



Analysis of responses to the higher rights of audience consultation

Education and Training Unit

1 June 2009

Introduction

The purpose of this consultation was to seek views on the proposal to require all holders of the mandatory rights of audience qualification to be reaccredited on a periodic basis.

Background

The Higher Rights Qualification was introduced by the Courts and Legal Services Act 1990 to allow solicitors to achieve rights of audience in the higher courts. In 1992, the Higher Courts Qualification Regulations were approved setting out requirements for training to obtain the qualification.

In 1999, the Access to Justice Act 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.

To date, 4995 solicitors have attained the higher rights qualification. This is a one-off qualification, with no reaccreditation or review of ongoing competence which remains valid for the professional life of the holder.

Why we consulted

We have already conducted two consultations on the future regulation of solicitors with higher rights of audience:

The first consultation in early 2007 sought views on the current restrictions imposed by the Higher Courts Qualification Regulations 2000. It was published on the SRA website for a period of 12 weeks. The discussion paper and an analysis of responses can be found on our website at www.sra.org.uk/sra/consultations/102.article

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 is available on our website at www.sra.org.uk/sra/consultations/801.article.

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 new regulations which stated 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 reaccredit every 5 years
- holders of a higher courts qualification granted under previous regulations should be passported onto the new scheme, they would however be required to reaccredit under arrangements to be published by the SRA
- the current requirement for experience evidenced by a portfolio would be removed

- the requirements for mandatory pre-assessment training would be removed.

The Board decided to issue a further consultation on the specific issue of reaccreditation in January 2009. The final consultation was intended to seek views on the issue of reaccreditation in the context of a mandatory scheme and seek views on the equality and diversity impact of such proposals. A final decision on the new scheme was deferred to enable the Board to take into account responses to the third consultation.

The Consultation Exercise

The consultation, in the form of an online questionnaire, was available on the SRA website for three months from 16 January 2009, a copy is available at <http://www.sra.org.uk/securedownload/file/1907>.

Respondents were requested to consider which of three options on the question of reaccreditation most effectively met the SRA objectives in regulating solicitors holding the higher rights of audience qualification. The options were:

- Reaccreditation for all holders of the qualification
- Targeted reaccreditation
- No reaccreditation at all

Respondents were asked:

- Whether clients would expect the regulator to assess higher court advocacy skills on an ongoing basis
- For views on the requirement that all holders of the higher courts qualification should be periodically reaccredited
- For views on whether passported holders of the current qualification should be required to undertake an initial assessment under the current scheme and/or be subject to assessment under the new scheme within a specified period prior to the reaccreditation process
- To consider possible methods of targeting reaccreditation
- To consider any equality and diversity implications

Responses

An email inviting responses was sent to over 1,000 people who subscribed to updates on training issues and also to all holders of higher courts qualifications (for which we had an email address). Key stakeholders were directly invited to respond. The consultation was sent to approximately 6,000 respondents in total. It was also publicised on the SRA website and in the Gazette.

There were 162 responses to the consultation. The respondents included the Law Society (TLS), the judiciary, Solicitors Association of Higher Court Advocates (SAHCA), Master of the Rolls, training organisations and a range of firms and individuals. A full list of those who responded can be found at Annex A.

Executive summary

Overall, respondents did not support the introduction of a mandatory reaccreditation requirement. Arguments against a reaccreditation requirement included the risk of creating a two tier system, the impact on solicitors' ability to compete effectively with barristers and the risk that solicitor advocates would be seen as second class citizens. Some respondents did favour mandatory reaccreditation suggesting in particular that it would place solicitors at an advantage compared to barristers and would improve perceptions of solicitor advocates.

Opinion was divided amongst those who responded to questions about whether passported solicitors should be required to undertake an advocacy assessment within a specified period of time. Those in favour suggested that it was necessary because some passported members had not undertaken an assessment of their advocacy skills and those against suggested that the experience of passported solicitors should be sufficient to ensure standards without the need for assessment.

Opinion was also divided on the issue of targeted reaccreditation and the introduction of a mandatory CPD requirement. In relation to the option of targeted reaccreditation, respondents highlighted the practical difficulties associated with implementing such an approach. Respondents were particularly concerned about the potential impact of targeted reaccreditation on certain equality groups.

