

SRA BOARD

11 March 2015

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Higher Rights of Audience Regulations 2011- removal of transitional arrangements

Purpose

- 1 To ask the Board to make amendments to our regulatory arrangements in relation to the Higher Rights of Audience Regulations 2011.

Recommendation

- 2 The Board is asked to:
 - a) make the SRA Amendments to Regulatory Arrangements (Higher Rights of Audience) Rules [2015] (Annex 1).

If you have any questions about this paper please contact: Crispin Passmore, Executive Director, Regulation and Education, crispin.passmore@sra.org.uk, 0121 329 6687.

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Higher Rights of Audience Regulations 2011 – removal of transitional arrangements

Introduction

- 3 The SRA Higher Rights of Audience Regulations 2011 ('HRA' regulations) govern the exercise by solicitors of rights of audience. A solicitor cannot exercise rights to appear in the Crown Court, High Court, Court of Appeal and Supreme Court of England and Wales without holding an HRA qualification in civil or criminal proceedings, or both.
- 4 The HRA regulations 2010 (now 2011) introduced a single method of obtaining higher rights: the successful completion of an HRA assessment at an SRA authorised assessment provider. Prior to this, there were a number of routes available, which were removed by the 2010 HRA regulations. One of these routes was undertaking training and presenting a portfolio of evidence, and was referred to as the 'development route'. Legal advice received at the time the changes were being introduced, recommended that a transitional provision was included in the new regulations, for a limited period, to accommodate those who were part way through the former routes at the time the new regulations were introduced. Consequently the new HRA regulations included regulation 11, which allowed a transitional period of 24 months, during which time any solicitor who had commenced the routes withdrawn by the 2010 regulations could complete that particular route.
- 5 The transitional period expired on 31 March 2012 but remains in the regulations. This has led to a small number of applications being presented to the SRA by applicants seeking to rely on the transitional arrangements notwithstanding that the 24 month period has expired.

Why the arrangements should be removed

- 6 The transitional arrangement in regulation 11 expired on 31 March 2012 when the 24 month period elapsed. Unfortunately, the imprecise wording of the provisions continues to generate a number of queries and raises expectations that the former routes to achieving higher rights are still available. We want to have a clearer regulation which does not intimate that former routes can still be embarked on. It was our intention in 2010 that a system of objective assessment should be the sole mechanism for solicitors seeking higher rights qualifications and we wish to ensure that this is not undermined by a lack of clarity in the regulations.
- 7 Regulation 11.3 includes the power to waive regulation 11. Despite removing 11.1 and 11.2, we would like to retain a power to waive and amend this to enable us to waive the requirement to undertake the Higher Rights assessment specified in the regulations. The reason for this is that when approval to introduce the new regulations was being sought under the former Courts and Legal Services Act process, a standing decision from a Law Society sub-committee responsible for casework decisions under the old regime came to light, which allowed Bar Vocational Course (BVC) graduates who had qualified as solicitors to obtain their Higher Rights qualification through undertaking a portfolio of cases as permitted by the development route, but also gave

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them five years in which to submit the portfolio to us. The last BVC students graduated in 2011. This decision was not reflected in either the old HRA regulations or the current ones. Although unlikely, it is possible that a BVC graduate relying on guidance available in 2010 at the time the new regulations were introduced (but no longer available) may have completed the development route by March 2012 but not yet applied for higher rights and submitted a portfolio, believing that he or she has five years in which to submit it.

- 8 Education and Training Committee considered this paper at its meeting on 26 February 2015 and was content with the proposal. We have not entered into a formal consultation on the proposed changes because amending the power to waive allows us to recognise any legitimate right to achieve higher rights other than by formal assessment that may have existed under the transitional arrangements.
- 9 The Board is asked to note that Annex 2 show amendments to the Higher Rights Regulations currently in force. The Board approved changes to regulation 9 in December 2014, such change to be effective from 1 April 2015. The regulations at Annex 2 do not contain the approved amendments to regulation 9, but the changes requested by this application are not affected by those amendments.

Business/operational impacts

- 10 Greater clarity in the regulatory requirements and the certainty as to what must be undertaken to achieve higher rights will reduce the number of enquiries about the transitional provisions.

Financial issues

- 11 There are no financial impacts arising from the removal of this regulation.

Recommendation: the Board is asked to make the SRA Amendments to Regulatory Arrangements (Higher Rights of Audience) Rules [2015] (Annex 1).

