

Consultation response

SRA/IPS/BSB: Advocacy Standards

Overview

1. **The Legal Services Consumer Panel welcomes proposals for developing and quality assuring common advocacy standards starting with criminal work. The benefits for consumers include: bolstering confidence in the quality of advocacy services; helping to choose the best advocate for their needs; clarifying what they can expect from their advocate; and competition above the minimum quality threshold.**
2. **The emphasis on client care throughout the standards is encouraging, although there are some areas where aspects of client care could be given a greater emphasis. A “banding” system should be introduced to help clients identify advocates who are qualified to handle the particulars of their case.**
3. **Independent and ongoing assessment of advocates should lie at the heart of monitoring and enforcement efforts. Quality is ultimately determined by users, so consumers should be involved in setting and enforcing the standards. This might include conducting surveys of users and learning from intelligence within complaints.**
4. The Legal Services Board will examine the wider issue of quality assurance during 2010-11 when it will seek the Consumer Panel’s advice. We have yet to start this work, so the comments below represent preliminary observations.

The proposals

5. This is a joint consultation by the Solicitors Regulation Authority (SRA), ILEX Professional Standards (IPS) and the Bar Standards Board (BSB).
6. The end goal is to quality assure overarching standards for advocacy in all areas of practice. This consultation focuses on the content of common standards for criminal advocates. A future consultation exercise will consider the details of a proposed scheme for criminal advocacy, including how the standards should be assessed and ultimately accredited.

The Panel’s response

Why set minimum advocacy standards?

7. Most individual consumers cannot judge the quality of advocacy services. Advocacy is specialised in nature, which makes it hard for clients to distinguish between providers and find the most appropriate advocate. Further, consumers only rarely use an advocate, and often at times of stress. In the absence of other signals of quality, repeat users will rely on previous experience and could be insensitive to changes in the quality of service provided over time. There is therefore a need for regulators to help consumers make more informed choices.
8. Consumers are entitled to receive a minimum acceptable level of advocacy standards from all regulated practitioners. Regulators should determine a quality floor

by setting and enforcing minimum entry standards and requirements to demonstrate ongoing competence. Where necessary, they will remove those practitioners who fail to meet the required standard. A quality assurance scheme should not hide the minority of advocates that are not up to the mark, but should drive up the overall quality of advocacy services.

9. Regulators can add value through quality schemes where entry standards are not sufficient in themselves to guarantee an advocate is suitable for the consumer's particular case or by helping to identify specialised advice. We consider this initiative could deliver the following benefits to consumers:

- Bolster confidence among consumers who purchase advocacy services at times of stress or who have a lot at stake in the outcome.
- Increase transparency to help consumers decide which advocate is most appropriate for their needs.
- Harmonise minimum standards across the profession so that consumers are clear what to expect and, if necessary, can pursue redress.
- Provide a platform to facilitate competition between providers of advocacy services on quality grounds above the minimum threshold.

10. However, there are also risks. Regulators should avoid drifting into representation activities by promoting rather than quality assuring advocates. The quality bar should not be set too high, as this could impose unnecessary barriers to entry and increase prices. Another risk is that regulators become overly-prescriptive on the content of standards and inhibit innovation.

11. In addition to this initiative, the regulators should also look for other ways to inform

consumers about quality. This might include removing unnecessary rules that restrict marketing activities or improving transparency to help consumers make informed choices between advocates, for example by publishing complaints data related to individual lawyers.

The proposed standards

12. Quality is ultimately determined by the users of a service, so it is important to involve end consumers in setting the standards. The consultation document does not describe any activity so far to find out from consumers what matters to them or even if they would make use of a quality assurance scheme. It will also be important to test whether consumers understand the standards.

13. A preliminary observation is that the proposed standards are focused solely on the individual practitioner and appear not to place any requirements on the entity. Whereas it is appropriate to focus mainly on the individual, the processes put in place by the firm or chambers also have an impact on the quality of service.