The SRA Board considered the summary of responses at its meeting on 23 April 2009. The Board particularly welcomed the suggestion of the development of a common approach to advocacy standards put forward by the Bar Standards Board. In view of this, the SRA Board decided that:

- It remained committed to the principle of periodic reaccreditation in accreditation schemes generally, in the interests of consumers
- It made sense to pursue the question of periodic reaccreditation of higher rights in collaboration with the Bar Standards Board with a view to achieving a common approach to securing advocacy standards across the legal profession
- It would defer any action on reaccreditation of higher rights of audience until the outcome of these discussions was known

Key findings

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?

Yes/No

Response	Count	Percentage	Including stakeholders such as...
Yes	23	15%	Legal Services Commission, Criminal Bar Association, City University, Master of the Rolls
No	125	82%	Law Society, City of London Law Society, Crown Prosecution Service, Clifford Chance, Newcastle Law Society
No answer	5	3%	
Total	153		

Overall, respondents felt that clients would not expect an accredited solicitor advocate to be recredited on a periodic basis. Instead they felt that clients would expect the regulator to have in place an initial qualification standard which was sufficiently rigorous to ensure the competence of the person they approved without the need for recreditation.

Question 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
- Ensure that any regulatory requirements are open, fair, transparent and proportionate

2a) Which of the options presented do you think most effectively meets all of these objectives?

Option 1 – recreditation for all

Option 2 – targeted recreditation

Option 3 – no recreditation

Response	Count	%	Including stakeholders such as...
Option 1 – Reaccreditation for all	13	9%	Master of the Rolls, Legal Services Commission
Option 2 – Targeted reaccreditation	25	16%	Crown Prosecution Service, Cambridge Law Society
Option 3 – No reaccreditation	113	74%	The Law Society, SAHCA
Targeted reaccreditation and CPD	1	0.5%	
No answer	1	0.5%	
Total	153		

Many respondents were of the view that reaccreditation was not necessary at all. Some did, however, favour the introduction of mandatory reaccreditation or reaccreditation on a targeted basis.

The main arguments against any form of reaccreditation included the risk of creating a two tiered system, the impact on solicitors' ability to compete with barristers and the risk that solicitors would be perceived as "second class citizens". Respondents also queried whether the SRA had appropriate evidence to support a requirement for reaccreditation. Arguments in favour of reaccreditation included the suggestion that reaccreditation would place solicitors at an advantage in comparison to advocates and would improve perceptions of solicitor advocates.

Many respondents highlighted the fact that barristers are not subject to reaccreditation requirements. It was suggested that to introduce reaccreditation requirements for solicitors would place solicitors at a significant disadvantage.

"Barristers are not regularly reassessed and if we are to maintain a level playing field then the regimes should be similar." (David Moore)

It was suggested that the introduction of reaccreditation for solicitors would create a two tier system – that of the bar and that of the solicitors' profession – and that this, in turn, would affect solicitors' ability to compete with barristers on an equal basis. The Law Society, for example, suggested "in view of the fact that there are no comparable requirements on the Bar, it seems likely that the rules would distort the market since solicitors will be at a disadvantage vis a vis solicitors".

It was also suggested that the introduction of reaccreditation for solicitors would create a perception that solicitor advocates were not as competent as their barrister counterparts. Many respondents suggested that the solicitors' code of conduct and free market conditions would be sufficient to ensure that solicitors did not undertake work they were not competent to do.

“I think that those who are represented by accredited advocates would assume that they would not exercise those rights if they did not feel they were competent to do so. It is the bedrock of the solicitors’ profession and certainly of the advocates code of conduct that an advocate should not act in proceedings which he feels are beyond his range of experience or expertise. This also applies to the Bar equally. It is for the individual’s judgment in this situation.” (Anon)

The Bar Standards Board reiterated their desire for a collaborative approach to developing common standards and comparable training for advocates.

Many respondents suggested that there is insufficient evidence of poor performance by solicitor advocates to justify the introduction of reaccreditation and that reaccreditation in itself would not guarantee quality or competence. Some respondents also expressed concern about the cost and time necessary to undertake reaccreditation assessments.

