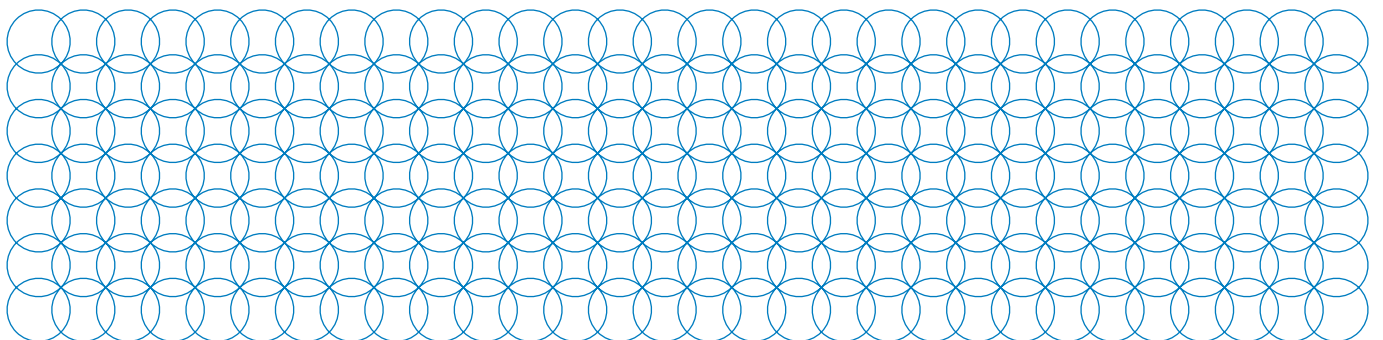




Creating a Quality Assurance Scheme for Publicly Funded Criminal Defence Advocates

Analysis of Consultation Responses

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Contents

1	Introduction	2
2	Background to the Consultation	3
3	Overview of Responses	5
	<ul style="list-style-type: none">•□ Proportionality of the scheme• Governance• Independent assessment• Prioritising assessments• The burden on advocates•□ Avoiding duplication and ensuring consistency with other schemes•□ Levels of work• Timetable to implementation•□ Running alternative pilot approaches	
4	Impact Assessment Statement	11
5	Next steps	13
	Annex A: Responses to Individual Questions	15
	Annex B: Overview of Responses to Equalities Supplementary Questions	25
	Annex C: List of Respondents	27

1. Introduction

- 1.1 This document provides analysis of responses to the consultation paper “Creating a Quality Assurance Scheme for Publicly Funded Criminal Defence Advocates”. That consultation paper set out the proposed objectives and framework for a pilot to test out the practicability of a quality assurance scheme for publicly funded criminal defence advocates practicing at Crown Court level and above. The consultation paper sought views on those specific proposals and was also used to encourage interested parties to contribute to development of the pilot arrangements.
- 1.2 This document provides:
 - A background to the consultation (in Section 2)
 - A summary of responses to the consultation paper in respect of pilot proposals in the main consultation document (in Section 3). A summary of findings in respect of the separate equalities questions is provided in Annex B
 - A statement on work to conduct an Impact Assessment (in Section 4)
 - Details of responses received to individual pilot proposals in the main consultation document (in Annex A)
- 1.3 Our initial comments identify the impacts that we anticipate responses will have on the project overall and the way in which we will consider these issues as we work to develop the pilot arrangements.
- 1.4 Our comments do not, however, provide details of proposed pilot arrangements. These will be developed through further work in all of the work streams identified in the Consultation Paper. That work will be underpinned by analysis of recently available survey data that will help us to understand the potential impacts of the pilot proposals on different groups of advocates.
- 1.5 We anticipate publishing detailed pilot proposals, including a timetable, in late Spring/early Summer 2008.
- 1.6 Further copies of this report are available from the Legal Services Commission (LSC) website.
- 1.7 This report should be read in conjunction with the consultation paper “Creating a Quality Assurance Scheme for Publicly Funded Criminal Defence Advocates” which can be found at: www.legalservices.gov.uk. Follow the link to >criminal defence service>consultations>closed>quality assurance scheme for advocates.

2. Background to the Consultation

- 2.1 The proposal to introduce a scheme of quality assurance for advocates was made by Lord Carter (Recommendation 5.3) following his review of legal aid procurement, and was published for consultation in a joint Department for Constitutional Affairs (now Ministry of Justice - MoJ)/LSC paper "*Legal Aid: a sustainable future*" in July 2006. In November 2006, the Department for Constitutional Affairs (DCA) and LSC published a further paper "*Legal Aid Reform: the Way Ahead*" that set out responses to consultation and subsequent plans for reform. The overwhelming majority of respondents endorsed quality as being at the heart of those reforms. The way ahead was to accept Lord Carter's recommendation 5.3 and the MoJ set up a Working Group to consider development of a quality assurance scheme for advocates.
- 2.2 The Working Group was chaired by Lord Justice Thomas and supported by Amanda Finlay, Director of Legal Aid Strategy Directorate at the Ministry of Justice. Representatives from the Bar Council, Bar Standards Board, Crown Prosecution Service, Institute of Advanced Legal Studies, Law Society, Legal Aid Practitioners Group (LAPG), Institute of Barristers Clerks, Legal Services Commission, Solicitors' Association of Higher Court Advocates (SAHCA) and Solicitors Regulation Authority are all members. The Working Group has also invited an individual Practitioner and members of the Judiciary to attend.
- 2.3 Working Group discussions focused on details such as competency frameworks and potential methods of assessment. The outputs from these discussions, and from those of a wider group of practitioners who attended 'walk through' sessions to draw out some the practical implications of the proposed options, were used as the basis for the most recent consultation document.
- 2.4 That document, "Creating a Quality Assurance Scheme for Publicly Funded Criminal Defence Advocates", was published jointly by the MoJ and LSC on 22 June 2007. It provided background on the original recommendation, on the consultation and decision to proceed with a pilot, and put forward proposals for the objectives that such a pilot might aim to meet as well as proposals for a framework in which it might aim to operate.
- 2.5 The consultation was published on both the MoJ and LSC websites and remained open, by agreement, beyond the original closing date of 17th September, to assist organisations that requested longer to respond. Details of the consultation were published in the August edition of Focus, the LSC newsletter.

