

Application by the Solicitors Regulation Authority for repeal of the Higher Courts Qualification Regulations 2000 and approval of the Solicitors Higher Rights of Audience Regulations 2003

A report by the Office of Fair Trading to the Ministry of Justice on the likely competition effects of the Solicitors Regulation Authority for repeal of the Higher Courts Qualification Regulations 2000 and approval of the Solicitors Higher Rights of Audience Regulations 2009 under Section 29 and Schedule 4 of the Courts and Legal Services Act 1990

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1 GENERAL SUMMARY

1.1 The advice below concerns the application made by the Solicitors Regulation Authority (SRA) to repeal its Higher Courts Qualification Regulations 2000 (the 'Current Regulations') and approve the Solicitors Higher Rights of Audience Regulations 2009 (the Proposed Regulations). This advice is given on the basis of information which the Office of Fair Trading (OFT) was provided with by the Ministry of Justice in a letter dated 22 June 2009 and also the following:

- The Higher Courts Qualification Regulations 2000
- The Solicitors Higher Rights of Audience Regulations 2009
- Responses from the SRA to questions submitted by the OFT dated 3rd July 2009, and
- The SRA consultation papers regarding higher rights of audience in 2007, 2008 and 2009 (and the responses to these consultations).

1.2 The SRA is the body responsible for regulating the solicitors' profession in England and Wales.

1.3 Under the Courts and Legal Services Act 1990 (CLSA90) Section 29 and Schedule 4 (as substituted by Schedule 5 of the Access to Justice Act 1999), if the SRA wishes to modify its regulations it must make an application to the Secretary of State for Justice. Under section 29 and Schedule 4 of the CLSA 1990, if a body authorised to grant rights of audience or rights to conduct litigation makes an alteration to its qualification rules or rules of conduct, the alteration shall not have effect unless approved by the Secretary of State. The Secretary of State may seek the advice of the OFT who shall consider whether the proposed alterations would have, or be likely to have, any significant effect on competition.

1.4 The SRA proposes to repeal the Current Regulations and replace them with the Proposed Regulations. The Proposed Regulations are the result of three consultations by the SRA regarding the introduction of what

was originally intended to be a voluntary accreditation scheme for solicitors wishing to exercise rights of audience in the higher courts. In light of feedback given during the consultations the SRA Board decided to implement an interim arrangement through the Proposed Regulations which will retain a mandatory scheme. The main aim of the amendments proposed is to simplify the regulatory regime, ensure that any regulatory requirements are proportionate, and ensure that all qualifications are assessed consistently.

- 1.5 I am authorised by the OFT, under paragraph 12 of Schedule 1 of the Enterprise Act 2002, to carry out a competition scrutiny of the proposed regulation alteration as required by the provisions of the CLSA (as amended) set out above.
- 1.6 For the reasons discussed in the following section we believe that the reduction in the number of routes to qualification under the Proposed Regulations will not have, or be likely to have, any significant effect on competition.
- 1.7 For the reasons discussed in the following section we believe that the reduction in type of qualification under the Proposed Regulations will not have, or be likely to have, any significant effect on competition.
- 1.8 We have expressed our views on the option of a re-accreditation scheme in the following section. We encourage the SRA to reassess this option in the future.

2 SOLICITORS' HIGHER RIGHTS OF AUDIENCE REGULATIONS— PROPOSED REGULATIONS AND THEIR LIKELY COMPETITIVE EFFECT

Background

The Current Regulations

- 2.1 The current requirements for a solicitor to obtain a HCAQ are contained in the Current Regulations. Solicitors are required to obtain a HCAQ in order to appear as an advocate in the higher courts.
- 2.2 The Current Regulations provide three routes to obtain a HCAQ for solicitors (and Registered European Lawyers (RELs)).
- 2.3 The first route is the **Exemption Route** (regulation 7). This route is for solicitors who:
- Have practised as a solicitor (or barrister) for at least three years, and
 - Can demonstrate experience of advocacy (relevant to the award they are seeking) in the higher courts of England and Wales or of a comparable jurisdiction.

