

*This paper will be published*

**Assuring advocacy standards: consultation response document**

**Purpose**

- 1 This paper sets out our proposed response to our assuring advocacy standards consultation.

**Recommendations**

- 2 The Board is asked to:
  - (a) agree our various policy positions to assure advocacy standards (paragraphs 8-47).
  - (b) make a minor amendment to regulation 9.10 of the SRA Authorisation of Individuals (Higher Rights of Audience) Regulations so that only admitted solicitors can take the Higher Rights of Audience (HRA) assessment (paragraphs 23-24 and annex 2).
  - (c) note our consultation response for publication (annex 1).

**If you have any questions about this paper, please contact Julie Brannan, [Julie.Brannan@sra.org.uk](mailto:Julie.Brannan@sra.org.uk)**

**Equality, Diversity, and Inclusion considerations**

<b>Consideration</b>	<b>Paragraph no's</b>
We have assessed our final positions against protected characteristic groups where we are able to do so given the available data. There is greater representation of Black and Minority Ethnic Solicitors (BAME), older solicitors, male solicitors and small firms when compared with all solicitors practising criminal advocacy. There is a risk (which we do not consider significant) that publishing reports could result in some people drawing inaccurate conclusions that poor advocacy is caused by these groups. This could lead to reputational damage for these groups. There is also a risk that if we encourage reporting of poor advocacy this group could be subject of increased or inappropriate regulatory reports. Despite these risks, our approach is justified given our objective of assuring standards. We have outlined the measures to mitigate these risks in this paper.	29,30,34,35,36,54

## **Assuring advocacy standards: consultation response document**

### **Background**

- 3 We issued a consultation in August 2019 in response to ongoing concerns about the standard of advocacy.
- 4 The consultation proposed measures to improve how we regulate advocacy and our approach to the HRA assessment required by solicitors before they can practise advocacy in the higher civil and criminal courts. Our proposals included:
  - a. Continuing to grant rights of audience to solicitors practising in the lower courts rather than requiring additional assessment in witness handling.
  - b. Revising our arrangements for higher court advocacy including:
    - i. Updating our HRA standards.
    - ii. Introducing a single HRA assessment provider.
    - iii. Requiring that the HRA qualification should be taken post admission.
  - c. Requiring youth court solicitors to pass our higher court advocacy qualification where they are acting as advocates in a case which would go to the crown court if brought against an adult.
  - d. Providing resources to help solicitors meet our advocacy standards, including publication of aggregated and anonymised information to highlight common themes in the reports we receive.
  - e. Providing resources for the public and other stakeholders that explain the criminal and civil advocacy standards we expect of solicitors.
  - f. Supporting appropriate reporting to help us act on concerns about a solicitor's competence to conduct advocacy.
- 5 We published analysis of consultation responses in March 2020. We have considered these responses and carried out further stakeholder engagement to develop our final policy positions.
- 6 We are now asking Board to agree to publish our response document and in doing so make a minor amendment to our HRA regulations.
- 7 Board should note that publication of our consultation response, setting out details of the issues raised in the consultation, how we have addressed them, and a detailed timetable for implementation of the programme of work in relation to the quality of advocacy, enables us to demonstrate to the Legal Services Board that we have met their requirements in relation to outcome S3 of their regulatory performance assessment of us. <sup>1</sup>

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<sup>1</sup> Outcome S3 states: "The regulated community are monitored to provide assurance that standards are met. If they are not, steps are taken to remedy this." The LSB requires us complete our work on better regulating the quality of advocacy standards in order to meet this outcome

