

Ministry of Justice Consultation on Preserving and Enhancing the Quality of Criminal Advocacy

A response by:

CILEx Regulation

27 November 2015

CILEx Regulation Ltd (CRL)

1. CRL is the regulatory body for the Chartered Institute of Legal Executives (CILEx). CILEx is an Approved Regulator under the Legal Services Act and is able to grant practice rights relating to litigation, advocacy, probate, reserved instrument activities and the administration of Oaths. It has delegated its regulatory functions to CRL as it is required to do by the Legal Services Act.
2. Chartered Legal Executives may specialise in criminal proceedings and can qualify as advocates with rights to appear in criminal cases in the Magistrates' Courts; in the Crown Court before a judge in chambers to conduct bail applications; and in the Crown Court on appeals from the Magistrates' or Youth Courts or on committal for sentencing where their firm has appeared for the defendant in the lower Court.
3. Many Chartered Legal Executives work at a senior level in solicitors' firms but can be granted rights to provide litigation services, including criminal litigation, in independent practice. Associate Prosecutors employed by the Crown Prosecution Service to conduct non-trial cases in the Magistrates Courts are regulated by CRL as members of CILEx and are authorised as advocates and litigators under the Act for this purpose.

Introduction

4. CRL accepts that it is important for defendants and others caught up in criminal proceedings, for the courts and for the administration of justice that advocates are competent for the work they are permitted to undertake. It also accepts that decisions about funding criminal defence and prosecution lie with the government, as does the procurement of service providers.
5. The consultation seeks to address a number of issues raised in the report produced by Sir Bill Jeffrey. That report focused on issues affecting the Bar. Although a wide range of views was canvassed in the course of preparing the report, it produced little hard evidence to support its conclusions. The current consultation does not add to the evidence base regarding the quality of advocacy in the Crown Court and provides little detail of how the proposals it contains might be implemented, or their impact. Sir Bill was in some difficulty in addressing the issue of quality as he had no criteria by which to assess it. The decision to disregard the work which had gone into the development of a quality assurance scheme for criminal advocates, whilst understandable in the circumstances at the time, meant that a valuable perspective was missed.

6. A number of the proposals in this consultation could have significant impact and should only be implemented on the basis of substantive analysis of evidence.
7. Responses to particular questions are set out below. They focus on regulatory issues arising from the MoJ's proposals.

Introducing a panel for publicly funded criminal defence advocacy

Q1: Do you agree that the government should develop a Panel scheme for criminal defence advocates, based loosely on the CPS model already in operation? Are there particular features of the CPS scheme which you think should or should not be mirrored in a defence panel scheme?

8. CRL is one of the members of the Joint Advocacy Group, responsible for developing the Quality Assurance scheme for criminal advocacy (QASA). That scheme has been approved by the Legal Services Board and has been found by the Supreme Court to be a lawful and proportionate scheme, in the face of legal challenge by members of the Bar. The scheme was developed over a number of years with the involvement of the approved regulators and litigation and advocacy practitioners. It will be implemented in 2016.
9. It is the view of CRL that the setting of standards and quality assurance are matters for the regulators. The Legal Services Act supports that principle in the statutory objective that Approved Regulators should promote and maintain adherence to the professional principles.
10. CRL, in common with the other members of JAG, does not have a view on the means by which the government procures legal services. However we believe that any panel scheme, if it is introduced, should be complementary to QASA rather than competing with it. QASA includes clear objective statements of the professional standards and competences needed for effective advocacy at a range of levels in the Crown Court; and arrangements by which those competences can be objectively assessed and maintained, including assessment by the judges before whom advocates appear. Standards apply to all advocates, whether acting for the prosecution or defence and whether or not publicly funded. Clients and the public could be confused by competing quality assurance schemes. Defendants would be reassured to know that the advocate chosen to represent them is accredited by independent and objective means in a scheme managed by independent regulators, rather than by the MoJ operating through the Legal Aid Agency. Competing schemes could also lead to challenges by practitioners to the operation of either scheme and, of course, would duplicate costs in a system where cost effectiveness is paramount.

