



# **QASA**

**Fourth consultation paper on the  
Quality Assurance Scheme for  
Advocates**

**A RESPONSE BY  
THE CHARTERED INSTITUTE  
OF LEGAL EXECUTIVES**

**DATE: 9 October 2012**

1. This response to the fourth and final consultation paper on the Quality Assurance Scheme for Advocates (QASA) represents the views of The Chartered Institute of Legal Executives (CILEx), an Approved Regulator under the *Legal Services Act 2007 (the 2007 Act)*. The consultation paper covers all the relevant areas and we hope the responses below may be of value to the Joint Advocacy Group (JAG) and help to inform its approach to the scheme.

### **Executive Summary**

2. CILEx agrees with QASA that 'Advocacy is a vital part of an effective Justice system'. For this reason alone, it is important that there is a quality assurance scheme in place for advocates. CILEx is proud to have had such a scheme in place for a number of years.
3. CILEx is pleased to note that JAG has committed to a full review of the scheme commencing in July 2015. The origin of QASA has been so difficult that there is a real risk of compromises being reached to ensure that the scheme can be launched in January 2013. For this reason it is vital that the scheme is closely monitored across all aspects during its first two years rather than waiting for July 2015 to reassess its effectiveness.
4. JAG quite rightly identifies that the scheme cannot override statutory rights of audience. However, the scheme requires advocates to demonstrate through assessment that they meet the required standards to pass through to the next level; this approach does somewhat undermine the rules relating to rights of audience, which currently bear no relation to competency. Whilst this issue is clearly outside the remit of JAG and the scheme, it is an issue which CILEx will raise with the sector and the Government as QASA progresses.
5. CILEx, for the reasons below, remains concerned about the widespread use of judicial evaluations.

6. Comments on the proposals in the consultation have been presented below where CILEx is able to offer a view.

### **Judicial Evaluation and Trial Opportunities**

**Q1: Are there any practical difficulties that arise from the proposal to allow advocates 12 months in which to obtain the requisite number of judicial evaluations to enter and achieve full accreditation within the Scheme? Would these difficulties be addressed by allowing a longer period of time, for example 18 months, in which to achieve the necessary judicial evaluations to enter the Scheme?**

**Q2: Are there any practical issues that arise from client notification?**

### **Questions 1 and 2 are answered collectively**

7. CILEx has concerns about the widespread use of judicial evaluation. The reason for our continuing unease is that we have not seen anything within the scheme which addresses the scheme's ability to deliver the same standards of evaluation across advocates, across Judges, across Courts, across trials and across time. The following appears to have reinforced our concerns:

- Paragraph 3.2(e) of the consultation makes it clear that judicial evaluation will be the compulsory means of assessment for those advocates undertaking trials at levels 2, 3 and 4. However, this is slightly at odds with paragraph 3.3 where it states that assessment at level 2 will be by assessment organisation, judicial evaluation, or a combination of the two.
- At paragraph 3.2(f) we note that trained Judges will continue to exercise their inherent jurisdiction over those who appear before them in the Courts, and continue to utilise the complaints procedure operated by each of the regulators where there are concerns about performance.

- The scheme envisages (as set out in paragraph 3.4 and 3.5) the extensive use of independent assessors and assessment organisations. There has been no cost analysis and there appears to be little evidence about costs at this stage.
8. Although CILEx is not primarily focused on levels 2, 3 and 4, we do note with approval the statement at paragraph 3.9 that, 'the purpose of the scheme is to ensure competence and not limit practice unnecessarily'. CILEx hopes that any developments to the scheme will be measured against this statement.

## **Notification**

### **Q3: Are there any practical issues that arise from client notification?**

9. CILEx agrees that it will be imperative for clients to know how far their advocates will be able to progress their case (we will return to this point concerning the instructing Solicitor or CILEx lawyer). However, there will be significant responsibility on the instructing party not only to ensure that the appropriate level of advocate is utilised in each case, but also to ensure that the client is comfortable with that choice. There is a danger that clients will form the perception that their advocate is 'limited' and therefore not 'good enough'.

