

## Joint Advocacy Group



QUALITY ASSURANCE SCHEME FOR ADVOCATES

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

July 2012

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## **Part 1: Background**

### **Introduction**

- 1.1 This is the fourth and final consultation on the development of the Quality Assurance Scheme for Advocates ('QASA' or 'the Scheme').
- 1.2 The Scheme has been developed by the three main regulators of advocacy – ILEX Professional Standards (IPS), the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB) – working together through the Joint Advocacy Group (JAG), which was established in October 2009. JAG comprises executive representatives from each of the three regulators. Prior to the regulators taking on the responsibility of the Scheme, there had been earlier work on quality assuring advocates undertaken by the Legal Services Commission.
- 1.3 Each of the regulators is committed to the implementation of a single quality assurance scheme, which applies equally to all advocates and requires them to be assessed against a common set of standards.
- 1.4 Much of the detail of the Scheme is now settled. The purpose of this consultation is to set out the revisions made to the Scheme following the previous consultation (closed in November 2011) and as a result of further discussions with all interested parties, including the judiciary, the Crown Prosecution Service, the Criminal Bar Association and the Solicitors Association for Higher Court Advocates and to seek views on the practicalities of the Scheme.
- 1.5 Further, the paper sets out specific elements of the Scheme upon which comments are sought and outlines proposals for reviewing the Scheme after two years of its operation.

### **The regulatory need for quality assurance**

- 1.6 Advocacy is a vital part of an effective justice system. Members of the public involved in litigation rely upon advocacy for the proper presentation of their case. Those who are involved in decision making whether as Judge or jury rely on advocacy for the proper administration of justice. For defendants reliant on effective advocacy in the criminal courts the stakes are high: loss of liberty may be an outcome.
- 1.7 A key element of professional responsibility is the maintenance of professional standards. The changing legal landscape coupled with competition and commercial imperatives are putting pressure on the provision of good quality advocacy. The economic climate, both generally and in terms of legal aid, has created a worry that advocates may accept instructions outside of their competence. The Judiciary has also raised concerns about advocacy performance.
- 1.8 QASA has been developed to respond to these issues. It will ensure that all advocates in criminal courts undergo a process of accreditation so that they only handle cases within their competence and that they are subject to assessment and monitoring of their performance against a common set of agreed standards.
- 1.9 This approach is consistent with the regulatory objectives of the SRA, BSB and IPS. Under the Legal Services Act 2007, the regulators are responsible for setting and maintaining standards. This includes a requirement upon them to have in place

effective quality assurance arrangements in order to benefit and protect clients and the public.

### Consultation history

- 1.10 Since the establishment of JAG there have been three consultations in respect of different elements of the development of the Scheme:

2009	The advocacy standards against which the competence of advocates would be measured
2010	Proposals for the development of QASA
2011	The regulatory rules underpinning QASA

- 1.11 In addition to these formal consultations there have been extensive discussions with all of the key stakeholders to the Scheme as well as a number of road shows, workshops, seminars and conferences.
- 1.12 There have been many opportunities therefore for comment upon the policy, politics and operation of the Scheme. The focus now is on implementing a practicable and proportionate Scheme.

### The need for further consultation

- 1.13 The Scheme framework and infrastructure have been consulted upon previously. The purpose of this fourth consultation is to focus on the substantive revisions which have been made to the Scheme and which have not been the subject of formal consultation. JAG has throughout this process worked to maintain an open dialogue with all interested parties and has sought to ensure that the Scheme has been developed in discussion with those who will be impacted by its implementation. JAG is keen to obtain final comments on the specific issues outlined in this paper.
- 1.14 Opportunities for feedback will not stop upon the implementation of the Scheme. JAG has committed to a full review of the Scheme commencing in July 2015 (two years from the second phase of implementation) and will seek to gather data, evidence and views on the Scheme and the standards of advocacy to inform that review.

### The scope of the consultation

- 1.15 The consultation is focussed on those elements of the Scheme which have not been consulted upon previously or which have changed since the previous consultation.
- 1.16 In particular, comments are sought on:
- i) The revisions to the scheme set out in Part 3
  - ii) The revised guidance to setting the level of the case
  - iii) The proposals for the offences to be included at each of the four levels
  - iv) The competence framework for judicial evaluation (how competence is determined based on the evaluations undertaken)
  - v) The accreditation of QCs
  - vi) The Scheme Handbook and the Scheme Regulations/Rules
  - vii) The scope of the review

- 1.17 However, JAG will give proper consideration to all comments and responses received.

**How to respond**

- 1.18 This consultation will close on 9<sup>th</sup> October.
- 1.19 A form for responses to this consultation is available alongside the consultation. Please email completed forms to [consultation@qasa.org.uk](mailto:consultation@qasa.org.uk). Alternatively, hard copies can be sent to:

Chris Nichols  
Bar Standards Board  
289-293 High Holborn  
London  
WC1V 7HZ

- 1.20 It will be assumed that all respondents are content to be identified in the consultation report. Please specify in your response if you would prefer not to be identified.

## Part 2: The third consultation

- 2.1 The third consultation sought views on the proposed rules and regulations to be introduced by each regulator in order to bring the Scheme and its operation in to effect. JAG is grateful to all those who responded to the consultation. The comments received have been invaluable in shaping the Scheme further.
- 2.2 An analysis of responses is attached at Annex A.
- 2.3 A number of points raised in responses are covered in detail in this consultation paper. These include:
- The position of advocates who appear in the Crown Court where their work is focussed on hearings rather than trials
  - Levels
  - Youth Courts
- 2.4 Of those not covered elsewhere in this paper, it is useful to highlight the following issues and how they have since been addressed.

### Consistency

- 2.5 There was broad concern that the rules proposed by each regulator did not adequately demonstrate that the Scheme would be applied consistently. The Scheme Handbook now contains the overarching principles which all advocates must adhere to. However, each regulator will still have their own rules and regulations in order to implement the detail of the scheme. This does not indicate that the Scheme will be applied differently by each regulator but merely reflects that the approach to rules and regulations adopted by regulators as a whole varies.

### Trial opportunities

- 2.6 There were some comments on the availability of Crown Court trial opportunities in which to be assessed. JAG has looked at trial statistics produced by the Ministry of Justice and based on the most recent set of annual data believes there should be sufficient trials for all advocates to be fully evaluated. However, JAG is aware that there has been a reduction in the number of trial opportunities in 2012 which, if sustained, may present a barrier to accessing judicial evaluation. There will be flexibility within the Scheme to accommodate those who need longer to access the required number of trials but if this proves to be necessary for the majority of advocates, it may be preferable to allow a longer period for advocates to acquire the necessary evaluations to enter the Scheme.
- 2.7 JAG will however monitor closely the number of assessment opportunities as part of the two-year review.

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

## Part 3: The Revised Scheme

### Introduction

- 3.1 This section of the paper sets out the detail of the Scheme and highlights the substantive changes that have been made since the last consultation which closed in November 2011.

