

## **Legal Services Regulatory Authority**

### **Public Consultation on Legal Partnerships**

#### **CCPC submission**

##### **Introduction**

The Competition and Consumer Protection Commission (CCPC), and its predecessor organisations (the Competition Authority and the National Consumer Agency), have long advocated for reform of the legal profession. Since the publication of the former Competition Authority report on the legal professions in 2006, we have consistently sought the establishment of an independent regulator for the sector, along with other reforms aimed at increasing competition and bringing down legal costs for consumers, businesses and the State.

The CCPC welcomed the Legal Services Regulation Act as providing a basis for significant reform of the legal profession and considers that the recently established Legal Services Regulatory Authority (LSRA) has a key role to play as a driver of such reform in the coming years.

The CCPC welcomes the opportunity to respond to the current public consultation and looks forward to working with the LSRA on the reform agenda.

##### **Consultation Questions**

#### **1. The benefits and risks for consumers of legal services (“services”) that can be reasonably expected from enabling them to access legal partnerships.**

- 1.1 The provisions in the Legal Services Regulation Act (the Act) which lift restrictions on legal practitioners setting up legal partnerships in Ireland will benefit consumers and potentially act as a driver for procompetitive changes in the market. Currently the legal profession in Ireland is organised in a highly rigid business model. Relaxing the rules on barristers forming partnerships with other barristers and/or solicitors will allow the profession the opportunity to deliver their services in ways that are more suitable, more efficient and more cost effective for consumers and will hopefully drive innovation in service delivery. There are a number of shared benefits that can be expected and some

model specific risks that might arise from enabling consumers to access legal partnerships.

### **Benefits of Legal Partnerships**

- 1.2 Barristers practising in a legal partnership will no longer be required to be sole practitioners. This enables them to group together on cases, divide work among themselves, benefit from the economies and efficiencies derived from shared income, shared work, shared risk and shared professional reputation. For the consumer, the possibility of barrister partnerships and solicitor-barrister partnerships will mean that additional choice will become available, in addition to what is currently provided by the traditional model.
- 1.3 Legal partnerships, as opposed to the sole trader model, can draw together persons with different levels of experience and differing areas of expertise. This enables the consumer to gain more comprehensive legal advice from a single source and, particularly in relation to complex cases, potentially avoid the necessity for a number of legal entities to be involved.
- 1.4 A significant benefit of a legal partnership is that a basis will exist for ensuring continuity of representation for a client and, where necessary, access to a quality replacement. The current sole trader model exposes clients to significant risk in situations where the barrister becomes unavailable for a Court hearing – proceeding with a barrister other than that initially chosen (and briefed) potentially exposes the client to additional cost and may diminish the prospects of a successful outcome. The CCPC has had direct experience of situations where a barrister, involved with a case, becomes unavailable (possibly very close to a Court hearing) and an alternative has to be sourced and briefed on the case, at short notice. With barrister partnerships, it could be expected that barristers would be in a position to better plan for availability and provide for contingency, thereby minimising double-booking. Where a replacement is unavoidable, then the partnership could, in effect, provide a guarantee of quality, in that the replacement would be of a similar standing to the original.
- 1.5 Legal partnerships will allow practitioners to pool their costs and allow barristers to employ adequate administrative support, thereby improving their service offering for clients. A busy sole trader may not be in a position to respond in a timely fashion to requests for meeting arrangements, fee notes etc. from solicitors. This can result in the client paying additional fees to solicitors for their time spent on such administrative work. A legal partnership,

with a dedicated administrative support, will bring a new level of efficiency to the service provided, and the potential for cost savings to the client.

