THE BAR *of* NORTHERN IRELAND

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

Consultation Response

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.

2. The Bar welcomes the opportunity to respond to the public consultation being undertaken by the Law Society of Northern Ireland in relation to the regulatory impact assessment on the instruction, qualification and conduct of authorised solicitors in the Higher Courts. We previously responded to the consultation on this matter conducted in 2013 which included the Society's draft Regulations to facilitate the extension of rights of audience in the Higher Courts to authorised solicitors and a draft Code of Conduct. Our response begins with some general observations on the consultation document. This is followed by commentary on the various sections of relevance to the Bar whilst the questions posed throughout the consultation are also addressed.

General Observations

3. The Bar takes the view that the structure of the legal profession in Northern Ireland has served the jurisdiction well to date and we believe it is vital to consider this in the context of the current RIA. The existing model for the delivery of legal services, whereby members of the public have direct and unrestricted access to a wide network of local solicitors who in turn have access to the independent referral Bar for advocacy or specialist advice, is best suited to the needs of the public. The Bar recognises and values the excellent working relationships established with local solicitors across Northern Ireland. This long established and mutually beneficial way of working has always helped to ensure a quality service and better outcomes for the lay client.

4. The Bar also believes in competition and considers that, provided the public interest always remains paramount, it has the potential to be a positive influence on quality. The Bar takes the view that the independent referral bar comprising practitioners in open competition with each other is the best guarantee of quality for clients and are confident that the quality service already on offer from the Bar

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

will compete effectively with solicitor advocates with rights of audience in the Higher Courts.

5. The Bar believes however that in any competitive model the public interest is of particular importance and that any alteration of the rights of audience must not compromise this. The independent referral bar exists as an important resource for local solicitors across Northern Ireland in addressing the needs of their clients and cases, responsible for the provision of specialist advice, representation in court and an invaluable source of independent challenge. We reiterate our view that both the public interest and best representation is achieved by the joint working of an instructing solicitor, junior counsel and, where appropriate, senior counsel. However, we remain concerned that the lay client must not lose their access to truly independent counsel or the quality of service. The lay client must be assured therefore that any solicitor advocate dealing with their cases is appropriately equipped to do so. In our view, these proposed changes risk eroding the traditional model for the delivery of legal services whilst also restricting client choice and potentially creating a two-tier system in the solicitor profession.

6. It is clear even from the results of the survey at annex one that there is a preference for solicitors to brief counsel in substantive matters. This is very much in evidence already in the Crown Court with paragraph 3.4.4 stating that only 10% of those surveyed (and less that 1% of the solicitor population) had participated in a Crown Court trial in the previous two years. The Bar expects that there will be limited change to this pattern if there is any extension of rights of audience in the Higher Courts to authorised solicitors.

7. As indicated above, the Bar previously responded to the Law Society's full consultation exercise on this matter in 2013. We subsequently expected that a post consultation report would be published alongside updated draft Regulations and a Code of Conduct to take account of the views expressed. However, a report has not materialised and a comparison of the Draft Solicitors' (Rights of Audience in Higher Courts) Regulations, Draft Solicitors' Practice (Amendment) Regulations and Draft Code of Conduct published in 2013 and 2017 shows that they remain identical with no amendments following the initial consultation exercise.

8. The Bar considers the draft regulatory impact assessment document to be a hybrid of a post consultation report and also a document providing feedback on a survey undertaken with solicitors who have already been awarded a Certificate of Advanced Advocacy. We note that paragraph 1.6 of the RIA states that the consultation issued in June 2013 was "distributed to almost 40 organisations,

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

including to the Lord Chief Justice of Northern Ireland, the Director of Public Prosecutions, the Crown Solicitor and the Bar Council". However, no reference is made to the number of responses received and no feedback on the views of respondents was furnished to the Bar following the 2013 consultation. We would welcome the opportunity to consider the comments made by other consultees in 2013 and believe that a full consultation report should be provided by the Law Society.

9. In addition, we would query the scope of this RIA. It does not seem to consider the effect of this policy proposal on those most likely to potentially be impacted, such as barristers, particularly the Junior Bar, the wider solicitor network and especially small solicitors' firms working in rural areas. Instead it focuses disproportionately on a small number of solicitors who have completed the CAA and are inclined towards a favourable view of the extension of rights of audience in the Higher Courts.

10. . The Law Society's own website highlights that there are "2300 plus solicitors currently practising law in Northern Ireland". Meanwhile just 476 of these have completed the CAA with 278 responding to the survey highlighted in Annex One. The number of respondents to the survey represents just 12 per cent of the solicitors practising in Northern Ireland, using the figure of 2300 as a conservative estimate of the total number. We therefore have queries in relation to the scope and evidence base used to support some of the comments and conclusions presented in the document.

