



Legal Services Regulatory Authority Initial Public Consultation on Legal Partnerships

**Submission by the Standing Committee of the Council on behalf of the Honorable
Society of King's Inns**

24 March 2017

I. INTRODUCTION

1. The Standing Committee of the Council makes these submissions on behalf of the Honorable Society of King's Inns ("the Society") in response to the invitation issued by the Legal Services Regulatory Authority ("the Authority") by way of public consultation notice dated 24 February 2017. As stated in the notice, the Authority is undertaking an initial public consultation pursuant to section 118 of the Legal Services Regulation Act 2015 ("the 2015 Act") prior to reporting to the Minister for Justice and Equality ("the Minister") on the regulation, monitoring and operation of legal partnerships. The deadline for submissions is 24 March 2017.
2. In light of the short time period between the date of notice and the date for submissions, as well as the Authority's indication that the current process relates to an initial public consultation and the making of preliminary recommendations to the Minister, these submissions cannot be viewed as comprehensive or final submissions on behalf of the Society on this subject-matter. These submissions ought to be viewed as initial observations on some of the potential issues associated with the introduction of legal partnerships. In that regard, the Society would welcome the opportunity to provide such elaboration as may be sought by the Authority on these or other issues affecting legal partnerships. The aim of these submissions is to assist the Authority in making its initial report to the Minister by highlighting some of the issues which would have to be addressed in any future regulatory regime. The Society reserves its right to make further submissions on this subject-matter in future public consultations undertaken by the Authority.

II. LEGAL PARTNERSHIPS

A. Definition

3. Section 2(1) of the 2015 Act defines a "legal partnership" as "a partnership formed under the law of the State by written agreement, by two or more legal practitioners, at least one of whom is a practising barrister, for the purpose of providing legal services".
4. The 2015 Act thus envisages two different types of legal partnership: partnerships between barristers ("barrister partnerships") and partnerships between solicitors and barristers ("barrister-solicitor partnerships"). The various issues raised in these submissions may relate to both types of legal partnership, or just one. Where this is not clear from the context, these submissions will endeavour to identify the type of legal partnership at issue.

B. Liability of Partners for Acts of Co-Partners

5. A key characteristic of partnerships is that each partner is liable for the acts of co-partners done as part of the ordinary course of business of the firm. This principle must be kept in mind at all times when considering the introduction of legal partnerships; it potentially has significant implications for the protection of consumers, the professional regulation of legal practitioners and the administration of justice. The joint and several liability of partners flows from the fact that each partner is his co-partner's agent for the purposes of the partnership business. It is a general principle of partnership law and is set out in the Partnership Act 1890, s 5:

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

C. Partnership Business

6. As is clear from the previous section, the concept of the "business of the partnership" is fundamental in partnership law. It is the foundation stone for the principle of joint and several liability. Partners are agents of each other, and bind one another, when they carry on "business of the kind carried on by the firm". This important principle would appear to be premised on the provision of a unitary professional service. There are questions surrounding its application to legal partnerships where not all partners are members of the same profession.
7. What is the business of a barrister-solicitor legal partnership? It can be described as the provision of legal services; yet the reality is that solicitors and barristers provide legal services of a different nature. There are, in particular, services offered by solicitors, representing a significant part of the business carried on by solicitors, which barristers cannot offer. Some of these are addressed in more detail below, but include notably the handling of client moneys and the provision of undertakings. This complicates the definition of the partnership business. There will be significant aspects of the business which barrister partners are professionally and/or statutorily prohibited from undertaking. This confusion surrounding the partnership business poses potential difficulties for consumers who may seek to rely on the principle of

joint and several liability or who may seek payment out of the solicitors' compensation fund (see *infra*).

III. ISSUES

8. It is proposed to highlight a number of areas where the introduction of legal partnerships raises regulatory and other concerns. These submissions do not purport to express a definitive view on the desirability or otherwise of introducing legal partnerships, nor do they express a view on whether, or how, any of the issues raised may be overcome. Instead, these submissions aim to assist the Authority in making its preliminary recommendations to the Minister by bringing to its attention the potential issues created by legal partnerships for the administration of justice, consumer protection and professional regulation.

A. Different Professional Codes

9. The question of which professional code would apply to legal practitioners in barrister-solicitor partnerships arises. All barristers, even those in legal partnerships, will continue to be subject to the professional code of the Society, in addition to any profession specific code of practice issued by the Authority. All solicitors will continue to be subject to the professional code of the Law Society, as well as relevant rules promulgated by the Authority. While many of the rules in the separate professional codes regulating barristers and solicitors overlap, there are also critical differences (some of which are addressed in more detail *infra*). How will these differences be reconciled with the nature of a legal partnership? Where there is a conflict between the different professional rules of conduct, as there is, for example, with the wider discretion of solicitors not to accept clients,¹ how will the conflict be resolved? If such resolution would involve a relaxation of some of the professional duties of barristers, how would this affect the administration of justice in Ireland and the interests of consumers?

