

SUBMISSION OF THE ASSOCIATION OF JUDGES OF IRELAND TO THE LEGAL SERVICES REGULATORY AUTHORITY

Introduction

1. The Association of Judges of Ireland (“AJI”) comprises most of the judges of the Supreme Court, the Court of Appeal, the High Court, the Circuit Court and the District Court. Among the aims and objectives of the AJI (as set out in Part B of its Constitution) are:-
 - (a) To maintain and promote the highest standards in the administration of justice; and
 - (b) To promote the exchange of ideas on the administration of justice.
2. The members of the AJI wish to make submissions to the Legal Services Regulatory Authority (“the Authority”) in response to an express invitation received from the Authority on 9th May, 2018, as part of a public consultation process preparatory to a report to the Minister in relation to the initial and continuous education and training of legal practitioners (solicitors and barristers). The AJI is grateful to be consulted in respect of this important report.
3. The members of the AJI have direct and daily experience of the results of legal professional training in Ireland. As explained in more detail below, professional training of lawyers (and the standard of that training) is a matter of immediate and direct importance to the work of the courts in the administration of justice. In this context, the AJI notes that in its notice seeking submissions, the Authority has drawn specific attention to the requirement contained in Section 13(4) of the Legal Services Regulation Act, 2015 (“the 2015 Act”) that, in performing its functions in regulating the

provision of legal services under the 2015 Act, it will have regard to the objectives of (*inter alia*):-

(a) Protecting and promoting the public interest;

(b) Supporting the proper and effective administration of justice and

(f) Promoting and maintaining adherence to the professional principles of independence and integrity, acting in the client's best interests, compliance with duties owed to the court and confidentiality

4. While the AJI notes that there are other considerations to which the Authority is to have regard under Section 13(4), the AJI, in this submission, wishes to address in particular the objectives identified above. There is a clear overlap between these objectives which does not require explanation.
5. The AJI notes also the terms of reference of the LSRA in the preparation of this report, as set out in section 34(3) of the 2015 Act. These include the standards of education and training for legal qualifications, standards required for the award of legal professional education and training and consideration of whether there is any need for accreditation of bodies or institutions in the provision of legal professional education and training and related matters. We will also address these important issues briefly below.

The importance of appropriate professional training to the administration of justice

6. It is of critical importance to the courts that practitioners (whether they be barristers or solicitors) have appropriate and comprehensive professional training. The administration of justice depends, to a very large extent, on the integrity of practitioners, the ethical standards required of practitioners and compliance by practitioners with their duties and obligations to the court. It also depends very heavily upon the competence and skills of the practitioners appearing before the courts.

7. It is of crucial importance to the courts that judges can rely on practitioners before them to discharge their ethical duties and obligations. If judges could not rely on practitioners to discharge their ethical obligations, this would have very serious consequences for the administration of justice. It is therefore vitally important that professional training of barristers and solicitors should be undertaken in a manner that ensures that those emerging from the system will be imbued with the values necessary to discharge their obligations to the courts, and that they should have a complete and comprehensive understanding of what those obligations are and how they should be honoured. Any dilution or undermining of those values would have very significant consequences for the proper and effective administration of justice.

8. In short, judges must be able to rely on what is said to them by an advocate (whether that is a solicitor or a barrister) in proceedings before the courts. This has been recognised for a very long time. In ***Law Society of Ireland v. Walker*** [2007] 3 IR 581 at p 588, Finnegan P. drew attention to observations made by an Irish judge, Crampton J., in 1844 where he said in ***R v. O'Connell*** (1844) 7 Ir. Lr. 261 at pp 312-313:-

*“This court in which we sit is a temple of justice; and the advocate ...as well as the judge upon the bench, are equally ministers in that temple. The object of all equally should be the attainment of justice ...Another doctrine broached by another eminent counsel I cannot pass by without a comment. That learned counsel described the advocate as a mere mouth-piece of his client; he told us that the speech of ...counsel was to be taken as that of the client; and thence seemed to conclude that the client **only** was answerable for its language and sentiments. Such, I do conceive, is not the office of an advocate. His office is a higher one. To consider him in that light is to degrade him. I would say of him ...- he is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law – he will not wilfully misstate the*

*facts, there would be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual and **retained** and remunerated ...for his ...services, yet he has had a prior and perpetual **retainer** on behalf of truth and justice; and there is no Crown or other licence which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer”.*

(Emphasis in original).

