

# **Assuring advocacy standards: analysis of consultation responses**

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March 2020

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## Executive summary

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1. On 21 August 2019 we published our assuring advocacy standards consultation. It ran until 13 November 2020. We also published our initial impact assessment.
2. The consultation proposed measures to improve how we regulate advocacy so that we can better address ongoing concerns about the quality of advocacy provided by the solicitors we regulate.
3. Our proposals included:
  - a. Considering whether we should restrict solicitors' rights of audience in the lower courts until they have been assessed in witness handling.
  - b. Revising our arrangements for higher court advocacy including:
    - i. Revising our Higher Rights of Audience (HRA) standards
    - ii. Introducing a single assessment provider
    - iii. Requiring that HRA is taken post admission
  - c. Providing resources to help solicitors meet our advocacy standards.
  - d. Encouraging reporting to help us act on concerns about a solicitor's competence to conduct advocacy.
4. In this report, we explore the responses and feedback we received to our consultation. We also provide a breakdown of responses by stakeholder to each proposal (annex 1) and a list of respondents who agreed to their name being published (annex 2).
5. We have analysed each consultation response. Our analysis shows that:
  - a. There was broad support for our proposals to develop additional resources for solicitors undertaking advocacy; not to place a restriction on solicitors' rights of audience in the lower courts limiting their right to undertake full trials or witness handling; to introduce revised HRA standards; and to require the HRA assessment to be taken post admission.
  - b. There was a more mixed response to our proposals to require solicitors advocating serious cases in the Youth Court to have the HRA qualification; to introduce a single assessment provider for HRA; and to improve reporting of concerns.
6. We will develop our response in the light of the consultation feedback, and further stakeholder engagement. We plan to publish our response and next steps later this year.

## Who did we hear from?

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7. We promoted the consultation to our stakeholders through our social media channels and our newsletters.
8. We also engaged with a wide range of stakeholders during the consultation to discuss our proposals, for example, our advocacy reference group<sup>1</sup>, the judiciary, the Crown Prosecution Service, the Solicitors Association of Higher Court Advocates, the Public Defender Service, Just for Kids Law, Citizens Advice, local law societies and the Law Society.
9. Many of these organisations welcomed our continued focus on this area given that advocacy is a high – risk practice area and poor advocacy can result in consumer detriment, miscarriages of justice and threaten the rule of law.
10. We received 61 responses to the consultation from a wide range of our stakeholders, including consumer organisations, solicitors, firms, education and training providers and solicitor representative groups.
11. We are grateful to everyone who took the time to respond to our consultation. We have reviewed all the comments we received and will give each one careful consideration in developing our final policy position.

## Responses to individual proposals

### **Consultation proposal 1: Should we place a restriction on solicitors' rights of audience in the lower courts until they have been assessed in witness handling?**

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12. Solicitors have full trial rights in the lower courts on admission. We have already concluded that the Solicitors Qualifying Examination will not include the assessment of witness handling. Our view is that this would be disproportionate, expensive, and out of step with most solicitors' work.
13. Against this background, the consultation considered whether we should place a restriction on solicitors' rights of audience in the lower courts until they have

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<sup>1</sup> A cross sector group set up to help us explore and develop our thinking around assuring the standards of advocacy.

been assessed in witness handling. We proposed that we should not do so because:

