

To:	Board	
Date of Meeting:	30 November 2010	Item: Paper (10) 83

Title:	Quality Assurance for Advocates: update on development of a scheme for criminal advocates
Workstream(s):	Workstream 2F: Developing a Workforce for a Changing Market
Introduced by:	Crispin Passmore, Strategy Director crispin.passmore@legalservicesboard.org.uk / 020 7271 0086
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Status:	Protect

Summary:
This paper provides an update on progress with the Joint Advocacy Group's proposal for a quality assurance scheme for criminal advocates. It invites the Board to endorse our proposed approach to ensuring delivery of the scheme.

Risks and mitigations	
Financial:	None.
FoIA:	Annex C – exempt under s36 ('free and frank advice').
Legal:	Detailed legal advice is included at paragraph 40 and Annex C.
Reputational:	LSB is publicly committed to ensuring the delivery of a QAA (Crime) scheme by July 2011; significant reputational risk if this is not achieved.
Resource:	Resource currently considered sufficient.

Consultation	Yes	No	Who / why?
Board Members:	✓		David Wolfe
Consumer Panel:		✓	Update only
Others:	N/A.		

Recommendation(s):
The Board is invited: (1) to note the progress update at paras 16 – 20; (2) to note that the absence of a QAA scheme for criminal advocacy is likely to have an adverse impact on one or more of the regulatory objectives; and (3) to comment on and endorse the proposed approach to ensuring delivery of a QAA scheme.

LEGAL SERVICES BOARD

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Date of Meeting: 30 November 2010	Item: Paper (10) 83

Quality Assurance for Advocates: update on development of a scheme for criminal advocates

Executive Summary

1. The LSB is overseeing the delivery of a quality assurance for advocates (**QAA**) scheme being developed jointly by the Solicitors Regulation Authority (**SRA**), Bar Standards Board (**BSB**) and ILEX Professional Standards (**IPS**) through the Joint Advocacy Group (**JAG**).
2. JAG published a consultation paper setting out proposals for the scheme in August 2010. While the publication of the proposals marks a significant achievement, they require significant further development to produce a robust and credible scheme by July 2011. It is unlikely we could approve the scheme outlined in the consultation paper as a change to regulatory arrangements, and a number of stakeholders (including The Law Society, The Crown Prosecution Service (**CPS**), Legal Services Commission (**LSC**) and Legal Services Consumer Panel) have expressed their dissatisfaction with aspects of the proposals.
3. We will continue to apply pressure to the JAG to present revised proposals that address our concerns, and a detailed implementation plan. We have set out our proposed approach to ensuring delivery of the scheme. We propose to:
 - commission research on best practice in assessment methods and the design of a model QAA scheme
 - make clear to the SRA, BSB and IPS that we consider the absence of a scheme is likely to have an adverse impact on one or more of the regulatory objectives and that we are seeking informal resolution of the issue in an attempt to avoid formal enforcement.

Recommendations

4. The Board is invited:
 - (1) to note the progress update at paras 16 – 20;
 - (2) to note that the absence of a QAA scheme for criminal advocacy is likely to have an adverse impact on one or more of the regulatory objectives; and
 - (3) to comment on and endorse the proposed approach to ensuring delivery of a QAA scheme.

Background

5. The LSC tried to develop and implement a QAA scheme for criminal advocacy over more than three years, following Lord Carter's review of legal aid procurement in 2006. The Board committed in 2009 to drive forward a QAA

scheme covering not just publicly funded criminal advocacy, but all criminal advocacy and family advocacy and potentially other areas of advocacy in the civil courts. The first priority is to implement a scheme for criminal advocates.