- 2.6 We also specifically invited responses from:
- members of the Judiciary
 - Attorney Generals Office
 - The Bar Council (BC)
 - The Law Society (TLS)
 - Bar Standards Board (BSB)
 - Crown Prosecution Service (CPS)
 - Solicitors Regulation Authority (SRA)
 - Institute of Barristers' Clerks.

3. Overview of Responses

- 3.1 A total of 22 written responses to the consultation were received. The majority were detailed and provided both general comments on the principle of quality assurance as well as responding to some or all of the questions raised in the consultation document. Of these responses, four were from the representative and regulatory bodies, two were from prosecution agencies, eight were from professional organisations and sub-groups, three were from chambers/firms four were from individual practicing advocates, both barristers and solicitors with higher rights and one was from Cardiff Law School's Centre for Professional Legal Studies. See Annex C for a full list of respondents.
- 3.2 We are extremely grateful to all those who responded for the detailed, thoughtful and constructive comments, which will help us to consider the way forward. Some themes and issues were presented consistently and these are outlined below and at Annex A entitled 'Responses to individual questions'. However, responses to the majority of questions were not conclusive and in some areas, views and comments from respondents were positively contradictory.
- 3.3 Responses did not at this stage, provide a sound basis on which to make decisions on pilot detail, nor did they provide consistent alternative proposals. They did, however, provide for clear direction in some areas and indicate those needing particular further work.
- 3.4 Set out below is an overview of findings in the key areas together with comment on our proposed response. Predominantly this outlines how and where we intend to undertake further work within the work stream groups and wider project, before agreeing detail for the pilot.

Proportionality of the scheme

- 3.5 There was general agreement on the need for arrangements to be proportionate, practicable and not administratively burdensome. This issue was touched upon in many of the responses, with eight respondents specifically seeking assurances that any scheme would be proportionate (in terms of the cost and time it will take to administer) to the problem it was seeking to remedy. Although generally using the same terminology, comments about proportionality fell into two distinct groupings.

- 3.6 One group of responses focused predominantly on practical issues and the need to keep any scheme as simple as possible in view of the number of assessments that would be required. The Bar Council pointed out that any national scheme would need to cover somewhere in the region of 5,000 criminal advocates from all parts of the country, and that many of these individuals would be looking to the same judges and fellow-professionals to provide evidence for assessment. They, and others, suggested that lessons should be learned from those already making an assessment of lawyers, such as the Attorney General's lists, QC Appointments, and the Judicial Appointments Commission. Anecdotally it was suggested that each of these schemes had been more time-consuming and costly to set up and run than had been anticipated.
- 3.7 In developing the pilot, we will take full account both of the lessons learned from other schemes and the demands that those schemes already place on those being assessed and those making the assessments. We have already begun detailed discussions with scheme operators and have started to look at issues associated with gathering appropriate evidence, identifying commonality and the potential for passporting between schemes.
- 3.8 Other responses focused on an apparent lack of evidence about the scale of any current problem concerning 'poor' advocacy. Some respondents felt that the market would deal, as they said it always had, with poor advocates who simply would not be offered work, and that no other measure was required. Others questioned how a scheme could be assessed as being proportionate if the scale of the problem could not be evidenced.
- 3.9 The second issue is a critical one for the project in engaging effectively with advocates. In these terms we need to be clearer that the core issue is not, as consultation responses suggested, about identifying a minority of poor performers but is instead about achieving and assuring the best possible quality within the marketplace. The MoJ and LSC are both clear that quality is a key issue for the future and that the legal profession must follow the lead of the medical profession in recognising that emerging public attitudes make objective quality assurance an absolute requirement to safeguarding professional good reputation and protecting the public, taxpayers and other stakeholders.
- 3.10 We will be working with the regulatory and representative bodies for both barristers and solicitor advocates, to ensure that we address this issue together. For barrister advocates, we will be paying particular attention to findings in the recent Ipsos MORI survey conducted for the BSB on Perceptions of Barristers¹. This provides valuable insight into views of the profession and will help us to work with the BSB to deliver a scheme that can address many of the issues raised.

¹ Perceptions of barristers: Research study conducted for the Bar Standards Board by Ipsos MORI (December 2006 – August 2007), November 2007.