11. It is understood the CPS proposes to adopt QASA when it is in effect, in place of its own register. CRL is confident that, if the panel scheme proposed to be introduced for defence practitioners reflects the CPS scheme, QASA will meet the quality assurance and control needs of the Legal Aid Agency. The LAA can then focus on putting in place its purchasing and contract model.
12. A summary is attached (annex 1) of the key elements of QASA, explaining how it could be integrated into defence advocates panel arrangements. One of the benefits of the scheme is that it will enable evidence to be collected over time on the quality of advocacy. It is vital in a changing legal services market to understand patterns of practice and what impact the scheme has on services to clients, the courts, providers and the public.

Q2: If a panel scheme is to be established, do you have any views as to its geographical and administrative structure?

13. If it is accepted QASA should be the primary mechanism for assessing quality, the Legal Aid Agency will find the management of panel arrangements much simpler. Accreditation under QASA will not be restricted geographically and it seems likely that administering area panels will involve duplication of effort between panels and risk embedding different quality standards in different areas.

Q3: If we proceed with a panel, do you agree that there should be four levels of competence for advocates, as with the CPS scheme?

14. QASA has four levels, including Magistrates' Courts. The CPS panel includes Magistrates' Courts as well. If, as it appears, the defence panel would be restricted to Crown Court advocacy, there should be three levels, as defined in QASA. The construction of competence criteria for a defence panel would be a significant undertaking for the Legal Aid Agency, as it was for the Joint Advocacy Group.

Q4: If we proceed with a panel, do you think that places should be unlimited, limited at certain levels only, or limited at all levels? Please explain the rationale behind your preference

15. QASA limits accreditation only by assessment of competence. The levels within QASA identify to some extent the specialist areas of work which advocates are experienced in so, for example, level 4 requires experience of dealing with cases involving serious sexual offences. It is not clear from the consultation whether it is an aim of the proposals to restrict or control the number of advocates able to undertake advocacy in criminal cases. Careful thought should be given to the extent to which it is appropriate for the MoJ to determine who should be permitted to defend people prosecuted by the state. As a regulator, CRL would expect to see panel arrangements ensure there are sufficient advocates available with the requisite expertise to meet the needs of service users. Predicting

demand and matching supply is notoriously difficult. Getting it wrong could adversely affect the choices available to consumers and the quality of advocate available. Appointing advocates at a number of different levels, specialisms and, potentially, in geographical areas makes the task of getting the right number of advocates on the register with relevant experience to meet the needs of defendants and the courts more difficult.

Proposals to prevent abuses of the system

16. It is difficult to comment on the proposals, given the lack of evidence regarding the abuses it is said take place and their impact currently and in the absence of any analysis of the impact of the measures proposed. Regulatory requirements imposed by CRL (and other regulators) relating to conflicts of interest and competence should provide a framework to address the concerns identified in the consultation. Where there is evidence that public money is being spent on 'kick-backs' then it should be provided to the regulators so that they can take action.

Q5: Do you agree that the government should introduce a statutory ban on 'referral fees' in publicly funded criminal defence advocacy cases?

Q6: Do you have any views as to how increased reporting of breaches could be encouraged? How can we ensure that a statutory ban is effective?

Q7: Do you have any views about how disguised referral fees could be identified and prevented? Do you have any suggestions as to how dividing lines can be drawn between permitted and illicit financial arrangements?

17. This is very much a policy decision for the MoJ. Governments are usually wary of introducing measures which impose criminal sanctions without very strong evidence that they are needed. The MoJ should consider carefully whether the necessary evidence exists. Good regulation is risk-based and proportionate. The concerns raised in the consultation are that referral arrangements inflate the price of the service which is provided and/or result in inadequate quality of service. Given the control over pricing which exists and the quality controls proposed, a statutory ban might not be a proportionate response. Monitoring the quality of advocacy under QASA will help to address the concerns as would policing by the Legal Aid Agency of the contracts for the supply of litigation and advocacy services and reporting by advocates subjected to referral arrangements.

Protecting client choice and safeguarding against conflicts of interest

18. Client choice of advocate is circumscribed where the advocacy is publicly funded. A panel of defence advocates might limit it further. As the consultation paper recognises, the Codes of Conduct of the approved regulators set out the professional obligations of litigators to put the interests of the client before their own, financial or otherwise, fully to inform clients about the options they have and to undertake only work for which they are competent. QASA will provide a

relevant control regarding competence. Existing complaints mechanisms should be capable of addressing concerns about conflicts of interest and failure to keep clients fully informed. The SRA and the Legal Ombudsman case work will show the extent to which such issues have caused concerns for clients or the funding agency. The entity regulation rules which CRL has in place will proactively assess the extent to which individual businesses it regulates adhere to the Code of Conduct.

