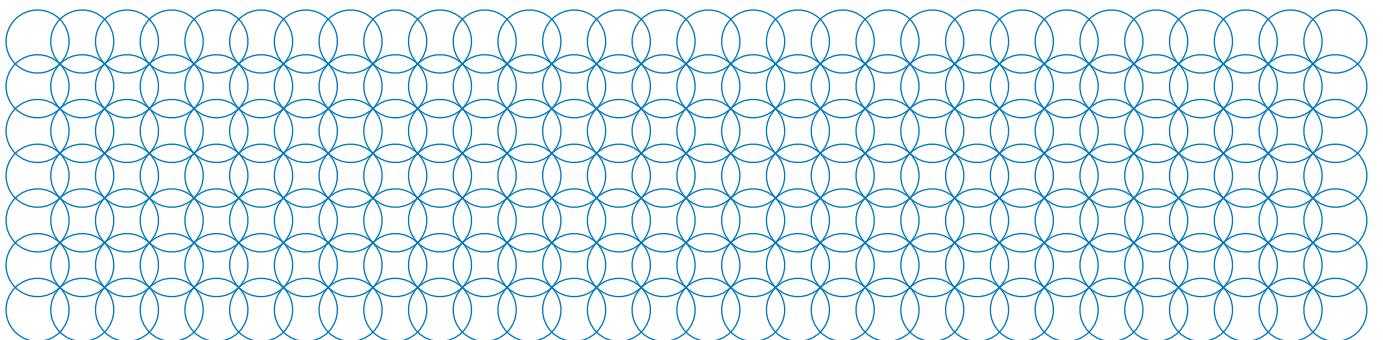




# Creating a Quality Assurance Scheme for Publicly Funded Criminal Defence Advocates

**Consultation Paper 13/07**  
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## **Creating a Quality Assurance Scheme for Publicly Funded Criminal Defence Advocates**

A joint consultation produced by the:

- Ministry of Justice
- Legal Services Commission

Drawing on discussions and workshops involving the:

- Bar Council
- Bar Standards Board
- Judiciary
- Law Society
- Solicitor's Association of Higher Court Advocates
- Solicitors Regulation Authority
- Institute of Bar Clerks
- Institute of Advanced Legal Studies

This information is also available on the MOJ website at [www.moj.gov.uk](http://www.moj.gov.uk) and on the LSC website at [www.legalservices.gov.uk](http://www.legalservices.gov.uk)



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## Foreword

by Lord Falconer, Secretary of State for Justice and Lord Chancellor,

Vera Baird QC MP, Parliamentary Under-Secretary of State for Justice

and Carolyn Regan, Chief Executive, Legal Services Commission

Lord Carter of Coles highlighted the importance of ensuring high quality legal services for clients in his review of legal aid procurement. By placing quality at the heart of the provision of all publicly-funded legal services clients can be reassured that the quality of service they are provided with is guaranteed, the justice system benefits from expert and dedicated practitioners, and the wider public can be confident that the system is delivering justice. To this end, Lord Carter recommended that a system of quality monitoring based on the principles of peer review and a rounded appraisal system be developed for all advocates working in the criminal, civil and family courts.

We were delighted that this proposal was endorsed by representative bodies and the overwhelming majority of practitioners in their responses to our consultation paper *Legal Aid: a sustainable future*, published in July 2006. Officials from the Ministry of Justice and Legal Services Commission have, over the past ten months, been working in partnership with representatives from the judiciary, the Bar Council and Bar Standards Board, the Law Society, the Solicitors Regulatory Authority, the Institute of Bar Clerks, the Crown Prosecution Service and the Attorney General's Office, to develop a quality assurance scheme for advocacy services.

The provision of good-quality advocacy is important in all areas of the law but particularly so in criminal defence work, where an individual's liberty may be at stake. We have therefore focused in the first instance, on developing a pilot scheme for quality assuring the quality of defence advocates practising at Crown Court level and above. The aim is to explore how lessons learnt from this quality assurance scheme can be introduced into other areas of publicly funded advocacy.

This Working Group has endeavoured to create a system of quality assurance that is robust, credible and independent, yet proportionate and affordable for the professions. It is a system of quality assurance that recognises the importance of demonstrating the entire range of skills now required of advocates: case management, client service and effective interaction with the wider justice system as well as advocacy and legal knowledge. Proposals based on Working Group discussions have now been put forward in a joint MoJ/LSC consultation paper and we urge you all to consider and comment on how you feel any such scheme should operate.

We are very grateful to the Working Group representatives whose constant stream of ideas and comments were invaluable to the development of a quality assurance scheme for criminal defence advocates. It would not have been possible to reach these proposals without their proactive engagement and ongoing participation. We are also grateful to the judges, barristers, peer reviewers, solicitors and barristers' clerks who attended our "Walk Through" events, for the wealth of expertise and practical experience they have contributed. We have been impressed with the way in which all parts of the criminal justice system have closely worked together on this and would like to thank everyone for contributing an enormous amount of their time and effort.

We are very keen to hear your views on both the principles outlined herein, and on the specific options for the potential operation of the pilot scheme. We will continue to work on the detail over the consultation period.



A handwritten signature in cursive script that reads "Charlie Falconer".

**Lord Falconer  
of Thoroton**

A handwritten signature in cursive script that reads "Vera Baird".

**Vera Baird QC**

A handwritten signature in cursive script that reads "Carolyn Regan".

**Carolyn Regan**

## Executive summary

1. These proposals for a Quality Assurance Scheme for Publicly Funded Criminal Defence Advocates are a response to Recommendation 5.3 of Lord Carter of Coles' independent Review of Legal Aid Procurement:

**Recommendation 5.3:** *A proportionate system of quality monitoring based on the principles of peer review and a rounded appraisal system should be developed for all advocates working in the criminal, civil and family courts. This system should be developed through a process chaired by a member of the judiciary in partnership with the Bar Council, Law Society, Legal Services Commission and Department for Constitutional Affairs (now Ministry of Justice) to ensure it covers all advocates with relevant rights of audience in these courts. The new quality monitoring system should be developed in the first instance for publicly funded criminal advocates, then for publicly funded family and civil advocates, and ultimately for all advocates. The scheme for publicly funded criminal advocates should be in place by the time the new graduated fee schemes are implemented in the Crown Court in April 2007. The system should be subject to a full regulatory impact assessment before being implemented.*

2. This recommendation was endorsed by the overwhelming majority of practitioners and representative bodies in their responses to the Department for Constitutional Affairs' consultation paper *Legal Aid: a sustainable future*, published in July 2006. They endorsed Lord Carter's view that quality must be at the heart of the provision of legal services. Quality assurance engenders confidence among clients in the legal advice they receive, and in the justice system more widely. It also secures value for money for the taxpayer. Moreover, many felt that systems to promote and assure quality would become even more important as the procuring of advocacy services moves towards competition and a unified graduated fee scheme.
3. A Working Group was set up last August to consider the development of a quality assurance scheme for publicly funded criminal defence advocates. The Working Group has representatives from the Judiciary, the Bar Council, the Bar Standards Board, the Law Society, the Solicitors Regulation Authority, the Institute of Barristers' Clerks, the Crown Prosecution Service, the Legal Services Commission and the Ministry of Justice. The various bodies recognise and endorse the principle that it is in the public interest for advocacy to be of a high quality, and delivered by practitioners working to the highest ethical standard.

