



# THE BAR OF IRELAND

*The Law Library*

*Submission by Council of The Bar of Ireland to  
the Legal Services Regulatory Authority on  
certain issues relating to barristers*

2nd June 2017

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## **Scope of the consultation**

In its public consultation notice dated the 6<sup>th</sup> April 2017 the Legal Services Regulation Authority (the “Authority”) seeks submissions in respect of the following issues relating to barristers:

- a. The extent, if any, to which the restriction on legal practitioners, other than solicitors, holding the money of clients, as provided under section 45 of the Legal Services Regulation Act 2015 (the “Act”), should be retained;
- b. The retention or removal of restrictions on a barrister receiving instructions in a contentious matter, directly from a person who is not a solicitor, and the reforms, whether administrative, legislative, or to existing professional codes, that are required to be made in the event that the restrictions are retained or, as the case may be, removed; and
- c. The circumstances and manner in which a barrister may hold clients’ moneys and the mechanisms to be applied for the protection of clients’ monies which may also be held.

Respondents are therefore requested to consider issues that can be grouped under two broad headings, namely (a) direct access to barristers in contentious matters and (b) barristers holding client money.

## Introduction and Executive Summary

The Council of The Bar of Ireland (the Council) is the accredited representative body of the independent referral Bar in Ireland. The *independent referral bar* consists of members of the Law Library which has a current membership of over 2,200 practising barristers.

The Council welcomes this opportunity to contribute to the public consultation process concerning these most important of issues.

Members of the Law Library do not hold client money and, save for the limited exception of work undertaken under The Bar of Ireland's Direct Professional Access scheme, members do not accept instructions directly from clients in either contentious or non-contentious matters.

These fundamental features of the barristers' profession are not regarded by The Bar of Ireland as "*restrictions*" in the sense of *limitations* or *controls* - the absence or relaxation of which will lead to a removal of impediments or barriers. Rather, these are the very features that (a) *ensure* that clients continue to have access to specialist advocacy and advisory services and (b) *enable* barristers, in a cost effective way, to fulfil a crucial role in the administration of justice in the State. Members of the Law Library will continue to abide by these rules and will not subscribe to the models of practice envisaged by the removal or relaxation of the s.120 restrictions.

In the main, barristers provide specialist advocacy and advisory services, particularly in the context of litigation. The organisation of barristers as a separate profession cultivates and promotes expertise and specialisation in these areas.

Currently barristers operating within the Law Library structure as independent referral barristers are not exposed to the costs that would inevitably be associated with a removal of the "*restrictions*" identified in s.120 of the Act (the "s.120 restrictions"). Barristers are not required to operate and maintain client accounts and are therefore not required to employ bookkeepers and accounting staff. Barristers are not exposed to significant administration costs associated and with running a "*full service*" legal practice (staff costs, administrative costs, insurance, buildings etc.).

Perhaps most importantly of all, barristers are not currently exposed to the very significant costs associated with a brand new scheme of regulation of barristers' accounts that would be necessitated by the relaxation of the s.120 restrictions. Notwithstanding the fact that it is not at all clear how such a scheme of regulation would be funded, the Council believes that higher costs of regulation would inevitably lead to higher costs of legal services. In this regard the Council would emphasise that in circumstances where members of the Law Library will not subscribe to these models of practice only those barristers who choose to handle client money and to accept instructions directly from clients in contentious matters could be called on to

fund the new scheme of regulation warranted by a relaxation of the s.120 restrictions.

The *flexibility* inherent in the defining features of the independent referral bar translates into some very real and tangible benefits to clients and to wider society, most notably (a) increased competition between barristers leading to lower costs and (b) greater access to specialist legal services for a greater number of people. The independent referral bar is a resource and a pool of expertise to which all members of society have access and because the s.120 restrictions ensure a *division of labour* between barristers and solicitors as opposed to a *fusion of roles* which will see barristers and solicitors compete directly, access to barristers is not currently restricted to those clients who can afford to engage barristers on a *full service* basis.

The current system which sees barristers engaged by solicitors from all corners of the country, from the largest firms to sole practitioner solicitors, on a flexible basis and in relation to certain defined and specialist tasks, and which sees solicitors provide a range of other ancillary services to clients, is both cost-effective and efficient. Further, the “*cab-rank*” rule ensures access to expert legal expertise for a greater number of clients. The fact that barristers are not currently exposed to very significant regulatory and administrative costs also ensures that more barristers are likely to continue to accept instructions from clients on a “*no win no fee*” basis.

The Council is of the view that any “*relaxation*” of the s.120 restrictions would bring about a fundamental restructuring and recalibration of the entire legal system in the State. While the Council continues to support the reforms to be introduced under the Act which have as their objective the modernisation of the legal professional and the better and fairer delivery of legal services to the citizens of Ireland, the Council is firmly of the view that a removal or relaxation of the s.120 restrictions will result in adverse outcomes that are inimical to the interests of clients and inimical to the interests of justice.

A number of likely outcomes that would result from the removal or relaxation of the s.120 restrictions have been identified:

- The significant costs associated with a brand new, necessarily complex and comprehensive regulatory framework will ultimately be borne by clients, resulting in higher costs of legal services;
- The significant costs associated with the establishment and maintenance of a compensation fund will ultimately be borne by clients, resulting in higher costs of legal services;
- The current model that ensures access to specialist legal expertise in a fair, cost-effective and efficient manner through collaboration and cooperation

between barristers and solicitors will be replaced with a model that ensures direct competition between barristers and solicitors;

- Fewer clients will have access to the specialist legal services provided by barristers;
- Barristers exposed to increased administration and regulation costs will be less likely to accept instructions on a “*no win no fee*” basis and will be less likely to operate a cab-rank rule model of practice;
- The *division of labour* model, which currently sees independent barristers, who do not hold client moneys and who generally fulfil certain *specialist* roles in the context of the conduct of litigation, will be replaced with the *full service* model. The independence, objectivity and specialist knowledge and expertise for which barristers can be relied upon to deliver and which is so very much required in complex litigation and disputes, will no longer be available to solicitors, clients and to the courts.

The Council has also carefully considered the split profession in England and Wales. The Council notes that in that jurisdiction, where wide ranging reforms have been introduced over the last decade, the “*one stop shop*” or *full service* model for the delivery of legal services by barristers does not exist. A near-absolute prohibition on barristers handling client money remains in place. The Council also notes that while barristers may accept instructions directly from clients in contentious matters, they may only do so having met certain qualification and training requirements and subject to an overriding obligation to advise a client to engage a solicitor when to do so is in the best interests of that client. Further, barristers in England and Wales, including those barristers who have met the requisite public access criteria, are not entitled to conduct litigation on behalf of clients unless they have been granted a *litigation extension*. The Council believes that the restrictions that remain in place in England and Wales only serve to underline the regulatory risk posed by the removal of similar restrictions in this jurisdiction.

The Council’s position can be summarised as follows:

- The restriction on legal practitioners, other than solicitors, holding the moneys of clients, as provided under s.45 of the 2015 Act, should be retained;
- Consequently, the Council does not believe that mechanisms should be devised or employed to facilitate the holding of client monies by barristers;
- Barristers should not be permitted to accept instructions in contentious matters from persons other than solicitors.

## PART 1 – KEY DEFINITIONS AND TERMS

### Client money

1. Pursuant to s.120(1)(a) of the Act consideration is to be given to the extent, if any, to which the restriction on legal practitioners, other than solicitors, holding the *moneys of clients*, as provided under s.45 of the Act, should be retained. In turn, s.45(1) provides as follows:

*“Subject to subsection (2), a legal practitioner shall not hold moneys of clients unless that legal practitioner is a solicitor.”*

2. The Act does not provide a definition of the terms “*client money*” or “*moneys of clients*”. The Council notes that a definition of the term “*clients’ moneys*” is contained in the Solicitors Accounts Regulations 2014.<sup>1</sup> The definition as set out in the Solicitors Accounts Regulations is comprehensive and reflects the fact that solicitors may hold different categories of moneys on account for a multitude of reasons and purposes.

