

**Legal Services Regulatory Authority Public Consultation on Certain Issues Relating to
Barristers**

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

29 May 2017

I. INTRODUCTION

1. The Legal Services Regulatory Authority (“the Authority”) is required under s 120(1) of the Legal Services Regulation Act 2015 to engage in a public consultation process on the following issues relating to barristers:
 - (a) The extent, if any, to which the restriction on legal practitioners, other than solicitors, holding the moneys of clients, as provided under section 45 of the 2015 Act, should be retained;
 - (b) The retention or removal of restrictions on a barrister receiving instructions in a contentious matter, directly from a person who is not a solicitor, and the reforms, whether administrative, legislative, or to existing professional codes, that are required to be made in the event that the restrictions are retained or, as the case may be, removed, and
 - (c) The circumstances and manner in which a barrister may hold clients’ moneys and the mechanisms to be applied for the protection of clients’ moneys which may be so held.

II. RESTRICTION ON BARRISTERS HOLDING CLIENT MONEYS

2. It is the view of the Honorable Society of King’s Inns (“the Society”) that the restriction on barristers holding client moneys ought to be retained. The principal reason for this conclusion is that, in the absence of compelling reasons for relaxation of the rule, in circumstances where the necessary protections are not in place and it is difficult to see how they could be put in place, any such relaxation would expose clients to unnecessary risks.
 - A. Absence of Compensation Fund
3. 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 Solicitors’ Compensation Fund”). The existence of such a compensation fund is an essential protection for clients where the legal services availed of may involve entrusting their own money – often large sums – to solicitors. It is respectfully submitted that the protection afforded by such a compensation fund has become a prerequisite to the lawful

handling of client moneys by lawyers. It has become a key component of the legal services infrastructure and is a protection that the public is entitled to expect. No relaxation of the prohibition on barristers holding client moneys could be introduced without the concurrent establishment of a fit for purpose compensation fund. Yet it is difficult to see how such a compensation fund could be established.

4. There are a number of critical questions which need to be addressed when asking whether or not such a compensation fund could be established in order to protect clients in the event of barristers being permitted to hold their moneys. The first appears to be the authority or body responsible for the administration of any such fund.
5. The Law Society administers the Solicitors' Compensation Fund. It is noteworthy that control over this important aspect of consumer protection and professional regulation has been retained by the Law Society and not confided in the Authority under the 2015 Act. From the Society's perspective, as a third party to that fund, it seems difficult to overstate the burden involved in its administration. The tasks entrusted to the administrator of a compensation fund range from, but are not limited to, dealing with and adjudicating upon client complaints, successfully managing the financial aspects and health of the fund, overseeing and enforcing contributions to the fund, and regulating those persons whose behaviour may expose the fund to a liability. It would require a significant staff with considerable and varied expertise and experience. It would require the employment of accountants to audit subscriber accounts. The Law Society is the only body who at present has the capabilities to administer a compensation fund of the nature required where lawyers handle client moneys. It would be necessary, if the s 45 prohibition were relaxed, to establish an equivalent administrator who adheres to the same high standards as the Law Society and who is capable of performing its functions to the same high level. The Society has neither the facilities nor the resources to assume such a role.
6. Another issue concerns the practical operation and viability of any such compensation fund for the clients of barristers. There is the obvious issue of subscription numbers. There are roughly five times more solicitors than barristers in the jurisdiction. This poses the immediate difficulty of establishing and sustaining a compensation fund on the basis of far fewer subscribers. The Society does not have access to precise details and commercial information surrounding the operation, health and sustainability of the Solicitors' Compensation Fund, but it is safe to assume that it is a difficult scheme to manage successfully on the basis of c. 10,000 subscribing solicitors. Reducing the number of subscribers, at a minimum, fivefold makes this much more difficult. Any consideration of the relaxation of the s 45 prohibition would have to

involve, *inter alia*, a detailed actuarial analysis of the viability of a compensation fund subscribed to by practising barristers.

7. Relevant to the number of potential subscribers – an issue inextricably linked to the very feasibility of a compensation fund – are the terms on which the s 45 prohibition might be relaxed, notwithstanding the Society’s opposition to same. There are a number of potential options ranging from a general relaxation to a relaxation in respect of certain categories of barristers only (eg, those in legal partnerships). This in turn could greatly reduce the numbers of barristers funding a compensation fund.