- a. Whilst concerns about the standard of advocacy are persistent, the evidence is largely qualitative, and it is difficult to establish whether poor advocacy is a widespread problem.
  - b. Given that this is the case, there is a risk that a broad restriction on all solicitors advocating in the lower courts, irrespective of their competence, is not targeted nor proportionate and could act as a barrier to practising advocacy. This could restrict access to justice.
14. We proposed instead to rely on solicitors' and firms' obligations in our Code of Conduct only to undertake the work which they are competent to perform.
15. The majority of responses agreed with our proposal including almost all individual solicitors, firms and representative bodies. The Birmingham Law Society's Criminal Law Committee felt that the current regulatory framework which requires individuals only to undertake work which they are competent to perform works well in practice and any additional regulation was unnecessary. Several respondents, for example, The City of Westminster & Holborn Law Society and the City of London Litigation Committee, suggested that there was a lack of evidence of poor advocacy to justify a fundamental change to practice rights.
16. The Legal Services Consumer Panel disagreed with our proposal. They felt that the potential risk of detriment to even a small number of clients as a result of poor advocacy justifies requiring that solicitors who wish to work in the Magistrates Court and upwards should be assessed in witness handling.

## Consultation proposal 2: Should we introduce revised HRA standards?

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17. Our consultation proposed revised standards for the HRA criminal and civil advocacy assessments. The proposed standards have been revised to make sure they cover the competences that are required by modern day higher court advocates, for example, including standards on witness handling and dealing with vulnerable clients.
18. A large number of responses agreed with the proposed changes to the HRA standards. The British and Nigeria Law Foundation and the Crown Prosecution Service (CPS) both welcomed the clarity that the proposed revised standards provide in helping solicitors understand their ongoing competence requirements, reflecting the legislative and procedural challenges of modern practice.
19. A small number of respondents disagreed with our proposed revisions for two reasons. Firstly, it was felt that revisions were not required because of the lack

of evidence that the existing standards consistently produce poor quality higher court advocates. Secondly, the introduction of revised and strengthened standards could result in fewer solicitors passing the assessment and therefore reduce the supply of solicitors practising in the higher courts.

20. The Society of Asian Lawyers and two individual solicitors suggested that the expected standard of solicitors in the higher court should be aligned with the standards expected of barristers.

## **Consultation proposal 3: Should we introduce a single assessment provider for HRA?**

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21. We proposed to appoint a single assessment provider for the HRA qualification to address the risk that our existing multiple assessment provider model does not guarantee that solicitors awarded the HRA qualification are assessed consistently.
22. Respondents were broadly split on this proposal. Those that agreed did so on the basis it would ensure greater assessment robustness, consistency, accuracy and fairness. Some respondents also felt that a single provider model offered a clearer and simpler assessment pathway for solicitors seeking higher rights.
23. Respondents who disagreed with our proposal, for example, The Society of Asian Lawyers, did so because they felt a single assessment provider would result in reduced assessment availability and increased assessment cost. The Solicitors Association of Higher Court Advocates and the Youth Practitioners' Association offered alternative approaches and suggested we could improve assessment robustness and consistency through greater standardisation of teaching and assessment processes, while retaining a distributed assessment model.
24. In addition, an education and training provider and individual solicitor disagreed with our proposal that the appointed assessment provider should not deliver training without our consent or where there is any perceived or actual conflict of interest.

## **Consultation proposal 4: Should we require that the HRA assessment is taken post admission?**

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25. We are aware that some aspiring solicitors take the HRA assessment as an elective course on the Professional Skills Course (PSC), before they have been admitted. We said that we did not consider this to be appropriate for an advanced assessment of rights which only admitted solicitors may exercise. We proposed changing our regulations to make clear that the HRA assessment may only be attempted by admitted solicitors.
26. The majority of respondents agreed with our proposal including most solicitors, firms and representative bodies. The Criminal Law Solicitors' Association felt that a solicitor seeking a higher rights qualification would benefit from experience and exposure to advocacy in practice before attempting the assessment. A few respondents went further and suggested that we should introduce requirements that the HRA assessment can only be attempted by solicitors with at least two years' advocacy practice post qualification experience.
27. A small number of respondents disagreed with our proposal. An education and training provider suggested it was the role of the regulator to assure competence and prescribe when rights can be exercised, rather than specify when the assessment can be taken. A firm respondent felt there was no reason to change our existing approach because there is no evidence that undertaking the HRA assessments as a trainee is linked with poor advocacy.