6. Last autumn we took on an oversight role of the JAG, made up of the SRA, BSB and IPS – a mechanism promoted by the Approved Regulators (AR) as a suitable vehicle for delivery. We agreed a deadline of July 2011 with JAG for the delivery of a criminal QAA scheme that is independent, robust and focused on protecting consumers.
7. July 2011 was agreed as the implementation date because it provided a reasonable amount of time for the JAG to develop and implement a credible scheme, because it coincides with the expected date of the next LSC tender round, and also because July is the time when a new intake is called to the Bar, so it is desirable to align implementation with the arrival of this new intake.
8. The Board agreed in February 2010 that the Executive should continue to hold the JAG to account for delivery of the scheme – maintaining momentum and ensuring the design of the scheme is proportionate but sufficient to meet the regulatory objectives. In May 2010, we published seven key principles that a robust and credible scheme would need to follow: independence, consistency, differentiation, tailored assessment, compulsory participation, limited exceptions and periodic reaccreditation (see full description at **Annex A**).

Our statutory role in relation to QAA

9. Ensuring regulation imposes appropriate minimum quality standards for authorised persons is directly relevant to the achievement of the following regulatory objectives:
 - RO4 – Protecting and promoting the interests of consumers
 - RO6 – Encouraging an independent, strong, diverse and effective legal profession
 - RO8 – Promoting and maintaining adherence by Authorised Persons to the professional principles (including maintaining proper standards of work).
10. We also have a specific duty under s.4 of Legal Services Act 2007 (**'the Act'**) to assist in the maintenance and development of standards in relation to both the regulation of Authorised Persons and the education and training of Authorised Persons.
11. In addition to the direct relevance to these objectives and the specific duty, QAA supports several other LSB work streams, including:
 - i. Increasing competition – there has to be a minimum standard of quality to ensure effective competition in the market; the case for more stringent quality assurance requirements in relation to criminal advocacy is strengthened by the potential consumer detriment
 - ii. Increasing access to justice – in legal aid cases, QAA should ensure that the advocate is of the required standard, irrespective of whether the contracted solicitor decides to refer the advocacy to external sources (for monetary or client interest reasons)

- iii. Ensuring independence – the scheme will drive home independence rules by addressing long-standing debates around whether quality assurance above entry-level qualifications should be a regulatory or professional membership concern. More broadly, it will reinforce the independence of professional regulation as a whole by removing the need for LSC and CPS to consider developing their own schemes in the absence of a regulator-led alternative (see para 14 below).

The need for a QAA scheme

12. The delivery of a QAA scheme for criminal advocates is a pressing need and the requirement for a scheme is agreed by the three relevant regulators. There is significant evidence of quality concerns in the criminal advocacy market. This evidence includes feedback from the judiciary and evidence from the LSC pilot scheme run by Cardiff Law School, which a significant number of advocates failed at least one module. It is also a view supported by independent analysis from Charles River Associates' report on referral fees. This is a market where consumers are likely to be particularly vulnerable and at risk of losing their liberty.
13. It is likely that there will be increased price competition in the publicly funded criminal advocacy market as a result of the next LSC tender round expected during 2011. This increased price competition increases the risk that the quality of advocacy will be compromised, and makes it all the more important that there are minimum quality standards.
14. The Ministry of Justice and LSC have made clear that they will expect regulators to set and police standards in the provision of legal services, rather than this being done by the LSC. It is therefore a collective test of our credibility and that of the three ARs as independent regulators to deliver a suitable scheme. We are in the unusual position for regulators of having advance warning of a potentially significant regulatory issue and we must respond by mitigating the risk.
15. SRA, BSB and IPS all agree, on the basis of the evidence and likelihood of increased price competition, that a QAA scheme is needed for criminal advocacy. They have developed common advocacy standards which were the subject of a full public consultation and have now been agreed. It was also accepted by all parties at the outset that the consequences of poor advocacy were potentially extremely serious for individual defendants, who could be a risk of losing their liberty – making consumer protection particularly important. The recent discussions with JAG have therefore focused not on whether a scheme is needed, but on how the scheme should be delivered and specifically what assessment methods should be used.