B. Unnecessary

8. The roles performed by solicitors and barristers in the administration of justice and the legal system in Ireland, whilst overlapping and interacting in significant ways, differ considerably. In particular, solicitors offer a much wider range of services beyond litigation and many of these services involve solicitors having to hold client moneys. Examples of such services include conveyancing and probate work. This represents a significant offering of solicitors which is not available from barristers. Numerous other examples can be cited of the distinct services offered by solicitors which may involve the handling of client moneys. In circumstances where barristers do not offer such services (and, as discussed below, where it is relatively straightforward to transfer between the professions should a barrister wish to offer such services), it seems that the relaxation of the prohibition on barristers holding client money is, to a considerable degree, unnecessary.
9. As regards the handling of client moneys in the course of litigation, the question whether or not the prohibition ought to be relaxed is directly connected to issue (b) raised in the consultation notice: whether or not the restriction on barristers receiving instructions in contentious matters directly from a person other than a solicitor ought to be retained. As set out below, it is the view of the Society that such a restriction ought to be retained. This is because of the ease of transfer between the professions and solicitors’ full rights of audience before the courts. Thus, where barristers are required to be instructed directly by solicitors, it is again unnecessary for barristers to be empowered to hold client moneys. It would expose clients unnecessarily to risks.
10. In this narrower context of direct access to barristers in contentious matters, it can be noted that there are alternative models to barristers themselves holding client moneys. One such model is that provided by the General Council of the Bar of England and Wales called

“BARCO”. BARCO is a third party company owned and operated by the General Council of the Bar of England and Wales which manages funds required to facilitate the provision of legal services directly by barristers. It coexists with the continued prohibition on barristers otherwise handling client money in England and Wales. Such a model does of course raise costs and administrative difficulties akin to those associated with the operation of a compensation fund.

11. Another factor to take into account, especially notable in circumstances where there is no great need for a change to the current rule, is the extra cost which would be added to the provision of legal services. As discussed above, it is not possible to permit barristers to handle client moneys without an effective compensation fund being in place to protect against the attendant risks. Such a compensation fund, however, involves very large management, administrative and funding costs. Given the relatively small number of barristers who would be funding any such compensation fund, the costs per barrister would be significant. This would lead inevitably to an increase in the cost of barristers’ services, without any real benefit to consumers.

C. Conclusion

12. Having answered the question of whether barristers ought to be able to hold client moneys in the negative, the Society does not propose to address issue (c) which raises the question of the potential circumstances and manner in which a barrister may hold client moneys. Regarding the mechanisms to be applied for the protection of client moneys, the Society has considered the Solicitors’ Compensation Fund which is a *sine qua non* of lawyers holding client moneys. However, in the absence of a suitable authority to administer a fund, as well as the difficulty of establishing and operating a compensation fund of the size and scope necessary to adequately protect clients, the Society does not believe that the protections required for the relaxation of the current rule are or will be in place. A similar position must also be adopted in respect of potential third party schemes such as “BARCO” operated by the General Council of the Bar of England and Wales.
13. There does not appear to be any need for the relaxation of the prohibition on barristers holding client moneys in relation to the areas of legal practice relevant to this branch of the profession. This, combined with the clear difficulties in establishing the necessary protective infrastructure, has led the Society to the view that changing the current rule would create an unnecessary risk to clients and would increase costs unnecessarily. There is considerable merit in retaining the clear statutory prohibition set out in s 45 of the 2015 Act in light of the risks involved in

permitting the handling of client moneys. It would be undesirable, where unnecessary, to introduce room for doubt, confusion or a grey area.

