



THE BAR
OF IRELAND

The Law Library

Submission by Council of The Bar
of Ireland to the LSRA
in relation to unification of the
solicitors' profession and the
barristers' profession

25 May 2020

1. INTRODUCTION

The Council of The Bar of Ireland (“the Council”) is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,170 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

2. SCOPE OF SUBMISSION

The Council has prepared these submissions at the request of the Legal Services Regulatory Authority (“the LSRA”) who are in the process of preparing an annual report for the Minister for Justice and Equality in relation to unification of the solicitors’ profession and the barristers’ profession.

The LSRA consultation paper has invited submissions on the following:

- Views on existing business structures for the delivery of legal services, as well as any opportunities or challenges that might arise from the unification of both branches of the legal profession.
- Views on planned or potential developments - within the legal services sector or external to it - which might impact on current and future business structures for legal services in the State.
- The experience of arrangements in operation in other relevant jurisdictions. Section 34(4) of the 2015 Act states that the Authority’s report shall contain details of arrangements in operation in other jurisdictions in which the professions have been unified.
- Whether the solicitors’ profession and the barristers’ profession in the State should be unified having regard to, among other things –
 - (i) the public interest,
 - (ii) the need for competition in the provision of legal services in the State,
 - (iii) the proper administration of justice,
 - (iv) the interest of consumers of legal services including access by such consumers to experienced legal practitioners, and
 - (v) any other matters that the Authority considers appropriate or necessary.

3. THE UNIFICATION PROPOSAL

The Council's submission is that the continued existence of the independent referral bar safeguards the public interest in the provision of legal services and access to specialist legal practitioners, including that of all persons who wish to access justice, and best serves the vital interest of the proper administration of justice. Its existence has been a positive influence on the development of the law, including the protection of individual rights for the citizens of the State, and it is well-placed to continue to deliver specialist advocacy legal services to all those who require them in the competitive and changing economic and social environment which now exist in the State.

These themes will be developed in the course of this submission.

The value and the function of the independent referral bar is set out succinctly in a recent judgment¹ of Gearty J where she says:

'The personal investment of the litigant in the outcome of the case is in stark contrast with the position of the professional lawyer, and in particular the independent referral barrister, who has no financial or personal interest in the outcome of the case. The practical implications of her role include duties of independence and absolute good faith. The self-employed barrister is singled out, not because solicitors are not independent, generally speaking, but because the barrister is not beholden to any other person: she has no duties to partners and is not in receipt of a salary, she has no ongoing relationship with the client and she is as independent as it is possible to be. This is the reasoning behind the professional model adopted by the referral Bar. The independent lawyer is in the best position to see the facts clearly, assess them clinically, and is concerned only to argue her side of each issue to the best of her ability. Just as importantly, she will assess what is not in issue and focus on the true crux of the case.'

A key advantage of the existence of the independent referral bar for citizens of the State, which shows that its existence best protects the interests of the consumers of legal services, is that it provides a large body of specialist advocates to each and every litigant in the State. Each litigant and each solicitor in the State has access to the same pool of advocacy expertise.

The engagement of the advocate of choice is not restricted to those that seek legal services from specific firms. An advocate is not thereby tied to the clients of any one firm. One week she can act for the prosecution. The following week he can defend an accused person. In one case she can seek to defend the rights of a citizen challenging some act of the State. In the next case he can defend the interests of the State against the citizen. The advocate can accept

¹ Fogarty v The Governor of Portlaoise Prison [2020] IEHC 154 https://beta.courts.ie/view/judgments/dde972f3-5f08-4882-80f6-405154888664/3ef4bd34-a60f-4706-9728-352518938f01/2020_IEHC_154.pdf/pdf

instructions on behalf of a client from one firm of solicitors and act against that same firm in the next case. Each advocate is available equally to the individual citizen and to the large corporation.

This facility is one which is vital to supporting solicitors throughout the State, whether large or small, to access specialist advocacy services, and ensures the delivery of legal services throughout the State rather than concentrating it in one or two large urban centres. That diversity of access to specialist advocacy services is important not only for pure economic terms but, more importantly, for ensuring that those without extensive financial resources have access to the courts to litigate their causes whether they reside in Dublin, Dingle or Dunfanaghy.

These benefits are available to State bodies as well. The largest consumer of legal services provided by the independent referral bar within the State is the State itself, whether through the auspices of the Attorney General, the Chief State Solicitor, the Director of Public Prosecutions, the State Claims Agency, the Legal Aid Board, the Criminal Legal Aid Scheme or some other organ of the State.