11. Furthermore, the significant passage of time between the initial 2013 consultation and the publication of the RIA in 2017 suggests that there is no major impetus for the extension of rights of audience in the Higher Courts to authorised solicitors to take effect. The document also fails to reflect the market, training and regulatory changes in the intervening period.

12. The issue which we raised in 2013 in relation to conflicts of interest has not been addressed with solicitors being empowered to advise that an advocate connected to the solicitor (or the solicitor him/herself) is the appropriate person to be briefed. This raises the risk of harm being done to the client given that there will be an actual or perceived financial incentive to the solicitor to remain a connected solicitor advocate and where this arises, the quality of service will no longer be the key consideration in advising a client. The Bar would welcome further clarification from the Law Society as to how this issue will be resolved as we do not believe that the RIA addresses this.

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

Chapter Three: Key Elements

Q1. Do you agree that these two options represent the viable options that would achieve the objective? If not, what specifically do you consider to be an alternative viable option to those listed?

13. The Bar notes that the two options listed in the RIA contain little additional detail to the 2013 consultation. The “more complex set of arrangements” for instructing authorised solicitors listed in option two elaborates no further on paragraph 5.4 of the 2013 consultation under which a form of written notice would be given to the client providing that 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. In 2013 the Bar called for further written safeguards to overcome the advantage the instructing solicitor has in influencing the choice of advocate, including the provision of advice highlighting the details of the experience and expertise of the barristers available for instruction.

14. We also stated that information should also be given to the client on the financial incentive or benefit to the solicitor arising from the use of an authorised solicitor especially one from his/her own practice and that a barrister may be retained whilst the solicitor remains to oversee the case as solicitor. We maintain that the RIA does not address these issues or provide any further information from that included in the 2013 consultation.

15. In addition, we would query the extent to which option two “goes beyond the requirements of the 2011 Act”. Part 8 of the Justice Act (Northern Ireland) 2011 authorises the Society to make regulations to confer additional rights of audience in respect of the “education, training or experience” to be undergone by solicitors. Whilst the Code of Conduct is not set out in legislation, the Act already includes a duty to advise a client as to representation in court at section 89(2) under which the solicitor must advise on the “advantages and disadvantages of representation by an authorised solicitor and by counsel, respectively” which option two appears to attempt to achieve to a degree. However, we believe that inclusion of the further detail outlined above within the regulations would be beneficial in preserving the legislative intent of the Act.

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

3.4 Element 2: Identify the Effects of the Proposals

3.4.1 Competition Concerns and Potential Distortions within the Marketplace

16. The Bar believes in competition and considers that, provided the public interest always remains paramount, it has the potential to be a positive influence on quality. The Bar believes however that in any competitive model the public interest is of particular importance and that any alteration of the rights of audience must not compromise this. The independent referral bar exists as an important resource for local solicitors across Northern Ireland in addressing the needs of their clients and cases, responsible for the provision of specialist advice, representation in court and an invaluable source of independent challenge. We reiterate our view that both the public interest and best representation is achieved by the joint working of an instructing solicitor, junior counsel and, where appropriate, senior counsel.

17. The Bar notes that this section appears to provide some feedback in relation to the concerns raised by the Bar in response to the 2013 consultation exercise. This section refers to the Bar's comments around the failure to address the conflict of interest between the solicitors' financial interest and the interests of the client which represents a material change to the relationship between the two parties by creating a vested financial interest for the solicitor in how the case is referred.

18. The only response provided in the RIA in relation to these concerns references the Assembly's scrutiny of the 2011 Act with the RIA highlighting the requirement that the Society's Regulations will be subject to the "concurrence of the DOJ (in consultation with the Attorney General) and the concurrence of the Lord Chief Justice". It would be helpful to have the opportunity to consider the views of the DOJ, Attorney General and the LCJ in response to the 2013 consultation as no comment is included on this.

19. The Bar also notes the comment that "in order to better inform the development of these proposals… and in line with best practice, the Society undertook empirical qualitative and quantitative research consisting of a Survey and an analysis of the workload of those who have already been awarded a Certificate of Advanced Advocacy". We would query whether the scope of the research is sufficient within the context of a regulatory impact assessment. Whilst the survey highlights some important findings, the Bar fails to see how conducting it amongst the individuals who have completed the Society's CAA will "shed useful light on the likely impact of the proposals" on the range of affected constituents.

