

THE **LAW SOCIETY**
OF NORTHERN IRELAND



Consultation Document

The instruction, qualification and conduct of authorised
solicitors in the Higher Courts

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THE INSTRUCTION, QUALIFICATION AND CONDUCT OF AUTHORISED SOLICITORS IN THE HIGHER COURTS

1. Introduction

- 1.1 A right of audience is a right for a lawyer to appear and conduct proceedings in a court on behalf of a client. Solicitors in Northern Ireland have traditionally had rights of audience in the Magistrates' Courts and County Courts and that right is widely exercised. Solicitors also enjoy rights of audience in the Crown Court by virtue of section 50 of the Judicature (Northern Ireland) Act 1978. Solicitors have developed considerable expertise in advocacy in these courts over many years.
- 1.2 To date, save for certain specific exceptions contained in section 106 of the Judicature (Northern Ireland) Act 1978, solicitors in Northern Ireland have not been permitted to exercise rights of audience in the High Court or the Court of Appeal (the Higher Courts).
- 1.3 In England & Wales, the Courts & Legal Services Act 1990 allowed solicitors to exercise rights of audience in the Higher Courts by completing prescribed courses of training and assessment administered by the Law Society of England & Wales. Solicitor advocacy has developed significantly since there, there now being approximately 4,000 solicitor advocates. Some solicitor advocates have been working exclusively in the Higher Courts leading to their appointment as Queen's Counsel. Solicitor advocates have also been appointed to the High Court Bench. Lawrence Collins, a former partner in Herbert Smith Solicitors, was appointed as a Solicitor QC in 1997 before being appointed to the High Court and later elevated to the House of Lords as Baron Collins of Mapesbury.

- 1.4 In Scotland, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 extended rights of audience in the superior courts to suitably qualified solicitors and there are now approximately 250 registered solicitor advocates in Scotland.
- 1.5 The Law Society of Northern Ireland (the Society), recognising the need for the provision of proper training for solicitors wishing to exercise advocacy rights, established an Advanced Advocacy Course in 2000. Each year since, the Society's Advocacy Working Party in association with the National Institute of Trial Advocacy USA has organised training courses for solicitors in advanced advocacy leading to the awarding of a Certificate of Advanced Advocacy.
- 1.6 Part 8 of the Justice Act (Northern Ireland) 2011 (the 2011 Act) provides for the authorisation by the Society of solicitors who have completed certain training to have rights of audience in the Higher Courts.
- 1.7 In relation to authorised solicitors, the Act requires the Society to make Regulations relating to:
- a) the education training or experience to be undergone by solicitors seeking to be authorised in the Higher Courts.
 - b) the recognition as authorised solicitors of those solicitors who have already completed prescribed training before the commencement of the relevant provisions of the 2011 Act.
 - c) the duties imposed by the Act as regards the advice to be given by solicitors instructing an authorised solicitor.

2. Purpose of consultation

2.1 The purpose of this consultation exercise is to seek views on the Society's draft Regulations to facilitate the extension of rights of audience in the Higher Courts to authorised solicitors.

2.2 In addition to the matters set out in paragraph 1.7, the Society also seeks views on a draft Code of Conduct covering all aspects of solicitor advocacy.

3. How to respond

- 3.1 The Society is issuing this consultation document to the list of consultees set out in Schedule 1.
- 3.2 When responding to this consultation document, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where appropriate, how the views of the members were assembled.
- 3.3 Please submit your response to this consultation by post, fax or email to:

Consultation Co-ordinator
Law Society of Northern Ireland
96 Victoria Street
BELFAST BT1 3 GN
E-mail: higherrights@lawsoc-ni.org

Closing date

- 3.4 Responses must be received by Friday 30th August 2013

Miscellaneous

- 3.5 Additional copies of this consultation document may be made without seeking permission from the Society. Printed copies may be obtained by post by contacting the Consultation Co-ordinator at the address above. An electronic version is available for viewing on the Society's website at www.lawsoc-ni.org. Copies in other formats may be made available

on request. If it would assist you to access the document in an alternative format or a language other than English, please let us know and we will do our best to assist you.

