



THE BAR
OF IRELAND

The Law Library

*Submission by Council of The Bar of Ireland to
the Legal Services Regulatory Authority*

*Section 118 Legal Services Regulation Act 2015
– Legal Partnerships*

24 March 2017

TABLE OF CONTENTS

PART 1: EXECUTIVE SUMMARY	3
PART 2: SCOPE OF THE CONSULTATION	6
PART 3: SUBMISSIONS ON INDIVIDUAL POINTS	8
APPENDIX 1: COMPARATOR JURISDICTIONS	32

PART 1: EXECUTIVE SUMMARY

The Council of The Bar of Ireland (the Council) is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of over 2,200 practising barristers.

The Bar of Ireland is long established and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the regulatory framework for barristers.

In approaching this submission the Council wishes to ensure that there is a maintenance of high standards in the regulation for legal practitioners and that the new regime of regulation continues to serve and uphold the proper administration of justice and ensures access to justice to clients of all backgrounds who engage with legal practitioners. It should be ensured that all legal practitioners, regardless of the practice structure that they use, continue to operate in the best interests of their clients in a manner consistent with longstanding and recognised ethical values underpinning the administration of justice. There must be no diminution in access to expert advocates on behalf of any person in the State.

The Council is supportive of innovation within the legal system but only where the outcome is the delivery of a better legal system supported by a robust regulatory framework which has taken account of the relevant impact on the public interest in access to justice.

In that regard, the Council does not believe that the client of legal services of a barrister is a “consumer” in the same manner as other persons seeking services. The public duties of the barrister to the court override all others and the use of the word “consumer” is not appropriate in those circumstances.

Account must also be taken of the structure of legal representation and advices to clients in the State where that client may not be paying for their representation either when as represented on a “no foal no fee” basis or where the client is in receipt of legal aid *i.e.* public monies are being paid for the barrister’s work. Thus, the Council considers that the use of the word “consumer” is not apposite for the role of the barrister on behalf of their client and this informs its approach to the submission on the regulation, monitoring and operation of legal partnerships in the State.

In that regard, the within submission raises a number of concerns about the operation of legal partnerships generally as defined by the *Legal Services Regulation Act 2015* (the 2015 Act) and how they can operate, in practical terms, in a manner that is consistent with the public interest in the due administration of justice.

The Council is concerned that the framework, both legislative and regulatory, for establishing legal partnerships requires further deliberation in the context of other research functions which the Authority has been given and in the context of the provisions of Part 8 of the Act itself.

The following key concerns are elaborated upon in the submission:

- The Council considers that further research should be undertaken on the economic consequences arising from the establishment and formation of legal partnerships and the possible risk of distortion to the market for legal services from barristers. Issues which were raised by the Competition Authority Report in 2006¹ and in other reports on the market for legal services have not been addressed by quantitative research. Concerns regarding access to justice still remain and should be addressed in the context of the regulation of legal partnerships from the outset;
- The Council notes that no other jurisdiction which has a split legal profession (solicitors and barristers) permits the operation of this type of legal partnership. In fact, the Council notes that this type of legal partnership model has been considered and later rejected by other jurisdictions while the models in place in England and Wales contain differences of approach and have led to regulatory issues from which the Authority could learn;
- The establishment of legal partnerships involving solicitors and barristers poses substantial and, perhaps, insuperable difficulties at the present time where s.45 of the 2015 Act prohibits barristers holding client monies. Research on the issue of barristers holding client monies is to be conducted pursuant to s.120 of the 2015 Act and the operation of solicitor-barrister partnerships pending the results of that research may be premature. Legal advices on this issue might be sought by the Authority;
- The rules for the commencement and operation of legal partnerships, including corporate governance requirements, will require careful consideration. It may also be necessary for the Authority to seek legal advices on the operation of a “*legal partnership*” in a manner consistent with the *Partnership Act, 1890* where partners may be solicitors and barristers offering different services. Issues concerning joint and several liability, the duties of partners, a requirement to have a “managing partner” who is responsible to the Authority for the operation of the partnership, partnership dissolution and the distribution of partnership assets upon dissolution will inevitably arise;

¹ Competition Authority, *Competition in Professional Service: Solicitors and Barristers*, published on 11 December 2006.

- The Council believes that key concerns for legal practitioners such as the avoidance of “conflicts of interest” and the continued operation, if at all, of the Cab-Rank Rule² for barristers in partnerships need to be addressed;
- In recognition of the different roles and functions of solicitors and barristers (holding client money etc.) there may be a need for separate codes of conduct or professional codes to be introduced for solicitor-barrister partnerships and barrister-barrister partnerships, with the attendant cost of regulating and monitoring same to be considered;
- Questions remain over how effective regulation and oversight of the establishment, on-going operation and cessation of practice of legal partnerships is to be achieved. Issues concerning continuing professional development requirements and the protection of client files and data need to be considered.

Accordingly, the Council considers that the establishment and operation of legal partnerships in the absence of a comprehensive and planned regulatory infrastructure could potentially damage rather than enhance the provision of legal representation to the general public and could undermine public confidence in the legal professions and in the administration of justice generally.

The submission will address those questions raised in the Invitation for Submissions³ (the invitation) that the Council believes are capable of being addressed at this time. Where appropriate, the Council will make suggestions about appropriate safeguards that may be required before the introduction of legal partnerships can be said to be in the public interest. The Appendix to the submission provides information regarding the operation of other practice models in the relevant comparator jurisdictions and some trends and themes emerging from the analysis undertaken are also set out to assist the Authority’s deliberations.

² See Rule 2.1 in the Code of Conduct of the Bar of Ireland adopted on the 23rd July, 2014.

³ Invitation by the Legal Services Regulatory Authority for Submissions, 24th February 2017.

PART 2: SCOPE OF THE CONSULTATION

The Authority's invitation for submissions of the 24th February 2017 sets out the following matters for consideration:

1. The benefits and risks for consumers of legal services ("services") that can be reasonably expected from enabling them to access legal partnerships.
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.
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).
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.
5. The relationship between complaints about legal partnerships and complaints about the individual legal practitioners who work in those partnerships.
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.
7. The registration requirements for legal partnerships that may arise from sections 104, 105 and 116 of the Act.
8. The consequences for legal partnerships and practitioners of a breach of the Act and/or any regulations made under the Act.
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?).
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.
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.
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.

The consultation document states that the above list of issues is not closed and it adds that respondents may wish to comment also on any other issues which the Regulations may address per Section 116(3) given the objectives set out in Section 13(4) of the Act and the issues referred to in Section 116(5) of the Act.

