised.

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

Responses were generally positive and recognised the difficulty in providing an overview of complex processes. However, a number of suggestions were made for improvements to the Handbook. These included:

- Adding an executive summary.
- Making it shorter and more concise, with greater use of diagrams and flow charts.
- The history and background do not need to appear in the handbook, which would only be used when the Scheme becomes operational.

#### Comment

See comment on Q17 below.

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

The following areas were deemed by some respondents as requiring additional guidance:

- Registration and how to manage this if your work crosses circuit boundaries or if you move circuit.
- The process of completing and returning CAEFs to the regulators.
- What “consecutive” cases means.
- The impact of submitting an assessment by a judge with a disclosed connection to the advocate.
- More detail on the spot check process during registration.
- Guidance on what an advocate can do if they believe a judge has been biased in their assessment.
- Further information of the costs associated with accreditation and progression at each Level.
- Further details on the frequency, location and cost of accreditation by approved assessment organisation.

One response suggested that JAG should produce a short explanation of the Scheme for clients.

#### Comment

JAG is committed to ensuring that all advocates are appropriately supported and clear on what is required to meet the Scheme's requirements. Suggestions for improvement raised during the consultation exercise have been helpful and will be incorporated into the final design of the Handbook to ensure it is as accessible and clear as possible. The revised Handbook will be available prior to launch of the Scheme.

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

Responses tended to concentrate on the need for a single set of rules in order to achieve consistency of application of the Scheme.

There were also requests for the appeals process to be clearer as well as some calls for there to be an appeal available against single judicial evaluations. The drafting of the grounds of appeal was questioned by some, who felt that reasonableness does not always align with comprehensibility.

#### Comment

JAG recognises the importance of consistency in rules across the regulators and will be undertaking further work to fully ensure that each regulator's rules achieve consistency of application of the Scheme Rules to support a single Scheme which applies equally to all advocates.

Comments made in response to the proposed appeals process have been noted and will be considered; further clarification and guidance on the appeals process will be issued prior to launch.

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

Responses were received from a number of groups who represented non-traditional practitioners who appear on occasion in the criminal courts and therefore might be caught by the Scheme. These groups were largely supportive of the intention to exempt their practice areas from the Scheme, although they were not all confident that the definition achieved its aim. The following key points were made:

- Many responses mentioned the difficulty of applying the Scheme to hearings under the Proceeds of Crime Act 2002
- One suggestion was that the issue could be resolved either through allowing consumers to choose any advocate they please for non-trial work or by rewording the definition of criminal advocacy or specialist practitioners to make it clear that POCA work is outside the scope of QASA.

- A number of responses were received from Local Government lawyers who were concerned about the possible impact of the Scheme on advocacy that Local Government lawyers are required to undertake.

There were also some respondents who suggested that QASA should apply to all criminal advocacy including specialist areas. The following definition (and many similar iterations) was proposed: *“Advocacy in all hearings involving the prosecution of a natural or legal person in the criminal courts who, if convicted, is liable to a fine, imprisonment or both”*.

Some responses expressed concern that certain legally aided proceedings (such as trading standards and RSPCA prosecutions) would be outside the scope of the Scheme. Many responses suggested that prosecutions brought by HMRC should be included.

Some questioned whether private prosecutions were intentionally excluded and other queried if the Scheme should apply to appeals. Some traditional fraud prosecutions may be prosecuted by either BIS or the FSA and not the SFO so at the very least some thought that these should be added to the list of possible prosecuting authorities.

#### Comment

In light of responses, JAG has agreed to review the definition of “criminal advocacy” to ensure that it does not inadvertently exclude certain categories of criminal work (such as the fraud examples provided in responses).

JAG does not believe that the definition should apply to all criminal advocacy including specialist areas, as this would include cases such as planning prosecutions that would not fit within the QASA framework. Therefore any changes that result from the review are likely to be technical ones to ensure that the definition does incorporate all traditional criminal cases that do properly fit within the QASA framework.

However, JAG has agreed to look into the issue of how Proceeds of Crime Act 2002 hearings should be dealt with by the Scheme. This issue is particularly important as there are valid concerns that the Scheme as consulted upon would not allow for those who specialise in these non-trial hearings at the highest level to be assessed and therefore accredited. JAG will make a statement in due course.

Any revisions to the definition of “criminal advocacy” will be published in advance of the Scheme coming into force so that advocates can determine whether they need to register.

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

Responses were split regarding the approach to specialist practitioners as outlined in the consultation. A number of respondents suggested that the Scheme should apply to all advocates who undertake any advocacy in the criminal courts.

However, some respondents felt the approach to specialist practitioners outlined in the consultation document was practicable.



A few responses mentioned categories of advocates who would appear to be within the Scheme but who would struggle to become accredited through criminal trials. This included those involved in manslaughter charges arising out of negligence, those who specialise in non-trial hearings in specialist areas such as terrorism and advocates who work under the Proceeds of Crime Act 2002. It was proposed by these respondents that they could be excluded from the Scheme as specialists.

Additional safeguards that were suggested included requiring specialist to apply for “waivers” to allow them to appear in the criminal courts or requiring them to obtain an endorsement from leading counsel, clients or judges.