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

20. The survey merely reflects the views of a small number of solicitors who have completed the CAA but it gives no consideration to the opinions of those who may potentially be negatively impacted by the proposals more widely. We would question whether the Society considered the value in also seeking the views of solicitors who have not completed the CAA, practices located in rural areas and barristers. The RIA document even outlines at paragraph 2.1 that "a key element of any impact assessment is the need to engage in dialogue with the range of constituents who may be affected by the proposals" yet there appears to be little attempt to do so within the RIA. The analysis presented by way of this survey of solicitors who are already likely to respond favourably to the proposals is wholly inadequate within the context of the RIA and should have little influence.

21. The Society may take the view that the work undertaken during the passage of the 2011 Act and the 2013 consultation will suffice in forming an "existing body of research and evidence from which to draw when assessing impacts". However, the lack of post consultation report in 2013 and the intervening four years mean that we find it difficult to accept that the views of other stakeholders are being properly accounted for as part of the present RIA exercise.

3.4.2 Composition of Existing Holders of the CAA

22. The breakdown of the data on the composition of the existing holders of the CAA is useful despite this being inappropriate in the context of an RIA. The Bar comments below on the exercise of advocacy rights across a number of the areas of work referenced in the document.

3.4.4 Advocacy Rights and Criminal Law

23. The Bar notes that of the respondents to the survey who had exercised advocacy rights in the last two years in the criminal courts, 82.9% (or 145 respondents) had carried out non-contested hearings in the Magistrates' Court. However, this figure drops to 68% (or 119 respondents) in relation to contested hearings in the Magistrates' Court. This suggests that solicitor advocates are conducting non-contentious matters in the Magistrates' Court but that they are less likely to be involved in more complex work given the reduced figure for contested hearings.

24. Meanwhile just under 50% of respondents (87 in total) had exercised rights of audience in non-trial work in the Crown Court. These figures drop even further for Crown Court trials with under 10% of those surveyed (17 respondents) participating in these in the previous two years. These 17 individuals represent

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

just 6% of the total number of survey respondents (278) and 0.7% of the total profession (using the conservative estimate of 2,300 taken from the Society's website). This is a clear indication that Crown Court cases are still being referred to the Bar where our members provide a quality source of specialist criminal law advocacy.

25. We note the comments in relation to the potential impact of the proposals on the criminal bar. It is clear from the figures presented that the number of solicitors choosing to appear in the criminal cases in the Magistrates' Courts are fairly limited in number; this pattern is even more evident in the Crown Court given that just 17 individuals have been involved in a trial. There is reference to the Bar's comments in response to the 2013 consultation that solicitors who choose to undertake advocacy are "limited in number and generally appeared in criminal cases in the Magistrates' Courts". The figures provided in the RIA only seem to prove the accuracy of these observations. They also suggest that solicitor advocates present very little threat to the long term future of the criminal bar and the quality of advocacy presently being provided by our members in the Crown Court.

26. There is also a comment in this section that "the Bar Council claimed that for financial reasons, it had become increasingly frequent for people to be represented in the Crown Court by solicitor advocates and that these advocates were frequently inexperienced". We would clarify this statement by highlighting that members have observed that some cases involving solicitor advocates have been referred to the Crown Court which could have been dealt with in the Magistrates' Court. This has resulted in pleas being entered at the first hearing rather than a contested case. We would be interested to receive a further breakdown of the advocacy work being completed by the 6% (17 respondents) in the Crown Court to consider the number involved in trials as opposed to preliminary hearings.

27. Whilst the figures in this section are enlightening, we would query the rationale for their inclusion in a regulatory impact assessment given that they show that the respondents exercising advocacy rights in the criminal courts are small in number resulting in a limited impact. This simply shows that there is currently – and it can be assumed this reflects the situation since the 2013 consultation was undertaken- no demand within the solicitor market to undertake this work.

3.4.5 Advocacy Rights and Family Law

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

28. The Bar notes that the figures provided in relation to the family courts follow a similar pattern to those in the criminal courts with a greater number of solicitor advocates being involved in non-contested hearings than contested hearings in the Family Proceedings Court. Meanwhile the number of solicitor advocates falls for both non-contested and contested cases in the Family Care Centre.

29. Paragraph 3.4.5 highlights that just over 80% (or 99 respondents) had exercised advocacy rights in the non-contested hearings in the Domestic/Family Proceedings Court whilst this dropped to 70% (89 respondents) for contested hearings. We would also query the potential impact which the guidance introduced by the Legal Services Agency in 2014 may have had on these figures. This guidance resulted in changes to the levels of representation in the Family Proceedings Court with the almost complete removal of counsel in serious and complex cases. Despite assurances from the Department of Justice that counsel would continue to be certified in these cases, the level of certification in the Family Proceedings Court dropped to 0.06% against a projected rate of 10%.