### The Scheme

- 3.2 The fundamental elements of the Scheme are:
- a. Advocacy standards have been developed against which all advocates will be assessed.
  - b. Advocates will be accredited at one of four levels – for example, a Level 1 advocate can undertake work in the Magistrates Court and a Level 4 advocate can undertake the most serious cases in the Crown Court.
  - c. Advocates may progress through the four levels (subject to rights of audience) by demonstrating through assessment that they meet the required standard for the next level. Advocates who choose to remain at their current level will be required to re-accredit at that level every five years.
  - d. Advocates' levels and methods of qualification dictate how they must be assessed, whether by way of assessed CPD, assessment organisation, or judicial evaluation.
  - e. Judicial evaluation will be the compulsory means of assessment for those advocates undertaking trials at Levels 2, 3 and 4.
  - f. Trained judges in the Crown Courts may assess advocates on their own initiative if they have concerns about performance, and submit such evaluations directly to the regulators for consideration.
- 3.3 There will be three methods of assessment within the Scheme; assessment at Level 1 will be by assessed CPD; assessment at Level 2 will be by assessment organisation, judicial evaluation or a combination of the two; and assessment at Levels 3 (other than in relation to those advocates who do not undertake trials who will be assessed against level 3 standards by an approved assessment organisation) and 4 will be by judicial evaluation only.
- 3.4 In addition, there will be a panel of independent assessors available to the regulators to deploy in circumstances where the requisite number of judicial evaluations cannot be achieved within a reasonable time, for example, where an advocate practises in a small court centre. Independent assessors will also be used to carry out assessments of advocates if the regulators decide that further evidence is required.
- 3.5 All solicitors will use an assessment organisation to make their initial move from Level 1 to Level 2. Advocates who progress from Level 1 to Level 2 in this way will be able at any time to undertake trial work subject to the requirement to obtain judicial evaluation of their competence in Level 2 trials.

- 3.6 A Scheme Handbook has been developed which provides a full articulation of how the Scheme will be applied to advocates and how it will operate in practice. The Handbook is attached at Annex B. The Scheme will be applied consistently by each regulator but the internal process for the administration of the Scheme will vary according to the governance structure of the regulator. The Handbook sets out both the overarching principles that will be applied equally and also how the Scheme will be administered by each regulator.

### **Revisions to the Scheme since the last consultation**

- 3.7 In the light of comments received to the consultation of November 2011 and as a result of subsequent discussions with interested parties, there have been certain changes to the Scheme. Of particular note are the following:

- a. Accreditation of Level 2 advocates
- b. The levels within the Scheme including the level of Youth Court work
- c. Phased implementation of the Scheme

- 3.8 Looking at each in turn:

### **Accreditation of Level 2 advocates**

- 3.9 Responses to the third consultation and further research undertaken by the SRA into patterns of practice of solicitor advocates gave rise to concerns about the impact of the Scheme on advocates who for various reasons undertake little or no trial work in the Crown Courts. The Scheme's objective is to assure the competence of criminal advocates. In practical terms, a trial provides an opportunity for an advocate to demonstrate competence against the QASA advocacy standards. However, the scope of the Scheme should not be restricted to those undertaking trials since the purpose of the Scheme is to assure competence and not to limit practice unnecessarily.
- 3.10 Consequently, any scheme that requires the completion of judicial evaluation in order for an advocate to be accredited or re-accredited would have the effect of restricting the ability to practise of those advocates who do not undertake trials.
- 3.11 In order to establish the extent of the issue it is helpful to set out the key findings of the SRA research which is based on responses from 859 solicitors with higher courts rights of audience:
- a. 50% of respondents conduct full trials
  - b. At least four-fifths of respondents are engaged in other types of advocacy – plea and case management hearings (87%), pre-trial hearings (85%), sentence hearings (83%), guilty pleas (82%) and bail applications (80%)
- 3.12 The findings indicate that a significant number of advocates would not be able to meet the requirements of a scheme which requires judicial evaluation in a trial setting because they do not conduct trials. These advocates would be prevented from undertaking criminal advocacy work solely because of their chosen pattern of practice.
- 3.13 In light of these findings and as a result of other feedback from the third consultation, JAG has made amendments to the Scheme. These will enable those advocates who do not undertake trials to enter the Scheme through an assessment organisation where they will be assessed against all of the QASA standards to

obtain full accreditation. This process is described in the QASA Handbook as Level 2 full accreditation (route A).

- 3.14 Under the revised Scheme, advocates who do not intend to undertake trials will need to inform their regulator of that fact during the Registration phase of implementation. Once registered and provisionally accredited the advocate will, at their earliest opportunity and within 12 months, need to be assessed as competent against the level 2 and 3 advocacy standards by an approved assessment organisation. The advocate will then apply to their regulator for full accreditation and will be able to undertake non-trial work at Levels 2 and 3. The period of accreditation will be for 5 years.
- 3.15 In the event that the advocate does not decide to undertake trial work, they will need to seek re-accreditation at an assessment organisation at the end of the five-year period. It will be for each regulator to develop systems and processes for checking that advocates are not undertaking trials without being judicially evaluated.
- 3.16 At any time during the period of accreditation the advocate may decide to commence trial work. The advocate would have to re-register and would be given provisional accreditation to obtain judicial evaluation at Level 2. If successful, the advocate would then be given full accreditation. This process is described in the QASA Handbook as Level 2 full accreditation (route B).
- 3.17 JAG believes that the revisions to the Scheme represent the most proportionate approach to ensuring that all advocates who are competent to do so are able to enter the Scheme and continue to provide advocacy services.

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

**Client notification**

- 3.18 As at the present time, clients need to know what they can expect from their advocate. In relation to QASA, clients will need to be aware of how far their advocate will be able to progress their case. Each regulator is committed to having in place clear regulatory arrangements which achieve this.
- 3.19 Data will be gathered on the effectiveness of the regulators' arrangements during the operation of the Scheme and will be used to inform the full Scheme review in July 2015.

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

**The level of Youth Court work**

- 3.20 Given the range and complexity of work undertaken within the Youth Court it has proven difficult to categorise all work within one level. The third consultation proposed that Youth Court work be at Level 2. However, responses suggested that this would prevent a substantial number of experienced advocates currently undertaking work in the Youth Court from continuing to do so. As a result of these responses, the Scheme has been revised so that the starting point for Youth Courts is Level 1. It should be noted that advocates will need to have regard to their

overriding professional obligation not to undertake work outside of their competence.

3.21 Youth Court cases involve vulnerable defendants and witnesses. Specialist skills are necessary to manage these cases and the impact of incompetent advocacy is potentially serious. It is proposed that the regulators should conduct focussed research into the Youth Court in order to establish whether there are risks present and if so what, if any, additional measures (such as specialist training, for example) might be necessary to address these. JAG recognises the need for this research to be undertaken as a matter of priority so that recommendations may be made during 2013.

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

### **Phased implementation**

3.22 JAG has decided that the implementation of the Scheme should be phased in geographically. Within each phase there will be a period of time available for registration. Advocates whose primary practising address falls within the relevant geographical area will be required to register with the Scheme within the specified registration time-frame and subsequently obtain their full accreditation within 12 months.

3.23 Advocates working in areas where registration has not commenced will be able to appear in courts within circuits where it has been and where judicial evaluation has commenced without needing to request assessment. Therefore advocates in Phase 2 and 3 circuits will be able to appear in criminal courts in the Midlands and Western circuits prior to the start of their own period for registration.

3.24 The phases are:

<b>Phase</b>	<b>Area</b>	<b>Registration window</b>
Phase 1	Midlands and Western Circuits	14 Jan – 12 Apr 2013
Phase 2	South Eastern Circuit	17 Jun – 13 Sep 2013
Phase 3	Northern, North Eastern and Wales and Chester Circuits	16 Sep – 13 Dec 2013

3.25 A map of the respective geographical areas is included within the Scheme Handbook.

3.26 It will be noted that there is a two month gap between the closing of the registration period in phase 1 and the opening of the registration period in phase 2. This allows for consideration of any issues that emerge during the first registration phase to be addressed.