- 1.6 Legal partnerships will support and facilitate entry into a profession in which newly qualified barristers often struggle to survive. Such barristers, who enter a partnership with established legal practitioners, will have a better prospect of steady income in the first few years, compared to operating as a sole trader and being paid only very occasionally and often long after the work is complete. Greater financial security can also help to encourage a broader spectrum of talent from diverse backgrounds and retain some who might otherwise have been forced out of the profession due to financial necessity. Newly qualified barristers will also gain experience and knowledge from their colleagues in the early stages of their careers. Legal partnerships that can advertise as a group and build a shared reputation will also provide valuable competition to well-established barristers.
- 1.7 Legal partnerships, in the form of solicitor-barrister partnerships, provide a basis for consumers to avoid paying a double mark-up on the legal services they receive. Currently the consumer pays the mark-up associated with a solicitor's fee and the mark-up associated with the barrister's fee. However, when a consumer uses a bundled service the consumer will only face one mark-up, i.e. that of the partnership.
- 1.8 The CCPC notes that legal partnerships of solicitors and barristers (Legal Disciplinary Practices - LDPs) have been permitted in the UK since 2009 - with Alternative Business Structures (partnerships between legal and non-legal professionals - ABS) being permitted from 2011. A recent study by the UK Legal Services Board (LSB)<sup>1</sup> found that the market for legal services in the UK has become less concentrated between 2011/12 – 2015. The LSB found that this had been driven in part by an increase in entry of ABS and LDPs, along with demand for legal services remaining stable over the period. The same study also found that ABS and solicitor-barrister practices were more productive than traditional legal practices. In addition to these business structures facilitating increased competition in the market, the study suggests that services provided by these firms are of a higher standard than more traditional service providers. The LSB found that from 2011 to 2015 LDPs generated the highest levels of turnover per complaint – and therefore received the lowest number of complaints when their size was taken into account.

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<sup>1</sup> UK Legal Services Board Evaluation: "Changes in the Legal Services Market 2006/07 – 2014/15- Main Report", 2016

## Risks of Legal Partnerships

- 1.9 There is a potential for legal partnerships to increase concentration in certain specialities which are dependent on a high degree of expertise, at least in the short term. If all or most of the top barristers in one specialisation formed a legal partnership, there would be a reduction in choice for the consumer who needed a lawyer with that specialisation. This is unlikely to be a significant issue if the LSRA introduces measures to address conflict of interest issues. Such measures would make entry to a legal partnership less attractive for some barristers as it would limit the client base, and thereby maintain consumer choice for barristers with specialised expertise. This point is expanded in paragraph 2.2 below. It is also likely that where a concentration of expertise does occur, new entrants would be attracted, from both domestic and international practitioners, to that speciality, thus increasing the expertise available to consumers in the longer term.
- 1.10 The former Competition Authority<sup>2</sup> had previously expressed concerns that legal partnerships in the form of solicitor-barrister partnerships might reduce access to justice for some consumers. Currently small solicitor firms can obtain access to high-quality advocates for clients. This allows them to compete with larger solicitor practices, and can be particularly beneficial for clients based outside of Dublin. If solicitors and barristers form partnerships, existing large solicitor firms might form partnerships with a number of recognised specialist barristers, and reduce the supply of barristers available to provide services to smaller solicitor firms – the likelihood of this would be dependent on whether such barristers worked exclusively for the partnership or also retained some element of private practice. How likely it is that well established barristers will form partnerships with solicitor firms is difficult to say. It seems more likely that less established barristers will be motivated to form these partnerships given the attractive prospects of having regular income and a chance to build a reputation within the firm.
- 1.11 In regard to access to justice, we note that the LSRA will engage in a future public consultation on the issue of direct access by clients to barristers for contentious issues. If this should lead to the LSRA lifting the restrictions surrounding direct access to barristers, it would likely militate against any prospective impediments to access to justice.

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<sup>2</sup> Competition Authority Study of the Legal Professions, 2006  
<http://www.ccpc.ie/sites/default/files/documents/Solicitors%20and%20barristers%20full%20report.pdf>

## 2. The measures that need to be included in any regulations adopted by the Authority in order to provide adequate protections to consumers procuring services from legal partnerships.