There were some respondents, including the Master of the Rolls and the Legal Services Commission, who supported the introduction of mandatory reaccreditation for solicitor advocates. It was suggested that reaccreditation would assist in weeding out solicitor advocates who do not maintain proper standards and that it would reduce the perception that solicitors were “the poor man’s advocate”. The Master of the Rolls suggested that “Where a skill is not central to a professional’s practice, or where it was one that might only be exercised periodically, it might reasonably be expected that a greater degree of regulatory scrutiny would be carried out by a regulator to ensure, as is apparent from the literature cited in the present consultation document, that the individual concerned has the necessary skill and competence. Given that the provision of higher rights advocacy services by solicitors is not necessarily a fundamental feature of the professional services carried out by solicitor advocates and given the wide range of utilisation of such rights once awarded it could properly be expected by the public that the SRA would subject those who are authorised to carry out such higher rights advocacy to a more exacting accreditation and reaccreditation regime than might otherwise be thought necessary.”

2b) Do you think that there are any equality and diversity implications with any or all of these options?

Response	Count	%	Including stakeholders such as...
Yes	58	38%	Law Society, London Criminal Courts Solicitors Association
No	90	58%	Crown Prosecution Service, City of London Law Society
No answer	5	4%	
Total	153		

Some of the respondents to this question referred again to the potential for disadvantage for solicitors compared to barristers if reaccreditation were introduced.

Those respondents who felt that there could be potential implications for specific equality groups referred in particular to the impact of the time and cost of undertaking reaccreditation. It was felt that this could have an adverse impact on women solicitor advocates and BME solicitors in small firms, in particular.

It was also suggested that reaccreditation might have a differential impact on older solicitor advocates who might be deterred from retaining their rights of audience qualification if they were required to undertake a formal assessment on reaccreditation.

Respondents also suggested that targeted reaccreditation in particular could have an adverse impact on women and solicitors in small firms who might find it difficult to undertake a level of advocacy sufficient to retain these skills.

Question 3

If you believe that reaccreditation 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 reaccreditation?

Response	Count	%	Including stakeholders such as...
Yes	13	9%	The Scottish Legal Complaints Service, Criminal Bar Association
No	22	14%	CPS, Kent Law Society, London Solicitors Litigation Association, City of London Law Society, Newcastle Law Society, London Criminal Court Solicitors Association
No answer	118	77%	
Total	153		

Not many of the respondents answered this question, presumably because they did not support the introduction of mandatory reaccreditation.

Of those who did answer the question, opinion was divided about whether passported members should be required to undertake an advocacy assessment within a specified period. Arguments against this requirement for passported solicitors included the fact that passported solicitors would have already been assessed under the previous system and the suggestion that “if they have been passported” it is because they are experienced and this on its own should be sufficient. It was also argued that some advocates only do limited work in the high

courts and that they should not be required to be assessed in the full range of skills if they do not use them in practice.

One respondent suggested, for example, “I was passported many years ago and carry out only limited work in the Crown Court within the sphere of my competence. I would not wish to be reassessed in relation to skills which I do not have or pretend to have, eg I do not undertake complex trials”. (Tanweer Ikram)

Respondents who supported a requirement for passported members to undertake an assessment of their advocacy skills included the Criminal Bar Association. Some respondents suggested that this should only be a requirement where the advocate had not regularly practised his/her skills. The Criminal Bar Association referred to passported members who had undertaken the experience route suggesting “It is our experience that many of those who have been passported through to the qualification based on experience rather than actual assessment would not pass such an assessment. On that basis, we are of the opinion that those who have been passported should be required to undertake an advocacy assessment within a specified period of time.”

Question 4

4a) If you believe that reaccreditation 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 reaccredited?

Response	Count	%	Including stakeholders such as...
Yes	23	15%	TV Edwards LLP, London Criminal Courts Solicitors Association, Cambridgeshire Law Society
No	18	12%	City of London Law Society, CPS, London Solicitors Litigation Association, CPS
No answer	109	71%	
Total	153		

Not many respondents answered this question, presumably because they did not agree with the principle of reaccreditation at all.

Of those that did answer the question, opinion was divided as to whether reaccreditation should be targeted to those who did not regularly and effectively practise their advocacy skills. Most respondents suggested that it would be very difficult to implement this in practice as it would be difficult to clearly define what would be meant by regularly and effectively practising advocacy skills. Other respondents did not accept the argument that skills diminish over time. The Solicitors Association of Higher Courts Advocates argued that just because someone

does not use their skills over a period of time it does not necessarily mean that they will lose them.

4b) Should this approach be accompanied by a mandatory and targeted advocacy CPD requirement?

Response	Count	%	Including stakeholders such as...
Yes	23	15%	Cambridge Law Society, London Criminal Courts Solicitors Association
No	19	13%	The Law Society, City of London Law Society, London Solicitors Litigation Association
No answer	111	72%	
Total	153		

Not many respondents answered this question, presumably because they did not agree with the principle of reaccreditation at all, but opinion was divided amongst those who did respond.