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

## **Part 4: Areas requiring feedback**

### **Introduction**

- 4.1 This section sets out those areas of the Scheme where substantive comments are sought on their underlying principle.
- 4.2 The areas covered in this section do not raise new elements of the Scheme but reflect further refined thinking within JAG. They include:
- a. Revised levels proposal and the approach to selecting the case level
  - b. The accreditation of criminal silks
  - c. The competence framework (how an advocate demonstrates competence)
  - d. The scope of the review of the Scheme
- 4.3 Looking at each in turn:

### **Revised levels**

#### **Background**

- 4.4 The QASA levels will be used to signify the competence of an advocate. This covers both the description of what competence looks like at each level (as set out in the Scheme's advocacy standards and performance indicators) and also mapping that competence to specific types of work and articulating what sort of cases and offences the advocate will usually be able to deal with at each level.
- 4.5 When seeking to establish which cases or offences should be positioned at each level there are a number of factors to be taken into account:
- a. Setting them at too low a level could impact upon competence and quality
  - b. Setting them at too high a level will affect competition and access to justice
  - c. Ensuring that the range of work within each level is likely to be a match for the usually competent advocate at that level whilst at the same time supporting gradual development for progression to the next level of work.
- 4.6 Earlier versions of the Scheme proposed that the level of the case should be determined by reference to the Legal Services Commission's Funding Order. This led to a prescriptive list of criminal offences categorised by level. Following feedback received during the third consultation on the Scheme, JAG held five workshops with representatives from each of the advocacy professions, including representatives of the CPS to discuss the approach to levels. There was general consensus that connecting levels to the Funding Order was too blunt an approach which was not likely to assist in balancing the factors set out in paragraph 4.5 above. Further, the Funding Order was not felt to be an appropriate reference for a regulatory Scheme as the categories had been created for a different purpose and did not translate easily to complexity of case. It was also suggested that having an indicative level for each offence was too rigid and did not take into account that a single offence could span levels 2-4 depending on complexity. There was general support for a broader approach to establishing the level of the case with greater flexibility being given (based on common guidelines) to the instructing party and instructed advocate.
- 4.7 In the light of the feedback from the workshops, and following targeted consultation with the Young Bar, the Bar Council, the Law Society, the Criminal Bar Association

and the Solicitor Association of Higher Court Advocates, a revised approach to establishing the level of the case has been developed and is detailed below.

- 4.8 A prescriptive list of offences has been removed in favour of a more general description of the type of criminal cases that will feature at each level. JAG believes that the flexibility that this approach provides is most likely to balance the factors set out in paragraph 4.5 above. It also recognises that the Scheme is likely to evolve over time and it will be much easier to move gradually from a flexible to a more structured approach (if necessary) than to seek to impose a highly complex approach which may be unworkable and impact upon the effective administration of justice from the outset.
- 4.9 The impact of the level of a case will be most relevant in a trial which is where advocates will be evaluated against the relevant standards for the particular level. However, the level of the advocate and the range of work open to that advocate will also be relevant to non-trial hearings. Although advocates will not be able to seek judicial evaluation in non-trial hearings, they may be evaluated at the discretion of the Judge under the on-going monitoring feature of the Scheme.

#### **How the level of the case is determined**

- 4.10 The level of the case should be set by the instructing party and then agreed with the advocate at the earliest stage possible. The level should be kept under review during the proceedings as the case may become more or less complex as it develops. Where a case becomes more complex, JAG has developed proposals for additional guidance - see the section below on "changes to complexity".
- 4.11 Issues have been raised about whether there may be a financial or other interest in increasing or decreasing the level of a case. The regulators, both individually and collectively through JAG, will keep the levels arrangements under review during the implementation of the Scheme. If there are concerns about cases being either over or under graded, the regulators will encourage individuals (whether other advocates or the judiciary) to report this to the regulators. The instructing party and the advocate must be able to justify their decision on the level of the case, with reference to the guidance, if asked to do so by their regulator.
- 4.12 Whilst the judiciary will not play a formal role in deciding the level of the case, judges will have an informal role to play in that if a judge believes that an advocate is acting above their competence, for example if the case should be at a higher level than the agreed level and the level of the advocate, they will be able to complete an on-going monitoring assessment and send it to the regulator. Additionally, if the advocate is asking for a judicial evaluation for a case and the Judge does not agree with the case level, the Judge can refuse to assess the advocate in that case (and again, will be encouraged to report any concerns about the case level to the relevant regulator).
- 4.13 JAG considered whether the judiciary should have a more formal role and discussed this with senior members of the judiciary as well as other interested parties. JAG has reached the conclusion that it is impracticable for the judiciary to, for example through a separate hearing, be required to determine the level of the case. The judiciary support this approach but welcome the informal role that they will have as set out in the preceding paragraph.

- 4.14 Finally, as part of the Scheme's monitoring and evaluation programme, the regulators will conduct spot checks of the level of advocates conducting cases, and the agreed level of the cases.
- 4.15 The regulators hope that these checks will reduce the potential for abuse. In any event, the regulators will keep the Scheme under review whilst it is implemented and will conduct a full review of the Scheme two years after the Scheme has been implemented.

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

#### **Level starting points**

- 4.16 On the following page is the revised levels framework, which was developed taking into account feedback from the five practitioner workshops held in November and December 2011 and preliminary comments from some of our key stakeholders.

**NOTE: Advocates must have the requisite rights of audience in addition to QASA accreditation.**

Level 1	Level 2	Level 3	Level 4
<p>All Magistrates' Court work, including Youth Court work, along with:</p> <ul style="list-style-type: none"> <li>➤ Appeals from Magistrates' Court to the Crown Court where the advocate's firm has represented the client in the Magistrates' Court or Youth Court</li> <li>➤ Bail applications before a judge at the Crown Court</li> <li>➤ Committal for sentencing where the advocate's firm has acted for the client in the Magistrates' Court or Youth Court</li> <li>➤ Preliminary s51 hearings</li> </ul>	<p>Level 2 is the first level in the Crown Court and includes:</p> <ul style="list-style-type: none"> <li>➤ All either-way offences where the Magistrates accepted jurisdiction but the defendant has elected a Crown Court trial</li> <li>➤ Straightforward Crown Court cases, for example: <ul style="list-style-type: none"> <li>○ lesser offences of theft</li> <li>○ deception or handling</li> <li>○ assault (section 47 and section 20);</li> <li>○ burglary</li> <li>○ less serious drug offences</li> <li>○ lesser offences involving violence or damage</li> <li>○ straightforward robberies</li> <li>○ non-fatal road traffic offences</li> <li>○ minor sexual offences</li> </ul> </li> </ul>	<p>Level 3 is a Crown Court level and includes:</p> <ul style="list-style-type: none"> <li>➤ More complex Crown Court cases, for example: <ul style="list-style-type: none"> <li>○ more serious dishonesty and fraud cases</li> <li>○ more serious drug offences (such as possession with intent to supply )</li> <li>○ blackmail</li> <li>○ aggravated burglary</li> <li>○ violent disorder</li> <li>○ arson</li> <li>○ complex robberies</li> <li>○ more serious assaults</li> <li>○ driving offences involving death</li> <li>○ child abuse</li> <li>○ more serious sexual offences</li> </ul> </li> </ul>	<p>Level 4 is a Crown Court level and includes:</p> <ul style="list-style-type: none"> <li>➤ The most complex Crown Court cases for example: <ul style="list-style-type: none"> <li>○ serious sexual offences</li> <li>○ substantial child abuse</li> <li>○ murder</li> <li>○ cases involving issues of national security</li> <li>○ serious organised crime</li> <li>○ terrorism</li> <li>○ complex and/or high value dishonesty</li> </ul> </li> </ul>

