JAG Consultation paper on regulatory changes to Quality Assurance Scheme for Advocates (QASA) - Response from South Eastern Circuit and Criminal Bar Association.

Introduction

The original JAG consultation paper on proposals for a Quality Assurance Scheme for Criminal Advocates (QAA) was published in August 2010. The South Eastern Circuit responded to this 35 page consultation in a paper dated 7th November 2010. We now seem to have jumped forward in being asked to respond to regulatory changes to the code of conduct to a much revised and different scheme, namely QASA. There was never any formal consultation with the CBA or the SEC regarding proposals for a final and revised scheme (although, there was some communication of ideas for the scheme between Bar representatives from the CBA and the BSB).

As we understood it, the purpose of the scheme was stated in the original consultation :

"Effective advocacy is fundamental to the justice system. Members of the public rely upon it for the proper presentation of their case and the courts are dependent upon it for the proper administration of justice. There is therefore a need for systematic and consistent quality assurance of advocates."

In a nutshell, the original proposal in the original consultation was stated as:

"The proposed scheme therefore builds on the existing education framework for entry into advocacy to develop a rigorous assessment process to ensure that adequate standards are attained at the start of an advocate's career. Periodic re-accreditation will ensure that those standards are maintained as the advocate's career progresses. This is complemented by an informal reporting arrangement for judges and others to refer poorly performing advocates for remediation or re-training. It is proposed that the scheme will be managed by an independent body, accountable to, and with oversight from, the three regulators of advocates."

The original consultation wanted to ensure a consistent approach for all advocates:

"…we are now at a stage where lawyers, their clients, the public, judiciary and those who are funding criminal litigation need to be satisfied that advocates who are appearing in the criminal courts are operating to consistent standards."

The Core Principles

In advance of making observations on the regulations as currently drafted we wish to set out in detail the principles which should underlie a Quality Assurance Scheme for Advocates. In order for a QASA scheme to be judged fit for purpose, in keeping with its stated aims and consistent with the statutory objectives as set out in the Section 1 of the Legal Services Act 2007 the following principles and objectives should be embedded in the scheme.

1) **Parity in respect of qualification of Grades**

The scheme is intended to provide a kite mark for all advocates appearing before the courts. The confusion that the scheme must seek to deal with, for the proper protection of the public, is that court advocates now appear from both sides of the profession. Assuming the scheme intends to certify a quality assurance scheme for advocates alone, it must follow that the system of achieving grading with in the scheme should be universal. If different routes to qualification are available the public can not be reliably assured as to the method of assessment.

2) **The Method of Certification**

Underpinning any such scheme must be judicial assessment. The judiciary bear a high duty to ensure a fair trial and in keeping with that duty will be keen to ensure the highest standards are maintained by advocates appearing both for the Prosecution and the Defence. They clearly present the most rigorous test for assuring quality as they observe advocates in the real life arena on a daily basis. No artificial test can replicate the Court room. Equally, no artificial test can test what is so important for the public to be re-assured of namely, consistency. An advocate can perform well in a test setting over 1 or 2 days. That is very different from performing to consistently high standards over the period of 12 months. The judiciary operate as a daily assessment centre for advocates and that must be the key to quality assessment.

3) **Assessment Centres**

An expensive alternative to judicial assessment has been mooted, the assessment centre. Whilst it could never be as rigorous as judicial assessment it is argued it is necessary to provide an available route to qualification. Firstly for those who are returning to the profession following a forced or voluntary leave of absence (maternity/paternity/illness/sabbatical/public service) or where advocates working in a limited court centre setting fear they suffer from judicial bias. In both circumstances it is argued that assessment centres are necessary to preserve equal opportunity standards. We disagree:

a) **Forced or Voluntary Leave of Absence**

Any advocate who leaves the profession for a time will have already obtained a grade, for the sake of the example we will take an advocate seeking to return having attain a Grade 3 certificate. On returning they will naturally have to fulfil a CPD requirement through a "Returning to Advocacy" course. Having fulfilled that requirement we suggest that they can self certify themselves back onto the grade at which they left say for 12 months or 15 months. This provides them with ample opportunity to garner judicial assessment. After that time they can then apply to have their grading confirmed or upped, whatever is the most appropriate. This method, preserves equal opportunities, provides consistency of assessment, maintains judicial assessment and saves the tax payer or the profession a vast sum of money.

b) **Perceived Bias**

Any regulator should be wary of an advocate citing judicial bias for failing to obtain a level of certification. Unfair bias might be the cause alternatively it may well simply provide an excuse for failing to meet the required standard of excellence. Any quality assured scheme must have an system of appeal for refusal and such a system can very easily judge whether judicial bias is at work. Indeed many tribunals cope with making such assessments on a daily basis. Provided the makeup of such a body is representative and includes the judiciary, advocates from both limbs of the professions and members of the public there can be no perceived or actual unfairness.