Confidentiality of Responses

3.6 The Society will publish a summary of responses following the completion of the consultation process. Unless individual respondents specifically indicate that they wish their response to be treated in confidence, their name and the nature of their response may be included in any published summary of responses.

4. Solicitors' (Rights of Audience in Higher Courts) Regulations 2013

4.1 The 2011 Act amends section 106 of the Judicature (Northern Ireland) Act 1978 to insert a new sub-section (3) which reads

“A solicitor who holds an authorisation under Article 9A of the Solicitors (Northern Ireland) Order 1976 shall have the same right of audience in any proceedings in the High Court or the Court of Appeal as counsel in those courts and any such right is in addition to any right of audience which a solicitor would have apart from this sub-section”.

4.2 The 2011 Act also inserts a new Article 9A into the Solicitors (Northern Ireland) Order 1976. It sets out how a solicitor may obtain an authorisation confirming these additional rights of audience.

4.3 In respect of authorised solicitors the Act requires the Society to make Regulations relating to:

- (a) the education training or experience to be undergone by solicitors seeking to be authorised in the Higher Courts.
- (b) the recognition as authorised solicitors of those solicitors who have already completed prescribed training before the commencement of the relevant provisions of the 2011 Act. This relates to those persons who have already been awarded a Certificate of Advanced Advocacy (see para 1.5 ante).

4.4 It would have been open for the Society to include a route to qualification by means of proven lengthy experience. After consideration of the position in comparable

jurisdictions, it was decided that the only route to qualification should be by way of completion of the Society's Course for Solicitor Advocates.

4.5 The Solicitors' (Rights of Audience in Higher Courts) Regulations 2013 make provision for a number of matters relating to the manner in which an application shall be made to the Society for an authorisation under Article 9A and the education, training or experience required to be obtained before the Society shall grant (or shall be taken to have granted) such authorisation.

Requirements for obtaining authorisation

4.6 A solicitor applying to obtain authorisation under Article 9A of the 1976 Order must:

- hold a current practising certificate from the Society
- have three years' post qualification experience prior to the date of his/her application
- have completed the training course specified in Schedule 1 of the Regulations.

Schedule 1 contains details of the training course. It comprises two modules: -

- (i) an Evidence module
- (ii) an Advocacy module

Applicants must successfully complete both modules.

The teaching of ethical issues is included in both modules. Compliance with professional ethics is a criterion against which assessments are carried out.

The Schedule contains details of the course content, its length and how modules are to be examined.

Deemed authorisation

4.7 Regulation 3.2 provides that a solicitor who has already been granted a Certificate in Advanced Advocacy by the Society on or before the commencement of the Regulations and has completed the course specified in Schedule 2 of the Regulations shall be taken to hold such authorisation. Schedule 2 contains details of a course of training in evidence and pleading in the Higher Courts.

Qualification gained in another jurisdiction

4.8 A solicitor seeking authorisation may rely on qualifications gained in another jurisdiction. The Society will consider each application on its merits. The Society may require the applicant to undertake specified steps in order to gain the authorisation – see Regulation 4.

Application for an authorisation

4.9 Regulation 5 provides that a solicitor wishing to become an authorised solicitor must complete an application form in the form set out in Schedule 3 and provide any other information which the Society may reasonably require for the purpose of determining the application. At any time after receiving the application and before determining it, the Society may require the applicant to provide further information. There will be a fee payable of £100.

A solicitor who is refused authorisation may within 28 days of receiving notification of the Society's decision ask for the decision to be reviewed.

Continuing Professional Development

4.10 Recognising the importance of Continuing Professional Development (CPD) for authorised solicitors, Regulation 6 requires them to undertake annually 3 hours of CPD in advocacy skills or the law of evidence.