3.4.8 Rights of Audience in the Higher Courts

30. This section of the RIA focuses on the motivations for solicitors seeking to exercise rights of audience in the Higher Courts with 70% (193 respondents) responding in the affirmative when asked if they would intend to exercise rights of audience in the High Court and/or Court of Appeal. However, the breakdown of the reasons for this makes no explicit references to financial motivations for solicitors seeking to exercise rights of audience in the Higher Courts. Instead this section highlights that 84% (163 respondents) indicated that they wished to improve the quality of existing skills and almost 80% (155 respondents) stated that they wanted to improve the quality of existing services. The Bar would be keen to understand at all times how it can support solicitors in providing an improved quality of service to the lay client. It is our view that given some of the challenges and issues that the proposals may introduce, alternative changes which also enhance the quality of service whilst protecting the existing model and valuable relationship and complementary roles between instructing solicitor and barrister are worthy of exploration.

31. The number indicating motivations around personal development is at 80% (154 respondents) and a desire to enhance practice development is at 70% (135 respondents). The numbers drop slightly for those stating that they wish to improve client choice at 65% (127 respondents) and 54% (106 respondents) who want to improve opportunities for new practice areas of work. Consequently, the

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

conclusion that these figures show that for "a large proportion of holders of the CAA rights of audience in the Higher Courts is more about better serving an existing client base and area of work rather than seeking to branch out into new areas" is questionable. The Bar acknowledge fully that solicitors may want to diversify their areas of practice and potentially (although it is not directly expressed in the survey feedback) secure additional financial opportunities. However the Bar would again urge that these motivations must be secondary to the best interests of the lay client and the overall best model of delivering legal services in the jurisdiction

32. We note the mention of other reasons cited by respondents for wishing to exercise rights of audience in the Higher Courts. The statement on page 13 that these proposals will add practical value to the administration of justice by allowing "authorised solicitors wishing to be able to "step in" and attend to an application should counsel be unavailable rather than seeking to practise in the Higher Courts themselves per se". The Bar contends that this actually reinforces our earlier point that there is little demand within the solicitor market to undertake substantive advocacy work in the Higher Courts with solicitors most interested in undertaking routine and non-contested applications. We would query once again the rationale for the expansion of rights of audience in the Higher Courts at this point in time when there appears to be little pressing need for it.

3.4.9 Rights of Audience in the Higher Courts – Potential Barriers

33. The section appears to refer to the potential market barriers for solicitors who already hold a CAA in exercising rights in the Higher Courts. However, we would query whether this information has been adequately set alongside other views to present a proportionate and representative assessment. The Bar is unsure as to why for example the comparative views of barristers and the wider solicitor profession which are not accounted for to the same degree. Whilst the statistics provided are informative, they are inappropriate within this context and seem to result in a disproportionate focus on solicitors who have already obtained a CAA rather than the "range of constituents who may be impacted by the proposals".

34. The statistics relating to those who currently hold a CAA but would not intend to exercise rights of audience in the High Court or Court of Appeal show that a third (26 respondents) believed that this would not fit with their personal development profile whilst 72% (55 respondents) felt that it did not suit their existing practice model. The time and training commitment required to conduct the work also

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

appears to be a factor 28 respondents citing this as a reason for not seeking to exercise rights in the Higher Courts.

35. Once again the numbers are relatively small and unrepresentative of the solicitor profession as a whole so it is difficult to draw definitive conclusions. However, they do give an indication that within this small segment of those who have completed the CAA, there remains a conspicuous number who have no intention of exercising these rights. Furthermore, given that these individuals have actively completed the CAA we believe that it would be more illuminating to consider how these results might be extrapolated out to be reflective of the wider solicitor profession across Northern Ireland.

36. We note some of the key themes emerging from the section on the challenges facing solicitors exercising higher rights of audiences. The issue around time management is a critical one with 39% (or 71 respondents) indicating that the time required to adequately prepare a case alongside the time involved in attending court would be a challenge. Our practitioners have observed in dealing with clients and the quality of instructions provided that solicitors are already under pressure in the day to day management of cases. Our concern is that the additional responsibility of advocacy in the Higher Courts would be difficult to achieve in a cost effective manner and likely to adversely impact on client service. This is clearly an issue that the solicitors who have completed the CAA are acutely aware of and we would also be interested to consider whether the Law Society has explored the views of the wider solicitor profession in relation to this matter.