4.17 The hearings listed in Level 1 are those which advocates with rights of audience in the Magistrates' Court are currently entitled to undertake. It is important to note that QASA is not intended to affect rules on rights of audience and retains the rights of audience that currently exist for example, solicitors conducting an appeal from the Magistrates' Court to the Crown Court. JAG recognises that there will inevitably be different views on where particular offences and hearings should fall within the levels. JAG has listened to practitioners who argued against a prescriptive list of offences and their levels and has developed the table in consultation with criminal practitioners. JAG accepts that it will not be possible to reflect all views on the levels table as there will be conflicting opinions. JAG is keen to ensure that the final version is as good as it can be for the implementation of the Scheme and will continue to monitor the allocation of hearings once the Scheme is in operation. The levels table will form a central part of the review of the Scheme and changes will be made where necessary.

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

#### **Guidance on determining the case level**

4.18 The levels table should always be the starting point to determine the level of a case. There may be circumstances when it is appropriate to deviate from the levels table, by taking the case up or down from the starting point. The instructing party and advocates must always be able to justify a departure from the levels table should they be called upon to do so by their regulator (for example, if a complaint is made or if a judge submits concerns about advocacy in a case).

4.19 In situations where the level of a case is not immediately clear to the parties, additional factors could be taken into account in reaching a decision as to whether the case is at the higher or lower level.

4.20 In all cases, if a case goes up or down a level due to the relevant factors, the instructing party and the advocate will need to be able to justify that decision if they are called upon to do so by their regulator or by the judiciary. The final decision on the case level will always need to be formally recorded and, if necessary, reference should be made to the additional factors relied upon in reaching that decision.

4.21 Factors to be taken into account that might suggest a different level is appropriate include:

- Trial characteristics: multi-handed prosecutions, contested expert evidence, expected length of trial.
- Witness characteristics: the nature of the witness' relationship with the defendant, age, learning difficulties, otherwise vulnerable witnesses.
- Offender characteristics: vulnerable defendant including a youth in an adult court or those with learning difficulties, previous convictions if they could trigger certain greater sentencing provisions.
- Offence characteristics: particular violence, use of a weapon, very high cost of damage or loss.

- Circumstances that make the proceedings substantially easier than other cases at this level, including, for example, substantial agreement on evidence or with the case against the defendant.

### Example of the application of the factors

4.22 Below is an example of how the table and additional factors might be applied to an offence of robbery:

#### *Level 2 – “straightforward robberies”*

*This includes:*

- *Street robbery where there is a threat of force or minimal force (for example, snatching an item from a person’s grasp)*

*This might be increased to a Level 3 case if, for example:*

- *The victim is vulnerable due to age or disability*
- *There are multiple offenders, potentially indicating “gang” activity (however, if the defendant had a peripheral role, this may decrease it back to Level 2 for that defendant)*

#### *Level 3 – “complex robberies”*

*This includes:*

- *Street robbery where there is significant use of force or a weapon involved (for example, a weapon is used to threaten, or force is used which results in injury to the victim)*
- *Robberies of small businesses or less sophisticated commercial premises*

*This might be decreased to a Level 2 case if, for example:*

- *The defendant had a peripheral role*

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

### Different levels in the same case

4.23 There may be circumstances where the same case requires different levels of advocate, depending on whether they are prosecuting or defending, or if there are multiple defendants. For example, depending on the circumstances, different level advocates may be appropriate for the defendant who is first on the indictment as opposed to fifth. Additionally, the nature of a client’s instructions may make a case more or less complex.

## Allocation of level to a case

- 4.24 Every case must be given a level at the earliest opportunity, and, as stated above, the case level should be kept under review during the course of proceedings. It is the individual case which holds the level, and all hearings associated with that case hold the same level as the case. Except as otherwise provided in this guidance, advocates may only undertake trials in respect of cases which are at their level or below.

## Non-trial hearings

- 4.25 Subject to the necessary rights of audience, advocates are permitted to undertake non-trial hearings (including guilty pleas) in cases at one level above their own accredited level, provided the advocate believes they are, in all the circumstances, competent to act. For example, an advocate who is accredited at Level 2 will be entitled to undertake non-trial hearings in Level 3 cases, provided they have demonstrated competence to act at that level.
- 4.26 The purpose of this is to allow advocates at lower levels to develop their skills by undertaking non-trial hearings in more complex cases. Additionally, feedback has been received to suggest that requiring all non-trial hearings to be conducted by an advocate at that level is unworkable at Levels 3 and 4, and would cause such a restricted supply base that the administration of justice would be disrupted.

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

## Other types of hearings

- 4.27 Newton hearings can range in content and complexity. If the Newton is more like a full trial, for example with witnesses being called for examination and cross-examination, advocates should only undertake the Newton hearing if the advocate is accredited to conduct a full trial at the level. In such a case, the advocate will be able to get judicially evaluated as if the hearing were a full trial. If the Newton hearing is straightforward and doesn't involve multiple witnesses, it should be treated as a non-trial hearing and therefore undertaken by advocates fully accredited at the relevant level or at one level below. In these circumstances, the advocate will not be able to be judicially evaluated against the full range of standards.

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

## “Leader – junior” categorisation

- 4.28 In cases where there is a leading and junior advocate, a balance has been struck between an approach that is unduly restrictive (insisting a junior be of the same level as the case since they might need to take the case over) and one that is too flexible (so that the junior may be ineffective). The starting point is that the junior should be no more than one level below the leader. Further, advocates at Levels 1 or 2 should not act as leaders.

- 4.29 Those instructing may use their discretion when appointing a junior and may, in certain circumstances, seek to deviate from the 'one below' approach. For example, a Level 4 case may require someone to review a large amount of detailed but not complex material and it would be disproportionate to require a Level 3 advocate to do a task that could be done by a Level 1 or 2 advocate. The junior would need to be satisfied that they were competent to act in these circumstances.

### **Changes to complexity**

- 4.30 Normally a case will remain at the same level for the duration of the case; however, in some circumstances there might be unexpected and substantial changes which might cause the level of the case to change part-way through the instruction. If there is such a change, advocates and instructing parties should review the level of the case and consider whether the level should be revised.
- 4.31 If a case level changes part way through the instruction because it has become more complex, the advocate must consider whether they are still competent to act in the matter and also whether the client's interests or the administration of justice would be prejudiced should they decide to withdraw at short notice. If the advocate believes they are still competent, they should continue to act, even though the case is now at a higher level than their current accreditation. If the advocate believes they are no longer competent to act, they must consider their position in relation to their respective regulatory requirements.

### **Appeals**

- 4.32 It is normally in the client's interest for the trial advocate to continue to represent the client in any appeal. If there is a change in the complexity, the advocate should consider whether they feel competent to continue to act.

### **Client choice**

- 4.33 Client choice may, in some circumstances, allow for deviation from the case level. For example, if a client specifically requests an advocate who has represented the client previously and the case is a higher level than the advocate's grading. An advocate will be entitled to "act up" one level in a case if:
- it is at the express request of the client;
  - the advocate has informed the client that they are accredited at one level below the case level;
  - in light of being provided with such information, the client continues to request that the advocate represent them; and
  - the advocate believes they are competent to act in all the circumstances.