### Contentious matters

3. Under s.120(1)(b) of the Act consideration is to be given to the retention or removal of restrictions on barristers receiving instructions in contentious matters from a person who is not a solicitor. The term “*contentious matter*” is defined in s.99 of the Act in the following terms:

*““contentious matter” means a matter that arises in, and that relates to the subject matter of, proceedings before any court, tribunal or other body or person before which the respective legal rights and obligations of two or more parties are determined, to which the person instructing the practising barrister concerned is a party;”*

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<sup>1</sup> S.I. 516 of 2014: ““*clients’ moneys*” means moneys received, held or controlled by a solicitor arising from his or her practice as a solicitor for or on account of a client or clients, whether the moneys are received, held or controlled by him or her as agent, bailee, stakeholder, trustee or in any other capacity, including moneys received by the solicitor on account of outlays not yet discharged; provided that “*clients’ moneys*” shall not include— (i) moneys received, held or controlled by a solicitor in respect of which he or she is a controlling trustee or a non-controlling trustee, or (ii) moneys to which the only person entitled is the solicitor himself or, in the case of a firm of solicitors, one or more of the partners in the firm, or (iii) moneys placed on joint deposit account or joint deposit receipt other than where the payees are all solicitors practising in the same solicitors’ practice, or (iv) (save as provided for under Regulation 8(2)(a) and 8(3)(b) and without prejudice to the generality of the liability of a solicitor pursuant to the provisions of section 73 of the Act of 1994 and regulations made thereunder) interest received by a solicitor on clients’ moneys held by the solicitor on account of his or her clients generally on an interest-bearing “*general client account*” as defined in Regulation 8(1); or (v) moneys received, held or controlled by a personal insolvency practitioner in accordance with an insolvency arrangement;”

## **PART 2 – THE CURRENT POSITION**

### **A. Client money**

#### **Barristers**

1. Barristers do not hold client money and Rule 2.19 of the current Code of Conduct of the Bar of Ireland<sup>2</sup> (the “Code”) provides that:

*“In the interest of maintaining an independent referral bar Barristers are prohibited from directly or indirectly administering or handling the funds or assets of any client and Barristers shall not give any financial advice or assistance to a client or their solicitor on the investment of such funds or assets.”*

#### **Solicitors**

2. Solicitors are entitled to hold client money and this in turn enables solicitors to undertake the type of work that one would usually associate with the solicitors’ profession.
3. Solicitors assist clients with the purchase and sale of property and this will often involve solicitors holding deposits and purchase monies in the solicitor’s accounts during some stage of a transaction. Solicitors assist legal representatives with gathering in assets after a person has died; money from bank and credit union accounts will often be held by the solicitor for a period of time. Solicitors might act as trustees and may hold monies in their accounts during the administration of the trust. Solicitors may receive settlement monies when litigation is brought to a conclusion. Solicitors may also hold money on account to be used to discharge outlay such as government duty and taxes.

#### *A multi-layered statutory framework of regulation*

4. A comprehensive and multi-layered regulatory framework governs the handling of client money by solicitors. The scheme of regulation is on a statutory footing with the most recent version of the regulations, the Solicitors Accounts Regulations 2014 (the “2014 Regulations”), enacted by way of statutory instrument in December 2014.<sup>3</sup>
5. Regulation and supervision is primarily undertaken by the Law Society of Ireland (the “Law Society”) through the relevant committees with the High

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<sup>2</sup> Adopted by a General Meeting of the Bar of Ireland on Wednesday 23<sup>rd</sup> July 2014.

<sup>3</sup> S.I. 516 of 2014



Court exercising a general supervisory role and a role in relation the investigation of solicitors' practices.<sup>4</sup>

6. The 2014 Regulations amount to a mandatory, self-contained statutory code of practice for the regulation of solicitors' accounts, with any material deviation from the regulations potentially giving rise to a complaint to the Solicitors Disciplinary Tribunal.<sup>5</sup> The regulations are all-encompassing and seek to regulate all aspects of the operation of solicitors' accounts, to include:

- How client money should be held, paid into and treated in the client account;<sup>6</sup>
- The handling of "*mixed moneys*" *i.e.* cheques or drafts which include a mixture of clients' moneys and / or controlled trust moneys or non-controlled trust moneys and / or other moneys by solicitors;<sup>7</sup>
- The handling of purchase monies in vendor / purchaser transactions;<sup>8</sup>
- The withdrawal of money from client accounts;<sup>9</sup>
- The holding of certain moneys in interest bearing accounts and the requirement to account for interest;<sup>10</sup> and
- Transfers between client ledger accounts.<sup>11</sup>

7. The regulations also prescribe the nature of the books of account to be kept and maintained by solicitors, to include "*...such relevant supporting documents as will enable clients' moneys handled and dealt with by the solicitor to be duly recorded and the entries relevant thereto in the books of account to be appropriately vouched.*"<sup>12</sup> Solicitors must comply with the minimum accounting records standards set out in Part IV of the regulations.

8. Similar regulations govern the handling by solicitors of moneys in controlled<sup>13</sup> and non-controlled<sup>14</sup> trust accounts as well as in insolvency arrangement accounts.<sup>15</sup>

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<sup>4</sup> Ibid. Regulation 35.

<sup>5</sup> Ibid. Regulation 35(6)(c).

<sup>6</sup> Ibid. Regulation 4.

<sup>7</sup> Ibid. Regulation 6(1).

<sup>8</sup> Ibid. Regulation 6(4).

<sup>9</sup> Ibid. Regulation 7 and regulation 9 (*Manner of withdrawal from client account*).

<sup>10</sup> Ibid. Regulation 8.

<sup>11</sup> Ibid. Regulation 10.

<sup>12</sup> Ibid. Regulation 13(1).

<sup>13</sup> Ibid. Regulation 14.

<sup>14</sup> Ibid. Regulation 20.

<sup>15</sup> Ibid. Regulation 21.

### *Reporting requirements*

9. Part V of the regulations addresses the solicitors' reporting requirements. Solicitors are obliged to furnish to the Law Society, within six months of the assigned "*accounting date*", in each practice year, a report (in the form set out in the Second Schedule to the regulations) signed by the solicitor's reporting accountant.<sup>16</sup> The reporting accountant must be a person in practice who is a member of one or more of a number of specified professional bodies, namely Chartered Accountants Ireland, The Institute of Chartered Accountants in England and Wales, The Institute of Chartered Accountants in Scotland, The Institute of Certified Public Accountants in Ireland or the Institute of Incorporated Public Accountants.<sup>17</sup> The reporting accountant must also be approved by the Law Society, with such approval capable of withdrawal.<sup>18</sup>
10. The regulations set out step-by-step guidelines to be followed by the reporting accountant when undertaking a review of a solicitor's practice.<sup>19</sup> A solicitor is also obliged under the regulations to ensure that he or she produce to his or her reporting accountant any document or documents requested by the reporting accountant which the reporting accountant considers necessary to inspect for the purposes of the reporting accountant's examination.<sup>20</sup>

### *Investigation of solicitors' practices*

11. The Law Society may authorise persons to attend at a solicitor's practice to investigate whether or not there has been compliance with the 2014 regulations.<sup>21</sup> Solicitors are under a statutory obligation to cooperate in any such investigation, to make available all accounting records and to ensure that the authorised person has access to all relevant bank accounts.<sup>22</sup> A failure to cooperate may result in an application to the High Court for an order requiring the solicitor to make available for inspection such accounting records as the Law Society deem necessary or as the Court thinks fit.<sup>23</sup>

### *The Compensation Fund*

12. The Law Society maintains a compensation fund (the "Compensation Fund") to assist clients who have lost money by reason of a solicitor's dishonesty. As

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<sup>16</sup> Ibid. Regulation 26(1).

<sup>17</sup> Ibid. Regulation 26(4)(a). See also Regulation 26(4)(ii) regarding persons of professional experience.

<sup>18</sup> Ibid. Regulation 26(5).

<sup>19</sup> Ibid. Regulation 28(2), steps 1 – 13.

<sup>20</sup> Ibid. Regulation 29(1).

<sup>21</sup> Ibid. Regulation 35(1).