PART 3: SUBMISSIONS ON INDIVIDUAL POINTS

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

Introduction:

- The Council re-affirms its commitment to the reforms concerning the determination of legal costs which were enacted in Part 10 of the 2015 Act. The Council notes that those reforms in the 2015 Act followed both extensive research on the topic of legal costs and careful deliberation on the reforms that were required to be introduced.
- While it is beyond the remit of the Authority itself to do so, the Council considers that the reforms on legal costs in Part 10 of the 2015 Act should be introduced without delay. This would allow for legal costs issues to be determined in a more transparent manner for clients and legal practitioners alike.
- The Council made extensive submissions on the issue of legal partnerships during the course of the legislative history of the 2015 Act in the Oireachtas and will not rehearse them further at this stage in minute detail. However, it re-iterates that for the reasons outlined in those submissions⁴ the Council cannot identify meaningful benefits for members of the public arising out of the existence of legal partnerships.
- Whilst there may be some superficial benefits, such as being able to visit a solicitor and barrister operating in the same premises, the Council considers that such benefits are minimal in nature and are undermined to a significant extent by the other issues that arise in relation to such partnerships and their impact on access to justice and the administration of justice generally.

Competition Authority Report (2006):

- The Council recalls that the Competition Authority Report⁵ in 2006 raised concerns about the introduction of Legal Partnerships (termed Legal Disciplinary Practices in its report). The Competition Authority did not recommend the establishment of legal

⁴ This includes the Regulatory Impact Assessment carried out while the Act was before the Oireachtas: *Compecon, An Economic Analysis of the Government’s Proposed Regulatory Regime for the Legal Profession in Ireland*, 3rd March 2012.

⁵ Competition Authority, *Competition in Professional Service: Solicitors and Barristers*, published on 11th December 2006.

partnerships at that time and noted that they raised “possible issues surrounding access the justice and regulation” which merited further research and examination.⁶

- In particular, it was noted that if such practices were permitted “it is possible that a large number of the most capable advocates would be enticed to work for the larger city-based firms” and “highly unlikely that barristers would form partnerships with small rural firms” with the result that “smaller rural and urban clients would no longer be able to access these advocates” and a consequent “reduction in the supply and quality of advocacy services for smaller buyers.”⁷
- This was illustrated by the Competition Authority where it cautioned of a potential diminution of competition in specialist areas if such practices were introduced. It referred to specialist areas such as defamation where there are only a small number of highly experienced and expert barristers and stated “[i]f even one of these were to join a large city firm this could have a negative effect on access to justice and competition by allowing lower quality barristers charge a higher rate and/or allowing existing expert barristers charge a higher fee.”⁸

Access to Justice, Competition and Prices:

- The Council notes that the Department of Justice and Equality’s Regulatory Impact Analysis⁹ lacked any quantitative analysis of the benefits or risks of legal partnerships. Some such quantitative analysis seems to be required at this juncture before legal partnerships operate. Indeed, the demand for such legal partnerships might be examined as no such demand has ever been tested or quantified itself.
- The Council also maintains its concerns, which were also echoed by the Competition Authority and in the Bain Report (for Northern Ireland), that there is potential for a rise in prices due to monopoly developing in certain sectors of the market.
- A monopoly may arise where, for example, a legal partnership specialising in the area of defamation law or medical negligence law and which includes the most established barristers begins to operate in Dublin. The monopolisation of such legal practitioners in one partnership may have knock-on effects for access to justice by members of the public, for prices and for entry into practice by legal practitioners in

⁶ Paragraph 5.134

⁷ Para 5.127 and 5.128

⁸ Para 5.129.

⁹ November 2013:

<http://www.justice.ie/en/JELR/RIA%20LSRB%20MASTER%20PDF%20VERSION%20PDF%20NOV%202013.pdf/Files/RIA%20LSRB%20MASTER%20PDF%20VERSION%20PDF%20NOV%202013.pdf>.

the areas concerned. Such a legal partnership could be in a position to set the prices for services provided by the partnership and have a chilling effect on entry into the professions.¹⁰

- Thus, the potential for larger city firms to recruit barristers operating in specialist areas and deprive clients of solicitors in smaller firms throughout the State of those services may arise. Currently, the poorest client in the most rural part of Ireland can, through their solicitor, engage the services of the best advocate at the Bar.¹¹ With the emergence of legal partnerships the wealthiest and largest firms may monopolise those expert advocates instead, who would then be un-available to the smaller firms. There is also the risk to the current practice of many barristers undertaking low-paid, publicly funded work and the risk to the “*pro bono*” tradition.
- Given the make-up of the legal professions in the country at present it appears to the Council that these matters should be quantified and researched so that the potential consequences of the introduction of legal partnerships is assessed and appropriate measures adopted to deal with any such adverse consequences.
- The Council also believes that there is a risk for prices to rise due to the removal of economies of scale provided through the Bar of Ireland, which provides services such as well-stocked libraries, work spaces and printing for in excess of 2,000 barristers. A legal partnership must factor in the cost of its overheads into the price charged to clients.
- Bearing those concerns about access to justice in mind and having regard to the features of the Irish market for legal services, the likely impact that the operation of legal partnerships should be further researched so that their establishment does not undermine rather than enhance the availability of legal representation for all clients in the State regardless of geographical or monetary issues. Some quantitative analysis with particular emphasis on the Irish market for legal services should be undertaken.
- Due account would have to be taken in any assessment of the market for legal services in this jurisdiction. There are many small solicitors firms throughout the country which rely on the Bar to provide expert advice and advocacy services to their clients. In addition, the difference between the solicitor profession in England and Wales and in the State itself concerning the right of audience to address the court is

¹⁰ See paragraph 6.4 of the Bain Report.

¹¹ See rule 2.1 of the Code of Conduct of the Bar of Ireland, adopted on the 23rd July 2014.

a significant issue which may have had an impact on the changes made in that jurisdiction but which does not apply here.¹²

- Thus, while it is acknowledged that there have been changes to the models of legal practice in England and Wales (which is discussed further below) the Council cautions that the Irish market for legal services is different and that a direct comparison is not apposite.
- The matter should be researched in the appropriate manner so that the introduction of legal partnerships is planned and that appropriate regulations are put in place to ensure that their introduction does not result in a shrinking of the available expertise of skilled advocates to all clients in the State.
- For instance, the Authority may have to consider that any licensing/registration requirements for the commencement of practice of a legal partnership would include some assessment of the benefits and the risks to competition in legal services and access to justice generally. If the Authority deemed that the formation of an intended legal partnership would be damaging to the objectives contained in s.13(4) of the 2015 Act, including access to justice and competition, then it should be in a position to block the formation of that particular legal partnership.
- These matters should be assessed at this juncture so that the landscape for the regulation of the establishment/formation of legal partnerships and the expected changes to the market for legal services in the State, including the effect on access to justice for poorer persons in Irish society, is examined in a proper manner and planned for in appropriate terms. The powers and regulations that would be required by the Authority itself to ensure that it can fulfil its functions should be considered.

Other Jurisdictions:

- The Council believes that the summary of the position in other jurisdictions shows that the majority of those countries/states do not allow for legal partnerships in the manner now legislated for under the 2015 Act here.
- Indeed, no jurisdiction has legislated for legal partnerships in the same manner as legal partnerships are defined by s.2(1) of the 2015 Act. There are no such partnerships in

¹² The Council notes that while solicitors in England and Wales are granted rights of audience in all courts upon qualification/registration they cannot exercise those rights in the higher courts until they have complied with additional requirements prescribed by the SRA. See SRA Higher Rights of Audience Regulations 2011.