4. This document consults on proposals to meet the requirements of a QAA scheme for publicly funded criminal defence advocates practising at Crown Court level and above, drawing on discussions with the Working Group. The results from this consultation will inform the design of the pilot which will, in turn, inform the development of a final scheme.
5. In summary, the proposals for the final scheme are that:
  - It should be robust and effective but also be simple to administer and proportionate;
  - It should apply the same quality assurance standards to all advocates, whether solicitors or barristers, employed or self-employed;
  - It should use a competence framework, which should identify the attributes and abilities required by advocates of differing abilities and experience both in and out of court;
  - It should use evidence from identified sources to inform the assessment of the competence or otherwise of the advocate;
  - The evidence should cover advocacy skills, legal knowledge, case management, client service, accurate and timely advice, and effective interaction with other agencies in the criminal justice system;
  - Individual advocates should be responsible for collecting a body of evidence to show their competencies and skills;
  - The competency assessment should be based on careful consideration of all evidence submitted on the advocate's performance and against objective criteria of competencies, which it is proposed should be based on the current quality assured QC system;
  - Processes should also be established within chambers/firms (and should be subject to audit) to ensure that the right advocate is taking on the right case, and that quality representation is assured for all publicly funded criminal defence cases.
6. Lord Carter had recommended that a quality assurance scheme for publicly funded criminal advocates be in place by April 2007. It has been agreed, however, that it is vital to ensure that the detail and operational processes of such an important and

far-reaching scheme are right, and that this process will take longer than Lord Carter suggested.

7. This consultation is being used to encourage interested parties to contribute to the development of a pilot scheme for quality assuring publicly funded criminal defence advocates practising at Crown Court level and above. The proposal is that the pilot will test out more than one approach in two or three different geographical areas. The pilot will be launched later this year and will run for six to twelve months.
8. Following the evaluation of the pilot, there will be a further consultation on more detailed proposals. Subsequent national roll out of the scheme will focus initially on all publicly funded criminal advocates.
9. While the working group has concentrated on publicly funded criminal defence work in the Crown Court and above to begin with, the aim is to explore how the lessons learned from this quality assurance scheme can be introduced into other areas of publicly funded advocacy. The evaluation of this pilot will contribute to that aim.

## 1 Introduction

1.1 This paper sets out for consultation the proposed objectives and framework for a pilot designed to meet the requirements of a quality assurance scheme for publicly funded criminal defence advocates practising at Crown Court level and above. The proposals will affect:

- all publicly funded criminal defence advocates doing higher court advocacy (barristers and solicitor advocates) in England and Wales;
- all chambers and firms with criminal defence advocates doing higher court advocacy in England and Wales, and;
- all procurers of publicly funded higher court criminal defence advocacy services in England and Wales.

1.2 This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The Consultation Criteria, which are set out on page 51 have been followed.

1.3 We will be publishing an initial Regulatory Impact Assessment imminently and comments on this document will also be welcome.

1.4 Responses are welcomed from anyone with an interest in or views on the subject covered by this paper. We particularly value responses from practising advocates, judges, chambers, firms, clients and consumer groups on the practical workings of the proposed pilot scheme.

## 2 The proposals

### 2.1 Aims and Objectives

- 2.1.1 These proposals to develop a quality assurance scheme for publicly funded criminal defence advocates are a response to Recommendation 5.3 of Lord Carter's independent Review of Legal Aid Procurement:

***Recommendation 5.3:** A proportionate system of quality monitoring based on the principles of peer review and a rounded appraisal system should be developed for all advocates working in the criminal, civil and family courts. This system should be developed through a process chaired by a member of the judiciary in partnership with the Bar Council, Law Society, Legal Services Commission and Department for Constitutional Affairs (now Ministry of Justice) to ensure it covers all advocates with relevant rights of audience in these courts. The new quality monitoring system should be developed in the first instance for publicly funded criminal advocates, then for publicly funded family and civil advocates, and ultimately for all advocates. The scheme for publicly funded criminal advocates should be in place by the time the new graduated fee schemes are implemented in the Crown Court in April 2007. The system should be subject to a full regulatory impact assessment before being implemented.*

- 2.1.2 The objectives of the pilot scheme are to assist in the development of a final quality assurance scheme for publicly funded criminal defence advocates that should:

- 2.1.2.1 Ensure the provision of a high quality service for clients and others engaged in the provision and procurement of legal services by maintaining high standards in advocacy, preparation and case management.
- 2.1.2.2 Apply the same quality assurance standards and procedures to all advocates with rights of audience in the higher courts, whether barristers or solicitors, and whether employed or self-employed.
- 2.1.2.3 Ensure that any standards and procedures are competency-based and focus on the objective measurement of behaviours and skills.
- 2.1.2.4 Provide positive opportunities for advocates to demonstrate their level of expertise against standards which apply across the full range of advocacy work, case management and client care.

- 2.1.2.5 Provide a light touch but robust and effective quality assurance scheme that is not an administratively burdensome or expensive process and that includes the assessment of evidence by peers who are independent of the advocate in question.
- 2.1.2.6 Link into the existing work on quality in the QC scheme, peer review for solicitors, the Bar Quality Mark (for chambers), the Specialist Quality Mark (for solicitors) and the Crown Prosecution Service scheme where appropriate.
- 2.1.2.7 Enable the consumer to see that high standards of service from a specialised advocacy service are being maintained and assured.
- 2.1.2.8 Have a structured quality assurance system in place which is owned by the professions.

**Question 1:**

**Are the objectives comprehensive, appropriate and reasonable?**

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

## 2.2 Competence Framework

- 2.2.1 Any quality assurance scheme for advocates needs to be competency-based and to focus on evidence of an advocate's behaviours and skills rather than length of experience or qualification. This will ensure that overseas entrants, those who come late to practice, those who practise part-time or those who take career breaks (whether barristers or solicitors) are not disadvantaged.
- 2.2.2 The description and definition of competencies are an essential part of any competency-based scheme. This ensures that a quality scheme is truly competency-based instead of reference-based (i.e. that individuals are able to assess the evidence and performance of an advocate against a set of clearly defined and understood requirements instead of interpreting them in their own fashion). Every competency therefore needs a clear corresponding example of what evidence of "good" looks like and what evidence of "poor" looks like.
- 2.2.3 Annex 1 sets out a possible list of competencies, which are based on the QC competencies. These were developed by the professions and the Department for Constitutional Affairs in 2004, and updated by QC Appointments in 2006. It is proposed that these competencies will be used in the pilot. The pilot will provide the opportunity for assessing the list and identifying suitable amendments, additions and deletions as appropriate.
- 2.2.4 Annex 2 breaks down criminal work at Crown Court level and above into four levels, which are intended to be illustrative of the type of work a criminal defence advocate at a particular level of competence is likely to be undertaking.
- 2.2.5 Annex 3 seeks to illustrate the behaviours and skills of each competency at each level. Some competencies, such as those relating to diversity and integrity, are to be expected in the work of all advocates. Others will be developed increasingly over time and with the benefit of experience.
- 2.2.6 As an advocate takes on more complex and serious cases, s/he needs to be able to prove that s/he has a standard of competence appropriate to the nature and level of the work being undertaken.
- 2.2.7 The grading criteria are intended to be illustrative of the type of work an advocate within a particular level is likely to be undertaking. They are not intended to impose rigid boundaries limiting practice or personal development.
- 2.2.8 One matter to be considered is whether advocates should only be able to undertake work at the level at which they have been identified as competent, or whether they should also be able to undertake occasional work at higher levels

in advance of assessment of competence at that level. If the latter approach were to be adopted it would be necessary to consider what safeguards would be required to allow for acceptance of higher level work (such as, for example, evidence of consistent strong performance, or a limit on the number of cases taken at a higher level prior to regrading).

