



Legal Services Board – decision notice issued under Part 3 of Schedule 4 to the Legal Services Act 2007

The Bar Standards Board (BSB), Solicitors Regulation Authority (SRA) and ILEX Professional Standards (IPS), joint application to alter their regulatory arrangements in relation to the introduction of the Quality Assurance Scheme for Advocates (Criminal).

The Legal Services Board (“the Board”) has granted an application from the BSB, SRA and IPS (“the applicants”), who sought approval of alterations to their regulatory arrangements in order to implement the Quality Assurance Scheme for Advocates (Criminal) (“the Scheme”). The regulatory arrangements of the applicants set out how the Scheme will work. This decision notice sets out the basis for the Board granting the application and the decision taken, including a brief description of the changes.

Introduction

1. The Board is required by Part 3 of Schedule 4 to the Legal Services Act 2007 (“the Act”) to review and grant or refuse applications by approved regulators to make alterations to their regulatory arrangements. The Bar Council, The Law Society and the Chartered Institute of Legal Executives are approved regulators which have delegated their regulatory responsibilities to the BSB, SRA and IPS respectively.
2. Paragraph 25 of Schedule 4 to the Act explains that the Board may only refuse an application setting out a proposed change to the regulatory arrangements if it is satisfied that by granting the application one or more of the criteria specified in sub paragraph 25(3) (and listed in the footnote below¹) will be met. For example, the Board’s granting of the application to alter the regulatory arrangements must not be prejudicial to the regulatory objectives overall. Accordingly, if the Board is not satisfied that one or more of the criteria for refusal are met, then it must approve the application in whole, or the parts of it that can be approved.

¹ The Board may refuse the application only if it is satisfied that—(a) granting the application would be prejudicial to the regulatory objectives, (b) granting the application would be contrary to any provision made by or by virtue of the Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator, (c) granting the application would be contrary to the public interest, (d) the alteration would enable the approved regulator to authorise persons to carry on activities which are reserved legal activities in relation to which it is not a relevant approved regulator, (e) the alteration would enable the approved regulator to license persons under Part 5 to carry on activities which are reserved legal activities in relation to which it is not a licensing authority, or (f) the alteration has been or is likely to be made otherwise than in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration.

3. As provided for by paragraphs 20(1) and 23(3) of Schedule 4 to the Act, the Board has made rules² about how the application to alter the regulatory arrangements must be made including the contents of that application. The rules highlight the applicant's obligations under section 28 of the Act to have regard to the Better Regulation Principles³. The rules also require that the applicant provides information about the nature and effect of each proposed change and of appropriate consultation undertaken. Sub paragraph 25(3)(f) of Schedule 4 to the Act requires that each proposed alteration has been made or is likely to be made in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration. This therefore includes the Board's rules.
4. The chronology for the Board's handling of this application can be found towards the end of this decision notice.

Proposed changes

5. The Scheme introduces arrangements to assess and assure the quality of all advocates conducting criminal advocacy in courts in England and Wales. The Scheme will mean that any advocate wishing to undertake criminal advocacy will require Scheme accreditation and only those who successfully demonstrate their competence will be accredited to practise as advocates in criminal cases. The Scheme was developed by the Joint Advocacy Group (JAG), which consists of representatives from all the applicant approved regulators. JAG was established in October 2009 by the applicants and its broad role is to develop, consult and implement common criminal advocacy standards.
6. The principal features of the Scheme are:
 - A single, common set of advocacy standards against which all advocates will be assessed.
 - Accreditation of an advocate at one of four levels.
 - Opportunities for advocates who wish to progress through the four levels to do so by demonstrating, through assessment, that they meet the required standard of the next level.
 - Periodic reaccreditation of all advocates within the Scheme.
 - Depending upon the level of the accreditation assessment by one of three methods: continued professional development, assessment centre or by judicial evaluation.
 - The option for judges in the Crown Courts to assess advocates, on their own initiative, if they have concerns about the advocate's performance and to submit such evaluations directly to the appropriate regulator for consideration.
7. Full details of the Scheme are set out in the Scheme Handbook and in the individual regulatory arrangements of each applicant, all of which have been considered by the Board in its assessment of this application.

² [Rules for Rule Change Applications – Version 2 \(November 2010\)](#)

³ Transparent, accountable, proportionate, consistent and targeted.

