



<b>To:</b>	Board		
<b>Date of Meeting:</b>	24 July 2013	<b>Item:</b>	Paper (13) 53

<b>Title:</b>	Application from the Bar Standards Board, the Solicitors Regulation Authority and ILEX Professional Standards Limited under the Legal Services Act 2007, Schedule 4, Part 3 for approval of a change to regulatory arrangements: the Quality Assurance Scheme for Advocates (Criminal)
<b>Workstream(s):</b>	Statutory Decisions ( <a href="#">Business Plan 2013/14</a> )
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<b>Status:</b>	Unclassified

#### Summary:

This paper recommends that the Board approve the application under Schedule 4, Part 3 of the Legal Services Act 2007 (the Act) from the Bar Standards Board (BSB), the Solicitors Regulation Authority (SRA) and ILEX Professional Standards Limited (IPS) for regulatory arrangements for the introduction of the Quality Assurance Scheme for Advocates (Criminal) (QASA).

This paper summarises the key issues that have been considered in making this recommendation. Annex A is the proposed decision notice which sets out in more detail the rationale for the decision.

#### Recommendation(s):

The Board is invited:

- (a) To note the executive's analysis of the application and the associated legal and reputational risks
- (b) To grant the application from the Bar Standards Board (BSB), the Solicitors Regulation Authority (SRA) and ILEX Professional Services Limited (IPS) for changes to regulatory arrangements resulting in the introduction of the Quality Assurance Scheme for Advocates (criminal)
- (c) If the application is approved, to delegate approval of the final drafting of decision notice to Chief Executive and Chair

<b>Risks and mitigations</b>	
<b>Financial:</b>	None
<b>Legal:</b>	The Board's attention is drawn to the Annex B paper containing legal opinion.
<b>Reputational:</b>	<p>A decision to approve is likely to attract a lot of media interest and likely criticism from those who against the introduction of QASA. The potential challenge (by way of judicial review) will attract more interest.</p> <p>We believe that the decision that we are recommending is within the scope of our powers. A judicial review of how those powers are used may provide greater certainty for future decisions.</p>
<b>Resource:</b>	None

<b>Consultation</b>	<b>Yes</b>	<b>No</b>	<b>Who / why?</b>
<b>Board Members:</b>		√	
<b>Consumer Panel:</b>		√	
<b>Others:</b>	None		

<b>Freedom of Information Act 2000 (Fol)</b>		
<b>Para ref</b>	<b>Fol exemption and summary</b>	<b>Expires</b>
Annex A	Section 21 – information reasonably accessible by other means: <a href="http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/26072013_decision_notice_final.pdf">http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/26072013_decision_notice_final.pdf</a>	
Annex B	Section 42 - information which is subject to legal professional privilege	
Annex C	Section 36(2)(b)(i) - Likely to inhibit the free and frank provision of advice	

## LEGAL SERVICES BOARD

<b>To:</b>	Board	
<b>Date of Meeting:</b>	24 July 2013	<b>Item:</b> Paper (13) 53

### **Application from the Bar Standards Board, the Solicitors Regulation Authority and ILEX Professional Standards Limited under the Legal Services Act 2007, Schedule 4, Part 3 for approval of a change to regulatory arrangements: the Quality Assurance Scheme for Advocates (Criminal)**

#### **Background / context**

1. The BSB, SRA and IPS (the applicants), working together as the Joint Advocacy Group (JAG), have developed the proposed QASA scheme over a number of years. In that time there has been much comment about the scheme; more recently the loudest voices seem to be those that are against the scheme. While it would appear that there is a consensus that quality of advocacy in criminal trials is important, there is less agreement on whether this particular scheme is the mechanism by which assurance about quality should be achieved.
2. The applicants submitted the application to the LSB on 14 May 2013 and a notice extending the decision period to 11 August 2013 was issued to each on 5 June 2013.
3. Under the LSB Scheme of Delegations, the Chief Executive has the delegated authority to determine how to handle applications for changes to regulatory arrangements taking into account an assessment of the significance, risk and impact. Given the degree of reputational and legal risk to the LSB in making a decision to approve this application, the Chief Executive has concluded that the decision should be made by the Board.
4. The application is available on the LSB's website and will be available at the meeting.