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

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

**The accreditation of silks**

- 4.34 As QASA is a regulatory and compulsory scheme, all criminal advocates, including criminal silks, will need to be accredited under the Scheme. JAG and the regulators are firmly of the view that the validity and credibility of a regulatory scheme would be significantly undermined should a category of advocates be outside of the reach of the Scheme. That said, in order to obtain the status of silk, advocates will have been subject to rigorous assessment against a defined competency framework. Whilst there are some differences in the assessment framework for QASA and Queens Counsel Appointments (QCA) there are similarities and overlap in the competencies that are applied. In recognition of the assessment undertaken to obtain silk and the similarities in the competency framework, JAG proposes that advocates who have recently taken silk should be able to take advantage of a modified entry arrangement.
- 4.35 It is important to note that these arrangements will only apply to those advocates who took silk since 2010 under the QC Appointments process introduced in 2006. Prior to this process there was no formal, independent or evidenced based means of assessing applications for silk. It is not therefore possible to demonstrate that the pre-QCA process is comparable in any way to the QASA assessment framework.
- 4.36 Further, it should be noted that the modified entry arrangements are limited to criminal silks.

**The proposal**

- 4.37 Silks are required to register under the Scheme at the same time as all other advocates in accordance with the phased implementation timetable, as set out in Part 3 of this paper. In recognition of the standard of excellence achieved to take silk, a modified timescale for entry is proposed. Silks appointed since 2010 will receive full accreditation (as opposed to provisional accreditation) when they join the Scheme, with their five-year accreditation running from the date that they took silk. Re-accreditation for silks would be due as follows:

Date became silk	Re-accreditation due date
2010	2015
2011	2016
2012	2017
2013	2018

- 4.38 The five-year accreditation provides no material advantage for those advocates who took silk before 2010. Should the exemption arrangement apply to 2009 silks they could have less than 12 months to obtain three pieces of judicial evaluations in order to be re-accredited from the date that their exemption period ends.
- 4.39 Once the exemption period ends, silks will need to comply with the assessment framework in the same way as any other advocate.

4.40 JAG believes that this proposal has the benefit of acknowledging the high standards and rigorous assessment process operated by QCA without watering down the credibility and universal application of the Scheme.

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

### **Competence framework**

4.41 The competence framework sets out how decisions will be taken on an advocate's competence by the regulator based on the assessments undertaken. The framework and the approach is detailed in the Scheme Handbook at Annex B.<sup>1</sup>

4.42 The approach to assessment has changed from one which required a decision on competence to be taken at the conclusion of each evaluation to one in which the decision about the advocate's competence is taken once all evidence is available.

4.43 Within the original framework it was possible for an advocate to be assessed as competent overall even though they had been assessed as not yet competent against the same standard or standards on every occasion when they had been assessed.

4.44 Within the new framework competence is dependent on how the advocate has performed against the standards as a whole from all of the evaluations. The approach moves beyond considering distinct pieces of evaluation to a more joined up approach that can identify consistent patterns of underperformance down to each standard.

4.45 Under this approach, the regulator makes a decision on an advocate's competence based on all of the evidence available rather than whether a number of judges have assessed that advocate as competent. JAG believes that this is a more robust and reliable approach to assessment. It removes any suggestion that the judiciary have direct responsibility for an advocate's continued ability to practise and places the responsibility for such decisions rightly on the regulators.

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

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<sup>1</sup> **entry/obtaining full accreditation:** see paragraph 5.21, also note definition of a competent evaluation at 5.65-5.66.

**Re-accreditation:** see paragraph 5.33 and note definition of a competent evaluation in same paragraphs above.

**Progression:** L1-L2 barristers: see paragraph 5.39 (note: same as re-accreditation requirements)

L1-L2 solicitors doing trials: see paragraph 5.42 (note: same as entry/full accreditation requirement). Other levels: see paragraphs 5.45-6 for stage one of progression and note paragraph 5.64 for definition of very competent, and see paragraph 5.47 for stage two of progression (note: same as full accreditation requirements).

## Scope of the review

- 4.46 As outlined in the introduction to this paper, JAG and the regulators have committed to a full and comprehensive review of the operation of the Scheme in July 2015 (two years from the end of the first phase of implementation). The review, undertaken jointly by the regulators, will measure the operation of the Scheme against the defined Scheme objectives and the regulatory objectives as set out in the Scheme Handbook and the Legal Services Act 2007 respectively.
- 4.47 The final detail of the scope of and methodology for the review will be developed and published in due course. In the meantime, JAG would welcome views on what interested parties think should be included. In order to assist that process, set out below are areas which JAG is likely to wish to include within the review. These areas are subject to change and revision but provide a helpful starting point for discussion.
- 4.48 Areas likely to be included are:
- a. The application of the standards to live advocacy
  - b. Coverage of the advocacy standards via the assessment methods
  - c. Assessment methods:
    - i) Validity and reliability of assessment
    - ii) assessment of all types of advocacy
    - iii) availability of assessment opportunities
  - d. Effectiveness of judicial training
  - e. Evaluation and review of advocacy and its assessment in the Magistrates and Youth Courts
  - f. The practical operation of the Scheme:
    - (i) the administration of the Scheme
    - (ii) appeals
    - (iii) costs – review to be undertaken by each regulator
  - g. The effectiveness of on-going monitoring
  - h. Impact of the Scheme on the advocacy market, equality and diversity issues in the provision of advocacy services and the perceptions of the standards of advocacy
  - i. The future development of the Scheme
    - i) In addition to data gathered during the operation of the Scheme, independent research will also be undertaken to help inform the review.
    - ii) It should also be noted that research into criminal advocacy will not be confined to consideration of the Scheme. For example, there may be aspects of advocacy, such as Youth Court work, which require detailed and in-depth study and which would be undertaken subsidiary, but complementary, to the review of the operation of QASA.

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

## **Part 5: The Scheme Handbook and Rules**

### **Introduction**

- 5.1 This section of the consultation seeks views on the Scheme Handbook and the proposed Regulatory Rules.

### **The Scheme Handbook**

- 5.2 The Scheme Handbook is attached at Annex B. It provides a full articulation of the Scheme and how it will operate, both generally and by each regulator. The Handbook ensures that there is clarity about what is required of advocates entering and practising within the Scheme and consistency of application across the regulators. Inevitably, there will be some variation in the administrative process adopted by each regulator as each has their own internal structures and governance arrangements, but, the overarching principles will be adhered to.
- 5.3 JAG views the Handbook as the primary reference for the Scheme and as such it must be accessible to anyone who comes into contact with the Scheme.
- 5.4 The Handbook will be available electronically and to download on the central QASA website and on each regulators' websites.

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

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

### **The Scheme Rules and Regulations**

- 5.5 The proposed Scheme Rules and Regulations for each regulator are set out at Annexes C1-C3. These Rules and Regulations codify the requirements and operation of the Scheme within the Handbooks and Codes of Conduct of each regulator. Whilst the drafting/wording of the Rules and Regulations may vary from regulator to regulator depending on the style and regulatory approach adopted, they are consistent in their application of the Scheme.
- 5.6 The JAG members previously consulted in August-November 2011 on draft substantive Rules and Regulations for the Scheme. The SRA also consulted at that time on proposed amendments to the requirements (the SRA Practice Skills Standards, the SRA Professional Skills Course Outcomes and the SRA Day One Outcomes) which underpin the education and training process to ensure that these reflected the QASA standards. The recent alterations to the Scheme have necessitated changes to the draft Rules and Regulations which are now included within this consultation. In the SRA's case, it is not consulting further on the amendments to the requirements which underpin the education and training process as these have not been subject to additional change or on the likely consequential changes to the SRA Handbook which will flow from the final Regulations (for example the SRA Practice Framework Rules 2011).