Applicants under this route are normally considered by the Higher Courts Qualification Casework Committee (HCQCC). The HCQCC consists of 5 members appointed by the SRA and supported by SRA staff members who record the decisions. The HCQCC meets quarterly and considers applications received in the preceding 3 months. Applicants are notified of the outcome usually within 7-10 working days.

- 2.4 The second route is the **Accreditation Route** (regulation 6). It is mainly for solicitors who:
- Practiced as a solicitor (or barrister) for at least three years, and

- Can demonstrate that they have acquired a sound understanding of the procedure, evidence and ethics applicable in proceedings relevant to the qualification they are seeking.

Applicants must apply to the SRA for a certificate of eligibility to allow them to undertake an assessment in advocacy skills. On completion of the assessment, they supply evidence to the SRA and the HCQCC considers the application before the qualification is awarded.

2.5 The third route is the **Development Route** (regulation 5). This is for applicants who either:

- Cannot satisfy the experience requirements of the Exemption and Accreditation routes, or
- Have not been practising as a lawyer for at least three years.

The Development Route has three stages which an individual must complete before applying for the qualification:

- Training and assessment in procedure, evidence and ethics in the higher civil and higher criminal courts
- Training and assessment in advocacy skills, and
- A minimum of 12 months relevant experience of either civil or criminal proceedings, some of which may take place pre-admission, evidenced by a portfolio and signed off by a mentor.

On completion of the assessment and training, they apply to the SRA and the qualification is awarded. The HCQCC does not consider the Development Route applications.

2.6 The SRA fee for all routes is £200.00 inclusive VAT, payable on application. The training and assessment organisations set their own fees for training and assessment.

2.7 The following table was provided by the SRA and shows the number of solicitors applying via each of the routes, and expresses these numbers as a proportion of the total of all applicants for HCAQ:

| Year | Route | | |
|------|-----------|-------------|---------------|
| | Exemption | Development | Accreditation |
| 2005 | 695 (71%) | 93 (10%) | 167 (18%) |
| 2006 | 646 (75%) | 129 (15%) | 78 (9%) |
| 2007 | 511 (75%) | 123 (18%) | 41 (6%) |
| 2008 | 290 (62%) | 140 (30%) | 33 (7%) |
| 2009 | 140 (46%) | 57 (41%) | 15 (11%) |

2.8 There are three types of HCAQ that a solicitor may receive under the Current Regulations. The first is the Higher Courts (All Proceedings) Qualification (the All Proceedings HCAQ) which is only obtained under the Development Route and entitles the holder to appear in the higher courts in both civil and criminal cases. The other two qualifications are the Higher Courts (Civil Proceedings) Qualification (the Civil Proceedings HCAQ) and the Higher Courts (Criminal Proceedings) Qualification (the Criminal Proceedings HCAQ). These HCAQs entitle the holder to appear as a higher court advocate in the relevant discipline (civil or criminal) only. These qualifications are gained by way of the Accreditation or Exemption Routes.

2.9 Under the Current Regulations a HCAQ is a qualification for life and recipients are not required to undertake further periodic reassessment.