Governance

- 3.11 An issue raised by half of those who responded to this question concerned the cost to advocates in meeting requirements that they considered were predominantly or solely for the benefit of the LSC.
- 3.12 Our view is that as the main procurer of criminal defence services, it is appropriate for us (on behalf of clients, taxpayers and other CJS stakeholders) to set out minimum requirements for the services we wish to purchase. We also consider, however, that responsibility for assuring the quality of the services being marketed should rightly lie with the profession. An aim of this project must therefore be to achieve a scheme that meets both our procurement requirements and, if possible, the much wider needs of the profession as well.
- 3.13 To achieve this we have reviewed the project structure. Our revised approach is set out under Next Steps in Section 5 and aims to maximise the potential for delivery of an effective and collaborative scheme in which the profession is involved in detailed development but has the opportunity to respond independently, and where synergy with other initiatives (LSC, BSB, SRA and others) is paramount. We will also work closely with the representational and regulatory bodies to try and establish and deliver a coherent communications strategy. This will have, as its core objectives, the delivery of a fair scheme that has been developed in collaboration with the profession and of quality assurance that is as essential for the profession as it is for the LSC.

Independent assessment

- 3.14 Views on this issue tended to emerge in response to a number of questions (not just Questions 11 and 12). This made overall assessment of the position difficult, though there was support for independence from the majority including the experts in competency assessment. Many respondents accepted that this was the only way to achieve a credible system that could provide necessary public assurance. Although some support was shown for chambers/firms involvement in the process, no clear view was set out about how any such scheme could also deliver the necessary credibility and robustness.
- 3.15 The majority of those who supported in-house assessment (within chambers and firms) suggested that this was driven by an assumption that it would cost less. The argument about the market taking care of the very worst advocates was also raised in this context, though we note from the Ipsos MORI survey² that even the majority of barristers (57% of barristers surveyed) do not in fact consider that the current system is effective at dealing with sub-standard barristers.
- 3.16 On the basis of responses, we will be working with practitioners to explore how best to achieve the independent assessment that we consider to be essential. Within the relevant work stream we will however, continue to explore how chambers and firms could be involved in assessment of newly qualified advocates and in supporting assessment for all other advocates. We will also explore alternative mechanisms, such as third party assessment.

² See footnote 1 for reference.

Prioritising assessments

- 3.17 As noted above, the scale of the task in assessing a significant number of individuals was a common issue raised by respondents. In particular, there is not a current system to identify which advocates should be targeted for assessment first. Most respondents favoured a risk-based approach in which assessments would start in areas prioritised for Best Value Tendering (BVT) roll-out, and targeting individuals who had not been assessed under any relevant scheme in recent years.

The burden on advocates

- 3.18 As well as the administrative burden of the scheme, another related issue raised in some detail by four respondents, was the burden (and cost) it might place on the advocates applying. There were specific comments about the need to keep the application forms and process simple, clear and easy to understand. One respondent also highlighted the impact that an over-complex process might have in terms of deterring advocates from undertaking publicly funded work.
- 3.19 The pilot will aim to identify simple and proportionate methods, learning lessons from other schemes.

Avoiding duplication and ensuring consistency with other schemes

- 3.20 Linked to other issues already raised, an identifiable trend in responses was the desire to make maximum use of what evidence is already available, to avoid unnecessary duplication and inconsistency. This applies in two ways, first in considering the schemes and processes run by other organisations that already contain an element of quality assessment, and secondly in making use of assessment evidence already available for individual advocates from other schemes.
- 3.21 There were many comments about initiatives that already exist to assess quality and standards of advocates, and about the need to ensure that any new scheme should be compatible with, and complementary to, those existing requirements. Recognising levels of competence already assessed as having been achieved by both barrister and solicitor advocates was said to be a key issue.

- 3.22 A number of respondents also highlighted the need to ensure consistency and compatibility with the professions' Codes of Conduct, and raised the issue of potential over-regulation if this was not properly addressed. These comments and those referring to other schemes can be found at Annex A and were raised by the representative bodies and individual advocates alike.
- 3.23 With regard to using existing evidence, the only consultation question to address this specifically was question 14 on using complaints records to trigger assessment. Nevertheless, many respondents commented generally on the need to fully understand and use available sources of evidence including, for example relevant feedback (about the interface between instructing solicitors and advocates) from the existing Peer Review process.
- 3.24 These comments support the work we are currently undertaking to build a comprehensive picture of competence assessment for advocates to identify how best to make use of that which is already available. In determining how best to fill in any gaps, we are also taking steps to understand the wider context and parallel initiatives that might offer opportunities or challenge our thinking. The LSC has already provided feedback to the Bar Standard Board's first consultation on a revised Code of Conduct.

Levels of work

- 3.25 The four levels proposed for differentiating criminal work in the Crown Court provoked a significant response. Although detailed comments were varied, there was general concern about definitions used and about rigidity of boundaries around those classifications.
- 3.26 Experienced advocates were critical of a strictly case-type classification approach, identifying other factors that were likely to influence complexity. Similarly they raised concerns about a comprehensive framework in which the mechanism for usual career progression was unclear. In commenting on levels, a number of responses raised issues about QCs or directly proposed that QCs should be either passported into the highest level or excluded from the pilot and/or any operational scheme.
- 3.27 In the absence of consensus about how to deal with classification of cases and setting of levels, we propose to review definitions agreed and adopted for VHCC cases, to establish whether this approach (considering numbers of trial days, witnesses and other factors likely to denote complexity) may provide a more appropriate route. We will also consider, within the overall development of the competency framework, how to address ongoing advocate development and the likelihood of advocates doing work across the classification boundaries.