37. We would query the reason for the inclusion of the paragraph at the bottom of page 13 on the Law Society's Library service which appears to have little relevance in the context of the RIA consultation.

38. The Bar also notes the mention of travel time as a concern on page 14, particularly for those holding the CAA from outside Belfast. Again we would ask if the RIA adequately reflects the views of the wider solicitor profession. There is reference to the passage of the 2011 Act and the 2013 consultation in relation to concerns that the proposals have the potential to undermine small solicitor practices outside Belfast with larger firms in the city seeking to establish their own advocacy services. Despite the comment that "concerns about larger firms establishing in-house advocacy services did not arise during this survey", it is not possible to know from the information provided that small rural practices do not still possess these concerns given that the RIA does not do enough to quantify the impact of the proposals on this group.

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

39. The views of small solicitor practices outside Belfast are not addressed in any substantive way within this part of the paper and the limited evidence of their concerns relates to matters raised a number of years ago in 2011 and 2013. We would be keen to understand and review more current evidence directly from this group on the impact of these proposals within the context of Northern Ireland's changing legal marketplace during the last six years.

40. Section 3.4.9 concludes with the observation that the survey of CAA holders shows that "for a significant proportion of those who hold the CAA there is no desire to exercise rights of audience in the Higher Courts" which once again leads us to query the necessity for the extension of these advocacy rights. However, the further statement that existing busy workloads "may minimise the impact on the Bar from solicitors whose practices are some distance from Belfast" touches on the fact that the proposals may result in or further embed a rural vs urban practice model. It would be a great concern if this were to indirectly cause some movement of work. It fails to appreciate the significant impact that this could have in enticing clients away from rural practices and have an adverse effect on work being conducted in courts right across Northern Ireland where solicitors routinely brief members of the Bar.

3.4.12 Potential Barriers for Exercising Rights of Audience in the Higher Courts

41. The Bar takes the view that the inclusion of another section on the potential barriers for solicitors in exercising rights of audience in the Higher Courts is inappropriate in the context of the current RIA. We are deeply disappointed by the tone of some of the content in this section in which individual comments from solicitors holding a CAA are used to justify a number of personalised statements in relation to this branch of the profession.

42. We note the comment on page 16 that "current Bar Council Rules and practices are deliberately restrictive and deigned to preclude solicitors from gaining experience in more serious cases". The Bar would point out that the rules and fundamental tenets of the Bar were created to ensure the proper administration of justice long before the passage of the Justice Act (Northern Ireland) 2011 which represents the origins of rights of audience for solicitors in the Higher Courts in this jurisdiction. We would also take issue with the comment that "without the gaining of valuable experience… solicitors will be unable to advance in this field thereby precluding the exercise of rights of audience". Whilst solicitors have traditionally had rights of audience in the Magistrates' Court and County Courts, the Law Society's survey demonstrates that solicitors have little interest in conducting the more difficult advocacy work in the Higher Courts. The statistics

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

in section 3.4.4 in relation to advocacy rights and the criminal law already show that under 10% of those surveyed (17 respondents) had participated in a Crown Court trial despite solicitors having this right under section 50 of the Judicature (Northern Ireland) Act 1978. Consequently, it is clear that solicitors continue to prefer to brief counsel in Crown Court cases despite having rights of audience and therefore we fail to see how the Law Society can reasonably conclude that the Bar is restricting access to valuable experience in the Higher Courts.

43. The Bar would question the evidence base for the further comment that "there is a lack of opportunity for solicitors to perform advocacy as frequently as their colleagues practising at the Bar, linked in part to a somewhat hostile attitude from members of the Bar". The conclusion appears to be grounded in a comment from one respondent who expressed concern that members of the Bar do not cooperate in the "openness of exchange of information and discussion of issues". This comment raises a serious accusation about professional integrity and service and is without foundation. To date no such complaint has been raised with the Bar Council in relation to our members and therefore we find it difficult to accept that this is a proportionate representative of the profession based on one comment.