## **Consultation proposal 5: Should solicitors advocating serious cases in the Youth Court have a higher rights qualification?**

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28. In response to concerns about the standard of advocacy in the youth court, we proposed requiring solicitors practising in the 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. We felt this would protect youth courts clients who are charged with serious offences.
29. Respondents agreed in principle that we should take steps to ensure that children against whom a case was brought in the youth court were represented by competent solicitors. However, a significant majority, including solicitors, firms and representative bodies disagreed with our proposal. Their view was

that this requirement could damage the quality and supply of youth court solicitors because:

- a. Experienced and competent youth court solicitors would be restricted from practising in serious cases and could be replaced by solicitors (with a higher rights qualification) who were inexperienced in youth court work.
  - b. Experienced and competent youth court solicitors without higher rights may not wish to obtain the qualification and would therefore not practise in the youth court.
  - c. There would be a financial impact on small firms employing youth court solicitors without higher rights, because they would therefore need to instruct counsel. As a result, firms might no longer see providing youth court advocacy as commercially viable.
30. Some respondents who disagreed with our proposal also suggested that the higher rights standards were not aligned with the skills, knowledge and experience required for competent practice in the youth court. Some respondents felt that representing young people in the youth court requires specialist skills and knowledge and as a result we should instead develop specific standards, require mandatory training or require periodic accreditation.
31. In addition, it was felt that our proposal was unnecessary as it would duplicate existing quality assurance regimes which assess the competence of youth court solicitors. For example, those employed by the CPS or those that deliver legally aided services are subject to quality assurance checks (e.g. audit/observation) by the CPS and the Legal Aid Agency.

## **Consultation proposals 6 and 7: Should we provide resources to help advocates meet our standards?**

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32. We proposed increasing the resources we provide to solicitors practising criminal and civil advocacy. These would encourage solicitors to maintain their competence throughout their careers by helping them to reflect on the quality of their work and address the learning and development needs they identified.
33. The majority of respondents supported this proposal on the basis that it would promote higher standards. Some respondents suggested that we should ensure that any resources we develop do not duplicate existing material published by other organisations providing advocacy training and resources. Others proposed that we should focus resources on sentencing and dealing effectively with vulnerable clients as they considered these to be areas where solicitors required further support.

34. A large number of respondents also agreed with our proposal to develop resources for the public and other stakeholders to explain the criminal and civil advocacy standards we expect of solicitors.

## **Consultation proposal 8: Should we encourage reporting about advocacy standards?**

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35. 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.
36. Those in favour of our proposal, including the City of Westminster & Holborn Law Society, agreed that it was desirable for judges and other stakeholders including clients to find it easy to make a complaint if and where they witnessed poor advocacy.
37. The Solicitors Association of Higher Court Advocates felt that if implemented the proposals could threaten advocates' independence. They felt an advocate 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. Some felt that simpler reporting could disadvantage higher court solicitors (as opposed to barristers) as some judges may be biased.
38. A small number of respondents called for frontline regulators to develop an independent organisation so that there is a clear and simple mechanism for all stakeholders to raise concerns about the standard of advocacy.

## **Consultation question on our initial impact assessment**

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39. We also asked for further information to help inform our impact assessment. Few respondents provided additional details. Those that did suggested that:
- a. Further analysis of the impact of our proposals on small and Black Asian and Minority Ethnic owned firms was needed
  - b. Further evidence was required on the scale and nature of concerns about poor standards of civil advocacy.

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- c. Our impact assessment should reflect the changing landscape of Legal Aid funding.

40. We welcome these additional comments and will take them into account in developing our thinking and final impact assessment.