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

## **The definition of criminal advocacy**

5.7 All advocates who undertake criminal advocacy will be required by their regulator to be QASA accredited. It is important therefore that 'criminal advocacy' is clearly defined. Previously, the definition was linked to the fact that the levels proposal included a list of offences which could be used to define the scope of the Scheme. Therefore anyone undertaking a hearing where the offence was listed in the levels document required QASA accreditation. Now that the approach to levels has been revised, as set out in part 4 paragraphs 4.4 – 4.28 of this paper, this definition is no longer appropriate.

5.8 The new definition is:

*“Criminal advocacy” means advocacy in all hearings arising out of a police or SFO investigation, prosecuted in the criminal courts by the Crown Prosecution Service or Serious Fraud Office.”*

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

## **Specialist practitioners**

5.9 The third consultation sought views on how 'specialist practitioners' should be addressed within the Scheme. The definition of 'criminal advocacy' set out above will exclude the majority of specialist practitioners who appear in the criminal courts in cases which do not arise out of police or SFO investigations i.e. planning, environmental, Local Government and regulatory specialists.

5.10 However, on occasion specialist practitioners are instructed to appear in hearings which would fall within the definition of criminal advocacy as a result of their specialism.

5.11 In the light of comments received and following discussions with advocates who fall within the category of specialist practitioners, JAG has updated the Scheme rules to prescribe certain situations in which specialist practitioners would be permitted to undertake criminal advocacy within the above definition without being QASA accredited.

5.12 The circumstances are broken down into two categories. Firstly, where an advocates is appearing in a case with a hybrid indictment where the primary offences are not within the definition of criminal advocacy ie financial regulation matters that include an element of fraud. Secondly, where the advocate has been instructed to appear in a case in the criminal court within the definition of 'criminal advocacy' as a result of their specialism e.g. a special purpose junior brought in to advise and deal with the effect of trust law on a fraud prosecution

5.13 JAG believes that at the outset of the Scheme this is a proportionate way in which to deal with specialist practitioners. It will keep the situation under evaluation and will gather data on the extent to which specialist practitioners appear in the criminal courts and in what cases. The stance adopted upon implementation will then be assessed during the Scheme review to see whether it remains appropriate and provides the necessary safeguards to the public and the proper administration of justice.

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

## **Part 6: Practicalities of the operation of the Scheme**

- 6.1 The Scheme has been designed, where possible, to not introduce unnecessary burdens on the advocate. It is inevitable that there will be some additional administrative requirements that arise from the Scheme during an advocate's career and JAG has sought to keep these to a minimum. The systems that each regulator has put in place to manage the Scheme are as streamlined as possible. Applications for registration, re-accreditation and progression will be managed on-line via each regulator's website and information about the application of the Scheme will be available electronically from the regulators and on the QASA website ([www.QASA.org.uk](http://www.QASA.org.uk)). There will be assistance for advocates with any queries that they may have about the Scheme's operation.
- 6.2 The Handbook sets out what is expected of the advocate at each stage of the process, explains how assessments will be conducted and how and when evaluation forms should be gathered and returned to the regulators. These processes have been developed in consultation with the judiciary and with criminal advocates. As with all elements of the Scheme, JAG will monitor its administration and will evaluate how it has operated as part of the two-year review and make changes where necessary. It would however be useful to get views now on whether there are any problems with the practical application of the Scheme.

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

## **Part 7: Equality and diversity**

7.1 Each regulator has undertaken its own equality impact assessment of the Scheme. These continue to evolve and JAG has been guided by the work undertaken on these equality impact assessments (EIA) as it has developed the Scheme. These will be publicly available prior to the implementation of the Scheme. In the meantime, each regulator has set out, in the draft EIAs that are available alongside this consultation (on their websites), how they are proposing to mitigate some of the potential adverse impacts that have been identified whilst developing the Scheme. In order to assist the assessment it would be helpful to receive views on the likely impact of the Scheme. In particular:

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

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

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

## **ANNEX A:**

### **Analysis of responses to the Joint Advocacy Group consultation on regulatory changes to support the Quality Assurance Scheme for Advocates (Crime)**

#### **1 Executive Summary**

- 1.1 This report provides a summary of responses received to the consultation proposing changes to the regulatory framework of the Solicitors Regulation Authority (SRA), Bar Standards Board (BSB) and ILEX Professional Standards to support the implementation of the Quality Assurance Scheme for Advocates (QASA).
- 1.2 The report also provides background to QASA, an overview of the Joint Advocacy Group (JAG), the scope of the consultation, and how consultation views have contributed to the ongoing development of the Scheme.

#### **2 Why is QASA needed?**

- 2.1 Advocacy is a vital part of an effective justice system. Members of the public involved in litigation rely upon advocacy for the proper presentation of their case. Those who are involved in decision making, whether as Judge or jury, rely on advocacy for the proper administration of justice. For defendants reliant on effective advocacy in the criminal courts the stakes are high: loss of liberty is a possible outcome.
- 2.2 A key element of professional responsibility is the maintenance of professional standards. The changing legal landscape coupled with competition and commercial imperatives are putting pressure on the provision of good quality advocacy. The economic climate, both generally and in terms of legal aid, has created a concern that advocates may accept instructions outside of their competence. The Judiciary has responded to these factors through judicial pronouncement on advocacy and performance.
- 2.3 QASA has been developed to respond to these issues. It will ensure that all advocates in criminal courts undergo a process of accreditation so that they only deal with cases within their competence and that they are subject to assessment and monitoring of their performance against a common set of agreed standards.
- 2.4 This approach is consistent with the regulatory objectives of the SRA, BSB and ILEX. Under the Legal Services Act 2007, the regulators are responsible for setting and maintaining standards. This includes a requirement upon them to have in place effective quality assurance arrangements in order to benefit and protect clients and the public.

### **3 The role of JAG**

- 3.1 JAG was formed in October 2009 to work on the strategic development and implementation of QASA. This group contains representatives from the principle regulators of advocacy; the SRA, BSB and ILEX.

### **4 What we consulted on**

- 4.1 Having previously undertaken two consultations on the QASA proposals, the purpose of the third consultation was to seek and establish views on those proposed rules and rule changes required to embed QASA within the regulatory framework of the SRA, BSB and IPS.
- 4.2 The consultation document was divided into three sections. The SRA, BSB and IPS have distinct regulatory frameworks and so each regulator proposed amendments and asked questions specific to its proposed rules and rule changes.
- 4.3 The consultation exercise was launched on the 15th August 2011 and closed on the 7th November 2011. Consultation documents were available on the SRA, BSB and ILEX websites and were also disseminated to appropriate representative bodies and organisations.

### **5 Summary of consultation responses**

- 5.1 This section provides a summary of responses to the consultation questions posed by each individual regulator. A full list of questions can be found in Appendix 1.
- 5.2 A total of 108 responses were received. A full list of respondents can be found in Appendix 2.

#### **Responses to regulatory changes proposed by the SRA**

- 5.3 The SRA section of the consultation document outlined seven key features of QASA and proposed a number of amendments to its regulatory framework. An overview of these features can be found in Appendix 1.