Northern Ireland, Scotland, Hong Kong, New Zealand, South Africa or in the Australian states discussed in the Appendix below. The Bain Report¹³ in Northern Ireland and the Competition Authority report here highlighted risks attaching to the formation of legal partnerships for clients and the provision of legal services.¹⁴

- In that regard, the Council believes that the concerns that gave rise to such regulation in other countries and which were also identified by the Competition Authority in its report here warrant further deliberation before legal partnerships begin operating in the State.
- The only comparable jurisdiction that has introduced some such model is England and Wales. But, as stated above, the market for legal services in England and Wales is different in terms of population and in the make-up of the professions themselves. Further, the economic case for Legal Partnerships in England and Wales insofar as clients of solicitors and barristers are concerned is underwhelming.
- While the Legal Services Board, “*Evaluation: Changes in the legal services market 2006/2007 – 2014/15*” (July 2016) report found that Legal Disciplinary Partnerships had acquired a considerable market share,¹⁵ it noted that that there was continued confusion among individual consumers as to which bodies were regulated with a broad assumption that all legal service providers were regulated.¹⁶
- The 2016 Evaluation also noted only a marginal increase in clients shopping around for legal providers between 2011 and 2015 as well as a small improvement in how easy consumers find it to compare providers.¹⁷ Further, while there had been a larger volume of service complaints about Solicitors’ Regulatory Authority regulated entities, such entities were resolving a greater proportion of those service complaints at the first tier (i.e. through the firm’s own in-house complaints procedure). This was attributed to new business models – Legal Disciplinary Partnerships and Alternative Business Structures – which had better complaint resolution ratios.¹⁸

¹³ Legal Services Review Group, *Legal Services in Northern Ireland: Complaints, Regulation, Competition*, 2006, “Bain Report”

¹⁴ See generally Appendix to this submission.

¹⁵ Including in the areas of: consumer problems (58%); commercial conveyancing (32%); intellectual property rights (32%); business affairs (31%) and, property (27%).

¹⁶ <https://research.legalservicesboard.org.uk/wp-content/media/2015-2016-FINAL-Market-Evaluation-Main-report11.pdf>, page 89. See also pages 90 to 92. The Report also noted that: (i) LDPs and ABSs were associated with higher levels of productivity; and, (ii) new regulatory arrangements in the form of permitting ABS and direct access services for barristers were associated with greater levels of innovation but that such innovations were more likely to be of benefit in service development and quality improvement than in delivering lower cost services at page 18.

¹⁷ <https://research.legalservicesboard.org.uk/wp-content/media/2015-2016-FINAL-Market-Evaluation-Main-report11.pdf>, page 95.

¹⁸ <https://research.legalservicesboard.org.uk/wp-content/media/2015-2016-FINAL-Market-Evaluation-Main-report11.pdf>, pages 119, 123 and 124.

- A separate report commissioned by OMB Research for the Legal Service Board, entitled *Prices of Individual Consumer Legal Services* (April 2016), found that there were no significant differences between the prices charged by Alternative Business Structures and those charged by other firms.¹⁹
- The Council believes that the research in England and Wales has not shown any substantial benefit to clients where legal partnerships (as allowed for under the regulatory regime there) have been allowed to operate. Rather, the economic benefits appear to be to the lawyers themselves operating in such partnerships. That was hardly the intended consequence of allowing such partnerships to operate in that jurisdiction and points to the importance of assessing whether there is, in fact, any benefit to clients from legal partnerships.
- Other regulatory issues have arisen in England and Wales concerning the operation, monitoring and oversight of legal partnerships. While it is acknowledged that the form of regulation under the 2015 Act differs from that implemented in England and Wales, nevertheless it is considered that the issues that have arisen in that jurisdiction should inform the Authority's planning on these matters to ensure that it is in a position to oversee and supervise such legal partnerships and that the general public are not exposed to any risks by their operation. These are addressed further hereunder and in the Appendix to this submission.

Clarity about the Role of the Lawyer Concerned:

- Both in the State and in the comparator jurisdictions where barristers and advocates continue to act as independent sole practitioners clients enjoy clarity regarding the roles of the lawyers they have engaged, the work to be undertaken by each lawyer and the steps that can be taken should a problem arise.
- The Council submits that the simplicity of the existing model ensures that clients have clarity regarding the independence of their lawyers, the type of legal privilege that clients can expect to attach to their communications and the nature of the duties owed to the client and to the court.
- The introduction of new practice structures for barristers and solicitors together risks causing considerable confusion amongst the public as to the role of the different branches of the profession generally and with specific regard to the services to be provided to individual members of the public seeking to access legal advice and representation. It is vital that when legal partnerships begin operation in the State that

¹⁹ <https://research.legalservicesboard.org.uk/wp-content/media/Prices-of-Individual-Consumer-Legal-Services.pdf>, pages 3 and 14.

clients are not confused or misled about the service being provided and the role of the particular lawyer in providing that service.

Possible Conflict between the Independence required by Barristers and the Partnership Model Need to be addressed:

- The Council considers that lawyer independence is not a right of lawyers, but rather a fundamental right of members of the public to obtain legal advice from a lawyer whose duty is to the client and to the court but not to any other person.²⁰ The Council believes that the concept of independence is already enshrined in the Irish legal system.
- It is not clear at present how the traditional role and duties of the independent barrister can be adapted to function in the legal partnership model where, presumably, partners will owe fiduciary duties to the firm itself.²¹ The Council believes that this is a matter which deserves close consideration by the Authority and will impact on the adoption of Codes of Conduct/Practice for such partnerships, whether they are barrister-barrister partnerships or solicitor-barrister partnerships.
- It is acknowledged that solicitors firms operate with the presence of such partnership duties alongside duties to deal with conflicts of interest in appropriate terms whilst also preserving the duties owed to clients and to the court alike. However, the Council believes that clear guidance will have to be provided by the Authority as to how conflicts arising in solicitor-barrister partnerships are to be resolved while ensuring that ethical duties are upheld because of the different roles and functions of solicitors and barristers. For example, barristers in the Law Library must adhere to the Cab-Rank Rule.
- Similar considerations arise in the context of barrister-barrister partnerships, including the operation of the Cab-Rank Rule, rules to deal with conflicts of interest within the partnership itself and the constituent barrister members of it, the retention of client data by the partnership and/or the individual barrister and the responsibility of a barrister (as a managing partner) of the partnership to the Authority. The concept of a “managing partner” is something the Council recommends as being required for partnerships and this is addressed hereunder.
- It is of interest that Bar Standard Board authorised bodies (whether barrister-barrister

²⁰ The Law Society of British Columbia has stated:

“Lawyer independence is a public right that protects the rule of law. It is not a lawyer’s right – rather, it is a fundamental right that the public has to be able to obtain legal advice from a lawyer whose duty is to the client, not to any other person.....It guarantees that a client can be confident that his or her lawyer provides legal assistance without fear of interference or sanction by the government or other interests’
<https://www.lawsociety.bc.ca/page.cfm?cid=2199>

²¹ See generally the Partnership Act 1890.

or barrister-solicitor) in England and Wales appear to be subject to the Cab-Rank Rule in some form. Rule C29 of the Bar Standards Board Handbook, which is discussed further in the Appendix to this submission, provides that where instructions are received from a professional client, and subject to certain limited exceptions, that self-employed barrister, individual employed by a BSB authorised body or BSB authorised body itself must accept the instructions of that client. The adoption of a similar rule for legal partnerships in this jurisdiction must be considered by the Authority where this is a new practice model.