The role of the Board

8. In setting out the Board's decision, it is first important to clarify the different functions and roles of the Board set out in the Act. Of particular relevance to this application are the oversight responsibilities of the Board and its separate decision making powers.

The Board's oversight role in respect of the Scheme under sections 3 and 4 of the Act

9. Under the Act the Board has two important oversight responsibilities. Under section 3 of the Act it is the Board's duty to promote the regulatory objectives⁴ and to have regard to the Better Regulation Principles. Under Section 4 the Board must "assist in the maintenance and development of standards in relation to the regulation by approved regulators of persons authorised by the approved regulator to carry on activities which are reserved legal activities"⁵. This provision allows (and indeed imposes a positive duty on) the Board to take action to help in the development of regulatory standards.
10. It was with its oversight responsibilities in mind that the Board has, since 2009, set out a need for quality assurance in the legal sector. For example, its first Business Plan for 2009/10 set out an aim that "cultures and systems of quality assurance are embedded throughout the legal services sector to give consumers confidence...". The Board has continued to be active within its oversight role to promote the need for quality assurance, including in criminal advocacy. We stated in our Business Plan for 2010/11 that "We welcome the coming together of regulators through the Joint Advocacy Group (JAG)" noting that their "ownership of the scheme is central to its success but we will continue to galvanise all stakeholders to support urgent progress".
11. The Board has not prescribed a specific scheme, but using its duty under section 4 of the Act, has assisted through its engagement with JAG over a period of three years. For example, it established principles and acceptance criteria for a quality assurance scheme and it liaised with JAG to help facilitate dialogue and to maintain an overview of the Scheme proposals. JAG has maintained ownership of the design and finalised arrangements for the Scheme.
12. It is worth noting that the Board's discussions of quality of criminal advocacy are on the public record through published board papers which were made available on its website shortly after each meeting at which they were discussed.

⁴ Protecting and promoting the public interest; supporting the constitutional principle of the rule of law; Improving access to justice; protecting and promoting the interests of consumers; promoting competition in the provision of services in the legal sector; encouraging an independent, strong, diverse and effective legal profession; increasing public understanding of citizens legal rights and duties; and promoting and maintaining adherence to the professional principles of independence and integrity, proper standards of work, observing the best interests of the client and the duty to the court, and maintaining client confidentiality.

⁵ Legal Services Act 2007, Section 4(a)

The Board's statutory decision making powers under the Act

13. The decision making and determination of this application was undertaken in accordance with the provisions of Schedule 4, paragraphs 19-27 of the Act. As referred to in the introduction part of this notice, paragraph 25 of Schedule 4 to the Act explains that the Board may only refuse an application setting out a proposed change to the regulatory arrangements if it is satisfied that by granting the application one or more of the criteria specified in sub paragraph 25(3) will be met.
14. This dual role of the Board in the Act of both oversight and decision making duties is not an unusual feature of the Board's normal business activity. The Board has previously had oversight engagement on matters that have lead to alterations to regulatory arrangements by approved regulators for which it had then to make a decision.

Assessment of the application

15. Having considered the application and accompanying material, other information provided by the approved regulators during the application process, and other information the Board considered relevant to the application, the Board has decided to grant this application. In reaching its decision, the Board has taken the following into account.

The assessment process

16. Under Schedule 4 paragraph 25(1) to the Act the Board can consider information supplied by the applicant and any other information it considers relevant to the application. The Board assessed the information contained in the application, conducted a review of the history and development of the Scheme and considered unsolicited representations made subsequent to the submission of the application.
17. While there is no formal public consultation requirement in the Board's assessment of applications in the initial decision period, the Board has considered the issues raised in the unsolicited correspondence it received after the application was made to the extent they were relevant to the decision.
18. In conducting an assessment of the application the Board wanted to better understand the problems the Scheme was trying to address and to assure itself that the regulatory arrangements proposed by the applicants were necessary, targeted and proportionate.
19. In the decision making process, the Board sought clarification from the applicants on a range of issues. These were mainly about how the Scheme will work in practice; consistency between the proposed rules of each applicant; and drafting points within the Scheme Handbook and individual rules of the applicants. The applicants made minor adjustments to the Scheme Handbook and to their respective proposed regulatory arrangements as a result of the Board's questions. The Board has not included details about these more minor matters in this decision notice but the more significant issues

are covered and the changes are included in the versions of the documents included in the annexes to this notice.