#### **The proposed Scheme**

5. QASA is a scheme to assess and assure the competence of all advocates conducting criminal advocacy in courts in England and Wales. The principal features of the scheme are
  - A single set of advocacy standards against which all advocates will be assessed
  - Four different levels of accreditation
  - Progression arrangements which will allow advocates to advance to higher levels where they meet the required standards of the higher levels

- Reaccreditation every five years
- Different assessment methods depending on level – continuing professional development, assessment centres, judicial evaluation
- A mechanism for judges to submit assessments on their own initiative where they have concerns about an advocate’s performance

## Key issues

### *LSB’s role in the development of the scheme and the approval of the application*

6. Section 4 of the Act states that the LSB must “assist in the maintenance and development of standards in relation to the regulation by approved regulators of persons authorised by them to carry on activities which are reserved legal activities”<sup>1</sup>. This provision allows (and indeed imposes a positive duty on) the LSB to take action to help in the development of regulatory standards. In addition, the Board is required to act in a way which is compatible with the regulatory objectives, Better Regulation Principles and best regulatory practice.
7. Although the start of the development of the scheme predates the formation of the LSB, this is an issue in which we have taken an active interest, facilitating discussions where necessary to ensure that a scheme is put in place.
8. The Board first discussed the issue in February 2010<sup>2</sup> noting the links to the Board’s key objectives and work programme. In November 2010 it noted that the absence of a quality assurance scheme for criminal advocates would be likely to have an adverse impact on the regulatory objectives and set out key principles for quality assurance of advocates<sup>3</sup>. In July 2011, having previously commissioned research and engaged widely, the Board agreed seven “Principles” which we could use to assess whether any scheme was likely to promote the regulatory objectives and the Better Regulation Principles.<sup>4</sup> (For the avoidance of doubt, these while these Principles have been considered in the assessment of the scheme, whether the scheme achieves them or not is not one of criteria for granting or refusing the application). This proactive approach was taken to further the performance of the LSB’s functions set out in the Act. It has been a feature of our Business Plans since 2010/11<sup>5</sup> and we have been clear about the outcomes that we expect the scheme to deliver.

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<sup>1</sup> Legal Services Act 2007, Section 4(a)

<sup>2</sup> [http://www.legalservicesboard.org.uk/about\\_us/board\\_meetings/pdf/paper\\_10\\_12\\_quality\\_assurance\\_for\\_advocates.pdf](http://www.legalservicesboard.org.uk/about_us/board_meetings/pdf/paper_10_12_quality_assurance_for_advocates.pdf)

<sup>3</sup> [http://www.legalservicesboard.org.uk/about\\_us/board\\_meetings/pdf/Paper\\_\(10\)\\_83\\_QAA.pdf](http://www.legalservicesboard.org.uk/about_us/board_meetings/pdf/Paper_(10)_83_QAA.pdf)

<sup>4</sup> [http://www.legalservicesboard.org.uk/about\\_us/board\\_meetings/pdf/20110622\\_qasa\\_board\\_paper\\_july\\_2011.pdf](http://www.legalservicesboard.org.uk/about_us/board_meetings/pdf/20110622_qasa_board_paper_july_2011.pdf)

<sup>5</sup> [http://www.legalservicesboard.org.uk/news\\_publications/publications/pdf/final\\_annual\\_plan\\_2010.pdf](http://www.legalservicesboard.org.uk/news_publications/publications/pdf/final_annual_plan_2010.pdf), paragraph 80

9. Schedule 4, Part 3 of the Act sets out the provisions relating to the approval of alterations (which includes additions and revocation<sup>6</sup>) to regulatory arrangements and requires them to be approved. Schedule 4, paragraph 19(2)(b) states that an alteration can be “approved by the Board under this Part of this Schedule”.
10. The LSB, therefore, has a positive duty to consider and approve applications for changes to regulatory arrangements . This is separate from its function of assisting in the maintenance and development of standards. Where we work with the approved regulators to develop solutions to issues, this does not fetter our discretion in relation to the rules change applications which are assessed against the criteria in Schedule 4, paragraph 25.