44. In addition, the Bar considers that it is entirely appropriate that members of the Bar should be performing advocacy more frequently than solicitors given that our members are specifically trained to provide advocacy as a specialist service. We would point out that a solicitor as the professional client is entirely responsible for deciding whether to brief counsel in a case. We repeat that the Bar takes the view that the structure of the legal profession in Northern Ireland has served the jurisdiction well to date and we believe it is vital to consider this in the context of the current RIA. The existing model for the delivery of legal services, whereby members of the public have direct and unrestricted access to a wide network of local solicitors who in turn have access to the independent referral Bar for advocacy or specialist advice, is best suited to the needs of the public. The Bar recognises and values the excellent working relationships established with local solicitors across Northern Ireland. This long established and mutually beneficial way of working has always helped to ensure a quality service and better outcomes for the lay client. It is not the responsibility of the Bar to facilitate opportunities for access to advocacy for solicitors, in the same way that counsel cannot demand to be briefed by solicitors. We would suggest that alternative reasons exist as to why there may be the lack of opportunity for solicitors including for example that in managing their clients, their time and workload does not afford this.

45. The Bar notes that there are numerous mentions of "hostile attitudes" from members of the Bar with a reference to the need for a "complete culture change".

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

This appears to be based on 31 responses where individuals "expressed concerns about the level of resistance and opposition that was likely to be faced from the Bar". We would refute entirely any suggestion that solicitors would be treated with hostility and that a complete culture change is needed to overcome this. We feel that such comments are very regrettable and have been overstated. We would also contend that this is not grounded in reality given that it is merely "anticipated" that solicitors wishing to exercise rights of audience would be treated in this manner. The Bar believes in competition and considers that, provided the public interest always remains paramount, it has the potential to be a positive influence on quality. The Bar takes the view that the independent referral bar comprising practitioners in open competition with each other is the best guarantee of quality for clients and are confident that the quality service already on offer from the Bar will compete effectively with solicitor advocates with rights of audience in the Higher Courts.

46. The Bar also notes the line that "one contributor stated that 'there exists a perception that counsel is more equipped to do a job'". Once again we emphasise the mutual benefit and value that is derived from a close working relationship between instructing solicitor and counsel. The value that counsel can bring stems from the fact that members of the Bar clearly are specialist advocates and dedicated to being trained and recognised as such. In this context, in order to provide the best possible service to the instructing solicitor, a barrister will be better equipped to exercise advocacy rights in the Higher Courts given the level of training, skills and experience possessed by our branch of the profession which specialises in this type of work. The claim from one contributor that this is reinforced by "some of the judiciary speaking to counsel in private and leaving solicitors outside discussions" is not a matter that the Bar has been made aware of to date. We do not believe that one comment is truly representative of the profession and any issue relating to an individual barrister would be better raised in another forum rather than in the context of this RIA.

Q2. Do you consider that the education and training requirements provided in the Regulations adequately addresses the concerns raised in relation to training for authorised solicitors? If not, how specifically do you think these problems can be addressed?

47. The training and education provided for authorised solicitors to exercise higher rights of audience must provide assurance to members of the public that competent standards of advocacy will be provided. However, the Bar Council does not agree that the training regime outlined within the draft regulations is

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

sufficient in preparing authorised solicitors to undertake representation in the Higher Courts and it has not been amended in any way following the 2013 consultation. When compared with the training and education undertaken by a member of the Bar, the training outlined in the regulations does not appear equivalent in terms of length, breadth and practical experience. Training for solicitors at all stages (vocational/new practitioner and continuing professional development) offers more limited opportunities for the preparation, practice, performance and review of professional skills such as advocacy, as opposed to knowledge of the law.

48. This is evidenced by the Law Society's own research in section 3.4.11 in which it is highlighted that "respondents identified training as a challenge in 14 out of the 53 responses received with challenges identified relating to either the lack of training available or the time commitment required in order to undertake adequate levels of training". It is clear that there are several areas which respondents felt they would require further training in, such as the rules of evidence, advocacy, drafting and use of affidavits, statements of case and skeleton arguments. The time commitment required for training is also an issue given the responsibilities solicitors already undertake on a daily basis. Furthermore, the fact that a considerable number of the respondents to this survey appear to be at partner level (over 70% or 209 respondents) suggests that this will only compound their difficulty in being able to afford the time commitment required to undertake the levels of training and experiential learning comparable to that completed by barristers. The draft regulations fail to address any of these concerns.

49. Section 3.4.11 highlights a lack of appreciation regarding the difference in training between solicitors and barristers. Members of the Bar who appear in the Higher Courts must first complete a year of postgraduate training, specifically focused on advocacy skills at the Institute of Professional Legal Studies. In the course of this year, they are in regular contact with the Bar and involve in shadowing with their designated Master prior to commencement of pupillage. The Bar has an important role in ensuring the training is of the highest standard, continually develops and remains relevant to the practice of advocacy.