- 3.28 The specific issue of QCs provides a different challenge. While we will work with QC Appointments to determine the maximum opportunity for using assessment material already available, after preliminary investigation we see some issues around wholesale passporting of QCs into the QAA scheme. One factor is that the appointment of a QC is not based on or tied to the quality in a particular area of work, while QAA has always proposed to identify quality assurance of advocacy skills, within specialist areas of law. Another factor is the lack of periodic re-assessment for QCs. Ongoing periodic assessment is a fundamental element of robust quality assurance schemes and is a major consideration for this scheme. Thirdly, only QCs appointed most recently have been subject to accreditation by a system that satisfies the objectives of the scheme required here. As we have observed above, we will be looking at scope for sharing evidence and avoiding duplication between the QAA and other schemes of competence assessment and it will be particularly important to do so at this level.

Timetable to implementation

- 3.29 A number of respondents asked for sufficient time to be built into the programme to ensure proper consideration of consultation responses and to conduct thorough preparatory research and evaluation. This message applied not only to the pilot, but was also raised in respect of proposals to be made for a final operational scheme.
- 3.30 Our approach to development and sign-off of proposals has been designed to encourage thorough consideration of each and every process, including consideration of differential impact. The timetable is required to deliver an operational scheme to support advocates entering into Best Value Tendering (BVT). However, within that context, we are working hard to avoid a schedule that could in any way jeopardise thorough pilot development, testing and evaluation. Pilot proposals and detailed arrangements will not, therefore, be available for publication until proper consideration has been given to the issues raised in consultation and the consequences for further development.

Running alternative pilot approaches

- 3.31 Although consultation did not directly request responses to the proposal to run a number of alternative approaches within the pilot, general comments suggest that this should be reviewed and that different approaches should be kept to a minimum. In particular, individual advocates expressed a general reluctance to take part in a pilot that would provide little or no benefit to them or that would require steps that would be unlikely to be implemented in any future operational scheme.
- 3.32 Our aim is to test out in the pilot approaches that are likely to be implemented, with whatever variation is necessary kept to a minimum. This would aid focused evaluation and would allow us to offer guarantees to participants, where practicable, about assessments made in the pilot once the pilot is concluded.

4 Impact Assessment Statement

- 4.1 An initial Impact Assessment accompanied the consultation paper together with a separate consultation paper seeking views on specific equality and diversity issues. Responses to those questions are summarised at Annex B below.
- 4.2 The initial Impact Assessment drew on all data currently available on practising barristers, which was very limited. This comprised data from the Bar Council annual equalities survey of barristers that provided global data on the gender and ethnicity of practising barristers as at December 2006.
- 4.3 The initial Impact Assessment identified areas of potential differential impact that would require further analysis prior to the implementation of the pilot. However, this analysis could not be conducted effectively on the basis of the limited data available. We therefore agreed to undertake a comprehensive data collection exercise to gather the information necessary to make sure that proposals were assessed robustly. Detailed information on the make-up of the profession would be required to ensure that the proposed scheme did not unfairly disadvantage any group because of, for example, location, full-time or part-time working, in chambers or as sole practitioners, career breaks, and regardless of gender, age, ethnicity or any disability.
- 4.4 The LSC has worked jointly with the Bar Council to gather this vital data. A survey by questionnaire was sent to all practising barristers on 22nd October 2007 accompanied by a letter from the Chairman of the Bar Council, Geoffrey Vos QC. The survey was conducted anonymously, ensuring that no individual could be identified.
- 4.5 This survey gathers comprehensive data on the profession including data on personal demographics, location, working patterns and career breaks, categories and volumes of work and proportions of publicly funded work undertaken. Similar data on solicitor advocates (i.e. solicitors with rights of audience in the higher courts) has also been made available from the Law Society.
- 4.6 The survey closed on 23rd November with a good response rate of almost 35% of all practicing barristers completing the survey. The data is owned by the Bar Council, to which all requests for further use or information should be addressed.
- 4.7 Data analysis for the QAA Scheme will be conducted by the Legal Services Research Centre (LSRC) at the Legal Services Commission and will be available to support the QAA Impact Assessment from late December 2007. The data will also be used by the LSC to inform further Impact Assessments in future legal aid reform proposals.

- 4.8 This analysis will form the basis of the Impact Assessment for the QAA pilot and will inform the design and implementation of the pilot scheme. It will enable the project team to ensure a representative sample of the profession is targeted for participation in the pilot as well as a strong sample of specific types of barristers such as part time advocates and diverse groups, so that we can effectively monitor their experience against others. It will inform outcome monitoring and assessment of any differential impacts during the course of the pilot and ensure any necessary adjustments are made in accordance with those findings in the proposals for a final scheme. A further Impact Assessment will be conducted on any resulting, final scheme.