Current position

16. We consider that the absence of a scheme is likely to have an adverse impact on one or more of the regulatory objectives. This is the threshold test for us to consider the use of our power to issue a direction under s.32 of the Act.
17. While progress has been made over the past six months, it is significantly slower than we would have liked. We are concerned that JAG is no longer on track to deliver a scheme by July 2011 which meets our requirements as oversight regulator. The current proposals fail to meet the principles we have set out in a

number of material respects and we do not have confidence in their ability to deliver the scheme by July 2011.

18. In view of this, we consider it appropriate to intervene more formally to put JAG back on track to deliver on the timetable we set out and agreed with stakeholders in March 2010. If we allow the current situation to continue unchecked, there is a significant risk both that the timetable for delivery by July 2011 is not met, and that the scheme that is presented to us for approval is prejudicial to the regulatory objectives because it is an ineffective means of guaranteeing a minimum quality standard.
19. Implementing a scheme based on the proposal in the JAG consultation paper would be disproportionate because it would add a regulatory burden without achieving what is required to support the regulatory objectives. On the information so far available, we are unlikely to be able to approve such a scheme as a change to the regulatory arrangements, as we consider that the Board is likely to be satisfied that such an application would prejudice the regulatory objectives.
20. We therefore consider it appropriate to intervene now to head off a disproportionate scheme and increase the chances of a credible scheme being submitted for approval and implementation by July 2011.

Main concerns about the proposal outlined in the consultation paper

21. The proposed scheme follows the four-level approach used by the CPS in allocating advocates to cases. The precise definition of the levels is yet to be determined, but broadly is likely to be:
 - *Level 1* – covering advocacy in the Magistrates' Court, appeals in the Crown Court from cases heard at first instance in the Magistrates' Court, and bail applications before a judge in chambers in the Crown Court and High Court
 - *Level 2* – covering the more straightforward Crown Court cases, and appeals from cases heard in these courts in the first instance (e.g. theft, deception, assault, burglary)
 - *Level 3* – covering more complex advocacy in the Crown Court (e.g. fraud, serious assaults, complex robberies, driving offences involving death)
 - *Level 4* – covering the most complex Crown Court cases and appeals.
22. The proposal presented in the consultation paper breaks down into three elements:
 - Levels 1 & 2, where it is proposed existing education and training mechanisms are relied on as the means of achieving accreditation (perhaps with some modifications and a requirement to have experience in criminal advocacy specifically)
 - Levels 3 & 4, where the proposal is to rely almost exclusively on judicial evaluation of live cases – advocates self-select cases, after which they ask the judge to complete a structured evaluation form, and then submit a number of these forms to their regulator to gain accreditation or reaccreditation.