9. While the language of Crampton J. may be somewhat archaic, the underlying message is as valid today as it was in 1844. The observations of Crampton J. were expressly approved by Finnegan P. in **Law Society of Ireland v. Walker** (above) and by Salmon L.J. (as he then was) in **Rondel v. Worsley** [1967] 1 QB 443.
10. Very similar sentiments were also expressed more recently by Mason C.J. in the High Court of Australia in **Giannarelli v. Wraith** (1988) 165 CLR 543 at pp 556-557 where he said:-

“The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client’s case

It is not that a barrister’s duty to the court creates such a conflict with his duty to his client but the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister’s duty to the court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case on which he has an eye, not only to his client’s success, but also to the speedy and efficient administration of justice.

In selecting and limiting the number of witnesses to be called, and deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case.

.....”

11. In the same case, at p 557, Mason C.J. explained that:-

“...Our system of justice as administered by the courts has proceeded on the footing that, in general, the litigant will be represented by a lawyer who, not being a mere agent for the litigant, exercises an independent judgment”.

12. Although the observations of Mason C.J. were made in the context of barristers, the same duties are imposed on solicitors participating in court proceedings either as advocates or as instructing solicitors of counsel. This is clear from a decision of Finnegan P. in ***Law Society of Ireland v. Walker*** (above). In that case, Finnegan P. held (*inter alia*) that:-

(a) A solicitor has a duty to the court not to mislead the court. The duty is paramount to the duty which he owes to his client;

(b) Counsel and litigants have a like duty;

(c) A solicitor must not permit his client to mislead the court.

13. It is obviously very important that legal practitioners, emerging from professional schools, should be well read in the law and that they should have

a thorough knowledge of court rules and procedures. However, in the view of the members of the AJI, it is also vitally important (and crucial to the proper and efficient administration of justice) that practitioners should not only be aware of the duties owed by them to the court (as summarised in the case law discussed above) but that they should also be aware of how these duties arise in practice and how they should be discharged in practice. As the case law shows, these duties are inextricably linked with the due administration of justice. As Mason C.J. observed, the efficient administration of justice depends on advocates discharging this fundamental duty which they owe to the courts. There is a clear public interest in ensuring that advocates are not only aware of their duty, but that they fully discharge the duty. Not only must a court not be misled, but advocates must always have in mind the obligation to assist in the efficient and cost-effective hearing of court proceedings. In ***Unioil International Pty Ltd v. Deloitte Touche Tohmatsu (No. 2)*** (1997) 18 WAR 190, Ipp J. in the Supreme Court of Western Australia said at p 193:-

*“Traditionally, lawyers owe a duty of honesty and candour to the court. It is the general duty of lawyers not to mislead the court by stating facts which are untrue, or mislead the judge as to the true facts, or conceive from the court facts which ought to be drawn to the judge’s attention, or knowingly permit a client to deceive the courtA trend towards a stringent duty of disclosure has become discernible Further, in modern times, there is an overriding duty on lawyers to assist on the prompt and economical disposal of litigation”*¹

14. The inextricable link between the duty of advocates and the administration of justice was also emphasised by Parker J. in a further case before the Supreme Court of Western Australia, namely ***Kyle v. Legal Practitioners’ Complaints Committee*** [1999] WASCA 115 where Parker J. said (at p 66):-

¹ This passage was also approved by Finnegan P. in ***Law Society of Ireland v. Walker*** (discussed above).

“The duty of counsel not to mislead the court in any respect must be observed without regard to the interests of the counsel or of those whom the counsel represents. No instructions of a client, no degree of concern for the client’s interest, can override the duty which counsel owes to the court in this respect. At heart, the justification for this duty, and the reasons for its fundamental importance in the due administration of justice, is that an unswerving and unwavering observance of it by counsel is essential to maintain and justify the confidence which every court rightly and necessarily puts in all counsel who appear before it”.