**Our final policy positions**

- 8 Concerns about advocacy standards are persistent but largely qualitative. We propose to take forward measures that reflect our ongoing commitment to assuring the standards of advocacy considering the available evidence. These will enable us to obtain a better understanding of the scale and nature of concerns about the standard of advocacy, provide relevant support to solicitors and firms and make sure that our regulation in this area is targeted and proportionate.
- 9 Annex 1 details our proposed consultation response. We propose to:
- a. Continue to grant rights of audience for solicitors practising in the lower courts without introducing a requirement to be assessed in witness handling.
  - b. Introduce revised HRA standards to be used in existing HRA assessments in early 2021.
  - c. Proceed with the procurement of a single assessment provider to begin assessment against our revised standards not before summer 2022.
  - d. Require that the HRA assessment is taken post admission to coincide with assessment against the revised standards by existing providers in early 2021.
  - e. Undertake a random sample of learning and development records from solicitors practising in the youth court. We will request training records to be provided to us for us to review in summer 2021.
  - f. Develop online resources to support solicitors practising criminal and civil advocacy. These will be available in summer 2021.
  - g. Publish resources for the public and other stakeholders that explain the criminal and civil advocacy standards we expect of solicitors in summer 2021.
  - h. Publish an aggregated and anonymised summary of the reports we receive raising concerns about criminal and civil advocacy and practice in summer 2021. This will also include a summary of regulatory action we taken, if any. We will use reports we have received from the previous 12 months to inform this summary.
  - i. Encourage appropriate reporting about advocacy standards from autumn 2020.
- 10 Having considered the views expressed during consultation, we will not take forward our proposal to require that solicitors advocating serious cases in the youth court should have a higher rights qualification. Instead, we will work with youth court practitioners to use training record checks to gain assurance and understanding about how they maintain their competence.

***Proposals we will implement***

***Not placing a restriction on solicitors' rights of audience in the lower courts until they have been assessed in witness handling***

- 11 The consultation considered whether we should place a restriction on solicitors' rights of audience in the lower courts until they have been assessed in witness handling. Instead of doing this, we proposed relying on solicitors' and firms' obligations in our Code of Conduct only to undertake the work which they are competent to perform and identifying poor advocacy through encouraging appropriate reporting. We propose to proceed with this approach.
- 12 We will support this approach by:
- a. Assessing standards of overall advocacy skills through the Solicitors Qualifying Examination (SQE), for example, assessing submissions to the court in interim and plea only applications.
  - b. Including questions to test knowledge of witness handling and rules of evidence as part of the SQE1. This will not impact significantly on the current SQE assessment design.
  - c. Reminding solicitors of their obligation to keep their learning and development up to date and to not act above their competence.
  - d. Relying on our work to encourage appropriate reporting to help us identify where solicitors are acting above their competence and taking regulatory action where appropriate.
  - e. Closely monitoring the standard of advocacy in the magistrate's court. We will consider further action if we see evidence of concerns specifically in relation to solicitors' ability to competently examine and cross-examine witnesses in the magistrates' court.

***The introduction of revised HRA standards and assessment by a single assessment provider***

- 13 We proposed to introduce clearer standards to better reflect modern advocacy practice and assess them through a single assessment provider rather than our current multiple provider approach.
- 14 There was broad support from stakeholders for the introduction of revised standards as they better reflect modern practice and provide clarity for higher court solicitors to understand their ongoing competence requirements.
- 15 There was mixed support for a single assessment provider. Those that agreed did so because it would increase assessment robustness, consistency, accuracy, and fairness. It would also provide a simpler and clearer qualification pathway for candidates. Those respondents that disagreed did so because they felt a single assessment provider would result in limited assessment availability and increased assessment cost. This could lead to fewer candidates taking the assessment and result in reduced availability of higher court solicitor advocates for the public.

- 16 We will proceed with the introduction of new standards and appointing a single assessment provider. This will put us in a better position to ensure that candidates awarded the HRA qualification have been assessed robustly and consistently and have the skills and knowledge to practise effectively and safely in the higher courts.
- 17 There is little evidence at this stage to suggest that our proposed approach will restrict the supply of higher court advocates. We will put in place contractual and quality assurance arrangements with the appointed assessment organisation so that assessment is at the appropriate standard. We will also publish sample assessment questions and make sure that training providers can engage with the appointed assessment provider, so that they fully understand the content and the assessment standard.
- 18 In addition, we will also make sure the appointed assessment organisation provides the assessment sufficiently frequently and that there is appropriate geographical availability. We will also include assessment cost as a factor in our tender process and appointment decision for the assessment organisation.
- 19 The revised standards will be used in assessments from early 2021 by existing providers which allows sufficient time for training providers to adapt their courses and candidates to understand the competences they need to demonstrate.
- 20 The first live assessments by a single assessment provider will be available not before summer 2022, subject to a successful procurement exercise.
- 21 This lead in time is necessary to allow us to complete the procurement exercise, to appoint the assessment provider, robustly develop and test the assessment framework and for us to communicate changes to the profession.
- 22 Subject to Board approval of our position, we will begin the procurement process in August 2020. We have established a group of assessment and criminal and civil advocacy subject matter experts to help us shape a draft assessment framework. This will provide clarity to potential bidders on our assessment requirements and help encourage the market to respond positively.

