

## THE SCOTTISH LEGAL AID BOARD

### CRIMINAL QUALITY ASSURANCE COMMITTEE

15 NOVEMBER 2018

## REPORT ON THE OUTCOME OF THE CONSULTATION ON CHANGES TO THE CRIMINAL QUALITY ASSURANCE SCHEME AND THE PEER REVIEW CRITERIA FOR THE NEW CYCLE

### BACKGROUND

1. The consultation on changes to the Criminal Quality Assurance Scheme and the peer reviewer criteria was issued on 27 July 2018, and was open for 12 weeks, closing on 19 October 2018. The consultation proposed a number of changes to the scheme as follows:
  - New outcome system - formalising the Committee's options of Marginal and Good passes;
  - New procedure for follow up reviews after a Pass Marginal score - the Committee should have the option to refuse the review if no overall improvements have been shown;
  - New procedure for routine reviews in the second cycle - where the reviewers will be sent a copy of the previous review and be asked to comment on whether any previous issues have now been addressed after conducting the review;
  - New procedure for solicitors unable to provide sufficient files for review - to allow the Committee to be satisfied that they have sufficient knowledge, skills and experience to deliver criminal legal assistance.
  
2. The consultation also proposed a number of changes to the summary, solemn and appeals peer review criteria, as follows:
  - New questions at the start of the summary and solemn criteria dealing with police station advice, and any post interview procedures;
  - Removing unnecessary questions about ABWOR, reviews, and sanctions which are covered elsewhere;
  - New question about mandates, and new guidance in line with the guidance note issued to the profession in March 2016;
  - New guidance about responding appropriately to a transfer mandate;
  - Solemn criteria - in the section on Preparation for the trial/Section 76, adding a reference to Written Records and Deferred Sentences;
  - Summary and Solemn criteria - removing the question on Consideration of the Account;
  - Criminal Appeals criteria - in the Application for legal aid section, removing the point about Regulation 15 and full legal aid being submitted at the right times as if they were not, legal aid would not be granted, so there would be no file to review.

3. The consultation paper with all the details of these changes, together with an electronic and paper response form was issued on 27 July 2018. All criminal solicitors were advised of this by email update. In addition, copies of the consultation documents were also sent to a number of other organisations such as the Law Society, the Scottish Legal Complaints Commission, Police Scotland, Scottish Courts, COPFS, and a number of national voluntary organisations working in the criminal justice sector.

## RESPONSES TO THE CONSULTATION

4. In all, six responses to the consultation were received, four from individual solicitors, one from the Law Society of Scotland (LSS), and one from the Glasgow Bar Association (GBA). In the responses from individual solicitors, two were from Ayrshire, one from Lanarkshire, and one anonymous. Two of the responses simply agreed with all the proposed changes to the scheme and the criteria.
5. The other two agreed with the recommendations, but made additional comments in relation to the new Police Station questions in the summary and solemn criteria.

## CONSIDERATION OF THE RESPONSES

### *Police Station Cases*

6. One of the individual solicitors felt that after the new question 2 - “*was appropriate advice given to the client?*” The right to silence should be qualified along the lines that “***where appropriate, to provide police with details of any line of defence, as per Section 261ZA of the Criminal Procedure (Scotland) Act 1995***”. This Section was brought into force on 25 January this year, following recommendations by the Carloway Review.
7. This Section affects the admissibility of the accused’s statement made in the course of questioning by police officers or other investigating officials. The Section is important, as it now means an accused can use any statement given to a police officer, or other official, which can be used as evidence of fact. The accused need not go on to give evidence in person in court and can rely on that statement. In addition, in certain sexual offences, it may be an advantage for the suspect to provide the police with information, such as consent, where appropriate. The default position of “***no comment***” may not always be the best advice, and it is important practitioners carefully consider whether or not “***no comment***” is appropriate.
8. **The Criminal QA Committee (CQAC) agreed that this suggested additional text should be added as a point to the guidance in the criteria.**
9. The other solicitor commented in relation to the same question:

*“Issue surrounding ‘correct’ advice at police interview. There is no wrong way to provide advice at interview. Suspect has the absolute right to remain silent albeit the provisions of s109 of CJ act. If solicitor ‘A’ chose to advise their client to remain silent and solicitor ‘B’ advised their client to put forward a position - the two solicitors cannot be penalised for that.”*

10. CQAC noted that we do not use the word “correct” in this question, but “appropriate”. In addition, CQAC have already seen reports where concerns were expressed about the position taken in the police station, which were considered to be valid.
11. **Therefore, CQAC agreed to take no action in connection with this comment, although this point was elaborated in the Law Society’s response, where certain additions to the guidance were proposed.**

12. The Law Society felt that it is not always practical for full notes and details to be recorded at the police station, and that their advice and information on police interviews is being updated. At Question 1, “and practical” should be added to the guidance note.