The Proposed Regulations

2.10 The SRA proposes to repeal the Current Regulations and put in place the Proposed Regulations.

- 2.11 Under the Proposed Regulations there is only one route to apply for a HCAQ. A solicitor must demonstrate that they are competent to undertake advocacy in relation to the proceedings applied for (civil or criminal) in the higher courts by successfully completing assessments prescribed by the SRA. There is no training, experience or portfolio required.
- 2.12 Assessment Organisations will be validated to offer assessments according to SRA requirements. The assessments will have: generic elements (part 1-3), a Civil Advocacy test (part 4) and/or a Criminal Advocacy test (part 5). These organisations will be subject to monitoring by the SRA as under the Current Regulations.
- 2.13 Upon passing the assessment(s), applicants will be able to apply to the SRA for Civil Proceedings HCAQ, Criminal Proceedings HCAQ or both. They will complete an SRA application form and provide evidence of their success issued by the testing organisation.
- 2.14 The SRA advised us that the application fee would be in the region of £130. The fee will be set to cover costs only, and will not be used as a source of revenue. Assessment organisations will set their own fees for provision of the assessment. The SRA anticipates that the costs for individuals will be lower as there will be no mandatory training requirement. The SRA also believes that the new assessment will be less time consuming as there is no requirement for post qualification experience, or building a portfolio.
- 2.15 The Proposed Regulations maintain the HCAQ as a mandatory qualification for solicitor advocates in the higher courts. The Proposed Regulations also maintain the HCAQ as a qualification for life with no requirement for periodic reassessment.

Likely competitive effects of the proposed changes

Reduction in the number of routes to qualification

- 2.16 Under the Current Regulations, a solicitor advocate can obtain a HCAQ through three different routes – Development, Accreditation or Exemption. The Proposed Regulations reduce this to only one route.
- 2.17 The SRA's application document sets out the SRA's reasoning for reducing the avenues available to obtain a HCAQ, these include:
- Ensuring that the regulatory requirements are proportionate and based on an assessment of competence (rather than compulsory training requirements or simply experience), and
 - Simplifying the regulatory regime for the benefit of clients, the profession and other stakeholders.¹
- 2.18 The SRA also stated that the desired effect of the new regulations is to encourage more solicitors to undertake the qualification as the processes have been simplified and are less onerous than the previous routes. The SRA stated that the Proposed Regulations “are more straightforward, less onerous, but at the same time should be more rigorous and objectively test more skills”.
- 2.19 The SRA have explained that the Exemption and Accreditation Routes to qualification were only intended to be temporary to allow an opportunity for solicitors with advocacy and/or litigation experience in the higher courts to obtain the HCAQ without the need for compulsory training and accreditation. This was intended to be transitional until 31 October 2005 but has been further extended. In particular, no applicants for the HCAQ under the Proposed Regulations will be required to comply with any training or experience requirements.
- 2.20 We note from the table provided by the SRA (see paragraph 2.6) that the majority (46%) of applicants for the HCAQ apply under the Exemption Route. Only a small number of applicants for the HCAQ applied under the Accreditation Route (11%). However, the number of

¹ 'Application by the Solicitors Regulation Authority for approval of changes to the regulatory regime governing the exercise of rights of audience in the higher courts by solicitors' page 33.

applicants applying under the Development Route has increased four fold (from 10% in 2005 to 41% in 2009) over time, while the number of applicants under the Exemption Route has decreased.

- 2.21 The SRA says it does not have any direct evidence to suggest that the percentage of applicants will increase or decrease as a result of the Proposed Regulations. At present it recognises that the number of applicants for the HCAQ are decreasing overall. In the SRA's view the simplification of the process and the removal of the requirement for compulsory training and completion of a portfolio should encourage access to the qualification. The SRA plans to monitor the impact of the Proposed Regulations.
- 2.22 Prima facie, the reduction from three routes to one route, and the removal of the Exemption Route, raises potential concerns of reduced entry. However the fact that the qualification is moving to being primarily competency based is an improvement. Additionally the Exemption Route is decreasing in popularity and, with the overall improvements to the clarity of the process by the Proposed Regulations, we would not expect to see a significant change to the number of applicants for the HCAQ as a result.
- 2.23 We support the SRA's proposal to monitor the impact of the Proposed Regulations on the numbers of applicants for the HCAQ.
- 2.24 We have no reason to believe that the changes to the process for qualification will lead to a significant variation in the number of those obtaining the HCAQ, and believe that the improved clarification of the process for obtaining the qualification will enhance transparency and objectivity. For this reason the OFT believes that these variations are unlikely to have significant effect on competition in the market for higher court advocacy.