In doing so, those various offices of the State have available to them, according to their need, the full extent of the independent referral bar, to advise upon or present cases for them. The State has the benefit of the full range of expertise available without the attendant costs of training, employment, continuing professional development, office services and pensions.

The benefits of the development of the present legal system, which enables solicitors throughout the State to access the services of the independent referral bar for specialist advice and advocacy services, is one which has grown, changed, developed and endured for a long period of time and continues to flourish.

While it is acknowledged that societies evolve, the Council believes that the independent referral bar has been a positive instrument for effecting legal change for the citizen of the State and there is no reason to abolish it or unify it with the solicitor profession, whose own proud history of providing legal services to citizens the Council is happy to acknowledge and support.

Solicitors have had full rights of advocacy in all of our courts since 1971. Thus, there has been no requirement that the services of barristers be retained to allow for access to the higher courts. Even so, the public, through instructing solicitors, have continued to use the specialist advocacy services of the independent referral bar for the last forty-nine years when it has not been necessary to do so.

This is in no way said as a criticism of the solicitors profession, without whom the independent referral bar could not function as it does. Rather, it is to highlight the continued acceptance of

the independent referral bar by the public to advance its causes in court and, contrariwise, the absence of public demand for a single legal profession.

The entitlement of solicitors to be heard in all courts also serves to highlight that a unification of the profession is unnecessary.

Any practising barrister who wishes to provide the full range of legal services can do so, in a very straightforward manner, by becoming a practising solicitor. Any practising solicitor can already do so without any change to his or her practising status. Any practising solicitor who wants to specialise in advocacy can either do so as a practising solicitor or, if preferred, he or she can, again in a very straightforward manner, become a practising barrister. These changes were brought into effect following the Competition Authority Report in 2006.

However, such evolution does not require the established legal professions to be unified where they have served the State and its citizens well since the State's foundation and would continue to do so into the future. The solicitor profession has a long and proud tradition of providing legal services to citizens in all parts of the State. Specialist advocacy services have been provided by the independent referral bar to those solicitors while contributing to ensuring that the Irish justice system is well-regarded and held in high confidence by its citizens.

The Council believes that the existence of the two professions will continue to serve the best interests of the citizens of the State and, importantly, the administration of justice into the future.

Further, such changes to the professions, such as legal partnerships, that have been introduced by the 2015 Act should be given time to operate without imposing further uncertainty to the legal economy, which will already be under considerable stress in light of the Covid-19 pandemic. Legal systems develop and evolve over time to reflect the culture and the country in which they are based. Ours is no different and the State now again faces economic, social and health difficulties in light of the Covid-19 pandemic.

Arising from the positive impacts of the independent referral bar and a consideration of the issues involved, the Council believes that the unification of the barristers' profession and the solicitors' profession is not in the public interest; is not in the interests of the consumers of legal services in accessing specialist legal practitioners; is not in the interest of the proper administration of justice; and is not in the interests of competition. It is also unnecessary.

4. BACKGROUND TO THE CONSULTATION

The Legal Services Regulation Act 2015² requires the Authority to prepare a report on unification of the two branches of the legal profession and, if the recommendation is for unification, how it could be achieved. It is important to note the context in which this provision was included in the Act.

During the passage of this legislation through the Oireachtas, it was stated on a number of occasions by the then Government that the Legal Services Regulation Bill was to give effect, *inter alia*, to commitments then owed by the State under the Memorandum of Understanding between Ireland and the Troika.

It was noted in a number of submissions, made by the Council at that time, that the Troika only sought that the State give effect to the outstanding recommendations of the Competition Authority to reduce costs and the report of the Legal Costs Working Group. Neither the Troika nor the Competition Authority advocated for a unification of both branches of the profession.

The LSRA is obliged to include in its report details of arrangements in operation in other jurisdictions in which the professions have been unified. However, it is not similarly obliged to review the arrangements in jurisdictions in which unification has not taken place or has been considered and rejected. The Authority in compiling its report should also examine and record that other jurisdictions do not have unified legal professions.

In our submissions to the LSRA of March 2017³ and June 2017⁴ concerning legal partnerships and multi-disciplinary practices, a summary of the structure of the legal profession in relevant comparator jurisdictions was undertaken. This may be of assistance to the LSRA in their exploration of arrangements in operation in other jurisdictions for the provision of legal representation and advice services.