13. **CQAC did not feel that this was required, but that the guidance on question 1 should be amended to:**

*“Where possible, has the solicitor made an appropriate record of what took place at any interview.....”*

14. The Law Society recommended that the guidance at Question 2 should refer to vulnerable clients as well as children.

15. **CQAC agreed that the guidance note should be amended to:**

*“Whether appropriate advice was given and steps taken if the client was a child or a vulnerable person.”*

16. The LSS felt that it was difficult to see a justification for a reviewer to criticise a solicitor’s decision to advise a client to provide a “no comment” interview, and that a similar guidance note to the one in the Appeals criteria on Taking Instructions on Appeal should be included in the Police Station section.

17. **CQAC noted that all the Peer Reviewers have experience of providing advice at police interviews, and agreed that the following should be included in the guidance:**

*In considering whether the advice given at the Police Station was appropriate, you must consider whether it was factually and legally acceptable, bearing in mind the IPS standard and that in Hunter v Hanley.*

*In considering whether advice or action was appropriate, you must take into account the circumstances in which advice was given at the Police Station, the level of information available to the solicitor, and ethical, practical, tactical*

*and legal considerations. In other words, you should put yourself in the position of the solicitor at the time, taking into account the information that was available to them and that professional opinions as to what is appropriate may differ.*

### *Formalising the addition of Marginal and Good passes*

18. The addition of 3+ and 3- marks was agreed by the Law Society, and CQAC agreed to confirm this in the scheme.

### *Refusing Second Marginal Passes*

19. Both the Law Society and the GBA had concerns about CQAC having the option to refuse a second marginal pass. The LSS noted that the consequences of a marginal pass are that the solicitor is reviewed again quicker, and that should remain. Reviews which fail should only be where “reasonable competence” is not demonstrated. The GBA felt that if the files merit a pass then they should be passed regardless of the result of the previous review. If this option was allowed then there could be scenarios where two solicitors have files of a similar standard but one solicitor would pass and the other would fail simply on account of the previous review.
20. This was noted by CQAC but as the purpose of the Peer Reviews is the promotion of continuous improvement, a refusal option should still be open to the Committee in these circumstances. If this was not the position solicitors could keep on getting marginal passes time after time - despite showing no signs of a commitment to continuous improvement.
21. **CQAC felt that a solicitor who has not addressed the issue raised in a first marginal pass is different from a solicitor receiving a first marginal pass, and agreed that the option to refuse in the first scenario should still be open to them.**

### *Sending the Reviewers the first report from the first cycle*

22. The Law Society had concerns about this, and felt that sight of the previous report may colour the new review being conducted. If this is to be introduced, this should be a second stage of the process.
23. It was always the intention is to have this as a two stage process. The reviewers will be told not to look at the previous review or issues until after the second review has been completed. When this proposed change was discussed with the Peer Reviewers themselves, they saw no difficulty with this process, which has been used for some time in the Civil scheme, where the experience is that the reviewers do not look at the previous reviews beforehand.
24. CQAC agreed to implement this change to the scheme.

### *New procedure for No File Reviews*

25. The LSS agreed with this, but felt that system should be flexible enough to deal with effective criminal solicitors without files in their name including those who do are not designated as nominated solicitor, but who undertake work on cases.
26. CQAC noted that the process will allow for this. We already use files where the solicitor may not be the Nominated Solicitor, but has worked on the case.
27. On this issue, the GBA felt that 2 Reviewers were not required to consider all these cases. They said that they were *not aware why this other form of review should be undertaken by two reviewers as opposed to the routine review which is ordinarily undertaken by one reviewer.*
28. **CQAC agreed that only one reviewer would be needed for these reviews, with 25% of these reviews being double marked, as is the position for standard routine reviews. It was also agreed that these reviews would be double marked until each reviewer had seen at least one of these reviews.**
29. The GBA also raised issues about solicitors being expected to have sufficient files by the time of the next review. They felt that there should be no such expectation.
30. CQAC considered that each case would be considered on its own merits. There would be different expectations depending on the circumstances, for example solicitors who practice exclusively as solicitor/advocates or court agents would not necessarily be expected to have legal aid cases as nominated solicitors.

### *Changes to the Peer Review Criteria*

31. The changes to the Peer Review criteria were all agreed, subject to the amendments to the new Police Station questions as outlined above.

### **THE NEXT STEPS**

32. We now intend to make the necessary changes to the Scheme and the criteria for use in the second cycle of peer reviews which is now due to start in early 2019. The final changes to the criteria will now be incorporated into the IT systems used by the peer reviewers. We also hope to have a number of other system improvements introduced at the same time.
33. We are also now further developing the new process for the solicitors who cannot provide sufficient or any files to be reviewed. This will involve a pilot series of reviews which will be referred to the CQAC in due course.

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