2.1 The CCPC considers that regulations should be adopted to ensure that legal partnerships have in place strong professional and ethical rules to govern the conduct of partners and the management of the business. Regulations should be adopted that ensure that each partnership has a robust internal complaints handling procedure. This will be particularly important in ensuring that consumers can have faith in the new partnership structures. Furthermore, ensuring that consumers are well informed as to their rights as consumers of legal services will be essential. The LSRA should give consideration to producing a Terms and Conditions document, in plain English, to be provided to clients of legal partnerships. The Law Society's "Terms and Conditions of Business", which can be relied on by all solicitor firms in the state, and their clients, is a useful example in this context. The document covers information about the firm including issues such as duty of care, confidentiality, fees and expenses, dispute resolution and the types of cases that a client might engage a firm on. Any such document should be drafted to include, among other things, any new regulations made by the LSRA as regards holding the moneys of clients, the role of the Chief Legal Costs Adjudicator, the complaints process (including a strong internal complaints handling process), and the roles of solicitors and barristers. The LSRA should also ensure that there are robust systems of financial control in place in legal partnerships and give consideration to the annual accounts reporting requirements of such partnerships.

2.2 The CCPC appreciates that solicitors and barristers will continue to be bound by the respective rules of their professions (e.g. codes of conduct etc) which provide assurance to consumers regarding ethical probity. However given concerns about the potential for legal partnerships to increase concentration in certain specialities, which are dependent on a high degree of expertise, the CCPC recommends that the LSRA use the powers conferred on it by Section 22 of the Act and issue a code of practice which provides adequate protection for the avoidance of conflict of interest within legal partnerships.<sup>3</sup> The Law Society's "A Guide to Good Professional Conduct for Solicitors" currently states that a solicitor should not act if there is a conflict of interest between two clients. Specifically Section 3.2 of the guide states that *"If a solicitor, acting with ordinary care, would give different advice to different clients about the same matter, there is a conflict of interest between the clients, and the solicitor should not act for*

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<sup>3</sup> Legal Services Regulation Act 2015, Powers of Authority in relation to codes of practice, Section 22 (1)

*both. The solicitor is also likely to have a conflict if either client could reasonably take exception to what the other client has asked the solicitor to do*".<sup>4</sup> There are specific exceptions to the rule which rely on the informed consent of the clients. Similar rules are in place for barristers in relation to their duty to a client.

- 2.3 The LSRA should ensure that adequate protections for consumers are in place in a code of conduct for legal partnerships which expand on those currently in place by the Law Society and the Bar Council. Such a Code should include standard rules regarding conflict of interest. That Code would in turn reduce any concerns regarding the potential for concentration of expertise as it would generally operate to prevent a partnership being able to represent both sides of a case as a clear instance of a conflict of interest. Furthermore, the existing codes of conduct applying to solicitors and barristers differ in a number of respects and it will be in the interest of consumers that an overarching code be introduced which is specific to legal partnerships – irrespective of the type of partnership involved, e.g. barrister partnerships or solicitor-barrister partnerships.
- 2.4 The LSRA should consider how best to enable the provision of useful and accurate information, including online resources, to consumers regarding the legal services available in the State. As regards information provision, it is noted that the legal regulators in England and Wales have collaborated on a website ("legalchoices.org.uk") which, among other things, provides information to aid consumer decision making, guides consumers in relation to the types of legal options available, and provides information on the types of lawyers they can engage with and how to make a complaint.
- 2.5 It is recognised that comparison is not straight forward in respect of legal services. Comparison tools – often centred on price – are nonetheless a valuable resource for consumers, can reduce search costs and can provide for enhanced transparency. At present this is an undeveloped feature of the market in Ireland. However it is a regulated feature of the market in England and Wales and a number of websites provide such a service to consumers. The LSRA should consider how any such comparison tools should operate to ensure that they provide a useful and trustworthy source of information for potential clients.