#### **Consultation Questions 1.01 & 1.02**

- 5.4 Responses to question 1.01 and 1.02 highlighted the broad range of skills and activities carried out by all criminal advocates. A number of respondents indicated that some advocates, despite being competent to do so, do not undertake full trials. Respondents further recognised that for this group of advocates, the proposed requirement that QASA accreditation can only be achieved by judicial evaluation in live trials could prevent competent advocates from seeking accreditation within the scheme. Respondents also asked for further clarity as to how an advocate determines the level of a case and guidance on how cases that change level during proceedings are managed.

#### **Consultation Questions 1.03 & 1.04**

- 5.5 A number of respondents favoured the use of judicial evaluation as a means of advocacy assessment. Some suggested that judicial evaluation should be extended further to assess competence across the full range of activities carried out by criminal advocates.
- 5.6 Other respondents identified potential difficulties when using judicial evaluation as a form of assessment. The lack of available trial opportunities for an advocate to be judicially assessed was considered a potential barrier to progression or reaccreditation. Some respondents expressed concern as to how the Scheme would ensure that judicial evaluations were consistent, impartial and avoided bias.
- 5.7 Comments were also received on the use of an Assessment Centre as a method of assessing competency. Whilst some respondents recognised the potential cost implication to advocates and smaller Solicitors firms of this route, others felt the approach was flexible and adaptable enough to assess competence whilst recognising the differences between solicitors and barristers.

#### **Consultation Questions 1.05 & 1.06**

- 5.8 Responses were broadly split on question 1.05 and 1.06. Some respondents recognised the need for cases to be categorised by level but felt it was important that banding avoided complexity and that levels were clear and that cases were readily identified. However, others felt that the need for levels was unnecessary and that the decision to undertake representation should be left to the individual in line with rules governing professional conduct.

#### **Consultation Questions 1.07 & 1.08**

- 5.9 One response was received to this question. The respondent suggested that the timeframe available for an advocate to be assessed should be consistent with the proposed accreditation period rather than being a shorter window.

#### **Consultation Questions 1.09 & 1.10**

- 5.10 Some respondents agreed that changes to the SRA's education and training pathway were required to prepare each advocate to meet Level 1 requirements.

#### **Consultation Questions 1.11 & 1.12**

- 5.11 One response was received to this question agreeing with the proposals.

#### **Consultation Questions 1.13 & 1.14**

- 5.12 No specific comments were received in relation to question 1.13 and 1.14.

### **Responses to regulatory changes proposed by IPS**

5.13 The IPS consultation questions focussed on the proposed regulatory changes to the Rights of Audience Certification Rules.

### **Consultation Questions 2.01, 2.02, 2.03, 2.04, 2.05 and 2.06**

5.14 No responses were received to the above questions.

### **Responses to regulatory changes proposed by the BSB**

5.15 The BSB proposed a separate annex to the Code of Conduct which established the requirements of advocates under the Scheme, plus a minor amendment to the main body of the Code to introduce reference to QASA in respect of competence to undertake a particular piece of advocacy.

### **Consultation Question 3.01**

5.16 Some respondents noted that there is an apparent disparity in the assessment framework for progression to level 2 between barristers and solicitors, with the requirements for barristers being seen as more rigorous. It was noted that in practice it will frequently take a young barrister over 12 months to conduct enough trials to be accredited at level 2.

5.17 A number of respondents recognised that advocates who do not or do not regularly undertake criminal advocacy work (including practitioners with mixed practices) may struggle to obtain sufficient judicial evaluation opportunities within 12 months to become QASA accredited or to progress through the Scheme. It was noted, for example, that employed barristers might have a more limited caseload than self-employed barristers and would therefore have less opportunities to be assessed in trials. Implementation of the Scheme in its current format could potentially prevent competent advocates from undertaking criminal advocacy.

5.18 It was also noted that there could be a negative impact on those advocates practising in small court centres if Judges in these centres refuse to participate in the Scheme.

5.19 The need for clarity about what constitutes “consecutive” cases was raised by a number of respondents.

### **Consultation Question 3.02**

5.20 Some of respondents noted the importance of judicial evaluation and the negative impacts on the public interest of allowing for accreditation that does not include live assessment by judges.

5.21 Various respondents also noted the potential negative impacts on the proper administration of justice and the public interest of a rigid timeframe for assessments, which could exclude competent practitioners whose practices do not provide them with sufficient trial opportunities within 12 month windows.

### **Consultation Question 3.03**

5.22 The proposed exceptions for specialist practitioners were generally welcomed. However, it was noted that generalist/mixed practitioners may also not fit naturally within the scheme.

5.23 A number of organisations suggested that there were risks related to allowing unaccredited specialist practitioners to undertake publicly funded criminal advocacy through hybrid indictments.

## **6 General comments**

6.1 A number of respondents used the consultation exercise to comment generally on the proposed Scheme. These comments included:

- recognition that specialist practitioners may find it difficult to meet requirements to obtain judicial evaluation and therefore may find it difficult to become QASA accredited
- the need for consistent application of the Scheme and reconciliation of differences between the rules created by each individual regulator
- concern regarding the manner in which cases are allocated levels. This included the process by which cases receive a level as well as the table of presumptive levels. Specifically, a number of respondents expressed concern regarding the level at which Youth Court work is set within the scheme and how current proposals may prevent advocates undertaking Youth Court Work
- that Queen's Counsel should be exempt from the Scheme
- that the Scheme, if not amended, could restrict a client's choice of advocate
- that there is a lack of evidence to support the perceived drop in quality of advocacy
- that implementation of the Scheme should not be rushed.

## **7 What happens next?**

7.1 JAG has been encouraged by the responses received to the consultation exercise. The depth and detail of information provided will be critical in helping ensure that any unintended consequences of implementation are appropriately managed and that the original objectives of the Scheme are fully delivered.

7.2 The consultation exercise has identified a number of issues with the current proposals for the implementation of QASA. These include: the need to ensure that judicial evaluation is consistent and avoids bias, further clarity on levels and case determination and ensuring that QASA accreditation requirements do not unintentionally prevent competent advocates from practising. JAG will be working to address these issues.

## **8 Further Information**

- 8.1 For further information on this consultation or QASA in general, please contact [QASA@sra.org.uk](mailto:QASA@sra.org.uk) or [consultation@qasa.org.uk](mailto:consultation@qasa.org.uk).

### Full list of consultation questions by each individual Regulator

#### Solicitors Regulation Authority (SRA)

The SRA set out the proposed regulatory changes to the SRA Handbook, involving changes to:

- the SRA Training Regulations 2011
- the SRA Higher Rights of Audience Regulations 2011
- minor and consequential changes to other Regulations
- changes to some of the educational standards required by the SRA

#### Key feature 1

“A single set of standards applying to advocates, and which identifies the skills and behaviours expected of a criminal advocate. The standards are a mandatory requirement for the practice of criminal advocacy.”

Questions 1.01 and 1.02 concern amendments to the SRA Higher Rights of Audience Regulations 2011 (which, as amended, become the SRA Advocacy and Higher Rights of Audience Regulations (SAHRAR)) to ensure that compliance with the QASA requirements is mandatory for solicitor advocates appearing in criminal proceedings, in accordance with Key Feature 1.

Q 1.01 Please comment on these amendments in respect of any impacts you foresee on the interests of the proper administration of justice and the rule of law, or on the public interest.

Q 1.02 Please add any other comments you may have on these amendments.

