



**SUBMISSION OF THE BAR COUNCIL OF IRELAND TO THE
JOINT COMMITTEE
ON JUSTICE, DEFENCE AND EQUALITY ON THE
LEGAL SERVICES REGULATION BILL 2011**

March 2012



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Introduction

1. The Bar Council welcomes the opportunity to make a submission to and address the Joint Committee on Justice, Defence and Equality (the “Joint Committee”) on the Legal Services Regulation Bill 2011 (the “Bill”).
2. This document contains a summary of the Bar Council’s position in relation to the Bill. The Bar Council’s representatives present at the meeting of the Joint Committee on 21 March 2012 will be happy to outline the Bar Council’s position on the Bill in greater detail and to respond to any questions which the members of the Joint Committee may have in relation to its position.

Bar Council

3. The Bar Council is the governing body for the barrister’s profession in Ireland. Its role is to promote and improve the services which the Bar gives, to ensure that barristers uphold the highest standards of conduct, ethics and independence in their practice and to put in place appropriate independent complaints and disciplinary procedures to deal with complaints against barristers and cases where it is alleged that a barrister’s conduct has fallen below proper standards. The Bar Professional Conduct Tribunal and The Professional Conducts Appeals Board (to which appeals from the Tribunal are brought) both have had lay majorities.

The Barrister’s Profession

4. There are currently just in excess of 2,300 practising barristers in Ireland. They work in Dublin and on circuits throughout the country and are members of the Law Library. The Law Library is based in the Four Courts and there are other libraries in the Criminal Courts of Justice complex and in the Distillery Building in Dublin and also in Cork.

5. More than half of the membership of the Bar is in practice for ten years or less. More than one third of the membership of the Bar is in practice for five years or less. There are more women than men entering the profession each year over the past few years. The profession is a young, vibrant, enthusiastic and highly professional one where many compete for what, in the current economic climate, is a shrinking amount of work. The market for barrister's services is extremely competitive. This has led to very considerable reductions in fees paid to most barristers by public and private clients. It should also be remembered that barristers have no monopoly in the provision of court or other advocacy services for clients or in the provision of legal advisory services. Since 1971 solicitors have had the right to appear and argue cases for clients in all courts in Ireland, including the Supreme Court.

6. The independent Bar in Ireland can be defined by the following core ethical values to which barristers must adhere, namely:
 - (a) absolute individual and personal responsibility for their own conduct and for their professional work;

 - (b) absolute independence and freedom from all other influences especially those that arise from their personal interests or from external pressure;

 - (c) an overriding duty to the Court to act with independence in the interests of justice and to ensure in the public interest that the proper and efficient administration of justice is achieved;

- (d) subject only to the above duty to the Court, barristers have a duty to promote and protect fearlessly, and by all proper and lawful means, the best interests of their clients and to do so without regard to their own personal interests or to any consequences to themselves or to any other person;
 - (e) barristers are bound to accept instructions in any case or field in which he or she professes to practise at a proper professional fee irrespective of any opinion which the barrister may have formed as to the character, reputation, cause, conduct, guilt or innocence of the person.
7. These core values are in the public interest and impose onerous obligations on barristers in the practice of their profession. Barristers must conform to these core ethical values irrespective of the personal or financial consequences to themselves. Barristers play a crucial role in the administration of the justice in Ireland and the public interest requires barristers to continue to adhere to these core ethical values.

Bar Council's Initial Submission to Minister

8. As the Joint Committee may be aware, the Bar Council furnished a detailed Initial Submission to the Minister in relation to the Bill in December 2011. A summary of the Bar Council's Initial Submission is contained at Appendix 1. The Bar Council's Initial Submission to the Minister itself is contained at Appendix 2.

Economic Analysis of the Bill

9. The Bar Council commissioned an economic analysis of the proposed new regulatory regime provided for in the Bill from Compecon, a firm of independent economic consultants. Compecon provided its report to the Bar Council on 3 March 2012 (the "Compecon Report"). The Compecon Report was provided to the Minister for Justice and Equality (the "Minister") on 5 March 2012. Compecon has prepared a summary of its report (the "Compecon Summary"). A press release summarising the

Compecon Report dated 5 March 2012 is contained at Appendix 3. The Compecon Summary is contained at Appendix 4. The Compecon Report itself is contained at Appendix 5.