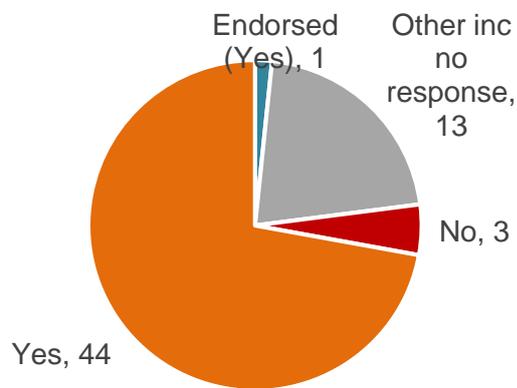
## Annex one: statistical analysis of responses

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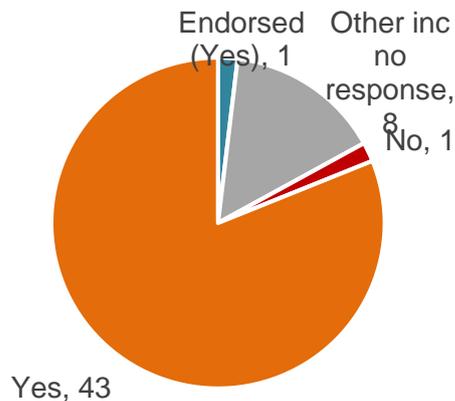
Note that responses to questions 2, 6, 7 and 9 were not in yes/no form and are therefore not suitable for statistical representation in chart form.

**Q1) Do you agree with our proposal not to change existing practice rights, and to rely on the obligation on solicitors not to undertake witness handling where they are not competent to do so?**

All respondents (61)

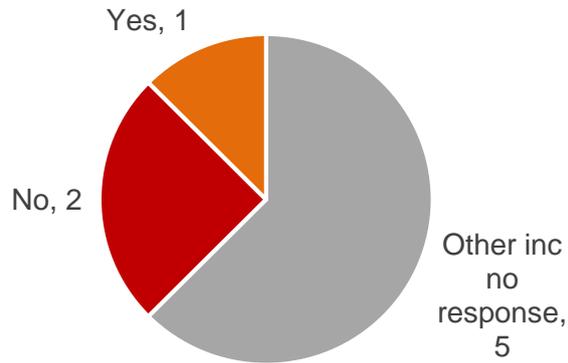


Solicitors, firms and representative bodies (53)



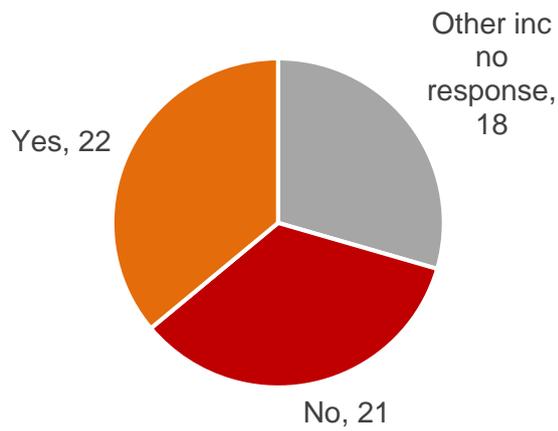
Other respondents\* (8)

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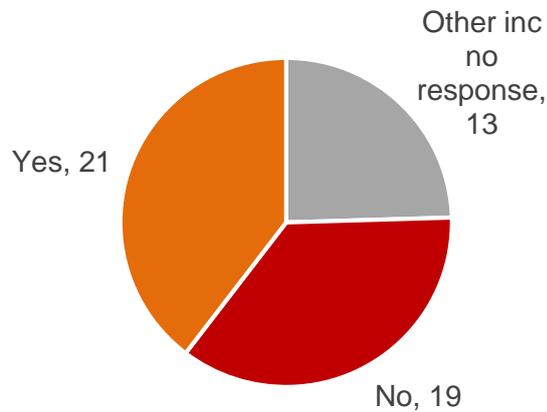


**Q3) Do you agree that we should introduce a single assessment organisation for the HRA qualification?**

All respondents (61)

