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20 January 2016

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Changes to the Quality Assurance Scheme for Advocates: consultation response and rule change

Purpose

- 1 This paper reports on the outcome of the consultation on changes to the Quality Assurance Scheme for Advocates (QASA).

Recommendations

- 2 The Board is asked to:
 - a) approve the response to the consultation, including any proposed changes to the Scheme materials (paragraphs 9-27 and Annex 1); and
 - b) note and approve the proposed approach to the QASA appeals rules (paragraphs 28-31).

If you have any questions about this paper please contact: Crispin Passmore, Executive Director, crispin.passmore@sra.org.uk or 0121 329 6687

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Changes to the Quality Assurance Scheme for Advocates: consultation response and rule change

Background

- 3 The Joint Advocacy Group¹ consultation on changes to the Quality Assurance Scheme for Advocates (QASA/the Scheme) was issued on 1 October 2015 and closed on 24 December 2015.
- 4 QASA is a compulsory accreditation scheme for all criminal advocates, which requires advocates to register and then have their advocacy periodically assessed to ensure they are competent to practise.
- 5 QASA was subject to judicial review proceedings challenging its lawfulness, brought on behalf of the Criminal Bar Association (CBA) in 2013. The proceedings were heard initially by the Divisional Court, and then on appeal by the CBA by the Court of Appeal and the Supreme Court. The lawfulness of the Scheme was upheld at each stage, but the Divisional Court and the Court of Appeal recommended minor changes to the scheme rules. The consultation sought views purely on the recommendations made by the courts.
- 6 The consultation was conducted by JAG, and the proposals suggested changes to the Scheme through the Scheme Handbook and associated documentation. The SRA Board therefore needs to approve the changes to the Scheme materials because it jointly operates the Scheme. It should also approve the JAG consultation response, which reflects the proposed rule changes.
- 7 The draft JAG response and associated changes to the Scheme materials are subject to the approval of the BSB and CILEX Regulation. The Board is asked to note that as a result, the final version of the response may be slightly different to the version at Annex 1. We will bring any substantive changes made to the response back to the Board.
- 8 The recommendations made by the courts during the judicial review were designed to improve the operation and understanding of the Scheme and included:
 - a change to the Criminal Advocacy Evaluation Form (CAEF)² to require an advocate to identify when they were first instructed;
 - a change to the CAEF to require an advocate to identify whether they have given advice on the evidence;
 - allowing a judge to decline to carry out an evaluation if they feel it would not be fair to do so;

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 QASA

² The form used by a Judge in a live trial to assess the competence of an advocate

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- requiring evaluation of the same advocate to be carried out by separate judges;
- clarification of the Scheme’s written material; and
- changes to the appeal rules.

Consultation responses

- 9 JAG’s report analysing and setting out its response to the consultation is attached at Annex 1. 14 responses were received to the consultation. The majority of responses received were from barrister and solicitor representative bodies. Responses were also received from the Crown Prosecution Service, three solicitors, a barrister and the Chartered Institute of Legal Executives. A full list of respondents is available in Annex 1.
- 10 A summary of the consultation proposals, issues raised and JAG’s position is outlined below:

Consultation question 1: Do you see any practical difficulties arising from amending the current Criminal Advocacy Evaluation Form (CAEF) to require an advocate to identify when they were first instructed?

- 11 Four respondents felt implementation of this proposal was unnecessary. The Council of the Inns of Court, the Criminal Law Solicitors Association, the Crown Prosecution Service and the Bar Council all suggested that the date of instruction should not act as a justification for the poor performance of an advocate.
- 12 In addition, these respondents pointed out that an advocate’s existing professional obligations should prevent an advocate from accepting instructions from a client if s/he has insufficient time to carry them out.
- 13 Ten respondents including the Law Society, the Criminal Bar Association, the Solicitors’ Association of Higher Courts Advocates and the Chartered Institute of Legal Executives did not identify any practical difficulties with implementing this proposal. They suggested that requiring advocates to provide the date that they were first instructed would help to ensure that they were not marked down unnecessarily as a result of receiving late instructions.
- 14 JAG recognises that the poor performance of an advocate should not be justified by their date of instruction, and that advocates should not accept late instructions if they are unable to fulfil the brief effectively.
- 15 Nevertheless, this does provide useful contextual information both for the judge assessing the case and for JAG in reviewing the scheme and therefore JAG proposes to implement the Divisional Court’s recommendation and amend the CAEF to include the date on which the advocate was instructed.

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Consultation question 2: Do you see any practical difficulties arising from amending the current the CAEF to require an advocate to identify whether they provided advice on the evidence?

