Analysis of responses to the higher rights of audience consultation

Education and Training Unit

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Why we consulted

The Solicitors Regulation Authority (SRA) consulted on proposals for a scheme to replace the current Higher Courts Qualification regime, and the standards which would underpin the new system.

The SRA sought views on revised competence standards for solicitor advocates, intended to be the benchmark for measuring the performance of solicitors appearing before the higher courts. We also asked for views on a new regulatory approach for solicitor higher courts advocates, with a voluntary accreditation scheme forming a means for individuals to demonstrate their competence.

The consultation, in the form of an online questionnaire, was available on the SRA web site for three months from 2 May 2008. An email inviting responses was sent to over 1,000 people who subscribed to updates on training issues. A further email was sent to all holders of higher courts qualifications for which we had an email address. It was also publicised in the Gazette. A number of key stakeholders were directly invited to respond.

The current position

The Courts and Legal Services Act 1990 allowed solicitors to achieve higher rights of audience. Following discussions with the Lord Chancellor's Advisory Committee on Legal Education (ACLEC), the Lord Chancellor, the judiciary and other stakeholders, specialist mandatory training and assessment for solicitors seeking higher rights was introduced. In 1992, the Higher Courts Qualification Regulations were approved to cover this training.

Following a review of the operation of the scheme in 1995, the Higher Courts Qualification Regulations 1998, intended to provide greater opportunity for solicitors to achieve higher rights of audience were introduced.

The Access to Justice Act 1999 introduced the concept that, on admission, all solicitors had full rights of audience in all courts in all proceedings, but required solicitors to comply with training requirements and rules laid down by the Law Society. This led to the implementation of the Higher Courts Qualification Regulations 2000, which amended existing routes to qualification and introduced some additional routes.

To date, around 4,700 solicitors have attained the higher rights qualification. This is a one-off qualification, with no re-accreditation or review of ongoing competence.

In the first quarter of 2007, we consulted on whether the current restrictions on higher rights of audience were justifiable in the interests of the public or the proper administration of justice. The majority of respondents (55%) thought that current restrictions on advocacy rights should not be retained.

Following the 2007 consultation, the SRA Board decided to repeal the current regulations, and to develop and implement a voluntary accreditation scheme.

The consultation sought feedback on the detail of the proposed regulatory approach and voluntary accreditation scheme.

Summary

Regulatory approach

The majority of respondents did not believe that the regulatory approach (ie the introduction of specific standards and a voluntary accreditation scheme) suggested in the consultation paper was sufficient to protect the public interest. Almost two thirds of respondents were of this opinion. There were strong views expressed that regulation “after the event” (i.e. action following complaints or regulatory breaches after they have happened) was not risk-based, proportionate or client-focused.

Respondents were concerned about potential lowering of standards in the absence of an initial, required, accreditation of competence. Several were of the view that the education and training of solicitors was not focused enough on advocacy to allow automatic higher rights on admission and that, if the proposal were to be implemented, then reform of many of the stages of education and training must follow.

Some did not see reliance on the Code of Conduct as a means of ensuring that solicitors did not act outside of their competence as sufficient. There were clear views that some individuals cannot objectively assess their own competence and that a voluntary scheme would be ignored.

There were also concerns about the high stakes of higher courts work (the potential for clients to lose their liberty), that public and judicial confidence in solicitor advocates may be affected if standards are lowered, that the proposals put solicitors’ benefit before clients’, and that there were no major issues with the current system.

Among respondents who were in favour of the proposed regulatory system, the Code of Conduct was seen as sufficient protection for clients and, it was believed, that solicitors would only take on work they felt they were adequately trained and experienced enough to do. However, there was still an admission within this group that the solicitor qualification system would need to be substantially revised to enhance advocacy training.

Competence standards

The majority of respondents (75%) thought that the draft standards adequately covered the knowledge and skills expected of a higher courts advocate. Some respondents identified gaps and they are listed on page 12.

A similar majority thought that the standards were set at the appropriate level – if anything, a little higher than might be required of a newly qualified barrister or entry level advocacy skills.

Just under two thirds of respondents were of the opinion that the standards met the SRA’s aims, and a similar proportion had the same positive view on the performance indicators that explained the standards.

Scope and structure of the new scheme

There was a less unanimous view of the proposed assessment process. A smaller majority, 60%, thought that the process was adequate to establish applicants' competence.

Period of accreditation

Opinion was split on revalidation – 53% of respondents thought that it was unnecessary, mainly because it would create inequality between solicitor advocates and barristers who have no such revalidation requirements. Those in favour saw that revalidation was in the public interest as the law and legal system constantly change and develop and that skills may not be maintained if not frequently used.

On the process for revalidation, those in favour thought that attention should focus on the law and procedure but take into account the amount of advocacy completed in a preceding period. Some did feel that it was legitimate to revalidate advocacy skills as well.

Current holders

There was clear agreement that existing holders of higher courts qualifications should be passported into any new scheme (83%) although less than half of respondents thought that they should be required to revalidate in due course.

Potential equality impact

Most respondents saw no potential impacts (66%) or did not answer the question (23%). Of those that did see an impact, they thought it would be mainly felt by younger advocates.

Profile of respondents

53 people or organisations responded to the consultation. 16 people completed the online survey hosted on the SRA website. 37 people responded by email or post.