Other Possible Risks to the Interests of Clients:

- The Council is concerned about risks to the interests of clients that might arise. These might be summarised as follows and are addressed in this submission elsewhere.
- Firstly, s.45 of the 2015 Act prohibits barristers from holding moneys of clients. The Council acknowledges that the Authority will give further consideration to this issue when fulfilling its research function under s.120 of the 2015 Act. However, until s.45 itself is commenced the existing position will be maintained.²²
- In those circumstances it seems difficult to the Council to envisage how barrister-solicitor partnerships could operate in a manner that is consistent with the protection of the interests of clients. If the solicitor partners in such a legal partnership hold client moneys but the barrister partners do not it is difficult to see how such partnerships can operate within a coherent regulatory structure.
- Secondly, aspects of the public interest in the regulation of legal practitioners need careful deliberation where legal partnerships involving solicitors and barristers are concerned. For instance, such partnerships may have legal difficulties in operating where there would be joint and several liability of partners pursuant to the *Partnership Act, 1890* but where the roles of the solicitors and barristers in the partnership are different having regard to their training, competencies and roles in the partnership itself.
- The Council believes that the existing delineations between professions in the State are well understood by clients in relation to their respective roles in providing legal services. The values of the independent Bar profession and the ethical framework underpinning same have been honed over a long period of time and are updated to take account of changing economic and societal circumstances. The corporate memory

²² Bar Standard Board regulated bodies in England and Wales are **not** permitted to hold client moneys.

involved in that regard has been built up over a long period of time and the value of that should not be underestimated where new models are being introduced.

- The introduction of legal partnerships would allow solicitors and barristers to operate together but it will be important that the client would understand what services the barrister is providing and, equally, what services the barrister cannot provide to the client at a given time.
- The codes of conduct/practice for partnerships, whether solicitor-barrister or barrister-barrister, need careful consideration in light of these concerns. Issues such as conflicts of interest, the Cab-Rank Rule and maintaining the pre-eminence of the duty to the court above all other duties also need to be set out in a manner that is understood and can be enforced by the Authority.
- Thirdly, the management and organisation of partnerships appears to require further consideration. A requirement that there would be a managing partner of the partnership that is responsible for dealing with interaction with the Authority and is responsible to the Authority and, if necessary, the High Court on issues concerning the legal partnership seems to be required. The partnership agreement may need to be lodged with the Authority so that it can ensure that it conforms to standards set by the Authority in terms of corporate governance requirements, adequate insurance cover, adherence to data protection laws in the management of client files and other regulatory considerations.
- Fourthly, other issues concerning legal partnerships which are of key interest to clients have not been addressed, to include measures to be implemented when there is closure and cessation, whether orderly or disorderly, of legal partnerships. There must be provision, either by means of statutory provisions or by regulations, to deal with the protection of client files in such circumstances, the distribution of such files to other legal practices to carry out necessary work for clients and to deal with any client moneys held by the partnerships (and compensation issues).
- Fifthly, the handling of complaints involving partnerships raises a number of complicated issues and the Council's view is that some legal advice and intensive planning is required concerning the handling of complaints involving individuals within a partnership and/or the partnership itself before such partnerships begin operation. This is addressed further hereunder.

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.

- Arising from the submissions already made above, the Council believes that the Authority must deliberate on the way in which it will permit legal partnerships to operate in this jurisdiction. If there is a risk that legal partnerships will distort the legal services market and remove choice for smaller solicitor firms throughout the country in accessing quality barrister advocates for their case, something recognised as an issue by the Competition Authority and by the Bain Report, it is submitted that the Authority must consider that point of principle in terms of providing protections for clients obtaining legal services in the State before such legal partnerships begin operation in the State.
- In addition, if the Authority is to licence legal partnerships for operation, something the Council considers as important given the issues that arise for the regulation of partnerships in general, it must address whether there are circumstances in which it would refuse to allow a partnership to be formed if that was inimical to proper competition in the legal services market and did not protect client interests.
- For instance, a partnership in which the existing experts in a particular area of law are working together with solicitors in the same area may remove and damage competition in the legal services market. In those circumstances, should the Authority have the capacity to refuse to allow a partnership to be formed and, further, is legislation required to enable the Authority to do that?
- Where such partnerships are allowed to operate, the Council believes that the issue of holding client moneys is a fundamental issue that needs to be addressed. The Council has already referred to s.45 of the 2015 Act and the possible implications of same. No partnerships should be allowed to operate where there is any legal risk to client moneys and/or where the legal position about liability for issues concerning client moneys is not clear.
- Where such partnerships are operational, the Council considers that separate codes of conduct/practice for legal practitioners in such partnerships will be required, which would deal with carrying out work which the lawyer is competent to do, obligations concerning internal complaints from clients and other regulatory matters.
- The Council notes the position in the Bar Standard Board Handbook in England and

Wales, which is set out in detail in the Appendix, in relation to the dis-application of certain rules of conduct if the lawyer is operating in a partnership. That is explained further in the Appendix to this submission. For ease of reference at this juncture, it states, *inter alia*, that:

*“If you are a BSB authorised individual who is employed by or a manager of an authorised (non-BSB) body and is subject to the regulatory arrangements of the Approved Regulator of that body, and the requirements of that other Approved Regulator conflict with a provision within this Handbook then the conflicting provision within this Handbook shall not apply to you. You will instead be expected to comply with the requirements of that other Approved Regulator and, if you do so, you will not be considered to be in breach of the relevant provision of this Handbook”.*²³

- The Council does not believe that this is a good model for legal practitioners to operate under and it also would cause confusion for clients who are entitled to know the obligations of the lawyer who is undertaking work for them. That is something which clients have at the present time. Thus, separate codes of conduct or professional codes for lawyers in such partnerships should be developed by the Authority for legal partnerships rather than “dis-applying” provisions of an existing code of conduct/practice.
- Reference is also made to such matters in s.116(3) of the 2015 Act. It is the view of the Council that where barristers and/or solicitors are offering services in a legal partnership then consumer confidence may require that specific codes of conduct or professional codes are established to deal with issues such as client monies, conflicts of interest and the maintenance of records.
- Clear information to members of the public as to the legal services that would and would not be provided by barristers and, separately, by solicitors who are working in a legal partnership may need to be considered.
- The requirement that legal partnerships have a designated managing partner, approved by the Authority with reference to specific and prescribed criteria, appears to the Council to be a necessary pre-requisite to licensing of legal partnerships. It is noted that s.108 of the Act refers to a “*managing legal practitioner*” in a Multi-Disciplinary Practice (MDP) who would, if MDPs are established, have responsibilities for the MDP.
- A similar provision should be introduced in relation to legal partnerships so that there

²³ Rule 18 of the BSB Handbook.

is a person who is responsible to the authority for corporate governance matters, the maintenance of proper records and books of account, client file and data protection policies and procedures within the partnership and other measures that are required in the best interests of clients of the partnership.