### Comment

Responses to this question have highlighted the lack of clarity in the guidance. Ultimately it will be for the advocate to decide, with reference to the prescribed guidance, whether they should be able to undertake “criminal advocacy” as a specialist and there will be monitoring to ensure that this is not abused. JAG will ensure that sufficient guidance is provided to advocates in order for them to make a decision as to whether they are required to enter the Scheme.

### **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?**

Many responses suggested that the weight of issues expressed in relation to the previous questions suggested that the Scheme as a whole was not fit for purpose. In addition, the following specific issues were raised as significant *practical* issues:

- The number of available trial opportunities and the fact that recorders will not be trained.
- The fact that each profession is subject to different rules and regulation.
- The courts will be clogged up with appeals and JRs resulting from the Scheme.

### Comment

Having considered all of the responses received, JAG believes that the fundamental components of the Scheme are appropriate to deliver the objectives of QASA and are consistent with the regulatory objectives of the Legal Services Act 2007. With this in mind, JAG considers that making amendments (as outlined in this paper) to the existing structure and approach is preferable rather than wholesale restructure or the consideration of alternative approaches.

The issue of recorders limiting the potential number of available trial opportunities in which to be assessed has been addressed by extending the period of time for collection of judicial evaluations (as set out in the comment on Q1). As set out in the comment on Q18, JAG is also undertaking further work to ensure that individual regulator's rules achieve consistency of outcome.

JAG will also use the two year review as a vehicle to monitor and review the operational efficiency and effectiveness of the Scheme. JAG will continue to meet on a regular basis once the Scheme has been launched and issues that may arise and may negatively impact on the delivery and objectives of the Scheme will be considered and addressed.

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

**AND**

**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?**

**AND**

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

The following main points were raised in relation to the equality impact of the Scheme:

- The Scheme needs to cater for part-time advocates to enable them to be assessed within the time periods. Similarly, some sources noted that those who, due to family commitment or other reasons, are unable to commit time to long running trials, will be at a disadvantage for assessment. This could impact more greatly on women and older practitioners.
- A number of responses mentioned the risk of unconscious bias in judicial assessment. This included claims that judges would tend to mark advocates that they know more favourably than those that they do not know. There were also a number of responses that noted the risk of judicial bias against solicitor advocates.
- Fees may impact disproportionately on smaller firms and sole practitioners. It might also discourage those from backgrounds and families with modest incomes from becoming criminal advocates.

The following themes were added by a number of the organisational responses:

- Concern from a number of responses that the Scheme has the potential to impact disproportionately on women and BME practitioners. Responses called for Regulators to monitor the impact of the Scheme on women and BME practitioners.
- A number of responses called for clarity on the circumstances in which independent assessors may be available as a substitute for judicial evaluation and confirmation that advocates who use this will not bear the costs. In addition, the potential for QASA assessment or fees to slow down career progression for certain groups needs to be monitored.
- Responses from both solicitors and barristers expressed concern at the lack of diversity amongst those who will be assessing advocates. Responses from a number of representative group indicate high drop out rate of female practitioners

with financial reasons being the most significant factor. It was recognised that the potential cost implications of QASA may accentuate this situation.

- In relation to disability, it noted that the training of judges does not appear to cover issues such as what reasonable adjustments might be appropriate in relation to assessment. In addition, there is no procedure for disabled advocates to follow to ensure that a judge is aware of their disability when assessing them.
- In respect of gender reassignment, responses pointed out that further clarity is required to reassure advocates that transitioning gender at any point of accreditation will not incur additional fees (e.g. for name change) or the need to begin the accreditation process again.
- Responses also suggested that advocates should be able to challenge an individual assessment if there is evidence to suggest that the judge was racially biased.
- One response suggested that if QASA does not allow for relevant and comparable advocacy experience from abroad to be factored into accreditation for advocates from other jurisdictions, it could be seen as an unjustified barrier.
- Another response noted that the Scheme should provide the regulators with an opportunity to promote equality issues as it will provide a wealth of information that will allow the true impact of the Scheme to be measured and for necessary changes to be made in order to identify and address negative impacts and enhance positive ones. The Scheme also has the potential to assist returners to work by creating a structured path back to practice.

### Comment

Each individual regulator has carried out analysis to explore and assess the impact of the proposed Scheme on the communities they regulate. Each regulator has produced an Equality Impact Assessment that has identified a number of measures and actions to help eliminate any potential disadvantage to particular groups and ensure full participation from those required to enter the Scheme. It is not thought that the consultation exercise has identified any further substantial issues which may disproportionately disadvantage those required to enter the Scheme. However, each regulator will be reviewing their EIAs in light of responses and seeking appropriate advice from their Equality and Diversity advisers to ensure that this is the case.

JAG believes that the Scheme is open, transparent, objective and fair. Efforts have been made to ensure the Scheme has sufficient levels of flexibility built into it and that it offers a proportionate merit based progression route for advocates, whilst still ensuring the ultimate aim of ensuring standards and protecting the public. Controls have been put in place to ensure that all forms of assessment are robust, accessible and consistent.

JAG is committed to ensuring that the Scheme remains fair and accessible. The two year review will focus on monitoring the impact of the Scheme on the advocacy market, equality and diversity issues in the provision of advocacy services and the perceptions of the standards of advocacy.

**Joint Advocacy Group**  
**19 March 2013**