43% of responses were made on an individual basis. 57% of responses were made on behalf of a firm or organisation.

fig 1

respondent's capacity

		no. in group	% of all responses
organisation	firm	8	15%
	representative body/group	7	13%
	academic institution	6	11%
	regulator	2	4%
	judiciary	1	2%
	local law society	3	6%
	LSC	1	2%
	OLSCC	1	2%
	CPS	1	2%
individual	solicitor	16	30%
	trainee	1	2%
	appeal judge	1	2%
	barrister	3	6%
	member of the public	1	2%
	academic	1	2%
total		53	

More solicitors completed the consultation questionnaire than any other type of respondent. All but one of the law firms were large, London-based organisations.

18 respondents wished to remain anonymous. Non-confidential responses were received from the following representative groups; the Law Society, the Legal Aid Practitioners Group, the General Council of the Bar, the City of London Law Society, the Criminal Bar Association, the Criminal Law Solicitors Association and the Junior Lawyers Division.

Other responses came from the Bar Standards Board, the Crown Prosecution Service, the Legal Services Commission, the Office of the Immigration Services Commissioner and the Office of the Legal Services Complaints Commissioner.

From the judiciary, a joint response was received from the Master of the Rolls and President of the Queens Bench Division. The Council of Her Majesty's Circuit Judges, as well as an appeal judge on an individual basis, also responded.

Regulatory approach

Question 1

Do you consider the regulatory approach suggested in paragraph 12 of the consultation paper sufficient to protect the public interest and ensure the standard of advocacy in the higher courts?

This was the most contentious area of the consultation paper, with the most substantive responses. They have been analysed in more depth as a result.

The majority – just under two thirds of respondents – believed that the proposed approach was not sufficient to protect the public interest and ensure the standard of higher court advocacy.

fig 2

Q1 is the suggested regulatory approach sufficient to protect the public interest and standards of higher courts advocacy?

	no.	% of all responses
yes	19	35.8%
no	34	64.2%
no answer	0	0%
total	53	

Against voluntary accreditation/mandatory standards approach

The 34 respondents who were not in favour of a voluntary scheme supported by changes to the Code of Conduct put forward a range of arguments to back up their view. Commonly held views are explored first – 'one-off' comments are summarised later.

- ***regulation after the event is not risk-based, proportionate or client-focused***

There were clear views expressed that with the proposed model 'maintenance of advocacy standards' would always be after the event and would depend on the speed by which judges fine, clients complain and the public sue incompetent advocates. ***"This is a derogation of the regulatory duty of the SRA to establish clear and mandatory foundation standards and will take solicitor advocacy back years."***

Another respondent went further, saying that, as the SRA had identified a risk of incompetent advocates appearing in higher courts, ***"we shouldn't be surprised if it happens***".

- ***proposals will lower standards and reduce reputation of profession***

There was anticipation of judicial criticism of incompetent performance which would not enhance public confidence in the profession as a whole or the justice system.

- ***matters are more serious and complex in the higher courts - 'light-touch' regulation will require revisions to pre- and post-qualification training***

There was frequent recognition that the training system for solicitors has minimal focus on advocacy, and that the skills should not be taken for granted for all solicitors: "***it is not just a question of standing up and talking***", the applicable rules cannot be learnt "***on the hoof.***" Respondents pointed out the crucial differences in the rules, responsibilities, knowledge, skills and style of advocacy in the crown court compared to the magistrates court.

It was seen that standards alone could not fill the gap between barrister and solicitor training. A judicial respondent was "***concerned***" that we were not committed to ensuring adequate pre-admission training and assessment on civil and criminal advocacy skills. Another suggested that the BSB, SRA and other advocacy regulators should co-operate to create a uniform standard of advocacy training – ***"It cannot be in the public interest for differential standards to apply to advocates dependent on which branch of the legal profession they belong."***

"These proposals should not, and in our view must not, be considered until the inadequacies of the LPC/PSC/work based learning (in the context of advocacy training) are remedied."

"If the training remains as it is then solicitors will always be behind the Bar in terms of the quality of their advocacy - this would, without doubt, affect the reputation of the solicitors' profession both with the judiciary and with the general public and would, therefore, be a retrograde step."

"Compulsory specific specialist training is necessary, for example, in examining witnesses as well as in the presentation of written and oral argument."

- ***individuals' assessment of their own abilities often does not match that of an objective reviewer***

One respondent was clear that people lacking the skills and judgement to appear competently in the Higher Courts would simply ignore a voluntary scheme altogether. Another saw that the proposals would rely heavily on the judgement of the individual solicitor in circumstances where no training has been provided to ensure that the solicitor is equipped to exercise the required judgement.

It was also mentioned that the financial pressures on legal aid firms meant that in some cases in-house solicitor advocates were instructed in favour of outside counsel even though this was not seen to be in the clients' interests.

- ***the right of audience is a reserved activity and the public should assume certification of competence***

It was noted that consumers cannot be assumed to have sufficient expertise or information to enable informed selection of advocates. Therefore, the market alone may not prevent poorer quality practitioners from operating.

- ***regulation of advocacy is as much about administration of justice as client protection***

A representative body respondent argued that for this reason the exercise of higher rights should be subject to effective regulatory control and not voluntary accreditation. There was a view that ***"the quality of justice will inevitably suffer if the quality of advocates is poor."***

- ***clients' liberty could be at risk***

One respondent believed that ***"you cannot experiment, to show competency, with a client's liberty in the criminal courts or … a child's safety in the family courts."*** Another suggested that it would be little consolation to an immigration client who has already been removed from the UK as a result of inadequate service from a solicitor advocate that the SRA may take action against their solicitor.