Q8: Do you agree that stronger action is needed to protect client choice? Do you agree that strengthening and clarifying the expected outcome of the client choice provisions in LAA's contracts is the best way of doing this?

19. A provision in the LAA's contract would clarify matters for providers, but is likely to reflect existing code of conduct requirements. Better evidence is needed of the extent of abuse or disregard of current requirements.

Q9: Do you agree that litigators should have to sign a declaration which makes clear that the client has been fully informed about the choice of advocate available to them? Do you consider this will be effective?

Q10: Do you agree that the Plea and Trial Preparation Hearing form would be the correct vehicle to manifest the obligation for transparency of client choice? Do you consider that this method of demonstrating transparency is too onerous on litigators? Do you have any other comments on using the PTPH form in this way?

20. The consultation identifies the limitations of this proposal to make a difference in practice. It is an additional administrative burden. Its effectiveness would depend on whether any statement reflected the case accurately and the client actually received the advice and/or understood it. In many cases the client would be unable to weigh the relative merits of different advocates. A signed statement might focus the practitioner's mind on their professional responsibilities and could provide useful evidence in the event of a complaint.

21. It is not clear what the purpose would be of including the declaration in the PTPH; for example, would the judge or the prosecution be able to comment on it?

Q11: Do you have any views on whether the government should take action to safeguard against conflicts of interest, particularly concerning the instruction of in-house advocates?

22. CRL takes the view that it is the role of the regulators to ensure safeguards against conflicts of interest are in place and are enforced in accordance with legislation and the principles of good regulation. It believes the necessary safeguards are in place. Barring service providers from instructing in-house advocates would limit client choice significantly. The Jeffrey report notes that solicitor advocates deal with 40% of hearings where the defendant pleads guilty. A relatively small proportion of cases in the Crown Court, around 10%, result in

a full trial. For many of the remaining cases an in-house advocate will be entirely appropriate and an efficient and client-friendly choice.

Equalities

23. CRL does not have any comment on the equalities assessment from a regulatory perspective.

*CILEx Regulation/MoJ consultation response
November 2015*

QASA - the quality assurance scheme for criminal advocates

1. At the heart of QASA is a set of professional standards in advocacy with competence descriptors at four levels. The standards and descriptors have been developed by practitioner and judicial experts in the field over a period of years and have been comprehensively consulted upon and independently scrutinised. They have also withstood judicial review and been found lawful in the Supreme Court.
2. The standards and the Scheme apply to all advocates irrespective of whether they are prosecuting or defending, or whether they are barristers, solicitor-advocates or chartered legal executive advocates. When the Scheme is implemented over a maximum of two years from April 2016, clients, the general public and the taxpayer will be assured that all advocates in the criminal courts meet objective, common professional standards and are competent to carry out work at their level of accreditation.
3. The public will also have the assurance that assessment of whether an advocate meets the required conduct and professional standards will have been made by the relevant independent regulatory body with the assistance of the judiciary or other independent specialist assessors, with the costs borne by those who are regulated: in respect of defence advocacy, this provides important constitutional safeguards where advocates' work is funded by the state.
4. This annex explains what the standards are, how they were drawn up, and how the standards and the Scheme can provide an objective, cost effective quality assurance mechanism in a panel procurement process.

The criminal advocacy standards: development.

5. The standards were developed over the period 2009-2013 by the independent regulatory bodies for barristers, solicitors, chartered legal executives and associate prosecutors regulated by CILEx Regulation.¹
6. A working group of specialists in the field, led by a very senior member of the judiciary, oversaw a process which included
 - A review of existing sources for standards including those used in Queens Counsel appointments by the QCA; those used by the Crown Prosecution

¹ <https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/quality-assurance-scheme-for-advocates/>

Service and its independent Inspectorate; the Dutton Criteria which are used for training of barristers and were themselves developed by representatives of the Judiciary, the four Inns of Court, the Specialist Bar Associations (SBAs), the DPP, and providers of education and training in advocacy.