² <http://www.irishstatutebook.ie/eli/2015/act/65/section/34/enacted/en/html>

³ [https://www.lawlibrary.ie/News/Legal-Partnerships-LSRA-24-3-17-\(1\).aspx](https://www.lawlibrary.ie/News/Legal-Partnerships-LSRA-24-3-17-(1).aspx)

⁴ <https://www.lawlibrary.ie/News/MDP-Submission.aspx>

5. THE DISTINCT ROLE OF THE LEGAL PROFESSIONS

Since the 12th century, there have been many adjustments made to the practice of law both in the common law system and throughout the world. The topic of fusion or unification of the two branches (barristers and solicitors) has raised its head on many occasions and the ethical, economic and public interest arguments are well versed from every point of view. What is apparent is that regardless of how the legal profession has evolved and how it is organised, the legal profession itself organically stratifies into subcategories of practitioners with distinct skills and practice areas.

For the purpose of this submission, it is useful to set out a high-level overview of the primary and distinct characteristics of the two branches of the legal profession in Ireland: barrister and solicitor.

BARRISTERS

- Barristers specialise in representing clients in court (advocacy), giving more detailed advice on a case and also advising on more difficult areas where a client (and often their solicitor) need more detailed advice e.g. about some complex business problem or medical negligence or a breach of human rights or a serious crime with which a person may be charged.
- Barristers are legal advisers and highly trained courtroom advocates. They are highly qualified professionals and subject to a strict code of professional ethics.
- Barristers put legal arguments to judges and juries. They cross-examine witnesses and otherwise attempt to sway the outcome of a court case.
- Barristers in Ireland are sole practitioners and are entirely independent. Importantly, a barrister is not under the influence of the Government or any public authority. Clients thus get a totally independent, objective and specialist view of their case.
- Barristers typically have no direct contact with the public. They appear in court when instructed by a solicitor, although solicitors also have full rights of audience in all courts.
- Barristers are not permitted to hold clients' moneys⁵.

SOLICITORS

- Solicitors are legal advisers and will have direct contact with their clients, providing expert legal advice and assistance in many different areas of law and in a range of situations.

⁵ S.45(1) of the Legal Services Regulation Act 2015 provides as follows: "Subject to subsection (2), a legal practitioner shall not hold moneys of clients unless that legal practitioner is a solicitor."

- They are highly qualified professionals and subject to a strict code of professional ethics.
- Everyday issues solicitors deal with include:
 - o providing expert guidance on the issues people regularly face such as buying and selling houses, drawing up wills, and dealing with relationship breakdown
 - o promoting business, by helping businesses with the legal side of commercial transactions
 - o protecting the rights of individuals by advising people of their rights, ensuring they are treated fairly by public or private bodies, and that they receive compensation when they have been unfairly treated
- Solicitors are permitted to hold clients' moneys⁶ and this in turn enables solicitors to undertake the type of work that the public usually associates with the solicitors' profession including the purchase and sale of property which 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.
- Solicitors may provide legal services through an organisational structure, including legal partnerships and firms.
- Solicitors are the normal mechanism through which barristers are instructed to represent a client in Court or where specialised advices are required, to provide a legal opinion.
- Solicitors have full rights of audience which they have enjoyed since the enactment of section 17 of the Courts Act, 1971.

The types of case where solicitors conduct all aspects of litigation on behalf of a client generally 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 lower monetary value; civil claims in the District Court are limited to a monetary value of €15,000;

⁶ Solicitors Accounts Regulations 2014, 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;

- By reason of the relatively straightforward nature of the dispute, the solicitor fulfils a limited investigative and evidence-gathering role;
- 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;

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. That has served the administration of justice and the citizens of the State well in ensuring access to justice to the higher courts in more complex litigation.

A useful analogy to describe the distinction between the two branches of the profession is that of a General Medical Practitioner and a Medical Consultant/Specialist. A GP will refer his or her patient to a specialist or consultant when that need arises. Similarly, a solicitor will engage the services of a barrister on behalf of a client when a legal opinion is required on a more complex legal problem or when their specialist advocacy skills are required to properly represent a client in Court.

6. SOCIETY BENEFITS FROM AN INDEPENDENT REFERRAL BAR

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.

The organisation of the profession in this manner ensures that:

- (a) clients continue to have access to specialist advocacy and advisory services and
- (b) enables barristers, in a cost-effective way, to fulfil a crucial role in the administration of justice in the State.

The independent referral bar is a resource and a pool of expertise to which all members of society have access and ensures a division of labour between barristers and solicitors. In that division of labour, the barrister and the instructing solicitor undertake distinct but complementary roles. There is significant competition within each branch in respect of the legal services that they respectively provide. A unification of the profession would reduce the competition in respect of advocacy because the inevitable result would be the employment of most advocates within firms thereby significantly restricting their availability generally.