***Requiring that the HRA assessment is taken post admission***

- 23 There was broad support for our consultation proposal to require that HRA can only be attempted by admitted solicitors. It was felt that a solicitor seeking the HRA qualification would benefit from experience and exposure to advocacy in practice before attempting the assessment. We will therefore proceed with introducing a rule, subject to approval by the Legal Services Board (LSB), that only admitted solicitors can attempt the HRA qualification.
- 24 Board is asked to make a minor amendment to our existing HRA regulations to introduce this rule (annex 2). Should Board approve, we will apply to the LSB

for approval and if approved, the new rule will be introduced to coincide with assessment against the new standards in early 2021.

***Develop online resources to support solicitors practising criminal and civil advocacy***

- 25 We proposed increasing the resources we provide to solicitors practising criminal and civil advocacy to help them meet practice challenges. These could improve advocacy standards by encouraging solicitors to maintain their competence throughout their careers by helping them to reflect on the quality of their work and address their learning and development needs. We also proposed developing resources to explain to the public what to expect from their solicitor in relation to advocacy services and to publish aggregated and anonymised data on advocacy reports we receive.
- 26 We will publish resources to support solicitors to meet challenges with practising advocacy, for example, how to engage with young BAME people and dealing with vulnerable witnesses. These will also include resources we are developing with the Bar Standards Board for solicitors working in the Coroners Court.
- 27 We originally proposed publishing an aggregated and anonymised thematic summary of the advocacy reports we received. Following further stakeholder engagement, we will extend this to reports received about wider criminal and civil practice, for the reasons set out below. This will also include a summary of the types of regulatory action we have taken, if any.
- 28 Publishing this information helps us:
- a. Focus learning and development on all aspects of criminal and civil practice and not just advocacy.
  - b. Make sure resources we publish better reflect the wider practice challenges solicitors and firms face.
  - c. Build our evidence base on criminal and civil practice issues and help us to be an informed voice in this area.
  - d. Gather further evidence and target our regulatory approach, for example, focus our forward plan of reviews of learning and development records.
- 29 There is greater representation of male solicitors, older solicitors, BAME solicitors and small firms amongst solicitors providing criminal work. There is a risk that publishing reports could result in some people drawing inaccurate conclusions that poor advocacy is caused by these groups. This could lead to reputational damage for these groups.
- 30 We do not consider this a significant risk. The information will be aggregated and anonymised so it will not be possible to identify an individual or firm. Any regulatory action we have taken will also be anonymised. Our approach is justified given that the objective of publishing reports is to help solicitors meet the standards we expect.

- 31 We have already started to develop material to help the public involved in criminal and civil advocacy cases understand what to expect from their solicitor. We have engaged with a range of consumer representative bodies, for example, Keyring, Revolving Doors and Support through Court to help us identify what matters most to the public and identify how best we can present this information.
- 32 These resources will be published in summer 2021 including data on reports and action we have taken.

