

| | | |
|-------------------------|------------------|----------------------------|
| To: | Board | |
| Date of Meeting: | 22 February 2010 | Item: Paper (10) 12 |

| | | |
|-------------------------------|---|--|
| Title: | Quality assurance for advocates (QAA) | |
| Workstream(s): | 5F – Developing a workforce for a changing market | |
| Author / Presented by: | Crispin Passmore, Strategy Director crispin.passmore@legalservicesboard.org.uk / 020 7271 0086 | |
| Status: | Restricted | |

| |
|---|
| Summary: |
| <p>Since 2006, the Legal Services Commission (LSC) and Ministry of Justice (MoJ) have been jointly developing a Quality Assurance Scheme for Advocates (QAA) to address a series of factors impacting on consumer protection, the administration of the courts, the needs of state procurers of advocacy services and commercial pressures.</p> <p>Despite the general acceptance that QAA could bring real benefits, progress has been slow and hampered by bad relationships and lack of consensus over mandate and governance. The LSB has therefore intervened in its role as oversight regulator to embed a governance structure and delivery timetable for the first stages of QAA to be delivered by mid-2011, and to maintain momentum and manage tensions to ensure that it is achieved.</p> <p>This Paper provides background and an update about key developments and issues. It further sets out the link with the other LSB agendas, next steps and future role.</p> |

| | |
|------------------------------|---|
| Risks and mitigations | |
| Financial: | None. |
| FoIA: | None. |
| Legal: | None. |
| Reputational: | QAA will publicly test the LSB's ability to informally influence across a range of interested parties within the sector where need is identified. |
| Resource: | Resource currently considered sufficient. |

| Consultation | Yes | No | Who / why? |
|------------------------|-----|----|-------------|
| Board Members: | ✓ | | David Wolfe |
| Consumer Panel: | | ✓ | Update only |

| |
|---|
| Recommendations: |
| <p>The Board is invited:</p> <ol style="list-style-type: none"> 1) to note the Paper; and 2) to endorse the approach proposed in the Paper. |

LEGAL SERVICES BOARD

| | | | |
|-------------------------|------------------|--------------|---------------|
| To: | Board | | |
| Date of Meeting: | 22 February 2010 | Item: | Paper (10) 12 |

Quality Assurance for Advocates

Background

1. Quality assurance of legal services is a long running issue. Controls on entry to the profession, restrictions on who can do reserved activities, accreditation schemes, panel memberships and more are used to distinguish one lawyer from another. Some are designed to raise standards across all lawyers doing a particular type of work; others are intended to signal higher quality whilst not restricting the right to undertake work; and some are focused only on publicly funded work.
2. In criminal work, there has been a series of factors that have put quality assurance firmly on the agenda:
 - judges, led by Thomas LJ, have complained about the quality of advocacy in criminal courts;
 - the Crown Prosecution Service (**CPS**) Inspectorate has highlighted the inconsistent quality of advocacy;
 - barristers have complained about the quality of solicitor-advocates (to whom they are losing work);
 - solicitors have complained about being seen as lower quality compared to barristers;
 - self-employed barristers and solicitor-advocates have complained about the quality of those employed in the CPS (to whom they are losing work);
 - Lord Carter of Coles (in his independent review of legal aid procurement – July 2006) urged Government to develop a Quality Assurance Scheme for Advocates (**QAA**) urgently and hand to the profession; and
 - LSC has sought to push down the price of criminal advocacy and changed pricing structures that have led to a greater use of employed advocates (be they solicitors or employed barristers) by solicitor firms.
3. Since 2006, the Legal Services Commission (**LSC**) and Ministry of Justice (**MoJ**) have been jointly developing a QAA scheme that would apply to criminal legal aid work. That project has sought to build a consensus between solicitor-advocates, barristers, Institute of Legal Executives (**ILEX**) advocates and the judiciary on how to design, develop and implement a QAA scheme. The project has been consistently plagued by bad relationships and a lack of consensus. The inherent complexity of the component parts of the issue on matters such as ownership for development and management of the scheme, proportionality, scope, methodology of assessment (including the role of judicial evaluation) and cost has also made for slow progress, with the scope for the 'best' to be used to delay delivery of the 'good'.

4. The debate around quality assurance is likely to further intensify in the future as it is anticipated that legal aid contracts will be increasingly tendered on a price basis rather than around a range of selection criteria set by the Government including quality requirements. This would in turn see increasing importance being placed on quality assurance measures set by regulators for different services and at different levels beyond entry. We share the assessment made by Peter Handcock (Director General – Access to Justice, MoJ) at last month’s Board meeting that the likelihood is that Government will expect regulators to set and police standards rather than this being done exclusively – or even primarily – by the LSC.