Bar Council is in favour of reform

10. The Bar Council supports reforms which have as their objective the modernisation of the legal professions and the better and fairer delivery of legal services to the citizens of Ireland. However, reforms which affect the fundamental rights of the citizen as well as the interests of those working in the profession should only be introduced following an informed and considered debate. Fundamental and far reaching reforms of the kind proposed in the Bill should be properly evaluated and demonstrated to be in the public interest prior to enactment of the Bill. The informed debate should include an evidenced based examination of the current system, systems in place in other democratic states and the particular economic and social needs of the citizens of this State.
11. The Bar Council believes that the overriding consideration in the evaluation of the Bill and the reforms which it proposes should be the public interest and not any sectional or selfish interest on the part of members of the profession. The Bar Council has at all times sought to focus on the public interest and on the interests of clients in its submissions and statements on the Bill.
12. For these reasons, the Bar Council welcomes provisions of the Bill dealing with legal costs. We believe that (apart from some changes that should be made to that part of the Bill dealing with legal costs), the provisions of the Bill dealing with such costs are generally in the public interest. We agree with the fundamental objectives of the Bill that legal costs should be transparent so that, as far as possible, clients know in advance what the legal costs are likely to be for any particular work done by a barrister. The Bar Council has for that reason since June 2007 required barristers to provide fee estimates (except in cases where the client does not require such estimates as in the case of the State).

13. The Bar Council also does not object to independent regulation but has concerns about the type of regulation provided for in the Bill and the cost of that regulation.

Bar Council Concerns

14. The Bar Council has concerns in relation to a number of aspects of the Bill and believes that they are not and have not been shown to be in the public interest.

15. Those concerns which are discussed in detail in the Bar Council's Initial Submission to the Minister (Appendix 2) may be summarised as follows:

(1) The lack of independence of the Legal Services Regulatory Authority (the "Authority") from the Minister and the Government and the extent of involvement and ministerial over and involvement in the powers and functions of the Authority:

The Minister has indicated that it is his intention to amend the Bill to address the criticisms made in relation to the independence of the Authority, while not accepting that those criticisms are valid. However, as far as the Bar Council is aware, the Minister's proposed amendments have not yet been finalised and provided to interested parties. We would welcome sight of those amendments and an opportunity to consider them and to engage with the Minister and the Joint Committee or indeed the Dáil Committee on Justice, Equality and Defence in relation to them. The Bar Council notes and agrees with the submissions made by numerous national and international bodies concerning the lack of independence of the Authority and the involvement and control of the Authority by the Government / the Minister (under the Bill as it currently stands) including those submissions and statements made by FLAC, Northside Community Law Centre, Irish Human Rights Commission, Irish Council for Civil Liberties, the International Bar Association (IBA), the American Bar

Association (ABA) and the CCBE (the Council of the Bars and Law Societies of Europe).

(2) The cost of the proposed new Legal Services Regulatory Authority:

To date, it appears that no Regulatory Impact Assessment (“RIA”) has been carried out for the Minister notwithstanding the recommendation of the Competition Authority that one should be done and the commitments contained in the Programme for Government. The Minister has indicated that an RIA is being prepared and will be made available before the Committee Stage of the Bill to address this deficiency. So far as the Bar Council is aware none has yet been prepared and circulated on behalf of the Minister. To enable a proper and informed consideration of the issues, the Bar Council commissioned the Compecon Report. A summary of the Compecon Report is at Appendix 4 and the Report itself is at Appendix 5 o. it is discussed further under point (3) below.

(3) The type of regulation provided for in the Bill:

The Bill provides for direct regulation of the legal professions. This type of regulation was not recommended by the Competition Authority in its 2006 Report on competition in the legal profession in Ireland (the “Competition Authority Report”). The Competition Authority Report recommended independent regulation of the legal professions. To that end it recommended the establishment of an independent statutory body (the Legal Services Commission) which would be independent of the legal professions and of Government and would delegate day to day regulatory functions to the front line professional bodies subject to oversight by the Commission. This is independent regulation. The Bar Council has confirmed and reiterates now its agreement to and support for such independent regulation.

Neither the Programme for Government of March 2011 nor the Programme of Support entered into between Ireland and the Troika in December 2010 requires the type of direct regulation provided for in the Bill. Nor does it appear that the Government has committed itself to it notwithstanding the provisions of the Bill as the Taoiseach confirmed on 3 December 2011 that the *“only decision taken by the Government in relation to this bill was to publish it”*.

The Bar Council believes that this form of direct regulation provided for in the Bill is not an efficient or effective way to regulate. It is also inconsistent with the independence of the legal professions and is not in the public interest. The Bar Council believes, on the basis of sound economic evidence, that it will also lead to an increase in costs for clients as while the State and the legal profession will initially have to bear the cost of the new regulatory structure, such costs will inevitably be passed on to clients.

The Compecon Report prepared for the Bar Council has estimated that the total annual cost of this proposed form of regulation will be between €12.7m and €16m which is an increase of €5.3m to €8.6m per annum on the current cost of regulating both branches of professions. (To put this in context the total regulatory expenditure of the Bar Council for 2010/2011 was €124,000).