- A development process on draft standards (and the indicators that sit behind them): workshops with a wide range of stakeholders including practitioners, academics, the Inns, the Advocacy Training Council (ATC), the professions' representative bodies.
7. The regulators consulted publicly on the standards and the detail of the Scheme in 2010, 2011 and 2013. Additionally in 2012 independent consultants were appointed by the LSB to review both the standards and the ways in which they could be used to assure quality. That review found that the approach proposed by the regulators for the development of a quality assurance scheme for advocates was robust and in line with accepted good practice.

The standards and competence descriptors at 4 levels

8. There are eight standards in which an advocate can demonstrate competence at four levels. These standards cover the core skills that all advocates need to be able to demonstrate in order to be competent. They are:
1. Has demonstrated the appropriate level of knowledge, experience and skill required for the Level
 2. Was properly prepared
 3. Presented clear and succinct written and/or oral submission
 4. Was professional at all times and sensitive to equality and diversity principles
 5. Provided a proper contribution to case management
 6. Handled vulnerable, uncooperative and expert witnesses appropriately
 7. Understood and assisted court on sentencing
 8. Assisted client(s) in decision making
9. Each standard has specific indicators that should be taken into consideration when determining the overall level of competence. The standards are further expanded to reflect the greater level of competence required to satisfy a standard as the level of advocacy increases. This means that a level 4 advocate will be assessed to a higher degree of competence than a level 2 advocate in respect of each standard. The levels also give a guide to the types of case advocates at each level will be competent and experienced in; for example a level 4 advocate will be experienced in serious sexual offences.

QASA – how the scheme works

10. QASA is a compulsory scheme for any advocate wishing to undertake criminal advocacy. Advocates are initially required to self-assess at which of the four levels they believe they are competent to practise. Guidance will be provided by the regulators to help advocates make that decision and random sampling will be conducted in order to assure the integrity of the self-assessment process. Advocates will be awarded provisional accreditation at the level of their self-assessment and will have a maximum of two years within which to convert that accreditation to full accreditation. In order to do so, advocates must be evaluated as competent against the advocacy standards in a minimum of two and a maximum of three consecutive trials at their level. The presiding judge will complete the evaluation form and return it to the advocate or to their regulator. The regulator will take a decision as to the competence of each advocate based on the body of evidence gathered through judicial evaluation as well as any other material information that the regulator might hold (such as disciplinary findings).
11. It will be possible for advocates who do not intend to undertake trials to obtain accreditation at level 2 via evaluation at an assessment centre. At these centres, advocates will be evaluated in simulated advocacy exercises against all of the advocacy standards. Successful completion of the evaluation process will give the advocate non-trial accreditation at level 2. Should those advocates wish to undertake full trials they can do so through successful judicial evaluation in a minimum of two cases at the advocate's accredited level.
12. Given the frequency of court appearance of the majority of advocates a high percentage of advocates will have completed the accreditation process within 6-9 months. Those advocates who appear less frequently or who have a small number of long trials will have two years to complete their evaluations – extensions will be available where that is not possible for good reason.
13. Advocates, irrespective of their profession or their pattern of practice, will therefore be assessed against the same standards. A strength of the Scheme is its consistency and transparency of evaluation.
14. All judges who undertake evaluation will first have completed specialist training on the assessment of advocates against the advocacy standards. This ensures that assessments are carried out by the judiciary in a consistent and objective manner.
15. A panel of independent assessors will be established which will be used by the regulator to undertake targeted evaluations where necessary. These assessors will have undertaken the same training as judges.
16. Advocates will be subject to re-accreditation every five years through a similar process of evaluation to that described above. Advocates will also be able to

apply to progress to the next level when they believe they are competent to do so. This is achieved first by demonstrating that they are very competent at their current level and then through positive evaluation at the higher level. Again that assessment is carried out against the advocacy standards.

17. The accredited level of the advocate will be publicly available on the regulators' websites.
18. Where an advocate fails to be assessed as competent at their chosen level they will drop down to provisional accreditation at the level below and will then need to apply for full accreditation at that level. The Scheme therefore prevents advocates who are not competent at a particular level from practising at that level.
19. Allied to the formal accreditation and evaluation process will be the opportunity for judges at any point to refer instances of poor performance to the regulators. Regulators will consider such referrals in the context of any other performance indicators or information to determine what the appropriate regulatory response should be. Such a response would include encouraging advocates to undertake training to address perceived areas of weakness to more formal arrangements to manage underperformance.