- In England and Wales Rule C91 of the BSB Handbook requires that a BSB authorised body has at all times a person appointed by it to act as its Head of Legal Practice and a person who shall be Head of Finance and Administration. Appointments to these positions must be approved in advance by the Bar Standards Board.²⁴

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).

- The Council believes that legal practitioners operating in a legal partnership must ensure that they can only offer such services as they are competent to perform. The Appendix to this submission sets out information concerning the relevant rules adopted by the Bar Standards Board in England and Wales in that regard.
- The Council believes that regulations should be introduced to ensure that clients have clear information and visibility at all times as to who is carrying out the service on their behalf within the partnership and that any such lawyer is acting within the principles and directions as are imposed on them by virtue of their employment or status in the partnership itself.
- Legal Partnerships should only be licensed to operate where the partnership satisfies the Authority that it has in place the following:
 - Adequate insurance for the legal services to be provided;
 - Adequate insurance “run-off” cover in the event of the cessation of the legal partnership or the departure of the legal practitioner from the legal partnership, including cover to deal with disciplinary complaints relating to work done whilst in the legal partnership itself;
 - Corporate governance agreements or arrangements so that client monies etc. are managed adequately, i.e. a managing partner who is approved as such by the Authority and is responsible for communications on all

²⁴ See Rules C91, S83, S90 and S110. See also the suitability criteria for such roles at Rules S104 – rS110.

- matters with the Authority and, possibly, a designated finance officer who is accountable for client moneys held by the partnership;
- On-going certification in relation to Continuing Professional Development should be provided by the partnership and its members to the Authority;
 - Adequate policies and procedures should be in place to protect client documentation/files and to comply with data protection law and financial law requirements;
 - Licensing should take place on an annual basis with the managing partner to certify that the legal partnership is operating in accordance with the relevant policies and procedures that are required in a legal partnership (as set down by the Authority) and the managing partner is to be responsible for any such certification made by him/her to the Authority on behalf of the legal partnership.
- The cost of investigating complaints related to the partnership and/or barristers operating within it should be borne by the partnership irrespective of whether the barrister in question has left it by the time the complaint is made or determined. This is addressed further hereunder.
 - Provision should be made for the Authority to suspend the legal partnership from operating if a serious issue comes to its attention, including provisions relating to the distribution of client files to other practitioners so that legal services to those clients can be provided and for the taking over of the management of clients funds that had been in the partnership's client accounts. Similar provisions should be in place if the partnership ceases existence in a disorderly fashion. There should also be a facility to seek orders or directions from the High Court if that is required in particular instances.
 - Such partnerships should have to advertise, either by means of their letter-heads and websites and otherwise, that they have in place professional indemnity insurance that has been approved by the Authority on a periodic basis.
 - Barristers operating in a legal partnership should have to advertise as such so that they are distinguished from barristers who are operating as sole independent traders from the Law Library or otherwise. This also applies to the roll of practising barristers and this is elaborated on hereunder.
 - Where a solicitor in a legal partnership intends or suggests that a barrister in the partnership provide advocacy or other services to a client, the client should be given the option of requesting an estimate of likely costs from a barrister operating as a sole trader either in the Law Library or otherwise. This should be a specific

requirement so that clients are making informed decisions about their legal services from barristers.

- Legal Partnerships should have to display their certification/licence to operate as a legal partnership at the partnership's premises or address. It should also be contained on their website.
- The Code of Conduct/Practice applicable to a legal partnership should be on physical display in the office(s) of the legal partnership and on its website.

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.

- The Council notes, arising from the research undertaken in the United Kingdom, that there were more complaints about Legal Disciplinary Partnerships and licensed bodies/alternative business structures (as operated there) although many were resolved at an early stage.²⁵ Even so, this is noteworthy and should inform the Authority's deliberations on this point as the risk of confusion and regulatory difficulties in this area may be difficult to anticipate. Advance planning of the handling of complaints involving legal partnerships seems necessary in those circumstances.
- At present, complaints against barristers who are members of the Law Library are dealt with by the Barristers Professional Conduct Tribunal. The Tribunal deals with such complaints by reference to the Code of Conduct of the Bar of Ireland (the "Code") to which all such barristers are subject.
- However, as noted in the submission on item 2 above the Council submits that specific codes of conduct/practice may have to be established to address issues which do not come within the existing Code such as the handling of client monies, conflicts of interest and the maintenance of records by barristers who operate in partnerships. The legislative structure for such partnerships under the *Partnership Act, 1890* may also have to be considered and the Council has already suggested above that legal advices on that matter may be required.

²⁵ <https://research.legalservicesboard.org.uk/wp-content/media/2015-2016-FINAL-Market-Evaluation-Main-report11.pdf>, pages 119, 123 and 124. For completeness it should be noted that it was also found in the same report that LDPs generated the highest level of turnover per complaint and, therefore, receive the lowest number of complaints when this measure of size is taken into account.

- Accordingly, the Council considers that barristers who work in a legal partnership will have to be subject to a different code of conduct to the code governing barristers who work independently. Whilst it can be envisaged that there will be some overlap between the two codes, it is also anticipated that the code governing barristers working in legal partnerships would be different in many material respects so as to govern the additional matters outlined above.
- In addition, legal issues about the holding of client monies and the interaction with the legislation and case law governing partnerships in general may arise and this should be considered, if appropriate, in conjunction with legal advices provided to the Authority itself.
- Thus, the Council considers that it may be necessary to establish a separate mechanism which will deal with complaints against barristers in legal partnerships in light of the matters outlined in this submission. It will be the responsibility of the Authority to establish this mechanism in advance of the establishment of any such partnerships so that public confidence in the complaints system and the legal professions themselves is maintained.

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

- If a complaint is made about a legal partnership that complaint will have to be handled in accordance with its terms save that it would appear necessary that the Authority ensure that all members of the partnership are advised that such a complaint has been made.
- Likewise, if a complaint is made about an individual legal practitioner in a legal partnership the Authority would have to ensure that all members of the partnership were informed of the existence of the complaint.
- In both cases, this would be particularly necessary where the complaint was of an especially serious nature, i.e. such as the mishandling of client monies.
- The Authority may also have to consider whether in the case of a serious complaint affecting the entirety of the partnership it should have the power to suspend the operation of the partnership or impose directions that it cannot take on new clients and/or distribute files of the partnership to other legal practitioners. A power to order the legal partnership to cease practice and/or seek a High Court order to that

effect in extreme cases might also be considered.

- It appears to the Council that Part 6 of the 2015 Act gives little guidance to the Authority on these issues and further deliberation on these points, including in relation to the possibility of seeking legislative powers dealing with suspension, cessation and closure of legal partnerships, should be undertaken.
- The Authority should have the power to discipline a managing partner of a partnership if corporate governance requirements are not met. Sanctions may include a suspension or disqualification from acting as a managing partner for a period of time.