<sup>22</sup> Ibid. Regulation 35(2).

<sup>23</sup> Ibid. Regulation 35(3).

is the case with the 2014 Regulations, the Compensation Fund is on a statutory footing.<sup>24</sup>

13. All practicing solicitors are required to contribute to the Compensation Fund every year.<sup>25</sup>

14. Claims on the Compensation Fund are adjudicated upon by the Law Society's Regulation of Practice Committee with administrative and investigative support provided by the Committee's Claim's Administration section.

15. In order to succeed in a claim a claimant must establish to the satisfaction of the Law Society that:

- They have sustained financial loss;
- They were a client of the solicitor;
- That such loss was as a result of the dishonesty of the solicitor; and
- That the solicitor was acting in the course of his or her practise as a solicitor within the jurisdiction of the State.

16. In her Annual Report for 2016<sup>26</sup> the Independent Adjudicator makes a number of observations relating to the period of 6 months to the 30<sup>th</sup> June 2016, to include the following:

- 84 claims were made on the Compensation Fund, compared to 140 for the same six month period in 2014;
- Valid claims increased to €1,376,533 from €517,587 for the same six month period in 2014;
- Payments from the Compensation Fund increased to €340,314 from €10,386 for the same six month period in 2014;
- Higher value claims were under investigation amounting to €1,036,219 from €507,217 for the same six month period in 2014.<sup>27</sup>

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<sup>24</sup> Established and maintained pursuant to Part VIII of the Solicitors Act 1954, s.21 of the Solicitors (Amendment) Act 1960, as substituted by s.29 of the Solicitors (Amendment) Act 1994 and amended by s.16 of the Solicitors (Amendment) Act 2002. See also S.I. 422 of 2013.

<sup>25</sup> See the Law Society's *Guide to Claiming Refunds of Money Paid to a Solicitor*, 2009: [https://www.lawsociety.ie/Documents/Regulation/Guide\\_refunds2009.pdf](https://www.lawsociety.ie/Documents/Regulation/Guide_refunds2009.pdf). See also the Law Society's *Guidelines on Compensation Fund Claims Procedures*: <https://www.lawsociety.ie/Documents/Regulation/Guidelines-CF.pdf>.

<sup>26</sup> *Annual Report of the Independent Adjudicator of the Law Society of Ireland – Year ending 30<sup>th</sup> September 2016*, <https://www.lawsociety.ie/Documents/committees/complaints/IAAnnualReport.pdf>.

<sup>27</sup> *Ibid.* at page 43.

## *The Law Society to retain solicitors' accounts regulation*

17. The Council notes that the power to supervise and enforce compliance with the Solicitors Accounts Regulations will remain vested in the Law Society. In its November 2013 Regulatory Impact Analysis<sup>28</sup> (the "RIA") the Department of Justice explains the rationale for this course of action.

18. In the RIA it is noted that the Law Society's Regulation of Practice Committee maintains and administers the Compensation Fund and has responsibility for overseeing compliance with the Solicitors Accounts Regulations. The operation of the Compensation Fund and the associated inspection and oversight regulations are regarded as important protections for clients:

*"...The Compensation Fund therefore brings with it a rigorous inspection and compliance regime administered by the Law Society over its members – last year its team of investigating accountants conducted approximately 400 investigations. As such, the Fund and its attendant inspection procedures form an important protection against fraud and dishonesty that may be perpetrated by solicitors in the handling of clients' monies or assets..."*<sup>29</sup>

19. In the RIA it is described how the Compensation Fund paid out €17.7 million in claims between 2008 and 2012. The annual contribution to the Compensation Fund per solicitor in 2013 was €760.<sup>30</sup> The RIA also describes how the cost of regulating the Compensation Fund alone,<sup>31</sup> (including litigation costs and the value of voluntary committee contributions) was €6.5 million.

20. Describing the Compensation Fund as a "...ongoing, substantial and costly undertaking..."<sup>32</sup> were the State or a statutory body to assume responsibility for its maintenance and administration, and noting that the Law Society, as custodian of the Compensation Fund, has a vested interest in supervising and investigating its members in a vigorous way to ensure that acts of fraud or dishonesty that could lead to a payment from the Fund are kept to a minimum, the RIA notes how "...the Government has been persuaded by the view that

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<http://www.justice.ie/en/JELR/RIA%20LSRB%20MASTER%20PDF%20VERSION%20PDF%20NOV%202013.pdf/Files/RIA%20LSRB%20MASTER%20PDF%20VERSION%20PDF%20NOV%202013.pdf>.

<sup>29</sup> Ibid. at paragraph 62.

<sup>30</sup> Ibid. : "... The Compensation Fund has been relied upon in a number of high profile cases in recent times and has paid out a total of €17.7 million in claims during the five years of 2008 to 2012 – the total claimed in that period amounted to close to €48 million. There was a 9% increase in the 266 claims made against the Compensation Fund in 2012 over the previous year though this remains much less than the peak of 672 claims received in 2008. The net assets of the Solicitors Compensation Fund were valued at €18 million as at 30th June 2013. The annual contribution to the Fund for 2013 is €760 per solicitor. Annual insurance cover for €50 million with an excess of €5 million is also in place..."

<sup>31</sup> October 2011 figures, see RIA at paragraph 65.

<sup>32</sup> Ibid. at paragraph 64.

*the power to supervise and inspect compliance with the regulations relating to solicitors' accounts should remain vested in the Law Society".<sup>33</sup>*

21. Under the heading of "Enforcement and Compliance" the RIA provides a succinct summary of the position regarding the Compensation Fund and the regulation of solicitors' accounts:

*"The retention of the current Compensation Fund and financial inspection regime administered by the Law Society supports a high level of vigilance and compliance in an areas [sic] of highest risk (i.e. fraud and dishonesty) while also ensuring that the actual and potential liabilities of the Fund do not fall back by way of a drain on Exchequer or other public resources."<sup>34</sup>*

## **B. Direct access in contentious matters**

### **Barristers**

22. Subject to very limited exceptions, barristers do not accept instructions directly from clients. Rule 2.1 of the Code states that:

*"... Barristers as members of an Independent Referral Bar hold themselves out as willing and obliged to appear in Court on behalf of any client on the instructions of a solicitor and to give legal advice and other legal services to clients. A Barrister who accepts an appointment as Attorney General is hereby deemed to continue to be a Barrister in practice at the Bar." (emphasis added)*

23. Rule 3.9 of the Code stipulates a client may engage a barrister *through that client's solicitor*.<sup>35</sup>

### *The Direct Professional Access Scheme*

24. Since 1990 the Bar of Ireland has operated the Direct Professional Access scheme (the "DPA scheme"). The scheme allows members of certain approved bodies, to include professional bodies and charitable organisations, to instruct barristers *directly* in non-contentious matters; the scheme does not extend to contentious matters. Approved bodies include:

- Barnardos;
- The Affordable Homes Partnership;

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid. at paragraph 113.

<sup>35</sup> Rule 3.9 provides: "If a client contacts a Barrister initially and asks the Barrister to act the Barrister should do nothing unless and until the Barrister is contacted by the client's solicitor but if it is a matter of urgency the Barrister may contact the client's solicitor."

- The Courts Service;
- The Commission for Aviation Regulation;
- County Education and Training Boards;
- The Institute of Chartered Accountants in Ireland;
- The Institute of Professional Auctioneers and Valuers;
- The Irish Congress of Trade Unions; and
- The Irish National Teachers' Organisation.<sup>36</sup>

25. The DPA scheme is evolving and the Council believes that it will be used more extensively in the future to afford a wide access to the reservoir of talent and skills available from independent professional barristers practising within the Law Library.

### **Solicitors**

26. Solicitors can provide all and any of the services provided by barristers. Solicitors enjoy full rights of audience before the courts of Ireland. There is no prohibition on solicitors acting on a *full service* basis for clients and this frequently happens in the District Court, in both the civil and criminal context, and in the context of tribunals exercising limited or quasi-judicial functions, for example the Residential Tenancies Board and employment tribunals.

