



Consultation response

Joint Advocacy Group: Quality Assurance for Advocates

Overview

1. The Legal Services Consumer Panel strongly supports the development of a mandatory quality assurance scheme for criminal advocates. Such a scheme should help ensure that advocates remain competent throughout their career and that consumers' expectations of regulation are met.
2. The proposals included in the consultation paper are important steps in this direction, but there is significant scope for improvement:
 - There is little consumer emphasis in the scheme and there seems to have been little consumer or user input to its development.
 - There are no mechanisms for the experiences of clients, witnesses, victims, JPs, the police or court staff to be considered as part of accreditation or reaccreditation.
 - The mapping of the common advocacy standards to the different levels is a central part of the scheme but has to yet occur.
 - The final advocacy standards are weaker than those consulted upon and still do not cover service elements of advocacy.
 - Advocates should not choose on which cases they are assessed or who by.
 - There is a lack of clarity around the governance of the scheme, including PAC's authority and membership.

The proposals

3. The Joint Advocacy Group (JAG) comprises the Bar Standards Board, the Solicitors Regulation Authority and ILEX Professional Standards.
4. JAG is consulting on its proposals for a new quality assurance scheme for criminal advocates. Key elements include:
 - Compulsory accreditation at four levels for criminal advocates based on a set of common advocacy standards.
 - Accreditation at levels 1 and 2 will be primarily based on existing solicitor, legal executive and barrister education, training and assessment requirements for advocacy.
 - Accreditation at levels 3 and 4 will be primarily based on reports from judges and a performance portfolio, although other evidence may be considered.
 - Re-accreditation every 5 years.
 - Establishment of a new body – provisionally called the Performance of

Advocacy Council (PAC) – to implement and operate the assessment process, mainly for levels 3 and 4.

- Establishment of a ‘traffic lights’ system of warnings, where judges, and possibly other stakeholders, can refer concerns to PAC, which makes recommendations to the relevant regulator.
5. The scheme is to be introduced in July 2011, with advocates self-assessing their level but needing to be formally accredited or re-accredited within three years.
 6. The Consultation Paper includes a final version of the common advocacy standards that were consulted on earlier this year.
 7. The scheme applies to criminal advocates. JAG is considering whether to develop a scheme for other advocacy areas.

The Panel’s response

8. The Panel strongly supports the development of a mandatory quality assurance scheme for advocates. The specialist nature of advocacy services, alongside infrequent usage, means that many consumers are not well placed to judge the quality of advocates or the services they offer. The consequences of poor advocacy for client liberty and victim justice make criminal advocacy a good place to start. The Panel would welcome extension of the scheme into other areas.
9. The need for a mandatory scheme is reinforced by the Panel’s consumer research and companion report on quality in legal services¹. This research found that consumers assume their legal advisors will be competent, and that someone else is making sure this is the case. Moreover, consumers strongly support the use of

‘harder’ quality assurance mechanisms, including periodic reaccreditation.

10. The Panel is very supportive of some key elements of the scheme:
 - mandatory participation;
 - four accreditation levels;
 - periodic reaccreditation;
 - an ongoing performance ‘warning’ system; and
 - judicial involvement.
11. However, the scheme has significant scope for improvement. The Panel has identified issues relating to consumer input, the common advocacy standards, governance, and the reaccreditation processes. Significant details about important elements of the scheme are also missing or lack clarity, with large parts left for JAG or PAC to determine later without public consultation.
12. These issues are not insurmountable but they must be addressed; some immediately and others as the scheme is implemented. Importantly, JAG should continue to work towards a July 2011 commencement.

Consumer input

13. The Panel is concerned that there is little consumer emphasis in the scheme and there has been little, if any, user input to its development.
14. The paper acknowledges that the scheme will have a consumer protection function. However, the main emphasis is on the judiciary, with the paper noting explicitly that the scheme has ‘*the judiciary at its heart*’. The judiciary is an important audience and the Panel welcomes its

increased appetite to become involved in quality assurance. However, relying solely on individual judicial evaluations raises risks in consistency of appraisal. JAG also needs to consider how to ensure judges maintain a strong appetite for involvement, as this will be a long term initiative.

15. The Panel is concerned that the outcomes and characteristics that a judge values will not always be the same as a consumer. For example, consumers and juries may want court arguments to be presented in lay terms. Even more importantly, aspects of advocacy outside the courtroom, such as client care and the provision of information to clients will not be visible to the judiciary. Neither will certain core competencies included in the common advocacy standards, such as the C1 'Assists clients in decision-making'.
16. The paper fails to recognise this distinction, which may be due to a lack of consumer engagement in its development. This approach means that the scheme may not actually deliver the kind of advocates that users want, whether they are lay clients or instructing solicitors.