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Supporting information

Legal risks and consumer impact

12. There is unlikely to be any impact on consumers of legal services as a result of this action.

Resource implications and operational requirements

13. There are no negative resource implications. Greater clarity in the requirements for achieving higher rights will reduce the resource which is currently spent dealing with queries about the transitional arrangements.

How the issues support the principles of better regulation

14. The proposed removal of the transitional arrangements supports the principles of better regulation as follows:
- **Proportionate:** the removal of the transitional arrangements but retaining the power to waive will not remove rights that were retained when the new HRA regulations were introduced.
 - **Accountable:** it allows for a clearer statement on the route to achieving higher rights.
 - **Consistent:** we need clear regulation to ensure that we can be consistent in how they are applied and the decisions that we make as to granting higher rights of audience.
 - **Transparent:** the wording of the transitional arrangements lacks clarity and raises false expectations that former routes to achieving higher rights of audience are available.
 - **Targeted:** the transitional period has expired.

Links to the Strategic Plan and / or Business Plan

15. Strategic objective three: we will improve our operational performance and make fair and justifiable decisions promptly and effectively. Removal of the transitional arrangement and a clear statement as to the purpose of the waiver enables us to deliver a more efficient service.

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Annexes
Annex 1 Draft SRA Amendments to Regulatory Arrangements (Higher Rights of Audience) Rules [2015]

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Annex 2 Higher Rights of Audience Regulations 2011 (tracked changes)

Draft SRA Amendments to Regulatory Arrangements (Higher Rights of Audience) Rules [2015]

Rules dated [] made by the Solicitors Regulation Authority Board.

Made under Part I, Part II, sections 79 and 80 of the Solicitors Act 1974 and paragraphs 2 and 3 of Schedule 14 to the Courts and Legal Services Act 1990.

Subject to the approval of the Legal Services Board under paragraph 19 of Schedule 4 to the Legal Services Act 2007 and coming into force on [30 April 2015].

Rule 1

The SRA Higher Rights of Audience Regulations 2011 shall be amended as follows:

- (a) delete regulations 11.1 (a) and (b) and 11.2 (a) and (b).
- (b) replace regulation 11.3 with the following to be regulation 11.1:

"We have the power to waive in writing any of the provisions of these regulations and to place conditions on and to revoke such waiver."
- (c) In the heading to Part 5 replace "transitional arrangements" with "waiver".
- (d) delete "transitional arrangements" from the heading to regulation 11 and insert "waiver" as the new heading for regulation 11

Rule 2

These amendment rules come into force on 30 April 2015 or the date of approval of the Legal Services Board, whichever is the later.

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SRA Higher Rights of Audience Regulations 2011

Introduction to the Higher Rights of Audience Regulations

Preamble

Authority: Made on 17 June 2011 by the Solicitors Regulation Authority Board under sections 2, 79 and 80 of the Solicitors Act 1974 with the approval of the Legal Services Board under paragraph 19 of Schedule 4 to the Legal Services Act 2007

Date: These regulations came into force on 6 October 2011

Replacing: Solicitors' Higher Rights of Audience Regulations 2010

Regulating: The qualifications that solicitors and RELs require to exercise rights of audience in the higher courts in England and Wales.

Overview

Outcomes-focused regulation concentrates on providing positive outcomes which when achieved will benefit and protect *clients* and the public. These regulations aim to ensure that *solicitors* and *RELs* who want to exercise rights of audience in the *higher courts* of England and Wales are competent to do so.

Solicitors and *RELs* are granted rights of audience in all courts upon qualification/registration but cannot exercise those rights in the *higher courts* until they have complied with additional requirements. *Solicitors* and *RELs* wishing to undertake *criminal advocacy* must comply with the *SRA QASA Regulations*. *We* are required to set the education and training requirements which *you* must comply with in order for these rights to be used. These regulations describe the qualifications available, where rights can be transferred, and set out the process for becoming eligible to exercise rights of audience in the *higher courts*.

The intention is to give the public confidence that *solicitor* higher court advocates have met appropriate standards and adhere to the relevant *Principles*.

The Principles

These regulations form part of the Handbook, in which the 10 mandatory *Principles* are all-pervasive. They apply to all those *we* regulate and underpin all aspects of practice. Outcomes relevant to these regulations are listed beneath the *Principles*.

