

Summary: Intervention & Options

Department /Agency: Legal Services Commission	Title: Impact Assessment of Quality Assurance Scheme for Publicly Funded Criminal Defence Advocates	
Stage: Pre-pilot consultation	Version: Final	Date: 17 July 2007
Related Publications: Bar Council's Consultation on Quality, published 5 April 2007		

Available to view or download at: <http://www.legalservices.gov.uk>

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What is the problem under consideration? Why is government intervention necessary?

Ensuring that an advocate is of the right quality for the work he or she has been instructed to undertake benefits the client (who can be confident he or she is receiving high quality advice and representation), the procurer (who can be confident they are getting value for taxpayer's money), and the public (who can be confident that the criminal justice system is delivering justice). Unlike solicitors, who are subject to the Peer Review process, and are bound by the Specialist Quality Mark, advocates are currently not required to undergo any formal process of quality assurance before undertaking publicly funded work.

What are the policy objectives and the intended effects?

To ensure the provision of high quality advocacy services for clients and others engaged in the provision and procurement of publicly funded legal services within England and Wales, by assessing and evidencing competency against a consistent framework covering all aspects of an advocate's work.

What policy options have been considered? Please justify any preferred option.

The recommendation to develop and implement a quality assurance scheme was made by Lord Carter in his fundamental review of legal aid procurement. He proposed a scheme "based on peer review and a rounded appraisal system". Within this remit, options for a pilot (to apply to publicly funded criminal defence advocates in two or three regions, for a period of six to twelve months beginning after this consultation period) are set out for consultation. They cover a range of possibilities to test the value of various types of evidence and of different assessment processes. The options presented are based on the discussions of the Working Group, on which all of the key stakeholders in the criminal justice system are represented.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

Full evaluation of the options will be carried out as part of the evaluation of the pilot which, if successful, will inform the development of a national scheme to apply to all publicly funded criminal defence advocates. This scheme will be consulted on prior to implementation, and a further evaluation of its operation will take place one year after implementation.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Lord Hunt of King's Heath

..... Date: 17 July 2007

Summary: Analysis & Evidence

Policy Option:	Description:
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COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Costs of the schemes are to be determined and analysed as part of the pilot process. The "Summary: Analysis and Evidence" section will be completed as part of the final Impact Assessment.
	One-off (Transition)	Yrs	
	£		
	Average Annual Cost (excluding one-off)		
	£		
Total Cost (PV)			£
Other key non-monetised costs by 'main affected groups'			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'
	One-off	Yrs	
	£		
	Average Annual Benefit		
	£		
Total Benefit (PV)			£
Other key non-monetised benefits by 'main affected groups'			

Key Assumptions/Sensitivities/Risks

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?					
On what date will the policy be implemented?					
Which organisation(s) will enforce the policy?					
What is the total annual cost of enforcement for these organisations?					£
Does enforcement comply with Hampton principles?					Yes/No
Will implementation go beyond minimum EU requirements?					Yes/No
What is the value of the proposed offsetting measure per year?					£
What is the value of changes in greenhouse gas emissions?					£
Will the proposal have a significant impact on competition?					Yes/No
Annual cost (£-£) per organisation (excluding one-off)		Micro	Small	Medium	Large
Are any of these organisations exempt?		Yes/No	Yes/No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)	
Increase	£	Decrease	£	Net	£

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

INTRODUCTION

This is an initial Impact Assessment to accompany the recent consultation document “Creating a Quality Assurance Scheme for Publicly Funded Criminal Defence Advocates”. The consultation document seeks views on options for the development of a pilot for the quality assurance scheme to be conducted with criminal defence advocates in two or three regions.

The consultation seeks views on the design of a pilot scheme, not a final scheme. The consultation document suggests a range of options to quality assure advocates during the pilot, but these options are open so as to acquire views and input from respondents. The aim of the pilot is to test alternative methods of gathering and assessing evidence of an advocate’s competence, in order to determine which approach best strikes the balance between robust outcomes, an independent process and administrative arrangements that are ‘light touch’ and cost effective. The pilot will also enable the project team to identify and address any operational issues of any final scheme

The format and content of the pilot will be developed following detailed analysis of the responses to the consultation document, the supplementary questions on the initial Impact Assessment and after the collection and analysis of further equalities data.

A further Impact Assessment will be conducted on the pilot and we will consult with wider equalities groups in the pilot development process.