Incorporating QASA in procuring advocacy services

20. A purchaser of professional services might take one of several possible approaches to doing so in order to ensure that best practice in procurement is observed and the market in the service sector concerned operates effectively in relation to the quality and price considerations driving the purchaser's choices and that no perverse incentives or unintended consequences of the procurement system develop.
21. In advocacy services to date one key method for procuring services has been the "panel" system: this is used for prosecution advocacy, as well as for the procurement of government legal advice and representation through, for example, the Treasury panel process.
22. Panel procurement processes typically break down into several stages:
 - a) The identification of basic eligibility criteria for potential providers
 - b) The identification of criteria relating to the capacity and capability of potential providers: criteria which will allow the purchaser to determine whether a provider has the scale of resources required to provide the service, and the right experience and qualifications to be able to do so at the levels of quality and competence needed by the purchaser. These criteria may have "core" and "additional" sets
 - c) (usually but not always) some means of assessing independently or verifying whether the potential supplier can do what s/he says s/he can

- d) (usually but not always) parameters for price offers from the prospective suppliers

23. This process is used to identify a pool (panel) of people/suppliers to whom offers of subsequent work/contracts for services will be made.

24. The CPS panel procurement scheme adopts the following process:

- a) Prospective panel members are asked to provide basic professional information such as names, practice addresses and academic qualifications; and to make declarations about their personal history in relation to criminal or disciplinary proceedings. They are asked to indicate in which location/s they seek to work and at which levels – on which panels – they want to offer services.
- b) Potential panel members are asked to provide a narrative with evidence in relation to their past experience and the competence criteria set out against four levels, broken down broadly into five areas – advocacy, advisory work, PII and disclosure, other relevant knowledge skills and experience, role of CPS panel advocate. They may also supply information to be considered for work on specialist panels for e.g. extradition, rape and child sexual abuse cases.
- c) References re the above from judges, instructing solicitors, more senior advocates etc.
- d) Not applicable.

26. Those making selection decisions in the CPS scheme will “rank” applicants (as long as they have satisfied the requirements in a) above) as high, medium or low relative to the extent to which to which they satisfy the criteria in b) above, using information supplied by the applicants and their referees in c). As payment levels are non-negotiable in the CPS process, d) does not fall to be assessed.

27. The table below indicates how QASA can fit into a typical panel procurement process

Procurement process stage	How QASA can be used in the stage	Further comment
a) Prequalification questions.	QASA is not directly relevant unless an advocate’s good standing in the Scheme were itself a prequalification question.	Note that the regulatory framework gathers information about the practice of advocates and their disciplinary and conduct history. This, and their current QASA level, appears on the public registers of regulatory bodies and is thus independently verifiable.
b) provide evidence in relation	The Criminal Advocacy	The regulatory bodies will