4. **Sub-Grading: Plea Only Advocates**

Consideration is being given to a species of advocate known as a plea only advocate. The introduction of such a category would destroy the notion that QASA was a quality assurance scheme. The public must have the re-assurance that any advice they receive from an advocate is independent and not influenced by considerations of self interest. The creation of a plea only advocate immediately creates a conflict of interest for the advocate and the public can never be assured that the advice received is not so influenced. How can they when receiving advice to plead guilty from an advocate who can only represent them if they do. In any event, no plea only advocate can be judged to have properly advised as to plea if they have not obtained and maintained the requisite grade as a trial advocate. Finally, such a species creates very costly practical problems. A plea only advocate representing on sentence may find themselves facing a Newton trial or confiscation proceedings. In that circumstance they would be bound to withdraw as both such proceedings are part of the trial process.

5. **The Code of Practice for Advocates**

Advocates must operate under the same Code in order to give the public a proper avenue of complaint. At present the Codes of Practice for Higher Court Advocates and the Bar differ substantially. By way of example: barristers can not, under their code, take a case which is beyond their competence or experience. No such stricture is placed on the Higher Court Advocate. Whilst a common-sense point of principle dictates that each code mirrors the other, it is vital that this self policing is built into the system. No quality assurance scheme can construct the number of grades to cover the myriad of complexities thrown up by criminal cases at all levels. We all recognise, even at silk level that we do not have sufficient experience to conduct all cases and accordingly refer cases on however lucrative they may be.

6. **Queen's Counsel**

It is now understood that Queen's counsel will not be included in the current QASA proposals. There is very good reason for this. The Queen's Counsel competition is far more rigorous than anything proposed under QASA and is wholly funded by the Bar itself with no expense to the public purse. In consequence, to introduce a less rigorous parallel system of Quality Assurance at the expense of the taxpayer makes no sense. Equally, the Queens Counsel rank is a world recognised and respected kite mark; Mr Bloggins Grade 5 is not.

Its suitability for a modern Bar was considered in detail between 2003 and 2006 when a moratorium was in place. It was viewed to be fit for purpose then and has operated successfully since. If the regulator wishes to have the Queen's Counsel Appointment system within its remit it should negotiate that according. Similarly if a re-validation process is deemed necessary that can easily and cheaply be accommodated within the current system. There is absolutely no merit in attempting to fix a system that isn't broken.

7. **Judicial Discretion Maintained as regards the Grading of Cases and Granting of Certificates**

It is essential in the public interest that it is the judiciary which retains the discretion to grant certificates for two counsel and Queen's Counsel. It is the judiciary who understand the complexity of cases being tried and in consequence it is experienced judges who are best placed to preserve the public interest. Indeed, in order to give effect to the right to a fair trial under the Human Rights Act the judicial discretion must be maintained. Indeed, if QASA is truly intended to be a Quality Assurance system for the protection of the public, the judiciary must have the discretion to deem a level 2 case to be a level 3 and a level 3 to be a level 4 etc in appropriate circumstances. The grading of cases should not be so rigid as to deny a litigant the appropriate level of experience for the particular case concerned. Indeed the regulator should demarcate certain cases ie Murder appropriate for defence by QC and junior of an appropriate level, unless a judge on application determines otherwise. This ensures that the interests of the defendant are preserved. Whilst the regulator can not ensure the interests of the victim it can set a standard which it would be hoped the Crown Prosecution Service would wish to follow.

8. **Setting the Level at Which a Case Falls**

This must be done in conjunction with both professions and the judiciary. Fundamental to the grading process must be the right to a fair trial and the rights of victims to have appropriate prosecutorial input.

9. **Youth Courts**

Given the sentencing options available at the youth court there is a tendency to forget the levels of serious crime they deal with. Clearly there is an important public interest for Youth Court work to come within a Level 2 category. However in order to ensure sufficiently experienced advocates at this level Youth Court Justices should be permitted

an assessment role. Further consultation is required as to provisional licences in order to ensure proper representation at this level.

Commentary on the Regulations as Currently Proposed

Level 1

In the original consultation (Pg.15) level 1 was to cover advocacy in the Magistrates Court as well as appeals from cases heard at first instance in the Magistrates and bail applications in the Crown Court. It was proposed back in August 2010 that level 1 would be achieved by completion of The Bar Training Course and the first six months of criminal pupillage. For solicitors, level 1 would be attained
upon admission to the Solicitors' roll which follows advocacy training and assessment during the LPC.

In the SEC response it was suggested that barristers should be permitted to undertake level 1 and 2 work after completion of 6 months' pupillage in light of the nature of the training provided during the Bar Professional Training Course.

It now transpires in the most recent consultation (albeit just in relation to regulatory changes) that solicitors will attain level 1 upon qualification (pg.16 and 19)

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

On the other hand the BSB states that in order to obtain accreditation, an application needs to be made to the BSB (pg. 94) with evidence that the barrister applicant holds a full [provisional or limited] practising certificate].