Review

4.11 Regulation 7 provides that the Society shall keep the general operation of the Regulations under review to ensure that they are consistent with the requirements of Article 9A of the 1976 Order. The Society commits to a formal review being conducted following the third anniversary of the Regulations coming into operation. When conducting the review, the Society shall have regard to any representations made by the Lord Chief Justice, the Department of Justice and any others which it considers relevant. The result of the review will be published,

5. Solicitors' Practice (Amendment) Regulations 2013

5.1 The 2011 Act inserts a new Article 40A into the Solicitors (Northern Ireland) Order 1976. It provides that a solicitor who is minded to brief an authorised solicitor in the Higher Courts must advise the client in writing of certain matters in relation to the proposed representation.

5.2 Article 40A imposes a strict duty on a solicitor to inform the client of the possible alternative means of representation available to him/her. The Article requires that the instructing solicitor must advise the client in writing:

- (a) of the advantages and disadvantages of representation by an authorised solicitor and by counsel, respectively;
- (b) that the decision as to whether an authorised solicitor or counsel is to represent the client is entirely that of the client.

5.3 The Act provides that the Society shall make Regulations with respect to the giving of this advice.

5.4 The Solicitors' Practice (Amendment) Regulations 2013 provide for an additional Regulation to be inserted in the Solicitors' Practice Regulations 1987. The new Regulation 8D sets out the form of the written notice to be given to the client. It is the Society's view that in addition to the matters provided for by the statute, the notice to the client should provide that in relation to the matters covered at (a), the advice shall cover:

- (i) The gravity and complexity of the case
- (ii) The nature and practice, including specialisation, and experience of the authorised solicitor and counsel respectively; and
- (iii) The likely cost of instructing an authorised solicitor and counsel respectively.

6. Code of Conduct

- 6.1 The draft Code of Conduct is the Society's response to the need to draw together existing regulation and new provisions in a comprehensive document to cover all aspects of solicitor advocacy.
- 6.2 The duty of a solicitor advocate to protect the interests of his/her clients is at the core of the draft Code of Conduct.
- 6.3 The draft Code mirrors similar provisions in comparable jurisdictions.
- 6.4 The draft Code sets out matters of professional ethics and compliance with relevant judicial decisions which any solicitor advocate might be expected to be aware of and respect.
- 6.5 The sensitive issue of guidance applicable in a criminal trial when a client confesses is dealt with at Appendix 1 and incorporates the Society's existing guidance to Solicitor Advocates in the Crown Court.
- 6.6 The Code is sufficiently clear and concise so as to be capable of being understood easily by a lay client in the event of dispute or disagreement.

7 Consultation Questions

- (i) Do you consider that the draft Regulations and Code of Conduct taken separately and as a whole adequately meet the requirements of the legislation?
- (ii) Are there any additional steps which the Society should take to ensure that the objectives of the legislation are met?
- (iii) Do you consider that the draft Regulations and Code of Conduct adequately safeguard the interests of the public engaged in litigation in the Higher Courts?
- (iv) Are there any additions or amendments to the draft Regulations and Code of Conduct which you consider would further ensure that they meet the objectives of the legislation?

Schedule 1

LIST OF CONSULTEES

The Lord Chief Justice of Northern Ireland

The Director of Public Prosecutions in Northern Ireland

The Crown Solicitor

The Departmental Solicitor

The Official Solicitor

Directorate of Legal Services

The Lay Observer

The Bar Council of Northern Ireland

The Northern Ireland Legal Services Commission

The Northern Ireland Human Rights Commission

Equality Commission of Northern Ireland

Association of British Insurers

Northern Ireland Housing Executive

Consumer Council

Chief Constable, Police Service of Northern Ireland

Chief Inspector, Criminal Justice Inspectorate of Northern Ireland

The Police Ombudsman

Northern Ireland Guardian Ad Litem Agency

Citizens Advice Bureau

Advice NI

Victim Support

Disability Action

Committee for the Administration of Justice
Housing Rights Service
Law Centre
Children's Law Centre
Public Interest Litigation Support Project
South Tyrone Empowerment Project
Local Solicitor Associations
NI Young Solicitors Association
Solicitor's Criminal Bar Association
Association of Personal Injury Lawyers
Company & Commercial Lawyers Group
NI Commercial Property Lawyers Association
EPLANI
Condico
Employment Lawyers Group
Association of Collaborative Lawyers
STEP – Solicitors Trust & Estate Practitioners