2.2.9 Annex 3 gives examples of “good” and “poor” behaviours against competencies. The competency framework used in judicial appointments also captures “excellent” behaviours and, in the scheme proposed here, this could be useful in identifying those advocates who are capable of progressing to the level above.

2.2.10 In any event, advocates will still remain subject to their codes of professional conduct, which may restrict or preclude the acceptance of work at a higher level than the level currently held. Such codes are available to deal with instances in which advocates inappropriately accept work at a higher level. For example:

- In the case of barristers, the Code of Conduct provides that:

*601. A barrister must not accept any instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister will be professionally embarrassed:*

*(a) if he lacks sufficient experience or competence to handle the matter.*

- In the case of solicitors, the Code of Conduct, due to come into force on 1 July 2007, provides that:

*“... you must refuse to act or cease acting for a client in the following circumstances...”*

*(b) where you have insufficient resources or lack the competence to deal with the matter...”*

2.2.11 Where there is in force a certificate for more than one advocate, it is to be expected that the leading advocate will hold the appropriate level to the case. The junior advocate(s) will hold the level appropriate to the requirements of the case.

2.2.12 Both lay and professional clients should have access to information about the level at which an advocate has demonstrated his/her competence. Chambers would be expected to publish lists of their advocates (and the levels of their advocates) on their websites and/or business literature. Firms would be

expected to do the same for their in-house solicitor advocates. This will enable procurers to select advocates of appropriate competence.

2.2.13 It is intended that, for the moment, individual procurers of work will continue to be responsible under the Specialist Quality Mark for ensuring that the advocate they engage has the necessary additional specialist training for particular types of work (e.g. specialist training for rape and serious sex cases). In due course, consideration can be given to whether that should be built into the wider quality assurance scheme.

## **Question 2**

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

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

## **Question 3**

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

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

## **Question 4**

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

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

**Question 5**

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

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

**Question 6**

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

**Please support your answer with reasons.**

**Question 7**

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

**Please support your answer with reasons.**

**Question 8**

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

**Please support your answer with reasons.**

## 2.3 Evidence and Assessment of Competence

- 2.3.1 It is proposed that the competency framework set out in the previous section would form the key starting point for the pilot.
- 2.3.2 It is proposed that the pilot scheme will apply the same competencies to all publicly funded criminal defence advocates undertaking work at the Crown Court and above, whether barristers or solicitor advocates, and whether employed or self-employed.

### *Generating the evidence*

- 2.3.3 The next stage in the operation of the pilot is identifying how to generate and gather evidence which will enable defence advocates to show how they satisfy the elements within the framework. The precise nature, extent, quantity and assessment of evidence have not yet been determined and the pilot will explore and evaluate different options. The costs associated with these different options will also be monitored and evaluated.
- 2.3.4 There are currently many existing sources of evidence to inform an assessment of competence. To minimise additional costs and complexities it is proposed to maximise the use of such material where possible and, where necessary, seek to find objective ways of capturing what is currently informally expressed and available. Existing evidence includes an advocate's current workload and experience (cases undertaken) and professional reputation. Evidence also exists as part of current quality assurance mechanisms such as Specialist Quality Mark (SQM), the Quality Mark for the Bar (QMB) and the solicitor's Peer Review (PR) process as considered further below. In addition, particularly at levels 3 and 4, written advices on evidence, written advices on PCMH, attendance and conference notes, skeleton arguments, the defence statement, and advice on appeal may provide evidence of competence.
- 2.3.5 The pilot will also consider whether, and if so in what way, completion of relevant Continuous Professional Development (CPD) should be a precondition to accreditation at any particular level.
- 2.3.6 The pilot will consider the best means by which the judiciary could give feedback on an advocate's performance against the competency framework. One suggestion has been for the judiciary to provide feedback on specific competencies for trials and significant pieces of advocacy work but care will be needed to design such feedback in a way which is robust, consistent and practical.

- 2.3.7 The SQM already imposes specific requirements for maintaining and monitoring the performance of advocates. The pilot will look at whether existing SQM requirements might be sufficient, as they stand, to provide evidence of an advocate's competence or whether the SQM should be amended to require professional clients to feedback on an advocate's performance against the competency framework on every case.
- 2.3.8 There will be a difference between the type and sources of evidence available to newly trained advocates and more experienced advocates and the pilot will be exploring the best way to take account of this. The case-mix of different advocates will also vary. Whilst some will undertake a high volume of one- or two-day trials, others may be involved in one or a few very high cost cases. It would be helpful to have feedback from a range of individual practitioners on what they think would provide a representative sample of evidence at each level.

#### *Gathering the evidence*

- 2.3.9 Building up a complete and consistent understanding of a defence advocate's level of competence is complex. A full picture would include evidence of competence in court and out of court alongside evidence of responsible relationships with defendant(s), witness(s), professional clients, the court, the prosecution and other partners in the criminal justice system.
- 2.3.10 The pilot will explore who is best placed to gather the different pieces of evidence that are needed to enable an assessment of competency to be made. This will include looking at how much responsibility should rest with the individual advocate to collect and present the evidence, what role chambers and firms would perform in supporting the process, and what evidence firms should be expected to hold automatically under the SQM on every advocate they use.
- 2.3.11 Whilst proportionality would suggest that as much of the evidence as possible should be collected by the individual advocate, or by their chambers or firm, the pilot will explore how best to collect and collate evidence from the judiciary, solicitors and other peers. The pilot will also explore mechanisms for evaluating evidence at random and will consider whether there is greater confidence in the final assessment result if those who are being assessed do not select the evidence.
- 2.3.12 Some evidence will be purely objective and factual, such as number of cases undertaken and the number of repeat briefs. But in the case of advocacy, some of the evidence is bound to be subjective and judgmental such as the assessment of performance in court, the assessment of relationships with

clients, and the assessment of communication skills. The pilot will explore how best to support consistency in judgements by providing a framework of criteria against which advocates can be assessed.

#### *Assessing the evidence*

- 2.3.13 One option is that chambers and firms should be expected to nominate one or two experienced advocates to sit on a co-operative QAA panel of assessors for a group of chambers/firms, or for a particular geographical area. This panel of advocates would be responsible for considering all of the required evidence and for assigning levels to all publicly funded defence advocates in the Crown Court. Submitted evidence could be marked blind or advocates could be required to sit on co-operative panels outside their home region.
- 2.3.14 Another option is that quality assured chambers or firms would be responsible for managing and assigning levels of competence to their own barristers or in-house solicitor advocates. Here, the sources of evidence themselves would need to be tightly controlled and quality assured to ensure that the task of assessing the evidence could be consistent and transparent. This option would also require that chambers/firms were independently audited. While this option has the attraction of being light touch, concerns have been expressed about whether it would be sufficiently robust and independent.
- 2.3.15 The pilot will look at both options, including the possibility of mixing the two by allowing chambers/firms to assign competence levels to a limited extent, say, to Levels 1 and 2 only. Each of these options has different tensions between being sufficiently consistent, robust, credible and independent as well as being proportionate and affordable for the professions. The evaluation of the pilot will explore these tensions carefully and provide full Regulatory Impact Assessments alongside any recommendations.
- 2.3.16 The pilot will also look at how the advocate in question should participate in the assessment process.
- 2.3.17 Whatever role is identified for chambers/firms in the assessment processes of the pilot, it will remain the task for the chambers/firms to ensure that advocates have been assessed as competent for the work they are being asked to undertake. Confirmation that these are being correctly adhered to will be provided through independent audit.
- 2.3.18 It will also be necessary to consider what adjustments would be necessary in relation to advocates returning to work after a period of absence, or carrying out advocacy on an intermittent basis, whether by reason of illness, childbirth, childcare, or any other cause.