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 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. Access to barristers is not currently restricted to those clients who can afford to engage barristers on a full service basis.

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.

7. ADVANTAGES OF THE SPLIT PROFESSION MODEL

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 professions be unified.

The Council considers that 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 the 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 and regulatory costs associated with running a full service legal practice (staff costs, administrative costs, insurance, buildings etc.). Costs of practice remain relatively low so that 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 has 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 are encouraged to develop expertise and skills in specialist areas of legal practice, to include advocacy and advisory skills, and in turn this ensures that clients can expect the highest level and quality of legal expertise;
- Independent Barristers expert in a particular area, building on a broad spectrum of client and solicitor experience, contribute to the advancement and a deeper understanding of fundamental legal principles such as, by way of example, in the area of constitutional law development which is not an area in which solicitors generally specialise.
- Barristers do not hold client money and are therefore not currently exposed to what would inevitably be very significant costs associated with regulation and insurance. No such costs are currently passed on to clients;
- Barristers collaborate with solicitors, but ultimately remain independent. Barristers bring fresh, independent and objective perspectives to cases and disputes.

The cost-effective and efficient nature of the current model

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, constitutional 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.

There are currently approximately 2,200 independent referral sole-trader barristers competing directly with each other for a limited pool of work. All practising barristers who operate as independent referral barristers, and who are available to every solicitor practising in the State and, pursuant to the cab-rank rule and subject to limited exceptions, must accept instructions from any client. Many barristers regularly accept instructions on a “no win no fee” basis and this in effect operates as a free legal aid system.

Barristers do not currently compete with solicitors directly because barristers provide different services and fulfil different roles to those of solicitors. The restrictions currently in place in relation to the holding of client moneys and direct access, 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.

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.

Properly conducted litigation has a proper division of labour between the solicitor and the barrister involved. The work done by the solicitors will not be repeated by the barristers and vice versa. The costs thus remain the same, but consumers enjoy the advantage of receiving specialist legal services.

Greater access to justice

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 practising barristers operate from the Law Library in Dublin or from the regional law libraries or from offices in their own homes on circuit 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.

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.

Naturally, in the event of the unification of the profession, 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.

In essence, the Council believes that the unification of the profession would 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

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 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.

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 to take full advantage of the manner in which all barristers compete with each other for work; 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

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.

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. Having recourse to all members of the independent referral bar enables smaller solicitor firms, who could not maintain large specialist departments, to compete with larger firms.

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 Council 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 Council 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 Council 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.

Inherent risks associated with a unification of the legal profession

A policy decision to enforce a unification of the legal profession, would likely cause the eradication of an independent referral bar, and give rise to serious consequences both economically and in terms of access to justice:

- 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 reduces competition within the legal community;
- 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 and would likely give rise to higher costs of legal services;

- 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 the entire community of solicitors, clients and to the courts.

No clear economic case has been made out for a unification of the legal professions and, in the absence of a comprehensive and economic analysis, questions remain over the economic feasibility of a unification of the professions.

A unification of the legal professions would bring about a very fundamental restructuring of legal practice in the State. 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 such a change and one that poses serious risks in relation to fair and equal access to justice. To date the Council is unaware of a demand, from any quarter, for a unification of the legal professions. There is no indication, for example, that the demand for services offered and provided exclusively by solicitors is not being met by solicitors. There is no indication that the demand for services provided by barristers is not being met. 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.

Impact on Practitioners

If the Council believed that there was any clear or compelling evidence of the public interest being served by unification of the legal professions, the potential impact on practitioners might not weigh so heavily in the balance of any debate. However, in the absence of any such evidence, and where the Council believes that the public interest will not be served by unification, as the representative body of barristers in Ireland it is incumbent upon us to highlight the negative impact of unification of the legal professions on existing practitioners and to stress that this is a factor which substantially weighs against the unification of the legal professions.

While, in the absence of any benefit which might necessitate the unification of the legal professions having been identified, it is not possible to address the proportionality of such a proposal in any detail, it should be highlighted that unification would have a starkly negative impact on the professional qualifications and practices of barristers currently practicing in the State. This is based on the assumption – in the absence of visibility as to the shape that a unified profession may take – that at least one possible model would see the abolition of the barristers' profession.