## **The Level of Youth Court Work**

### **Q4: Are there any practical problems that arise from the starting categorisation of Youth Court work at Level 1?**

10. CILEx is pleased to see that JAG is now proposing that Youth Court work should continue to start at Level 1. CILEx advocates are currently licenced to undertake youth work and they are not aware of any concern over their performance.

11. CILEx can see no practical problems that arise with the starting categorisation of Youth Court work at Level 1.

12. Whilst it is true that Youth Court cases involve vulnerable defendants and witnesses, it is the case that the instructing party, whether Solicitor or CILEx lawyer, will be managing those vulnerable defendants and some witnesses throughout the preparation for trial. As the consultation rightly points out, the impact of incompetent advocacy is potentially serious. However, it is potentially serious in any case at any level. Given the manner in which CILEx advocates specialising in crime qualify, their experience over many years of handling vulnerable defendants and witnesses and their ability to conduct Youth Court work is likely to be more embedded than that of a Level 1 Barrister or Solicitor. This position at Level 1 appears to have been reinforced by Cardiff University's Research. For example, when the QASA trials took place, CILEx advocates were deemed to be the only branch of the legal profession that could be considered competent without the need for additional training. CILEx advocates are only granted certificates when considered competent by the training provider and the Chartered Institute.

**Questions 5 to 14 are answered collectively.**

### **Phased Implementation**

13. CILEx understands that CILEx advocates will be required to register during Phase 1, regardless of their practising certificates. Presumably, there will be facilities in place for those advocates who do not register now (for whatever reason) or for those that decide to move to criminal work after phased implementation?

### **Determining Levels**

14. The responsibility which QASA places upon the instructing party is something that has not been entirely clear, and remains unclear to a significant number of practising criminal lawyers, many of whom do not exercise advocacy rights. CILEx would urge JAG, the regulators and the

Approved Regulators, to commence a programme of raising awareness with the full range of criminal lawyers, not merely advocates. CILEx will be assisting its members who practice criminal law to understand the implication of QASA regardless whether they are advocates.

15. At paragraph 4.14 it is stated that the regulators will conduct spot checks on the level of advocates conducting cases, including the agreed level of the case. It is unclear as to how this will be undertaken and further clarification is sought.

16. The factors on determining case level as set in the consultation at paragraph 4.21 seem appropriate, and the examples are helpful. It would be useful to include similar examples within the Levels guidance. As regards to different levels in the same case (paragraph 4.23), there is a potential issue regarding fairness and perceptions of justice when different levels of advocates are appointed to different defendants in a multi-handed case. Paragraph 4.23 quotes the example of a different level of advocate for the defendant who is first on the indictment as opposed to fifth. However, there may well be a public perception of unfairness if, for example, the first defendant represented by a higher level advocate is acquitted, but the fifth defendant represented by a lower level advocate is convicted.

17. CILEx approves the proposal that advocates are permitted to undertake non-trial hearings (including guilty pleas) in cases at one level above their own accredited level, provided the advocate believes they are, in all the circumstances, competent to act. Presumably it will be not merely for the advocate to believe that they are in all the circumstances competent, but that the instructing party also believes they are fully competent. The final sentence at paragraph 4.25 is unclear. Is the demonstrated competence that exhibited at Level 2, or at Level 3? Clarification is sought.

### **Client Choice**

18. CILEX approves of QASA's approach to client choice set out in paragraph 4.33 of the consultation. This enables an advocate to 'act up' one level in

light of the prescribed criteria as set out in the consultation. Presumably this will be subject to rights of audience?

### **Scope of Review**

**Q15: Are there any other issues that you would like to see included in the review?**

19. CILEx is pleased to see that JAG and the regulators have committed to a full and comprehensive review of the operation of the July 2015 scheme. However, operation of the scheme should be monitored in the interim.