20. The Board considered whether there were sufficient grounds for it to consider refusing the application and therefore whether to issue a warning notice under Schedule 4, paragraph 21(1)(b) to the Act. For the reasons set out in the assessment, the Board determined that there were not sufficient grounds on which to consider refusal. Additionally the Board did not consider, particularly in the context of the four consultations undertaken by JAG, that seeking further advice through the warning notice procedure would have provided new empirical evidence or further anecdotal evidence that would have added any further value to the Board's overall assessment.

The Board's assessment of the rationale for the Scheme

21. In developing the Scheme, the approved regulators have had to consider their duty under the Act to have regard to the regulatory objectives and Better Regulation Principles. The Board considered whether the applicants have acted in a way which is compatible with those regulatory objectives and principles.
22. As with all applications from approved regulators for alterations to regulatory arrangements, it is for the approved regulators themselves to undertake the policy development and drafting of the specific arrangements. It is also their responsibility to provide in the application any relevant material that supports it, including relevant evidence highlighting the necessity for regulatory arrangements. This includes an explanation of why the applicant wishes to make the alteration in question and the provision of any explanatory material which the applicant considers might be needed for the Board's assessment of the application.
23. Building on the Board's existing knowledge from its oversight engagement, the Board wanted to re-assure itself that there was a risk that needed to be addressed through a regulatory response and that there was a firm rationale for the introduction of the particular Scheme proposed. It is not the role of the Board to repeat the applicant's analysis of the issue in its decision making process. However, the Board did undertake a review of the history and development of the Scheme as part of its assessment of the application.
24. Concerns have been expressed over a long period of time about standards of criminal advocacy. For example, following the publication of the Carter Report in 2006 there appeared to be a consensus that quality assurance of advocacy is important. There is a range of evidence that points towards a risk and in some places a pattern of advocacy not being at the required standard. These include some senior judicial comment, though not all of this highlighted an increasing problem of poor advocacy in criminal courts. A pilot of a quality assurance scheme for criminal advocates undertaken by Cardiff University⁶ found that a significant proportion of advocates failed at least one part of the assessment. This was a self selecting group of advocates but nonetheless provided an

⁶ <http://www.law.cf.ac.uk/research/pubs/repository/2269.pdf>

indicator. Her Majesty's Crown Prosecution Service Inspectorate has also highlighted problems of poor advocacy and that a quality assurance scheme can help improve quality.

25. The Board is of the view that poor advocacy risks having a detrimental impact on victims, witnesses, the accused and on public confidence in the rule of law and administration of justice, and hence on the regulatory objectives of protecting and promoting the public interest of and supporting the rule of law. It also took into account the potential for higher costs from poorer quality advocacy, in terms of immediate costs by extended trials and the need for defective decisions arising in whole or part from poor quality advocacy needing to be corrected at appeal.
26. The Board in making its decision has taken into account that there has been a broad range of opinions expressed about this matter including views opposing both the necessity of a scheme and the details of the particular Scheme proposed. Grounds for opposition have covered the evidence base, necessity, proportionality and targeting. Much of the disagreement about the extent of low standards of criminal advocacy and the risks that this poses stems from the lack of consistent and measurable evidence available under the current arrangements. The Board recognises that, without a quality assurance framework in place, it would be very difficult to find conclusive evidence of quality problems across criminal advocacy. It is important that those practising criminal advocacy are operating at least to a minimum imposed standard and that the risks associated with poor quality are addressed by means of a proportionate regulatory response.
27. The Board concluded that, while no single piece of evidence of systemically poor standards would suffice on its own to justify the Scheme, there is sufficient consistency of evidence and concern to warrant a scheme such as that proposed by the application. This is because the concerns and limited evidence suggest a real risk, and a pattern, of actual problems in standards across a wide range of criminal advocates and almost nothing by way of evidence that quality is consistent good enough.
28. The Board considers that the proposed Scheme has the potential to provide reliable and sustained evidence for approved regulators to measure and improve the quality of criminal advocacy over time. The Board further considers that it is important that where there is opportunity, through a proportionate and targeted mechanism of accreditation, for relevant approved regulators to measure and enhance the quality of criminal advocacy, they should do so. In that regard, the Board concludes that the Scheme is proportionate because it addresses the risk in a structured way that allows the Scheme to be adjusted on the basis of evidence gained from its actual implementation. This is consistent with the Better Regulation Principles enabling a consistent, proportionate and targeted approach to regulation.
29. The Board is further assured by the commitment from the applicants to review the Scheme after two years. The Board understands from the application that this review will "provide a comprehensive analysis of the Scheme including the assessment of the performance of key processes". The review will also assess whether the Scheme promotes the regulatory objectives and improves criminal advocacy standards. With the