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<sup>4</sup> A Guide to Good Professional Conduct for Solicitors, 3<sup>rd</sup> Edition, "Chapter 3, Conflict of Interest" 3<sup>rd</sup> Edition, Law Society of Ireland, available at <https://www.lawsociety.ie/Documents/committees/conduct-guide.pdf>

3. **The information that legal partnerships are required to provide to clients, given the obligations that arise from the codes of practice and professional codes that will apply to practising solicitors and practising barristers (e.g. on compensation fund coverage or professional indemnity cover or provision of information regarding the basis of professional fees).**

See the response to Question 2.

4. **The manner in which the Authority deals with complaints from clients or other parties in relation to allegations of inadequate services, excessive costs and professional misconduct on the part of practising solicitors or barristers who work in legal partnerships.**

- 4.1 Complaints in relation to legal service providers should be handled by the LSRA in a consistent and proportionate manner. The CCPC is not aware of any justification for applying a different approach for complaints relating to solicitors or barristers that are a part of legal partnerships as distinct from other forms of legal practice. Standards and ethical guidelines should be similar for all solicitors and barristers regardless of the business structure they choose to operate under.
- 4.2 Currently solicitors who are partners in, or owners of, a solicitor firm are responsible for everything which happens in that firm including handling complaints. The LSRA should ensure that the same standards are applied to legal practitioners involved with the new legal partnership model.
- 4.3 Legal partnerships should be required to implement effective internal complaint handling procedures. It is possible that legal partnerships will have an increased incentive to resolve complaints before they are escalated to the LSRA, in order to avoid reputational damage. It is noted that evidence from the UK suggests solicitor-barrister partnerships solve more complaints in house than other types of solicitor firm when their size is taken into account<sup>5</sup>.

5. **The relationship between complaints about legal partnerships and complaints about the individual legal practitioners who work in those partnerships.**

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<sup>5</sup> Legal Services Board (2016) "Changes in the legal services market 2006/07 - 2014/15 –summary report Pg. 6 par 34".

- 5.1 The question of whether complaints about legal partnerships should be handled at entity or individual level depends on whether regulation is targeted at entities or individuals. It is noted that the Solicitors Regulatory Authority (SRA) in the UK has moved towards a system of entity based regulation, representing a change in emphasis from individual focused regulation. A breach of the SRA code will see the SRA seeking to determine whether it was due to either a failing of an individual, a systematic failure of the organisation, or a combination of both. The SRA can then take action against the responsible party or parties.
  - 5.2 Currently the Law Society in Ireland cannot punish firms or entities for violations of its code of conduct. This may result in ineffective regulation if breaches in the code of conduct are occurring as a result of systemic failures within organisations.
  - 5.3 Consideration should be given by the LSRA to the introduction of a flexible approach, allowing for individual sanction, sanction against the legal partnership, or both, depending on the circumstances.
6. **The form in which the Authority shall publish the register of legal partnerships under section 117 of the Act, and in particular, the information that the public register should include.**
- 6.1 International practice varies in respect of the publication of registers of legal practices and/or lawyers, with registers available at the offices of the relevant regulator and in some cases available online. The CCPC considers the register as a useful resource for consumers which the LSRA should make available both online and at its premises.
  - 6.2 An easily accessible register can aid transparency and – depending on what information is made available - better inform consumers in regard to the business model of the partnership and any relevant history of the partners and/or partnership. It is noted that the UK Legal Services Board requires, among other things, that alternative business structures provide previous names of the licensed body and any enforcement actions taken against the business, partners or employees be noted on the register.
  - 6.3 The CCPC notes that the Law Society currently requires certain information to be provided by solicitor practices, some of which is made publicly available on its website. We further note that Section 116(3)(e) permits the LSRA to regulate the “names that may be used by a practice.” The aim of any requirements made of partnerships should be to ensure that consumers can make informed

decisions. Relevant information to be required might include the name of the partnership; the head of the partnership / managing partner; the address and contact details; and, if the partnership has been formed out of an existing solicitor firm, or the merger of firms, the name of those firms.