B. Independence and Overriding Duty

¹The Law Society Guide to Good Professional Conduct (3rd ed), p 7: "The decision to accept instructions in any particular case is a matter for the discretion of the individual solicitor." Rule 32 of the proposed new Professional Code of the Society, however, sets out the "cab rank" rule for barristers: "Save insofar as legal services as a barrister are being provided under a contract of service, having regard to the anticipated length and complexity of a case and having regard to their other professional commitments and the provisions of the Code, barristers are bound to accept instructions in any case in the field in which they profess to practise (having regard to their experience and seniority) subject to the payment of a proper professional fee. A barrister may be justified in refusing to accept instructions where a conflict of interest arises or is likely to arise or where they possess relevant or confidential information or where there are other special circumstances."

10. Would changes which might be necessary to the professional duties of barristers in barrister-solicitor partnerships, or indeed in barrister partnerships, fundamentally alter the nature of the profession and its role in the administration of justice? One of the most prominent and distinctive features of the role played by barristers in the administrative of justice is their status as independent advocates. Independence is the hallmark of the profession.² This independence is a valuable cog in the administration of justice. It is respectfully submitted that this long-established and oft-asserted independence is an important offering to consumers of legal services. The question is whether the independence of barristers in legal partnerships would be compromised and the extent to which this would harm either the administration of justice or consumers, or both.
11. Related to the independence of barristers is their “overriding duty to the court to ensure in the public interest that the proper and efficient administration of justice is achieved”.³ This is an equally important feature of the profession, without which the administration of justice would be impaired. It is crucial that any consideration of the operation and regulation of legal partnerships has regard to the implications for, and the importance of preserving, barristers’ overriding duty to the court.

C. Holding Client Moneys

12. Barristers are prohibited, by professional duty and by statute,⁴ from handling client moneys. This poses a major difficulty for barrister-solicitor partnerships. Solicitors in any future legal partnership would be able to receive and handle client moneys; indeed it would be a key part of the services they offer. Barrister partners, however, would be prohibited from doing so. The question is whether such a distinction between the powers of partners is desirable or practicable. The partners are agents of each other in the course of the partnership business. Yet how could a barrister partner be considered a principal in relation to the handling of client moneys by a solicitor partner where the barrister partner is statutorily prohibited from same?

² Rule 22 of the proposed new Professional Code of the Society: “It is the duty of barristers to be independent and free from influence, especially such as may arise from their personal interests or external pressure, in the discharge of their professional duties. Barristers must avoid any impairment of their independence and be careful not to compromise their professional standards in order to please their client, the court, third parties, or, as the case may be, their employer(s) or partner(s).”

³ Rule 20 of the proposed new Professional Code of the Society.

⁴Rule 28 of the proposed new Professional Code of the Society and s 45(1) of the 2015 Act which provides that “a legal practitioner shall not hold moneys of clients unless that legal practitioner is a solicitor.”

Moreover, is it fair and appropriate that a barrister partner be liable for the partnership's handling of client moneys where the barrister partner is not permitted to exercise any powers in relation to same?

D. Compensation Fund

13. There are major issues of consumer protection to be considered before barrister-solicitor partnerships are introduced. In the previous section it was asked whether or not it would be fair to impose a liability on barrister partners in respect of solicitor partner handling of client moneys, where barrister partners are prohibited from same. It is necessary now to consider the increased exposure to risk faced by consumers where legal partnerships hold their money.
14. There exists a solicitors' compensation fund, governed by s 21 of the Solicitors (Amendment) Act 1960 and the Solicitors (Compensation Fund) Regulations 2013, the purpose of which is to provide compensation where a client of a solicitor has suffered loss due to the dishonesty of a solicitor or the clerk or servant of a solicitor arising from that solicitor's practice as a solicitor ("the Compensation Fund"). This is an extremely important and valuable protection afforded to the clients of solicitors in circumstances where, in ordinary practice, an extraordinary level of trust is placed in the solicitors' profession. It reinforces that trust and no doubt serves to strengthen the confidence that the general public has in the profession, evidenced on a daily basis by the recourse people have to the services provided by solicitors.
15. In the context of a barrister-solicitor partnership, however, the protection afforded by the Compensation Fund would be undermined because it would not be available in respect of acts by barrister partners. Although barrister partners would be prohibited from handling client moneys, it is not inconceivable that, given the practicalities of a partnership, situations could arise whereby a client of the legal partnership suffers a loss which would have been covered by the Compensation Fund but for the fact that the relevant acts are attributable not to a solicitor but to a barrister.
16. Section 113 of the 2015 Act makes clear that the Law Society will not be required to expand the coverage provided by the Compensation Fund to acts of barrister partners or barrister employees of the legal partnership:

Nothing in this Part shall be construed as extending the obligation of the Law Society under section 21(4) (as amended by section 29 of the Solicitors (Amendment) Act

1994) of the Solicitors (Amendment) Act 1960 to loss sustained in consequence of dishonesty on the part of a legal practitioner who is a partner in or an employee of a legal partnership or, as the case may be, a multi-disciplinary practice or any clerk or servant of that legal practitioner arising from the provision by that legal practitioner of legal services to a client, where that legal practitioner is not a practising solicitor.