The Compecon Report estimates that an independent regulator of the type proposed in the Competition Authority Report (and supported by the Bar Council) would increase the current cost of regulating the legal professions by €2.4 million to €3 million per annum.

The Compecon Report estimates that the method of regulation provided for in the Bill would increase the cost of regulating the legal professions by €5.3 million to €8.6 million compared with the current system (between €2.9 million to €5.6 million per annum more than the type of independent

regulation recommended by the Competition Authority). In addition to this Compecon estimate that there will be once off transition costs of in between €5 million to €7 million.

The Minister has not yet furnished any detailed estimates of the likely costs of implementation of the form of regulation provided for in the Bill. To fill that vacuum, and ensure that the consideration of the Bill would be better informed, the Bar Council felt it necessary to commission the Compecon Report. We await the Minister's RIA and his considered comments on the Compecon Report. We are happy to engage further with the Minister and/or his officials on the costings involved.

(4) Access to justice and competition will be impaired by the proposed new business structures provided for in the Bill:

The Bar Council believes that the new business structures for the delivery of legal services proposed in the Bill such as Multi-Disciplinary Practices ("MDPs") and legal partnerships (partnerships between barristers and solicitors) will damage and not enhance competition in the delivery of legal services. The Bar Council believes that these proposed new business structures will be likely to lead to increased costs and a reduction in choice. They have the potential to make the profession more elitist and to prevent people from entering or developing a practice by potentially concentrating the best lawyers in a small number of large city firms. While they may benefit leading members of the profession, the Bar Council believes that they will be of no benefit to junior members commencing in the profession and, more fundamentally, will not be in the public interest.

The Bar Council believes that the proposed new structures are likely to undermine small solicitors offices up and down the country who rely on ready access to the independent Bar in order to be able to compete on a level playing pitch with the large city firms.

Neither legal partnerships nor MDPs were recommended by the Competition Authority in its 2006 Report. It recognised that there were possible issues surrounding access to justice and regulation which required further consideration. It did recommend that the Legal Services Commission be established should consider and carry out further research into these issues. The Bar Council agrees with that recommendation.

It might be noted that no commitment to introduce these new structures was contained in the Programme for Government. Their proposed introduction has not been supported by any economic assessment as to whether they are or are not in the public interest. Indeed, the only considered report into their introduction in Ireland is the Competition Authority Report of December 2006. Despite this the Bill envisages their introduction within 30 months of enactment.

The Bar Council agrees with the concerns expressed about the introduction of these new business structures by bodies such as FLAC, Northside Community Law Centre and others. The Bar Council also notes and agrees with the considered views expressed by many Deputies in relation to the introduction of these proposed new business structures during the Second Stage of the Bill in Dáil Éireann.

However, rather than rejecting these new business structures out of hand, the Bar Council does agree, and has suggested to the Minister its Initial Submission, that the Authority should be tasked with the function of conducting research on and considering whether their introduction in Ireland would be in the public interest and in the interests of consumers. This is consistent with what the Competition Authority recommended in its 2006 Report. It makes sense. The approach taken in the Bill does not.

16. In its initial Submission to the Minister the Bar Council put forward a number of alternative solutions and proposals (see Part 4 of the Initial Submission). The Bar Council has prepared a series of draft amendments to the Bill to reflect these alternative proposals. A copy of those amendments is contained at Appendix 6 as the Joint Committee may find them useful.

Bar Council's Key Amendments

17. As noted above, the Bar Council has a number of key concerns in relation to the Bill. The Bar Council does not oppose independent regulation. However, the Bar Council does not believe that the type of regulation proposed in the Bill is appropriate or in the public interest. Rather, the Bar Council believes that the type of independent regulation recommended by the Competition Authority which is also the type of regulation introduced in England and Wales in 2007 (following an extensive study by Sir David Clementi) is much more efficient, less costly, less damaging to the independence of the professions and is in the public interest. The Bar Council has suggested a series of amendments to the Bill to give effect to this type of independent regulation.

18. The Bar Council awaits receipt of the Minister's proposed amendments to the Bill and would very much welcome the opportunity of engaging further with the Minister and with the Joint Committee in relation to those amendments. However, pending receipt of the Minister's amendments, the Bar Council has offered the following further amendments which address the key concerns which the Bar Council has in relation to the Bill.

19. The following is a summary of the areas covered by and a general description of the type of amendments proposed by the Bar Council which we would be happy to discuss further with the Minister and with the Joint Committee.