27. However, and crucially, the Council believes that the vast majority of cases where solicitors conduct all aspects of litigation on behalf of a client have certain common features and characteristics that lend themselves to “*full service*” engagement:

- The issues in dispute, both legal and factual, are usually of a limited and relatively discrete nature; minor road traffic offences, District Court material damage claims; landlord and tenant disputes relating to breaches of covenant or the return of deposits etc.;
- The claims are generally of relatively low monetary value; civil claims in the District Court are limited to a monetary value of €15,000;
- By reason of the relatively straightforward nature of the dispute, the solicitor fulfils a limited investigative and evidence-gathering role;

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<sup>36</sup> See full list of approved bodies available at <https://www.lawlibrary.ie/legal-services/direct-professional-access/list-of-approved-bodies.aspx>.

- Intervention by the court at the interlocutory stage (discovery orders, preliminary issues etc.) is less likely;
- There will be limited scope or need for in-depth cross-examination;
- The parties' exposure to costs will be limited.

28. Conversely, in the vast majority of cases that appear before the Circuit Court and the Superior Courts (the High Court, the Court of Appeal and the Supreme Court) solicitors and clients choose to engage the services of barristers.

## **PART 3 – THE ADVANTAGES OF THE SPLIT PROFESSION MODEL**

### **Introduction**

29. Clients benefit directly from the split profession or *division of labour* model that sees solicitors and barristers collaborate and work together but ultimately fulfil different roles. The many and varied advantages of the current model would be lost should the s.120 restrictions be relaxed or removed. Further, the Council considers the s.120 restrictions, which are arguably the key distinguishing features of the barristers' profession, as being critical to the efficient and cost-effective administration of justice in the State.

- The retention of these defining characteristics of the independent referral bar will ensure that clients, from all corners of society and from all parts of the country, will continue to have access to a pool of legal expertise on a flexible and cost-effective basis;
- Barristers are not currently exposed to significant administration costs associated and with running a *full service* legal practice (staff costs, administrative costs, insurance, buildings etc.). Costs remain low, barristers can continue to accept work on a flexible basis and barristers remain more likely to accept work on a “*no foal, no fee*” basis in certain cases;
- The retention of the *division of labour* model which sees solicitors and barristers collaborating as opposed to competing will have the effect of ensuring the continued existence of the *independent referral bar* and all of its attendant benefits (cab-rank rule, direct competition between barristers, engagement of barristers only when required, the continued development of expertise ensuring high quality services for clients);
- Barristers do not hold client money and are therefore not currently exposed to what would inevitably be very significant costs associated with regulation. No such costs are currently passed on to clients;
- Clients are not exposed to any greater regulatory risk;
- Barristers will continue to collaborate with solicitors, but will ultimately remain independent. Barristers will continue to bring fresh, independent and objective perspectives to cases and disputes.

### **The cost-effective and efficient nature of the current model**

30. While barristers provide a varied range of legal services, barristers primarily provide specialist advocacy and advisory services. For the most part barristers in Ireland are specialists and have specialist expertise in either a



general area (civil litigation, criminal litigation etc.) or a specific area (medical negligence law, planning law, consumer law etc.). In cases involving complex legal issues barristers are generally engaged to provide legal advice and opinion, to prepare court documents or pleadings and, if the matter proceeds to trial, to conduct the trial of the case before court.

31. There are currently approximately 2,200 independent referral sole-trader barristers. Barristers compete directly with each other for a limited pool of work. All practising barristers who operate as independent referral barristers, and who, pursuant to the cab-rank rule and subject to limited exceptions, are obliged to accept instructions from any client, are available to every solicitor in the State at the present time. Many barristers regularly accept instructions on a “*no win no fee*” basis and this in effect operates as a free legal aid system.
32. Barristers do not currently compete with solicitors directly because barristers provide different services and fulfil different roles to those of solicitors. The s.120 restrictions prevent barristers from operating a model of *full service* legal practice but enable and encourage barristers to develop expertise and specialist skills in advocacy and litigation. Barristers therefore provide a varied but ultimately limited range of *specialist* services, and services which are generally not provided by solicitors. This model brings with it a *flexibility* which translates to:
  - Wider access to specialist legal services for a greater number of people;
  - Greater competition between barristers which acts to drive costs downwards;
  - The delivery of specialist legal services in a flexible manner and *on the client’s own terms*.

#### *Greater access to justice*

33. Barristers are currently not required to operate and maintain client accounts. Barristers are not exposed to the significant administration costs associated with running a *full service* legal practice (staff costs, administrative costs, insurance, buildings etc.); the vast majority of barristers operate from the Law Library in Dublin or from the regional law libraries and while some barristers rent or share office space any costs incurred are a fraction of those associated with running a *full service* practice or firm.

34. With lower costs associated with running a low-overhead model of practice comes a greater willingness on the part of barristers to adhere to a cab-rank rule and to accept instructions on a *no win no fee* basis; this simply reflects the reality that barristers who do not have the very significant financial commitments associated with running a *full service* practice remain more flexible.
35. Naturally, where the s.120 restrictions are relaxed or removed, and where barristers, placed in a situation of direct competition with solicitors *and* exposed for the first time to additional and significant costs, to include the costs of regulating barristers' accounts, barristers will be more likely to agree to work and only accept instructions in cases where fee recovery can be guaranteed.
36. In essence, the Council believes that a relaxation of the s.120 restrictions will lead to the *commercialisation* of the specialist legal services provided by barristers and that this will have the outcome of restricting access to specialist advocacy and advisory services to those who can afford to engage barristers on a *full service* basis.

#### *Competition between barristers*

37. Currently, when it comes time in any given case to engage a barrister to provide specialist advice or advocacy, a client is entitled, through his or her solicitor, to approach any member of the independent referral bar who has expertise in the particular area to assist in his or her case. Subject to a number of limited exceptions, and subject to reaching agreement in relation to the terms of engagement, the barrister is *obliged to accept the work*, and the client is therefore guaranteed access to specialist legal expertise.
38. The barrister is obliged to provide an estimate of his or her professional fees, and this will allow the client to compare the prices and rates of other barristers. Clients and their solicitors are therefore encouraged to "*shop around*"; this drives down prices and promotes competition amongst barristers who compete for a limited pool of work.

#### *The delivery of specialist legal services in a flexible manner and on the client's own terms*

39. Clients will very often engage a barrister on a "*once off*" basis. In other words, the barrister will be engaged to carry out one discrete task at a time; the barrister may be engaged to appear in court to deal with a pre-trial application regarding discovery of documents for example.
40. The client has therefore had the benefit of accessing the *specialised services* of a barrister *on the client's own terms*. The model both allows and

encourages clients to access the specialist legal services provided by barristers only when they need to do so, with clients relying on the direction of solicitors to help with identifying when that need arises, much in the same way that a GP will refer his or her patient to a specialist or consultant *when that need arises*.

### Summary

41. The overall benefits of the split profession model are clear. Barristers will continue to develop expertise and specialist skills and solicitors will continue to develop expertise in the roles and functions traditionally associated with solicitors. Clients will continue to have access to all independent referral barristers, who subscribe to the cab-rank rule; access to legal expertise will not be restricted to those who can afford to engage barristers on a full-service basis. Clients will continue to have the option of engaging barristers, in the context of a market where all barristers compete for work, to undertake specific and discrete items of work as and when the need arises.

### The benefits inherent in the “*division of labour*” model

#### Overview

42. The Bar of Ireland recognises that there are cases, with certain common features and characteristics as identified above, which may not require the engagement of a barrister. In such cases solicitors provide legal services on a *full service* basis. However, in the vast majority of cases involving complex legal disputes, barristers *are* engaged and are engaged *specifically* to provide specialised legal services.

43. The Bar of Ireland rejects any notion that the current model results in a “*doubling up*” of labour between barristers and solicitors; in reality the separate and distinct roles fulfilled by both barristers and solicitors, collaborating in a particular case rarely overlap to any great extent. There is a *division of labour* between barristers and solicitors and clients benefit from this model of practice.

