

**Application made by the Solicitors Regulation Authority to the Legal Services Board under Part 3 of Schedule 4 to the Legal Services Act 2007 for the approval of the SRA Amendments to Regulatory Arrangements (Higher Rights of Audience Regulations) Rules [2014]**

**A Summary**

1. This application is made to the Legal Services Board (LSB) for the approval of changes to the SRA Handbook to account for the dissolution of the Patents County Court (PCC) and establishment of the Intellectual Property Enterprise Court (IPEC). The specific changes are described in section C below and are designed to allow solicitor advocates who represented clients at the PCC to continue to be able to do so at the IPEC.
2. In outline, the changes:
  - remove the IPEC from the scope of the Higher Rights of Audience (HRA) Regulations;
  - allow solicitor advocates who previously represented clients at the PCC to continue to do so at the IPEC, without the need to instruct barristers, gain the Higher Rights (Civil Advocacy) Qualification, or seek a discrete right to appear from the court in each case.

**B Details of the SRA's current regulatory arrangements**

3. Since October 2011, the SRA has adopted a risk-based, outcomes-focused approach to regulation. This approach allows the SRA to focus on issues that really matter, whilst giving practitioners the freedom and flexibility to decide how best to deliver services in the context of managing their own risks.
4. The regulatory provisions for restricting the rights of audience which solicitors may exercise date back much further. Historically, the courts determined which advocates had rights of audience before them and solicitors were generally limited to the lower courts. Section 27 of the Courts and Legal Services Act 1990 (CLSA 1990) made provision for solicitors to achieve rights of audience in the higher courts, stating that lawyers could only exercise a right where their regulator's qualification regulations and conduct rules had been approved. Section 32 limited the rights themselves to "*the rights of audience exercisable by solicitors (in their capacity as such) immediately before 7th December 1989*".
5. Section 36 of the Access to Justice Act 1999 (AJA 1999), in amending sections 31-33 of the CLSA 1990, introduced the concept that on admission all solicitors had full rights of audience in all courts in all proceedings, exercisable in accordance with training requirements and rules laid down by the Law Society. These rules were the Higher Courts Qualification

Regulations which restricted the rights, established civil and criminal qualifications, and set out the training processes for gaining them.

6. Sections 27 and 31 of the CLSA 1990 have been repealed by the Legal Services Act 2007 (LSA 2007). The LSA 2007 did not explicitly replace these requirements, nor did it distinguish between higher or lower courts. Instead the LSA sets out exercising rights of audience as a reserved legal activity, and says that a person is entitled to carry on a reserved legal activity where authorised.
7. The LSA defines "*regulatory arrangements*" as a regulator's "... *arrangements for authorising persons to carry on reserved legal activities...*" and "... *its qualification regulations*". It then describes qualification regulations as any rules or regulations "*relating to ... the education and training which persons must receive... or any other requirements which must be met by or in respect of them in order for them to be authorised*" to carry on a reserved legal activity. This gives us the ability to set HRA regulations but there is not a clear a distinction between lower and higher courts as in the previous legislation.
8. The current HRA regulations are supported by standards of competence, which establish the skills required to advocate effectively at the higher courts. These skills are set at a higher level than the advocacy skills taught throughout the solicitor qualification process. The potential impacts on clients of less than competent performance at the higher courts are greater than those impacts at lower courts – greater financial repercussions and loss of liberty for longer periods, for instance. To address these risks we continued to require HRA accreditation even though the LSA 2007 removed the statutory requirement for such a scheme.

