

Standards for solicitor higher courts advocates and outline proposals for a new accreditation scheme

Consultation questionnaire form

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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?

Yes

No

Please explain and highlight any other measures you think the SRA should consider.

It is of fundamental importance that reform should in no way dilute the quality of advocacy practised in the Higher Courts. It is as important in the public interest in the proper and efficient administration of justice for all those who exercise higher rights of audience, whether they be members of the Bar, Solicitor-Advocates or, if appropriate, other properly authorised advocates, to do so to the same standard. This should require the same nature and type of training and experience to be obtained before an individual can properly exercise rights of audience. It should also require all advocates to be subject to comparable regulation once they are actually exercising rights of audience. It cannot be in the public interest for differential standards to apply to advocates dependent on which branch of the legal profession they belong. If the SRA is to move to what appears to be a light touch regulatory approach to the exercise of higher rights of audience we consider that it should only do so if solicitors who wish to exercise such rights have undergone comparable training during their LPC, PSC and Training Contract to members of the Bar. This will require reform to those aspects of solicitors' vocational training. Equally, it will require those solicitors who wish to exercise higher rights of audience to undergo comparable advocacy training whilst they are in their first three years' of practice to that which junior barristers are required to undergo. To ensure that comparable standards in training are in place we suggest that the BSB, SRA and, where appropriate, other advocacy regulators should co-operate to create a uniform standard of advocacy training.

If comparable training and then experience in the lower courts is obtained there is no reason in principle why solicitor advocates could not be placed under a regulatory regime as proposed in the consultation i.e., in effect self-certification that they are competent to act as advocates in the higher courts pursuant to the Solicitors' Code of Conduct. A competent solicitor mindful of the professional obligations imposed by the Code of Conduct would not reasonably be expected to take on work which is

beyond their competence levels: to do so would not only be a breach of their professional code, leaving them open to disciplinary and regulatory sanction (such as a restriction on their practising certificate barring them from taking on advocacy work) but would arguably render them potentially liable for a professional negligence claim. It is reasonable to expect, much like a junior barrister, that solicitor advocates under the proposed new regime would develop their advocacy skills in the lower courts initially, whilst attending higher courts with more senior advocates in much the way that junior barristers do during pupillage.

It might well be advisable for the proposed regime to emphasise, either within the specific standards which are to be drafted into the Code of Conduct or relevant guidance notes as to the interpretation of those standards to emphasise that solicitor advocates need to acquire experience in this way as competence comes through practical experience.

We would also note that there ought to be a requirement for continuing advocacy CPD for those who undertake higher courts (and lower) courts advocacy.

Question 2

Do the standards adequately cover the knowledge and skills that should be expected of a solicitor advocating in the higher courts?

Yes

No

Please explain with particular reference to any gaps in knowledge and skills and how these can be best addressed.

The standards appear adequate; however it may be advisable to include within guidance to supplement the standards that it would reasonably be expected that a solicitor had, at the least, gained practical advocacy experience in the lower courts as a means to develop their competence prior to embarking on advocacy in the higher courts.

We note that evidence standards should be uniform across all courts and not as suggested arguable differ between lower and higher courts. Particular rules of evidence may differ but standards do not.

We note that it ought to be explicit, rather than as present implicit, within the standards that a solicitor is and ought to be under a professional duty to advise their client, pursuant to Rule 1 of the Code of Conduct, to advise their client as to all available options for court representation, i.e., that they should advise them of the possibility of instructing a barrister or a solicitor-advocate from outside their own practise or another solicitor from within their own practise.

Question 3

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

Yes

No

Please outline your reasons.

They appear, in a generic way, to provide a reasonable outline of the areas and issues with which a reasonably competent higher court advocate would expect to be familiar. We could not accept any lower level of competence as acceptable.

Question 4

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

Yes

No

Please outline your reasons.

Insofar as written standards can provide guidance on what can be expected of a competent solicitor advocate the standards and performance indicators appear to achieve the objective set out in paragraph 16 of the consultation; subject to the comments above. The difficulty will arise however in testing whether an individual solicitor has fallen below those standards; in a particularly egregious case it may well be clear that they have whereas in other cases there may be room for argument. But that would be a matter for the regulatory body, for instance, to grapple with if any complaint is made regarding adherence to the standards by any individual solicitor.

Question 5

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

Yes

No

Please outline your reasons with particular reference to any additional indicators you would include or what amendments you would make.

In themselves they are, although it might be advisable for the SRA as they have done in respect of other rules within the Code of Conduct to provide explanatory guidance notes as to the suggested proper application of the performance indicators.

Question 6

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

Yes

No

Please outline your reasons and make any alternative suggestions.

The light touch approach to assessment is predicated on the assumption that once accredited a solicitor will act as a higher court advocate regularly and at the least maintain the minimum level of competence required for accreditation. Where that is the case, the light touch approach outlined appears reasonable, subject to the SRA prescribing the standards to be applied by those bodies which actually conduct the accreditation process. However it may be the case that once accredited a solicitor does not regularly utilise their higher court advocacy rights, such that by the end of the five year accreditation period they, through lack of use, would no longer satisfy the basic requirement for accreditation. There is no reason why such an individual should either retain their accreditation at all or should only do so by reference to an assessment of their knowledge of new or reformed areas of court procedure. An individual who has not used their advocacy rights regularly should be required to undergo the same accreditation process as an initial applicant, in which case their knowledge of any new procedure etc will of necessity be examined in any event.