<p>to their past experience and the competence criteria set out against four levels, broken down broadly into five areas – advocacy, advisory work, PII and disclosure, other relevant knowledge skills and experience.</p> <p>Role of CPS panel advocate (role of the defence panel advocate).</p> <p>Supply information to be considered on specialist panels for e.g. extradition, rape and child sexual abuse.</p>	<p>Evaluation Forms (CAEF), which the advocate will have secured in the QASA process provide this evidence. A minimum of two positive evaluation forms will be in the possession of advocates from April 2016 and by April 2018. Some advocates will have more CAEFs, if for example they have progressed from one level to the next during that time. Using the CAEFs for this part of the process means all applicants are providing standardised information in relation to the same set of criteria, with the evaluations having been conducted by people who are all trained in the same way to evaluate against those criteria.</p> <p>QASA provides no specific direct assistance, though the CAEF’s might be from exclusively prosecution or exclusively defence advocacy roles, thus providing objective evidence of an advocate’s capability in one role or another.</p> <p>QASA does however provide assessment against generic standards that are applicable to both the competence of defence or prosecution advocates.</p> <p>QASA is unlikely to provide sufficient specific information of the advocate’s expertise so a submission from the applicant in relation to specialist work is still likely to be necessary.</p>	<p>have collated CAEF evidence and any further evidence the advocate will have supplied as necessary, and will have attributed a formal level to the criminal advocates.</p> <p>Regulators will also have gathered specific information about advocates through its other regulatory activity, for example, in relation to continuing professional development or complaints. This breadth of evidence allows the regulator to take an informed decision on the competence of an advocate.</p> <p>Regulators are developing discrete regulatory responses to areas of risk, such as in relation to Youth Court advocacy (an area identified by this Government as requiring</p>
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		particular attention).
c) References re the above from judges, instructing solicitors and more senior advocates	QASA evaluation forms are completed by judges before whom the advocate has recently appeared and who have been trained to assess against a common core of standards; and have been trained in avoiding unconscious bias. The forms could be submitted instead of judicial references, saving judicial resources and ensuring a level playing field for advocates. If an advocate has been through an assessment centre in QASA, the same standards are used and the pool of independent assessors is wider: the effect on this part of a procurement process of using the assessment centre outputs is similarly helpful.	It is important to note that the CAEFs belong to the advocate but must be submitted to the regulator, and it is the regulator which attributes the QASA level, on the basis of all the evidence before it. No single piece of evidence is determinative. Using a QASA level instead of most of step b) and all of step c) is more economical and more objective and fair than the steps in current panel processes.

“Ranking” of applicants

28. Although the levels give a ranking of expertise in relation to seriousness of offence, QASA accreditation status and the evidence that underpins that, may not be able entirely to supplant any ranking process to the same extent that it could replace significant parts of the evidence base from applicants and judicial referees (b and c) above) – at least not as currently designed. The CAEF’s may contain important information to assist any ranking process. This is especially the case in relation to the free text reasoning for the evaluation that the assessing judge is invited to give – and required to give if the advocate has been found not competent or it has not been possible to evaluate any of the core standards on the basis of the evidence that the live trial provided.

The case for QASA as the primary means of quality assurance

29. The operation of QASA coupled with the general regulatory framework would be able to meet the majority of the quality assurance/control needs of both the CPS and any defence panel arrangements. It provides a gateway for entry on to any panel and provides assurance to major purchasers of legal services such as the CPS and the LAA that advocates have satisfied the standards of advocacy necessary to practise at a given level. The CPS and LAA will then be in a position to put in place its own model to satisfy its

purchasing needs to ensure that there is adequate supply of advocates across the country and in the volume and level necessary to meet demand.

30. Through QASA there is an established, operationally ready, robust and legally sound quality assurance scheme available to support any defence panel arrangements, which is already seen as the natural means of convergence for the prosecution panel system adopted by the CPS. Any alternative assurance mechanism which sits outside of the regulatory framework is likely to be more expensive, more bureaucratic, less objective and less independent. There is also the risk of duplication in regulation and assessment of advocates and the associated increased costs and impact on access to justice. For example, if QASA and a defence panel scheme were established with two separate assessment processes, there is considerable risk of confusion to the public and those involved within the criminal justice system if advocates are assessed at one level under QASA and another in any defence panel arrangement. Further, public confidence is more likely to be achieved through a quality assurance mechanism operated independently of those in a legal services purchasing role.

31. Of fundamental importance to the future understanding of the legal services market will be capturing data on how that market operates and what drives change. QASA will provide a comprehensive and reliable means of gathering in one place information about all criminal advocates. It will highlight trends in patterns of practice, incidence of poor performance and gaps in the provision of legal services; all of which will be critical to understanding the future priorities for the legal sector and its regulation and addressing the information asymmetry that exists for consumers. Such a picture of the legal services market will be more difficult to achieve with different quality assurance measures being implemented by different purchasers of legal services using different evaluation metrics.

Timetable for implementation of QASA

32. It is proposed that QASA registration will open in April 2016 with advocates who wish to undertake criminal advocacy having until the end of July 2016 to register. Advocates will then have a maximum of two years to complete their evaluation (either through judicial evaluation or assessment centre evaluation) in order to be fully accredited under the Scheme. We would expect the majority of advocates to be accredited however within the first 12 months of the Scheme's operation.

*QASA/MoJ consultation
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