#### Key feature 2

“The scheme proposes a statement of standards for advocacy, with four levels, and advocates can be assessed, accredited and certified at any of these levels, and progress through the levels, by means of assessment either by:  
Assessment organisation or  
Judicial evaluation”

To implement this, amendments to the SRA Training Regulations [2011] Part 1 - Qualification Regulations and the SAHRAR incorporate into the SRA's regulatory framework the requirements under QASA relating to the statement of standards

Q 1.03 Please comment on these amendments in respect of any impacts you foresee on the interests of the proper administration of justice and the rule of law, or on the public interest

Q 1.04 Please add any other comments you may have on these amendments.

#### Key feature 3

“The scheme proposes that the levels are connected, through guidance developed by JAG, to levels of cases. The usual expectation will be that advocates will not undertake work at a level higher than that at which they are certified but there will be

circumstances in which the parties will agree that the level of advocate required for a case does not need to accord with the level of case.”

A proposed amendment to the guidance to the SAHRAR explains this expectation within the SRA's regulatory framework

Q 1.05 Please comment on this amendment in respect of any impacts you foresee on the interests of the proper administration of justice and the rule of law, or on the public interest.

Q 1.06 Please add any other comments you may have on this amendment.

#### **Key feature 4**

“The scheme proposes that advocates who remain at the same level will be required to be recredited after 5 years of practice at that level. Advocates who, after 5 years, are not recredited or have not progressed to a higher level will not be able to exercise their rights of audience in criminal proceedings without reconfirming their competence to do so.”

Proposed amendments to the SAHRAR incorporate into the SRA's regulatory framework the recreditation requirements under QASA.

Q 1.07 Please comment on this amendment in respect of any impacts you foresee on the interests of the proper administration of justice and the rule of law, or on the public interest.

Q 1.08 Please add any other comments you may have on this amendment.

#### **Key feature 5**

“The scheme proposes that as the entry point into the scheme, each regulator's education and training pathway will prepare each advocate to meet the level 1 standard as the entry point into qualification.”

Changes were proposed to elements of the SRA's education and training pathways -  
The Practice Skills Standards  
The Professional Skills Course Outcomes  
The Day One Outcomes, which are used as the basis for the assessment of transferring lawyers under the Qualified Lawyers' Transfer Scheme.

The transition period before newly qualified solicitors have followed these potentially revised pathways was explained in a proposed new guidance note to Regulation 12 of the SAHRAR

Q 1.09 Please comment on these amendments in respect of any impacts you foresee on the interests of the proper administration of justice and the rule of law, or on the public interest.

Q 1.10 Please add any other comments you may have on these amendments.

#### **Key feature 6**

“The scheme proposes that for recreditation, advocates who are conducting level 1 advocacy must evidence that, over the period of accreditation, they have

demonstrated that they still meet the level 1 standard by means of assessed advocacy Continuing Professional Development (CPD) as specified by their regulator.”

A proposed amendment to the SAHRAR, and to a guidance note to Regulation 3 of the SRA Training Regulations [2011] Part 3 - CPD Regulations, implement the CPD requirements relating to certification at level 1 under QASA.

Q 1.11 Please comment on these amendments in respect of any impacts you foresee on the interests of the proper administration of justice and the rule of law, or on the public interest.

Q 1.12 Please add any other comments you may have on these amendments.

### **Key feature 7**

“Other consequential amendments”

It is proposed to add text to a reference in the SAHRAR Regulation 11, which is specific to higher rights of audience and does not relate to QASA, to make that specific application clear.

New defined terms relating to QASA are also proposed.

Q 1.13 Please comment on these amendments in respect of any impacts you foresee on the interests of the proper administration of justice and the rule of law, or on the public interest.

Q 1.14 Please add any other comments you may have on these amendments.

### **ILEX Professional Standards proposed regulatory changes**

Q 2.01 Should IPS separate the entry and course criteria from the Rights of Audience Certification Rules. If not please give reasons

Q 2.02 Provide any comments you have on the definitions added into the Rules. Do you agree that the definitions adequately reflect the principles of the quality assurance scheme? If not, please indicate any changes that should be made.

Q 2.03 Do the appeal rules adequately reflect the proposals on appeals developed by JAG?

Q 2.04 Do the rules adequately reflect the proposals developed by JAG as to reaccreditation?

Q 2.05 Do the rules adequately reflect the proposals developed by JAG that IPS may receive referrals about the competence of advocates from JAG and seek an independent assessor to assess an advocate?

Q 2.06 Do the knowledge and experience guidelines, portfolio guidelines, course outcomes and assessment criteria adequately reflect the standards developed for the quality assurance scheme for advocates?

### **Bar Standards Board proposed regulatory changes**

Q 3.01 Comments are welcome on whether the Rules create any difficulty in their application either for individual barristers or for any particular group (protected groups or otherwise) of advocates;

Q 3.02 Comments are welcome on whether the impact of the Rules on the interests of the proper administration of justice and the rule of law, or on the public interest.

Q 3.03 Comments are invited on this proposal.

## Appendix 2

## List of respondents

Organisation / Name	Anonymity
Foresters	
Alasdair Watson & Co Solicitors	
Andrea Clarke ( as individual)	
Bishop & Light Solicitors	
Andrew Cogan (as individual)	
Andrew Storch ( as individual)	
Andrew Thompson & Co	
Wainwright & Cummins Solicitors	
Richard Griffiths & Co Solicitors	
Angus Mathieson ( as individual)	
Angus Taylor (as individual)	
Anonymous	
TV Edwards LLP Solicitors	
Antony Meisels (as individual)	
Huntingdonshire District Council	
Barlow Lyde & Gilbert LLP Solicitors	
Legal Services Commission	
23 Essex Street Chambers	
Chris Clark Solicitors/East Gate Chambers	
Christopher Baldwyn (as individual)	
Edward Hayes LLP	
Bird & Co Solicitors LLP	
23 Essex Street Chambers	
Kaim Todner Solicitors	
McLartys Solicitors	
Clare Antenen (as individual)	
Fellowes Solicitors LLP	
ITN Solicitors	
Daniel Woodman & Co Solicitors	
Kaim Todner Solicitors	

Lawyers with Disability Division	
Young Barristers Committee	
Emma Lamble (as individual)	
Tuckers Solicitors	
Gennaro Baffa (as individual)	
GC Law Solicitors	
Ross Solicitors	
Trafford Council	
Graham Pressler (as individual)	
Elvin & Co	
Forbes Solicitors	
Fellowes LLP	
Solicitors in Local Government	
The Solicitors	
Suffolk Coastal District Council	
Kelcey & Hall Solicitors and Advocates	
Evans Roberts Solicitors	
Itpal Dhillon (as individual)	
1 King's Bench Walk Chambers	
Jan Davies (as individual)	
Nottingham Law School	
Lewis Nedas & Co Solicitors	
Wilberforce Chambers	
John Hewlett (as individual)	
John Skinner (as individual)	
Julian Young & Co	
Brady Eastwood Pierce & Stewart	
Aylesbury Vale District Council	
Amphlett Lissimore Bagshaws LLP	
Burton Copeland Solicitors	
Anthony King Solicitors	
Shelley & Co Solicitors	
GT Stewart Solicitors	
Nottingham City Council	
South Eastern Circuit and Criminal Bar Association	
CDA Solicitors	
CDA Solicitors	
Niall Doherty (as individual)	
Martin Murray & Associates Solicitors	
Fisher Jones Greenwood LLP Solicitors	
Mylles & Company Solicitors	
Rebecca Hurst (as individual)	
Goldman Bailey Solicitors	