15. The members of the AJI believe that it is crucial to the daily work of judges in the courts that they can rely on what is said to them by advocates who appear before them. While there will always be a few individuals who will fail to adhere to the appropriate standards, it is the experience of the AJI’s members that graduates of the Law Society and the King’s Inns are not only aware of the duties which they owe to the courts, but, in the main, properly discharge those duties such that the members of the AJI can rely on them to act with integrity and in compliance with their ethical obligations to the court. The members of the AJI believe that the fact that the professional educational courses run by the Law Society and the Kings’ Inns involve tuition by experienced practitioners is of immense importance in ensuring that graduates from those courses will have a complete understanding of their ethical obligations and duties to the court. Most importantly, they will be aware of how these duties are to be performed in practice, and will be aware, through practical example (derived from actual experience), as to how the duties are to be correctly and comprehensively discharged. The AJI is very concerned that the ethical obligations owed to the court cannot be fully learned or appreciated solely by knowledge of the theory underlying the obligations. It is essential, in the AJI’s view and that of its members, that the duties (and the manner in which they are to be discharged) are explained and understood at a practical level. In the view of the AJI, this can only realistically be achieved if any courses of professional education are undertaken under the aegis of experienced

practitioners. That is why the courses currently offered by the Law Society and King's Inns respectively have such value.

16. The AJI submits that it would be important that the work undertaken by both the King's Inns and the Law Society should be maintained and that nothing should be done which would undermine their work. If additional colleges of professional education are to open, it would be essential, in the view of the members of the AJI, that very stringent requirements should be put in place to ensure that any courses undertaken by such colleges involve experienced practitioners who are aware not just of the theory underlying ethical obligations but also how these obligations are honoured in practice.
17. Similarly, the AJI is concerned that the high standards of entry to institutions such as the King's Inns and the Law Society should be maintained, as well as the standard of teaching in those institutions of court rules and procedures, and skills essential for practice in the courts. AJI submits that in its deliberations, the LSRA should not assume that all third level law degrees are of the same standard, and that such standard is sufficient for entry into professional training courses. No doubt the King's Inns and the Law Society will make their own detailed submissions in this regard, but for its part AJI is concerned that those coming into the profession are well versed in the law, and to a reasonably uniform standard. It hardly needs to be said that all of the above is essential not just to ensure a minimum level of competence for practice in the courts, but to promote the highest standards of litigation practice and alternative dispute resolution (where appropriate) in the public interest generally, and in the administration of justice in particular.
18. From the perspective of the judiciary, one of the useful features of the organisation of the King's Inns is the involvement in the Inns of members of the judiciary in its governance generally and, more significantly for present purposes, in the oversight of its courses of education. The judiciary is represented on the Council and on each of the committees of the King's Inns and in particular on the Education Committee which is also usually chaired by a senior member of the judiciary. In that way, the judiciary is able to have an

active input in the formulation of policy relating to the education of barristers and in the oversight and regulation of that education. Accordingly, the judiciary has an opportunity in practice to ensure that the courses of education provided at the King's Inns are maintained at an appropriately high standard and that those delivering the courses are suitably qualified and experienced such that graduates of the King's Inns will be imbued with the values necessary for advocates to properly understand and perform the duties and obligations that are required for the effective and efficient administration of justice. The AJI believes that this input by the judiciary in the education of barristers is very valuable and that it is crucially important that it should be maintained in the future.

19. Members of the judiciary also provide assistance to the Law Society Law School, in the delivery of courses in the School, in acting as external examiners (in which they have a first hand input into maintaining standards of training if solicitors in both criminal and civil litigation) and in less formal ways, such as acting as judges in moot court competitions run by the Society. Again, the AJI believes that it is crucially important that this input by the judiciary should be maintained in the future.

20. All of this means that if the LSRA considers it appropriate to recommend the licencing of colleges other than the King's Inns or the Law Society, high standards for initial and ongoing accreditation of such institutions will need to set. Additionally, in considering this issue, it is submitted that LSRA will need, in a small country like Ireland to pay careful attention to economies of scale. If there are too many service providers, this could undermine the ability of the existing service providers to maintain their standards. This is to some extent illustrated by the fact that the Law Society, having opened a law school in Cork in order to facilitate students in the Munster area, was forced to close for economic reasons because of insufficient uptake by students. In this regard, it is worth observing that both the King's Inns and the Law Society schools are run on a non-profit basis, with significant input from practitioners who often receive little more than an honorarium for their services. It is difficult to

envisage how commercial institutions could provide courses of equivalent standard at any less cost to students.

The Association of Judges of Ireland
10th June 2018.