- ***may undermine public and judicial confidence in solicitor advocates***

There was a suggestion that the proposals may lead to trials not being dealt with efficiently and effectively - ***"the result being the potential for miscarriages of justice."*** One respondent clearly stated that accreditation should be mandatory to "***give the public confidence***" in solicitor higher court advocates. A firm stated that 'self accreditation' may lead to incompetent solicitor advocates appearing in court – "***as a result judges are likely to take a dim view of solicitor advocates generally and will tar them all - good and bad - with the same brush."***

- ***current requirements not seen as restrictive/onerous***

A respondent noted that the current regulations do impose restrictions on solicitors, but that ***"it is debatable whether these are unwarranted."*** Another said that they ***"do not believe the current system involves unwarranted restrictive practices or is unnecessarily complex or onerous."***

- ***proposals directly conflict with the good regulation principles and the SRA's purpose***
- ***conflicts with compulsory Magistrates Courts accreditation requirement [i.e. CLAS, at least for duty solicitor work]***
- ***the Bar has a more rigorous mandatory CPD system for newly-qualifieds than the SRA***
- ***proposals put solicitors' benefit before clients'***
- ***if all solicitors have automatic rights, there will be no benefit in obtaining expensive accreditation***
- ***unaccredited solicitors would not meet minimum Quality Assurance scheme for Advocates (crime) standards***
- ***solicitors under financial pressures may not be persuaded to undergo voluntary accreditation***

In favour of voluntary accreditation/mandatory standards approach

Of the 19 who were in favour of the new approach only 10 gave views to support their position. Some gave the view that amendments to the Code should provide enough protection. However, two respondents raised a concern that a solicitor might have the experience and competence to handle a matter in the conventional role of solicitor, but not as an advocate, and yet would be tempted to take on the advocacy. They went on to say that the Code of Conduct as currently drafted is not enough to prevent this. "***It should be stressed in the Code that solicitors should be satisfied that they are competent to act as advocates in the higher courts before undertaking this type of work***."

A view was expressed that there is no significant danger to the public interest because solicitors can be relied upon to undertake advocacy work only to the extent that they feel they are adequately trained and experienced. They went on to say "***If a solicitor performs as an advocate at a standard considered to be unacceptable, members of the judiciary can refer the matter to the SRA. This itself operates as a brake on a solicitor being overly ambitious in seeking to undertake work for which he has inadequate competence, training or experience.***"

Another respondent was of the view that the LPC offers enough advocacy training, perhaps with the addition of a criminal course and/or assessment. One organisation respondent admitted that they had additional management safeguards for their solicitor advocates, but saw that the proposals were in line with the Code where the onus is on the individual practitioner to ensure they are competent.

Five of the 10 comments conceded that if higher rights were automatic and a voluntary scheme was adopted, then solicitors' pre-qualification advocacy training should be enhanced. This echoed the position of some of those against the proposal.

Do the standards cover the expected knowledge and skills?

Question 2

Do the standards adequately cover the knowledge and skills that should be expected of a solicitor advocating in the higher courts? [Please explain with particular reference to any gaps in knowledge and skills and how these can be best addressed.]

fig 3

Q2 do the standards cover the knowledge/skills expected of a solicitor in the Higher Courts?

	no.	% of answers to this question	% of all responses
yes	40	76.9%	75.5%
no	12	23.1%	22.6%
no answer	1		1.9%
total	53		

The draft competence standards for solicitor higher courts advocates were annexed to the consultation paper and questions 2 to 5 requested feedback on various aspects of them.

The majority thought that the standards adequately covered the knowledge and skills expected of a higher courts advocate. 16 of these respondents gave supporting comments and nine identified gaps or areas for amendment which have been considered and incorporated by the SRA as appropriate.

Are the standards set at appropriate level?

Question 3

Do you think that the standards are set at the appropriate level of a competent solicitor higher courts advocate?

fig 4

Q3 are the standards set at appropriate level of competent solicitor Higher Courts advocate?

	no.	% of answers to this question	% of all responses
yes	40	80%	75%
no	10	20%	18.9%
no answer	3		6%
total	53		

The majority of respondents thought that the standards were set at the appropriate level. The supporting comments provided have been analysed below.

Yes – the standards are appropriate

The standards were seen to have covered most if not all of the requirements. A small number noted that if anything they were set quite high:

- ***"… particularly in comparison with some advocacy/practices I have observed from those at the bar"***
- ***"they reflect what would be required of an advocate in a trial. Many solicitor advocates only conduct bail applications, PCMHs, preliminary hearings, appeals against sentence, etc, and not trials."***
- ***"they seem to require rather more than might be required of someone qualifying as a barrister"***
- ***"they go beyond what strictly is required in relation to advocacy skills (e.g. requiring compliance with pre-action protocols and interviewing witnesses)"***
- ***"the standard is set higher than the entry level of non-contentious work that most advocates aim for. It also includes most of what CPS would expect its advocates to be able to do in the Crown Court."***

Some took the opportunity to go further than the question and consider other criteria – ***"solicitors wishing to undertake advocacy in the higher courts should first acquire a***

minimum number of hours experience of advocacy conducted in the lower courts". Others thought about how to assess – ***"… these are skills which are best judged by judiciary and other advocates in a real situation." "…it is the specifics of testing which will ensure that they are met."***

No – the standards are not appropriate

Supporting comments were also provided by the ten respondents who thought that the standards were not appropriate. It was asserted that learning on the job is insufficient as the courts do not give feedback on the advocate's performance in each case. ***"Given the proposed Quality Assurance of Advocates scheme is unlikely to be in operation until at least the autumn of 2009, reliance on a self critical approach is insufficient to ensure that problem areas to be improved are properly identified"***

Another respondent considered how our proposals might fit with the QAA scheme, and noted that while compliance to the standards would not be sufficient to assure competence across all levels of the QAA scheme, they could guarantee an element of passporting.