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.

- The Council considers that it is somewhat difficult to provide useful submissions on this issue until more substantive issues about the establishment, form and management of legal partnerships are considered further by the Authority in light of the submissions already made above.
- The Council notes that s.104(1)(a) of the 2015 Act provides that a legal partnership that “intends” to provide legal services “shall notify the Authority...of that fact” and “shall not provide such services” until it has provided such notification in the form provided for under s.104(3) of the Act.
- To the extent to which that section does not appear to provide for a role for the Authority to scrutinise a legal partnership **before** it provides legal services to any member of the public it is suggested that the Authority should consider obtaining advices as to whether s.116 of the Act would enable it to carry out such a role in vetting legal partnerships before they begin operation.
- Section 116 of the Act provides for the making of regulations in a number of areas concerning the provision of legal services and the holding of client moneys. But it may not be entirely clear as to whether adherence to such rules can be made a pre-condition for the registration of such partnerships in the first instance.
- Section 105 of the Act provides that legal partnerships “shall not provide legal services unless there is in force, at the time of the provision of such services” appropriate professional indemnity insurance. But that may also not be absolutely

clear in relation to the establishment of such partnerships and whether the Authority can vet the establishment of the legal partnership in question.

- As a matter of principle, to the extent that the question concerns the registration of legal partnerships the Council is concerned that the Authority should have a role to ensure that legal partnerships do not provide legal advices and representation to members of the public before they are registered by the Authority and have satisfied the Authority that they have the adequate controls in place to deal with issues such as client moneys, insurance, corporate governance, continuing professional development and the other matters referred to in this submission.
- The Council has already submitted above that the Authority should have a power to refuse to allow the establishment of legal partnerships if their operation would damage rather than enhance competition in legal services having regard to access to justice issues.
- The Council considers that the importance of ensuring that any new practice models are vetted by the Authority for appropriate corporate governance issues prior to their commencement in offering legal services to the public is an important protection for the public itself and the integrity of legal practitioners.
- Thus, the Council believes that the registration requirement imposed in s.117 of the Act should be robust and that it should entail much more than mere notification. It should also encompass a requirement to satisfy the Authority of a number of matters before it can be registered as a partnership. The Authority must have the power to refuse registration to a proposed legal partnership if the legal partnership cannot satisfy it about corporate governance and other requirements and if it is contrary to the public interest to allow it to commence practice for reasons already elucidated further above.
- Insofar as there would be a “public register” of partnerships then it is considered that any such public register should contain the name of the partnership, the lawyers attached to it, its principal place of business and the name of the “managing partner” (which is referred to elsewhere in this submission).
- There should also be a specific statement in that part of the public register as to the Code of Conduct/Practice that applies to each partnership that is referred to in the register itself. Again, the Council has made suggestions about this above. There should also be a statement on the public register for each partnership for the purposes of s.105 of the 2015 Act in a form and manner that makes it clear to the public that the legal partnership has the appropriate insurance for the services that

would be provided by its members and staff.

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

- As set out in the preceding section, the Council believes that these issues can only be addressed in a comprehensive fashion once important issues of principle concerning the make-up and management of legal partnerships are addressed by the Authority during this consultation process.
- Furthermore, the Council has raised the issue in the preceding section about the establishment and commencement of practice of legal partnerships where it believes that the Authority must have a vetting procedure for such partnerships before they commence practice as such.
- Consistent with those submissions, the Council considers that the Authority might ensure that such partnerships have the following before they commence practice and offer legal advice and representation services to members of the public:
 - That the legal partnership has appropriate professional indemnity insurance, including in relation to run-off cover in the event of the cessation of the legal partnership, on the date of its commencement and not just at the time it provides “legal services” as appears to be implied by s.105 of the Act;
 - That the legal partnership has appropriate corporate governance structures and appropriate protections, policies and procedures in relation to the holding of client moneys;
 - That the partnership has a partnership agreement and that same has been lodged with the Authority;
 - That the legal partnership has a managing partner and that the said person is approved by the Authority;
 - That the legal partnership has appropriate policies and procedures for data protection of client documentation;
 - That the licence/registration of the legal partnership is contained on its website and at its business premises.

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

- The Council considers that this is a difficult question to address at this juncture where the form and shape of legal partnerships, the regulations surrounding same and the necessary corporate governance rules surrounding them need to be addressed and considered in draft form, which would require further consultation with relevant interested parties.²⁶
- As with breaches of any section of the Act and/or regulation made under the Act, the Council considers that the consequences for the legal partnership and the practitioners operating within same will depend on the particular breach in question and the consequences for the client and/or the administration of justice that arises from it.
- It might be envisaged that some type of restrictions would need to be imposed on the continued practice of the legal practitioner concerned within the partnership and/or on the legal partnership itself depending on the nature of the breach concerned.
- Indeed, if the breach of the Act concerned was of a serious nature and was carried out with the connivance or knowledge of other legal practitioners within the legal partnership then serious issues about the continued operation of that partnership may have to be assessed and appropriate action taken in order to protect the interests of the legal partnership's clients and confidence in the administration of justice generally.
- The Authority must consider whether it has a power to restrict a legal partnership from taking on new clients and/or suspend the operation of the legal partnership and/or seek an order from the High Court to dissolve the legal partnership and assign its clients to other legal practitioners. Such powers might be required if, for example, the breach of the Act concerned was so serious and/or raised issues about the legal partnership as a whole and/or the breach was found to arise from conduct that was planned, pre-meditated or prevalent within the legal partnership.

²⁶ It may be relevant to note that, in the United Kingdom, the Legal Services Act 2007 foresees situations in which a breach of a duty thereunder could be grounds for disqualification of a Head of Legal Practice, Head of Finance and Administration, manager or employee of a licensed body from acting as such. <http://www.legislation.gov.uk/ukpga/2007/29/section/99>
Section 99(3) specifies grounds for the disqualification. Such persons can be disqualified if they (intentionally or through neglect) breach a relevant duty or cause, or substantially contribute to, a significant breach of the terms of the licensed body's licence.
Relevant duties include that under section 176(1) of the Act to comply with the regulatory arrangements of the regulator. There are also separate duties under section 91 on the HOLP and under section 92 on the HOFA.

- The Council queries whether the provisions in Part 6 and Part 8 of the 2015 Act have taken account of such possibilities and whether there is a need for specific provisions to be inserted in the 2015 Act to enable the Authority to take such action if it considers that the results of any disciplinary procedures under Part 6 of the Act have implications for a legal partnership as a whole.
- The implications of any such procedures for a “managing partner” in the firm and the accountability of such a “managing partner” to the Authority and/or the High Court in cases of alleged serious short-comings in the legal partnership also need to be assessed.

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?).