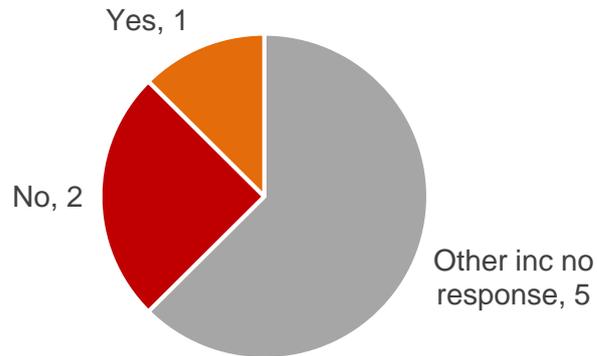


Solicitors, firms and representative bodies (53)



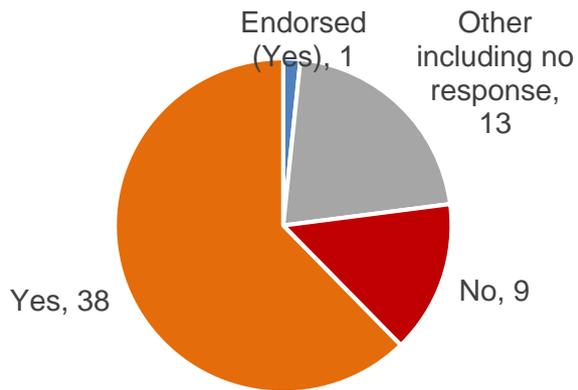
Other respondents\* (8)

Assuring advocacy standards: consultation responses

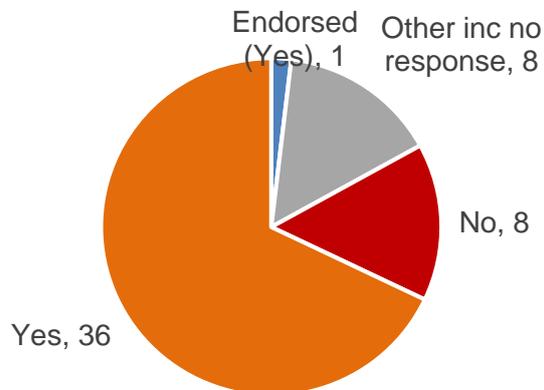


**Q4) Do you agree with our proposal that the HRA assessment can only be attempted by admitted solicitors?**

All respondents (61)

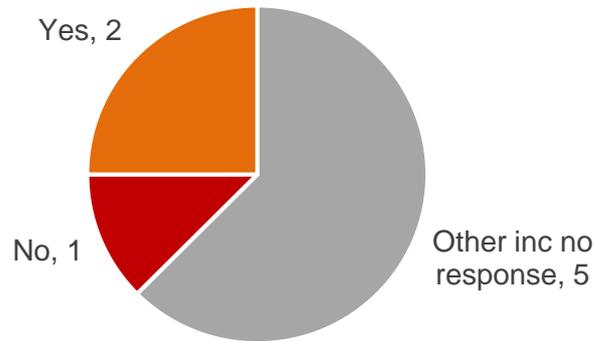


Solicitors, firms and representative bodies (53)



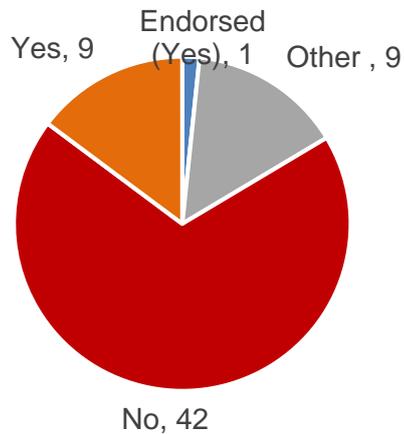
Other respondents\* (8)