experience and lessons gained from the operation of the Scheme, the Board considers it should be possible to further calibrate it so that there continues to be a proportionate regulatory response to the risk posed from poor criminal advocacy. The Board will actively engage with the review in its oversight role.

Issues raised about the Scheme

30. JAG consulted four times on the Scheme details and aspects of the Scheme were adjusted as a result of representations made in those consultations. For example, as a result of issues raised in the third consultation in 2011, JAG considered it necessary to amend the Scheme to ensure that it was more targeted and proportionate. This included: development of the Scheme to ensure that judicial evaluation was fair, consistent and avoided bias; provision of clarity on levels of case determination; and ensuring that the Scheme accreditation requirements did not unintentionally prevent competent advocates from practising. The Board considers that, on balance, the applicants have responded to issues raised during consultation and have adjusted the Scheme to make it proportionate and targeted without undermining its potential effectiveness.
31. The Board considers monitoring of the scheme to be crucial and is reassured that continuing governance by JAG will enable there to be overall monitoring. It is important that ongoing monitoring of the Scheme includes some specific sources of evidence for supervision and enforcement, such as evidence from court records about which advocates carry on criminal advocacy, visits by approved regulator staff to court centres and spot checks to ensure that advocates have not registered at an unrealistic level. The Board was reassured that data on the competency of those practising criminal advocacy will be published. The Board considers it important that data is published frequently and is accessible so that consumers can find out about the competency of advocates.
32. The Board considered whether the Scheme was contrary to any provision made by virtue of the Act or any other enactment (the criteria under 25(3)(c) of Schedule 4, part 3 of the Act). Although the Scheme will be compulsory for those wishing to undertake criminal advocacy, this accreditation scheme remains separate to the overall authorisation process for being entitled to exercise a right of audience. Even without being signed up to the Scheme, those authorised to do so under the Act, will still be able to carry on other forms of advocacy.
33. The Board also considered whether the Scheme was contrary to any other legislation including that derived from the EU. The Board considered the Provision of Services Regulations 2009 ("POS Regulations") and, while it could be argued that accreditation could be perceived as a gateway to practising, the Board's conclusion was that the Scheme is not an "authorisation scheme" falling within the definition of the POS Regulations; it is an accreditation scheme and does not provide for authorisation to practise. Authorisation remains with the approved regulators under their respective authorisation rules.

34. In respect of the Scheme being targeted at criminal advocates rather than all advocates, the risks of poor advocacy are better evidenced in criminal work than elsewhere and the implications from poor advocacy are very serious in that area. The four levels within the Scheme allows the process for accreditation and reaccreditation to be targeted; at the higher levels the more exacting standards will need to be demonstrated by judicial evaluation compared to the a less intensive approach at Level 1 (mainly qualification as a lawyer with associated on-going Continuous Professional Development).
35. The Board considered whether there was a significant risk of conflict between advocacy assessment and the needs of clients and concluded that there was not. Advocates have a duty to the Court to act with independence in the interests of justice. Equally, they are aware of their duties to their client under the regulations of their respective approved regulators. There is no evidence to suggest that by implementing the Scheme, advocates will start to act without appropriate independence.
36. The Board also considered whether the Scheme posed a challenge to judicial independence and concluded that this was a very low level risk. Our assessment is that there is a low risk that judicial independence would be challenged by the scheme arrangements. The independence of the judiciary is underpinned by the principle of separation of powers and judicial independence is one of the core values of our justice system. Judicial independence is also governed by relevant legislation (such as the Constitutional Reform Act 2005) and will remain subject to that legislation's provisions. Additional safeguards in place include the Guide to Judicial Conduct which was updated in March 2013 and this includes provisions relating to judicial independence and impartiality. The Board also took into consideration that the Scheme introduces transparent and consistent criteria for advocates to be judged against and that judges will receive training on how to apply these criteria. It could be argued that the Scheme will be more robust and transparent than what happens under current arrangements, where judges may provide feedback informally on the performance of advocates via the circuits to heads of chambers rather than via the approved regulator.
37. A narrow but important concern was raised about how judicial evaluation forms are returned to regulators. The concern was in respect of the proposed arrangement whereby if an assessment is requested by an advocate, the judge must return it to the advocate who will pass it to their regulator and that this risks tension between the assessing judge and the advocate, or the possibility of the advocate failing to return an adverse assessment to the regulator. The Board is satisfied with the arrangements for returning assessment forms and do not believe there is a significant risk of assessment forms not reaching the regulator or conflict between the judge and advocate. Nonetheless, the plans to monitor compliance provide additional reassurance that the regulators will try to ensure that all Scheme provisions will be adhered to by the regulated community.
38. The Board considered whether the application had adequately dealt with the impact of the Scheme on diversity. Each applicant conducted an equality impact assessment (EIA) and has committed itself to monitoring and understanding the impact of the Scheme on their regulated communities. The Scheme tries to mitigate the risk from