Availability of current equalities data is limited. The General Council of the Bar conduct an annual equalities survey of barristers and their data on ethnicity and gender (December 2006) has been considered in this initial assessment. They currently do not process data on age or disability. The proposed scheme will apply to solicitors with Higher Rights of Audience. The Law Society collects equalities data for all solicitors on the roll; we are working with the Law Society to source data for solicitor advocates.

The MoJ and LSC will undertake a survey to collect the data necessary to conduct a further Impact Assessment on the pilot.

During the operation of the pilot we will collect targeted and relevant statistical data to enable us to identify clearly any adverse impacts on particular groups. These results will inform any resulting, national scheme.

PROJECT OBJECTIVES

The aim of the project is to produce a quality assurance scheme for publicly funded criminal advocates practicing at Crown Court level and above that ensures the provision of high quality advocacy services for clients, and others engaged in the provision and procurement of publicly funded legal services, within England and Wales, by assessing and evidencing competency against a (consistent) framework covering all aspects of an advocate's work.

THE WORKING GROUP

A Working Group was established in August 2006 to take forward Lord Carter’s recommendations, and consists of representatives from the judiciary, Bar Council, Bar Standards Board, Law Society, Solicitors Regulation Authority, Solicitors’ Association of Higher Court Advocates, Institute of Barristers’ Clerks, Legal Services Commission, Ministry of Justice, and Crown Prosecution Service.

The development of the consultation paper and the options now being consulted upon draw on the discussions of the Working Group, who will continue to meet to help develop the detailed arrangements of the pilot scheme following consultation.

Through this consultation, through the pilot, and through the (future) consultation on any national scheme, we aim to ensure that all potentially affected groups have had an opportunity to contribute to the development of this scheme.

COSTS AND BENEFITS

A full cost-benefit analysis will be undertaken in designing the detailed arrangements for the pilot, and costs for the pilot will be monitored closely and assessed during its operation.

The pilot will enable us to evaluate the cost and benefits of the different options being piloted, and will therefore allow us to estimate the likely costs of the final scheme. Specifically, we will be able to assess the cost to the advocate, and to chambers, firms and other contributors, of gathering the requisite portfolio of evidence, and the cost of assessing the evidence to those doing so. The pilot will provide evidence to assess whether the scheme offers value for money and to identify benefits to the wider efficiency of the justice system, for example by ensuring that advocates undertake work appropriate to his/her level of competence.

The pilot will test several options: this is advantageous as we will be able to compare the costs of each approach to determine which is most cost effective in comparison with the benefit gained. The objective is to determine the most robust and transparent scheme that is proportionate and affordable to the profession.

Pilot costs and predicted costs of any national scheme will be included in the evaluation of the pilot.

IMPACT ON CLIENTS

The introduction of the scheme is intended to have a positive effect on clients, as it will ensure the provision of high quality advocacy services, with the competence of the advocate in question matching the complexity and gravity of the case in question.

There is a risk that if the scheme is perceived to be overly burdensome, some advocates (particularly those for whom publicly funded criminal defence work is not the main source of income) may opt not to engage with it, and therefore reduce the number of suitable advocates operating in a given area. The pilot provides the opportunity to ensure that the eventual scheme is not overly burdensome, and will take account of the different circumstances of chambers and firms of different sizes, and of sole practitioners and self-employed advocates.

An additional potential short-term risk is that the operation of the scheme could reveal a lack of sufficient numbers of quality assured advocates at the various levels in a particular region, resulting in a shortfall in the number of suitable advocates to undertake work. Previous experience from Peer Review suggests that such a situation might be a motivator for movement up the (competence) levels, and in that sense a quality assurance scheme for advocates should, in the longer term, produce a surfeit of quality. The pilot is intended to evaluate and address this issue.

IMPACT ON ADVOCATES

A principle of a quality assurance scheme is that it should also have a positive effect on those being assessed. The same standards will apply equally to all advocates, be they barristers or solicitor advocates, self-employed or employed. Advocates will be able to demonstrate the ability to carry out publicly funded work at progressively higher levels, and the distribution of publicly funded criminal defence work will be based on an objective and transparent assessment of competence to do that work.

It is recognised that the scheme may have a differential impact on specific individuals such as advocates returning to work from a career break, part-time workers, new entrants, sole practitioners, rural practitioners, those practicing in niche areas of law and advocates who conduct a limited number of long cases in any given period of time because of their involvement in Very High Cost cases. The pilot will include, as far as is practicable, representative inclusion of those groups.

Availability of current baseline data, necessary to conduct a final Impact Assessment, is limited at this stage. We are working with the General Council of the Bar and the Legal Services Research Centre to

obtain the data necessary to conduct a final Impact Assessment on the pilot. This will include data on the demographic profile of the full spectrum of advocates to whom the scheme will apply.