***Support reporting about advocacy standards***

- 33 We proposed measures to help us better understand the extent and nature of concerns about solicitors' competence to conduct advocacy so that we can take targeted and proportionate action where appropriate. These included introducing simpler reporting mechanisms, working with the judiciary to raise awareness of how and when to report and reminding solicitors and firms of their regulatory responsibilities.
- 34 Many respondents agreed with our proposal. However, some solicitors, firms and solicitor representative bodies felt that our approach could:
- a. Threaten their independence when representing clients, for example, a solicitor might not pursue issues in a case that did not find favour with a judge, but were in the client's interests to raise, because they could be reported.
  - b. Lead to an increase in potentially unfavourable or inappropriate reports from judges. This could result in increased regulatory action against BAME, male and older solicitors and small firms practising criminal advocacy given their greater representation in this area.
- 35 We can justify proceeding despite these concerns because it will help us better assure standards by:
- a. Enabling us to take appropriate and justified regulatory action where we have evidence of a solicitor not meeting the standards we expect.
  - b. Developing a much richer picture of possible issues with the standard of solicitors undertaking advocacy.
  - c. Helping us develop relevant and targeted support for solicitors to meet our standards.
- 36 There are also measures in place to mitigate the risk of inappropriate regulatory action. Our Assessment Threshold Test means we have a clear, proportionate, and transparent approach to decide whether we should investigate a report or complaint made to us.
- 37 From autumn 2020, we will begin to engage with the judiciary to encourage them to raise appropriate concerns about the standard of solicitors' advocacy to us. We will develop resources and work with judicial training bodies to

explain the standards we expect, how they can make a report to us where they have concerns and what we do with the information we receive.

- 38 We will also remind solicitors and firms of this responsibility to make a report to us where they witness poor advocacy – and the ways in which to do so - through our regular communications, for example, Compliance News and through our advocacy resources.

***Proposals we will not implement***

- 39 In response to ongoing concerns about the standard of advocacy in the youth court, we proposed requiring solicitors practising in youth courts to have the criminal HRA qualification where they are acting as an advocate in any case which would go to the Crown Court if it was brought against an adult.
- 40 Having carefully considered responses to the consultation, we agree with respondents that using our HRA standards would mean we are not assessing specific standards required for effective youth court work.
- 41 If we proceed with our consultation proposal it could negatively impact on young people accessing a solicitor of their choice because:
- a. Experienced and existing youth court solicitors without higher rights may not wish to obtain the qualification and could exit the market.
  - b. Experienced and existing youth court solicitors may not meet the required qualification standard and would be unable to continue to practise in serious cases.
  - c. There could be a financial impact on small firms employing youth court solicitors without higher rights, because they would need to instruct counsel or pay for staff to obtain the qualification. As a result, firms might no longer see providing youth court advocacy as commercially viable and exit the market.
- 42 We said in our consultation that we are committed to making sure that all solicitors practising in the youth court meet the standards we, young people and wider stakeholders expect.
- 43 We have considered alternative approaches that balance the need to assure standards without restricting access to good quality solicitors and reflects the available evidence, which is largely anecdotal.
- 44 We will put in place a programme of work to consider how our regulation can best achieve this objective. This will build on our previous work in the youth court, for example, our leaflet for young people and resources for solicitors. Our proposed approach involves:
- a. Engaging with solicitors, firms, and youth court stakeholders to further develop our evidence about standards and risks. This will include face to face engagement and carrying out a literature review.

- b. Considering whether we can further articulate the standards we expect from solicitors practising in the youth court.
  - c. Providing updated resources to support solicitors practising in the youth court to meet our standards.
  - d. Collecting more accurate data on solicitors and firms by introducing a youth court work category in our Practising Certificate Renewal Exercise.
- 45 We will also review on a sample basis the Continuing Competence training records of solicitors practising in the youth court. We will do this initially on a pilot basis. We will check training records to see whether youth court practitioners are taking appropriate steps to make sure they are competent to practise in the youth court. In doing so, we can explore how youth court solicitors are keeping their skills and knowledge up to date, increase our understanding about the risks in this area and better address concerns about standards.
- 46 If we identify an individual who has not carried out any learning and development, we will contact them to seek an explanation as to why and remind them of their regulatory responsibilities. In line with our enforcement strategy, we may consider further regulatory action if the person has clearly failed to consider and address their learning needs and ensure they are competent to do this work.
- 47 This approach sends a clear signal to solicitors, firms, and wider stakeholders that we take youth court standards seriously. We also anticipate that our approach will encourage practitioners to appropriately consider their learning and development needs. For example, our research suggests older solicitors may not be undertaking regular learning and development relying instead on the extent of their post-qualification experience as a measure of competence.

