

Solicitor higher court advocates Proposal for mandatory re-accreditation

Consultation paper

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Introduction

1. The Solicitors Regulation Authority (SRA) regulates the standards of solicitors in England and Wales. This consultation paper seeks views on the way in which the SRA proposes to regulate solicitors who appear in higher courts proceedings.¹
2. In developing the higher courts qualification scheme, the SRA's key objectives are to
 - provide the public and clients with confidence in the standard of solicitor higher court advocates,
 - provide assurances that appropriate standards are being met and maintained, and
 - ensure that any regulatory requirements are open, fair, transparent and proportionate.
3. Following two earlier consultations on the regulation of solicitors and registered European lawyers (REs) wishing to exercise rights of audience in the higher courts, the SRA has revised its proposals and is seeking further views on the issue of re-accreditation.
4. This consultation will end on 16 April 2009. We will publish a summary of responses and, where respondents have given consent, the names of organisations and individuals.

Background

5. We have already conducted two consultations on the future regulation of solicitors with higher rights of audience:
 - (a) The first consultation in early 2007 sought views on the current restrictions imposed by the Higher Courts Qualification Regulations 2000. The discussion paper and an analysis of responses can be found on our website.² A large number of respondents, including those representing large groups of the profession, favoured removal of current restrictions with full rights of audience being automatic for all solicitors from the point of admission.
 - (b) The second consultation, in early 2008, sought views on our proposals for establishing formal standards for solicitor higher court advocates, changes to the Code of Conduct to implement those standards and the operation of a voluntary accreditation scheme. The consultation paper and an analysis of responses can be found on our website.³ A large number of respondents were of the view that the proposal to move to voluntary accreditation was not sufficient to protect the public interest in general and clients in particular, neither were the proposals

¹ In this paper "higher courts proceedings" means those proceedings before the House of Lords, Court of Appeal, Crown Court and the High Court in which a solicitor would not have had an automatic right of audience immediately prior to 7 December 1989.

² See www.sra.org.uk/sra/consultations/102.article#download

³ See www.sra.org.uk/sra/consultations/801.article#download

in the interests of the efficient administration of justice or the rule of law. Opinion on re-accreditation in the context of a voluntary accreditation scheme for solicitor higher court advocates was divided.

6. The background to solicitors' higher rights of audience and the various regulations is set out in the previous consultation papers and also in papers considered by the SRA Board on 4 September 2008⁴ and 16 October 2008⁵.

A mandatory accreditation scheme

7. Following the second consultation, the SRA Board decided to retain a mandatory accreditation requirement for solicitors and RELs wishing to exercise rights of audience in the higher courts. The Board also agreed draft new regulations which state that
 - all solicitors and RELs seeking to exercise rights of audience in the higher courts must successfully complete an assessment of advocacy skills relevant to the court in which they seek to appear,
 - solicitors and RELs awarded a higher court qualification under the new regime would be required to be re-accredited every five years,
 - holders of a higher courts qualification granted under previous regulations should be passported onto the new scheme but would be required to be re-accredited under arrangements to be published by the SRA,
 - the current requirement for experience evidenced by a portfolio will be removed, and
 - the requirements for mandatory pre-assessment training will be removed.
8. This consultation seeks views specifically on the requirement that all holders of the higher courts qualification should be re-accredited periodically and that holders of the current qualification should be required to be assessed under the new scheme within a specified period.

Re-accreditation

9. The current higher court qualification is valid for the professional life of the holder. A large number of those who responded to the first consultation in January 2007, however, felt that the qualification should be periodically reviewed.
10. The second consultation sought further views on this issue but was framed specifically in the context of a voluntary accreditation scheme with re-accreditation being a requirement only for those who chose to be accredited. In this context, opinion was split on whether holders of the qualification should

⁴ See

www.lawsociety.org.uk/aboutlawsociety/how/committees/view=viewmeeting.law?MEETINGID=2267&COMMITTEEID=10754.

⁵ See

www.lawsociety.org.uk/aboutlawsociety/how/committees/view=viewmeeting.law?MEETINGID=2268&COMMITTEEID=10754.

be re-accredited every five years. Respondents who did not agree with the proposal to re-accredit felt that it would be disproportionately onerous.