The pilot will be screened and assessed to identify any adverse effects on specific groups. We will work with equalities organisations to ensure their input in to the pilot scheme.

The pilot (and any subsequent national scheme) also displays a number of particular elements that will need to be taken into consideration when assessing the impact on advocates.

These are as follows:

- The pilot and any subsequent national scheme will apply only to publicly funded criminal defence advocates (both barristers and solicitors with higher rights of audience, whether self-employed or employed).
- The proposals on which we are consulting relate to a new scheme that we intend to pilot. The pilot will test several approaches so that we can properly assess impact and identify best practice
- The detail of the pilot will be informed by the consultation responses and it is proposed that the Institute of Advanced Legal Studies will evaluate the pilot. A full evaluation and a summary of findings will be published following the pilot, with views sought at that stage, if appropriate, on proposals for a national scheme.
- We will build in a monitoring process to identify potential impacts along lines of gender, ethnicity, disability, age and size of chambers or firm (as well as sole practitioners), with particular focus on both the practicability of the scheme itself and on any unexplained variation in outcomes. For example, were there a requirement that evidence submitted should cover a specified time period, we would need to ensure that there were sufficient safeguards so as not to penalise unfairly an advocate who, for example, returned to work after a period of absence, or a part-time worker who might find it difficult to comply with such a requirement.
- The proposals are for a competency-based scheme, and incorporate an Equality and Diversity competency that all advocates would be expected to meet in their work. The advantage of the competence framework is that performance is based on an objective framework of competencies, and not on subjective criteria such as experience or reputation.
- Measures, akin to those in peer review, should be developed to enhance feedback within the assessment process, to enable self-assessment by new starters and to more generally aid an individual's development.

SECTORS AFFECTED

- Client users of legal aid services
- Advocates (whether barristers or solicitors, self-employed or employed) undertaking publicly funded work
- Providers of legal aid services
- The LSC and MoJ
- Partners in the wider justice system, for example HMCS, other funders of legal services such as local authorities
- Suppliers of software systems to legal aid providers
- Judiciary

AVAILABLE STATISTICS

This initial impact assessment has utilised ethnicity and gender data from the General Council of the Bar annual survey (2006). Data on age and disability is not currently processed as part of that annual survey. The Working Group is conducting a survey to collect the data necessary to conduct a final Impact Assessment on the pilot. This includes comparable data for solicitors with Higher Rights of Audience. Such data will be used to determine the exact number and the demographic profile of advocates that will be affected by the scheme and to inform pilot design, monitoring and evaluation.

EQUALITY AND FAIRNESS:

RACE EQUALITY

Public authorities in Britain have a legal duty to promote race equality. This means that they must have due regard to the need to:

- Eliminate unlawful racial discrimination
- Promote equal opportunities
- Promote good relations between people from different groups

The MoJ and LSC have a duty to assess the impact on race equality of their policies and, within this, to identify whether there is a differential and adverse impact on particular racial groups. In this respect any proposals for the pilot will be 'equality proofed' to identify any potential adverse impact. The Bar Council and Law Society also have diversity responsibilities that will need to be built into any scheme of quality assurance.

The General Council of the Bar collects annual ethnicity and gender data.. The following analysis of self-employed and employed barristers is drawn from their December 2006 survey.

Self employed barristers:

Currently, there are 12,304 barristers in self-employed practice. Of these ethnicity data is processed for 10,572. The ethnic status of 1,462 (12.1%) is unknown.

Of the 10,572 barristers in self-employed practice for whom ethnicity status is known, 89.6% describe themselves as White. The next largest ethnic groups are Asian with 4.9%, Black with 2.9%, Mixed with 1%, Chinese with 0.2% and other at 1.3%.

Employed barristers:

There are 2,856 barristers in employed practice. The ethnic status of 649 (22.7%) is unknown. Of the 2,207 employed barristers for whom ethnicity data is recorded, 85% describe themselves as White. The next largest ethnic group is Asian with 6.1%, Black with 4.7%, Mixed with 2.3%, Chinese with 0.9% and other at 1.2%.

Queens Counsel

Currently there are 1,278 Queens Counsel in self-employed practice. The ethnic status of 63 QCs (5%) is unknown. Of the 1,215 QCs for whom ethnicity data is recorded, 96% identify themselves as White. The number of QCs who describe themselves as being from an ethnic minority group is low; Asian with 1.3%, Black with 0.9%, Mixed 0.5%, Chinese with 0.08% and other 0.8%.