- A 'traffic lights' system to provide a formal structure enabling judges to report instances of poor performance. Once the advocate has been subject to a specified number of reports, the regulator decides what action to take.
23. It is proposed that a new body is established jointly by the three regulators, provisionally called the Performance of Advocacy Council (**PAC**). The precise role of this body in developing and delivering the scheme is still subject to discussion, although Lord Justice Thomas has been invited to Chair it.
24. We have three key areas of concern with these proposals:
- The need for a robust assessment approach for advocates at levels 1 & 2 for both newly qualified and experienced advocates
 - The need to supplement judicial evaluation in live cases at levels 3 & 4 with other forms of evidence (e.g. a structured assessment via a role-play exercise)
 - The need to re-think the implementation approach so that resources are committed to project management and the establishment of a new body does not prove a distraction from implementing an operational scheme.
25. At levels 1 & 2, the proposal is to rely on existing educational pathways for each of the three branches of the profession and for this to be a permanent feature of the scheme, rather than a matter of transition. There is no clear proposal about the mechanism for accrediting experienced advocates at levels 1 & 2, who either already practice in criminal law or wish to move into this area of practice. This issue needs to be addressed to ensure consistency with the principle of compulsory participation for advocates at all levels.
26. At levels 3 & 4, the proposal is to rely almost exclusively on judicial evaluation of live cases. While judicial input to the assessment process is important, the proposed approach has significant limitations. Judicial evaluation of live cases can never fully cover the range of competencies that have been agreed – for example, judges observing advocacy performance in the courtroom will not be in a position to assess the advocate's performance in advising their client. Further, the judge will not be aware of the instructions the advocate has received. We are also concerned that the proposed approach has the potential to lead to inconsistency in assessment outcomes, both between different individuals and different categories of advocates.
27. We therefore consider that there needs to be a balance between assessment based on performance in live cases, and other forms of evidence to supplement this assessment. This is particularly important since the proposal enables advocates to 'self-select' when they request a judge to complete a judicial evaluation form, with the request being made after the event (at the end of a hearing) once the advocate has a good idea how they have performed. This could lead to a perception that the assessment approach is geared in favour of the advocate, and may result in allegations that advocates with personal connections to particular judges are at an advantage. There is also a risk that advocates who only ever appear at one crown court centre will be at a disadvantage because they appear before only a small number of judges. For example, a barrister doing crime only in London is likely to have far more opportunities to ask a range of judges to fill in a judicial evaluation form than a

solicitor-advocate in a provincial town who has a mixed practice and only ever performs criminal advocacy at the same small Crown Court centre.

28. The proposed delivery mechanism is also a matter of concern. The establishment of a new body will be time consuming and divert resources away from delivering the scheme by July 2011, and we are not convinced that it is necessary. There is the potential for the duplication of functions between individual ARs, JAG and PAC, and also blurred lines of accountability.

Proposed approach

29. Following a meeting at Chief Executive level on 27 October, JAG has undertaken to provide a written response setting out its response to our concerns, and a detailed implementation timetable showing the critical path. This was requested by 12 November, and a letter (although no implementation plan) was received on 25 November (see **Annex B**). This response provides little reassurance that our concerns have been taken on board, other than at the margin in relation to implementation.
30. We have sought legal advice from our in-house legal team about the powers available to us under the Act should we need to take more formal action to ensure delivery of an appropriate scheme. The legal advice is attached at **Annex C**. An indicative enforcement timeline is attached at **Annex D**. The Board should note that the advice is designed to set out the tests which would need to be considered in making a decision to intervene, rather than fully analysing the current proposals against those tests.
31. At this stage, we do not consider it appropriate to continue with informal oversight of JAG as the sole intervention. We do not have sufficient confidence that JAG is addressing our concerns with the current proposals for the scheme, and we have not been presented with an implementation plan showing a realistic and achievable critical path to delivery in July 2011.
32. The fact that we consider that the absence of a scheme is likely to have an adverse impact on one or more of the regulatory objectives suggests that the Board should consider taking more formal steps with a view to future enforcement action if necessary.
33. However, in the Executive's view, it would not be appropriate or proportionate at this stage to move straight to initiating the process of issuing a direction to any of the ARs, pending more direct intervention and further legal analysis in the light of the outcome of that work. Our statement of policy on compliance and enforcement makes clear our commitment to informal resolution, where this is possible and appropriate:
- The LSB will always consider whether it is appropriate, in the circumstances of the case, to resolve matters informally and will usually seek to do so before considering more formal intervention.¹*
34. We therefore propose two immediate steps to increase the pressure on the relevant ARs to deliver an appropriate scheme:

¹ *Compliance and Enforcement: Statement of Policy*, December 2009, paragraph 2.27