4c) Do you have any suggestions for overcoming the practical difficulties with a targeted approach?

The most common suggestion was a CPD requirement together with self-certification of a minimum number of days' advocacy over a 5 year period. One respondent suggested an equal requirement to that of the Bar's "New Practitioner Programme", with a specific CPD requirement in the first three years of practice (or gaining the higher rights qualification in a solicitor's case).

4d) If a targeted approach to reaccreditation is adopted, should all passported members who have not previously undertaken an advocacy assessment be required to do so within a specified period?

Response	Count	%	Including stakeholders such as...
Yes	18	11.5%	Master of the Rolls, the Scottish Legal Complaints Commission
No	27	18%	The Law Society, London Criminal Courts Solicitors Association
Not applicable	1	0.5%	

No answer	107	70%	
Total	153		

Again, not many respondents answered this question, presumably because they did not agree with the principle of reaccreditation at all.

Opinion was divided as to whether passported members should be required to undertake an assessment within a specified period.

Question 5

If you do not believe that reaccreditation 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?

Response	Count	%	Including stakeholders such as...
Yes	27	18%	Birmingham Law Society, Criminal Bar Association
No	87	57%	The Law Society, Herbert Smith
No answer	39	25%	
Total	153		

Respondents “on the whole” did not think it was necessary for passported members to undertake an advocacy assessment under the new scheme even if reaccreditation was not introduced. Respondents believed that the fact that they had been passported deemed them competent. Arguments in support of a compulsory assessment for passported members included the fact that there is a risk of a basic lack of knowledge if they do not undertake a formal assessment and that it is important to ensure consistency amongst members of the scheme. The Criminal Bar Association argued that passported members should be required to undertake an advocacy assessment to instil public confidence.

Other issues raised in the course of the consultation

A number of respondents urged the SRA to avoid duplication for solicitors who might be subject to more than one accreditation scheme or to more than one training and assessment regime. Respondents referred, in particular, to the need to ensure equivalence and passporting between the SRA scheme and the Quality Assurance for Advocates Scheme. The CPS also urged the SRA to recognise other training and assessment regimes which are already in place.

Some respondents, notably the CPS and the Law Society, also suggested that the SRA should consider whether it is necessary to introduce more advocacy training for solicitors. The Law Society suggested that the requirements for advocacy specific training should be enhanced during the training contract and the Legal Practice Course to give prospective practitioners an example of what skills are needed to perform advocacy in the higher courts.

SRA response

The SRA Board was pleased with the range of views expressed by respondents to this consultation and considered the summary of responses at its meeting on 23 April 2009. The Board particularly welcomed the suggestion of the development of a common approach to advocacy standards put forward by the Bar Standards Board. In view of this, the SRA Board decided that:

- It remained committed to the principle of periodic reaccreditation in accreditation schemes generally, in the interests of consumers
- It made sense to pursue the question of periodic reaccreditation of higher rights in collaboration with the Bar Standards Board with a view to achieving a common approach to securing advocacy standards across the legal profession
- It would defer any action on reaccreditation of higher rights of audience until the outcome of these discussions was known

Many respondents made reference to the impact of a mandatory reaccreditation requirement on the ability of solicitor advocates to compete effectively with barristers. As a responsible regulator, the SRA is committed not only to consideration of issues of public interest but also to the promotion of competition in the provision of legal services. The SRA will ensure that it properly takes into account issues of competition when discussing a common approach with the Bar Standards Board and when developing future policy in this area.

The SRA is also committed to the principles of good regulation which include proportionality, transparency and accountability. Many respondents suggested that the SRA did not have appropriate evidence of poor performance amongst solicitor advocates to justify the introduction of a requirement for reaccreditation. We are aware of concerns from some key stakeholders about the standard of advocacy amongst some solicitor advocates. We will be working together with these stakeholders to determine the nature of these concerns and the basis on which they are raised. We will use this information to inform future policy development in this area and to ensure that our regulatory requirements are sufficient to protect the public interest.

We are particularly sympathetic to respondents' suggestions that we should work to avoid duplication of assessment and regulation for solicitors who might be subject to more than one accreditation scheme or training and assessment regime. In developing the new higher rights of audience scheme, we will work together with stakeholders to recognise existing accreditation arrangements and assessment regimes where they are comparable to the SRA scheme. We are already in the process of discussing issues of passporting and comparability with the group responsible for the development of the Quality Assurance for Advocates Scheme.