The scheme applies to criminal defence advocates and will therefore apply to a greater number of self-employed barristers than employed. 10.3% of self-employed barristers are from minority ethnic groups. This figure compares to 2001 census data that shows that minority ethnic groups make up 11.6% of all economically active people.

There is a marked distinction at the Queens Counsel level where just under 4% of QCs are from minority ethnic groups.

Our initial assessment, based on the data above, is that barriers may exist for BME advocates to progress to higher levels in the profession generally. As the proposed quality assurance scheme is based on demonstration of an advocate's ability to carry out progressively higher levels of work we will work with BME organisations in the development and monitoring of the pilot to ensure that impacts, where identified, are eliminated.

The Working Group will aim, as far as is practicable, to recruit barristers to participate in the pilot that are representative of the ethnic profile of the sector. It will engage with equalities groups and professional bodies to ensure that representative participation is actively encouraged. We are aware of the need to ensure that the pilot scheme, and any final scheme, are able to operate objectively and consistently in a way that does not adversely impact any ethnic group.

Data collected during the pilot will be assessed for evidence of adverse impact to feed in to consultation on the final scheme.

DISABILITY EQUALITIES

The Disability Equality Duty came into force on 4th December 2006. The LSC has published a Disability Equality Scheme, which is available at www.legalservices.gov.uk. This sets out the actions that the LSC will be taking to promote disability equality for legal service providers and the clients they serve, and our staff.

When carrying out our functions, the MOJ and LSC must comply with the duties placed upon them by the Disability Discrimination Act 2005. This requires them to have due regard to the need to:

- Promote equality of opportunity between disabled people and other people
- Eliminate discrimination that is unlawful under the Disability Discrimination Act
- Eliminate harassment of disabled people that is related to their disabilities
- Promote positive attitudes towards disabled people
- Encourage participation by disabled people in public life and
- Take steps to take account of disabled people's disabilities, even where that involves treating disabled people more favourably than other people

From 4th December 2006, the MoJ and LSC are also under a duty to conduct disability equality impact assessments of their policies in relation to the public duty to promote disability equality and within this, to identify whether there is a differential and adverse impact on disabled people and other people.

Currently, there is no data available on the disability status of practising barristers. Until this data is collected it is not possible to assess the potential impact of the proposed quality assurance scheme on disabled advocates.

The MoJ and LSC will address this information gap for the further Impact Assessment and will work with professional bodies and disability organisations to source appropriate data and ensure the involvement of disabled people in the development, monitoring and evaluation of the pilot scheme.

GENDER EQUALITY

The Equality Act of 2006 places a statutory duty on all public authorities, when carrying out their functions, to have due regard to the need:

- To eliminate unlawful discrimination and harassment
- To promote equality of opportunity between men and women

This general duty will come into effect on 6th April 2007.

From 6th April 2007, the MoJ and LSC are also under a duty to to promote gender equality

Data available from the General Council of the Bar 2006 survey highlights that women are generally, under represented in self-employed practice and at Queens Counsel level.

- Of the 12,034 barristers in self employed practice, 70% are men and 30% women.
- Of the 2,856 employed barristers 54% are men and 46% women.
- Of the 1,278 QCs 91% are men and 9% are women.

These figures compare to the 2001 census data where women make up 45.4% of the economically active population.

In developing the detail of the pilot scheme, we will take care to ensure that requirements do not adversely impact on advocates who have recently been on a career break, have caring responsibilities or work part-time. . However, no data is currently collected on advocate working patterns and the proportion of men and women that fall into those groups.. The MoJ and LCS are dealing with gaps in the data for the further Impact Assessment.

RURAL PROOFING

We will take into account rural circumstances and needs (Rural White Paper, 2000). Rural proofing states that policy makers should systematically:

- Consider whether policy is likely to have a different impact in rural areas, because of particular rural circumstances or needs;
- Make a proper assessment of those impacts, if they are likely to be significant;
- Adjust the policy, where appropriate, with solutions to meet rural needs and circumstances.

Where appropriate, the LSC considers the rural impacts of its policies to identify whether there is a differential and adverse impact on rural areas.

General Council of the Bar data is only broken down at London and Province level. Of the 12,034 self-employed practising baristers, 7585 (63%) are based in London, 4429 (37%) in the provinces, 20 are based overseas.

There are 644 chambers of which 332 (51.5%) are London based, 312 (48.5%) are based in the provinces.

There is no data currently collected on the distribution of rural practitoners. Until this data is available it is not possible to ases the impact on rural advocates and chambers. We will collect information in our survey on the number and size of chambers serving rural communities for the further Impact Assessment and ensure the inclusion of rural practitioners in the pilot to assess any differentials on case types available for competence assessment and issues arising.