- commission independent research into best practice in assessment methods and the design of a model scheme (fulfilling our duty to assist ARs under s.4 of the Act)
 - write to ARs making clear that the Board is satisfied that the test has been met for us to consider the use of our powers of direction under s.32 of the Act, and that we are seeking to resolve the matter informally so as to avoid the need for formal enforcement action.
35. In the absence of a credible proposal from JAG, it is the Board's duty under s.4 of the Act to offer further assistance in the development of standards in relation to the regulation of Authorised Persons and their education and training. We will provide such assistance by commissioning research to consider best practice in assessment design and devise a model scheme that meets the principles we have set out (and which we consider are required to meet the regulatory objectives).
36. The research could be completed in the first two months of 2011 and presented to the ARs. Assuming that the product is satisfactory, it could at that stage be made clear to the relevant ARs that the Board is unlikely to approve a rule change application that did not take account of the best practice proposal, or justify why it was not followed.
37. This research, combined with a clear signal that we are prepared to move to formal enforcement if necessary to deliver a robust and proportionate scheme, will act as a strong signal to JAG that it needs to adapt the current proposal significantly to address our concerns.
38. The Board could then take a view in the New Year about the level of confidence we have in JAG delivering a credible scheme with the benefit of this research, and in what timescales. At that stage, the Board could consider whether it is necessary and proportionate to initiate the formal enforcement process to put further pressure on ARs to deliver.
39. Should it be necessary to proceed to formal enforcement by way of a direction under s.32 of the Act, we will need to consider a revised timetable. The enforcement process is lengthy because of the procedural steps required under the Act. Issuing a direction would take several months from the initial decision that the threshold for making a direction has been met and commencement of informal resolution, to publishing the direction (see indicative timeline at **Annex D**). If we want to use these powers to enforce a scheme in July 2011, we need to work back from this date and identify the steps necessary. A preliminary estimate is that following attempts at informal resolution, the first formal steps would need to be taken in February 2011 at the latest to lead to a direction in July (and this assumes the process runs smoothly).
40. Our legal advice is attached at **Annex C**. The Board should be aware of the implications of this approach in terms of damage to our relationship with ARs, the resources required to support the enforcement action and deal with any challenges, and the potential for reputational damage if we were successfully challenged.

Stakeholder handling

41. We are in regular contact with the CPS and LSC, which have fundamental concerns that the proposed approach is not robust or credible and is insufficient to meet the objectives. We have seen the LSC's response to the JAG consultation, which provides a detailed and cogent critique of the proposals. The risk is that one or both of these major purchasers of criminal advocacy imposes additional quality assurance requirements which go above and beyond the requirements of QAA – and therefore undermines the credibility of regulators who, it will be argued, do not impose sufficient mechanisms to safeguard minimum standards of quality for the protection of consumers.
42. There is significant judicial support for the JAG proposals in principle, since they place judges at the heart of the assessment process. The Chairman met Lord Justice Thomas on 10 November. He largely agrees with the proposals put forward, although he agrees with us that there is a need for additional forms of evidence at levels 3 & 4. He accepts that role play/mock trials could be used for both a sample of all cases and for any advocate that is not considered to meet the standard following judicial evaluation, although he is concerned about the resource implications and how such an approach would be funded. The use of role plays in this way would act both as a quality assurance mechanism, and a guarantee that no advocate fails to achieve accreditation purely as a result of judicial evaluation. This will help address the perception that some judges have a potential bias against solicitor-advocates.
43. The Law Society and Solicitors Association of Higher Courts Advocates are also unhappy with the current proposals, mainly because of the weight they give to judicial evaluation. They consider that this will result in an 'uneven playing field'.
44. The Legal Services Consumer Panel have also raised concerns about the proposal in its response to the consultation, focusing on a lack of consumer input to the process and the ability of advocates to self-select when they are assessed and by whom.