It was questioned whether accreditation or compliance to a standard is an appropriate badge for a solicitor high court advocate to practise across all civil categories and all courts, i.e. could a competent solicitor advocating in a immigration case be equally competent to advocate within a tax law environment?

The wording of the standards was also questioned – ***"references are made to solicitors 'being able' to carry out certain key functions, or 'being aware' of or 'familiar with' certain requirements. It is not clear how this will be evidenced in practice".*** It was also pointed out that the differences between magistrates' and Crown courts' evidential and advocacy standards were not set out.

Do the standards achieve the desired aims?

Question 4

Do the standards as drafted achieve the desired aims set out at paragraph 16 of the consultation paper?

fig 5

Q4 do the standards meet the stated aims?

	no.	% of answers to this question	% of all responses
yes	34	68%	64.2%
no	16	32%	30.2%
no answer	3		5.7%
total	53		

The majority of respondents thought that the standards met the SRA's aims, i.e. providing the public with clear expectations of solicitor advocates, a clear statement and guidance on those standards for solicitors, a template for assessment organisations and a tool for regulators to assess complaints or misconduct allegations. .

Yes – they do meet the stated aims

It was suggested that standards may not mean much to some members of the public – and that most users of legal services may be assisted by use of reserved titles, i.e. a solicitor, solicitor-advocate, (junior) barrister or QC.

Some saw difficulties in using the standards in adjudicating complaints against advocates – ***"the standards may be too narrow a set of criteria in many circumstances."***

The standards were seen as an important benchmark ***"of a kind that is not transparently available, for example, for barristers***." Another respondent did feel that they were set too high even for a 'green' Barrister ***"as many of them are obtained by experience often by the shadowing of experienced Counsel."***

Some of the standards were seen as subjective rather than objective, and of differing levels of rigour ***"… e.g. being able to structure an effective plea in mitigation is something one would expect a good practitioner in the lower courts to have mastered… 'Does not act in a manner which may adversely affect the client's case in the eyes of the jury' has no equivalent in respect of the impact of the civil practitioner on the judge."***

No – they do not meet the stated aims

The supporting comments explored several areas (such as the difference in advocacy knowledge and skills required in the higher and lower courts and the required depth of the standards). However, the clearest common view that emerged was on how the public might view, or make use of, the standards:

- ***"… the standards will not make clear to the general public what level of service can be reasonably expected from a competent high court advocate. It may be that the general public will be confused regarding the reason why there is lack of mandatory accreditation. If the intention is for those not wishing to practise in the higher courts not to embark on accreditation then the standard may as well be mandatory to all those that wish to."***

- ***"… the vast majority of users of legal services and the general public are not going to be interested in reading them unless and until it is too late i.e. when a significant problem has arisen."***

- ***"The standards are only intelligible to other practitioners and would be meaningless to the public."***

- ***"they will not be that useful for the majority of the general public (such as immigration clients) in helping them assess what they might reasonably expect from a competent higher court solicitor advocate… they are not written in a particularly client-friendly way and presuppose a degree of knowledge of the legal system that the average client is unlikely to possess. For example, clients may not be familiar with expressions such as "examination in chief", "skeleton arguments" or "pre-action protocols". Clients are also unlikely to be able to tell whether their solicitor understands the Civil or Criminal Procedure Rules or has a trial plan based on an understanding of the issues that may arise at and/or from a Plea or Directions Hearing."***

- A similar view was put forward in answer to Question 5 – ***"we do not believe that the public will understand these performance indicators as they are aimed at those with expertise in these fields, not the consumer who is less familiar with the concepts and the language."***

There were clear views, reiterating the respondents' stance to Question 1, that the standards should not be used retrospectively as ***"a tool to be used to assess performance in the event of a complaint or allegation of misconduct.' Instead the assessment should be made in advance of the exercise of the right."***

The absence of a regulatory framework that imposes the proposed standards was seen as travelling in the opposite direction from ***"the pre- and post-qualification compulsory advocacy training developed by the Bar Council, ACLEC, Inns of Court and Circuits in recent years, and more latterly by the BSB."***

Another respondent did not believe that the standards would achieve the desired aim if accreditation were optional – "***If accreditation is mandatory, subject to the points we have already made on the standards, we feel that the standards will achieve the desired aim."***

Are the performance indicators sufficient?

Question 5

Are the performance indicators appended to the standards (see Annex 1 of the consultation paper) sufficient explanation of the required competence?

fig 6

Q5 are the performance indicators sufficient explanation of the required competence?

	no.	% of answers to this question	% of all responses
yes	37	74%	69.8%
no	13	26%	24.5%
no answer	3		5.7%
total	53		

The majority of respondents thought that the performance indicators were sufficient explanation of the required competencies.