44. In relation to litigation, the solicitor is the first point of contact for the client seeking legal representation in court. Solicitors fulfil two crucial functions at this initial or *triage* stage, namely:

- Solicitors advise clients as to whether or not they have an actionable claim (or arguable defence); and
- Where a claim does arise, solicitors assist the client by framing that claim within a recognised cause of action.

45. Where a novel or complex issue of law arises for consideration at this initial stage the solicitor will assist the client by recommending a barrister or barristers who possess expertise in a given area. Much in the same way that a GP will assist a patient by referring him or her to an appropriate consultant or specialist, the solicitor will have identified the area of law and the legal issue to be considered and will be able to assist with recommending a barrister who is an expert in that particular area and who can advise further.
46. Again, clients are furnished with fee estimates and are therefore encouraged to *shop around* between competing barristers. Having received guidance from the solicitor at the initial or *triage* stage the client will also be aware, *before* engaging a barrister, whether or not there is in fact anything to be gained from obtaining the further advices. Where the client decides to proceed further the solicitor's guidance will also ensure that the client does not waste time and money seeking the opinion of barrister who may not possess expertise in the relevant areas.
47. In the normal course the solicitor will after this initial stage carry out further investigations, gather evidence, take statements from witnesses and engage the services of relevant independent experts. The solicitor, often supported by junior solicitors and administrative and support staff, will have the resources to manage the administrative burden at this stage in the process. Barristers are not traditionally engaged to assist in this stage of the process.
48. Barristers are however engaged when the matter comes to Court, at which time the expertise of the barrister will be called upon. The barrister will assist with advising on pre-trial steps and procedures, and when the case is listed for hearing, the barrister may be asked to explore the prospect of compromising or settling the case. In circumstances where the case proceeds to a full hearing the barrister will be required, as an expert advocate to carry out specialist tasks, to include:
- The examination and cross-examination of witnesses;
  - Addressing the court on issues relating to the admissibility of evidence;
  - Making submissions on the law with reference to legal authorities and in many cases with reference to written legal submissions that have been prepared by the barrister;
  - Identifying issues which may give rise to grounds of review or appeal;
  - Making submissions in relation to the costs associated with the trial.

### *Benefits to clients*

49. The Bar of Ireland is firmly of the view that there is little justification for the relaxation or removal of the key distinguishing features which have the effect of maintaining clear distinctions between the roles fulfilled by solicitors and barristers.
50. The split profession model ensures that in most cases, and by reason of the guidance and advice provided by solicitors at the *initial* or *triage* stage, clients only ever engage barristers if and when the need arises.
51. And when that need arises the features of the current model sees clients encouraged to *shop around*, to take full advantage of the manner in which all barristers compete with each other for work, and to engage the services of barristers *on the client's own terms* and often in relation to one specific task.
52. The nature of the current model, which places limits on the range of legal services that barristers can provide, also means that barristers are encouraged to develop expertise and specialist skills in those limited areas of practice, to include advocacy and advisory skills, and in turn this ensures that clients can expect the highest level and quality of legal expertise.

### **Regulation – cost and risk**

#### *Costs currently not passed on to clients*

53. Barristers are not currently exposed to significant administration costs associated and with running a *full service* legal practice (staff costs, administrative costs, insurance, buildings etc.). The cost of professional indemnity insurance for barristers is also currently a fraction of that paid by solicitors. The current model ensures that *full service* practice costs are not passed onto clients by barristers and this has the effect of lowering the overall cost of legal services provided by barristers.
54. While the administration costs associated with running a *full service* practice are potentially very significant they pale in comparison to the costs of regulating the practices of those barristers who would choose to handle client moneys.
55. There is no doubt but that the relaxation of the s.120 restrictions relating to the handling of client money would necessitate the introduction of a brand new scheme of regulation for barristers' accounts. It is also very likely that a compensation fund would have to be established to function as an additional protection for clients.

56. The Bar of Ireland has reached a number of conclusions in relation to this aspect of the s.120 restrictions.

*Comprehensive and all-encompassing code*

57. The Bar of Ireland believes that the scheme of regulation would require to be comprehensive and essentially to amount to an all-encompassing code for the operation of all aspects of barristers' accounts, similar to the Solicitors Accounts Regulations.

58. It is also to be noted that barristers have never previously held client funds. The Bar of Ireland believes that provision would therefore have to be made for a programme of education and training to barristers who wish to hold client money. Consideration will also have to be given to the authorisation and licensing of those barristers who wish to hold client funds.

*Extremely costly*

59. The Bar of Ireland believes that the introduction and operation of the scheme of regulation would be extremely costly relative to the costs associated with regulating the barristers' profession currently.

60. In the November 2013 RIA the Department of Justice estimated the total annual costs incurred by The Bar of Ireland in handling complaints received about barristers to be in the region of €200,000.<sup>37</sup> The RIA itself did not factor in the potential costs associated with the a scheme of regulation of barristers' accounts, with the RIA noting:

*"...If, at a future stage, any decision is made to confer barristers with similar access to clients' monies or assets (e.g. allowing direct access to barristers for contentious business) then the issue of regulating and inspecting barristers' accounts will need to be duly considered and addressed in a similarly rigorous manner by a mechanism similar to the Solicitors' Compensation Fund. The Legal Services Regulation Bill provides for public consultation on this key issue."<sup>38</sup>*

61. While The Bar of Ireland notes that there are significantly more solicitors practicing in the State than there are barristers, and that accordingly the figure of €6.5 million contained in the RIA and relating to the costs of regulating the Compensation Fund<sup>39</sup> may be of limited assistance to the drawing of any

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<sup>37</sup> See

<http://www.justice.ie/en/JELR/RIA%20LSRB%20MASTER%20PDF%20VERSION%20PDF%20NOV%202013.pdf/Files/RIA%20LSRB%20MASTER%20PDF%20VERSION%20PDF%20NOV%202013.pdf>. At paragraph 67.

<sup>38</sup> Ibid. at paragraph 64.

<sup>39</sup> October 2011 figures (including litigation costs and the value of voluntary committee contributions); see RIA at paragraph 65.

precise analogy, The Bar of Ireland believe that any costs would be extremely significant.

62. The Bar of Ireland also notes that any costs associated with the maintenance and operation of the Law Society's Compensation Fund and solicitors' accounts regime do not include the cost of establishing such schemes, to include any costs associated with the engagement of additional staff, accountants etc. and the cost of education and training. On account of the fact that any new regulatory scheme would have to be devised and established "*from scratch*", and that barristers who have never previously held client moneys would require education and training, it is likely that these additional costs would be incurred.
63. Perhaps more fundamentally, The Bar of Ireland notes that it is unclear how any such regulatory scheme governing the operation of barristers' accounts would be funded. Members of the Law Library are independent sole practitioner barristers. In the interests of maintaining independence, members of the Law Library will not handle client money and will not accept instructions directly from clients in contentious matters.
64. Accordingly, members of the Law Library will not subscribe to the models of practice envisaged by the removal or relaxation of the s.120 restrictions and therefore cannot be called upon to contribute to the funding of any scheme of regulation necessitated by such removal or relaxation. The question arises as to how such a scheme would be funded?
65. The Bar of Ireland believes that it is likely that any such scheme would have to be funded by either the State from public resources and / or through contributions from those barristers who wish to operate under the type of model envisaged by the removal or relaxation of the s.120 restrictions.