Common Advocacy Standards

Mapping competence to accreditation levels

17. The mapping of the common advocacy standards to the different levels is a central part of the scheme but is yet to occur. Paragraph 46 indicates that '*advocates will be assessed against the common advocacy standards at each level*'. However, the paper does not explain how the standards will be translated into the minimum competencies required for each accreditation level.

18. Without this mapping, the Panel cannot judge how advocates at different levels will be assessed, what different skills will be required and whether this matches with consumer need.

Final advocacy standards

19. JAG has not responded to the earlier consultation on the common advocacy standards, although a final version is included in the consultation paper.
20. The Panel is concerned that the final version has not incorporated its earlier comments, but has instead removed important requirements. This includes the requirement to keep lay and professional clients up-to-date (removed from C1). The Panel is bemused that JAG no longer considers this a necessary competence for advocates to demonstrate.
21. The standards still do not cover the service aspects of accepting instructions. The Panel's consumer research on quality indicates that consumers want lawyers to demonstrate empathy and provide advice that is timely and clearly explained. Client care is an essential dimension of quality alongside technical competence. Therefore, the advocacy standards need to include service elements of quality alongside technical skills.
22. It is concerning that the final standards are weaker than those consulted upon. The paper contains no discussion of why changes were made, or why other suggested changes were not adopted.

Accreditation Levels

23. The Panel is pleased by the decision to introduce four accreditation levels, an approach we strongly supported in responding to the earlier consultation.
24. In implementing this system, it is essential that the levels deliver minimum competency requirements without 'gold-plating' services. For example, it is important that consumers (or instructing solicitors) can determine whether they want 'the best' or 'the best they can afford' at each level.
25. The proposed discretion for judges to 'allow' advocates to act above their level is supported. The expert assessment of a judge is a vital dimension. This approach, together with the proposed measures to avoid abuse, should help address the need to allow choice, whilst ensuring that consumers are protected.

Level 1 and 2 assessment

26. Paragraph 66 implies that practising advocates (whether or not they are currently criminal advocates) can be automatically accredited at Level 1 or 2. This raises some concern as there is no guarantee that these advocates will have the required skills or experience, either in criminal advocacy or advocacy more generally. More specifically, the Panel understands that the Legal Practice Course for solicitors commonly focuses on civil litigation, which may mean some advocates gain accreditation without any criminal advocacy experience at all.
27. Under the proposed approach, these advocates would not be subject to re-accreditation for up to 8 years (3 years to first accredit and then 5 more until re-accreditation). Given a Cardiff University

study into advocate quality found a significant number of issues (eg. 49% of level 2 candidates failed cross-examination and 41% failed examination-in-chief)², the Panel considers that there needs to be earlier and more robust assessment for practising advocates becoming accredited at these lower levels.

Level 3 and 4 assessment

28. The paper indicates that advocates will need to gather a number of judicial evaluations over a prescribed period of time for accreditation at level 3 or 4. The Panel understands that the details of this process are still to be decided; however discussion has indicated that advocates could choose when evaluations occur and by whom, and could potentially make requests for assessment after a case was completed. In order to reliably assess competence, it is essential that advocates are assessed on a representative basis, not only on isolated cases where things go well. The odds are stacked too heavily in advocates' favour.
29. A better approach would be for an advocate to indicate they would like to be assessed and then any cases over a specified timeframe, say 6-12 months, could be subject to review, without advocates knowing which until after the event.

Reaccreditation and monitoring

30. The Panel's advice to the LSB on quality in legal services finds that a key gap in regulatory quality assurance processes is regular and proactive monitoring of competence. Therefore, the inclusion of a reaccreditation requirement is strongly supported; however the paper is unclear around how it will operate in practice.

31. The Panel understands that reaccreditation will be primarily based on judicial evaluation. However, judicial assessment is not sufficient alone and must include user input. It is essential that reaccreditation is a robust assessment of all aspects of advocacy and must proactively ensure that advocates at all levels are competent.
32. It is also unclear what happens if an advocate fails to be reaccredited at a specific level: Do they fail entirely and therefore cannot practice; or do they go down a grade? This needs to be clarified as a key driver for the scheme was concern about poor advocates. It is essential that the scheme includes mechanisms to prevent poor performers from practising.
33. Moreover, if reaccreditation is assessed by PAC, regulators should be alerted of any failure, so that they can check the lawyer's performance in other areas of practice.