We are also sympathetic to suggestions that the time and cost associated with accreditation and reaccreditation should be minimised. We will be working with assessment organisations responsible for the new scheme to ensure that the assessment burden and costs are minimised and we will also take this into consideration when developing future policy in this area.

We note the suggestions that we should consider whether to introduce additional training requirements for would-be solicitors and solicitors who might wish to exercise rights of audience in the higher courts. We will consider these suggestions as part of our wider review of the pre qualification training and assessment regime. We will also consider these and other issues relating to reserved areas of work as part of our emerging work on quality assurance.

As part of our work to assess the impact of the new higher rights scheme on solicitors and on equality groups in particular we plan to undertake a survey to ascertain how many solicitor advocates use their advocacy skills in the higher courts on a regular basis. We will use this information to ensure that the new scheme does not adversely affect any specific groups and to assist in developing future policy in this area.

We are grateful for respondents' suggestions on the potential impact of the introduction of a mandatory reaccreditation requirement and have used this information to inform our wider equality impact assessment. This [equality impact assessment](#) can be found on our website. There are a number of actions arising from this assessment which will ensure that we take the necessary steps to mitigate against any adverse impact under the new scheme.

Next steps

We have submitted an application to the Ministry of Justice to approve the new higher rights of audience scheme. The new scheme will include the following features:

- Mandatory accreditation for solicitors and RELs wishing to exercise rights of audience in the higher courts
- Only one route to gaining the higher rights of audience qualification based on an assessment of advocacy skills
- The option to apply for the qualification in either civil or criminal proceedings or both
- Automatic passporting of any solicitor or REL who is a member of the current scheme
- The retention of an annual, advocacy specific CPD requirement for new members of the scheme during the first five years of qualification

We are planning to introduce the new scheme from January 2010 and transitional arrangements will be in place for anyone pursuing the qualification under the current scheme. We will publicise further details about the new scheme and the transitional arrangements when we have confirmation from the Ministry of Justice that the new scheme has been approved. In the meantime, if you have any queries about the rights of audience qualification, please refer to the Policy Team, Education and Training Unit.

Annex A

Profile of respondents

162 people or organisations responded to the consultation. 106 people completed the online survey hosted on the SRA website. 56 people or organisations responded by email or post.

Solicitors in private practice	64
Employed solicitors	15
Firms/organisations	22
CPS employed solicitors	13
Local law societies	8
Representative groups	3
Professional bodies	2
Consumers	3
Academics	2
Other legal professionals	2
Trainee solicitors	1
Students	1
Other	7
Not identified	21
The Law Society of England and Wales	1
The Master of the Rolls	1
SAHCA	1
The Legal Services Commission	1
The Crown Prosecution Service	1

List of respondents

Master of the Rolls

General Medical Council

The Law Society of England and Wales

Legal Services Commission

SAHCA

Crown Prosecution Service

Bar Standards Board

London Criminal Courts Solicitors

Legal Services Commission

Birmingham Law Society

Cambridge Law Society

Chester/North Wales Law Society

City of London Law Society

Newcastle Law Society

Kent Law Society

Scottish Legal Complaints Service

The College of Law

City University

Department for Business Enterprise and Regulatory Reform

Bell Lax

Clifford Chance

Herbert Smith

Rodgers & Burton

ABV Solicitors

Nunn Rickard

John W Davies Partnership LLP

Barrie Fairbairn Solicitors

Sharon Taylor Associates

Russell & Russell

Mir & Co

Davies Arnold Cooper

Dyer Burdett Gray Purdue Ltd

A B Marsh

Kirwans

Newman Myers Keines Gross Harris

Hossacks

Placidi & Co

Kaplan Hawksmere

T V Edwards LLP

Rodgers & Burton

Robin Murray & Co

Gottlee & Goldsmith

Freshfields

Edward Hayes

Bousfield Gaskin McGloin

Responses made on an individual basis

Andrew Duncan

Julian Coningham

Geoffrey Brunton

Claire Sharp

Claire Milne

Paul Bennett

Michael Hillman

Richard Atkins

Martin Oldham

Peter McCormick

Anthony Clarke

Hugh Lyons

Kerry Waitt

Steven Friel

Christopher Hamlet

John Higham

David Moore

Matthew Subbiani