#### *Regulatory risk*

66. The relaxation of the s.120 restrictions relating to handling client money would also pose a significant regulatory risk in the provision of legal services and it is likely a compensation fund would have to be established and maintained as an additional protection for clients.
67. The Council notes that in England and Wales the Bar Standards Board (the "BSB"), the body responsible for regulating barristers in England and Wales, considered the rationale for the restriction on barristers holding client money in its December 2012 consultation paper. The BSB recommended that the prohibition continue, noting that the public would be exposed to greater risks if the BSB were to permit self-employed barristers or BSB authorised entities to hold client money:

*“The BSB proposes to continue to prohibit barristers from holding client money. Client money is one of the areas of greatest regulatory risk in the provision of legal services. If the BSB were to permit self-employed barristers, or BSB authorised entities, to hold client money, the public would be exposed to greater risks and the nature of the BSB’s regulation would be significantly changed, leading to higher costs.”<sup>40</sup>*

68. In their earlier report on the new BSB Handbook in March 2012, the BSB listed the dishonest use of and incompetent handling of money as risks that arise from the holding of client monies by other entities. The report notes these risks require increased regulation, detailed handling rules, and proactive monitoring systems.<sup>41</sup>

69. The Bar Council of England and Wales in their response to the BSB consultation on the new BSB Handbook noted their support for the continued prohibition on the handling by barristers of client money stating that they supported same as it was necessary to minimise regulation.<sup>42</sup> The Legal Services Board in their *Alternatives to Handling Client Money* briefing paper highlighted the cost implications of the risks associated with the handling of client money. The Report noted that in the solicitor profession in 2014, there were over 140 reports of misuse of client money or assets each month and 1,699 claims against the compensation fund totalling £24.69m in pay-outs.<sup>43</sup>

70. The Council is firmly of the view that a similar regulatory risk to that identified by the BSB would arise in this jurisdiction if barristers were permitted to handle client funds. The regulatory risk and the cost of a scheme of regulation to mitigate against such a risk far outweigh any benefit that may be obtained by permitting barristers to handle client money.

### **The benefits of independence in the administration of justice**

71. The nature of the *division of labour model* is such that barristers and solicitors fulfil different roles and functions in the context of a given dispute or case.

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<sup>40</sup> BSB, New Handbook and Entity Regulation & Supervision and Enforcement: Consultation Report  
[https://www.barstandardsboard.org.uk/media/1438535/handbook\\_\\_\\_entity\\_regulation\\_consultation\\_report\\_dec\\_2012.pdf](https://www.barstandardsboard.org.uk/media/1438535/handbook___entity_regulation_consultation_report_dec_2012.pdf), pages 44 - 45.

<sup>41</sup> BSB, New Handbook and Entity Regulation: Part One,  
[https://www.barstandardsboard.org.uk/media/1393764/consultation\\_part\\_1\\_1\\_final.pdf](https://www.barstandardsboard.org.uk/media/1393764/consultation_part_1_1_final.pdf), page 37.

<sup>42</sup> Response of the Bar Council of England and Wales to the Bar Standards Board’s Consultation paper on the new BSB Handbook  
[http://www.barcouncil.org.uk/media/157685/12-06-29\\_bsb\\_handbook\\_consultation\\_response\\_final.pdf](http://www.barcouncil.org.uk/media/157685/12-06-29_bsb_handbook_consultation_response_final.pdf) page 32.

<sup>43</sup> Legal Services Board, *Alternatives to Handling Client Money* Briefing Paper, June 2015,  
[http://www.legalservicesboard.org.uk/what\\_we\\_do/pdf/20150720\\_Proposals\\_For\\_Alternatives\\_To\\_The\\_Handling\\_Of\\_Client\\_Money.pdf](http://www.legalservicesboard.org.uk/what_we_do/pdf/20150720_Proposals_For_Alternatives_To_The_Handling_Of_Client_Money.pdf), page 3.



72. Solicitors are the first point of contact for a client seeking legal representation in court. Solicitors will take a leading role in undertaking investigations, gathering evidence, taking statements from witnesses and engaging the services of relevant independent experts. Solicitors, often supported by junior solicitors and administrative and support staff, will traditionally have the resources to manage the administrative burden at this stage in the process. Barristers are not traditionally engaged to assist in this stage of the process.
73. On account of the fact that barristers do not hold client money and do not accept instructions directly from clients in contentious matters, they provide a varied but limited range of legal services, which do not extend to those “hands-on” services provided by solicitors.
74. Barristers therefore fulfil a specialist *advisory* role and this enables the barrister, who has had limited interaction with the client and who has played no role in the gathering of evidence, to come to look at a case in a cold and objective manner and to approach the case from a fresh perspective.
75. The Bar of Ireland believes that both solicitors and clients alike rely on barristers to be able to offer an entirely objective point of view and that the importance of this function cannot be overlooked.
76. Further, The Bar of Ireland believes that members of the public have a fundamental right to obtain legal advice from persons who are in no way influenced by or beholden to other persons or entities. Access to independent legal advice acts as a guarantee that a client can be confident that his or her legal advisors are providing legal assistance without fear of interference or sanction. The *division of labour* model which currently limits direct access to barristers maintains an important degree of separation between the client and the barrister. The Bar of Ireland believes that this line of separation, which fosters objectivity and independence, is a key feature of the current independent sole practitioner model and a feature which solicitors, clients and courts rely upon; barristers currently practice in an environment in which the exercise of independence before the court is not only facilitated, but required of barristers.

## PART 4 – THE SPLIT PROFESSION IN ENGLAND AND WALES

### Introduction

77. The prohibition on barristers holding client money remains in place in other jurisdictions where legal services are offered via the *split profession* model. Where the rules relating to barristers accepting instructions directly from clients in contentious matters have been relaxed, the circumstances in which barristers may act are extremely limited and barristers may only so act within the confines of strict rules and regulations.
78. The Bar of Ireland notes that in England and Wales in particular, (a) barristers are prohibited from handling client money, (b) that barristers may engage in *public access* work subject to many constraints and restrictions and (c) that even in the case of public access work, barristers in England and Wales are not automatically permitted to conduct litigation on behalf of their client.
79. The Bar of Ireland notes therefore that the *full service* practice model envisaged by the removal or relaxation of the s.120 restrictions is not permitted in England and Wales.

### England and Wales

#### *Continuing prohibition on barristers holding client money*

80. In the latest edition of the BSB Handbook<sup>44</sup> the prohibition on barristers holding client money remains in place. Rule 73 of the BSB Handbook provides for this general prohibition on the handling of client monies in the following terms:

*“Except where you are acting in your capacity as a manager of an authorised (non-BSB) body, you must not receive, control or handle client money apart from what the client pays you for your services.”*

81. The prohibition applies to all BSB regulated persons,<sup>45</sup> to include all practising barristers.<sup>46</sup> Importantly, the prohibition also applies to any person acting on behalf of the barrister and to a situation where client moneys are held through any agent, third party or nominee.<sup>47</sup>
82. The BSB Handbook defines the term “*client money*” as follows:

*“(a) money, securities or other assets beneficially owned by a client; or*

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<sup>44</sup> Third edition, in effect from the 3<sup>rd</sup> April 2017.

<sup>45</sup> *Ibid.* rule rC1(2)(a), page 21.

<sup>46</sup> *Ibid.* rule rL7, page 15.

<sup>47</sup> *Ibid.*, gC103, page 59.

*(b) money, securities or other assets provided by, or for the benefit of, your client or intended by another party to be transmitted to your client,*

*But excludes:*

*(c) a fixed fee paid in advance; or*

*(d) a payment made in settlement of an accrued debt; or*

*(e) money which belongs to your employer.”<sup>48</sup>*

83. The guidance section of the BSB handbook elaborates on the prohibition on handling client money somewhat and provides *inter alia* as follows:

*“Receiving, controlling or handling client money includes entering into any arrangement which gives you de facto control over the use and/or destination of funds provided by or for the benefit of your client or intended by another party to be transmitted to your client, whether or not those funds are beneficially owned by your client and whether or not held in an account of yours.”<sup>49</sup>*

84. The payment of fixed fees on account will not constitute the handling of client money within the meaning of the BSB Handbook.<sup>50</sup> Barristers may also accept instructions subject to the payment of an “*upfront*” fixed fee. However, such an arrangement should only be entered into having regard to the conditions and criteria set out in the BSB Handbook.<sup>51</sup>

85. As noted previously, the BSB considered the rationale for the prohibition on barristers handling client money in their December 2012 consultation paper, with the BSB recommending that the prohibition continue noting that the public would be exposed to greater risks if the BSB were to permit self-employed barristers or BSB authorised entities to hold client money.<sup>52</sup>

86. The Bar Council of England and Wales in their response to the BSB consultation on the new BSB Handbook confirmed their support for the

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<sup>48</sup> Ibid. page 264.

<sup>49</sup> Ibid., gC104 at page 59.