5 Next Steps

- 5.1 In a few key areas – such as proportionality, passporting and the inclusion of in-court advocacy skills within assessment – responses to consultation provided a clear indication of agreement to the proposals as set out in the consultation document. Elsewhere, responses highlighted the need for further research and development before detailed pilot arrangements can be confirmed.
- 5.2 In some areas, such as competency framework development, and means of assessment it is now clear that specialist (academic and vocational) skills are required to assist in the research and development process. It is also clear that, without exception, all areas will also require the detailed input of representative advocates.
- 5.3 Taking the lead from consultation responses, we will therefore begin work in the previously identified work-stream groups. Each of these will be targeted on key areas for pilot development (e.g. competence, evidence and assessment, equality and diversity and pilot arrangements), for each, discussion will be led by the consultation responses, and each group will have membership to meet both technical and representational requirements.
- 5.4 To maximise effective development, governance of the project will be further clarified. The pilot project (established in LSC and MoJ) will report to an LSC internal Project Board that will ensure adherence to appropriate project standards; that will ensure synergy with other legal aid reform programmes; and that will deliver detail on the LSC's specific quality requirements (as procurer) for advocacy services provided to publicly funded clients.
- 5.5 A Reference Group will be established to replace the previous Working Group. Although the Working Group was productive in delivering the consultation proposals to that stage, the process of publishing those proposals and responses received to consultation showed clear concern about a conflict of interest for members. A Reference Group, comprising all bodies represented on the Working Group, will have significantly more freedom to respond independently, which will be helpful.
- 5.6 Having given very careful consideration to the responses received, we consider that our key objectives of working collaboratively and in partnership with the advocacy profession will be enhanced further by these arrangements. There will be a clear delineation of responsibility for those on the Reference Group, and yet we will retain extensive input (of the advocacy profession and its representatives) to the detailed development within the work-stream groups.

- 5.7 Early research has been underway since the first consultation responses began to arrive. With plans for development within the Competence and Evidence work-stream groups now also underway, we are confident that detailed pilot proposals will be available by before Summer 2008. Once we have also established what assessment will involve, we will be in a position to identify potential pilot participants (by region or type) and pilot duration. We would anticipate giving between two and three months notice of pilot arrangements, before any pilot start-date.

Annex A

Responses to Individual Questions

The questions were drafted in such a way as to encourage responses to particular elements of the proposed scheme. Because of this there was considerable opportunity for overlap, with many questions offering an opening to raise a range of subjects. A particularly good example was reference to existing schemes which respondents raised under a wide range of questions.

Question 1:

Are the objectives comprehensive, appropriate and reasonable?

If you consider that they are not, please tell us what you would amend, add or replace and the reasons for this.

22 responses were received but not all addressed this question directly or at all.

Half the respondents (11) agreed that the objectives, overall, were comprehensive, appropriate and reasonable (while also suggesting some amendments).

Some respondents thought that objectives could be distilled into something simpler and others thought that it was important that pursuing these comprehensive objectives should not be allowed to result in an over-burdensome or expensive scheme.

Others did not raise any concerns about the objectives apart from two respondents who thought that there was no need for a scheme of this type at all and one other who thought it would be better to focus on firms/chambers rather than individual advocates.

Others commented that any scheme must provide value for public money, be proportionate, not too costly or burdensome for the professions and that we must ensure any monitoring system is applied equally to those employed (in firms or government departments) and self-employed (within chambers or sole practitioners). It was noted that one respondent was concerned about the wider programme application (beyond criminal defence) and the risk of less focused application to the current pilot.

Question 2:

Do you consider that the competencies for the pilot for the publicly funded criminal defence advocates quality assurance scheme should be as set out in Annex 1?

If not, please set out what additional or different criteria you would suggest and why, or your preferred alternative approach and the basis of it.

Of the 22 responses received the vast majority of respondents (19) supported, in principle, a competency framework system and were, subject to caveats, happy with this approach.

Several respondents (six) had some reservations about drafting and/or how the framework would be applied. For example, one was concerned about how appropriate it was to use Queens Counsel competencies for this scheme (which includes newly qualified advocates) and others suggested that the level of detail was too elaborate, complex, disproportionate and should be simplified: some of the behaviours were considered to be subjective and difficult to measure.

Question 3:

Do you agree with the four levels into which it is suggested in Annex 2 that criminal work at Crown Court level and above should be broken down?

If not, please suggest your preferred alternative(s) and explain how this would work.

Of the 22 responses, 18 addressed this question: nine broadly agreed with the four levels as set out in the consultation document (some with caveats). Almost everyone raised issues, comments or suggestions and this question, by far, provoked the most comments - including suggestions to have a reduced number of levels, observations that it would be very difficult to distinguish between levels as currently drafted, re-definition of each level and difficulties caused by passporting from other schemes in terms of fairness and confidence. Other general comments were received covering a range of issues (e.g. that the system would be over-complicated, passporting/ handling of QCs and newly qualified advocates etc.)

Question 4:

Do you consider that demonstrating the behaviours and skills set out in Annex 3 in relation to each competency will sufficiently demonstrate competency at each level (including by reference to both performance in court and the other elements of the competencies)?

If not, please suggest how you would amend the behaviours and skills and the reasons for this.

Of the 22 responses received 18 addressed this question: seven agreed that the descriptors were suitable as drafted. Others thought identification of behaviours using the grid was too rigid and that it would not be possible to produce a watertight list of skills required at different levels of case – and that the grid would only assist in demonstrating competency generally – not the level. Several respondents thought that the behaviours should be simplified to ensure consistency. Other general concerns were raised about potential subjectivity of assessors when applying definitions of behaviours. There were also a number of drafting suggestions concerning the behaviours at various levels to change/amend/remove/add certain behaviours.

Question 5:

Do you think that, overall, the evidence linked to the competency framework and examples as set out in the Annexes will enable an assessment to be undertaken of whether an advocate is competent for the complexity of the case?

If not, please suggest your preferred alternative for getting the appropriate level of advocate doing the appropriate level of work.

