



Law Society
of Scotland

Consultation Response

Consultation on changes to the Criminal Quality Assurance Scheme in the Peer Review Criteria

17 October 2018





Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Legal Aid sub-committee welcomes the opportunity to consider and respond to the Scottish Legal Aid Board (SLAB) consultation on changes to the Criminal Quality Assurance Scheme (CQAS) and the Peer Review Criteria. We were involved in the original development of the CQAS. We support its administration and the provision of review procedures as a means of ensuring the quality of advice being supplied by those registered to provide criminal legal aid.

This response should be read in conjunction with Appendix which forms part of the Consultation and refers to the New Peer Review Criteria and Guidance for Peer Reviewers on changes to the CQAS.

We have the following comments to put forward for consideration.

Specific questions for consideration

Question 1 – Do you agree with the proposed addition of 3+ and 3- marks to the range of marks that can be awarded by the committee?

Yes. In principle, there is no objection to the change in the range of marks proposed as long as consideration is given to the potential consequences of a 3- mark. The flexibility being provided by the additional marking criteria should provide further scope for the CQAS.

Question 2- Do you agree that the QA Committee should have the option of refusing a second marginal routine review where no overall improvements on the first review have been shown?

Given the consequences of failing an assessment, this should not be considered appropriate in the situation where a solicitor has been classified as 'competent'. The consequences of a 'competent marginal' pass is that the solicitor requires to be reviewed much sooner than in the normal course and this should remain the position. However, a solicitor should only fail if their mark reflects a level below any of the 'competent' marking scales, namely 3-, 3 or 3+. The consultation recognises at paragraph 5 what the standard required by a solicitor is when a review is completed. That is that of the 'reasonable competence expected of a solicitor of ordinary skills'¹. Refusing a second marginal routine review does not equate to a failure to comply with that standard.

Question 3- Do you agree with the proposal that, in order to encourage continuous assessment, peer reviewers should be sent the review from the first cycle and, after they have assessed the files, asked to comment on any issues raised in the first review?

The files should be reviewed by the peer reviewers on their own merit. Sight of the report from the previous review may well colour, or be seen to colour, the current peer reviewer's views on a file. There is a need to ensure transparency of process. Even if not demonstrably affected by the previous peer reviewers' comments, there may be a feeling that they have been. There may also be a higher expectation for a particular file from the peer reviewer if they have had sight of comments from a previous review.

If the practice is to be introduced to request that the peer reviewers on a second cycle should be asked to comment on any issues raised in the first review, this should be a second step in the process and follow completion of their report.

Question 4- Do you agree with the new procedure being proposed for reviewing solicitors who are unable to supply sufficient firm files for a routine peer review?

Yes. As long as this procedure is flexible enough to recognise that solicitors can be perfectly good and effective even if they have not obtained a sufficient number of legal aid certificates in their names. Many firms operate a practice where applications for criminal legal aid must be made in a partner's name although other solicitors, both junior and senior, carry out regular court appearances.

The proposals in relation to the potential ways to assess solicitors falling into this category appear to be wide ranging and reasonable.

¹ *Hunter v Hanley* 1955 SC 200

Question 5: Do you agree with the changes being proposed to the peer review criteria for summary, solemn and criminal appeals cases?

Yes. These seem reasonable.

Question 6- If you think that any other questions in the criteria should be changed, or if any new areas need to be covered by the criteria, please provide details here:

The majority of the changes proposed are innocuous and reflect updates in procedure, for example, the requirement to submit written records in sheriff and jury prosecutions.

We have significant concerns with the proposed amendments relating to the introduction of a new section introducing questions about the contact with clients at a police station (and reflecting the changes that were introduced recently with the implementation of the Criminal Justice (Scotland) Act 2016 (2016 Act). Our concerns relate to the examination of both summary and solemn files headed:

Client contact at a police station (where this takes place)

- Often, advice is given when the solicitor is not in the office as that advice requires to be provided 24/7 and 365 days a year. It may not be practical for full notes and details to be recorded. Though the Criteria refers to 'Where possible' we would suggest that the words 'and practical' are added. (We note the reference to the Law Society's advice and information on police interviews which will be updated to reflect the recent changes).
- The level of information that is provided by police varies considerably from case to case. Often, a full assessment of the case against an accused is not able to be carried out during the period in police custody. For example, often, the results of forensic examinations and medical testing are not known at that stage. The full impact and significance of the evidence as well as admissibility against the accused is not able to be known.
- We note that the criteria only refer to a client who is a child; we suggest that this should extend to those who are vulnerable too.
- A quality assessment should not be carried out merely on the 'appropriate' advice that was provided where the assessment is based on notes which may have been taken in the middle of the night and which may be based on scant information that was provided by the police. Any assessment of such advice should be fully reflective of the circumstances in which it was taken at the relevant time.
- The client is unlikely to be in the best frame of mind for a lengthy discussion, for example, in the middle of the night and in what are for both a client and solicitor difficult, challenging and may be unfamiliar circumstances. Often what is 'appropriate' to provide by way of advice is the 'right to remain silent' and in effect, that the accused makes 'no comment'. In these circumstances, as the law stands, there can be no adverse comment made or inference drawn by the court in any trial process on the 'no comment interview'.



It is difficult to see any justification for introducing a system where a peer reviewer could criticise a solicitor's decision to advise a client to provide a 'no comment' interview. That would involve the introduction of a retrospective examination of the advice provided by the solicitor at the time of interview, potentially in the light of subsequent information that is obtained.

We refer to the section in the Appendix which refers to **Criminal Appeals Criteria**. This section reflects what a file should contain but recognises that the notes may be '*an initial hand-written or typed file note.*' It goes on to provide that:

'in considering whether advice is accurate, you must consider whether it is factually and legally acceptable, bearing in mind the IPS standard and that in Hunter v Hanley [see note 1 above].'

Furthermore, it states:

'in considering whether advice or action is appropriate, you must take into account the circumstances of the case, 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.'

We cannot see why similar safeguards would not be included under the police station advice section if indeed, which we question, a section on the police station advice should be included at this stage.

If there is an issue with the advice being provided by a solicitor at the police station, this may be something that can be challenged in due course as part of the court process.

The Scottish version of the SUPERLAT training regarding advice in the police station will shortly be rolled out by us. This will provide additional support and training for Scottish solicitors in this relatively new area of criminal law and practice which has recently seen the implementation of the 2016 Act. This training may be undertaken by most solicitors in due course. We therefore consider that the section on client contact at a police station should not be included. As a body of caselaw develops, it may be appropriate for this to be included as a topic in due course. As currently drafted, we consider it requires considerable review.

Question 7- If you have other views on the proposed changes to the Criminal Quality Assurance Scheme and the Peer Review Criteria that are not covered in the specific questions, please provide details:

The majority of the changes proposed are innocuous and reflect updates in procedure, for example, the requirement to submit written records in sheriff and jury prosecutions. We have no further comments to make in relation to the changes provided in the consultation's Appendix.



We would of course be happy to discuss any of our comments further with the Committee.

For further information, please contact:

Gillian Mawdsley
Policy Team
Law Society of Scotland
DD: 0131 476 8208
gillianmawdsley@lawscot.org.uk