You must:

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1. uphold the rule of law and the proper administration of justice;
2. act with integrity;
3. not allow *your* independence to be compromised;
4. act in the best interests of each *client*;
5. provide a proper standard of service to *your clients*;
6. behave in a way that maintains the trust the public places in *you* and in the provision of legal services;
7. comply with *your* legal and regulatory obligations and deal with *your* regulators and ombudsmen in an open, timely and co-operative manner.
8. run *your* business or carry out *your* role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
9. run *your* business or carry out *your* role in the business in a way that encourages equality of opportunity and respect for diversity; and
10. protect *client money* and *assets*.

Outcomes

The outcomes which apply to these regulations are that:

- O(HR1) *you* have achieved the standard of competence required of *higher courts* advocates;
- O(HR2) *you* demonstrate this competence through objective assessment;
- O(HR3) *you* maintain competence through relevant ongoing training; and
- O(HR4) *you* act so that *clients*, the judiciary and the wider public, have confidence that this has been demonstrated.

These outcomes, and the regulations that flow from them, apply to admitted *solicitors*, and *REs*.

Part 1: Interpretation

Regulation 1: Interpretation and definitions

- 1.1 The SRA Handbook Glossary 2012 shall apply and, unless the context otherwise requires:
 - (a) all italicised terms shall be defined; and

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- (b) all terms shall be interpreted;
in accordance with the *Glossary*.

Part 2: Rights, and qualification

Regulation 2: Rights of audience

- 2.1 Subject to the provisions of these regulations, and in relation to *criminal advocacy* the *SRA QASA Regulations*, *you* may be authorised by *us* to exercise rights of audience in the *higher courts*.
- 2.2 *Solicitors* and *REs* appearing in the Intellectual Property Enterprise Court (IPEC) do not need to hold a Higher Courts (Civil Advocacy) Qualification under these regulations.

Guidance note:

- (i) As a *solicitor* or *REL you* already have full rights of audience in Tribunals, Coroners Courts, Magistrates Courts, County Courts, the Family Court and European Courts. An application for civil higher rights of audience allows *you* to also appear in civil proceedings in the Crown Court, High Court, Court of Appeal and Supreme Court. *Solicitors* and *REs* undertaking *criminal advocacy* must also comply with the *SRA QASA Regulations*.
- (ii) The IPEC, a specialist court within the Chancery Division of the High Court, replaced the Patents County Court (PCC) in October 2013. Prior to this, *solicitors* and *REs* appearing did not need a higher rights qualification to appear in the PCC. As the cases, rules and procedures are not materially different, and the costs and damages limits are the same, *we* do not require *solicitors* and *REs* to possess the civil qualification in order to exercise their rights of audience in the IPEC.

Regulation 3: Qualifications to exercise extended rights of audience

- 3.1 If *you* meet the requirements of these regulations, *we* may grant one or both of the following qualifications:
- (a) Higher Courts (Civil Advocacy) Qualification which entitles the *solicitor* or *REL* to exercise rights of audience in all civil proceedings in the *higher courts*, including judicial review proceedings in any *court* arising from any criminal cause;

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(b) Higher Courts (Criminal Advocacy) Qualification which, subject to the **SRA QASA Regulations** in relation to **criminal advocacy**, entitles the **solicitor** or **REL** to exercise rights of audience in all criminal proceedings in the **higher courts** and judicial review proceedings in any **court** arising from any criminal cause.

3.2 If **you** have been granted a **higher courts** qualification by the Law Society or **us** under the **previous regulations**, **you** shall be deemed to have been granted the equivalent qualification or qualifications under regulation 3.1 above.

Guidance note

- (i) If **you** have been granted a **higher courts advocacy qualification** under previous regulations, **you** are not required to re-apply under these regulations.
- (ii) **You** may not undertake **criminal advocacy** unless **accredited** to do so in accordance with the **SRA QASA Regulations**.

Regulation 4: Qualifying to exercise extended rights of audience

4.1 When applying for a **higher courts advocacy qualification** **you** must demonstrate to **us** that **you** are competent to undertake advocacy in the proceedings in relation to which **you** have applied by:

- (a) successfully completing assessments prescribed by **us**;
- (b) being an **REL** and having undertaken any further step(s) as may be specified by **us** under regulation 5.2; or
- (c) being a lawyer to whom Directive 2005/36 applies and having undertaken any further step(s) as may be specified by **us** under regulation 5.2.

4.2 **We** will issue **standards** against which the competence of those applying for a **higher courts advocacy qualification** and exercising those rights of audience conferred by the qualification awarded will be assessed. The **standards** do not form part of these regulations and may be amended from time to time by **us**.