- 16 Eight respondents including the Junior Lawyers Division saw no problem with implementing this proposal. They agreed that this information would enable a judge making the assessment to be more aware of the background and extent of the advocate's pre-trial involvement in the case.
- 17 Six respondents identified practical difficulties with implementation. The Council of the Inns of Court, the Criminal Law Solicitors Association, the Bar Council and the Criminal Bar Association all raised the risk that implementing this proposal might lead a judge to blur the line between an enquiry about whether advice on evidence was provided and what that advice was.
- 18 The Law Society suggested this proposal was unnecessary. They felt that as an advocate is already required to identify the date on which they were instructed, the judge is already able to determine whether or not the advocate has had the case for a sufficient period of time to be properly prepared.
- 19 The rationale behind the recommendation of the Divisional Court was the need to understand the extent to which the advocate has been involved in the case prior to trial. There is no reason why this will result in further enquiries or requests for information about the actual advice given. Therefore JAG proposes to implement the recommendation and amend the CAEF to include information about whether the advocate being assessed provided advice on the evidence in the trial in which they are appearing.
- 20 JAG will monitor the impact of the implementation of this proposal as part of the two year review of the Scheme.

Consultation questions 3 and 4: Do you see any practical difficulties arising from allowing a judge to decline to carry out an evaluation if they felt it would not be fair to do so and requiring assessments to be carried out by separate judges?

- 21 Most respondents to these questions suggested that implementation of these proposals could restrict the ability of an advocate to obtain the judicial evaluations required for accreditation under the Scheme.
- 22 The proposal to permit a judge to decline to carry out an evaluation is clearly limited to circumstances in which they believe that for them to assess the advocate would be unfair. Likewise, the proposal for evaluations of the same advocate to be undertaken by different judges is designed to ensure fairness to the advocate through each evaluation being free from influence about previous performance. We therefore believe this recommendation is proportionate, notwithstanding the risk that advocates may have difficulties meeting the trial requirements.

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- 23 JAG has already put arrangements in place to support those advocates who experience difficulties in getting access to the required number of judicial evaluations. JAG will recruit and retain a pool of independent assessors that can be deployed in circumstances where the requisite number of judicial evaluations cannot be achieved. 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.
- 24 Further, the training which participating judges receive will include the circumstances in which it may be unfair for them to carry out an evaluation.
- 25 Given these measures, JAG does not believe that there is a material risk to advocates, and proposes implementing the court's recommendation.

Consultation question 5: Are there any practical difficulties that arise from the proposed amendments to the Scheme Handbook?

- 26 JAG proposed a number of minor, drafting amendments to the Scheme Handbook in the consultation. These do not have a substantive effect on the Scheme. They include:
- removal of the registration timetable and reference to registration phases;
 - clarification on how to complete the CAEF;
 - clarification on where an advocate can reapply for provisional accreditation at a higher level;
 - clarification on transitional arrangements for recently appointed QC's; and
 - clarification on the period of full accreditation on registration for those solicitors that have recently obtained their Higher Rights of Audience qualification.
- 27 The majority of responses to this question did not raise any practical difficulties with the proposed amendments to the Scheme Handbook. JAG therefore proposes to make these minor drafting amendments to the Scheme Handbook as they are not substantive in nature. JAG will review the Handbook on an ongoing basis once the Scheme is implemented, to ensure it provides appropriate guidance and support for advocates. JAG will provide more information on when the revised Handbook will be available in advance of the re-opening of registration.

Recommendation:

(a) to approve the JAG response to the consultation at Annex 1, and the associated changes to the operation of QASA.

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Consultation question 6: Do you see any practical difficulties arising from the changes to the BSB or SRA Appeal rules?

- 28 Amendments to the BSB and SRA QASA appeals rules were proposed to clarify the circumstances and process by which an advocate can appeal to their respective regulator. We proposed a change to the SRA QASA appeals rules making clear that an appeal against a QASA decision could be brought to the SRA only on the grounds of error or irregularity.
- 29 The Law Society called for further clarification on the grounds on which an advocate can make an appeal. They suggested that the amendment to rule 20.3 of the QASA Regulations 2013 should include provision for an appeal to be made to the SRA on the grounds of bias or unfairness in the judge's approach. The Junior Lawyers Division also called for greater consistency between the SRA and BSB grounds of appeal
- 30 The BSB grounds of appeal are that the decision was unreasonable, or that there was a procedural error in the assessment or decision making process which had a material impact on the decision reached. These grounds are not the same as the proposed SRA rule.
- 31 We recognise that consistency between both regulators' appeals rules is desirable. We will therefore be working with the BSB to agree consistent appeals rules, which incorporate an appeal on the grounds of bias or unfairness. Our intention was to allow appeals on the grounds of "irregularity" and "procedural error" and so encompass issues such as bias – however we will revisit the wording in conjunction with BSB to ensure, so far as possible, consistency. Once agreed, we will bring these back to the Board for approval.