Yes – they are sufficient

In addition to the more technical feedback above, some of those respondents who saw the performance indicators as sufficient had some general critical comments to make.

Some saw the performance indicators as subjective. Others would have preferred to see the indicators expressly stated not to be exhaustive or determinative of any failure of performance, and that they should not be made unnecessarily prescriptive. SRA guidance notes on the proper application of the indicators were suggested. There was a similar request for clarification that the more detailed standards rather than the performance indicators should be referenced in the event of a complaint.

An indication of the standards or indicators that do not apply to prosecutor advocates was suggested. It was suggested that the indicators should stress that solicitor advocates should understand the distinction between permissible help for a witness and impermissible coaching.

No – they are not sufficient

Comments were again received that advocacy service users are unlikely to be able to use the indicators to objectively assess whether the advocates they instruct meet the required level of competence – ***"Judging advocates' competence should be left to the regulatory body to assess."*** One respondent pointed out that they are not written in client-friendly language – ***"the client is unlikely to understand what it means for the***

solicitor advocate to, for example, advise him or her in "autonomous decision-making", "assimilate (their) opponent's evidence or "follow pre-action protocols where relevant". Another said that they do not enable the client to measure eloquence, effectiveness and familiarity with the trial process.

Respondents said that the standards were too general, that they would include far more detail at each stage, and highlight practice-specific variations and 'actionables', to set out the skills/knowledge expected of advocates in Criminal, Civil and Family practice. An example of specificity in the indicators was given – ***'When describing the skills involved (e..g. 'sound witness handling') it is necessary also to identify what makes a piece of witness examination 'sound'. So the indicators should specify e.g. 'asks one fact per question' or 'asks only non-leading questions on disputed matters.'***

The frequent use of the word 'appropriate' was seen to leave scope for argument about what is and is not appropriate, making it unhelpful guidance for practitioners and a poor basis on which to take regulatory action.

The grammar used in the standards was criticised – ***"how does one assess an advocate's ability 'to deal appropriately with vulnerable witnesses'? The verbs used to describe these skills should be active verbs e.g. 'able to describe and apply the appropriate techniques for handling vulnerable witnesses.'"***

The requirement to present formal opinions, or offer advice, as required was noted as missing from both the performance standards and indicators in the evidence section.

Is the process adequate to establish competence?

Question 6

Is the proposed assessment process adequate to establish the competence of the applicant?

fig 7

Q6 is the assessment process adequate to establish applicants' competence?

	no.	% of individual respondents	% of all responses
yes	28	52.8%	59.6%
no	19	35.8%	40.4%
no answer	6	11%	12.8%
total	53		

A majority of respondents thought that the proposed assessment process would be adequate to establish applicants' competence, albeit a smaller majority than in the previous questions relating to the standards.

Yes – it is adequate

Three respondents reiterated the view that the scheme should be mandatory rather than voluntary. One such respondent made the point that if the MoJ / LSC require the assurance of accreditation before solicitors can be paid for higher courts work ***"why should private clients have any less of an assurance?"***

Two respondents suggested a fundamental change in approach - ***"thought should be given to undertaking the equivalent of a pupillage."***

There was a view that a voluntary system could generate confusion in the market place, where clients are left with a choice of accredited or non-accredited advocates: "***taken in the round, the proposals seem to leave too much to market forces and client choice".***

One respondent reasoned that to thoroughly assess applicants via written and oral tests as well as mock trials, the assessment process might last several days and be prohibitively expensive. Another had concerns over the timetable, in that potential Assessment Organisations would have to devise criteria and an assessment regime and have it approved by the SRA before January 2009.

There was recognition that simulated assessment can be an adequate means of assessment. But the counter to this was also put forward – that there ***'is no substitute for an advocate learning his craft in the time honoured way of starting with small***

cases in the lower courts and building experience." Also, the disadvantage of simulated assessment is that there may be instances whereby a solicitor is well prepared, or performs well in this environment but this is not replicated on a consistent basis before the courts.

A safeguard was suggested where targeted assessment from complaints about a particular solicitor and random assessment should sit alongside the assessment regime. Those that do not wish to be accredited but exercise higher rights would be monitored and required to undergo accreditation if complaints are received or there are concerns around performance.

In the comments provided under question 5, it was put forward that the performance indicators did not adequately spell out the differences in competence needed for civil and criminal courts. However, one answer to this question asked whether it is right in principle to distinguish between civil and criminal proceedings. The respondent saw the distinction as ***"unfortunate, given the intention to put solicitors and barristers on an equal footing."***

No – it is not adequate

A range of comments were given to support the views of those who thought the proposals would not establish applicants' competence. Demonstration of the advocate's skill before actual practitioners was viewed as essential by one respondent. This was echoed by another who thought that assessment in a simulated environment, however detailed and rigorous, could not fully replicate the learning experience of actual case conduct and court work. There were also requests for more clarity and detail. The current method of Higher Rights of Audience assessment was seen as adequate.

One respondent thought that the process should focus on written submissions as well as practical exercises to demonstrate that the candidate is competent in drafting complex legal documents as well as oral advocacy.