2.3.19 All of the options would require that advocates disclose any complaints which have been concluded with a determination against the advocate within the past three years either by the advocate's chambers, firm or employer or by the advocate's professional regulatory body.

### **Question 9**

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

**Please indicate the number and type of sources of evidence and the span of time the evidence covers e.g. 12 months or number of cases.**

**Please support your answer with reasons.**

### **Question 10**

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

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

**Please support your answer with reasons.**

### **Question 11**

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

**Please support your answer with reasons.**

**Question 12**

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

**Please support your answer with reasons.**

## **2.4 Reassessment**

- 2.4.1 It has been suggested that the final scheme should incorporate a provision for reassessment, either as a result of adverse evidence being received, or after an appropriate interval without application for regrading.
- 2.4.2 Other similar processes of quality assurance indicate that a 3-year cycle would be appropriate for automatic reassessment where there has been no intervening consideration for regrading.
- 2.4.3 One trigger for reassessment as a result of adverse evidence could be three adverse determinations of complaints against an advocate to chambers, firm or professional regulatory body within three years. Another could be five poor feedback forms from judiciary or professional clients in a twelve month period. This will be explored in the pilot.
- 2.4.4 It is proposed that such reassessment should apply at all levels. It is considered likely that those assessed as competent at Level 4 will include QCs, leading juniors and those on the verge of becoming QCs. However, the scheme being proposed here is independent of other schemes (such as the QC scheme or those operated by various public bodies and government departments). Failure to maintain competence at Level 4 will have no impact on designation as a QC, which is awarded on the competency of the advocate at the time of designation.

### **Question 13**

**How frequently should advocates be reassessed? Is 3 years a reasonable period?**

**Please support your answer with reasons.**

### **Question 14**

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

**Please support your answer with reasons.**

## 2.5 Quality Assurance of Approved Organisations

- 2.5.1 There are currently in operation a range of existing quality assurance tools: the Specialist Quality Mark (SQM) for solicitors firms, the Quality Mark for the Bar (QMB) and peer review for solicitors. These could potentially be further developed either to provide good sources of evidence for use in the quality assurance process for individual advocates and/or quality assure the process of selection of advocates.
- 2.5.2 Although the SQM and QMB are management standards primarily concerned with the running of the organisations in question, well run organisations are currently required to make evidence based assessment of advocates to support decisions about which advocates are instructed on a case by case basis.
- 2.5.3 The LSC suggests that, in order to support a quality assurance scheme for advocates, the SQM and QMB would need additional requirements in relation to the role that firms and chambers would play in ensuring that advocates only undertake work for which they have been assessed as competent. The present independent auditing process (currently undertaken by LSC auditors) would then assess compliance with these requirements.
- 2.5.4 The SQM has specific requirements dealing with the choice and quality assessment of advocates selected by the firm. The LSC uses peer review to verify that these requirements are being met. Providing the firm itself achieves a sufficient rating at peer review, then evidence relating to those advocates who were instructed by the firm could potentially be regarded in itself as quality assured and therefore potentially of value in the process of assessing the quality of the advocates in question.
- 2.5.5 The pilot will examine this evidence and assess what changes might be necessary to the SQM requirements to achieve a) consistency between firms and b) take into account the advocacy competency framework.
- 2.5.6 In addition to organisational requirements, the SQM also has proxies for the quality of advice provided by solicitors firms, especially supervision, file review and managing the competence of advisors. These have been superseded by solicitor peer review, a direct measure of the quality of advice. At the moment, the QMB does not have similar proxies (due to the nature of chambers operation and the nature of barrister's work) or a peer review process.
- 2.5.7 The Bar Standards Board and the Solicitors Regulation Authority are currently considering how they should take over responsibility for auditing the quality of

chambers and firms, and can be expected to contribute to this debate in due course.

2.5.8 The pilot scheme will consider the areas in which audit is required, and how this can most proportionately be effected.

2.5.9 Peer review for solicitors firms does not currently assess individual solicitor advocates. However, elements of the work of some of the advocates used by the firm is assessed. This is not formally reported in most instances. The pilot will provide an opportunity to examine the material to investigate if there is valuable evidence which can be used as part of the wider advocate quality assurance process. The Institute of Advanced Legal Studies will analyse this area alongside the pilot.

### **Question 15**

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

**Please support your answer with reasons.**

## 2.6 Consistency and the role of a National Panel

2.6.1 It has been suggested that an important element of ensuring consistency in the development, delivery and maintenance of the scheme would be a National Panel who would be responsible for maintaining and amending the procedures, arranging or approving group or area panels, and organising and conducting hearings for any appeals. Such a National Panel might have equal representation from the Bar and Solicitors' profession and might have the judiciary, the LSC and other lay representation as appropriate. The pilot provides an opportunity to assess how such a panel might operate.

2.6.2 The composition of the National Panel might be as follows:

- 2.6.2.1 A High Court Judge or senior Circuit Judge, to be appointed by the Lord Chief Justice;
- 2.6.2.2 A practising QC, to be appointed by the Chairman of the Bar;
- 2.6.2.3 A practising barrister, to be appointed by the Chairman of the Criminal Bar Association;
- 2.6.2.4 A practising Junior barrister under 7 years call, to be appointed by the Chairman of the Bar;
- 2.6.2.5 A practising QC, to be appointed by the President of the Law Society;
- 2.6.2.6 A practising solicitor advocate, to be appointed by the Chairman of the Solicitors' Association of Higher Courts Advocates;
- 2.6.2.7 A practising solicitor advocate, under 7 years admission, to be appointed by the President of the Law Society;
- 2.6.2.8 A representative of the Bar Standards Board, to be appointed by the Chairman of the BSB;
- 2.6.2.9 A representative of the Solicitors Regulation Authority, to be appointed by the Chairman of the SRA;
- 2.6.2.10 A member of the Legal Services Commission, to be appointed by the Chief Executive of the LSC;
- 2.6.2.11 Three lay members to be appointed by the Lord Chancellor under public appointments procedures.

- 2.6.3 An important element of the scheme will be consistency in the procedures/assessment/decisions between advocates, chambers, and firms across the country. It is envisaged that a National Panel would have an important role to play in promoting consistency, in particular, through hearing any appeals.
- 2.6.4 It is proposed that the appeals process should be triggered by a submission in writing by the advocate, within 21 days of the receipt of the grading decision under appeal, and be accompanied, or followed within 28 days thereafter, by such supporting documentation as the advocate wishes to submit. The advocate might be asked to provide further details in writing in support of the appeal. The appeal would be considered as soon as reasonably practicable and, in any event, within three months of the receipt of all the material submitted.
- 2.6.5 The advocate would be notified of the appeal decision in writing within 28 days of determination.