Equally, accreditation after an initial five year period might well serve to differentiate revalidated solicitor advocates from those who were in their first period of validation. If it is to act as a quality mark validation and reaccreditation could reasonably incorporate a more stringent assessment at the revalidation stage as a solicitor revalidated might reasonably be expected to have attained a higher level of competence during five years' practise and might also benefit from being able to demonstrate that the quality mark they have post-revalidation differentiates them from those who have been only initially validated.

Question 7

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

Yes

No

Please outline your reasons.

Accreditation is optional. Its aim is to provide an accredited solicitor with what is in effect a quality mark, which can act as a genuine guide to the public of ability and experience.

As with any other quality mark it seems reasonable to require it to be renewed at regular periods, otherwise its value (assuming it has one over any reputation which a solicitor advocate has built up through their actual advocacy practice) will be denuded of worth. Absent revalidation an individual once accredited could maintain their quality mark despite never or hardly ever exercising their higher rights. Revalidation would ensure that only those who exercised their rights maintained their accreditation.

Revalidation would have two further positive benefits: first, it would ensure that those who had been initially accredited but who for whatever reason no longer wished to be accredited would not simply maintain their accredited - it would ensure that only those who positively wished to remain accredited because the quality mark was relevant to their practise maintained accreditation; secondly, it would enable the accreditation list to be a more flexible and informative system. Regular revalidation, with the revalidation process being 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.

For the above reasons, revalidation at regular intervals appears to be firmly in the public interest.

Question 8

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

It might be expected that the revalidation process should be more rigorous and searching than the initial accreditation process. A solicitor advocate seeking revalidation five years post initial accreditation ought to be expected to have gained considerable higher courts advocacy experience, and be able to evidence such experience, and to have consequently improved significantly as an advocate from the standard they initially demonstrated.

Any revalidation process might in the circumstances require a solicitor advocate to undertake a more rigorous practical assessment process, which might require completion of a series of practical advocacy exercises; assessment of their performance in court by members of the judiciary who the individual had appeared before (similar to the reference process used in the QC assessment process); and/or actual assessment of the performance in court by suitably qualified SRA assessors or SRA accredited assessors.

Question 9

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

Yes

No

Question 10

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

Yes

No

Please outline your reasons.

The central principle of the proposed new regime is that accreditation or validation is optional: solicitors are to self-certify their competence according to the Code of Conduct. This leads to two conclusions. First, in the context of question 9: while there is good reason to automatically accredit those solicitors who already have a higher rights qualification - passport them onto the new accreditation scheme in the terms used here - that should only be done if the solicitor concerned chooses to opt-in to the accreditation scheme. Automatic and compulsory accreditation would undermine the rationale of the new accreditation scheme i.e., its optional nature. Secondly, given that accreditation is an optional quality mark, there can be no reason why accredited solicitors should be treated any differently in respect of revalidation. If the supposed value of accreditation is to be maintained then all who are accredited should be treated in the same fashion i.e., all should be subject to: i) applying for revalidation in order to ensure that the accreditation scheme remains an optional quality mark; and ii) to the same revalidation scheme to ensure that all who are accredited have demonstrated the same minimum level of ability. It is to be noted that the upshot of this will be that the accreditation scheme will of necessity have different levels akin to the Attorney-General's A, B and C Panels reflective of the period of time each solicitor has been accredited and number of times they have been validated/revalidated.

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?

For each equality strand, please place a check in one of the three columns to indicate your answer.

Equality strand	No impact	Positive impact	Negative impact
Age	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Gender	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Race	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Disability	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sexual orientation	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Religion or belief	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you answered “negative impact” or “positive impact” above, please indicate what you consider the impacts to be and outline your reasons.

It is difficult to answer this question meaningfully. It is not clear if the question asks whether it is believed that the new scheme may have an impact on equality for solicitors or in respect of those individuals who seek and obtain representation from solicitors in the higher courts.

If it is assumed that the SRA is addressing the effect its proposed reforms might have on solicitors themselves it is difficult to see what impact the reforms could have on equality issues.

It is difficult to see how a scheme which replaces positive mandatory accreditation with what is in essence self-certification and optional accreditation could have a negative impact on the identified equality issues, especially where competence is the central issue. It is equally difficult to see it having a positive impact on these issues, unless the present system in some way as a barrier to the exercise of higher rights on the basis of age, gender, race etc.

If it is assumed that the SRA is addressing the latter issue ie., an effect on those who seek representation from solicitors in the higher courts it is difficult to see what possible positive or negative effects the reforms would give rise to.

Question 12

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

Yes

No

If you answered "yes", which qualification do you hold?

All proceedings

Criminal proceedings

Civil proceedings

Thank you for completing the **Consultation questionnaire** form.

Please save a copy of the completed form.

Please return it, along with your completed **About you** form, as an email attachment to trainingconsultations@sra.org.uk, by **25 July 2008**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you** form, to

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