III. RESTRICTIONS ON BARRISTERS RECEIVING INSTRUCTIONS IN CONTENTIOUS MATTERS DIRECTLY FROM NON-SOLICITORS

14. The Society is of the view that no change should be made to the present regulation of the manner in which barristers receive instructions in contentious matters. The Society sees no reason for such a change. Furthermore, it would constitute an unnecessary erosion of the specialised role of the barrister advocate within the legal system.
15. Solicitors have full rights of audience before all courts in the jurisdiction. It is the case, therefore, that a person who wishes to instruct directly the lawyer who will, in addition to all of the roles performed by solicitors in the litigation process, also perform the primary advisory and advocacy functions can at present instruct a solicitor. Persons who, on the other hand, wish to instruct a barrister whose focus is on matters which have been the area of specialty of barristers, namely drafting, advice, advocacy, negotiation, and who does not undertake, in addition to these specialist tasks, all of the other responsibilities of a lawyer in litigation, may do so by instructing both a solicitor and a barrister. The two options are available at present, and are availed of at all levels of the legal system.
16. It is noteworthy that under the direct access system in England and Wales – a jurisdiction in which solicitors do not enjoy automatic full rights of audience as they do here – of the c. 2,850 barristers who offer direct access, out of a total of c. 15,000 practising barristers in England and Wales, only 59 offer litigation services. This is a strong contra-indication to any argument as to the necessity, practicability or desirability of a direct access service in which barristers represent clients in court without the instructions of a solicitor.
17. The Society acknowledges the existence of concerns amongst some junior members of the profession with the restriction on direct access as it operates in the District Court. . It is the view of the Society, however, that changing the rules on direct access is not in the interests of the profession as a whole, nor indeed is it in the best interests of clients or the administration of justice. The Society believes that the concerns raised do not warrant a general change of this nature but rather that other measures and reforms may be a more effective means of addressing the said concerns.

18. Moreover, owing to the ease with which barristers and solicitors may transfer between their respective professions, there is even less need to change the current system. This addresses the concerns of any barristers who may wish to provide, in addition to the services they currently provide in the litigation process, the services provided by solicitors.

19. The procedure for transferring from the profession of barrister to solicitor is as follows. Persons who have been called to the Bar and for a minimum of three years have either practised as a barrister in the State, been a member of the judiciary, been employed in the provision of services of a legal nature and/or been employed by the State in the provision of services of a legal nature are eligible to apply to transfer to become a solicitor. Applicants are required to send the following documentation and fee of €70 to the Law Society:
 - A certificate of being in good standing while practising from two of the benchers of the Society confirming the period of practice;
 - A certificate from the Registrar of the Society confirming that the applicant passed the Barrister-at-Law degree, certifying the results of that degree, that the applicant passed or was exempted from an Irish examination and the date they were called to the Bar;
 - An up-to-date CV setting out either the history of their work at the Bar and/or as a member of the judiciary and/or the history of their employment;
 - In the case of a term of employment, a reference from the applicant's employer confirming the period that the applicant has been engaged under a contract of employment full time in the provision of services of a legal nature and the nature of the work done. A character reference should be furnished from a solicitor outside the applicant's firm which should verify the applicant's work;
 - Certified copies of academic qualifications (*ie*, law degree if obtained, listing subjects and results);
 - Confirmation from the Society that the applicant has been voluntarily disbarred;
 - Details of the office of a practising solicitor where the applicant intends to complete any in-office period;
 - If applying for an exemption from the 6 months in-office experience, confirmation from the applicant of the basis of the application and if relevant, confirmation from the applicant's firm of any period worked, the experience obtained and whether the work done was equivalent to that of a solicitor.

20. On receipt of the application, the applicant may be called for interview by the Law Society. The next step is referral of the application to the Education Committee of the Law Society for

a decision on whether the applicant is eligible to be admitted to the Roll of Solicitors and what conditions, if any, may apply. The Education Committee meets approximately 10 times annually. Eligible applicants are thereafter required to undertake the Essentials of Legal Practice Course (ELPC), which runs annually in August or September, and covers professional conduct, solicitors' accounts, probate and taxation and conveyancing. There is no examination. The fee in 2017 for the ELPC is €2,830.

21. Applicants may then be obliged to spend up to a maximum of six months in the office of a practising solicitor, for the purpose of receiving due instruction and obtaining experience in the practice and profession of a solicitor. On completion of the ELPC, the in-office period and on satisfaction of any other conditions outlined by the Education Committee, the applicant may apply to be admitted to the Roll of Solicitors.

22. This aspect of the interrelationship between the two professions is evidenced by the figures for voluntary disbarments effected by the Society at the request of barristers. These figures can be assumed to equate to the number of barristers transferring to the solicitors' profession as this, it is submitted, can be regarded as the near-exclusive reason why barristers seek voluntary disbarment. In 2014, 17 barristers were voluntarily disbarred; in 2015, 14 barristers were voluntarily disbarred; in 2016, 33 barristers were voluntarily disbarred; in 2017, as of the date of these submissions, 12 barristers have been voluntarily disbarred.