Conclusion

45. The objectives of QAA are:
 - to address quality concerns
 - to facilitate a competitive market
 - to protect and empower consumers
 - to ensure proper assessment and recognition of high quality practice.
46. Delivering a QAA scheme could be seen by some commentators as a test of our credibility and that of the ARs forming the JAG. The design of the scheme needs to strike the right balance between, on the one hand, sufficiently robust assessment methods to ensure the objectives are met and the scheme carries the confidence of the key stakeholders; and on the other hand, a proportionate approach that does not impose unnecessary regulatory burdens.
47. Imposing the scheme that JAG has proposed in the consultation paper risks being disproportionate because it will impose a burden but will not be sufficiently robust to ensure the objectives are achieved. In the absence of a credible

scheme, it is the Board's duty under s.4 of the Act to assist the ARs to develop education and training requirements in relation to advocacy.

48. We consider that decisive action is needed. We should try to resolve the matter with ARs informally, but we must be clear about the seriousness of this issue. We should writing to the relevant ARs stating that the Board is satisfied that we consider the test for us to use our enforcement powers has been met and that we are now seeking informal resolution of the matter informally so as to avoid the need for formal enforcement action.
49. We will provide a further update on progress at the January Board meeting.
50. The Board is invited to discuss and endorse the proposed approach in the light of the legal advice.

25.11.10

LSB KEY PRINCIPLES FOR QAA

1. **Independence** - of the scheme and assessment process from those being assessed or their professional bodies;
2. **Consistency** - one scheme (with the possibility of multiple providers delivering it or parts of it);
3. **Differentiation** - multiple levels of assessment, from entry level to the most senior level;
4. **Tailored assessment** – according to area of law and level;
5. **Compulsory participation** - any advocate wishing to practice in an area of work covered by the scheme would need at least the minimum level of accreditation for that area of work, but with clients choosing above that level the relevant level of advocate that suits their case, budget and personal preference subject only to limited restrictions in place to protect the interests of justice;
6. **Limited exceptions** - passporting and exemption only where this is demonstrably in the consumer interest and supported by proper evidence;
7. **Periodic reaccreditation** – probably at least five yearly.

RESPONSE FROM JOINT ADVOCACY GROUP

Our ref: AJT/1335

24 November 2010

Dear Chris

Quality Assurance for Advocates

Many thanks for your letter of 2 November 2010 and for hosting the constructive meeting held in the previous week. On this occasion we have produced a joint JAG response to the issues which you have raised.

Implementation

Our view is that the coordinated and collegiate approach we have established within JAG is working well. We are aware that there is much work to be done and to this end have taken on some additional support to assist with the detailed work which we now need to undertake on unpacking and mapping the standards to levels and further developing the assessment framework. We are refining our project plan and will be agreeing this at our next meeting during the first week in December.

We are further refining the role of "PAC" to reflect its focus on advising the three regulatory bodies rather than overseeing operational matters and are working on terms of reference. Our work on this has appropriately been cautious as we need to understand the assessment requirements and likely process to support assessment prior to committing to a governance structure to enable the process. The consultation period has just ended and we are undertaking analysis of feedback to further our considerations in the area of governance of the scheme.

Assessment methods

JAG is united in its view that judicial evaluation as a feature of the assessment process will provide a good source of "real" work place evidence of advocacy performance. Our consultations with the judiciary to date have suggested strong support for involvement and willingness for appropriate training. However we remain committed and believe the feedback analysis will strongly support the development of alternative assessment methods for those candidates who for whatever reason will need to undertake simulated live assessment and for the assessment of some of the standards which do not lend themselves to workplace assessment.

We note your views and comments on the use of simulated live assessment for QA and benchmarking purposes. Our view is that the shared understanding of the required standard and achievement of consistency in evaluation will be best developed via other QA methods (judicial training and annual review, analysis and comparison of judicial evaluation) rather than the creation of a parallel assessment model. We will however consider the feedback that is provided and provide rationale for those assessment and Quality Assurance approaches that are finally adopted.

Many thanks for the tender specification which you enclosed with your letter: we will have regard to this as we move forward with the development of the scheme and the assessment process.