Level 2

In the original consultation level 2 covers advocacy in the Higher Courts as well as appeals from cases heard in these courts at first instance. Advocates will attain

Level 2 by demonstrating for the time being via the existing training and assessment arrangement that they meet the required standards.

Level 2 will be achieved by barristers by successfully passing the compulsory advocacy element of the New Practitioners Programme (NPP). It was said in the original consultation that 'it is expected that barristers could undertake the additional advocacy training within the first 15 months of commencing pupillage but could not move to Level 2 until they have served at least nine months at Level 1. This would mean that the earliest a barrister could practice at Level 2 in the higher courts would be three months after the completion of a 12 month pupillage.'

In the SEC response it was suggested that barristers should be permitted to undertake level 1 and 2 work after completion of 6 months' pupillage in light of the nature of the training provided during the Bar Professional Training Course.

In the most recent consultation, the BSB proposes that applicants for Levels 2, 3 and 4 make an application to the BSB and in support of an application evidence is to be provided to demonstrate competence detailing cases and hearings undertaken in the 12 months preceding the date of the application. (pg. 94).

Further, the BSB proposes that once the applicant has made the application and provided evidence of their cases and hearings undertaken in the 12 months preceding the date of the application that this only warrants 'provisional' accreditation. (pg. 98). Proposed rule 24.2. Rule 25 will require the application to 'apply' to convert this to full accreditation by submitting to the BSB within 12 months from the date of grant of provisional accreditation completed judicial evaluation forms in respect of two of the first five court appearances undertaken by the applicant confirming that the applicant is competent to conduct criminal advocacy at that level.

Solicitors on the other hand simply obtain level 2 by the proposal in the original consultation – by obtaining their Higher Rights of Audience (pg. 29).

"If you meet the requirements of these regulations in respect of higher rights of audience, we may grant one or both of the following qualifications, which authorise you to conduct advocacy in the higher courts…….Higher Courts (Criminal

Advocacy) Qualification which certifies the solicitor or REL under QASA Level 2 of the statement of standards."

Solicitors will **not**

have to make an application separately for certification at Level 2;

pay a fee for QASA at Level 2;

provide cases and hearings in the preceding 12 months;

only obtain provisional accreditation;

make a further application providing judicial evaluation forms to obtain full accreditation.

We also make the point as to cost. Presumably it will cost money for the applicant to make an initial 'application'? Presumably it will cost money to make a further 'application' to obtain 'full' accreditation?

What does 'application' mean? How much will it cost?

Re-accreditation

This consultation proposes re-accreditation at levels 2, 3 and 4 by judicial evaluation forms (no less than 3 and no more than 5 consecutive court appearances undertaken in the 12 months preceding your application) or assessment centre together with one judicial evaluation form.

Firstly – what does 'appearance' mean in tandem with 'consecutive'? If you have a 5 day trial, do you obtain 5 judicial evaluation forms from the same judge? Does it refer to different 'cases'?

Solicitors can get away without having to obtain judicial assessment (See pg.10). '…progress through the levels, by means of assessment either by assessment centre ***or*** judicial evaluation'. There is no definition of 'assessment'.

Levels of Cases

Who sets the Levels? In the original consultation it was stated that there should be four levels of criminal advocate, similar to the levels used by the CPS in allocating advocates to cases. The final defined levels will be determined in the light of consultation responses and after discussions with the CPS in order to assist with harmonisation

The SRA regs have the "parties" setting the level (p.12). This is clearly open to abuse by solicitors. If there is a level 3 case but only level 2 in house advocates the solicitor and their 'employee' can certify that the case is actually level 2.

There has been no consultation or agreement with the Bar about levels.

Acting up a Level

It will be a breach of the Code of Conduct if barrister accepts instructions in relation to criminal advocacy when he/she is not accredited at the correct level to undertake it in accordance with QASA.

The new consultation proposes circumstances where an advocate can act up a level but these are different depending on whether you are regulated by the SRA or BSB.

SRA – 'there may be circumstances in which the parties agree that the level of advocate required for a case does not need to accord with the level of the case' (pg. 12)

BSB – 'You shall only accept instructions to conduct advocacy in criminal cases which you are satisfied fall within the level at which you are accredited, or any level below the same, unless you are satisfied that you are competent to accept instructions for a case at a higher level in light of the particular circumstances of the case, and strictly in accordance with the prescribed criteria set out in the scheme'

Progression

Para 21.1 on pg. 97 is missing an 'or' at the end of the paragraph.

In relation to the specialist practitioners questions which were posed as the reason for the consultation, the preamble seems perfectly fine and sensible, but we cannot say what circumstances would dictate what was a specialist practitioner without having sorted out the table of Levels and whether any work falls outside that or not- eg restraint applications.

Michael Turner QC

Patricia Lynch QC

Nathaniel Ruldolf

Isabelle Forshall QC

Rosina Cottage QC

James Thacker

Ian West

For and on behalf of the CBA and South Eastern Circuit and subject to confirmation by the circuit leadership.

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