- It appears to the Council that periodic declarations should be required in respect of the following matters from legal practitioners in a legal partnership and/or from the “managing partner” of the legal partnership concerning policies and procedures of the legal partnership to protect client moneys, files and documentation and other corporate governance issues:
 - Professional indemnity insurance;
 - A list of the partners and employees in the legal partnership itself and their respective roles;
 - Declarations that the legal practitioners in the legal partnership have undertaken appropriate continuing professional development should be provided on a periodic basis;
 - Any changes to the partnership agreement should be notified to the Authority and the updated partnership agreement should be lodged with the Authority;
 - A declaration of the number of complaints dealt with internally in the legal partnership;
 - The policies and procedures concerning the handling of client moneys, client documentation and files, in relation to data protection law compliance and concerning other corporate governance requirements should be provided by the “managing partner” of the legal partnership at the commencement of practice of the legal partnership;
 - The designated managing partner in the legal partnership should inform the

Authority of any changes to policies and procedures involving the handling of client moneys, client files and documentation, corporate governance obligations, data retention obligations and financial requirements imposed on the legal partnership.

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.

- The Council considers that there is scope for considerable confusion amongst the general public about persons being on the roll of practising barristers, the roll of practising solicitors and also contained on the register of legal partnerships (as suggested above). The Council considers that the Authority should give careful consideration to ensuring that the general public is in a position to distinguish barristers who are operating as independent sole traders within the Law Library from those practicing in other manners.
- The Council notes that s.133(5) of the 2015 Act provides that “*additional information*” may be prescribed by the Authority to be entered onto the roll of practicing barristers. But such information is stated in s.133(5) to relate to the “*professional qualifications*” and “*areas of expertise*” of the barrister concerned rather than the format of their practice.
- Section 133(4)(c) of the Act includes a requirement to set out that the barrister is a member of the Law Library or not but, curiously, does not outline a requirement to set out what form of practice the barrister is engaged in if he/she is not a member of the Law Library.
- The Authority might consider if this is something that should be on the roll of practising barristers to compliment the public register of partnerships. In other words, if a “practising barrister” is in a legal partnership then this information should be available in a manner that is clear to the general public who consult the roll.
- Thus, the Council considers that the roll of practicing barristers, which is to be established pursuant to s.133 of the 2015 Act, should set out whether a barrister are is a member of the Law Library or otherwise is a sole trader barrister or whether the barrister is in a legal partnership.
- The Council considers that it can provide the Authority with information about its members who are members of the Law Library and update same on a periodic basis to be agreed with the Authority. But those barristers who practice outside of the Law

Library should inform the Authority as to the format of practice that they are engaged in, whether as an independent sole trader and/or in a legal partnership so that same can be entered onto the roll itself.

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.

- The Council considers that, pursuant to the provisions of s.95(7) (a) – (c) inclusive of the 2015 Act itself, its members are liable for a proportion of the expenses of the Authority and of the Disciplinary Tribunal in the manner stipulated in those subsections.
- The Council considers that barristers operating within the Law Library cannot have any obligation to fund the investigation or adjudication of complaints concerning barristers who are outside of the Law Library when the relevant legal services were provided.
- Similar considerations arise for the costs in relation to the establishment of legal partnerships, their ongoing regulation, monitoring and operation. Any such costs should not be attributed to the Council in any manner as any barristers who are members of legal partnerships will not be members of the Law Library. The Council does not consider it appropriate that the costs of overseeing, monitoring or supervising legal partnerships should be paid for by members of the Law Library. This is a matter for the Authority to levy on the members of legal partnerships (both solicitors and barristers) as they are legal practitioners who are outside the Law Library.
- The Authority might consider obtaining some financial and prudential advices on the costs that will be associated with the establishment of the register of legal partnerships and the other matters attendant to the operation, monitoring and regulation of them so that these costs are planned for by the Authority within its own running costs and expenses.
- Furthermore, where barristers were members of legal partnerships and a complaint arises in respect of their time in the partnership then the levy paid by the Bar Council should not include the costs of any such investigation/prosecution irrespective of whether the barrister re-joins the Law Library at the time that the complaint is being dealt with by the Authority or the Disciplinary Tribunal.

- In that regard, the Council is concerned that s.95(4)(b), s.95(5) and s.95(12) (which refers to the barristers on the roll of practising barristers for the purposes of the apportionment of the levy) of the 2015 Act are interpreted in a manner that does not impose a levy on the Council and its members for the investigation or adjudication of complaints against practising barristers where the barrister was outside the Law Library when he/she provided the legal service that is under investigation or disciplinary action.
- The Council believes that members of partnerships must pay for the costs of such complaints in accordance with their status at the time that the legal service was provided. That may mean that barristers who were in partnerships would need some type of “run-off” cover to deal with the costs of investigating any complaint relating to their time in the legal partnership. Thus, the costs of the investigation and adjudication of complaints against barristers who were members of legal partnerships at the time that the act/conduct giving rise to the complaint should not be borne by the Council or its members in any form whatsoever.

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.

- The Council has already set out above that the importance of rules concerning independence, conflicts of interest and the Cab-Rank Rule have been important to the proper administration of justice in the State. Furthermore, the Council considers that the ethical issues arising from legal partnerships, both of a barrister-barrister nature and a solicitor-barrister nature, need to be considered in a distinct manner as separate legal and ethical issues arise. For instance, the issue of holding client moneys has already been flagged above.
- The Council considers that a separate Code of Conduct/Practice would be required for barristers and solicitors operating in legal partnerships given the novelty of the practice model itself and in order to ensure that members of the general public are aware of the specific duties of their legal practitioner for the legal advice or representation in question.
- Issues such as the application of the Cab-Rank Rule, the importance of avoiding conflicts of interest within the partnership where a solicitor partner and a barrister partner (or two barrister partners) might be instructed on opposite sides of a dispute and how to address the duties to the client and to the court in case of a conflict

between those duties and the instructions from the solicitor to a barrister within the partnership itself need to be examined.

- It does not appear to the Council that its own Code of Conduct can regulate all of the matters that would arise in legal partnerships and the Authority should develop a Code of Conduct/Practice for barristers operating in them having regard to the legal, ethical and regulatory issues that will necessarily arise for barristers who practise in them.

APPENDIX 1

COMPARATOR JURISDICTIONS

The Council sets out hereunder a summary of the considerations about the operation of alternative practice structures in the relevant comparator jurisdictions *i.e.* countries where members of the public have access to both independent advocates/barristers and to other legal professionals for the provision of legal representation and advice services.

A common theme emerges from an assessment of the practice models that exist in those countries, namely that it has proven difficult to reconcile the features of the legal partnership model contemplated in the 2015 Act with the advantages and safeguards inherent in the existing legal systems that see access to independent lawyers as a fundamental right of those persons seeking legal assistance.

The following table summarises the position in those countries that have a split legal profession involving barristers and solicitors.