#### *Evidence base*

11. While LSB’s involvement in the development of the scheme has meant that we have had access to a lot of the evidence, this does not negate the responsibility in the rules change process to be satisfied that the proposals are an appropriate way of addressing the identified risk or issue.
12. The application itself did not replay the history of the development of the proposals and the evidence to support it. We have undertaken our own analysis as part of the assessment of the application from which the following conclusions were drawn:
  - At the outset, following the publication of the Carter Report in 2006, there appeared to be a general consensus that quality assurance of advocacy is important
  - As proposals have developed, and particularly as the scheme became a more imminent reality, opposition to a scheme of assurance has become more vocal
  - There is a lot of opinion about whether the scheme will be effective or not but of course empirical evidence of the likely success or failure of any particular scheme cannot be in place ahead of the scheme.
  - There is a range of evidence that points towards a significant risk, and in some places an actual pattern, of advocacy not being at the required standard:
    - Some judicial comment, though not all, has highlighted an increasing problem of poor advocacy in criminal courts
    - A pilot of a quality assurance scheme for criminal advocates conducted by Cardiff University<sup>7</sup> found that a significant proportion of participants failed at least one part of the assessment. It is noted that this was a relatively small, self selecting group of advocates

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<sup>6</sup> Legal Services Act 2007, Schedule 4, paragraph 19(5)

<sup>7</sup> <http://www.law.cf.ac.uk/research/pubs/repository/2269.pdf>

- Her Majesty’s Crown Prosecution Service Inspectorate has highlighted problems of poor advocacy and that a quality assurance scheme can help improve quality.
13. Failure to tackle the quality of advocacy could be seen as prejudicial to the public interest, the rule of law, the maintenance of a strong profession and the professional principles if it were to result in miscarriages of justice and public confidence in the fairness and effectiveness of the court system.
  14. Although the executive regard the comments as no more than speculative, the Board should also note persistent comment from some stakeholders that changes to the market are increasing the likelihood of poor advocacy emerging.
  15. The Board needs to consider the risk as well as the fact of poor advocacy.
  16. The changes to criminal legal aid remuneration (generally downwards pressure but also changing how payments are related to work) is often cited as a risk to quality by the profession. Similarly the recent Ministry of Justice consultation on the introduction of further cuts and the use of price competitive tendering has attracted further comment on the risk to quality. Furthermore, some parts of the profession have highlighted that the increasing narrowness (in terms of areas of court process rather than the subject matter of the case) of some advocates’ practice (what are often called plea only advocates) is a real risk to quality.
  17. While no individual piece of the evidence considered is wholly conclusive on its own, the whole presents sufficient concern to warrant a scheme such as that proposed by the application. This is because the evidence suggests a real risk, and a pattern of evidence, of actual problems across a wide range of criminal advocates and almost nothing by way of evidence that quality is consistently good enough.
  18. We have noted that the applicants intend to carry out a review of the scheme in 2015 which will provide a comprehensive analysis of the Scheme and how it promotes the regulatory objectives and improves criminal advocacy standards. It will also provide an opportunity to assess whether the scheme impacts on criminal advocates’ behaviours in the way intended. It is of course conceivable that in future the scheme itself will provide even better evidence that allows ever greater targeting, but at this stage that is little more than conjecture.

## **Assessment of the application**

### *Principles for QASA*

19. In July 2011, the Board set out seven “principles” for any quality assurance scheme. In assessing the proposed scheme we have considered whether it achieves those principles in policy terms, although, of course, these complement rather than supplement the formal statutory criteria.