<sup>50</sup> Ibid., gC106 at page 60.

<sup>51</sup> Ibid., gC107 at page 60.

<sup>52</sup> BSB, New Handbook and Entity Regulation & Supervision and Enforcement: Consultation Report

[https://www.barstandardsboard.org.uk/media/1438535/handbook\\_\\_\\_entity\\_regulation\\_consultation\\_report\\_dec\\_2012.pdf](https://www.barstandardsboard.org.uk/media/1438535/handbook___entity_regulation_consultation_report_dec_2012.pdf), pages 44 - 45.

continued prohibition on the handling by barristers of client money stating that they supported same as it was necessary to minimise regulation.<sup>53</sup>

87. The Legal Services Board in their *Alternatives to Handling Client Money* briefing paper highlighted the cost implications of the risks associated with the handling of client money.<sup>54</sup>

#### *Direct access*

88. In England and Wales the BSB permits such “*direct access*” in two situations, namely:

- For all members of the public pursuant to the conditions relevant to public access (“*Public Access*”);
- For certain licensed bodies, pursuant to the conditions relevant to licenced access (“*Licensed Access*”).

#### *Licensed Access*

89. The BSB Licensed Access Scheme<sup>55</sup> closely resembles the Bar of Ireland’s DPA scheme whereby a number of bodies and / or members of certain bodies, to include State and semi-State bodies and charitable organisations, are licensed by the BSB in such a way that permits them direct access to barristers.<sup>56</sup>

90. Certain additional restrictions apply however and the BSB Handbook provides that a barrister cannot accept such instructions if it is in the interests of the lay client or in the interests of justice that a solicitor or other authorised litigator or intermediary be instructed with the barrister or in his place.<sup>57</sup> This is a continuing obligation, with the Handbook also stipulating if, at any stage, it becomes the case that the client’s interests will best served by involving a solicitor or other authorised litigator in the case, the barrister must advise the

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<sup>53</sup> Response of the Bar Council of England and Wales to the Bar Standards Board’s Consultation paper on the new BSB Handbook [http://www.barcouncil.org.uk/media/157685/12-06-29\\_bsb\\_handbook\\_consultation\\_response\\_final.pdf](http://www.barcouncil.org.uk/media/157685/12-06-29_bsb_handbook_consultation_response_final.pdf) page 32

<sup>54</sup> Legal Services Board, *Alternatives to Handling Client Money* Briefing Paper, June 2015, [http://www.legalservicesboard.org.uk/what\\_we\\_do/pdf/20150720\\_Proposals\\_For\\_Alternatives\\_To\\_The\\_Handling\\_Of\\_Client\\_Money.pdf](http://www.legalservicesboard.org.uk/what_we_do/pdf/20150720_Proposals_For_Alternatives_To_The_Handling_Of_Client_Money.pdf), page 3.

<sup>55</sup> The relevant regulations are set out here: <https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/licensed-access-recognition-regulations/>.

<sup>56</sup> The bodies are listed in this document: [https://www.barstandardsboard.org.uk/media/1712927/licensed\\_access\\_-\\_approvals\\_for\\_website\\_may\\_2017.xls](https://www.barstandardsboard.org.uk/media/1712927/licensed_access_-_approvals_for_website_may_2017.xls).

<sup>57</sup> BSB Handbook, Third edition, in effect from the 3<sup>rd</sup> April 2017, rC135(2), at page 83.

lay client to instruct a solicitor / intermediary and, if this is not done, must cease to act and return instructions as soon as reasonably practicable.<sup>58</sup>

### Public Access

91. The Public Access Scheme allows the general public to access barristers directly. However, the BSB Handbook and the associated guidance document (“the Public Access Guidance Document”)<sup>59</sup> place a number of significant restrictions on barristers accepting such instructions.

92. As is the case with the “*licensed access*” scheme discussed above, certain general and overriding conditions apply:

- A barrister cannot accept such instructions if it is in the interests of the lay client or in the interests of justice that a solicitor or other authorised litigator or intermediary be instructed with the barrister or in his place (Rule C122);
- There is a continuing duty in this regard that if, at any stage, this becomes the case, the barrister must advise the lay client to instruct a solicitor / intermediary and, if this is not done, must cease to act and return instructions as soon as reasonably practicable (Rule C123); and
- Record-keeping requirements as to instructions and advices apply (see rules C128 to C131).

93. Barristers must also be registered with the Bar Council as a public access practitioner and must have completed the appropriate public access training.<sup>60</sup>

94. Upon receiving instructions Rule C125 requires the barrister to inform public access clients in writing of the following matters:

- The work he or she has agreed to perform;
- The fact that in performing the work he or she will be subject to the requirements of Parts 2 and 3 of the BSB Handbook and, in particular, rules rC25 and rC26;
- Unless authorised to conduct litigation by the BSB, the fact that he or she cannot be expected to perform the functions of a solicitor or other authorised litigator and in particular to fulfil limitation obligations,

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<sup>58</sup> Ibid., rC138., page 84.

<sup>59</sup> *The Public Access Scheme Guidance for Barristers* (January 2016) available at [https://www.barstandardsboard.org.uk/media/1725710/the\\_public\\_access\\_scheme\\_guidance\\_for\\_barristers\\_january\\_2016\\_.pdf](https://www.barstandardsboard.org.uk/media/1725710/the_public_access_scheme_guidance_for_barristers_january_2016_.pdf).

<sup>60</sup> Ibid., rC120.

disclosure obligations and other obligations arising out of or related to the conduct of litigation;

- The fact that he or she is self-employed, are not a member of a firm and do not take on any arranging role;
- In any case where he or she has been instructed by an intermediary:
  - The fact that he or she is independent of and has no liability for the intermediary; and
  - The fact that the intermediary is the agent of the lay client and not his or her agent;
- The fact that he or she may be prevented from completing the work by reason of his or her professional duties or conflicting professional obligations, and what the client can expect of him or her in such a situation;
- The fees which he or she proposes to charge for that work, or the basis on which his or her fee will be calculated;
- His or her contact arrangements; and
- The information about his or her complaints procedure.

95. There are therefore significant and numerous restrictions on barristers accepting public access instructions in England and Wales, the most relevant for the purposes of this submission being:

- Barristers cannot engage in receiving or handling clients' money, except as payment for fees. The prohibition against holding clients' money means that a barrister cannot make disbursements on behalf of a client, for example by paying court fees or witnesses' expenses. (rC73-rC75, BSB Handbook);
- Barristers cannot undertake the general management, administration or conduct of a client's affairs (rS25, BSB Handbook);
- Barristers must not conduct a case in court if they have previously investigated or collected evidence in the case unless they reasonably believe that the investigation and collection of that evidence is unlikely to be challenged.<sup>61</sup>

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<sup>61</sup> Ibid., see rules rC21.10, read in conjunction with gC73, also read in conjunction with *The Public Access Scheme Guidance for Barristers* (January 2016) available at

96. One additional and important restriction on the services which a barrister may offer in the case of either public access or licensed access is that the barrister may not be authorised to “*conduct litigation*” within the meaning of the Legal Services Act 2007.

97. The BSB’s Public Access Guidance document sounds the following note of caution:

*“Public access does not put barristers on a par with solicitors. A key difference is that solicitors may conduct litigation on behalf of their client. A barrister in independent practice does not have the right to conduct litigation unless authorised by the BSB to do so. If you conduct litigation without authorisation you are not only breaching the Handbook but also committing a criminal offence under the Legal Services Act 2007.”*<sup>62</sup>

98. The BSB takes the view that the following activities constitute *litigation* and that barristers, even those who are authorised to act for clients directly in contentious matters under the *public access* scheme should refuse to undertake these tasks unless authorised to conduct litigation:

- issuing proceedings or applications;
- acknowledging service of proceedings;
- giving your address as the address for service;
- filing documents at court or serving documents on another party; and
- issuing notices of appeal.

99. In order to conduct litigation, a barrister can apply to the BSB for a “*litigation extension*”.<sup>63</sup> Rule S47 governs eligibility for same and barristers who apply must meet certain criteria, to include an ability to demonstrate that they have the relevant administrative systems in place to be able to provide legal services direct to clients and to administer the conduct of litigation.