adverse impacts for lawyers who take a career break. The Scheme makes provision for advocates to apply for an extension of time to receive full accreditation and there is now a section on how approved regulators will deal with individuals returning from maternity leave. Following feedback in the fourth consultation on the number of trial opportunities (which would have been a more significant issue for those that work part time) the applicant's have reduced the minimum number of evaluations required.

39. The Board requested that the applicants provide further information on fee levels for accreditation and re-accreditation so that it could ascertain if there was consistency in approach. The Board is reassured that each approved regulator adopted a costs recovery approach and that fees will reflect the costs associated with the development and operation of the Scheme for their specific regulated community. Each regulator has adopted an "online" approach to minimise staff involvement and therefore keep costs for advocates at a minimum. There was some variation in actual fee level between regulators. These variations were not significant except in the case of the BSB's fees for progression at levels 3 and 4. Each regulator will monitor operational performance and the proposed review will gather data on the impact of the Scheme fees on the criminal advocacy market.
40. In considering if the fees might raise costs of practice to the extent that they threatened or undermined competition, the Board considered what costs were associated with criminal advocacy beyond those for the Scheme. It identified considerably higher costs associated with legal education and qualification as a barrister, solicitor advocate and legal executive advocate. It also noted higher costs were likely in meeting Continuing Professional Development requirements and other training material. Overall, the Board concluded that the Scheme adds only a marginal cost to the practice of a criminal advocate.

Decision

Scope of decision

41. The decision relates to the Scheme Handbook and the individual sets of regulatory arrangements of the SRA, BSB and IPS in respect of the Scheme.

The Board's decision

42. On balance, considering the details in the application and other relevant information, the Board is satisfied there is legitimate and sufficient concern about the quality of criminal advocacy and that the Scheme proposed in the application is both proportionate and targeted. Furthermore, the Scheme and implementation will now allow the approved regulator applicants to have consistent and reliable data on the quality of criminal advocacy. As the Scheme is implemented and embedded, the planned review will help to ensure it also remains proportionate and targeted.
43. The Board has considered the application against the criteria in paragraph 25(3) of Schedule 4 to the Act, and is satisfied that there is no reason to refuse this application;

accordingly, the Board grants this application. The rules to introduce the Scheme are therefore approved.

44. The Annexes to this decision notice contain:

- **Annex A:** The Scheme Handbook
- **Annex B:** BSB QASA Regulations
- **Annex C1:** SRA QASA Regulations
- **Annex C2:** SRA Glossary QASA Amendments
- **Annex D1:** IPS Associate Prosecutor and Rights of Audience Litigation Rules (QASA amended)
- **Annex D2:** IPS Rights of Certification Rules (QASA amended)

Chronology

- The Board confirmed receipt of an application from JAG on 14 May 2013.
- On 5 June 2013, the LSB extended the initial decision period to 11 August 2013.
- This decision notice is effective from and is being issued to the SRA, BSB and IPS on 26 July 2013.
- The decision notice will be published on our website on 29 July 2013, the first working day after the issuing of the notice.

Chris Kenny, Chief Executive
Acting under delegated authority granted by the Board of the Legal Services Board
26 July 2013