

Application made by the Solicitors Regulation Authority Board to the Legal Services Board under Part 3 of Schedule 4 to the Legal Services Act 2007, for the approval of changes to regulatory arrangements in respect of rights of audience in the higher courts

A. Summary

1. This application is made by the Solicitors Regulation Authority (SRA) to the Legal Services Board (LSB) for approval of changes to the SRA's regulatory arrangements in respect of higher rights of audience (HRA).

B. Background

Purpose of our application

2. We are applying for minor changes to our regulations so that only those individuals who have passed the Solicitors Qualifying Examination (SQE) and been assessed as competent in foundation advocacy skills can take the criminal or civil HRA assessments.
3. In proposing this change, we have considered the relationship between the introduction of the SQE and our criminal and civil HRA assessment and qualification. Our view is that the assessment and subsequent award of rights to practise in the higher court should build on the advocacy skills and knowledge obtained and assessed through the SQE rather than precede it.
4. Our data suggests that our proposed change will only affect a small number of people. However, it will help us better assure standards of advocacy in the higher courts as solicitors will develop their advocacy skills and knowledge through experience gained before admission as a solicitor, and before being assessed and awarded the HRA qualification to practise in the higher courts.

Our wider programme of work to assure advocacy standards

5. This application should be seen in the context of our wider programme of work to better assure advocacy standards in the lower and higher courts.
6. Advocacy is a high-risk practice area and poor advocacy can result in consumer detriment, miscarriages of justice and threaten the rule of law. As a public interest regulator, we are committed to making sure that solicitors practising criminal and civil advocacy in all courts have met and continue to meet the high standards we and the public expect.
7. Ongoing concerns have been raised about the standard of solicitors' advocacy in the higher courts, for example, in the Jeffrey Review in 2014 and in research we conducted jointly with the Bar Standards Board in 2019 into judicial perceptions of the quality of advocacy. These concerns are persistent but the evidence to support them is largely qualitative, and it is difficult to establish whether poor advocacy is a widespread problem or not.
8. In 2019, we consulted on a programme of work to improve how we currently regulate the quality of civil and criminal advocacy including advocacy conducted in the higher court.

9. [Our Board approved this programme](#) in July 2020. In [finalising our policy positions](#), we comprehensively addressed all the issues raised during the consultation and set out the evidence we relied upon in deciding our approach. Our programme of work includes:
 - a. Introducing revised HRA standards to be assessed by existing providers in early 2021.
 - b. Procuring a single assessment provider to begin assessment against our revised standards not before summer 2022.
 - c. Undertaking 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.
 - d. 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.
 - e. Collecting more accurate data on solicitors and firms by introducing a youth court work category in our Practising Certificate Renewal Exercise.
 - f. Considering whether we can further articulate the standards we expect from solicitors practising in the youth court.
 - g. Publishing online resources in summer 2021 which help solicitors to reflect on the quality of their advocacy and address any learning and development needs.
 - h. Working with the judiciary to remove the uncertainty that judges face when making a report to us.
 - i. Developing resources to support solicitors practising in the Coroners Court.
10. Proceeding with the procurement of a single HRA assessment provider to assess against our revised standards is likely to involve changes to our existing [Education, Training and Assessment HRA regulations, because we will need to publish revised HRA assessment regulations](#). We will engage with the LSB on this issue in due course once we have completed our procurement exercise and identified a preferred bidder.
11. Whilst our revised HRA assessment standards are not within scope of this application, we have included them in annex 2a and b to provide a full picture of our measures to ensure the quality of higher court advocacy.
12. Our view is that the only part of our proposals which require a change to regulatory arrangements are when the HRA qualification can be taken and changes to our HRA assessment regulations.
13. Our resources to support solicitors practising criminal and civil advocacy are not regulatory arrangements. They are not mandatory and are designed to help solicitors consider and address their learning and development needs in order to maintain their competence.
14. The resources are similar to those we have developed for the youth court, continuing competence and SQE qualifying work experience guidance. These were not considered regulatory arrangements, but we have provided an overview of the likely content of our resources in annex 3 for context.

C. Details of the SRA's current regulatory arrangements

15. All solicitors are granted rights of audience in the lower courts upon admission. We require all solicitors to pass the HRA assessment before they practise in the Crown Court and High Court.
16. The HRA assessment tests their knowledge of evidence, procedure, witness handling, ability to conduct a full trial and ethics in the higher courts as well as their advocacy skills. Only admitted solicitors who pass this assessment can exercise rights in the higher courts.
17. Our current regulations do not prohibit individuals attempting the HRA assessment before their admission as a solicitor. 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. An individual who obtains the HRA qualification prior to admission cannot practise in the higher courts until they have been admitted.