Of the 22 responses 18 addressed this question: only five indicated a clear, positive response to this question. There were comments (similar to answers to previous questions) that the system was overly complicated and elaborate and should be simplified. This question appears to have been interpreted in one of two ways as follows: (1) Once an advocate is assessed at a particular level that then could be used to determine whether they could undertake a particular case or (2) As part of the assessment process by looking at all the evidence and linking it to the competency framework could an assessor say that the advocate can undertake a particular (level of) case. Others thought that there was a system already in place, i.e. the instructing solicitor, judge and Codes of Conduct and that it would be easier if a simplified competence framework were used.

Question 6:

Annex 3 gives examples of "good" and "poor" behaviours against competencies. Would it be beneficial to add examples of "excellent" behaviour to identify those advocates capable of progressing to the level above?

Please support your answer with reasons.

Of the 22 responses 18 addressed this question: 10 were clearly opposed to the additional 'excellent' rating, while five were strongly in favour (the other three were unclear).

Many did not think "excellent" or any higher standard should be added and a number of respondents thought the system were already too complicated and that this additional category would only make matters worse. Other suggestions were also made, for example to include five levels as in peer review.

Question 7:

How do you think that the levels of advocacy should be applied when there is a certificate in force for more than one advocate?

Please support your answer with reasons.

Of the 22 responses 16 addressed this question. Seven thought that the lead advocate should be at a level appropriate to the case. Comments varied quite widely including: that the junior advocate should be no more than one level below the lead; that levels should not be applied at all when there is more than one advocate owing to factors which would be different in every case (e.g. type/complexity of case, number of juniors, leader instructed at different stages) and; that both advocates should be at same level and that any scheme should not be too rigid. Concern was noted that if the scheme rigidly required juniors to be only one level below, this would exclude new advocates from acting as junior briefs.

Question 8:

Do you think that specialist training or assessment for particular types of work (such as juvenile, serious sex, murder or VHCC work) should be required in addition to the appropriate level of competence?

Please support your answer with reasons.

Of the 22 responses 17 addressed this question. 10 were clear that no additional/specialist assessment should be required for work in particular areas under this scheme. Only three thought that specialist training should be required on skills and knowledge for specific types of criminal work. The other four respondents thought this issue could be covered by continuous professional development activities or should be considered as a requirement in the future.

Question 9:

How much and what kind of evidence do you believe is required to enable an accurate assessment to be made of an advocate's competence by reference to the competencies considered above?

Please indicate the number and type of sources of evidence and the span of time the evidence covers e.g. 12 months or number of cases. Please support your answer with reasons.

Of the 22 responses to consultation 20 addressed this question. 11 commented on the need for observations of advocacy including suggestions as to whom could provide this evidence (i.e. judge, jury, fellow advocate or outdoor/solicitor's clerk/assessor - as for Criminal Litigation Accreditation Scheme (CLAS)). Comments varied widely including; a requirement for no 'evidence' for Levels 1 & 2, application form plus two references only for Levels 3 & 4; that evidence should be kept to a minimum (in light of cost and time for all concerned) with, say, three independent references or the advocate showing some evidence of at least six months work at a particular grade; that Levels 3 & 4 need at least two judicial assessments, Level 2 should have two assessments and none for Level 1.

There was a range of caveats concerning issues of potential discrimination including the need to consider time limits on evidence/numbers of cases. It was also noted that young barristers might lack sufficient standing with any one judge, making obtaining a reference difficult.

The procedure for gathering evidence prompted comments including: whether peer review of advocate's preparation could be used; that Judges should be required to assess counsel after each trial/hearing and should play a pivotal role in gathering evidence as they are usually best placed and would be cost neutral; that this posed particular difficulties for the competencies of diversity and integrity as it was not always appropriate to hand lay client's questionnaires; and about the use of SQM records on instructing solicitors, about peer review and about judge's reports which it was said could be assessed by a team of assessors whose work could be monitored by adjudicators.

Question 10:

Should all firms, which have successfully passed their peer review, submit to the relevant advocate or chambers, evidence of the performance of the advocate they have instructed (in order to feed that into the evidence gathering process outlined earlier in this consultation paper)?

Should this be an automatic process at a certain frequency, or on request?

Please support your answer with reasons.

Of the 22 responses 19 addressed this question. 15 agreed that evidence from instructing solicitors should be part of the process while four did not agree. Eight thought that this should be in response to a request from the advocate only.

Other comments included that: Where observation of the trial process is required this could be used as evidence (five); There is a need to consider the additional burden this would place on firms (three); Where observation of the trial process is not required – extent and relevance would be limited (two); It is likely that only junior fee earner's will observe advocacy (two).

Question 11:

Do you have any observations on the first proposal for the assessment of evidence against the competencies as above? What measures could be taken to ensure that the assessment process is robust, credible and transparent? What concerns and problems could you foresee within this option?

Please support your answer with reasons.

Of the 22 responses received 17 addressed this question with overall comments very mixed. Six respondents suggested that no levels should be assessed using an in-house approach while the same number thought that panel assessment should be used for all levels. A similar number again favoured a mixed approach with in-house assessment for Levels 1 & 2, and panel assessment for Levels 3 & 4. Specific comments in favour of panel assessment suggested that this option provided the greatest potential for consistency and credibility. Others raised concerns about practicalities, cost and objectivity. Some commented that advocates could not reasonably be expected to sit on panels outside their home regions while others commented that this option may be too much like the Regional Committee of the Duty Solicitor Scheme (which had issues of consistency and independence) and which has now been replaced by CLAS. It was suggested that any prejudice resulting from knowledge or local connections could be minimised by size of pool from which the panel was drawn and by robust appeal, though a number of respondents considered that even with reasonable safeguards, a panel assessment would still be likely to attract judicial challenge. The need for experienced assessors was specifically raised by two of the respondents.