11. Respondents who supported the introduction of re-accreditation suggested that re-accreditation would stimulate the advocate to undergo refresher training and would have the advantage of encouraging good performance and demonstrating that standards are maintained. A large number of respondents, whether or not they supported re-accreditation, suggested that holders of the qualification should be required to undertake regular continuing professional development (CPD) in advocacy and that this could form the basis of re-accreditation.
12. The SRA Board favours an approach based on mandatory re-accreditation of all holders of the qualification every five years. It considers that this approach is the most effective way for the SRA to achieve its regulatory objectives in relation to the scheme. This approach is also supported by evidence in academic literature⁶ from other fields that there is a direct relationship between volume of work and rate of skills attrition. Where solicitors' rights of audience are only intermittently rehearsed, this may present a significant risk which can be mitigated by periodic re-accreditation. Where the rights of audience are regularly exercised, the re-accreditation will provide an assurance to the SRA and its stakeholders of the advocate's continued competence. The Board is nonetheless keen to seek views on the issue of re-accreditation and explores a range of options within this paper to facilitate debate.

Option 1 – Re-accreditation for all

13.
 - (a) The SRA is committed to protecting the public and client interest and one of its key objectives in achieving this is to “set standards for entry to the profession, professional behaviours and continuing professional development so as to maintain and enhance competence and performance...”. The simplest and most effective way for the SRA to ensure that solicitors holding the higher courts qualification continue to meet the standards set by the scheme would be to require all qualification holders to undertake a re-accreditation of their advocacy skills on a periodic basis (e.g. every five years).
 - (b) Historically, there has been a perception that the quality of advocacy undertaken by solicitor higher court advocates is not as good as that of their barrister counterparts although there is no empirical evidence to support this. Periodic re-accreditation for all solicitors holding the qualification might enhance the performance or reputation of solicitor advocates and go some way to alleviating concerns in this area. Whilst re-accreditation alone might not affect perceptions of

⁶ Ali, J., Howard, M., Williams, J., Skills attrition of advanced trauma life support acquired skills affected by trauma patient volume? The American Journal of Surgery, Volume 183, Number 2, February 2002, pp. 142-145(4); Ali, Jameel, Howard, Mary, Williams, J. Ivan, Do factors other than trauma volume affect attrition of ATLS-acquired skills? The Journal of trauma, injury, infection, and critical care. 2003, vol. 54, no. 5, pp. 835-841. There is also a large literature demonstrating the relationship between skills attrition and usage in language.

performance, it would, however, confirm performance and enhance it where necessary. Re-accreditation might also sustain public and client confidence in the scheme. Clients who might not be familiar with the technical aspects of the higher rights of audience scheme but who knew they were being represented by an accredited advocate might reasonably expect the regulator to take steps to ensure that accredited advocates maintain their competence.

- (c) It is suggested, therefore, that periodic re-accreditation for all would
- sustain public and client confidence in the scheme and in solicitor higher court advocates,
 - provide an assurance to the regulator that standards are being maintained,
 - improve performance where that might be required, and
 - enhance the reputation of solicitor advocates with the qualification.
- (d) In the second consultation, we proposed that current holders of the higher courts qualification would be initially transferred to the new scheme without the need to complete assessments. However, all passported members would be required to be reassessed within a certain period and to be re-accredited periodically thereafter. Again, this question was asked in the context of a voluntary scheme and opinion was divided.
- (e) There are currently in the region of 4,500 solicitors with a higher courts qualification. The majority of these were awarded the qualification under the exemption route, which is based on an applicant's experience rather than on an assessment of advocacy skills. It is not feasible for all these individuals to be re-accredited under the new scheme as soon as it comes into operation. If mandatory re-accreditation is introduced for all holders of the qualification for the reasons set out in paragraph 13(c), it follows that all passported solicitors should be required to undertake an advocacy assessment within a period to be specified, and to be re-accredited on a periodic basis thereafter.

Option 2 – Targeted re-accreditation

14.

- (a) Although periodic re-accreditation is the simplest and most effective way for the SRA to ensure that standards are being maintained and that public/client confidence is supported, it might be argued that periodic reassessment of all holders of the qualification is not a proportionate to the risk. In the second consultation, we suggested that advocacy skills, once assessed, would remain with the individual and might not normally need to be reassessed, except in exceptional circumstances. Exceptional circumstances might include where an

advocate had not practised and applied the skills on a recent and regular basis.