D. Nature and effect of the proposed alterations to the SRA's regulatory arrangements

18. Our proposed change means that only admitted solicitors can attempt the HRA assessment. We outline our rationale for amendment in section E.
19. A change to our regulatory arrangements is therefore required to introduce this rule. Annex 1 is the SRA Authorisation of Individuals (Higher Rights of Audience) (Amendment) Regulations 2020 which implements this change. If approved, this rule will take effect from 1 April 2021.
20. We have considered when we should introduce this rule. While we would wish to introduce the change as early as possible to secure the regulatory benefits it provides, we need to give non admitted individuals, who may have already started the process of obtaining their HRA qualification, enough time for them to complete the assessment before the rule comes into effect. We know that there are over 20 opportunities for candidates to take the HRA qualification between April and September 2021 (when SQE comes into force). Introducing the rule on 1 April 2021 gives sufficient notice to individuals who may have already or are about to start preparation for the assessment.
21. Our proposed rule change will not significantly affect the supply of solicitor advocates in the higher court. Under our current rules, an individual who has not yet qualified can obtain the HRA qualification but cannot use it until they have been admitted. Our change therefore only affects the timing of when the HRA assessment can be taken.
22. Our change will affect a very small number of individuals. Our data shows that from August 2014 until July 2020, we only received 45 applications to grant the HRA qualification from individuals who were not admitted as a solicitor. A total of 1898 HRA applications were granted during this time. This demonstrates that a very small proportion (2 percent) awarded the HRA qualification take the assessment prior to admission. Despite our change only affecting a small number of individuals, it is nevertheless right to make the change, as it will contribute to increased confidence in standards of advocacy.
23. Most respondents to our consultation agreed with our proposal (see section I. below).

E. Rationale for amendments

24. The SQE will assess at admission the advocacy skills and knowledge required to practise effectively. This includes:
- SQE 1: In the context both of specified criminal offences and civil dispute resolution, candidates are required to apply relevant core legal principles and rules appropriately and effectively, at the level of a competent newly qualified solicitor in practice.
 - SQE 2: Oral advocacy skills are assessed.
25. Our change will result in a clear and logical progression in our advocacy training and assessment requirements. Individuals who also wish to conduct higher court advocacy can build on the skills and knowledge assessed through the SQE by getting more experience of advocacy practice, through observation, or conducting simple applications or trials in the lower courts before they take their HRA assessment and apply for higher rights.
26. This helps us better assure advocacy standards by making sure that the advocacy skills of those solicitors seeking the HRA qualification are first assessed through the SQE and then developed by experience consistent with the rights of audience they have without HRA.
27. In addition, the PSC will be phased out with the advent of the SQE. So, the opportunity it provides for trainees to gain the qualification will fall away. Our rule clarifies when the HRA qualification may be attempted in light of these circumstances.

F. Statement in respect of the Regulatory Objectives

28. Our change will have the following impacts on the regulatory objectives in s.1(1) of the Legal Services Act 2007.

Regulatory Objective	Impact
Protecting and promoting the public interest	Our requirement as to when the HRA qualification can be taken will enhance confidence in the HRA qualification. It will help us assure that the advocacy skills of a solicitor seeking the HRA qualification are first assessed through the SQE.
Supporting the constitutional principle of the rule of law	Effective advocacy supports the rule of law by enabling individuals to build up their advocacy skills through the SQE and then HRA
Improving access to justice	The consultation exercise and our engagement with stakeholders did not highlight any issues or data to suggest that this change would reduce the supply of solicitors providing criminal and civil advocacy. The numbers of individuals who gain the qualification before admission is very small. Non admitted individuals who hold the HRA qualification cannot practise in the higher courts, and so those who pass HRA before admission under the current rules must

	in any event wait until they are qualified solicitors before being able to exercise their rights.
Protecting and promoting the interests of consumers	Our change reduces the potential risk of poor advocacy in the higher courts by helping solicitors wishing to practise in the higher courts build their skills, knowledge, and experiences before exercising their higher court rights.
Promoting competition in the provision of services	<p>There is no evidence that this change will negatively impact this objective or materially affect the supply of solicitors providing criminal or civil advocacy.</p> <p>As already stated, our change will only impact a small number of individuals. We only received 45 applications to grant the HRA qualification from individuals who had not been admitted as a solicitor and they cannot exercise their higher rights of audience until after admission. A total of 1898 HRA applications were granted during this time.</p> <p>We will monitor the impact of programme of advocacy on this objective through our evaluation programme.</p>
Encouraging an independent, strong, diverse and effective legal profession	There is no evidence to suggest that this change will negatively impact this objective. It should help encourage a strong, diverse and effective profession by ensuring that HRA is a higher qualification that is only attempted by admitted solicitors and therefore enhancing confidence in solicitor advocates.
Increasing public understanding of the citizen's legal rights and duties	There will be no negative impact on this objective.