Question 12:

Do you have any observations on the second proposal for the assessment of evidence against the competencies as above? How do you think that quality-assured chambers/firms could manage an independent, credible, robust and consistent assessment of their own advocates? Do you think that this should be limited to particular levels, say, Level 1 and Level 2? What concerns and problems could you foresee within this option?

Please support your answer with reasons.

Of the 22 responses 16 addressed this question. As with question 11 above, this question prompted a wide range of comments. Five respondents preferred a mixed option with Levels 1 & 2 being assessed in-chambers and Levels 3 & 4 via panel assessment. The same number considered that all levels could be assessed in-house, while six respondents said that no levels should be assessed in-house. Respondents who favoured in-house assessment suggested that their position was driven either by cost (which they assumed would be less than for panel assessment) or that it was based on their confidence in the ability of some larger sets/firms to carry out impartial assessment following thorough audit and accreditation to do so. However, concern that this confidence could not be applied consistently to all sets and firms led at least one respondent to conclude that this should not be the favoured option. Others also mentioned concern about how this might operate in small sets/firms and on the need for consistency checks through periodic audits, checks by the panel and/or other procedures. Those who considered that this approach should not be used at all suggested that it lacked credibility, independence and robustness and that it would not be seen by the public and others as transparent. Barristers clerks noted that although they held a view on their advocates' performance, they could not be part of the assessment due to conflict of interest and because of their lack of direct expertise to judge legal aspects of work and advocacy in court.

Question 13:

How frequently should advocates be reassessed? Is three years a reasonable period?

Please support your answer with reasons.

Of the 22 responses 17 addressed this issue. A range of views were expressed including that advocates should be allowed to apply for re-evaluation sooner (than three years); that five years in line with CPSS guidance was adequate (using automatic reassessment as a safety net if no application by advocate); that four plus years was more appropriate (due to expense and time to get through the process); three years was reasonable (two) and that three years was too long a time gap. Others said it would depend on level and also whether they were exceptionally good/bad (i.e. Levels 1 & 2 yearly, Levels 3 & 4 every three years and exceptionally as often as necessary).

Question 14:

Should a certain number of complaints determined against the advocate trigger reassessment automatically? Should a certain number of poor feedback forms trigger reassessment automatically? How many such complaints in what period would be reasonable?

Please support your answer with reason.

22 responses were received and 17 addressed this issue. Comments varied including agreement that complaints should be a factor to consider (16): Nature of complaint may be more important than number; Where the complaint results in an adverse adjudication by professional body then it should trigger consideration for re-assessment; Should apply where a complaint is upheld which relates to the advocate's preparation and delivery of the case. It was noted that lay clients have other avenues of complaint and that complaints are often ill founded. Some respondents also suggested that advocates may be deterred from undertaking the defence of clients who were "difficult" if a set number of complaints automatically triggered re-assessment.

Question 15:

Should all organisations that have one or more advocates associated with them, be required to have a quality management system, independently audited?

Please support your answer with reasons.

Of the 22 responses 15 addressed this issue. Comments varied including: Disagreement on the need to put more systems in place; Agreement there should be systems; Consideration of the requirements of the professional regulators, BSB and SRA (latter has rule 5 of Code of Conduct July 2007); Consideration as to the extent to which the individual advocate was being monitored /assessed – need to avoid over-burdening (three). Respondents also suggested that whilst this would support advocates in ensuring provision of quality services for their clients, it was not directly relevant to an advocate's competence.

Question 16:

Do you agree with the proposed role, membership and appointment arrangements for a National Panel?

Please support your answers with reasons.

Of the 22 responses 17 addressed this issue. Comments centred around: Agreement with the National Panel proposal (13); Disagreement with the National Panel proposal (two); Consideration of equality issues when appointing the panel (using other representative groups Asian or black groups, Women's Solicitors' Group or any disability group); That members would need the technical background to assess defence advocates; That it was not necessary to include a lay person (that they would make the process more costly as discussions would need more explanation); That it could include others responsible for instructing counsel (suggestions CPS, GLS, Whitehall Prosecutors Group, AG); That it should be made up of one judge, one barrister and two solicitors; That it should consist of solicitors and barristers only (it would not justify judges and there is a lack of universal respect for representative bodies) ; and Both that there was no need to include Institute of Barristers' Clerks and that it should include a senior clerk/practice manager from a set of chambers.

Comments were also received that any sort of regional panels would militate against the aim of consistency and be cumbersome while other comments supported a National Panel that would ensure common standards for both barrister and solicitor advocates. A number of respondents, also identified the aim to recruit those with experience of assessing.

Question 17:

Do you think that the role of the National Panel in considering appeals is important in ensuring consistency?

Do you think that the appeals process outlined above would be fair and timely?

If you consider that it is not, please tell us your preferred alternative for each level and the reasons for this.

Of the 22 responses 17 addressed these issues. Comments included: Agree that it would be appropriate and fair to have an appeals process and ensure consistency (16); Cannot say whether it would be timely in practice (three); Need to consider time-scale of process because of effect on the advocate's livelihood; Where advocate appeals – they should have right to appear; Not agree (but did not propose an alternative); Format will depend on the scheme implemented; Where an advocate appeals will the grading body take part in the appeal process?; and Appeals should be decided blind.