Reduction in types of qualification

- 2.25 Under the Current Regulations a solicitor could apply for three different types of HCAQ – the Civil Proceedings HCAQ, the Criminal Proceedings

HCAQ and the All Proceedings HCAQ. Under the Proposed Regulations, the All Proceedings HCAQ has been abolished.

- 2.26 The All Proceedings HCAQ was originally only obtained where a solicitor advocate applied for their qualification through the Development Route. With the abolishment of the Development Route the SRA has decided to only retain the Civil and Criminal HCAQs. However the SRA does not propose the abolition of the ability to advocate in all proceedings.
- 2.27 We do not believe the elimination of the All Proceedings HCAQ makes any significant effect on the process of obtaining a qualification for both criminal and civil proceedings. Therefore the OFT believes that this change is unlikely to lead to a significant variation in the number of those obtaining a HCAQ, and consequently these variations are unlikely to have a significant effect on competition.

Comment on aspects of Proposed Regulations

- 2.28 During its consultation period the SRA considered more fundamental amendments to the Current Regulations, including the introduction of re-accreditation requirements to the HCAQ, which it has decided not to proceed with at this stage. We wish to comment and present the OFT's views on this issue even though it is not a proposed rule change.

Maintenance of a 'qualification for life'

- 2.29 After its 2008 consultation on solicitor higher courts advocates,² the SRA decided to retain a mandatory scheme. It consulted with the public once more in 2009 on the issue of whether mandatory reaccreditation of the qualification should be introduced.³ A large number of respondents did not support reaccreditation.⁴ The SRA Board continues to support a

² SRA 'Standards for solicitor higher courts advocates and outline proposals for a new accreditation scheme – Consultation paper' May 2008.

³ SRA 'Solicitor higher court advocates proposal for mandatory re-accreditation – Consultation paper' January 2009.

⁴ 'Application by the Solicitors Regulation Authority for approval of changes to the regulatory regime governing the exercise of rights of audience in the higher courts by solicitors' page 4.

scheme of mandatory reaccreditation but wishes to meet with the Bar Standards Board to explore a joint approach to this issue. Consequently the Proposed Regulations do not require mandatory reaccreditation and the qualification remains one for life.⁵

2.30 We favour schemes which help consumers make informed choices to judge quality and we believe that accreditation schemes may assist. The OFT has previously set out its stance on re-accreditation in its views on the QC scheme.⁶ The OFT considered that for the QC appointments process to function effectively and in the interests of consumers, awards should be revalidated from time to time, and be capable of being withdrawn.⁷ We would apply similar thinking to the HCAQ accreditation scheme.

2.31 We appreciate and welcome that the SRA wishes to ensure that solicitor advocates maintain a good reputation as advocates in the higher courts. We believe that the introduction of a re-accreditation requirement for the HCAQ may enhance this reputation and give solicitor advocates a competitive advantage over their barrister colleagues. A well-publicised re-accreditation scheme would raise public awareness that the competence of solicitor advocates has been validated as compared to barristers who are not required to show that their skills have been maintained over time. We would strongly encourage the SRA to reconsider this issue in the future.

⁵ 'Application by the Solicitors Regulation Authority for approval of changes to the regulatory regime governing the exercise of rights of audience in the higher courts by solicitors' page 4.

⁶ OFT 'The future of Queen's Counsel – Response from the Office of Fair Trading' October 2003.

⁷ OFT 'Wider choice and better protection. consultation paper on the regulation of legal services in Scotland. Response from the Office of Fair Trading' April 2009, page 20.

CONCLUSION

- 2.32 For the reasons given above the OFT believes that the approval of the Solicitor Higher Rights of Audience Regulations 2009 (and the changes from the Higher Courts Regulations 2000) will not have, or not be likely to have, a significant effect on competition in the market for advocacy services in the higher courts.
- 2.33 Furthermore, the OFT recommends that the SRA reassess the issue of re-accreditation in relation to the HCAQ in the future.

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