G. Statement in respect of the Better Regulation Principles

29. We consider that in making this change, we have fulfilled our obligation under s.28 of the Legal Services Act 2007 to have regard to the Better Regulation Principles, as follows.

Proportionate	This change is a proportionate regulatory response. It does not introduce any additional burdens nor impose any unnecessary restrictions on those individuals wishing to practise in the higher courts and is required to make sure that solicitors practising in the crown and high court are competent to do so.
Accountable	This change is a response to ongoing concerns about the standard of advocacy raised with us through our engagement and through our consultation. Most consultation responses supported this proposal and we have carefully considered all consultation responses in making our decision to proceed with this change.
Consistent	This change is consistent with our wider approach to regulation and enforcement, for example, regulation based on available evidence and risk.

	It also means that we have a clear and logical progression in our advocacy training and assessment requirements.
Transparent	We have engaged extensively with a wide range of stakeholders to explore our approach including solicitors and HRA assessment providers. This includes a public consultation.
Targeted only at cases in which action is needed	This change is targeted at an identified risk and only impacts those solicitors who wish to take the HRA qualification before admission without building upon their advocacy skills assessed through the SQE.

H. Statement in relation to desired outcomes

30. This change will help us better assure advocacy standards in the higher court by requiring that solicitors who wish to conduct higher court advocacy build on the skills and knowledge assessed through the SQE before applying for higher rights of audience.
31. This is a minor change with a minor impact on individuals seeking the HRA qualification but helps us to better assure standards in the higher courts. However, we will review the impact of our proposal through our evaluation of our wider advocacy programme. We are in the early stages of developing our approach, but we will monitor and review the impact of this change on the supply of solicitors seeking the HRA qualification as well as on the quality of advocacy.

I. Stakeholder engagement

32. Our public consultation was launched on 21 August 2019 and closed on 13 November 2019. We promoted the consultation to our stakeholders through our social media channels and our newsletters.
33. We also engaged with a wide range of stakeholders during the consultation to discuss our proposals, for example, our advocacy reference group, 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.
34. 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. We published our [analysis of consultation responses](#) in March 2020.
35. 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.
36. Most respondents agreed with our proposal to allow only admitted solicitors to take the HRA assessment, including most solicitors, firms and representative bodies. Respondents felt that a solicitor seeking a higher rights qualification would benefit from experience and exposure to advocacy in practice before attempting the HRA assessment.

37. A small number of respondents suggested the HRA assessment should only be attempted by admitted solicitors with at least two years' advocacy practice post qualification experience.
38. A small number of respondents disagreed with our proposal, stating that 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, and that there is no evidence that undertaking the HRA assessments as a trainee is linked with poor advocacy.
39. Despite this, our view remains that our change reduces the potential risk that newly qualified solicitors who obtain the HRA qualification prior to admission enter the higher courts without first building their knowledge and skills assessed through the SQE.
40. We also considered whether it is was appropriate to introduce a period of post admission practice before an individual can take the HRA assessment, as some respondents suggested. We have discounted this suggestion at this stage as any period set would be arbitrary and could dissuade solicitors from seeking to obtain the qualification. This could impact on access to justice.

J. Statement in relation to impact on other Approved Regulators

41. We have not identified any impacts on other Approved Regulators.

K. Implementation

42. We will implement this rule on 1 April 2021 subject to LSB approval. This will provide enough time for any individual who is currently preparing for the HRA qualification to obtain it before our requirement is introduced. We will communicate with all existing HRA training and assessment providers and solicitors to update them on this rule change.

Action	Date
Submission to LSB	6 January 2021
LSB approval	6 January 2021 + 28 days
Implementation	1 April 2021

L. SRA Contact

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Annexes

Annex 1 - SRA Authorisation of Individuals (Higher Rights of Audience) (Amendment) Regulations 2020

Annex 2a & b Revised Higher Rights of Audience assessment standards – please see attachments.

Annex 3 – Proposed content of support material