Part 3: Rights from previous professional status

Regulation 5: Qualification gained in a European jurisdiction

5.1 **You** may apply for a qualification to exercise rights of audience in the **higher courts** if **you** are an **REL** or a lawyer to whom Directive 2005/36 applies.

5.2 Each application will be considered by **us** on its merits and **we** may require **you** to undertake such steps as **we** may specify in order to gain the qualification.

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Regulation 6: Conversion provisions for barristers

6.1 In accordance with paragraph 86 of Schedule 21 of the LSA, a *barrister* with existing higher rights of audience will automatically be awarded the *solicitors'* higher rights of audience when applying to the roll.

Guidance note

- (i) *You* will be required to declare when applying to be admitted to the roll that *you* were formerly a *barrister* with higher rights of audience and that *you* have no disciplinary proceedings in progress against *you*.
- (ii) *You* may not undertake *criminal advocacy* unless *you* are *accredited* under the *SRA QASA Regulations*. If *you* have qualified as a *solicitor* under the *QLTSR* on the basis of being a *barrister you* will be entitled to bring *your QASA* accreditation level with *you*.

Regulation 7: Conversion provision for RELs

7.1 If *you* are an *REL* who is granted a qualification listed in regulation 3.1, *you* shall keep that qualification upon being admitted as a *solicitor*.

Part 4: Assessments and ongoing training

Regulation 8: Assessments

8.1 *We* shall:

- (a) issue guidelines and *standards* for the provision of competence assessments in *higher courts* civil advocacy and *higher courts* criminal advocacy;
- (b) validate and authorise organisations to provide assessments; and
- (c) monitor the provision of assessments.

Guidance note

- (i) *You* are not required to undertake any training before taking the assessments, but *you* may decide that *you* need to undertake additional training, which will be offered by assessment organisations. Whether or not *you* require additional training is a decision for *you*.

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- (ii) In satisfying the *standards*, *you* will need to comply with the relevant legislation and procedures in force at the time.
- (iii) *You* can apply for the qualification in either civil or criminal proceedings. Assessment providers will offer assessments that cover the generic standards in evidence, ethics, advocacy and equality and diversity as well as specific standards in either civil or criminal proceedings. If *you* wish to obtain the qualification in both proceedings *you* must take both assessments.
- (iv) A *trainee* may undertake the assessments but will not be permitted to exercise the rights until admission as a *solicitor*.

Regulation 9: Continuing professional development

- 9.1 If *you* have gained a *higher courts advocacy qualification* under regulation 3.1, *you* must undertake at least five hours of *CPD* relating to the provision of advocacy services in the *higher courts* in each of the first five *CPD years* following the grant of the qualification.
- 9.2 If *you* have gained a *higher courts advocacy qualification* under regulation 5.1 or are exercising any right of audience in the *higher courts* by virtue of any exemption *you* have under regulation 6, *you* must undertake at least five hours of *CPD* relating to the provision of advocacy services in the *higher courts* in each of the first five *CPD years* following the date of *your* first exercise of the right.

Guidance note

- (i) The requirements in regulation 9.1 and 9.2 are not an additional requirement to that required by the SRA Training Regulations Part 3 - CPD Regulations.
- (ii) This requirement commences the *CPD year* following the year in which the qualification is awarded or from the date *you* first undertake advocacy in the *higher courts* if qualifying via a comparable qualification. It is up to *you* to decide what *your* training needs are in relation to the advocacy services *you* provide. Therefore, the training may be advocacy training, training on new procedures or on substantive law if relevant to higher court practice.

Part 5: Applications, reviews and waiver

Regulation 10: Applications and reviews

- 10.1 *You* shall make an application under these regulations in the manner prescribed by *us* and accompanied by the appropriate fee fixed from time to time.

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- 10.2 *You* shall not apply for a *higher courts advocacy qualification* until one of the requirements of regulation 4 has been met.
- 10.3 When applying for a *higher courts advocacy qualification*, *you* may within 28 days of receiving notification of *our* decision ask for the decision to be reviewed.
- 10.4 *You* may not apply to *us* for a review of a decision by an assessment provider where *you* have failed an assessment.

Guidance note

- (i) An application for higher rights of audience should be made via *our* website – www.sra.org.uk.

Regulation 11: Waiver

- 11.1 *We* have the power to waive in writing any of the provisions of these regulations.