(a) The appointment and terms and conditions of an Independent Regulatory Authority

20. The relevant provision dealing with these issues in the Bill is Section 8. It is proposed to delete this section in its entirety and replace it with a section that, to a considerable extent, mirrors the regulatory model found for the Medical Council in the Medical Practitioners Act 2007. This is in line with paragraphs 150 to 153 of the Initial Submission of the Bar Council to the Minister of December 2011. As acknowledged in Part 4 of the Initial Submission, the Bar Council also agrees that there could be a role for an independent appointments body such as the Public Appointments Service.

(b) Oversight Regulation of the Legal Professions

21. Under the alternative Bar Council model proposed at paragraphs 154 to 158 of the Initial Submission, it was proposed that the independent Legal Services Regulatory Authority should be responsible for regulating and overseeing the legal profession. This would include regulating and implementing the codes of conduct of the professions, the handling and determination of complaints in relation to the delivery of legal services, the carrying out of research functions and other functions as provided for in the enabling legislation.
22. Under the Bill in its current format, the functions of the Authority are set out at Section 9, provision is made for strategic plans and reports to the Minister at Sections 16 and 17 and Section 18 deals with the approval and amendment of codes of practice for the professions with far too much control and power given in this regard to the Minister.
23. It is proposed to delete Sections 9, 16, 17 and 18 of the Bill and, given that we are proposing amendments to the Bill (rather than recasting the Bill) providing for the oversight functions of the Authority (apart from discipline and cost) in Section 9 to 9H of the Bill.

(c) Disciplinary Framework

24. The proposed disciplinary framework, consistent again with the oversight regulatory model, is in accordance with what was set out in paragraph 158 of the Initial Submission. It is proposed that Part 5 of the Bill be deleted in its entirety and replaced with a new Part 5 as set out in the Bar Council's suggested amendments.
25. The Bar Council wishes to state, however, that neither it nor its members have any fear of an independent disciplinary procedure or independent disciplinary structures. Our members do not handle client money, have less direct interaction with the public than solicitors and, consequently, have fewer complaints made against them. What we do object to and fear is the likely excessive cost of what is proposed in the Bill as it stands, which will disproportionately affect members of the Bar. Once the Minister has published an RIA in relation to the Bill, we will be happy to engage further with him and with the Joint Committee on this issue.

(d) Provision for Levy

26. Sections 69 and 70 in Part VI of the Bill provides for a levy to be raised for the payment by the Bar and Solicitors professions of the costs of the Legal Services Regulatory Authority. The Bar Council believes that the current Section 69 should be deleted. The Bar Council proposes that the substantially reduced costs, which will necessarily follow from oversight regulation as proposed by the Bar Council, be paid in the manner set out in the Section 69 set out below. The suggested amendments also attempt to incorporate some of the recommendations contained in the Submission to the Minister by the Law Society of Ireland dated February 2012.

(e) Proposals on Research Functions of the Legal Services Regulatory Authority in relation to Access to Justice, the Education and Training of Legal Professionals and Business Structures for the delivery of Legal Services:

27. It is proposed that Part 7 of the Bill and section 116 (employed barristers) should be replaced so that the Authority would be required to carry out a comprehensive and clear assessment as to the appropriate legal structures which should deliver legal services in the State. Included in that assessment is the requirement to consider the existing professions, their possible unification along with alternative business structures for legal services.
28. The Bar Council suggests that the Bill should be amended in such a way as to require that the Authority's reports are made to the Houses of the Oireachtas instead of the Minister. The Authority could make appropriate recommendations in its report(s) for the establishment, in accordance with such recommendations, of any such modified or alternative structures for the delivery of legal services. A public consultation process must be engaged in by the Authority when considering these matters.
29. In relation to education, training and qualification as legal professionals, the amendments we suggest to the Bill contain one comprehensive provision dealing with that matter instead of sections 29 and 30, which requires the Authority to conduct an examination of the existing arrangements and make recommendations for reform in the area.
30. The amended provisions the Bar Council puts forward set out in specific terms that the Authority is to research and report on how the practices of new entrant legal professionals can be enhanced and barriers to entry can be removed both in respect of educational matters and in relation to the business structures of the professions themselves.

Concluding Comments

31. The Bar Council welcomes certain provisions in the Bill. However, it has concerns about others. It set out those concerns in its Initial Submission to the Minister in December 2011. It has sought to summarise those concerns in this Submission.

32. The Bar Council's representatives will be happy to elaborate on those concerns at the meeting of the Joint Committee on 21 March 2012.

33. The Bar Council has suggested a range of proposed amendments to the Bill to address its concerns. The Bar Council believes that at all times the overriding consideration for the Joint Committee in considering this Bill is the public interest and not the interests of the profession.

34. Finally, the Bar Council would like to thank the Chairman of the Joint Committee and the Clerk of the Joint Committee for the invitation to attend the meeting of the Joint Committee on 21 March 2012 and for the courtesy they have extended to us.

14 March 2012