It was also suggested that any process could have a large workload.– One suggestion for dealing with this was to establish a separate tribunal or circuit tribunals to deal with appeals, while another respondent suggested that existing regulatory bodies could deal with the bulk of issues referring only points of principle/policy to the National Panel. One respondent noted that the appeals process would need to allow for advocates requesting an extension of the time limit for appeals in certain circumstances, while another proposed charging a substantial fee (refundable if the appeal was upheld) to discourage ill-founded appeals.

Question 18:

Do you have any comments on the proposed governance arrangements?

Of the 22 responses 12 addressed this issue. Comments focussed on funding as a major issue – LSC/government should fund if the scheme is designed only for publicly funded work (i.e. it is for the benefit of a sole purchaser) (six).

Some responses also raised concern if the pilot was to be evaluated by LSC and MoJ only while the proposal was for the final scheme to be owned by the professions (proposing independent evaluation and transparency of findings with the current Working Group). In this context they raised the need for an impact study to analyse the direct and indirect costs of the scheme and to share these openly with the regulatory bodies.

Annex B

Overview of Responses to Equalities Supplementary Questions

Introduction

B1.1 The Bar Council, the Law Society and the Crown Prosecution Service responded to the supplementary equalities questions. In responding to the main consultation two other organisations provided comments that were pertinent to some or all of the equalities issues raised in the supplementary questionnaire. All five sets of responses are represented in this overview. Detail of individual responses is not provided to reduce repetition; responses tended to be generic for all equality types or were repeated for each target group. We are very grateful to those organisations for their considered and comprehensive comments.

Key findings

- B2.1 All responses supported the need to collect appropriate data and made recommendations as to the type of data that should be included in the survey. Respondents highlighted the need to ensure that diversity monitoring is carried out throughout the pilot and that grades awarded in the pilot are evaluated to ensure consistency of approach between diverse groups. The need to ensure that assessors are representative was also raised.
- B2.2 The Bar Council stressed the need to 'actively' engage with ethnic minority groups and made constructive recommendations as to the main relevant organisations and sub-committees within the Bar. The Bar Council highlighted the need to actively encourage BME participation in the pilot to support their campaign to develop confidence among BME lawyers that a diverse profession is high on the agenda.
- B2.3 Respondents highlighted that the lack of physical accessibility of many courts may restrict the number of courts in which advocates with a physical disability may practise and hence impact on their access to quality work. Also, some disabled barristers may need time out of practice to manage their disability. The scheme therefore needs to be aware of these issues and make reasonable adjustments to enable disabled barristers to demonstrate how they meet the competencies. The Bar Council recommended working with their disability sub-committee and actively engaging disabled advocates in the pilot.

- B2.4 Respondents suggested that while women appear to be under-represented in self-employed practice, in general there is evidence that they are over-represented in certain types of criminal defence work, in particular those relating to sexual offences and children, and under-represented in others such as fraud. While this does not appear to present a disadvantage to women the pilot must be monitored and should an uneven distribution between the levels be shown an investigation of the reasons should be conducted. A greater number of women tend to adopt alternative working patterns, which may impact on their ability to gain experience of more lengthy or complex cases. This should be considered in the pilot.
- B2.5 Generally responses suggested that the scheme should not have any differential impact by reason of age. It was noted that the Law Society has issued guidance to firms of solicitors that suggests firms should no longer ask for barristers by year of call as this could transgress new age discrimination regulations. Some responses suggested that as experience is gained over time the scheme could differentially impact on young barristers; elsewhere it was suggested that changes in practice over time could impact negatively on older people's ability to meet the competencies.
- B2.6 The issue of rural proofing was considered by two respondents, both of which recommended flexibility in the process for demonstrating competence, given that practitioners in rural areas would have a smaller number of available court centres in which to work. This could prevent an advocate who practises away from city centres from having sufficient access to cases that will enable progression to the next level. It could also prevent such practitioners having sufficient access to work to be economically viable which in turn could impact on the supply of advocates in those areas.
- B2.7 The Bar Council commented that BME practitioners are more likely to practise in small chambers and therefore could be disproportionately impacted upon. Small chambers were said to be more likely to be adversely affected by an administratively cumbersome scheme.

Conclusions

- B3.1 The comments received support and help develop the work we already have underway with the Bar Council and other representative and regulatory bodies. The LSC has completed the data survey and will use the analysis to drill down further on the issues raised. We will actively engage diversity groups and sub-committees in the design and implementation of the pilot and are establishing a specific equalities and diversity work stream to equality proof all proposals for the pilot.

Appendix C - List of Respondents

Bar Council (The General Council of the Bar)

Bar Council (Professional Practice Committee)

Bar Council (Training for the Bar Committee)

Bar Standards Board

Bar Union

Bhatia Best Solicitors

Cardiff Law School's Centre for Professional Legal Studies

Richard Craven (barrister)

Criminal Bar Association

Crown Prosecution Service

Irene Hogarth (solicitor sole practitioner and higher rights advocate)

Digby Johnson (solicitor partner of Johnson Partnership and higher rights advocate)

The Law Society

Legal Aid Practitioners Group

Lincoln's Inn Chambers

Lesley Manley (barrister)

Matrix Chambers

Revenue and Customs Prosecution Office

Solicitors Association of Higher Court Advocates

Solicitors Regulation Authority

Young Legal Aid Lawyers

Young Barristers Committee

Legal Services Commission
85 Gray's Inn Road
London WC1X 8TX

www.legalservices.gov.uk
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