#### **Question 16**

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

**Please support your answers with reasons.**

#### **Question 17**

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

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

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

## **2.7 Governance**

- 2.7.1 This consultation paper will inform the creation of a pilot scheme for all publicly funded criminal defence advocates undertaking work in the Crown Court and above. The intention is that the pilot will run for a period which enables evaluation of the effective operation of potential options and their cost.
- 2.7.1.1 The pilot will be managed and resourced by the LSC and MOJ.
- 2.7.1.2 There will be wide stakeholder involvement in the pilot process including of all organisations currently represented on the working group.
- 2.7.2 The pilot will then be evaluated by the LSC and MOJ (with advice and input from the Institute of Advanced Legal Studies, which has proved a useful source of similar advice for the solicitor peer review scheme). Full details will be provided to the bodies currently represented on the working group, and discussions will take place within that group on the proposed design of the final scheme.
- 2.7.3 A consultation on a more detailed quality assurance scheme for advocates will be undertaken prior to national rollout to all publicly funded criminal advocates.
- 2.7.4 The desire is that the final scheme will be owned by the professions and monitored by their appropriate regulators, as was suggested by Lord Carter.

### **Question 18**

**Do you have any comments on the proposed governance arrangements?**

## ANNEX 1

### COMPETENCE FRAMEWORK

#### A. Understanding and using the law

*Has expert, up-to-date legal knowledge and uses it accurately and relevantly, and becomes familiar with new areas of law quickly and reliably.*

1. Is up to date with the law and precedent relevant to each case, or will quickly and reliably become familiar with new areas of law
2. Draws on the law accurately for case points and applies relevant legal principles to particular facts of the case

#### B. Oral and written advocacy

*Develops and advances the lay client's case to secure the best outcome for the lay client by gaining a rapid, incisive overview of case material, identifying the best course of action, communicating the case persuasively, and rapidly assimilating the implications of new evidence and argument and responding appropriately.*

1. Deals effectively with necessary preliminary stages of legal disputes
2. Gains an accurate understanding of case material
3. Appreciates aspects of the case that are particularly important, sensitive or difficult and appreciates the relative importance of each item of evidence
4. Prepares thoroughly for the case by identifying the best arguments to pursue and preparing alternative strategies
5. Anticipates points that will challenge an argument, and deals with them effectively if/when they arise
6. Deals responsibly with difficult points of case management and disclosure in accordance with the relevant rules in force; adheres to timescales set by the court for case management; is proactive in ensuring compliance with such timescales and so ensures that, where appropriate, the court is notified of any failure to comply with such timescales; keeps the court informed and up-to-date about issues and potential problems, of changes to existing pleas and readiness for trial
7. Presents facts and structures arguments in a coherent, balanced and focused manner
8. Writes arguments accurately, coherently and simply, and in an accessible style

9. Assimilates new information and arguments rapidly and accurately
10. Immediately sees the implications of answers by witness and responds appropriately
11. Listens attentively to what is said, paying keen attention to others' understanding and reactions
12. Accurately sees the point of questions from the tribunal and answers effectively
13. Is prepared and able to change tack or to persist, as appropriate
14. Gives priority to non-court resolution throughout the case where appropriate, identifies possible bases for settlement and takes effective action

### **C. Working with others**

*Establishes productive working relationships with all, including professional and lay clients, the judge, other parties' representatives and members of own team*

1. Behaves in a consistent and open way in all professional dealings
2. Establishes an appropriate rapport with all others in court and in conference
3. Advances arguments in a way that reflects appropriate consideration of the perspective of everyone involved in the case
4. Helps the lay client focus on relevant points and is candid with the lay client
5. Explains the law and court procedure to the client and ensures the lay client understands and can decide the best action
6. Keeps lay and professional clients informed of progress
7. Is prepared to advance an argument that might not be popular
8. Is prepared to stand up to the judge
9. Responds to the needs and circumstances of the lay client (including the lay client's means and the importance of the case to the lay client, and bearing in mind the duty to the legal aid fund) and advises the lay client accordingly
10. Meets commitments and appointments
11. Accepts ultimate responsibility for the case when leading the team
12. Motivates, listens to and works with other members of the team
13. Is aware of own limitations and seeks to ensure that they are compensated for by others in the team
14. Is able to take key decisions with authority and after listening to views
15. Identifies priorities and allocates tasks and roles when leading the team

## **D. Diversity**

*Demonstrates an understanding of diversity and cultural issues, and is proactive in addressing the needs of people from all backgrounds and in promoting diversity and equality of opportunity*

1. Is aware of the diverse needs of individuals resulting from differences in gender, sexual orientation, ethnic origin, age, educational attainment, physical or mental disability, or other reason, and responds appropriately and sensitively
2. Is aware of the impact of diversity and cultural issues on witnesses, parties to proceedings and others, as well as on the lay client, and adjusts own behaviour accordingly
3. Takes positive action to promote diversity and equality of opportunity
4. Understands the needs and circumstances of others and acts accordingly
5. Confronts discrimination and prejudice when observed in others; does not just ignore it
6. Acts as a role model for others in handling diversity and cultural issues

## **E. Integrity**

*Is honest and straightforward in professional dealings, including with the court and all parties*

1. Does not mislead, conceal or create a false impression
2. Does not take on publicly funded work at a higher level without verifiable evidence of competence
3. Honours professional codes of conduct
4. Where appropriate refers to authorities adverse to the lay client's case
5. Always behaves so as to command the confidence of the tribunal and others involved in the case, as well as the lay and professional clients
6. Acts in professional life in such a way as to maintain the high reputation of advocates

## **ANNEX 2**

### **LEVELS FOR CRIMINAL WORK AT CROWN COURT LEVEL AND ABOVE**

Please note that the case types are indicative only. Cases may require advocacy at a higher level depending on factors such as:

- vulnerability / age of witnesses.
- vulnerability / age of victim.
- representation of multiple defendants.
- exceptionally complex evidence / points of law.

#### **LEVEL 1**

##### **Indicative type of case**

- Simple jury trials lasting not more than two days, involving such matters as shoplifting, minor assault and simple possession of Class C drugs.
- Simple applications, committals for sentence and appeals in the Crown Court.

#### **LEVEL 2**

##### **Indicative type of case**

- Jury trials including alleged theft, handling, deception, assault (ABH and Section 20), harassment (and aggravated offences under the Public Order Act), non-aggravated burglary, simple possession of drugs (Class A and/or B) and non-fatal road traffic offences.
- Simple trials involving up to three defendants.
- Straightforward non-jury work, such as Newton hearings.

#### **LEVEL 3**

##### **Indicative type of case**

- Jury trials in more serious and onerous cases such as fraud, possession with intent to supply Class A drugs, robbery, blackmail, aggravated burglary, violent disorder, riot, arson, serious assaults (Section 18), threats to kill, driving offences involving death, child abuse and indecency cases up to but not including rape.

- Trials involving more than 3 defendants.
- Trials involving child victims and witnesses.