There was disagreement with the SRA's intention not to prescribe training requirements. "***This seems to… be an abrogation of their responsibility for ensuring that their accreditation process actually achieves that those who pass it have been assessed appropriately as meeting the standards that the SRA have laid down. Letting the market decide is a recipe for achieving the lowest common denominator."***

There was an opinion expressed that training providers see a significant minority of delegates who put themselves forwards for the current accreditation training with ***"no insight at all into the standards inherent in competent advocacy or the depth of knowledge or understanding required to conduct a case to trial without counsel. Further and more worryingly, they possess no insight at all into their own abilities in these regards - sometimes even after they have completed the course."***

As in the previous analysis, there was concern that the requirements of accreditation would result in an expensive process, therefore it would not be realistic to expect firms to voluntarily undertake training and assessments at substantial cost.

There was also another selection of strongly-held views against the underpinning voluntary accreditation proposal in this category of comments.

- ***"We reiterate our concerns that the proposed changes will lower standards. Our view is that there should be proper accreditation which is mandatory in the same way as at present."***

- ***"A voluntary accreditation process is inadequate. The people who are lacking the skills and judgement to appear competently in the Higher Courts will simply ignore the scheme altogether."***

- ***"If accreditation is voluntary, but higher rights are automatic, why would a solicitor put him/herself through the accreditation and training process at great expense, when he could simply opt out? The very people who are likely to need most training seem potentially most likely to opt out of the training and accreditation but exercise higher rights in any event… the consequences could potentially impact very severely on the reputation of the solicitors' profession."***

- ***"I would not support any move to change the current system."***

Should holders be revalidated every five years?

Question 7

Should holders of the higher courts accreditation be revalidated every five years?

fig 8

Q7 should HRA holders be revalidated every 5 years?

	no.	% of answers to this question	% of all responses
yes	24	46.2%	45.3%
no	28	53.8%	52.8%
no answer	1		1.9%
total	53		

Generally, opinion was more split on the issue of revalidation, with a small majority saying that it was not necessary.

No – holders should not be revalidated every five years

Even though the strength of argument was against revalidation, there was still acknowledgment that maintenance of experience, knowledge and skills was vital. However, it was seen as equally important that the requirements should not be ***"disproportionately onerous."***

By far the most common reason given for the objection to regular revalidation was essentially that barristers did not have to undergo anything similar. A revalidation requirement was therefore seen as less favourable treatment for solicitor advocates. Instead, solicitors should ***"confirm that they are still practising in the same field, and that relevant CPD requirements have been fulfilled."*** It was also seen as potentially challengeable unless clear public-interest reasons were established.

A suggestion was made to toughen, and tailor, CPD requirements for HCAs in order to ensure knowledge of current law and procedure. This was seen as a simpler and more cost effective means of ensuring competence. The market was seen as a decisive tool in establishing the level of competence the advocate has reached, but underpinned by the individual practitioner's view of their own competence and the Code of Conduct.

Another respondent highlighted the difficulty in imposing revalidation on those who voluntarily accredit. ***"If the implicit intention is that solicitor HCAs ought to seek accreditation (and validation) then the system should be mandatory for all."***

It was also noted that courts are not the only places where solicitors can gain advocacy experience. Tribunals and inquests can require a high level of advocacy competence, often against barristers.

Some respondents asked where the evidence is to support the assumption that someone who has advocacy skills can lose them.

Yes - holders should be revalidated every five years

Respondents in this group were of the opinion that revalidation at regular intervals is in the public interest, and that it is consistent with the focus of the proposed assessment for initial accreditation. The difference in the environments of chambers and law firms was highlighted, as the scheme would not impose ***"the research methodologies adopted by Barristers in keeping themselves abreast of changes to their practise areas."***

It was seen that the law and the legal system is constantly developing, making it vital that the SRA should ensure that the advocate's knowledge and skills, both in theory and practical experience, develops as well. Regular re-assessment could potentially stimulate the advocate's need to undergo refresher training. Revalidation was also seen as a useful way of 'weeding-out' people who did not exercise their rights regularly – ***"if one does not appear in court for a long period it is easy to lose the relevant skills."***

Taking this point a step further, one person thought that revalidation should depend on the regularity of higher courts practice, so in some circumstances it would not be necessary at all, e.g. where the solicitor conducts higher courts advocacy very regularly.

One respondent suggested that regular revalidation, with the revalidation process becoming more difficult at each stage, would enable differing levels of accreditation to be introduced, ***"akin to the distinction in ability and experience evident in appointment to the Attorney-General's A, B and C panels."***

Some respondents recognised that the cost could be prohibitive. At the same time, some put forward suggestions for more cost and time effective methods such as online questionnaires on procedure, or multiple-choice papers, to minimise these impacts.

It was also seen as appropriate that there should be consistency across SRA accreditation schemes. However it was noted that re-accreditation of Criminal Litigation Accreditation Scheme members had not happened, and so ***"is it realistic - or fair - to suggest [higher rights revalidation] will happen?"***

Another proposal was put forward – ***"regular revalidation should be recognised by the Indemnity Insurance providers in providing a reduction of the Premiums, to encourage good practice and maintenance of the public in the profession as a whole."***

Question 8

If you answered "yes" to Question 7 above, please provide us with any views you may have on the proposed process.

There was broad agreement that attention should focus on areas that may change, i.e. law and procedure. It was also said that the purpose of accreditation is to badge advocacy, so it is legitimate to monitor the advocate's use/development of their skills. The countering view was also made, that advocacy skills are best regulated by 'market forces'.

The view was that revalidation should also take into account an individual's experience and frequency of advocating in the higher courts in the preceding five years. Two respondents thought that continuing practice alone was sufficient evidence.