EVALUATING THE POTENTIAL IMPACT

The aim of the project is to produce a quality assurance scheme for publicly funded criminal advocates practicing at Crown Court level and above.

The scheme has to be robust and proportionate. Following analysis of the responses to consultation, detailed administrative and other routines can be designed. It is possible that different design options may be piloted in different regions around the country.

It is an advantage that the pilot will allow us to evaluate fully any impact, or potential impact, for gender, race, disability and age. In addition, we will need to fully understand the different practical issues and impact of such a scheme for chambers and firms of various sizes, and for sole practitioners.

During the pilot phase it will be necessary to collect statistical data on, for example, the number, gender, age and ethnicity of solicitors with higher rights of audience, and advocates, in the region(s) where the pilot arrangements are piloted. These issues will be considered in detail once the size, scope, and geographical issues have been agreed for the pilot scheme(s).

PILOT PARTICIPANTS

Steps to encourage participants for the pilot and in the pilot selection process will be taken to ensure that pilot participants allow for representative evaluation of equality issues. This should not only include statutory obligations but include data concerning individuals returning to work, part-time workers, advocates practicing in niche areas of law, new entrants, solicitor-advocates and advocates, whether self-employed or employed.

PRE-PILOT

Prior to the pilot in any area or region, a targeted questionnaire will be sent to all applicants requesting statistical information on gender, race, disability and age. Data from questionnaires may be used to inform the pilot participants' selection process, though consideration will also be given to the benefits of this data remaining confidential. All questionnaires will be filed for analysis when evaluating the pilot.

POST-PILOT EVALUATION

Following the pilot a detailed evaluation process will collect qualitative and quantitative data including a request for all participants to provide detailed feedback on the success or otherwise of the pilot scheme in which they took part. Questions will cover all key elements of the process from an individual perspective as well as more generally, including whether the advocate felt they had been graded appropriately.

There will also be specific questions relating to equality impact. It is intended to compare results to the original pre-pilot questionnaire to identify any trends or concerns.

Interviews with a sample of participants should also provide insight into any impact issues.

LEGAL AID IMPACT TEST

We are currently conducting the Legal Aid and Justice Test to evaluate any potential legal aid costs and any impact that proposals may have on the workload of the judiciary, tribunal service or courts.

The impact on the Legal Aid Fund should be one of improved efficiency, whilst ensuring quality services that should deliver improved value for money.

There are no anticipated Fund savings as a result of the scheme but analysis will be undertaken in relation to this issue in due course.

As part of the pilot exercise we will be assessing the cost of each proposal and its effect on the Legal Aid Fund.

We will also monitor the scheme to ensure that the cost of the final scheme is proportionate (in terms of overall benefits derived from being involved in an assessment process) and affordable.

COMPENSATORY SIMPLIFICATION

The Cabinet Office has published interim guidance on compensatory simplification, to be applied when producing impact assessments. The interim guidance requires government bodies to actively look for opportunities to simplify or remove existing requirements when they want to introduce new regulation, and to assess both the extent to which the simplification proposal(s) will offset the cost of the new regulatory measure and the impact of removing the existing provision.

The QAA scheme objectives are to be proportionate, not overly bureaucratic or administratively burdensome or costly. Where appropriate use will be made of existing processes such as Bar Mark, Quality Mark for the Bar, Specialist Quality Mark and Peer Review to deliver the scheme.

CUMULATIVE IMPACT

We have considered the issue of cumulative impact of proposals to quality assure advocacy alongside existing reforms and proposals concerned with amendments to fee schemes in a number of discreet areas of legal aid. At this stage it is our assessment that there is unlikely to be any negative cumulative impact on advocates as currently, this is the only proposed reform that relates directly to barristers. However, we are aware there could be a cumulative impact on solicitors, as the quality assurance scheme will apply equally to solicitors with Higher Rights of Audience. We do not currently have access to data on the number of solicitor advocates that will be affected by the scheme and the Working Group is sourcing data to identify how many solicitors with Higher Rights of Audience work in practices that are also affected by current reforms. We will remain alert to this issue - during the pilot and at the evaluation stage.

ENFORCEMENT, SANCTIONS AND MONITORING

We plan to monitor all decisions on the competence of advocates under the scheme, plus any subsequent appeal decisions. It is envisaged that the regulatory bodies will be responsible for monitoring this in an operational (day-to-day) setting, once implemented.

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Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	No
Small Firms Impact Test	No	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	No	No