## **LEVEL 4**

### **Indicative type of case**

- Jury trials in the most serious and complex cases.
- In particular, cases within Categories A and J of the Revised Advocacy Graduated Fee Scheme are included.
- The cases will often involve serious, novel and difficult points of law and fact, sometimes in opposition to leading counsel.

## ANNEX 3

### COMPETENCY GRID

|   |  |  |
|---|--|--|
| <p><b>A. Understanding and using the law</b></p> <p><i>Has expert, up-to-date legal knowledge and uses it accurately and relevantly, and becomes familiar with new areas of law quickly and reliably.</i></p> | <p>Behaviours:</p> <ul style="list-style-type: none"> <li>• Is up to date with law and precedent relevant to each case dealt with, or will quickly and reliably make self familiar with new areas of law.</li> <li>• Draws on law accurately for case points and applies relevant legal principles to particular facts of case.</li> </ul> |  |
| <b>Examples</b>   | <b>Good</b>  | <b>Poor</b>  |
| <b>Level 1</b>  | <ul style="list-style-type: none"> <li>• Is familiar with the law and practice relating to sending and committal for trial, committal for sentence, drafting indictments and powers of sentencing</li> </ul>   | <ul style="list-style-type: none"> <li>• Fails to detect unlawful sending or committal for trial or sentence, defective indictment; allows court to sentence in excess of powers</li> </ul>  |
| <b>Level 2</b>  | <ul style="list-style-type: none"> <li>• Is familiar with the law and practice relating to disputed evidence, hearsay and bad character, and can deal with such applications efficiently and expeditiously</li> </ul>  | <ul style="list-style-type: none"> <li>• Introduces inadmissible evidence, or allows it to be introduced; fails to make hearsay or bad character applications at the appropriate time or at all; regularly makes unnecessary applications</li> </ul> |
| <b>Level 3</b>  | <ul style="list-style-type: none"> <li>• Can deal with pre-trial issues such as abuse of process (including knowing when not to make such an application), specific disclosure, public interest immunity and special measures</li> </ul>   | <ul style="list-style-type: none"> <li>• Consistently makes unnecessary abuse of process applications; fails to raise and deal appropriately with specific disclosure, public interest immunity and special measures applications</li> </ul>         |
| <b>Level 4</b>  | <ul style="list-style-type: none"> <li>• Can deal with all issues of law which may arise, including serious, novel and difficult points</li> </ul>   | <ul style="list-style-type: none"> <li>• Is out of depth with difficult questions of law and evidence; is unable to detect or argue novel points of law</li> </ul>   |

|   |   |
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| <p><b>B. Oral and written advocacy</b></p> <p><i>Develops and advances the lay client's case to secure the best outcome for the lay client by gaining a rapid, incisive overview of case material, identifying the best course of action, communicating the case persuasively, and rapidly assimilating the implications of new evidence and argument and responding appropriately.</i></p> | <p>Behaviours:</p> <ul style="list-style-type: none"> <li>• Deals effectively with necessary preliminary stages of legal disputes</li> <li>• Gains an accurate understanding of case material</li> <li>• Appreciates aspects of the case that are particularly important, sensitive or difficult and appreciates the relative importance of each item of evidence</li> <li>• Prepares thoroughly for the case by identifying the best arguments to pursue and preparing alternative strategies</li> <li>• Anticipates points that will challenge an argument, and deals with them effectively if/when they arise</li> <li>• Deals responsibly with difficult points of case management and disclosure in accordance with the relevant rules in force; adheres to timescales set by the court for case management; is proactive in ensuring compliance with such timescales and so ensures that, where appropriate, the court is notified of any failure to comply with such timescales; keeps the court informed and up-to-date about issues and potential problems, of changes to existing pleas and readiness for trial</li> <li>• Presents facts and structures arguments in a coherent, balanced and focused manner</li> <li>• Writes arguments accurately, coherently and simply, and in an accessible style</li> <li>• Assimilates new information and arguments rapidly and accurately</li> <li>• Immediately sees the implications of answers by witness and responds appropriately</li> <li>• Listens attentively to what is said, paying keen attention to others' understanding and reactions</li> <li>• Accurately sees the point of questions from the tribunal and answers effectively</li> <li>• Is prepared and able to change tack or to persist, as appropriate</li> <li>• Gives priority to non-court resolution throughout the case where appropriate, identifies possible bases for settlement and takes effective action</li> </ul> |
|---|---|

| <b>Examples</b> | <b>Good</b>  | <b>Poor</b>   |
|-----------------|--|---|
| <b>Level 1</b>  | <ul style="list-style-type: none"> <li>• Is aware of the Criminal Procedure Rules, especially relating to pre-trial preparation and hearings, including Plea and Case Management Hearings</li> <li>• Is capable of simple case analysis, identifying the necessary ingredients of a charge, checking whether there is evidence to support the charge and advising on relevant evidence for the defence</li> <li>• Can deal with examination and cross-examination in accordance with the rules of evidence, dealing with both systematically, intelligibly and efficiently</li> <li>• Communicates with the court and judge, and complies with court orders</li> </ul> | <ul style="list-style-type: none"> <li>• Fails to ensure that relevant information is available to the court, or is not available at the correct time</li> <li>• Allows a case to proceed without proof of an essential element; fails to advise on defence evidence required</li> <li>• Continually asks leading questions in examination-in-chief; fails to put client's case in cross-examination; deals with evidence haphazardly and unintelligibly</li> <li>• Fails to inform court or judge of matters relevant to case management; fails to comply with court orders</li> </ul> |