LSB position and intervention

5. The LSB has intervened to drive forward a wider QAA scheme – covering not just legal aid crime but also other crime and family and possibly other areas of advocacy. The introduction of QAA supports several other LSB workstreams (some of these links are explored more fully in **Annex A**):
 - **Opening the market:** QAA reduces the potential for market changes that would provide benefit to the consumer to be resisted on the basis of theoretical arguments that services delivered by some types of advocates are inherently good quality and those delivered by different types of advocates are poor quality. QAA further provides consistent measures of quality to allow consumers and purchasers to make informed choices based on access and price as well as quality.
 - **Increasing access to justice through tackling referral arrangements:** In legal aid cases, QAA could ensure that the advocate is of the required standard irrespective of whether the contracted solicitor decides to refer the advocacy to external sources be it for monetary or client interest reasons.
 - **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. The Law Society wrestled ownership of quality assurance panel schemes from an unwilling Solicitors Regulation Authority (**SRA**) ahead of the introduction of the Legal Services Act (**‘the Act’**) in 2007. This damaged the perceived independence of the newly created regulatory arm. Similar land grabbing continues over QAA. Delivery under the proposed LSB governance structure will help put this issue to bed. The draft Business Plan 2010/11 commits the LSB to taking the lead in ‘achieving clarity of understanding over which bodies should be responsible for the delivery of different types of quality assurance schemes...which is particularly important when the schemes relate to the type of service delivered rather than the arm of the sector that is providing it’. Our position has been clear: ownership of standards rests clearly with the regulatory arm, but it is open for them to agree to sub-contract the assessment of those standards in individual cases to the professional body or any other third party.

6. Furthermore, as the Board agreed in November, the LSB has expanded its workstream on 'promoting diversity' to further incorporate education and training and quality assurance. The 'developing a workforce for a changing market' chapter of the draft Business Plan 2010/11 recognises the role of the LSB in driving transparency of quality assurance measures which help the understanding of both consumers and procurers of legal services. This starts with overseeing the delivery of a credible advocacy scheme for crime and family. It also recognises the importance of developing evidence of how consumers view quality and what they understand of the range of assurance measures and badges on offer. Research in this area will help inform our position in promoting different measures to provide consumer protection (and aid competition) in the changing market, including how best to progress accreditation for advocacy and whether it should be expanded into other areas.

Recent Developments

7. In the autumn of 2009, the LSB intervened with Thomas LJ and other stakeholders to set a mid-2011 deadline for a criminal QAA scheme (thus covering defence and prosecution) that was independent, robust and focused upon protecting consumers. We backed this up with strong communications activity in the Chairman's interview in The Times at the start of the year.
8. A roundtable was held and a timeline set out by the LSB with key milestones. The governance structure for implementing the first stage of the advocacy scheme, covering crime, was set out by the LSB – named as project sponsor. The structure empowers a Joint Advocacy Group made up of the regulatory arms of the Bar, solicitors and ILEX to set competencies and assessment mechanisms and holds them accountable for delivery. The governance structure also names the following as interested parties who have a stake in the process and must have the opportunity to put forward their views for consideration, but who have no formal role or right of veto:
 - Thomas LJ, on behalf of the judiciary;
 - the CPS and LSC, as the largest purchasers/users; and
 - the professional representative bodies of solicitors, barristers and legal executives.
9. All of the above have been written to seeking agreement. Most have signed up to the proposals, although ILEX and ILEX Professional Standards have not replied. The Bar has not replied directly but, jointly with the Bar Standards Board (**BSB**), has engaged with the LSC in a forthright exchange about the independent evaluation of the LSC's early pilot of assessment mechanisms and in particular the small sample for testing judicial assessment within the process and the negative conclusions drawn from this. Thomas LJ has been equally vociferous and even more visible in his criticism of the LSC pilot evaluation in this area. The Bar and BSB remain 'incandescent' with the LSC's continued involvement and approach.
10. The Law Society has responded positively but focused on a different governance arrangement which would see a more formal role for representative bodies. They have also floated the possibility of a 'Royal College of Advocacy', which could

have some merits in the medium-term, but risks delaying delivery of a workable crime scheme in mid-2011, as efforts are diverted into questions of abstract governance and fund-raising.

11. The LSB has therefore now written to all to re-state the mid-2011 deadline and the fact that the responsibility for delivery sits with the regulatory bodies, particularly the setting of standards and the assessment measures used – including the use of judicial assessment. We will cement this with a major stakeholder meeting next month, having previously discussed with Thomas LJ and the Joint Advocacy Group.
12. Our efforts have galvanised the regulators to take ownership and they have developed a more detailed plan for them to implement the scheme on time. They have already issued a joint consultation on standards (the first ever joint consultation by the regulators) and are making progress. This is based upon the work done to date led by the LSC but, in taking it away from the LSC, gives a greater chance of the plans sticking through to implementation in mid-2011 and beyond.