The 'traffic lights' system

34. The Panel supports the inclusion of a 'warning' system that will feed into regulators' risk management processes. This should complement the reaccreditation process by providing a mechanism for ongoing reactive review of advocates.
35. However, the proposed 'traffic lights' system needs further development. At present, it seems to be misnamed, as it is more of a internal warning system and does not seem to have graduated levels or signals i.e. what would be 'red', 'amber' and 'green' issues, how would they link to regulatory action and how will consumers be protected when advocates are subject to these warnings?
36. The process of sending referrals to PAC, who then consider and refer them to the regulators to consider disciplinary action, has the potential to be protracted. This could result in a poorly performing advocate continuing to provide services for a considerable time, which raises serious risks of consumer detriment.

Input from users and other stakeholders

37. A key weakness of the proposed scheme is that there are no mechanisms for the experiences of clients, witnesses, victims, JPs, the police or court staff to be considered. The most common purchasers of advocacy services, instructing solicitors, also have few opportunities to input. The only time when input from people other than judges is proposed (but only as a possibility) is in relation to 'borderline cases' for level 3 and 4 and 'traffic light' referrals.
38. In contrast, the General Medical Council, as part of its consultation on revalidation, proposed that colleague and patients participate in doctor appraisals at least once within each revalidation period, and that the outcomes of this process be considered as part of the revalidation process.³ The Panel suggests a similar mechanism could be part of an advocate's reaccreditation for all levels.
39. Building on earlier remarks, judicial evaluation is very welcome, but judges cannot tell PAC what it feels like to be a client or other court user. The quality of skills being assessed might be viewed differently by various stakeholders. For example, it would be useful, if practicable, to draw on jury members and witnesses, as well as judges, when assessing the quality of 'examination in chief and cross-examination'.

40. The 'traffic lights' system offers little opportunity for anyone other than judges to provide input or raise quality concerns. The Panel recommends that the views of clients, witnesses and the jury should be sought regularly, and should certainly be permissible as referrers in a 'traffic light' system. JAG indicates that this could mean the scheme is abused or misused (although no further detail is provided). The Panel disagrees, and suggests that the above risk is outweighed by the risk that genuine concerns from advocacy service users may have no structured route for communication to regulators, resulting in serious issues being missed and not rectified.

Governance

PAC's Authority

41. There is a lack of clarity around the governance of the scheme, including PAC's authority and whether it can make decisions or only recommendations.
42. The start of the paper suggests that PAC will have delegated authority from JAG. The paper lists a number of important matters PAC is expected to consider, including: setting the levels of 3 and 4 '*more precisely*'; the option of judicial discretion to allow an advocate to '*act up a level*'; and the setting of assessment requirements.
43. However the paper also implies that JAG or the regulators may need to approve any recommendation of PAC. For example, in paragraph 91, the paper notes that it will '*ultimately be for the regulatory bodies, on the recommendation of PAC, to approve the standards that will be used in the assessment process*'.
44. It does not seem to make sense to incur the expense of creating a whole new organisation if it going to be advisory only. This will create significant layers of bureaucracy and cost. PAC should either be established as an independent organisation that can make decisions or JAG should keep ownership of policy decisions and contract out assessment to a private sector body (or bodies), similar to the assessment process used by the SRA for higher rights of audience. Disciplinary action should remain the responsibility of approved regulators.

PAC membership

45. The proposed requirements for membership of PAC seem overly restrictive. Although PAC is nominally to include lay members, the paper states that the PAC membership will be restricted to those with '*particular expertise in the performance and assessment of criminal advocacy*' – which will limit significantly the eligible persons. The Panel considers that eligibility should be broadened, such as to people with exposure to criminal advocacy (such as a court officer) or with broader professional quality assurance expertise (such as from within the medical profession).

Consumer communication

46. The new scheme will need to be communicated to the market, including lay consumers and instructing solicitors. In particular, regulatory reforms over the next few years are likely to facilitate more barristers working with lay clients through direct instruction. This increases the importance of ensuring that consumers understand the scheme and know what the different levels mean, so they can be sure they are instructing an appropriate person.

47. The Panel recommends that JAG or the implementing body, develops a plain language document that explains the scheme and what a consumer can expect from an advocate accredited at each level.

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¹ Vanilla Research (2010) *Quality in Legal Services*, Report prepared by Vanilla Research for the Legal Services Consumer Panel, September 2010 and legal Services Consumer Panel (2010) *Quality in Legal Services*, November 2010, available online, <http://www.legalservicesconsumerpanel.org.uk/ourwork/QualityAssurance.html>

² Devereux, A, Tucker, J, Moorhead, R and Cape, E (2010) *Legal Services Commission 'Quality Assurance for Advocates'*, Centre for Professional Legal Studies Cardiff Law School, <http://www.law.cf.ac.uk/research/pubs/repository/2269.pdf>

³ General Medical Council (2010) *Revalidation: the way ahead – Consultation Document*, March 2010