14. The Panel endorses the emphasis on client care in section C1 and other sections of the standards. However, there are some gaps, which we outline below:

- The standards do not cover the service aspects of accepting instructions. It may be that this is better dealt with elsewhere, but it is important that this is not lost between regulatory stools.
- Section B1 should have a greater emphasis on clear explanation of court proceedings to assist all lay persons involved, not least jurors.
- Section C1 would benefit from a greater emphasis on listening skills to

understand the needs of clients as well as explanation.

- There should be a stronger emphasis on timeliness: in allowing sufficient preparation time for cases (A2); and in keeping clients up to date (C1).
- Section C1 should cross-reference to the obligations of advocates in respect of addressing complaints.
- In the section on equality and diversity (E1), it is important to capture the need for advocates to understand the diversity of client needs.

“Banding” of advocacy standards

15. A discussion paper by the Legal Services Commission¹ points to the need to classify criminal defence cases into four broad levels from the simplest magistrates’ court cases to complex cases in the Crown Court and above.
16. We are concerned by assertions in the discussion paper that there are advocates who appear in cases that are beyond their competence. Whilst all the regulators forbid advocates from practising outside their competence, it is striking that none of the regulators have mechanisms for routinely monitoring or measuring this. The Panel considers that the minimum required standards of advocacy will depend on the context and there is a need to help clients identify advocates who are qualified to handle the particulars of their case. This is particularly relevant as the Bar Standards Board extends its Public Access scheme – which enables clients to engage barristers directly instead of only via a solicitor - to criminal, family and immigration work.
17. As the minimum competencies required for advocacy depend on the complexity of the case, a banding system should be part of the regulatory framework rather than left to major purchasers to demand. The Panel

therefore urges the Joint Advocacy Group to reconsider its approach.

Monitoring and enforcement

18. A striking feature of the existing quality assurance arrangements for advocates is the emphasis on entry requirements to safeguard quality, with little emphasis on assessing ongoing competence. Legal developments and client expectations may change the competencies required of advocates over time. Further, experience in the medical arena suggests that the abilities of professionals decline. Therefore, the Panel would expect independent and ongoing assessment of advocates to lie at the heart of the new arrangements.
19. Measuring quality will be considered in the next phase of work for the Joint Advocacy Group. It will be vital to ensure this process is informed by client feedback, for example by learning from complaints and thinking creatively about ways to survey users.
20. Complaints about advocates will be handled by the Legal Ombudsman. However, regulators must have access to complaints data, both to identify advocates who may require help or disciplinary action, and to use the intelligence to inform the further development of advocacy standards.
21. The standards should be regularly reviewed to address new areas of concern and reflect changing client expectations.

Promotion

22. The consultation document is silent about how the quality standards will be promoted to consumers. Whilst the majority of individual consumers will find advocates via other legal professionals, it will become more common for them to choose their advocate directly. Any new scheme will

have to stand out against a busy crowd of quality assurance schemes.

23. As a starting point, the scheme should be actively promoted, it should be clear what the coverage of the scheme is, the benefits to consumers should be clearly explained and the methodology that sits behind the scheme must be transparent. Proactive promotion of the scheme will also help to build trust among consumers.

Governance

24. Ownership of the scheme is the responsibility of the Joint Advocacy Group made up of the three regulators plus major purchasers, with oversight regulation provided by the Legal Services Board.
25. The Consumer Panel welcomes this collaborative approach, which should deliver joined-up regulation. The regulation of advocacy services is unavoidably fragmented, but this should not harm consumers if all advocates must demonstrate that they meet minimum competency standards. This continuing level of cooperation is essential to deliver common standards for all advocates.
26. The Legal Services Commission and the Crown Prosecution Service are bulk purchasers of legal services and are well placed to drive up standards through their purchasing power. Responsibility for setting minimum standards should lie with regulators. However, if these fall short of the expectations of major purchasers, they will – as spenders of public money - demand higher standards from their providers. Ideally, the scheme being developed by Joint Advocacy Group should meet everyone's needs.

¹ Legal Services Commission, *Quality Assurance for Advocates: Working with the professions to deliver a framework for better advocacy. A Discussion Paper*, February 2010.

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