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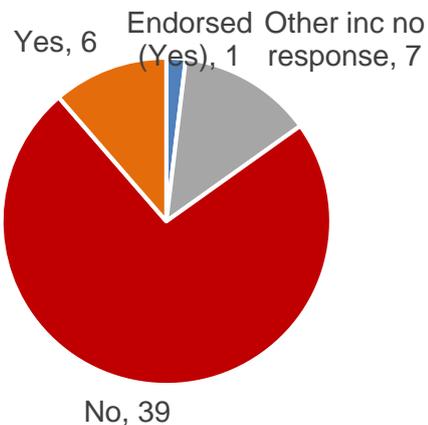


**Q5) Do you agree that we should impose a new youth courts requirement that solicitors practising in the youth courts must hold the criminal HRA qualification where they are acting as an advocate in any case which would go to the crown court if it involved an adult?**

All respondents (61)

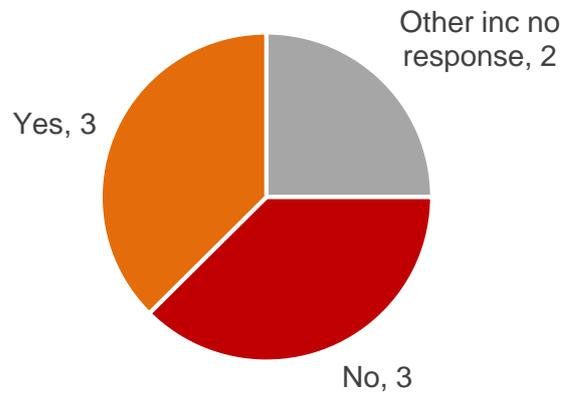


Solicitors, firms and representative bodies (53)



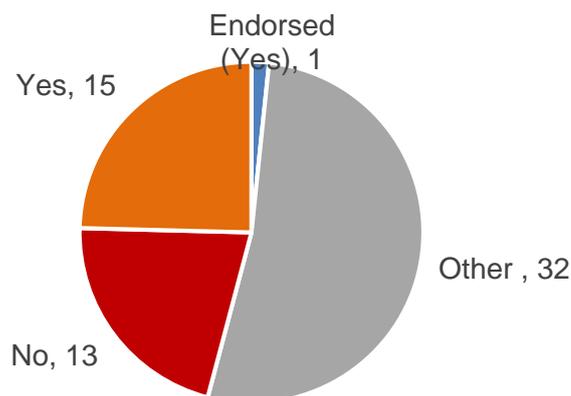
Assuring advocacy standards: consultation responses

Other respondents\* (8)

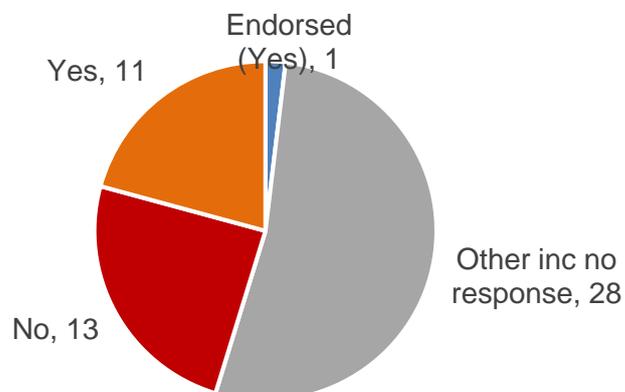


**Q8) Do you agree with our proposals to support reporting?**

All respondents (61)