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| <p><b>Level 2</b></p> | <ul style="list-style-type: none"> <li>• Can take tactical decisions when co-defending, and liaise with co-defendant's advocate about the division of cross-examination on common issues</li> <li>• Can plan a more complex cross-examination to deal with issues in a sensible, intelligible and efficient manner</li> <li>• Can assist the court and judge with case management, including witnesses required, order of witnesses, admissions and jury bundles</li> </ul> | <ul style="list-style-type: none"> <li>• Prejudices client's case by unnecessary attack on co-defendant; repeats cross-examination points already made by co-defendant</li> <li>• Cross-examines without any apparent plan or structure, so that the court and jury have difficulty in following it</li> <li>• Consistently fails to alert court or prosecution to issues affecting timetable; fails to ensure that all relevant exhibits are available when required</li> </ul> |
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| <p><b>Level 3</b></p> | <ul style="list-style-type: none"> <li>• Produces short and succinct skeleton arguments relating to such pre-trial issues, citing all relevant law (but no more than is necessary)</li> <li>• Can plan for a trial lasting for 10 days or more, to ensure that issues are not repeatedly raised, that cross-examination is conducted efficiently and in the shortest reasonable time, and that a jury can understand the defence being put forward</li> <li>• Can deal sensitively, appropriately and effectively with child witnesses, and cross-examination through a live TV link</li> <li>• Can deal with confiscation hearings arising after conviction</li> </ul> | <ul style="list-style-type: none"> <li>• Fails to produce skeleton arguments when appropriate, or provides ones which are too long or not supported by relevant authorities</li> <li>• Fails to have any proper trial plan, shown by irrelevant, repeated and/or incomprehensible cross-examination, and inability to stick to timetable</li> <li>• Is rude, offensive or bullying to child witnesses, or uses inappropriate level of language; fails to ensure that he/she is visible on the live TV link and stays visible when dealing with the witness</li> <li>• Is unaware of confiscation provisions and timetable</li> </ul> |
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| <p><b>Level 4</b></p> | <ul style="list-style-type: none"> <li>• Can succinctly relate issues of law to detailed evidence, giving appropriate references to assist the judge</li> <li>• Can assist the court in managing trials lasting up to 40 days, including timetabling of witnesses</li> <li>• Can deal with cases in which there is substantial public interest and media coverage sensitively and appropriately</li> <li>• Can deal with examination and cross-examination of vulnerable witnesses of all kinds, and in relation to the most serious cases, with sensitivity and responsibility whilst fully protecting the interests of the client</li> </ul> | <ul style="list-style-type: none"> <li>• Fails to relate the point of law to the evidence, giving examples where appropriate</li> <li>• Consistently fails to give accurate and satisfactory time estimates, or assist in timetabling of witnesses</li> <li>• Fails to deal with sensitive cases carefully and discreetly</li> <li>• Is rude, offensive or bullying to vulnerable witnesses, or uses inappropriate level of language</li> </ul> |
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| <p><b>C. Working with others</b></p> <p><i>Establishes productive working relationships with all, including professional and lay clients, the judge, other parties' representatives and members of own team.</i></p> | <p>Behaviours:</p> <ul style="list-style-type: none"> <li>• Behaves in a consistent and open way in all professional dealings</li> <li>• Establishes an appropriate rapport with all others in court and in conference</li> <li>• Advances arguments in way that reflects appropriate consideration of perspective of everyone involved in the case</li> <li>• Helps the client focus on relevant points and is candid with the client</li> <li>• Explains law and court procedure to client and ensures the client understands and can decide the best action</li> <li>• Keeps lay and professional clients informed of progress</li> <li>• Is prepared to advance an argument that might not be popular and to stand up to the judge</li> <li>• Responds to the needs and circumstances of client (including client's means and importance of case to client and bearing in mind duty to legal aid fund) and advises client accordingly</li> <li>• Meets commitments and appointments</li> <li>• Accepts ultimate responsibility for case when leading the team</li> <li>• Motivates, listens to and works with other members of own team</li> <li>• Aware of own limitations and seeks to ensure that they are compensated for by others in team</li> <li>• Able to take key decisions with authority and after listening to views</li> <li>• Identifies priorities and allocates tasks and roles when leading the team</li> </ul> |
|--|---|

| <b>Examples</b> | <b>Good</b>   | <b>Poor</b>   |
|-----------------|---|---|
| <b>Level 1</b>  | <ul style="list-style-type: none"> <li>• Can give clear, firm and intelligible advice to the client on plea and evidence</li> </ul>                     | <ul style="list-style-type: none"> <li>• Fails to advise a client properly as to plea or evidence</li> </ul>  |
| <b>Level 2</b>  | <ul style="list-style-type: none"> <li>• Can deal with advice on plea to a lesser offence, and negotiation about the factual basis of a plea</li> </ul> | <ul style="list-style-type: none"> <li>• Fails to advise client to enter plea to lesser offence; fails to ensure that there is a proper written basis of plea in appropriate cases</li> </ul> |
| <b>Level 3</b>  | <ul style="list-style-type: none"> <li>• Can assist the judge in relation to directions of law in more complex cases</li> </ul>                         | <ul style="list-style-type: none"> <li>• Fails to offer assistance on law and directions, either voluntarily or when asked</li> </ul>   |
| <b>Level 4</b>  | <ul style="list-style-type: none"> <li>• Can manage a team to ensure that the work carried out is necessary, proportionate and timely</li> </ul>        | <ul style="list-style-type: none"> <li>• Requires excessive and unnecessary work to be carried out, which delays the trial to the prejudice of the client</li> </ul>                          |

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| <p><b>D. Diversity</b></p> <p><i>Demonstrates an understanding of diversity and cultural issues, and is proactive in addressing the needs of people from all backgrounds and promoting diversity and equality of opportunity</i></p> | <p>This is a core competence – it must be demonstrated by advocates taking on work at any level.</p> <p>Behaviours:</p> <ul style="list-style-type: none"> <li>• Is aware of the diverse needs of individuals resulting from differences in gender, sexual orientation, ethnic origin, age and educational attainment and physical or mental disability or other reason, and responds appropriately and sensitively</li> <li>• Is aware of the impact of diversity and cultural issues on witnesses, parties to proceedings and others as well as on own client, and adjusts own behaviour accordingly</li> <li>• Takes positive action to promote diversity and equality of opportunity</li> <li>• Understands needs and circumstances of others and acts accordingly</li> <li>• Confronts discrimination and prejudice when observed in others; does not turn a blind eye</li> <li>• Acts as a role model for others in handling diversity and cultural issues.</li> </ul> |                    |
| <p><b>Examples</b></p>   | <p><b>Good</b></p>   | <p><b>Poor</b></p> |
| <p><b>All Levels</b></p>   |  |                    |

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|---|---|--------------------|
| <p><b>E. Integrity</b></p> <p><i>Is honest and straightforward in professional dealings, including with the court and all parties</i></p> | <p>This is a core competence – it must be demonstrated by advocates taking on work at any level.</p> <p>Behaviours:</p> <ul style="list-style-type: none"> <li>• Does not mislead, conceal or create a false impression</li> <li>• Honours professional codes of conduct</li> <li>• Where appropriate refers to authorities adverse to the client's case</li> <li>• Always behaves so as to command the confidence of the tribunal and others involved in the case, as well as client</li> <li>• Acts in professional life in such a way as to maintain the high reputation of advocates</li> </ul> |                    |
| <p><b>Examples</b></p>  | <p><b>Good</b></p>  | <p><b>Poor</b></p> |
| <p><b>All Levels</b></p>  |   |                    |

## Annex 4

### Existing Quality Assurance Schemes

In developing the Quality Assurance scheme for Advocates, we will look at the possibility of using and building on existing quality assurance tools and processes. These include Quality Mark for the Bar (QMB), the Specialist Quality Mark (SQM) and Peer Review (PR).

#### **Peer Review:**

The peer review process, currently being rolled out nationally to assess the quality of advice of solicitors' firms, was devised jointly by the Institute of Advanced Legal Studies (IALS) and the Legal Services Commission (LSC).

The peer review process consists of an assessment, by a trained and quality assured solicitor, of a random selection of, usually, 15 closed case files. The process provides a high level of assurance that an assessment of these files reflects the overall work of the firm. The LSC uses the rating assigned to the firm for contracting purposes and firms wishing to take part in the best value tendering process from October 2008 will be required to demonstrate that they have been certified as a Peer Review Level of 3 "Competent", 2 "Competent Plus" or 1 "Excellent".

The peer review process does not attempt to measure the quality of work of each advisor. No individual rating or assessment is made and it is not necessary to include a sample of each advisor's work. The principle is that the partners of the firm and the supervisors are responsible for the entire work of the firm, no matter who actually undertakes the work and provides the legal advice. Many cases are managed by teams of advisors or different stages of a case are managed by different people. The overall purpose of peer review is to verify that a firm is providing competent legal advice for the majority of its work. This is an overall assessment based on the contribution of the fee earners, partners, supervisors, support staff and any experts used, especially advocates. The random sample provides a high level of confidence that the peer review rating is an accurate reflection of the entire work of the firm.