Next steps

13. Our role will continue to be one of maintaining momentum, ensuring focus and managing tensions. The level of discomfort with QAA is likely to remain right through to delivery. Even at that point there remains the issue of extension into other areas of law which will re-surface all of the issues about ownership, proportionality, methodology and scope.
14. The Executive will continue to hold regulatory bodies to account for delivery and to engage with all stakeholders to ensure that the focus remains in delivery of an acceptable scheme by mid-2011.
15. Beyond the delivery of the first stages of QAA, the LSB's role in quality assurance more widely will include:
 - gathering evidence of how consumers understand and use quality badges;
 - considering the effectiveness of different approaches to quality assurance against the need to drive up standards, assure consumers of standards and underpin competition on quality;
 - taking the lead in achieving clarity of understanding over which bodies should be responsible for the development, delivery and maintenance of different types of quality assurance or accreditation schemes; and
 - working with regulators and other stakeholders to drive forward the above.

10.02.10

Background and links to LSB agenda

Competition

There is increasing competition between law firms and self-employed barristers to undertake this work under legal aid. As the balance of profitability has shifted firmly from litigation to advocacy, solicitor firms have sought to retain advocacy in-house through employing their own solicitor or barrister advocates. This has meant that the flow of work to self-employed barristers has shrunk significantly over the last two years with, anecdotally, some Chambers seeing work having more than halved.

These commercial pressures are a significant driver on barrister support for proposed changes to BSB rules. The rule changes allow Chambers to interview clients and take instructions and thus to undertake police station work. This enables them to bid for legal aid contracts against solicitor firms. This gives them control of the flow of profitable advocacy work. LSC is obviously seeking to use this to drive better value and to undermine any threatened strike action from any element of the profession.

Allowing barristers into partnerships with each other and with solicitors allows them to bid for the volumes of work that are needed to win legal aid contracts. Without this, criminal sets of Chambers have only a tenuous future for the most part and are less and less able to sustain pupilages and junior bar. Offering employed barristers a route to partnership makes employment a more attractive route for barristers and helps break down the employed / self-employed advocate split.

Similar pressures within prosecution work mean that CPS is taking more work in-house and thus reducing the work available for self-employed advocates. This simply increases the pressure on barristers to find new ways of competing and gaining work.

This level of competition is resisted by some advocates on the grounds of quality. One narrative that we hear is that the price pressures are driving the LSC away from high quality barristers into lower quality solicitors. Other versions of this narrative focus on work being done by more junior advocates that ought to be undertaken by those with greater experience both within the legal aid defence work and the CPS prosecution work.

The competitive pressures here are so strong that they are the key commercial driver in the bar allowing legal disciplinary partnerships and related reforms. Government will maintain and increase these commercial pressures if it is confident that quality assurance is in place. That in turn will drive Approved Regulators (**AR**) to move more quickly on entity regulation and alternative business structures. In short, QAA underpins a competitive market and helps us deliver the overall changes to regulation that we seek.

Referral fees

The link between QAA and referral fees is again related to the changes within the advocacy market related to changes in legal aid. Where solicitor firms do not want or

do not have capacity to undertake advocacy in-house, they pass the work on to other advocates. The legal aid rates for advocacy are set in regulations and cannot be undercut. But in return for giving up very profitable advocacy work, solicitor firms are accused of asking for a referral fee from the other advocate. Within the solicitor side of the profession a payment does not count as a referral fee for the purposes of the solicitor code, but such payments are against the barrister code of conduct.

Therefore a solicitor firm with a case requiring advocacy may pass the advocacy to another solicitor firm that has advocacy capacity and ask for a financial return for that case – a referral fee or a part of the fee that the advocate will be paid by legal aid. Anecdotally, we understand that barristers do also pay the fee in some cases. A way around this is for the solicitor firm to appoint its own advocate as lead advocate but sub-contract almost all of the work to a self-employed advocate. This allows them to agree a payment rate outside (and lower than) the legal aid fee that is paid to the lead advocate. In short, the market finds a way around restrictions on practice and price setting.

The accusation from some at the bar is that these referral fees undermine quality because the client loses choices of advocate: the solicitor decision is driven by money rather than client interest. A QAA scheme has the advantage of ensuring that the lead advocate is of the required standard to undertake or lead the case.

Independence

There has been a long running dispute over the ownership of quality assurance schemes within The Law Society. These were transferred to the SRA as part of the setting up of independent regulation but were seized back by The Law Society ahead of the Act taking full effect. The dispute continues to be played out through QAA both at the bar and solicitor end.

Progress on QAA has been hampered as governance and ownership are played out, with the regulatory arms struggling to maintain their right to own the scheme in the face of a powerful onslaught from the main ARs.

The QAA scheme therefore offers the LSB the opportunity to drive home its independence rules in this area in practice rather than be permanently caught in a debate with ARs about the theory of where such schemes sit.