From a preliminary review, the adverse effects on individual practitioners include the following:

- While barristers have already adapted their practices to the changing regulatory landscape following the 2015 Act, this proposal would involve a sweeping change to the very nature of barristers' qualifications and their day-to-day legal practice. Individual practitioners would struggle to meet the wide-ranging financial and administrative obligations flowing from unification of the legal professions, both in terms of requalifying and the financial implications of meeting the wider and more onerous regulatory requirements typically placed on solicitors;
- Individual barristers have established qualifications, expertise and streams of work, which they have built over the course of their careers, and on foot of much academic and professional endeavour. A requirement that all barristers retrain⁷ or requalify as members of a unified legal profession would have a severe impact on established practitioners who have built stable and sustainable practices over many years. Alternatively, if only new entrants were trained as part of a unitary profession, this would create a bifurcated two-stream practice that would leave existing practitioners badly disadvantaged in competing with newly qualified unified practitioners;
- The 2015 Act is premised upon and reproduces the existing division of the legal professions. While certain new requirements have been imposed on barristers pursuant to the 2015 Act, such as, for example, the provision of section 150 letters, the regulatory regime largely mirrors the existing well-established obligations placed on barristers and solicitors by their respective professional bodies. As a consequence, the obligations placed upon practicing barristers are separate and distinct to those placed upon solicitors. Unification of the professions would necessitate an overhaul of the recently introduced regulatory obligations imposed on barristers by the 2015 Act which reflect the divided professions;
- The qualification of 'barrister' is one which has a defined and widely-understood meaning and which is relied upon by barristers in marketing themselves as providers of legal services in domestic, European, and international markets. A fundamental alteration to the nature of the professional qualification of a barrister, and the unification of that profession with that of solicitors, would particularly undermine the position of barristers with clients in common law jurisdictions that recognise or share the existing structure of separate legal professions;

⁷ Retraining would likely be required, not least because practicing barristers hold no training or qualification in the various aspects of practice and regulation that are specific to the solicitors' profession such as the holding of client moneys and management of client accounts.

8. CONCLUSION

It is the Council's view that the unification of the profession is unnecessary for the achievement of any of the objectives set out in the Act, or for any other reason. The present structure of the legal professions allows for greater access by consumers of legal services, whether they be individual citizens, corporate bodies or the State itself, to the full range of specialist advocates. Any consumer that does not want to engage a practising barrister does not have to. Any consumer that wants a "one-stop shop" can already do so without any change to the structure of the professions.

The Council is of the view that a proposal to unify the legal professions, where the objective for such a change is unstated and unclear, would result in adverse outcomes that are inimical to the interests of clients and inimical to the interests of justice.

Furthermore, as noted in previous submissions made to the LSRA, the arrangements in place for barristers to transfer to the profession of a solicitor and vice versa are well established and do not appear to present any obstacles to either profession. Solicitors can provide all and any of the services provided by barristers if they so wish. 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.

As set out above, the Council believes that the occasions where solicitors have provided full litigation services and those where they and their clients have chosen to engage the services of a barristers, most notably in higher jurisdiction courts and more complex cases best serves both access to and administration of justice.

The overall benefits of the split profession model are clear. Barristers continue to develop expertise and specialist skills and solicitors will continue to develop expertise in the roles and functions traditionally associated with solicitors. Clients 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.

While this submission has not set out any views on planned or potential developments - within the legal services sector or external to it - which might impact on current and future business structures for legal services in the State, we wish to draw the attention of the LSRA to our previous submissions made in relation to Legal Partnerships, Multi-disciplinary Practices and the restrictions on certain issues relating to barristers.

The LSRA consultation also invited submissions in the event that a unification of the solicitors' profession and the barristers' profession is unified on:

- (i) How the professions can be unified,
- (ii) The reforms or amendments, whether administrative, legislative, or to existing professional codes, that are required to facilitate such unification, and
- (iii) Any other matters that the Authority considers appropriate or necessary.

The Council is not in a position to make any informed submission on this aspect of the consultation at this juncture. It reserves its position to do so at a later date in the event that the LSRA considers that a proposal to unify the legal professions requires further consideration.

As stated at the outset of this submission, regardless of how the legal profession has evolved and how it is organised, the legal profession itself organically stratifies into sub-categories of practitioners with distinct skills and practice areas thereby rendering a theoretical unification of the professions as a meaningless exercise.

In summary, the Council believes that the independent referral bar serves the administration of justice well in this country, ensures that access to justice and specialist advocacy services are provided to a wide range of clients, assists rather than detracts from competition in the delivery of legal services by providing advice and advocacy services when required to the solicitor profession. Changes in the delivery of services under the 2015 Act, principally in relation to allowing legal partnerships, should be given appropriate space and time to be observed. The Council would also question the wisdom of restructuring the provision of legal services at this time. The Authority should recommend against the unification of the legal professions.



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