50. In addition, the Bar has been actively engaged in the ongoing reform process for the Diploma in Professional Legal Studies and has produced a course specification highlighting the core learning objectives for Bar students during the academic phase of their vocational training. As the regulator of the profession, the Bar is resolved that this revised Bar Skills Module will continue to include a range of components combining theory and practice. The 2017-2018 IPLS pupil intake will see an increased level of personal guidance from professionals to further ensure

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

that students put the knowledge gained into practice regularly under expert supervision. The topics to be covered in this module will include an introduction to the role of counsel in litigation, case analysis, oral advocacy, written advocacy and legal research. Consequently, these changes mean that advocacy training will be further enhanced resulting in Bar students emerging from the Institute of Professional Legal Studies with a range of professional skills which will further set them apart from their solicitor counterparts.

51. Having successfully completed this year to the necessary standard and after they are called to the Bar, each student is obliged to undertake a 12 month pupillage under the direct supervision of a senior member of the Bar. The first six months of pupillage is non-practising to facilitate the development, learning and engagement with experienced practitioners prior to receiving instructions to advise or to appear in Court. Throughout the pupillage year, the Bar delivers mandatory training programme with the Bar Advocacy Training Board delivering a six month series of intensive sessions with pupils, covering various areas of legal practice with formal written and practical assessment.

52. Advocacy skills form a core part of ATB training, particularly in relation to concepts of effective case presentation and practical tasks, such as case analysis, leading evidence in chief from investigator witnesses, cross examination skills, questioning an expert witness, objections to oral evidence and preparing an effective written argument. As we highlighted in response to the 2013 consultation, such a scheme is unique to the profession of barrister and is a key element in ensuring the necessary standards for those who practice in the profession.

Q3. Are there additional impacts associated with the proposals that have not been identified in this RIA? If so, do you have any specific recommendations with regard to mitigating action that might be taken to eliminate or reduce these impacts?

53. The Bar has already been critical in scrutinising this document in terms of the lack of proper consideration given to the impact of the proposals on barristers and solicitors working in rural practices. Instead of grounding this RIA in an evidence base using a survey of solicitors who have already completed the CAA, we maintain that it would have been more appropriate for the Law Society to instead consider the current views of the wider solicitor profession and the membership of the Bar by conducting a survey of these individuals. This would provide a more representative picture of the views of both branches of the profession on this

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

proposed change to the current structure of the legal system which has served this jurisdiction well for many years.

54. The Bar is also very concerned by the conclusion at paragraph 3.13 in relation to rural proofing that this policy has no "direct or indirect impacts which would accrue to rural communities… the benefits which would flow from these proposals would be equally applicable to rural areas due to the embeddedness of firms in rural communities". We would dispute this given that these proposals represent a significant change to the structure of the profession which may promote the interests of large centralised firms in Belfast and could result in clients being drawn away from firms and barristers working in rural areas. This will have an impact on communities which may lose local practices meaning that individuals seeking legal advice will have to travel elsewhere to obtain assistance instead.

55. Furthermore, we note that this consultation question asks for recommendations as to mitigating action that might be taken to eliminate or reduce the impact of these proposals. As one of the key affected stakeholders identified by the Law Society in the course of this RIA, the request for such recommendations stands in sharp contrast to the claim in paragraph 3.4.12 that the Bar requires a "complete culture change" to facilitate solicitors in exercising rights of audience. Consequently, we can only describe the language used in respect of the Bar as deeply regrettable with a lack of consideration for any adverse impacts that our members might potentially experience. We hope that these views do not prevent the Law Society from taking our concerns seriously and can see that they are intended to be objective and should not be characterised as "hostile" and requiring a "change in mind set"

Q4. Are there specific matters related to training and experience of authorised solicitors that are missing from this RIA?

56. The Bar's response to question 2 covers the matter of training in detail. However, we would also point to concerns around continuing professional development for authorised solicitors around which there is little detail with the draft regulations highlighting at 6.1 that alongside the five day CAA training course just 3 hours will be required annually in advocacy skills or the law of evidence. We would welcome further clarity as to how solicitor advocates will be able to develop the required expertise to meet client need in the Higher Courts when these requirements are not comparable to the rigorous standards required by the Bar of counsel.

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

57. In addition, the Bar is currently in the process of seeking to modernise its professional development programme and support members in the management of their CPD activity. It is anticipated that the new CPD framework will come into effect in December 2017 for the new 2017-18 CPD year. The CPD programme will encompass events on new developments in law and procedure, skills training and practice management. Mandatory elements will include ethics, advocacy and professional skills which will be rolled out across the profession.