In crime, the sample of files always includes crown court work and therefore the contribution of any advocate, whether Barrister or solicitor with higher rights. The peer reviewer is therefore able to assess the effectiveness of the advocacy, although clearly this can only be derived from the information enclosed within the case file and from the final outcome of the case. The peer review process does not require any specific assessment or comment to be made on the advocate or the

contribution of the advocate although the reviewer does occasionally do so. The pilot will consider whether it would be possible to develop the peer review process to extract a useful assessment of the specific contributions made by advocates.

The LSC recognises the peer review rating as an assurance, not only of the quality of the legal advice, but also that the management systems are effective, especially file review, supervision and the allocation of work based on the competence of advisors. These management systems are encapsulated within the SQM. A good peer review rating enables the LSC to cease formal auditing of the SQM.

Further information about peer review can be found at:

[http://www.legalservices.gov.uk/criminal/contracting/mq\\_peerreview.asp](http://www.legalservices.gov.uk/criminal/contracting/mq_peerreview.asp)

### **Specialist Quality Mark (SQM):**

The SQM is a quality management system and includes specific requirements for the selection, management and quality assurance of advocates. It is a contractual requirement for any organisation wishing to undertake legal aid work that the SQM is followed. Confirmation that the organisation is adhering to the requirements within the SQM is determined by an on-site audit, conducted by a trained auditor from the LSC. Any non-compliance must be resolved within a reasonable time. Failure to do so will result in the withdrawal of the SQM accreditation and the removal of the legal aid contract.

The SQM looks at virtually every aspect of the work of the firm. This includes business areas such as recruitment, financial planning, business planning, referral mechanisms and client feedback and complaints. Many of these requirements are common to a range of recognised quality management systems. However, the SQM was designed specifically for the provision of legal advice and includes requirements tailored to this. These include supervision, file review, referral arrangements, allocation of cases and use of experts (the term used to signify any recognised expert paid to perform a necessary function within the running of a case). The principle types of experts are Barristers and Advocates.

The specific requirements in the SQM relating to Advocates call for each advocate to be quality assured prior to being employed. It is only acceptable for a firm to use an advocate for the first time without a prior quality check in exceptional circumstances. To this end, the SQM requires that every firm create an approved list of advocates. Every firm is also required to keep a record, following the completion of every case, of the quality of the contribution and work done by an advocate. The pilot will therefore explore whether it is possible to use these records as part of the sources of evidence.

Further information about SQM can be found at:

[http://www.legalservices.gov.uk/criminal/contracting/specialist\\_qm.asp](http://www.legalservices.gov.uk/criminal/contracting/specialist_qm.asp)

### **Quality Mark for the Bar (QMB):**

The Quality Mark for the Bar is a quality management standard. It is tailored to the normal operation of Chambers, although it does recognise the particular differences for sole practitioners. It is intended to ensure that Chambers and their associated Barristers provide a quality service and quality legal advice.

The QMB is less extensive than the SQM as the concepts of supervision and file review, central to the management of advice competence in a solicitor's firm, are not elements within Chambers. The key differences, which have impacted on the creation of the QMB are:

1. Barristers are essentially independent, operating within a loosely knit collection of similar individuals.
2. The partner structure and supervision arrangements in firms do not exist in Chambers.
3. Barristers provide input within a case – they are not responsible for the entire case.

The QMB is therefore mainly concerned with general management functions and client relationships, although there are requirements for trainees and juniors. There is therefore a need to supplement the current standard with mechanisms to ensure advocates' competence.

As there are no complete case files to assess, peer review, akin to that for Solicitor firms, has not been contemplated. As a consequence, the LSC continues to provide an auditing function, which encompasses the general management procedures within Chambers. The pilot will consider how to develop QMB to ensure that it supports QAA systems.

Further information about the QMB can be found at:

<http://www.legalservices.gov.uk/criminal/qm/bar.asp>

## **Questionnaire**

We would welcome responses to the following questions set out in this consultation paper:

### **Question 1:**

**Are the objectives comprehensive, appropriate and reasonable?**

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

### **Question 2**

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

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

### **Question 3**

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

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

### **Question 4**

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

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

### **Question 5**

**Do you think that, overall, the evidence linked to the competency framework and examples as set out in the Annexes will enable an assessment to be**

undertaken of whether an advocate is competent for the complexity of the case?

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

**Question 6**

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

Please support your answer with reasons.

**Question 7**

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

Please support your answer with reasons.

**Question 8**

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

Please support your answer with reasons.

**Question 9**

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

Please indicate the number and type of sources of evidence and the span of time the evidence covers e.g. 12 months or number of cases.

Please support your answer with reasons.

**Question 10**

Should all firms, which have successfully passed their peer review, submit to the relevant advocate or chambers, evidence of the performance of the

advocate they have instructed (in order to feed that into the evidence gathering process outlined earlier in this consultation paper)?

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

Please support your answer with reasons.

#### **Question 11**

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

Please support your answer with reasons.

#### **Question 12**

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

Please support your answer with reasons.

#### **Question 13**

How frequently should advocates be reassessed? Is 3 years a reasonable period?

Please support your answer with reasons.

#### **Question 14**

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

Please support your answer with reasons.

**Question 15**

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

Please support your answer with reasons.

**Question 16**

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

Please support your answers with reasons.

**Question 17**

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

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

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

**Question 18**

Do you have any comments on the proposed governance arrangements?

**Thank you for participating in this consultation exercise**

## About you

Please use this section to tell us about yourself:

|  |                          |
|--|--------------------------|
| <b>Full name</b>   |                          |
| <b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. solicitor advocate, barrister, member of the public etc.) |                          |
| <b>Date</b>  |                          |
| <b>Company name/organisation</b> (if applicable):  |                          |
| <b>Address</b>   |                          |
|  |                          |
| <b>Postcode</b>  |                          |
| <b>If you would like us to acknowledge receipt of your response, please tick this box</b>  | <input type="checkbox"/> |
| <b>Address to which the acknowledgement should be sent, if different from above</b>  |                          |
|  |                          |
|  |                          |

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

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## **How to respond**

Please send your response by 17 September 2007 to:

**Louise Sowden**  
**Project Manager**  
**Supplier Development Group**  
**Legal Services Commission**  
**85 Gray's Inn Road**  
**London WC1X 8TX**  
**Tel: 0117 3023132**  
**Fax: 020 77590534**  
**E-mail: [louise.sowden@legalservices.gov.uk](mailto:louise.sowden@legalservices.gov.uk)**

### **Extra copies**

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.MOJ.gov.uk/index.htm> and <http://www.legalservices.gov.uk>

### **Publication of response**

A paper summarising the responses to this consultation will be published in [insert publication date, which as far as possible should be within three months of the closing date of the consultation] months time. The response paper will be available on-line at <http://www.MOJ.gov.uk/index.htm> and <http://www.legalservices.gov.uk>

### **Representative groups**

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

### **Confidentiality**

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

## **The Consultation Criteria**

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

**These criteria must be reproduced within all consultation documents.**

## Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact the Ministry of Justice Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622, or email him at [consultation@justice.gsi.gov.uk](mailto:consultation@justice.gsi.gov.uk)

Alternatively, you may wish to write to the address below:

**Laurence Fiddler  
Consultation Co-ordinator  
Ministry of Justice  
5th Floor Selborne House  
54-60 Victoria Street  
London  
SW1E 6QW**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under **the How to respond** section of this paper at page 49.



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