Coverage of advocates at levels 1 and 2

We are working through the standards which apply to the various stages of advocacy qualification equivalent to stages 1 and 2. From this piece of work we will identify how to best address issues of assessing advocates at these stages. We are also further exploring the involvement of District Judges in the training and development sessions on assessment/evaluation, in the event that some judicial assessment of advocacy in the Magistrates' Courts proves to be practicable.'

Next steps

Following our next meeting we will be able to provide you with a revised and updated project plan and timeline. This will include target dates for applications to the LSB for approval of regulatory arrangements. We will also confirm at this time whether we think it would be helpful for you to issue further guidance under s162 of the Legal Services Act 2007.

Kind regards

Yours sincerely

Joint Advocacy Group

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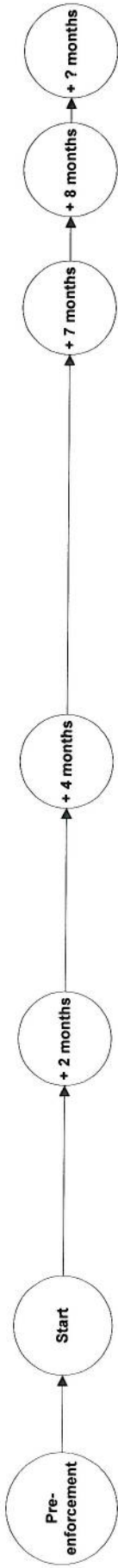
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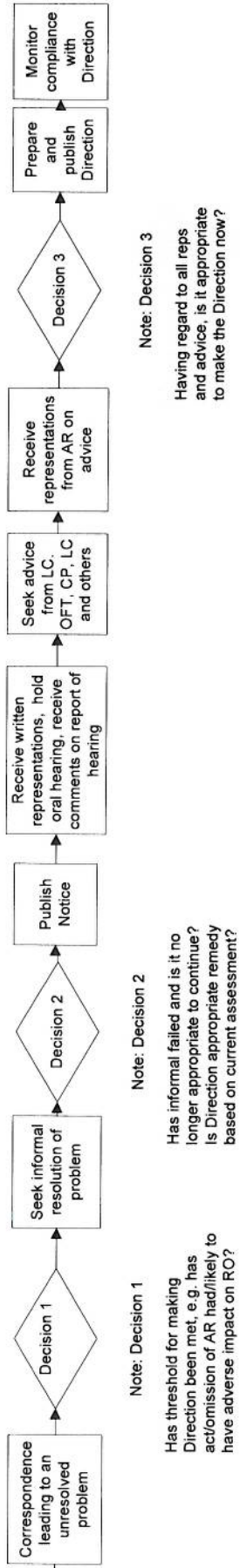
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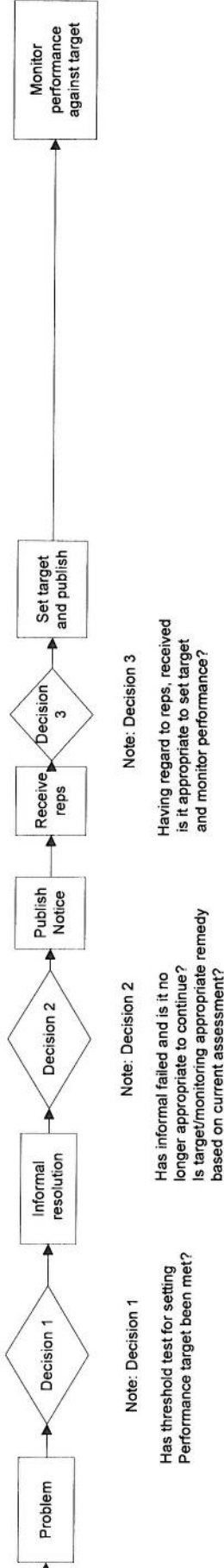
Enforcement Timelines



Direction (section 32)



Performance targets and monitoring (section 31)



Public censure (section 35)