- (b) If this argument is accepted, it might be more appropriate to require only those holders of the qualification who have not used and applied their skills on a regular basis to be reassessed. The evidence on skills attrition referred to in [paragraph 12](#) might support the argument for targeted re-accreditation. However, the evidence suggests that the rate of attrition of skills is also related to the standard of initial skills acquisition and deliberate attempts to maintain them. The SRA would need to be sure of the initial standard of skills, therefore, and attempts to maintain them. This approach would be facilitated by the introduction of a mandatory advocacy CPD requirement for all solicitors holding the rights of audience qualification.
- (c) There are practical difficulties associated with a targeted approach based on frequency of advocacy and CPD, however. As well as the challenge of keeping accurate and accessible records, it is likely to be difficult to assess how much advocacy or how much CPD would be appropriate for skills to be retained. In the absence of any empirical or academic evidence to support such a decision, any approach developed along these lines would most likely be based on a specified, but essentially arbitrary minimum amount of advocacy and advocacy CPD in any period. Such an approach would also need to be based on self-certification by those holding the qualification due to the time and cost involved in collecting independent evidence from third parties, though self-certification could be supported by random checks on the accuracy of reporting. This approach could be seen as more proportionate, but also more bureaucratic. There is also a risk that an approach based on self-certification would reduce the effectiveness of the re-accreditation process in ensuring standards and consequently reduce confidence in the scheme and the reputation of higher court advocates.
- (d) If a targeted approach to re-accreditation is adopted, it is suggested that all passported holders of the qualification who have not passed an advocacy assessment (i.e. those who qualified via the exemption route) should still be required to undertake an advocacy assessment within a specified period given that attrition is related to the quality of the initial acquisition of the skill. Once they have passed the initial assessment, they would be subject to the same targeted re-accreditation requirements as all other qualification holders. This would provide the regulator with an assurance that all holders of the qualification have been assessed against the standards of the scheme and would be even more important if a targeted approach to re-accreditation is adopted.

Option 3 – No re-accreditation

15.

- (a) The current higher courts qualification is a qualification for life, and holders are not re-accredited. We do not have any evidence to suggest that advocates on the scheme do not continue to meet the standards for the scheme, other than the anecdotal evidence which suggests that there is a perception that solicitor higher court advocates are not as competent as their barrister counterparts. Similarly, however, we do not have any evidence to provide us or the public with assurances that standards are being maintained. If it were accepted that the regulator could have confidence that advocacy skills do not diminish once developed and assessed, even if they are not regularly applied, re-accreditation may be an unnecessary requirement. The literature in other fields suggests that such confidence might be misplaced, however.
- (b) If it is agreed that there should be no re-accreditation requirement for holders of the higher courts qualification, it is suggested that all passported holders of the qualification who have not passed an advocacy assessment (i.e. those who qualified via the exemption route) should still be required to undertake an advocacy assessment within a specified period. This would provide the regulator with an assurance that all holders of the qualification have been assessed against the standards of the scheme and would be even more important if no re-accreditation requirement is imposed.

Consultation questions

Question 1

Do you think that clients who are represented by an accredited advocate would reasonably expect the regulator to assess their skills on a periodic basis?

Question 2

In [paragraph 2](#), we suggested that the SRA's key objectives in the development of the higher courts qualification scheme are to

- provide the public and clients with confidence in the standard of solicitor higher court advocates,
 - provide assurances that appropriate standards are being met and maintained, and
 - ensure that any regulatory requirements are open, fair, transparent and proportionate.
- (a) Which of the options presented do you think most effectively meets all of these objectives? "Option 1 – Re-accreditation for all," "Option 2 – Targeted re-accreditation," or "Option 3 – No re-accreditation"?

- (b) Do you think there are any equality and diversity implications with any or all of these options? If you answer “yes”, please outline what you believe the equality and diversity implications to be.

Question 3

If you believe that re-accreditation should be mandatory for all holders of the higher courts qualification, should passported members still be required to undertake an advocacy assessment within a specified period before they are due for re-accreditation?

Question 4

- (a) If you believe that re-accreditation should be targeted, do you think that the SRA should require only those advocates who have not regularly practised and applied their skills to be re-accredited?
- (b) Should this approach be accompanied by a mandatory and targeted advocacy CPD requirement?
- (c) Do you have any suggestions for overcoming the practical difficulties with a targeted approach detailed in [paragraph 14](#)?
- (d) If a targeted approach to re-accreditation is adopted, should all passported members who have not previously undertaken an advocacy assessment be required to do so within a specified period?

Question 5

If you do not believe that re-accreditation is necessary at all, should passported members who have not previously undertaken an advocacy assessment still be required to do so within a specified period?

Next steps

The consultation will run for 12 weeks, until 16 April 2009, and the responses will be published on the SRA website.

When the consultation responses have been considered, the proposals for the new regulations for solicitor higher court advocates will be finalised, and an application will be made to the Secretary of State for approval and the repeal of the current regulations.

The current regulations have been extended in full until 31 December 2009 or the coming into force of new regulations, whichever is the earlier. It should, however, be remembered that the implementation of new regulations and the repeal of previous regulations will depend on the completion of the approval process under the Courts and Legal Services Act 1990, as amended.

How to respond

To find out how to respond to this consultation, please visit our website.

- Go to www.consultations.sra.org.uk.
- Select **Solicitor higher court advocates – re-accreditation**.
- Click **How to respond**.
- Alternatively, go to www.sra.org.uk/sra/consultations/1906.article#respond.

Submission deadline

The deadline for the submission of responses is 16 April 2009.