



July 2018

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# SLAB consultation on changes to the Criminal Quality Assurance Scheme and the Peer Review Criteria



## Contents

Overview.....	3
Why we are consulting.....	3
Background to the Criminal Quality Assurance Scheme .....	4
Changes to the Scheme.....	5
Procedures for reviewing solicitors who are unable to provide sufficient files for a routine review.....	6
Changes to the Peer Review criteria .....	8
Responding to this consultation .....	9

## Overview

This consultation invites stakeholders to give their views on proposed changes to the Criminal Quality Assurance Scheme and peer review criteria.

All criminal solicitors who have registered with the Scottish Legal Aid Board (SLAB) to provide criminal legal assistance are subject to peer review. The process is overseen by SLAB's Criminal Quality Assurance Committee.

Consultation on the new draft Code runs for a twelve week period from 27 July 2018. Please ensure any responses are submitted to us by 5pm on 19 October 2018. Details on how to respond are provided on page 9.

## Why we are consulting

Over the past few years, the Criminal Quality Assurance Committee has identified a number of areas of the Scheme which needed to be updated but had to await the start of a new cycle of peer reviews to ensure consistency of the reviews in the current cycle.

The new cycle of peer reviews is due to commence later this year. This gives us the opportunity to introduce changes and updates to the peer review criteria which form the basis of the assessments carried out by the Peer Reviewers. A number of changes were recommended by the peer reviewers themselves, along with other changes which the Committee felt were appropriate too. The changes being consulted upon are attached as an appendix to this paper.

The feedback from this consultation will be used to finalise the changes to the Scheme and peer review criteria for the new cycle of peer reviews due to start later this year.

## Background to the Criminal Quality Assurance Scheme

1. The Criminal Quality Assurance scheme was devised in partnership with the Law Society of Scotland, alongside the development of the new solemn criminal payment regime which was introduced in 2010. The scheme is administered by SLAB under Part IVA of the Legal Aid (Scotland) Act 1986, and is part of the overall compliance regime.
2. All criminal solicitors who have registered with SLAB to provide criminal legal assistance are subject to peer review. The reviews are carried out over an initial six year cycle. The process is overseen by SLAB's Criminal Quality Assurance Committee, which comprises three members appointed by SLAB, three members appointed by the Law Society of Scotland, and three independent or lay members appointed in consultation with the Society.
3. The peer reviews consist of an examination of a range of solicitors' files by one or more of a panel of peer reviewers who are experienced and currently practising criminal solicitors, and were appointed after an open recruitment process. The purpose of the review is to examine the quality of the work carried out on behalf of the client, based on the evidence contained within the file. Files are assessed against set peer review criteria for summary, solemn and criminal appeal cases. The criteria cover issues like initial client contact, bail matters, handling of preliminary or guilty pleas, trial preparation, communication of outcomes, and legal aid matters. The criteria were developed in consultation with the Law Society, and with the reviewers themselves.
4. The routine review is comprised of a random mix of eight summary, solemn and appeals files from each solicitor which reflect the nature of the criminal business which the solicitor carries out. These completed files are identified by selecting the nominated solicitor on the legal aid or ABWOR applications systems.
5. The standard applied in carrying out the reviews is that of the reasonable competence expected of a solicitor of ordinary skills, known as the *Hunter v Hanley* test, or the Inadequate Professional Service standard. The reviewer marks the review on a scale of 1 to 5 as below. A score of 3 or above is a pass.
  1. Non-performance
  2. Inadequate professional service
  3. Competent
  4. Competent plus
  5. Excellent
6. After the review has been completed by the peer reviewer, we return the files as soon as possible, and put the results of the review before the Criminal Quality Assurance Committee for consideration.

7. Where the Committee agrees with the reviewer's recommendation to pass, we confirm this with the Compliance Partner in writing. We also provide the solicitor with details of any issues arising from the review and a copy of the peer reviewer's report.
8. Where the Committee agrees that a solicitor has failed a routine review, the solicitor will normally become the subject of an extended review, which will involve a review of files taking place at the solicitor's premises by two peer reviewers. If this extended review also fails, a final review will be held after a further nine to twelve months at the solicitor's premises.

## Changes to the Scheme

### *New Outcome System*

9. The overall marking for a review was originally set on a five-point scale mirroring the scale used by reviewers as shown at paragraph 5 above.
10. It is proposed that this five-point range remains in place for the peer reviewers' recommendations, but that the Committee also has the flexibility of the two additional outcomes (3+ and 3- ) which were introduced during the first cycle. It is now considered that this more formal seven-point scale for outcomes reached by the CQAC should be introduced to allow for the 3+ (good pass) and 3- (marginal pass) scores as below. A score of 3- or above will be a pass, with scores of 1 and 2 being regarded as fails as before.
  1. Non-performance
  2. Inadequate professional service
  - 3- Marginal pass
  3. Pass
  - 3+ Good pass
  4. Very good
  5. Excellent

### *New Procedure for follow up reviews after a 'competent marginal' score*

11. When a review is given a Competent Marginal score, this means that a further routine review of the solicitor will take place more quickly than in the next six year cycle, usually after one to two years. We have already conducted a number of the follow up reviews of Pass Marginal cases, and in the main these have been successful with the solicitor going on to score at least a Competent score at the second review.
12. However, there have also been a number of follow up reviews of Competent Marginal cases, which have not been so successful. While the follow up review did not fail for Non Performance or Inadequate Professional Service, it could not be awarded a full Competent score as there was no evidence to show any improvement on any of the issues which led to the marginal pass in the first place. This was not felt to be satisfactory, and that a better

way of dealing with these cases was needed to help ensure that improvements were put in place by the solicitor.