Equality Impact Assessment

- 32 As part of the scheme's approval by the Legal Services Board in 2013, JAG carried out a comprehensive equality impact assessment. The proposals subject to the current consultation are minor and this consultation has not raised any further equality issues, beyond concerns about access to judicial evaluation which have been addressed at paragraph 23 above. JAG will monitor the equality impact of implementation as part of the two year operational review.

Recommendation:

(b) to note and approve the proposal to review the appeals rules to ensure consistency of approach between the SRA and the BSB.

Next Steps

- 33 We have not identified any significant operational, financial or consumer impacts with the implementation of these recommendations. They are minor,

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technical changes designed to implement court recommendations and will clarify and improve operation of the Scheme.

- 34 We will bring the proposed appeals rules for approval to the next Board meeting.
- 35 We will be making an application to the LSB to approve the changes to the operation of the Scheme.
- 36 Work also continues to ensure that the business is ready to reopen registration in spring 2016. This involves ensuring that the IT system to manage an advocate's accreditation is fit for purpose and that appropriate business units are trained to deal with external queries. QASA information on the SRA website will also be updated.

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Supporting information

Links to the Strategic Plan and / or Business Plan

- 37 The proposed recommendations support strategic objective 2 (work with solicitors and firms to raise standards and uphold core professional principles). QASA is designed to ensure that those undertaking criminal advocacy – a high risk area - are competent to do so. The recommended changes will improve the operation and clarity of the scheme, and so better achieve this aim.

How the issues support the principles of better regulation

- 38 QASA is a proportionate and targeted response to the risk of consumer detriment as a result of poor advocacy.
- 39 Clarification of the scheme's written materials will enable those required to comply with QASA to better understand their regulatory obligations and consumers to be better protected.

How the action will be evaluated

- 40 JAG has committed to a two-year evaluation of QASA. This will include exploring the operational and equality impact of the scheme.

What engagement approach has been used to inform the work (and what further communication and engagement is needed)

- 41 The proposed rule change and other proposals have been subject to a 12 week consultation. All major representative groups responded. A Communications and Stakeholder engagement plan has been developed. JAG (and the SRA) will communicate changes through our wider communication channels, for example, through our website and direct communications to those that we regulate.

What equality and diversity considerations relate to this issue

- 42 QASA has been subject to extensive EDI impact analysis. In particular, a full EDI report was provided as part of the LSB approval of the Scheme. In terms of the minor changes being proposed, we have not identified any further equality and diversity issues. The only potential impact is the risk that some advocates may not be able to get access to judicial evaluation, and we have set out at paragraph 23 the measures we will take to address this risk.

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Annexes
Annex 1 Joint Advocacy Group response to consultation

Quality Assurance Scheme for Advocates

Summary of responses

Introduction

- 1 On 1 October 2015, we issued a consultation seeking views on proposals to make changes to the Quality Assurance Scheme for Advocates (QASA).
- 2 QASA was subject to judicial review proceedings challenging its lawfulness, brought on behalf of the Criminal Bar Association (CBA) in 2013 - 2015. The proceedings were heard initially by the Divisional Court, and then on appeal by the CBA by the Court of Appeal and the Supreme Court. The lawfulness of the Scheme was upheld at each stage, but the Divisional Court and the Court of Appeal recommended minor changes to the scheme rules, designed to improve the operation and clarity of the Scheme. The consultation sought views purely on the recommendations made by the courts in the judicial review proceedings
- 3 The proposals included in the consultation were as follows:
 - A change to the Criminal Advocacy Evaluation Form (CAEF)³ to require an advocate to identify when they were first instructed
 - A change to the CAEF to require an advocate to identify whether they had provided the advice on evidence for the trial at which their advocacy was being evaluated;
 - Allowing a judge to decline to carry out an evaluation if they felt it would not be fair to do so;
 - Requiring successive evaluations of the same advocate to be carried out by separate judges
 - Clarification of the Scheme's written material
 - Changes to the Bar Standards Board (BSB) and Solicitors Regulation Authority (SRA) appeals rules.
- 4 The consultation closed on the 24 December 2015. This report summarises the findings and the response of the Joint Advocacy Group⁴ (JAG).
- 5 We were clear in our consultation document that we were not seeking views on any other aspect of the Scheme or its implementation beyond the proposals contained in that document.