### **C Nature and effect of the proposed amendments to the SRA's regulatory arrangements**

9. The SRA Amendments to Regulatory Arrangements (Higher Rights of Audience Regulations) Rules [2014], annexed to this application, were made by the SRA Board on [22 January 2014], subject to approval by the LSB. The LSB has consulted the relevant Judiciary and HMCTS. The proposed amendments have not been consulted upon more widely as we consider this to be maintaining the status quo with a minor technical change to the scope of the regulations to take account of the externally changed environment. The unintended consequence of the change in court status was only drawn to our attention in December. Wider consultation with the whole legal profession or public would have added cost with no tangible benefit.
10. The effect of the proposed amendment will be that any practising solicitor will be able to appear in the IPEC, whether or not they have the civil HRA award. The regulations will continue to apply to all other higher courts and will require solicitors appearing in them to hold the relevant HRA award. The Quality Assurance Scheme for Advocates is unaffected as that scheme is restricted to criminal work.
11. Regulation 2 of the HRA Regulations sets out the scope of the regulations, which cover all higher courts. A new regulation 2.2 will be added which will say "*Solicitors and RELs appearing in the Intellectual Property Enterprise Court (IPEC) do not need to hold a Higher Courts (Civil Advocacy)*

*Qualification under these regulations.*” A commentary guidance note will explain why this change was made.

#### **D Rationale for amendments**

12. The PCC was created under the Copyright Designs and Patents Act 1988 to deal with low cost patent litigation. One of the specific aims was to reduce the cost of litigation by opening up rights of audience to all solicitors and patent attorneys. Changes to the procedures and costs were implemented in 2010 as part of the Jackson Review of civil litigation costs. Further changes were made in October 2013 in order to take advantage of the administrative and logistical support provided by the Chancery Division of the High Court; this established the new IPEC.
13. However, this latest change led to an inadvertent impact on solicitor advocates – as the PCC was a ‘subordinate’ court, and the IPEC a higher court, any solicitor who previously represented clients at the PCC would not be able to do so at the new court if they did not possess the Higher Rights of Audience (Civil Advocacy) qualification. This would leave solicitors having to instruct barristers to appear at the IPEC, or gain accreditation which may take several weeks or even months to obtain. Both options could adversely impact clients.
14. The work of the court has not changed. The procedures and cost and damages limits are the same. No concerns have been raised with the quality of work carried out by solicitor advocates at the IPEC. The MoJ did not intend to restrict or prevent solicitor advocates from appearing at the IPEC, and the transfer of cases from the PCC to IPEC poses no additional risk, so the exclusion of solicitors without HRA rights from the IPEC is a simple unintended consequence.
15. The Intellectual Property Regulation Board, the regulatory body of Patent Attorneys and Trade Mark Attorneys, has extended rights of representation and audience to IPEC hearings. Insisting that solicitor IPEC advocates gain the HRA civil award would be disproportionate and contrary to the public interest.
16. Further, the Chancellor of the High Court has confirmed that, pending formal amendments to our rights of audience requirements, discretion will normally be exercised to allow solicitors to appear as before.

#### **E Statement in respect of the LSA Regulatory Objectives**

17. The SRA must, so far as is reasonably practicable, act in a way that is compatible with the regulatory objectives set out in the Legal Services Act 2007, and in a way that it considers to be most appropriate for the purpose of meeting those objectives. The SRA Board is satisfied that the amendments it has made are compatible with the regulatory objectives and represent an appropriate means of meeting them.

#### **Protecting and promoting the public interest**

18. Removing the IPEC from the scope of the HRA regulations is in line with a risk-based and outcomes-focused regulatory approach. The public interest is

protected by the obligation under the Code of Conduct relating to provision of a proper service to clients. There is no benefit to the public interest by an insistence on our part on gaining the HRA civil award where there is no evidence of potential harm.

19. The amendments to the scope of the HRA regulations remove requirements and processes which could add regulatory costs to intellectual property specialist solicitor organisations but are unnecessary to protect the public interest. We feel they are unnecessary because the competencies needed to adequately represent clients at the PCC have not changed for the IPEC.

#### **Supporting the constitutional principle of the rule of law**

20. The amendments are considered to have a neutral effect on this regulatory objective.

#### **Improving access to justice**

21. The amendments are considered to have a neutral effect on this regulatory objective – if we failed to address the technical change in status and insisted on solicitors gaining the HRA civil award, there could be some negative effects on this objective, including additional costs which could be passed on to clients, delays in cases or clients having to seek alternative representation.