It was suggested that the scheme should encourage constant feedback from judges to help ensure a balanced view of solicitors' performance generally as well as specific feedback on individuals.

It was suggested that revalidation should be more rigorous and searching than the initial accreditation process, due to holders having gained considerable higher courts advocacy experience following initial accreditation.

Some suggestions on the method for revalidation were made. These included:

- rigorous practical assessments
- assessment of their performance in court by members of the judiciary
- actual assessment of the performance in court by suitably qualified SRA assessors
- online exams
- a portfolio of cases
- a short written test (of an hour's duration)
- multiple choice
- compulsory training courses for those who fail the assessment
- accreditation under the QAA scheme.

One respondent strongly disagreed with the proposal to insist upon revalidation for those who qualified through the exemption route, as the majority were likely to be fully qualified barristers. ***"It seems preposterous to suggest that the exemption route advocates have not been assessed or that they are less well qualified than others."***

The Judicial Studies Board was suggested as an appropriate authority for revalidation.

Some people who answered ‘no’ to question 7 also gave views on the process.

One respondent thought that revalidation should assess skills as well as knowledge. Someone else agreed that skills should not be reassessed but thought that it would ***“not harm to ensure that the technical and legal knowledge remains up to date.”***

The argument for advocates who can demonstrate a certain level or frequency of practice to be exempt from revalidation was reiterated. Only advocates who do not meet minimum levels of practice over a period would face revalidation.

It was suggested that we should consider requiring evidence of continuing advocacy from those who represent lay as opposed to professional clients. This view is based on the opinion that the professional client would be better able to judge the adequacy of representation and will determine, accordingly, whether to continue to instruct the advocate.

Should solicitors holding a current HRQ be passported onto a new scheme?

Question 9

Should solicitors holding a higher courts qualification under the current regulations be passported onto the new scheme?

fig 9

Q9 should solicitors with existing HRA qualifications be passported onto a new scheme?

	no.	% of answers to this question	% of all responses
yes	44	88%	83%
no	6	12%	11.3%
no answer/unsure	3		5.7%
total	53		

The majority view was that solicitors with current Higher Courts qualifications should be passported onto a new scheme. No room for comments was provided on the form, but a very small number of respondents gave reasons for their answers.

Yes – existing holders should be passported

- ***"Those who have already put time and resources into demonstrating competence in this area should be presumed to have met the standards of the new scheme... We think that it is important that the voluntary accreditation scheme should be recognised as meeting the needs of the CPS and LSC. Duplication of effort and cost should be avoided if at all possible."***
- ***"… the new scheme should include only those that meet current HCA standards. Further, a continuing effort should be made to improve those standards."***
- ***"… if obtained within the last 5 years."***

Unsure

'It is difficult to see what exactly holders would be passported into… there might be a disbenefit in passporting if this 'deemed' accreditation then leads to a requirement for periodic revalidation that new advocates who choose not to seek accreditation would avoid."

Should passported advocates have to revalidate?

Question 10

Should passported advocates be required to complete the revalidation process in due course?

fig 10

Q10 should passported advocates be required to revalidate in due course?

	no.	% of answers to this question	% of all responses
yes	23	46.9%	43.4%
no	26	53.1%	49.1%
no answer	4		7.5%
total	53		

As with the answer to question 7 (on periodic revalidation for all members of a new scheme), opinion was more evenly split, with a small majority of respondents against revalidation for passported solicitors.

No – passported advocates should not be required to revalidate

Some respondents repeated their stance that revalidation is unnecessary, unfair and inappropriate. Others said that revalidating passported solicitors would devalue the time and effort already spent by them in obtaining their rights if they were required to reaccredit, and that it would put barristers and solicitors on an unequal footing.

Some thought that as all solicitors who currently exercise rights of audience in the higher courts would continue to do so regardless of accreditation, there will be no need for passporting. ***"Further, unless they undergo some form of assessment prior to accreditation, it is not possible to be sure that all accredited solicitor advocates will meet the new standards."***

There was a note of caution within these responses, where some recognised the risk in automatic rights for all solicitors – they wondered whether solicitors ***"would bother to revalidate at all but simply continue to exercise higher rights, albeit without accreditation."***

Two respondents thought that revalidation should depend on the route through which the passported solicitor originally gained their qualification – however, they disagreed on which routes would gain this exemption. The first thought that they should only have to revalidate on the exemption route. The second thought that accreditation and exemption route advocates should have to revalidate. The reason given was that

"those who qualified via the development route had to undergo an extensive training programme and advocacy portfolio."

CPD was seen by many as enough to guarantee ongoing competence. Finally, a respondent noted that revalidation must apply to everyone in the new scheme, otherwise it would be inconsistent.

One respondent strongly disagreed that passported HCAs should be subjected to revalidation because they qualified via the exemption route. Their argument was that the qualification was awarded ***"on merit taking in to account both experience before the higher courts and judicial references."*** However, they did recognise that under the proposals their ability to appear before the higher courts would not be affected.

Yes – passported advocates should be required to revalidate

The common view was that no distinctions should be drawn between solicitors accredited through the current and the replacement schemes. Revalidation for all would 'even the playing field' for the profession. There was recognition that solicitors with accreditation or exemption routes to HRA have never had their advocacy skills tested. ***"Re-testing would ensure the standards are upheld."***

It was asked whether the SRA could vary the position that the existing qualification is valid for life. Others noted that it would be useful for passported advocates to have a refresher/update.