13. As a result, it is now proposed that where no overall improvements have been shown on the issues raised at the first review, the Committee should have the option to fail the subsequent review. This allows the Committee to determine the most appropriate follow up review, ie an immediate or a deferred extended review.

### ***Procedure for Routine Reviews in the Second Six-year Cycle***

14. One of the main reasons for conducting the peer reviews under the Scheme is to encourage continuous improvement in the legal services being provided to clients. Therefore, during the second six-year cycle we want to ensure that any issues raised during the peer review in the first cycle have been attended to and improved upon. Where a review was passed but issues were raised in this review, we want to have a system so that these issues can be highlighted to the reviewer conducting the review in the second cycle.
15. Therefore, we propose that a copy of the solicitor's previous review should be sent to the reviewer carrying out the new review with instructions not to read it until the new review has been completed. Any issues which had been raised in the previous review (usually set out in the covering letter intimating the outcome of the review) will also be sent to the reviewer with similar instructions. In the Overall Summary form which the reviewers complete and are submitted to the Committee, a new section will be added to allow the reviewers to comment on whether these issues have now been addressed.

## **Procedures for reviewing solicitors who are unable to provide sufficient files for a routine review**

16. A revised Code of Practice for Criminal Legal Assistance was issued on 22 December, and came into force on 25 January 2018. This includes a section which says that solicitors without sufficient files to be reviewed will need to demonstrate to the satisfaction of the Criminal Quality Assurance Committee that they have the required knowledge, skills and experience to deliver criminal legal assistance. The onus is on the solicitor to show that they are competent to provide Criminal Legal Assistance. The most straightforward way to satisfy the Committee will be to undertake sufficient work for a routine peer review to be carried out. It is important for the legitimacy of the peer review system that other means of satisfying the Committee as to competence do not come to be seen as less demanding than peer review itself. That would be unfair on the majority of registered solicitors who do have sufficient files for review.

### ***Requirement to Demonstrate Knowledge, Skills and Experience***

17. Section 2.12 of the new Code states:

*If there are an insufficient number of files to allow a solicitor to be assessed under Criminal Quality Assurance Scheme, the solicitor is expected to demonstrate to the satisfaction of the SLAB Criminal Quality Assurance Committee that they have the required knowledge, skills and experience to deliver criminal legal assistance.*

18. Periodically, and at intervals of not more than every three years, solicitors who are on the CLAR but who cannot provide sufficient files for peer review (currently eight) will be invited to provide details on a pro forma designed to assist them in capturing information about their practice, knowledge and experience in the provision of criminal legal services, whether on a publicly funded or other basis. This form will also need to be countersigned by the firms' Compliance Manager, with an opinion from them on the suitability of the solicitor to remain on the CLAR. The Compliance Manager will also be asked to set out on the form why the solicitor under review has insufficient files and what steps are being taken to enable a routine review to be undertaken at a future point. If a solicitor can only provide less than eight files, then the review will be carried out on the available files as well as the completed form.
19. The onus is on these solicitors to satisfy the Committee, and if they do not respond to the call for information in the timescale indicated, or if they are unable to satisfy the Committee with the information they provide, then consideration will be given to whether their inclusion on the Criminal Legal Assistance Register can continue. In these circumstances, the QA Committee would make a recommendation on this to the Board.
20. There are a range of circumstances which can lead to a solicitor on CLAR having too few files to be subject to peer review. Peer review is currently the primary basis upon which legal competence can be assessed. A solicitor who is not able to participate in peer review does not have the benefit of the assurance it brings and will be called upon to confirm continuing suitability more regularly than those who have passed routine review. SLAB requires to be satisfied as to the competence of the solicitor. SLAB intends that the assessment is flexible, and able to accommodate a wide range of circumstances, such as solicitors who undertake only agency work, solicitors who undertake work on a basis other than legal aid funding, and solicitors who work mainly in other areas of law.
21. Solicitors must be able, at least, to provide professional services which are of a quality which could reasonably be expected of any competent solicitor conducting business in the criminal courts. In order to meet this definition, solicitors must be able to demonstrate that they are competent and knowledgeable in criminal business. In essence, a solicitor ought to be able to demonstrate that they have experience of practicing in the criminal courts, or in other criminal business, and have regimes in place to keep abreast of developments in criminal law, procedure and practice.
22. Some of the ways in which this could be demonstrated to the Committee would be:
- Reference to the number of criminal instructions taken in the High Court, Sheriff Court and JP court cases. This can include work carried out in criminal cases where another solicitor in the firm is the nominated solicitor in addition to providing details of competence and knowledge of criminal business on the new form;
  - the number of appearances in police stations and in the criminal courts on a weekly and monthly basis;
  - How much work has been done under criminal legal assistance;
  - How much criminal law and practice other than legal aid, and at what level;
  - For solicitors acting as Agents in the courts - testimonials from instructing agents.
  - Systems in place for work reviews
  - Records of relevant training