#### **Protecting and promoting the interests of consumers**

22. As in the case of the public interest objective, the interests of consumers are protected by the SRA Code of Conduct requirements in relation to solicitors being required to provide a proper standard of service. The change in court status has not resulted in any additional or higher competence requirements needed to appear at the IPEC.

#### **Promoting competition in the provision of services**

23. The amendments are considered to have a neutral effect on this regulatory objective. An insistence on holding the HRA civil award could, at least in the short term, result in a reduction in the number of solicitors and organisations able to appear at IPEC which could harm competition.

#### **Encouraging an independent, strong, diverse and effective legal profession**

24. The amendments are considered to have a neutral effect on this regulatory objective.

#### **Increasing public understanding of the citizen's legal rights and duties**

25. The amendments are considered to have a neutral effect on this regulatory objective.

#### **Promoting and maintaining adherence to the professional principles**

26. The amendments are considered to be proportionate and to have no foreseeable negative effects on this regulatory objective.

## **F Statement in respect of the Better Regulation Principles**

27. The SRA Board believes that the amendments fulfil the SRA's obligations to have regard to the Better Regulation Principles. The amendments are considered to be proportionate and targeted in a way that achieves the necessary level of protection for consumers and the public interest with an appropriate level of regulation. Requiring all IPEC solicitor advocates to gain HRA civil accreditation before appearing is not seen as a proportionate solution to a change in the status of the court.
28. Although the SRA has not consulted publicly on the proposed changes, the guidance note which will be added to the regulation states why the change has been made and why the HRA requirements should not apply to IPEC solicitor advocates. Following the approval of the LSB, we will ensure that the changes are published and implemented transparently.

## **G Statement in relation to desired outcomes**

29. The SRA's desired outcome is to have in place a regulatory framework which is aligned with risk-based, outcomes-focused regulation and contains only those regulations and processes that benefit the public interest.
30. We will assess the outcome of the amendments as we continue to develop and operate as a risk-based regulator, focusing on areas of greatest risk and on those issues that matter the most.

## **Stakeholder engagement**

31. The SRA has engaged with the Law Society, who raised the issue on behalf of affected organisations, and Her Majesty's Courts and Tribunals Service.

## **I Statement in relation to impact on other approved regulators**

32. The amendments have no impact on any other approved regulator under the Legal Services Act 2007.

## **J Implementation timetable**

33. This application for LSB approval of the SRA Amendments to Regulatory Arrangements (Higher Rights of Audience Regulations) Rules 2014 is made on [30 January 2014].
34. Subject to LSB approval, the changes will be included in Version 9 of the SRA Handbook due to be published on 1 April 2014.

## **K Further explanatory information**

35. The following documents are annexed to this application:

**Annex 1** – SRA Amendments to Regulatory Arrangements (Higher Rights of Audience Regulations) Rules 2014

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# SRA Amendments to Regulatory Arrangements (Higher Rights of Audience Regulations) Rules 2014

Rules dated [date of LSB approval] made by the Solicitors Regulation Authority Board.

Made under Part I, Part II, sections 79 and 80 of, and paragraph 6B of Schedule 1 to, the Solicitors Act 1974 and sections 9 and 9A of, and paragraphs 14A, 14B and 32 to 34 of Schedule 2 to, the Administration of Justice Act 1985, paragraphs 2 and 3 of Schedule 14 to the Courts and Legal Services Act 1990 and section 83 of, and Schedule 11 to, the Legal Services Act 2007, with the approval of the Legal Services Board under paragraph 19 of Schedule 4 to the Legal Services Act 2007.

## Rule 1

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

(a) after regulation 2.1, insert a new regulation 2.2:

“*Solicitors* and *RELS* appearing in the Intellectual Property Enterprise Court (IPEC) do not need to hold a Higher Courts (Civil Advocacy) Qualification under these regulations.”

(c) in guidance note (i) under regulation 2, insert a new guidance note (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 *RELS* 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 *RELS* to possess the civil qualification in order to exercise their rights of audience in the IPEC.”

## Rule 2

These amendment rules shall come into force on 1 April 2014.