It was put forward that the priority in any re-accreditation timetable should be those who have achieved the qualification by the exemption route. It was also suggested that the revalidation process should begin within 12 months of the new scheme to limit the possibility of any shortcomings in knowledge affecting clients.

Some gave their agreement on the basis that the proposed revalidation would be a simple straightforward process.

The situation of people who are part-way through the current development route, (e.g. those who have passed the advocacy and academic assessments but have not yet completed the mentoring year) was discussed – there was a suggestion that they should be exempted from all or part of the new assessment to reflect the work already done.

Are there any potential diversity impacts?

Question 11

Do you consider that the proposed regulatory approach, competence standards, and scope and structure of the new accreditation scheme have potential positive or adverse impacts in the following areas?

fig 11

Q11 will the new scheme have positive or negative impacts in the following equality categories?

	no impact	positive impact	negative impact	no view
age	52.8%	13.2%	13.2%	20.8%
gender	66%	3.8%	7.5%	22.6%
race	67.9%	3.8%	5.7%	22.6%
disability	67.9%	5.7%	1.9%	24.5%
sexual orientation	71.7%	3.8%	1.9%	22.6%
religion or belief	69.8%	3.8%	3.8%	22.6%

The majority of respondents either indicated that no impacts would be felt in the stated diversity categories, or did not answer this question. Some people were confused about the purpose of the question, others simply held no view or felt that the proposed scheme appeared to be non-discriminatory.

Of those that did see an impact, age was most frequently suggested.

Age – supporting comments

Those who saw a negative impact within the age category held this view because:

- senior existing solicitor advocates may be unlikely to wish to go through further bureaucratic hoops to continue doing what they have been doing for years
- additional requirements on younger practitioners could be imposed if there was no requirement for passported, therefore senior, advocates to undergo re-accreditation
- newly qualified solicitors who have completed the current training requirement could be under prepared and pressured into attending a hearing they have not been trained to handle. ***"There will be a conflict between the employer's assumption that the training prepares a NQ for all of the day one rights that a solicitor has and the NQs need to keep a job and progress."***

- the LPC barely prepares a newly qualified solicitor for a hearing in the magistrates' court or the county court. It would be dangerous to allow it to give automatic rights in all courts in its current form.

- experienced practitioners may read the standards and realise that they possess the necessary knowledge and skills and so take up voluntary accreditation, where they might not necessarily have formed this view where accreditation was compulsory.

Those who saw a positive impact within the age category thought that the proposals would allow younger solicitors a chance to undertake higher courts advocacy who may have been deterred by the cost of qualification.

Gender – supporting comments

There was a concern expressed that working mothers may find it difficult to fit in revalidation between their careers and lives as parents.

Another comment was made on routes to accreditation. It was noted that the majority of family practitioners are female, and that the lack of dedicated family qualification route could disadvantage female practitioners.

The Law Society gave a detailed response based on solicitor advocates demographic data collected for the QAA scheme. Compared to the make up of the profession as a baseline, they noted that there were disproportionately more male solicitor advocates than female (70% of advocates were male, but 57% of private practice in 2007 were male). The suggestion was that the current scheme might present barriers to women.

Race – supporting comments

The Law Society's response also touched upon ethnicity. They mentioned differentials in earnings between white and BME solicitors and barristers, but their figures indicated that the proportions of private practice solicitors and solicitor advocates were about even. They again urged the SRA to explore the current barriers to accreditation (including accreditation costs, and the potential difficulties in gaining experience needed for accreditation in small firms where BME practitioners are more likely to work) and ensure the proposed scheme removes them.

Disability– supporting comments

One person said that disabled solicitors are probably not well represented in higher court advocacy. However, they also said that this depends largely on their disability and the access to most courts, not the current accreditation scheme or the proposals.

No supporting comments were given for the few indications that there might be an impact within sexual orientation/religion or belief categories.

Do you hold a higher rights qualification?

Question 12

Do you hold a higher courts qualification awarded under the current or previous Regulations?

fig 11

Q10 do you have a HRA qualification?

	no.	% of individuals
yes - civil	3	13%
yes - criminal	4	17.4%
yes - all proceedings	5	21.7%
no	11	47.8%
total	23	

30 responses came from organisations, so they were discounted from this analysis. Just over half of the individual respondents had higher courts qualifications.

List of respondents

Organisations

Allen & Overy LLP
Altior Consulting & Training Ltd
Bar Standards Board
Cambridgeshire & District Law Society
Cardiff Law School
City Law School, City University London
City of London Law Society
Clifford Chance
Central Law Training
College of Law's Legal Services Policy Institute
College of Law's Professional Development Division
Council of Her Majesty's Circuit Judges
Criminal Bar Association
Criminal Law Solicitors Association
Crown Prosecution Service
General Council of the Bar
Herbert Smith
Irwin Mitchell
Junior Lawyers Division
The Law Society
Legal Aid Practitioners Group
Legal Services Commission
Lovells LLP
Master of the Rolls and the President of the Queens Bench Division (joint response)
Nunn Rickard Solicitor Advocates
Office of the Immigration Services Commissioner
Office of the Legal Services Complaints Commissioner

Three organisations indicated that their names should not be published.

Individuals

Alan Fisher
Andrew Fouracre
Christopher Rennie-Smith
Jane Phillips
Jo Cooper
Mark Humphries
Robert Boothroyd
Rodney Noon

Fifteen individuals indicated that their names should not be published.