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[https://www.barstandardsboard.org.uk/media/1725710/the\\_public\\_access\\_scheme\\_guidance\\_for\\_barristers\\_january\\_2016\\_.pdf](https://www.barstandardsboard.org.uk/media/1725710/the_public_access_scheme_guidance_for_barristers_january_2016_.pdf).

<sup>62</sup> *The Public Access Scheme Guidance for Barristers* (January 2016) available at

[https://www.barstandardsboard.org.uk/media/1725710/the\\_public\\_access\\_scheme\\_guidance\\_for\\_barristers\\_january\\_2016\\_.pdf](https://www.barstandardsboard.org.uk/media/1725710/the_public_access_scheme_guidance_for_barristers_january_2016_.pdf), at page 4.

<sup>63</sup> Rule S66.

100. While the BSB Handbook stipulates that barristers may not withhold their services on a number of general discriminatory grounds,<sup>64</sup> the cab-rank rule does not apply to cases under the public access scheme.<sup>65</sup>

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<sup>64</sup> BSB Handbook, Third edition, in effect from the 3<sup>rd</sup> April 2017, see rules rC29 and rC12.

<sup>65</sup> Rule rC29 only applies to instructions received from a “*professional client*”.



## PART 5 – THE CASE FOR THE RETENTION OF THE S.120 RESTRICTIONS

***No clear economic case has been made out for a relaxation or removal of the s.120 restrictions. Questions remain over the economic feasibility of any move to remove or relax the restrictions.***

- The Bar of Ireland believes that the relaxation or removal of the s.120 restrictions would bring about a very fundamental restructuring of the legal system in the State; essentially this would lead to a *fusion* of the professions. Any such course of action should therefore be seen, first and foremost, against the backdrop of a complete absence of any justification or basic reasoning offered for this radical restructuring. To date The Bar of Ireland is unaware of a call, from any quarter, for a removal of the restrictions on barristers holding client monies and accepting instructions in contentious matters. There is no indication, for example, that the demand for services offered and provided exclusively by solicitors is not being met by solicitors. Further, there is no indication that the restrictions, which mean that barristers cannot provide certain legal services, have any material anti-competitive or otherwise detrimental effect on the market for legal services.
- For the reasons identified The Bar of Ireland believes that a comprehensive and independent *economic analysis* should be undertaken prior to any decision being taken that could lead to a removal or relaxation of the s.120 restrictions. Given the fact that the removal of the restrictions would have to coincide with the introduction of an all-encompassing scheme of regulation and monitoring of barristers' accounts *and* the establishment and maintenance of a compensation fund as well as a programme of education and training, The Bar of Ireland believes that questions remain over the economic feasibility of any move to remove or relax the restrictions. This is particularly so in circumstances where members of the Law Library will not subscribe to the models of practice envisaged by the removal or relaxation of the s.120 restrictions and where the cost of regulation would have to be met by either the State from public resources and / or through contributions from those barristers who wish to hold client monies and act directly for clients.

***Only a very limited form of relaxation of similar rules has been permitted in England and Wales***

- The legal system in England and Wales is a close comparator to the legal system in the Ireland. Wide ranging reforms have been introduced in that jurisdiction.

- A prohibition on barristers handling client money remains in place.
- Barristers may accept instructions directly from clients in contentious matters, but subject to meeting certain qualification and training requirements and subject to the overriding obligation to advise a client when the client's best interests will be served by involving a solicitor in the case.
- Barristers may not provide litigation services to clients under the public access scheme. Barristers may apply for an additional *litigation extension* but in order to do so barristers must meet additional criteria, to include the ability to demonstrate that they have the relevant administrative systems in place to be able to provide legal services directly to clients and to administer the conduct of litigation.
- The Bar of Ireland believes therefore that the *one stop shop* or *full service* model for the delivery of legal services directly by barristers does not exist in England and Wales, and that this should be seen as a clear recognition by the regulators in that jurisdiction of the fact that barristers and solicitors fulfil very different roles, particularly in the context of complex litigation. The relevant guidelines in England and Wales expressly state that *public access* does not put barristers on par with solicitors, and that barristers in independent practice may not conduct litigation on behalf of direct access clients (in the absence of a *litigation extension*).

***The current model offers wider access to specialist legal services to a greater number of people***

- The Bar of Ireland believes that a relaxation of the s.120 restrictions will lead to the *commercialisation* of the specialist legal services provided by barristers and that this will have the outcome of restricting access to specialist advocacy and advisory services to those who can afford to engage barristers on a *full service* basis.
- At the moment, and by reason of the nature of features of the independent sole practitioner model, a barrister may be engaged by solicitors from all corners of the country, from the largest firms to sole practitioner solicitors, on a flexible basis and in relation to certain defined and specialist tasks; is both cost-effective and efficient. Further, the "*cab-rank*" rule ensures access to expert legal expertise for a greater number of clients. The fact that barristers are not currently exposed to the very significant regulatory and administrative costs also ensures that more barristers are likely to continue to accept instructions from clients on a "*no win no fee*" basis.

***The division of labour model ensures flexibility, lower costs and the highest quality of legal services for clients***

- The current model ensures that in most cases, and by reason of the guidance and advice provided by solicitors at the *initial* or *triage* stage, clients only ever engage barristers if and when the need arises.
- Clients are encouraged to *shop* around, to take full advantage of the manner in which all barristers compete with each other for work, and to engage the services of barristers *on the client's own terms* and often in relation to one specific task.
- Barristers are encouraged to develop expertise and specialist skills in limited areas of practice, to include advocacy and advisory skills, and in turn this ensures that clients can expect the highest level and quality of legal expertise.

***The cost of regulation is not passed on to clients***

- A relaxation of the s.120 restrictions relating to the handling of client money would necessitate the introduction of a brand new scheme of regulation for barristers' accounts. It is also very likely that a compensation fund would have to be established to function as an additional protection for clients.
- Any such scheme of regulation would require to be comprehensive and essentially amount to an all-encompassing code for the operation of all aspects of barristers' accounts, similar to the Solicitors Accounts Regulations. The Council believes that any such scheme of regulation would have to be at least as comprehensive as the Solicitors Accounts Regulations scheme.
- A programme of education and training would have to be provided to barristers who wish to hold client money. Those barristers wishing to hold client money would have to be authorised and licensed.
- The associated costs would be significant and the Council believes that it is likely that any such scheme would have to be funded by either the State from public resources and / or through contributions from those barristers who wish to operate under the type of model envisaged by the removal or relaxation of the s.120 restrictions.

***Clients are not currently exposed to increased regulatory risk***

- The relaxation of the s.120 restrictions relating to handling client money would also pose a significant regulatory risk in the provision of legal

services. This regulatory risk has been identified in England and Wales. The Bar of Ireland is of the view that nature of the regulatory risk and the cost of a scheme of regulation to mitigate against such a risk far outweigh any benefit that may be obtained by permitting barristers to handle client money.

### ***Independence in the administration of justice***

- In the context of litigation barristers do not provide the *hands-on* legal services traditionally provided by solicitors (evidence gathering, taking of witness statements, collation of documents to be disclosed etc.). Barristers fulfil a specialist *advisory* role and this enables barristers, who have had limited interaction with a client in any given case, and who will have played no role in the gathering of evidence, to come to look at a case in a cold and objective manner and to approach the case from a fresh and independent perspective.
- The Bar of Ireland believes that solicitors, clients and the courts rely on barristers to be able to offer an entirely independent and objective point of view and that the importance of this function cannot be overlooked.
- The Bar of Ireland also believes that access to independent legal advice acts as a guarantee that a client can be confident that his or her legal advisors are providing legal assistance without fear of interference or sanction.
- The *division of labour* model which currently limits direct access to barristers maintains an important degree of separation between the client and the barrister. The Bar of Ireland believes that this line of separation, which fosters objectivity and independence, is a key feature of the current independent sole practitioner model and a feature which solicitors, clients and courts rely upon; barristers currently practice in an environment in which the exercise of independence before the court is not only facilitated, but required of barristers.