- 6.4 Section 116 provides for ethical and professional standards to be observed. In the interests of transparency, it should be clear to clients of a partnership the relevant regulatory / disciplinary bodies. In order to protect consumers, it should not be possible for a partnership to be entered on the register without being in compliance with the Section 105 requirements for professional indemnity insurance.

**7. The registration requirements for legal partnerships that may arise from sections 104, 105 and 116 of the Act.**

See the response to Question 6.

**8. The consequences for legal partnerships and practitioners of a breach of the Act and/or any regulations made under the Act.**

See the response to Question 5.

**9. The events in respect of which the Authority should require notification from legal partnerships after registration apart from cessation of practice (e.g. should legal partnerships be required to provide periodic declarations to the Authority and if so, what information should be required in such declarations?).**

- 9.1 Any changes to the information required on registration should be notified.

**10. The relationship between on the one hand, the roll of solicitors and the roll of practising barristers and, on the other hand, the register of legal partnerships.**

- 10.1 It will be important in the interests of protecting the consumer to ensure that practitioners who are struck off from the relevant Roll, or voluntarily remove themselves, cannot continue to be registered with a legal partnership.

**11. The manner in which the establishment of the register of legal partnerships is funded, and also the manner in which the ongoing regulation, monitoring and operation of legal partnerships is funded with reference to the levy to be paid by the Law Society, Bar Council and certain barristers per Part 7 of the Act.**

11.1 The CCPC has no comment other than emphasising the importance of an effective and proportionate regulatory regime being introduced at minimal cost to the clients of the profession.

**12. The extent to which the creation of legal partnerships would have ethical implications for members of the professions and, if so, how those implications could be addressed in the professional codes.**

12.1 The CCPC does not consider there to be any additional ethical implications for the members of the profession arising from legal partnerships that do not already arise under current business structures. While barristers joining legal partnerships will be taking on a new role and have new responsibilities, their fundamental ethical obligations should not change - they will have the same duty of care to the client regardless of whether they are sole traders or part of a legal partnership.

12.2 Currently barristers who fail to act in the interest of their clients can be found to be in contempt of court or face professional misconduct proceedings. This situation will not change if barristers form legal partnerships. They will still be subject to Bar Council's Code of Conduct.

12.3 It had been claimed that the sole trader business model ensures that barristers are free from personal interests or external pressure, and that by making barristers accountable to other partners they might be tempted to avoid unpopular cases or advise clients in a manner which might bring revenue to the partnership but not necessarily be in the interests of the client. The CCPC does not share these concerns. Sole traders have a direct personal interest in their business. Indeed for some sole traders, a single large case may have very significant consequences, both financial and reputational, particularly in the early stages of their career. The sole trader may in fact be more exposed to the risk involved in a case than in an alternative business structure. A larger firm is able by virtue of its size to absorb and spread risk. So a larger firm is able to take on riskier individual cases, knowing that it is less exposed to the risk of failure than a smaller firm or sole trader. Therefore it would be reasonable to expect that legal partnerships will be in a position to take on more *pro bono* / "no foal

no fee” work as the cost and risk is spread. A barrister operating as a sole trader must shoulder the entire risk of a “no foal no fee” case and may be less likely to take on high risk cases as it could mean no payment at the end of the case.

- 12.4 Any lapses in ethical behaviour by practitioners will be answerable to the entire partnership. To take the example of barrister partnerships: the entire partnership will suffer in the event of an ethical lapse. As the reputation of the partnership is on the line, the partners have an interest in maintaining high standards and are likely to have in-house ethical rules. Therefore, the partnership business model may provide valuable additional ethical oversight for legal practitioners, which is not a feature of the sole-trader business model.

.... Ends ....