### **SCHEME HANDBOOK**

**Questions 16-20 on The Scheme Handbook and Rules are combined for a response.**

#### **The Aims and Objectives of QASA**

20. Paragraph 2.6 of the Scheme Handbook sets out the aims and objectives. CILEx does not disagree with those aims and objectives, but would prefer to be referred to as a 'professional association', as opposed to 'the representative body'. Each of the professional associations, that is the Bar Council, the Law Society and The Chartered Institute of Legal Executives, is an Approved Regulator under the Legal Services Act 2007; and whilst carrying out 'representative' functions, also carry out considerable quasi regulatory functions under the provisions of the Act which refer to 'permitted purposes'. CILEx itself is a Chartered Institute, and therefore must at all times act in the public interest. Our responsibilities go well beyond being a representative body.

#### **Implementation of the Scheme**

21. It would be useful if the information at paragraph 2.10 in the Scheme Handbook was reflected in the consultation document itself. It is unclear

from the consultation document that CILEx Advocates and Associate Prosecutors will need to register between January and April 2013.

### **Level 1 – Registration and Re-accreditation**

22. CILEx notes that at paragraph 5.7 of the proposed Handbook, Solicitors must hold a Practising Certificate and register with the SRA as a Level 1 advocate during the implementation phase. Once the implementation phases are concluded, Solicitors will automatically be granted Level 1 accreditation when they are given their first Practising Certificate. However, CILEx Advocates will only be given a provisional accreditation when 'newly qualified', and will need to wait for their first renewal in order to gain full accreditation. This does not seem to be on a level playing field with solicitors, many of whom may never have set foot in a Magistrates' Court. This situation will, of course, change on re-accreditation. Because of rights of audience, CILEx Advocates will not be able to progress.

23. CILEx approves the approach to re-accreditation at Level 1 being focused on CPD activity. This will be particularly pertinent to Chartered Legal Executives and the changes to CPD which are proposed by IPS.

### **Section 9- Chartered Legal Executives and Associate Prosecutors**

24. At paragraph 9.21 we are told 'an appeal may only be brought on the grounds that the decision reached was one which no reasonable person would find comprehensible'. This would indicate that no reasonable person could possibly understand the decision, as opposed to it being one that no reasonable person could reach. There is a distinction. We would ask that ILEX Professional Standards clarify what they mean, and suggest that it be the latter i.e. as an appeal may be brought where the decision reached was one that no reasonable person with all the facts could reach. This would reflect judicial review principles.

### **Practicalities and operation of the Scheme**



**Q21: Do you foresee any insurmountable practical problems with the application of the Scheme? If so, how would you suggest that the Scheme be revised?**

25. One of the difficulties that CILEx has with the answer to this question is that there is no agreed base line from which to measure whether the scheme is making a positive or negative impact. The research commissioned by the Legal Services Commission from Cardiff University was perhaps unfairly criticised by in particular, the judiciary, the Bar Council and the Bar Standards Board. Clearly that cannot form a base line in those circumstances. The original driver for the QASA scheme was, in fact, anecdotal reports and anecdotal 'perceptions' from the judiciary that advocacy was somehow not as good as it used to be. Could JAG please be clear about the base line that will be used to assess 'if the scheme is making a difference'?

**Equality and diversity**

**Questions 22 to 24 are combined for a response:**

26. Introducing a quality assurance scheme for advocates will provide the regulators with an opportunity to promote equality issues within the profession by helping to eliminate the discrimination of advocates based on characteristics irrelevant to their competency. One of the benefits of the scheme is that it will provide a wealth of equality and diversity monitoring information. This will allow for its true impact to be measured and for any necessary changes to be made to the scheme, in order to identify and address negative impacts or enhance positive impacts.

27. Returners to work may also benefit from a scheme, provided there is in place a structured path back to the level at which they were previously practising. This will not only assure them of their own competence at a certain level but will also eliminate any discrimination they may be subject to due to their time away from practice.