Q5. Do you have specific recommendations regarding the way in which the barriers that have been identified in this RIA might be addressed?

58. See above for our suggestions in relation to creating a proper evidence base for the RIA involving extensive dialogue with affected parties. We do not accept that the "barriers" identified in 3.4.12 for solicitors already holding the CAA are relevant in this context.

3.5.3 Cost Benefit Analysis

Q6. Are there additional costs associated with the proposals that have not been identified? If so, please outline these costs and any remedial action that might be carried out to mitigate the impact of these costs.

59. We note that the survey of the CAA holders identified a range of views in relation to costs with two respondents stating this as one of the reasons for wishing to practise in the Higher Courts. However, the Bar would be concerned to ensure that such motivations are always subservient to the proper administration of justice. Whilst we take the view that costs are important, the quality of representation must always be preferred in the first instance.

60. Meanwhile a number of other solicitor advocates identified the issue of fees as a reason for not exercising rights of audience. Respondents clearly indicate that enhanced financial incentives would induce them to consider this work in future. However, these responses highlight once again the actual or perceived tension or conflict of interest that must be adequately addressed between the solicitors' financial interest and the interests of the client associated with these proposals, thus highlighting the points made around safeguards at 3.4.1. It would also be informative to consider the matter of fees further in relation to section 3.4.8 around the reasons for solicitor advocates wishing to appear in the Higher Courts which does not explicitly mention costs, particularly the 70% (135 respondents) expressing a desire to enhance practice development.

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

Q7. Do you consider that there are additional risks associated with the proposals that have not been identified? If so, do you have any specific recommendations with regard to mitigating action that might be taken to reduce/eliminate these risks?

61. The Bar considers that the point identified in paragraph 3.6 around authorised solicitors in the Higher Courts not being adequately prepared for the new work that they could be required to undertake is a significant risk and the RIA fails to adequately address this in any way. We note that none of the comments we made in response to the 2013 consultation have been actioned with regard to enhanced education and ongoing supervision given the rights under consideration. Therefore we still believe that a clear risk still exists that solicitor advocates will not be properly equipped to conduct cases in the Higher Courts.

62. In addition, we would take issue with the comment at paragraph 3.6 that "it is important to note that a number of concerns were expressed about the inadequacy of the training from the Bar Council". This appears to be a general observation and is lacking in the provision of any supporting evidence. We would query the reason for the inclusion of such a comment and its relevance in addressing the appropriate management of risk by the Society in allowing solicitors to exercise rights of audience in the Higher Courts. The assertion that it is enough to simply rely on the survey findings that most of those completing the CAA are "experienced members of the legal profession thereby minimising the risk that representation in the Higher Courts might be carried out by someone unqualified for the role" is not satisfactory. This demonstrates that the RIA fails to properly appreciate the specialist skill set that members of the Bar develop and continually enhance as part of their training and supervision.

Q8. Do you have additional evidence that has not been considered in the RIA regarding the impact of the proposals?

63. The Bar considers that the RIA also neglects to consider the important distinction between the roles of junior and senior counsel when working on cases in the Higher Courts given that there is no mention of this at all within the document. Senior counsel brings their specialism to a particular case, often ensuring expertise in relation to narrowing down further issues in dispute and the cross examination of witnesses. However, the distribution of labour between junior counsel and senior counsel is well defined with both having separate but necessary roles. For example, senior counsel and junior counsel perform different yet complementary roles which are both essential to the proper administration

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

of serious children's cases in the High Court in relation to The Children (Northern Ireland) Order 1995, which can involve the removal of a child from a parent's care. These serious, complex and time consuming cases require the joint expertise, experience, time and effort of both counsel.

64. The value brought to a case by junior counsel, particularly in respect of written advocacy, appears to be entirely missing from this document. It displays a clear misconception around the role of junior counsel and the value which they bring to a case. The idea that junior counsel can simply be replaced by a solicitor advocate in the Higher Courts without a diminution in the quality of representation is completely misguided.

Q9. Are there specific issues related to the implementation, enforcement and sanctions for the preferred option that you consider are relevant and which have not been considered in this RIA?

65. There is no reference within the RIA to how the current complaint structures of the Law Society will respond to issues in relation to the conduct of solicitor advocates. At present it is not clear that those in the Law Society dealing with complaints will have the ability to do so in respect of the conduct of a solicitor advocate in the Higher Courts.

Q10. Do you consider that these monitoring and review measures are adequate? If not, have you specific recommendations regarding the monitoring and review aspect of the proposals that you would wish considered?

66. The Bar has no further comments to make in relation to this.

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com