Consultation Responses

³ The form used by a Judge in a live trial to assess the competence of an advocate

⁴ 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 QASA.

6 We received 14 responses to the consultation. The majority of responses received were from barrister and solicitor representative groups. Responses were also received from the Crown Prosecution Service, three solicitors, one barrister and the Chartered Institute of Legal Executives. Annex 1 provides a list of all respondents.

Consultation responses to our proposals

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

7 Ten respondents, including the Law Society, the Solicitors' Association of Higher Courts Advocates and the Criminal Bar Association did not identify practical difficulties with implementing this change. The proposal was seen as a mechanism to avoid an advocate being unnecessarily marked down as a result of receiving late instructions.

8 Four respondents felt implementation of this proposal was unnecessary. The Council of the Inns of Court, the Crown Prosecution Service, the Criminal Law Solicitors Association and the Bar Council suggested that the date of instruction should not act as a justification for the poor performance of an advocate and that an advocate is already bound by professional obligations not to accept instructions from a client if they have insufficient time to carry them out. The Junior Lawyers Division suggested that the proposal did not take into account the quality of instruction.

Our response and next steps

9 JAG recognises that the poor performance of an advocate cannot be excused by their date of instruction, and that advocates should not accept late instructions if they are unable to fulfil the brief effectively

10 Nevertheless, this does provide useful contextual information both for the judge assessing the case and for JAG in reviewing the scheme and therefore JAG proposes to implement the Divisional Court's recommendation and amend the CAEF to include the date on which the advocate was instructed.

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

11 Eight responses to this question highlighted practical difficulties with implementation.

12 The Council of the Inns of Court, the Criminal Bar Association, the Bar Council and the Criminal Law Solicitors Association raised the risk that implementing this proposal might lead a judge to blur the line between an enquiry about whether advice on evidence was provided and what the advice was. They, along with the Crown Prosecution Service, were also concerned that the proposal risked opening up sensitive and/or potentially legally privileged matters and placing the advocate under undue pressure. They also felt that implementation could lead to court time being wasted in unnecessary enquiries by the judge.

13 The Law Society suggested this proposal was unnecessary. They felt that as an advocate is already required to identify the date on which they were instructed, the judge is already able to determine whether or not the advocate has had the case for a sufficient period of time to be properly prepared.

14 Six responses to this question did not identify any significant difficulties with implementation of this proposal. The Junior Lawyers Division suggested that this was a positive inclusion as long as an advocate was not penalised for not completing the form. Other respondents thought it beneficial because it would ensure a judge making the assessment was aware of the background and extent of the advocate's pre-trial involvement in the case.

Our response and next steps

15 The rationale behind the recommendation of the Divisional Court was the need to understand the extent to which the advocate has been involved in the case prior to trial. There is no reason why this should result in further enquiries or requests for information about the actual advice given. Therefore JAG proposes to implement the recommendation and amend the CAEF to include information about whether the advocate being assessed provided advice on the evidence in the trial in which they are appearing.

16 We will monitor the impact of the implementation of this proposal as part of the two year review of the Scheme.

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

17 Most respondents to this question suggested that implementation of this proposal could restrict the ability of an advocate to obtain the required judicial evaluations to be accredited under the Scheme.

18 The Junior Lawyers Division and Solicitors' Association of Higher Courts Advocates suggested that this may be a particular problem for those advocates that have limited access to evaluations by different judges because they are involved in long trials, only undertake a small number of trials or practise in areas where there are few trials.

19 The Law Society, the Criminal Bar Association, the Crown Prosecution Service and the Bar Council called for further guidance on the practical application of this proposal. Respondents identified that there was a lack of clarity as to whether a judge is required to provide reasons to the regulator and/or the advocate for declining to complete the evaluation.

Our response and next steps

20 The proposal to permit a judge to decline to carry out an evaluation is clearly limited to circumstances in which they believe that for them to assess the advocate would be unfair. We therefore believe this recommendation is proportionate, notwithstanding the risk that advocates may have difficulties meeting the trial requirements.

21 JAG has already put arrangements in place to support those advocates who experience difficulties in getting access to the required number of judicial evaluations. JAG will recruit and retain a pool of independent assessors that can be deployed in circumstances where the requisite number of judicial evaluations cannot be achieved. 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

22 Those judges who participate in the Scheme will receive training on evaluating the performance of an advocate. We will ensure this training includes the circumstances in which it may be unfair for them to carry out an evaluation.