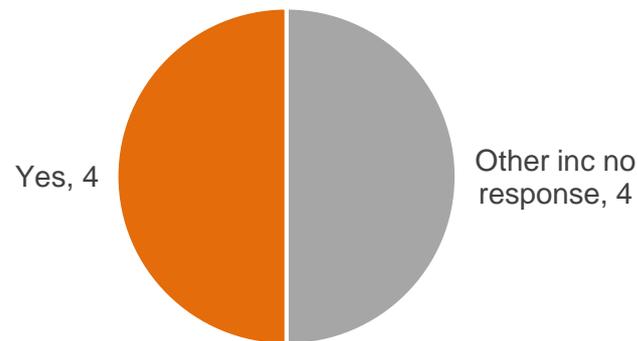


Solicitors, firms and representative bodies (53)



Other respondents\* (8)

## Assuring advocacy standards: consultation responses



\* The eight respondents classified as “other” are

- Centre for Justice Innovation
- CILEx Regulation / CILEx (joint response)
- CPD Training (UK)
- Lee Emberton, a non-legally qualified individual
- Legal Services Consumer Panel
- Transform Justice
- An anonymous university or other education/training provider
- Youth Justice Legal Centre (Just for Kids Law)

## Annex two: list of respondents

Name	Respondent type
Publish the response with my/our name	
<i>Responses from organisations</i>	
Birmingham Law Society Criminal Law Committee	Law society
Birmingham Law Society Dispute Resolution Law Committee	Law society
British Nigeria Law Forum	Representative group
Centre for Justice Innovation	University or other education/training provider
CILEx Regulation / CILEx (joint response)	Other
City of London Law Society Litigation Committee	Law society
City of Westminster & Holborn Law Society	Law society
CPD Training (UK) Ltd	University or other education/training provider
Criminal Law Solicitors' Association	Representative group
Crown Prosecution Service	Law firm or other legal services provider
District Judge (Magistrates Courts)	Representative group
Elliot Mather LLP	Law firm or other legal services provider
Garden Court Chambers / Howard League for Penal Reform (joint response)	Other
Johnson Astills	Law firm or other legal services provider
Junior Lawyers' Division	Representative group
Legal Aid Practitioners' Group	Representative group
Legal Services Consumer Panel	Other
London Criminal Courts' Solicitors' Association	Representative group
London Solicitors' Litigation Association	Representative group
McGuireWoods London LLP	Law firm or other legal services provider
Phillips Solicitors	Law firm or other legal services provider
Society of Asian Lawyers	Representative group
Solicitors Association of Higher Court Advocates (SAHCA)	Representative group
The Law Society	Law society
Transform Justice	Other
Youth Justice Legal Centre (Just for Kids Law)	Other
Youth Practitioners' Association	Representative group
Youth Team, Hodge Jones & Allen	Law firm or other legal services provider
<i>Responses from individuals</i>	
Arthur Michael Robinson	Solicitor
Craig Rappel	Solicitor
David Sedgwick	Solicitor
Dennis Clarke	Solicitor
Janetta Davies	Solicitor
Lee Emberton	Non-legally qualified, working in legal services
Pamela Martin-Dominguez	Solicitor

## Assuring advocacy standards: consultation responses

Robbie Ross	Solicitor
Robert Cashman	Solicitor
Simon Walton	Solicitor
Thomas Julian Edwards	Solicitor
Publish the response anonymously	
<i>Responses from organisations</i>	
ID – 056	Law firm or other legal services provider
ID – 070	Law firm or other legal services provider
ID – 109	University or other education/training provider
<i>Responses from individuals</i>	
ID – 017	Solicitor
ID – 019	Solicitor
ID – 026	Solicitor
ID – 030	Solicitor
ID – 036	Other
ID – 042	Solicitor
ID – 044	Solicitor
ID – 049	Solicitor
ID – 053	Solicitor
ID – 064	Solicitor
ID – 083	Solicitor
ID – 089	Solicitor
ID – 103	Solicitor
ID – 108	Solicitor
ID – 116	Solicitor
Publish my/our name but not the response	
<i>Responses from organisations</i>	
Boyce & co criminal and motoring solicitors	Law firm or other legal services provider
<i>Responses from individuals</i>	
Gregory Earnshaw	Solicitor