## *Procedures to be followed in considering these cases*

23. It is proposed that the process for considering applications from solicitors to demonstrate that they have the required knowledge, skills and experience to conduct criminal legal assistance follows the standard peer review process as much as possible to ensure consistency of approach. Therefore, it is proposed that these applications are considered by two Peer Reviewers in the first instance. The Peer Reviewers will then make a recommendation to the Committee about their suitability to provide criminal legal assistance.
24. If the Committee agrees with a recommendation that the solicitor is suitable, then the solicitor will be advised of this, and reviewed again in not more than three years' time. The solicitor will also be advised that the Committee would expect by then that the solicitor does have sufficient files for a full routine review to be carried out.
25. If the Committee agrees with a recommendation that the solicitor is not suitable, (or overturns a recommendation of suitability from the reviewer), the solicitor will be advised of this. The solicitor will then be advised that a routine review will be held in 9 months' time (or whatever period is considered appropriate) at which stage we would expect there to be sufficient files to be reviewed as per usual. If there are sufficient files at that stage, a standard routine review would then be carried out and the solicitor would follow the standard process from then on.
26. If there are still not enough files after 9 months (or whatever period was specified), then the solicitor will be invited to explain how they can now demonstrate that they are suitable to provide criminal legal assistance. This explanation will also be considered by two peer reviewers in the first instance, who will be asked to make a recommendation on their suitability to remain on the CLAR register.
27. If it is now felt that the solicitor is suitable, then they will be reviewed again in not more than three years' time, and advised that the Committee would still expect that there are sufficient files for a routine review at that time.
28. If it is felt that the solicitor is still not suitable, the Committee would then have the option to revisit the position in another 9 months' time, or to move directly to a recommendation to the Board for de-registration from the Criminal Legal Assistance Register.

## Changes to the Peer Review Criteria

29. The criteria used for reviewing Summary, Solemn and Criminal Appeals cases have remained largely unchanged since 2012. With the new cycle of peer reviews approaching, it is considered to be a good time to review and update the questions. A number of changes were recommended by the Peer Reviewers themselves, along with other changes which the Committee felt were appropriate too.
30. The revised criteria for Summary, Solemn and Appeals cases are [attached as an appendix to this paper](#), with notes of the changes being proposed. In brief, the main changes are:



31. A new set of questions has been added to both the summary and the solemn criteria, to deal specifically with police station advice. January 2018 saw the implementation of Part 1 of the new Criminal Justice (Scotland) Act 2016, bringing changes to police arrest and custody procedures. The Act also extended the right to legal advice to everyone in a police station, and not just those who are questioned by the police as before. This change is already bringing more of an emphasis on the provision of legal advice in police stations, and it is felt that a series of questions on this in the criteria is now appropriate.
32. We have amalgamated a number of similar questions which were felt to be duplicates.
33. We have added specific questions on the Online Legal Aid declaration or mandate forms.
34. We are suggesting that the previous question on the legal aid account is removed from the summary, solemn and appeals criteria. Having the account in the file can sometimes help the reviewer see what has happened in the file, but this is not compulsory.

## Responding to this consultation

35. We have included some specific questions in the Consultation Questionnaire which we are seeking your views on. However, respondents are not required to submit an answer to all questions and can choose to answer some or all of the questions as they choose.

Of course, views on any other matter would also be most welcome. Please address these in the area provided at the end of the questionnaire.

36. SLAB looks forward to receiving your views on these issues and other aspects of the proposed changes to the Criminal Quality Assurance Scheme and the Peer Review Criteria.

### Deadline

Consultation on the proposed changes runs for a twelve week period from 27 July 2018. Please ensure any responses are submitted to us by 5pm on 19 October 2018.

### How to respond

#### Online

You can respond using our online [Consultation Questionnaire](#).

#### By email or post

If you wish to respond by email or post, please complete the Consultation Questionnaire provided in [Annex A](#).

Completed questionnaires should be emailed to: [consultations@slab.org.uk](mailto:consultations@slab.org.uk)

Or printed and posted to: Kingsley Thomas, Head of Criminal Legal Assistance, Thistle House, 91 Haymarket Terrace, Edinburgh, EH12 5HE

**Enquiries:** If you have a query about the consultation process, please contact:

Kingsley Thomas, Head of Criminal Legal Assistance, [thomaski@slab.org.uk](mailto:thomaski@slab.org.uk)