17. This would leave consumers exposed. It would also complicate the process of making an application to the Compensation Fund. Clients would only be able to avail of compensation for dishonest acts of solicitor partners. It is not a distinction which, it is respectfully submitted, to the consumer would seem justifiable. However, it is an inevitable consequence of the proposal to permit legal partnerships under the current Compensation Fund regime. At a minimum, of course, legal partnerships ought to be required to inform clients whether and to what extent they are protected by the Compensation Fund. However, it remains to be decided whether or not this alone is adequate or if other measures would be required to protect clients of legal partnerships where there is a gap in the coverage of the Compensation Fund.

E. Undertakings

18. The provision of undertakings by solicitors is an issue which arises in respect of barrister-solicitor partnerships. Undertakings are a part of the ordinary business of solicitors, but they are not a feature of barristers' practices. Currently, where a solicitor in partnership gives an undertaking as a solicitor in the course of practice, all partners are responsible for its performance.⁵
19. In barrister-solicitor partnerships, how will the giving of undertakings be regulated and where will liability for failure to comply with undertakings fall? In a manner similar to the issues surrounding client moneys, if a solicitor partner, or indeed a solicitor employee, provides undertakings which a barrister partner is incapable of giving, or over which he cannot exercise any control *qua* partner, is it fair, just and reasonable that a barrister partner would be exposed to liability on foot thereof? Is it consistent with the nature of a partnership that certain partners are professionally prohibited from exercising or supervising such important functions which potentially expose the partnership to significant liabilities?

F. Investment Advice

⁵ Law Society Guide to Good Professional Conduct (3rd ed), p 49.

20. Solicitors can provide investment business services, investment advice or insurance intermediary services to clients. These are not services that barristers have provided or can provide.⁶ Therefore, once again, there are difficulties in how a legal partnership will operate and be regulated with respect to such services.

G. Availability of Barristers

21. This is a major area of concern for consumers of legal services. If barristers and solicitors are permitted to enter into partnership, it is not inconceivable that the largest solicitors firms and the leading barristers may enter into partnership whereby these barristers would no longer accept briefs from smaller solicitor firms. This would restrict the access of many solicitors throughout the country to the professional services of the leading barristers. It would deprive many individual litigants of their services, which would in all likelihood have a negative impact on their ability to assert their legal rights and further negative consequences for the administration of justice.

22. Moreover, the choice of barristers for the clients of legal partnerships would likely be diminished as the solicitors in a legal partnership would presumably encourage, or at least have an interest in, the client being represented by a barrister partner. This would not appear to be in the best interests of consumers.

H. Individual Responsibility

23. It is an important duty of the profession that barristers are individually responsible for their own conduct.⁷ It is a feature of the profession that comes to the fore in proceedings before a court. It is important that any future regulatory regime take account of this duty and enforce it in respect of barristers in legal partnerships.

I. Regulation by the Professional Bodies

24. The Law Society will exercise its residual regulatory and disciplinary function in respect of solicitors only; the Society will exercise its residual regulatory and disciplinary functions in respect of barristers only. With no power to regulate members of the other profession, how

⁶ Rule 28 of the proposed new Professional Code of the Society: "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."

⁷ Rule 12 of the proposed new Professional Code of the Society.

will the two professional bodies regulate legal practitioners in legal partnerships effectively? The potential reliance on the principles of vicarious or joint liability in disciplinary matters would, it is submitted, be controversial. The difficulties facing the professional bodies in this regard could lead to reduced oversight of legal practitioners in legal partnerships, which would be detrimental to consumers.

J. Conflicts of Interest

25. Barrister partners in legal partnerships will face an increased risk of conflicts of interest. There will be potential for conflict between the interests of their clients and the interests of their partners; there will also be potential for conflict between the interests of their clients and the interests of their partners' clients. These risks will require detailed regulation. It is imperative that appropriate structures and procedures be put in place so that potential conflicts of interest are identified and addressed. There is also a risk to clients considered "less valuable". For example, if a conflict arises between two clients, will the partnership automatically cease to represent the "less valuable" client? Under the current regulatory regime barristers would be prevented from doing this, which, it is submitted, is of significant benefit to consumers.

K. Solicitors on Record

26. Consideration will have to be given to how the introduction of barrister-solicitor legal partnerships will affect the practice of solicitors' firms coming on record for parties to proceedings. It is unclear whether or not such a firm, comprising as it does barristers and solicitors, would be able to enter an appearance and effectively act in the current role of the solicitor on record in the proceedings.