20. Our assessment is that scheme submitted meets the principles:

<b>Principle</b>	<b>Assessment</b>
<b>Independence</b> – of the scheme and assessment process from those being assessed or their professional bodies	<b>Achieved – evidence</b> <ul style="list-style-type: none"> <li>• Scheme managed by the regulatory arms</li> <li>• JAG oversight – JAG made up of regulatory arms</li> <li>• Judicial evaluation</li> <li>• Assessment centres</li> <li>• Independent assessors</li> <li>• Evaluation will consider the assessment methods</li> </ul>
<b>Consistency</b> – one scheme	<b>Achieved – evidence</b> <ul style="list-style-type: none"> <li>• One scheme has been agreed by the approved regulators who make up JAG</li> <li>• Crown Prosecution Service in-house advocates included in the Scheme</li> </ul>
<b>Differentiation</b> – multiple levels of assessment, from entry level to the most senior level	<b>Achieved – evidence</b> <ul style="list-style-type: none"> <li>• four levels to represent the different types criminal cases</li> <li>• Covers advocates operating in all levels of criminal court – QCs included</li> </ul>
<b>Tailored assessment</b> – according to area of law and level	<b>Achieved – evidence</b> <ul style="list-style-type: none"> <li>• Targeted at criminal law – the competence framework properly focused on the skills need for such advocacy</li> <li>• Competency framework recognises different skills need at different levels</li> <li>• Higher levels have more complex competency framework</li> <li>• Clear progression route to higher levels</li> </ul>
<b>Compulsory participation</b>	<b>Achieved – evidence</b> <ul style="list-style-type: none"> <li>• All advocates wishing to do criminal work will need to seek accreditation</li> <li>• Phased implementation</li> </ul>
<b>Limited exceptions</b> – passporting and exemption only where this is demonstrably in the consumer interest and supported by proper evidence	<b>Achieved – evidence</b> <ul style="list-style-type: none"> <li>• All those currently doing criminal advocacy will have to seek accreditation – including QCs (despite strong lobbying that they should be excluded)</li> <li>• Transitional arrangements for registration for advocates appointed as QC between 2010 and 2013 (required to reaccredit within five years of appointment as QC rather than two years from scheme introduction)</li> <li>• From September 2015, solicitors automatically granted Level 1 accreditation with first practising certificate</li> <li>• Advocates who do not do trials can obtain accreditation at Levels 2 and 3 through an assessment centre</li> </ul>
<b>Periodic reaccreditation</b>	<b>Achieved – evidence</b> <ul style="list-style-type: none"> <li>• All advocates will need to seek reaccreditation every five years</li> </ul>

*The statutory criteria in Schedule 4 to the Act*

21. Schedule 4, paragraph 25 sets out the criteria against which applications for changes to regulatory arrangements should be assessed. The criteria are expressed in terms of the what must be demonstrated for an application to be refused – if these cannot be satisfied then the application must be approved.
22. Our analysis for this application is as follows:

	<b>Reasons for refusing an application</b>	<b>Commentary</b>
25(3)(a)	Would granting the application be prejudicial to the regulatory objectives?	No evidence to support this. Rather than prejudicial our view is that the scheme will have a positive effect on protecting and promoting the interests of consumers, encouraging an independent, strong, diverse and effective legal profession and promoting and maintaining adherence to the professional principles
(b)	<p>Would granting the application be contrary to the Act or other legislation</p> <p>Or would result in <b>designation requirements</b> ceasing to be satisfied</p> <p><i>The <b>designation requirements</b> (25(4)) are</i></p> <p><i>A requirement to have appropriate internal governance arrangements</i></p> <p><i>A requirement that the applicant is competent, has sufficient resources to perform the role of AR in relation to RLA for which it is designated</i></p> <p><i>The requirements of paragraph 13(2)(c)-(e)</i></p> <p><b>Paragraph 13(2)(c)-(e) requires</b></p> <p><i>That the applicant's proposed regulatory arrangements make appropriate provision</i></p> <p><i>The proposed regulatory arrangements comply with the regulatory conflict requirements (s.52 and s.54 of the Act)</i></p> <p><i>Those arrangements comply with the requirements for complaints about authorised persons (s.112) and the duty of authorised persons to co-operate with investigation (s.145)</i></p>	<p>We have not identified any other statutory provision (in the Act or elsewhere) which would be adversely affected if the application were granted</p> <p>We have not identified any designation criteria that would cease to be met if the application were granted</p> <p>All applicants have appropriate internal governance arrangements</p> <p>All applicants have demonstrated in the application that they have the resources to operate and manage the scheme</p> <p>The scheme constitutes an appropriate set of arrangements through which to provide assurance in the quality of criminal advocacy</p> <p>No conflicts have been identified</p> <p>The existing complaints mechanisms will continue to apply</p>
(c)	Would granting the application be contrary to the public interest	Our view is that granting the application will not be contrary to the public interest. The criminal justice



		system needs good quality advocacy if it is deliver fair results for the accused, victims and witnesses and for the public to have confidence in it.
d)	Would granting the application allow an approved regulator to authorise carrying on of RLA for which it is not approved	All applicants are designated as approved regulators for the exercise of rights of audience
(e)	Would granting the application enable the AR to license persons to carry on RLAs for which it is not a licensing authority	The Law Society/SRA is the only applicant that is a licensing authority. As a licensing authority it is designated for exercise of rights of audience
(f)	Has the alteration been made otherwise than in accordance with procedures making alterations	The application has been made in accordance with the LSB requirements for seeking approval for changes to regulatory arrangements

23. Consequently, our assessment is that none of the criteria which would allow us to refuse the application have been met.

*Legal advice*

24. The Board is aware that we have received a pre-action protocol letter from a barrister who has indicated her intention to seek a judicial review if the LSB decides to approve the application. Annex B sets out the legal advice (both internal and external) as to the legality of the application.

*Alternative decision*

25. We have considered whether we should issue a warning notice<sup>8</sup> on the application and through that mechanism obtain further advice. We concluded that while it may be possible to obtain more opinions on the proposal, this is unlikely to give us additional evidence on which to base our decision. The executive’s view is that the wide ranging consultations, with significant publicity and comment, have provided ample opportunity to draw out available evidence, and therefore it is unlikely that any new or significant evidence, as opposed to further opinion and comment, is likely to be obtained that would aid the Board’s decision.

*Potential consequences if delivery of the scheme is delayed*

26. While the application can only be considered against the statutory criteria, the Board might want to aware of the potential consequences of any delay in delivering the scheme. Annex C sets out the executive’s analysis of outcomes of any such delay.

**Conclusion and recommendation**

27. The proposed scheme meets the principles for a quality assurance scheme agreed by the Board in July 2011.

<sup>8</sup> Legal Services Act 2007, Schedule 4, paragraph 21(1)(b), Where the Board has received an application under paragraph 20 it may give the approved regulator a notice stating that it is considering whether to refuse the application (“a warning notice”)

28. Our analysis is that the application does not meet any of the criteria set out in Schedule 4, paragraph 25(3) of the Act which would allow us to refuse the application. The executive recommend, therefore, that the application is granted.
29. If the recommendation is accepted and the application is granted, a decision notice will be issued to the applicants. Annex A is a draft of the notice.
30. The Board is invited:
  - (a) To note the executive's analysis of the application and the associated legal and reputational risks
  - (b) approve the application from the Bar Standards Board (BSB), the Solicitors Regulation Authority (SRA) and ILEX Professional Services Limited (IPS) for changes to regulatory arrangements resulting in the introduction of the Quality Assurance Scheme for Advocates (criminal)
  - (c) If the application is approved, to delegate approval of the final drafting of decision notice to Chief Executive and Chair

19.07.2013