23 In addition, we will monitor the exercise of judicial discretion to decline to conduct an evaluation and its impact on the ability of an advocate to meet the requirements of the Scheme.

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

24 Almost all responses to this question highlighted the impact on the ability of an advocate to meet the required number of judicial evaluations. Despite this concern, respondents did not object to the introduction of this proposal. The availability of independent assessors in circumstances where an advocate faces difficulties in accessing the required number of judicial evaluations was considered an appropriate mechanism to mitigate this risk.

25 A number of responses also suggested minor drafting changes to the Scheme Handbook to explain this proposal required further clarification.

Our response and next steps

26 The proposal for evaluations of the same advocate to be undertaken by different judges is designed to ensure fairness to the advocate through each evaluation being free from influence about previous performance. As outlined, in paragraph 21, measures have been put in place to ensure that an advocate who cannot obtain the required number of judicial evaluations to be accredited and therefore we will implement this proposal.

27 The wording in the Scheme Handbook will be reviewed to ensure that the application of this proposal is clear for all advocates.

28 We will monitor the impact of this proposal on the ability of an advocate to meet the requirements of the Scheme as part of the proposed two year evaluation.

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

29 We proposed in our consultation document a number of minor, drafting amendments to the Scheme Handbook which do not affect the substantive effect on the Scheme. These included:

- Removal of the registration timetable and reference to registration phases,
- Clarification on how to complete the CAEF
- Clarification on where an advocate can reapply for provisional accreditation at a higher level
- Clarification on transitional arrangements for recently appointed QC's
- Clarification on the period of full accreditation on registration for those solicitors that have recently obtained their Higher Rights of Audience qualification

30 Nine respondents, including the Council of Inns Courts and the London Criminal Courts Solicitors' Association did not raise any practical difficulties with the amendments to the Scheme Handbook.

31 The Solicitors' Association of Higher Courts Advocates, the Junior Lawyers Division and the Law Society all called for greater clarity on the application and implementation of the Scheme but did not raise any substantive concerns to the proposed amendments.

Our response and next steps

32 The majority of responses to this question did not raise any practical difficulties with the proposed amendments to the Scheme Handbook. The proposals are minor drafting changes and therefore JAG proposes to make these amendments to the Scheme Handbook. JAG will on an ongoing basis review the content of the Handbook during implementation of the Scheme to ensure it provides appropriate support for advocates. JAG will provide more information on when the revised Handbook will be available in advance of registration.

Proposal 6: Clarification of BSB and SRA QASA rules

33 Amendments to the BSB and SRA QASA appeals rules were proposed to clarify the circumstances and process by which an advocate can appeal to their respective regulator.

34 Most responses to this question did not raise any substantial issues with the proposed changes to the BSB and SRA appeals rules.

35 The Law Society called for further clarification on the grounds by which an advocate can make an appeal. They suggested that the amendment to rule 20.3 of the QASA Regulations 2013 should include provision for an appeal to be made to the SRA on the grounds of bias or unfairness in the judge's approach. The Junior Lawyers Division also called for greater consistency between the SRA rules and BSB on the grounds of appeal.

Our response and next steps

36 We recognise that consistency between both regulators' appeals rules is desirable. JAG will seek to develop and agree consistent appeals rules. We will provide further information on these rules in due course.

Equality Impact Assessment

37 A number of measures built into the design of the scheme 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 regulatory action is taken

38 QASA was subject to a full Equality Impact Assessment when it was approved by the Legal Services Board in 2013. We have not identified further equality issues as a result of the current proposals, apart from the possible risk of access to judicial evaluation mentioned in paras. 17 – 28. We believe the measures set out above will effectively mitigate this risk.

Next Steps

39 We have identified the key issues and concerns received by respondents to this consultation. Based on our analysis of responses and the reasons stated in this report, we will proceed with implementation of each proposal. Regarding the Scheme's appeals rules, we will work to achieve consistency between our rules. These rules will be subject to Legal Services Board approval.

40 We will monitor the impact of these proposals on the administration and the ability of an advocate to meet the requirements of the Scheme as part of the two year review.

Annex 1 List of respondents

- 1 Anonymous barrister
- 2 Anonymous solicitor
- 3 Bar Council
- 4 Cartwright King Solicitors
- 5 Chartered Institute of Legal Executives
- 6 Council of the Inns of Court
- 7 Criminal Bar Association
- 8 Criminal Law Solicitors Association
- 9 Crown Prosecution Service
- 10 GT Stewart Solicitors
- 11 Junior Lawyers Division
- 12 Law Society
- 13 London Criminal Courts Solicitors' Association
- 14 Solicitors' Association of Higher Courts Advocates