**Recommendations: the Board is asked to:**

- (a) agree our various policy positions to assure advocacy standards (paragraphs 8-47).**
- (b) make a minor amendment to regulation 9.10 of the SRA Authorisation of Individuals (Higher Rights of Audience) Regulations so that only admitted solicitors can take the Higher Rights of Audience (HRA) assessment (paragraphs 23-24 and annex 2).**
- (c) note our consultation response for publication (annex 1).**

**Next steps**

- 48 We aim to publish our response document on our website following Board approval. We will apply to the LSB for changes to our HRA regulations. Following approval, we will begin our programme of work to the following delivery timetable:

Action	Delivery date
Engage with judiciary to encourage appropriate reporting	Autumn 2020
Remind solicitors of their responsibility to report poor advocacy to us	Autumn 2020
Engage with consumer representative groups and public to explain how to they can report poor advocacy to us	Autumn 2020
Introduce revised HRA standards to be assessed by existing providers	Early 2021
Require that the HRA assessment is taken post admission to coincide with assessment against the revised standards by existing providers	Early 2021
Appoint single assessment provider	Early 2021
Engage with youth court solicitor and solicitors, firms, and youth court stakeholders to further develop our evidence about the quality of practice in this area	Spring 2021
Undertake a random sample of learning and development records from solicitors practising in the youth court	Summer 2021
Resources to help solicitors published	Summer 2021
Resources for the public and other stakeholders to explain the criminal and civil advocacy standards	Summer 2021
Publish an aggregated and anonymised summary of the reports we receive raising concerns about criminal and civil advocacy and practice	Summer 2021

**SRA BOARD**

14 July 2020

**CLASSIFICATION – PUBLIC**

Public – Item 11



Provide updated resources to support solicitors practising in the youth court	Summer 2021
Start collecting data on solicitors and firms practising in the youth court	Autumn 2021
Single provider begins assessment against new standards	Summer 2022
Evaluation completed	2023

## **Supporting information**

### **Links to the Corporate Strategy and/or Business Plan**

- 49 Our proposed programme of work will contribute towards the following strategic business objectives:
- a. We will set and apply consistently high professional standards for the individuals and firms we regulate and make sure they are appropriate to meet the challenges of today and the future.
  - b. We will make sure our regulatory requirements are proportionate, providing solicitors and firms with the flexibility to innovate and better meet the needs of members of the public and businesses, while maintaining appropriate levels of public protection.

### **How the issues support the regulatory objectives and best regulatory practice**

- 50 By ensuring that solicitors meet our standards at qualification and post qualification, we are protecting the interests of consumers. Our measures are targeted and proportionate to the available evidence and we do not anticipate that they will have a detrimental impact on the supply or access to competent solicitors.

### **Public/Consumer impact**

- 51 We will engage with the public to help us shape our resources explaining what a good solicitor looks like. We have spoken to several organisations who will help us access individuals and validate any products we may develop. We recognise that Covid-19 may hamper our ability to do this, but a number of these organisations have virtual reference groups where we can test our thinking.
- 52 Our resources will help the public to better understand the standard expected of a solicitor and what they can do to challenge poor standards.

### **What engagement approach has been used to inform the work and what further communication and engagement is needed**

- 53 In addition to the consultation, we have discussed our proposals with stakeholders, for example, our advocacy reference group, the judiciary, the Crown Prosecution Service, the Solicitors Association of Higher Court Advocates, and the Law Society.

### **What equality and diversity considerations relate to this issue?**

- 54 We carried out an initial impact assessment. We have assessed our proposals against protected characteristics groups where we are able to do so given the available data. We have outlined in this document the potential risks to BAME solicitors, older solicitors, male solicitors, and small firms practising criminal advocacy.

## **SRA BOARD**

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### **How the work will be evaluated**

55 We will put in place an evaluation framework to consider the impact of our final policy positions. We have begun work to develop our evaluation approach. It will assess the effectiveness of our proposed measures and whether there are any unintentional consequences, for example, detrimental market or equality impacts.

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### **Annexes**

**Annex 1**                    **Consultation response document**

**Annex 2**                    **Amendment to HRA regulations**