COUNTRY OR JURISDICTION	KEY FEATURES OF LEGAL SYSTEM	STATUS OF OPERATION OF SIMILAR LEGAL PARTNERSHIP MODEL
New South Wales Australia	Spilt profession, legal services provided by barristers and solicitors	Prohibited – barristers must be independent practitioners and may not practice in partnership with anyone
Queensland Australia	Spilt profession, legal services provided by barristers and solicitors	Prohibited – barristers must be independent practitioners and may not practice in partnership with anyone
New Zealand	Lawyers may practice as barristers and solicitors (combined) or as independent barristers <i>sole</i>	Independent barristers sole are prohibited from practising in partnership with other persons
South Africa	Split profession, legal services provided by attorneys and advocates	Prohibited – advocates must be independent practitioners and may not practice in partnership with anyone
Hong Kong	Split profession, legal services provided by barristers and solicitors	Prohibited – barristers must be independent practitioners and may not practice in

COUNTRY OR JURISDICTION	KEY FEATURES OF LEGAL SYSTEM	STATUS OF OPERATION OF SIMILAR <i>LEGAL PARTNERSHIP</i> MODEL
		partnership with anyone
Scotland	Split profession, legal services provided by advocates and solicitors	Prohibited – advocates must be independent practitioners and may not practice in partnership with anyone
Northern Ireland	Split profession, legal services provided by barristers and solicitors	Prohibited – barristers must be independent practitioners and may not practice in partnership with anyone
England and Wales	Legal services may be provided in a number of business models. A multi-layered regulatory regime exists, with interaction between an oversight regulator (the Legal Services Board) as well as the Legal Ombudsman, the Solicitors Regulation Authority and the Bar Standards Board	Barristers have been permitted to join legal disciplinary practices (subject to regulation by both the Solicitors Regulatory Authority and the Bar Standards Board). Barristers may also practice within the Bar Standards Board “ <i>authorised body</i> ” model but subject to certain constraints and restrictions. See Case Study in Part 3.

The Council hopes that by identifying the challenges and concerns expressed in those jurisdictions about legal partnerships it will be possible to identify the types of difficulties that could arise for their regulation here. The identification of the issues will inform the nature of the regulatory structure required and will also bring into focus the areas that require further analysis and clarification.

AUSTRALIA - NEW SOUTH WALES AND QUEENSLAND

The legal profession in Australia comprises both barristers and solicitors. In some States, the profession is integrated.²⁷ However, a split profession remains to an extent in both New South Wales and Queensland.

In both New South Wales and Queensland there is a legislative basis for legal services to be provided by lawyers in conjunction with other lawyers and/or non-lawyers in incorporated practices²⁸ and multi-disciplinary partnerships.²⁹ However, the relevant bar association rules in each State prohibit members of the bar from entering into partnerships.³⁰

The rationale for the approach of the Australian Bar Councils, *i.e.* the continued prohibition on independent barristers entering partnerships, was stated by the Law Council of Australia in the 2001 discussion paper entitled “*Challenges for the Legal Profession*”. The discussion paper noted both the bar associations’ wish to preserve the traditional values of independence and integrity as well as the absence of evidence in support of fiscal or economic reasons for change:

“The bar associations consider that the sole practice rule serves to reflect a traditional characteristic of an independent bar. For members of the Bar, the rule highlights the personal nature of the ethical duty owed by each counsel, to both clients and the court, by reinforcing the individual nature of the duty. It also fosters a suitable business structure for members to conduct business because it encourages independence and neutrality, which are important to clients of the Bars. There has not been any serious momentum towards incorporation from within the Bars, probably because upon examination of that alternative, no significant fiscal or other benefits have been demonstrated as flowing from incorporation, while the existing benefits that flow from the sole practice rule would be lost.”³¹

The Law Council of Australia also noted the contention that sole practice enables barristers to provide their services in a flexible manner and in a manner that supports and enhances competition.³²

²⁷ South Australia, Tasmania, Victoria and Western Australia.

²⁸ Legal Profession Uniform Law Application Act 2014 (NSW); Legal Profession Act 2007, Chapter 2 Part 2.7.

²⁹ Legal Profession Uniform Law Application Act 2014 (NSW); Legal Profession Act 2007.

³⁰ Legal Profession Uniform Conduct (Barristers) Rules 2015, rule 12; Bar Association of Queensland 2007 Barristers Rule, Rule 85.

³¹ Law Council of Australia, “A Discussion Paper: *Challenges for the Legal Profession*” (September, 2001) https://www.lawcouncil.asn.au/lawcouncil/images/Discussion_Paper.pdf, 12.

³² “Sole practice also enables barristers to provide their services in a flexible manner, as each case requires. The present flexible arrangement with its emphasis on freedom of choice in terms of style of practice is likely to continue. The Bar Rules seek to maximise the disinterestedness and wide availability of barristers as counsel and advocates and to foster specialisation. In addition to its merits for the community locally, this specialisation

New South Wales

- Despite major reforms in the last 20 years or so in particular, barristers in New South Wales (NSW) may not practise in partnership with any other person.³³ Both the Council of Australian Government's (COAG) Working Party³⁴ and the Trade Practices Commission recommended that the sole practice rules of the bar associations be abolished.³⁵³⁶
- Following that, in 1998 the New South Wales Attorney General's Department conducted a statutory review of the *Legal Profession Act 1987*.³⁷ Overall, the Attorney General's Report on the matter concluded that, while respondents to the review had not identified any anti-competitive effects flowing from the sole practice rule, the matter should be given further consideration by the Australian Competition & Consumer Commission.³⁸ It remains the case today that the relevant professional rules stipulate that barristers must be sole practitioners and must not enter into partnerships of any kind.
- As part of its review, an Issues Paper was released in August 1998 calling for submissions on a wide range of topics including the business associations of solicitors and barristers. One such question concerned legal business models and their effect on competition:

supports and enhances competition by the Australian legal profession in the globalised market for the supply of legal services, particularly in the Pacific Rim and Asia." Ibid.

³³ Rule 12 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 which took effect as of the 1st July 2015.

³⁴ Trade Practices Commission, Study of the Professions - Legal; Final Report, Commonwealth of Australia, March 1994

³⁵ Legal Profession Reform Working Group, Reform of the Legal Profession in Australia: Report to the Council of Australian Governments, July 1996

³⁶ It should also be noted that the Office of the Legal Services Commissioner (OLSC) in their submission expressed the view that they were "*unaware of any evidence which indicates that the prohibition on barristers practicing with other professionals either hampers or promotes the efficient and competitive provision of advocacy services.*" They argued that as there was no monopoly on the provisions of advocacy services by barrister practitioners wishing to provide advocacy services "*should be free to do so as a sole practitioner, partner or employee.*" The Office of the Legal Services Commissioner, Submission to the National Competition Policy Review of the Legal Profession Act 1987 (1988), 20

http://www.olsc.nsw.gov.au/Documents/olsc_sub_nat_comp_policy_review_1998.pdf.

³⁷ The review was undertaken pursuant to a requirement of the Australian Governments Competition Principles Agreement to consider any potentially anti-competitive restrictions in legislation and pursuant to a statutory requirement that the amendments made by the Legal Profession Reform Act 1993 be reviewed within four years of their commencement: Schedule 4, (12), of the Legal Profession Reform Act 1993.

³⁸ Attorney General's Department, "*Review of the Legal Profession Act Final Report*", Chapter 10 (1999) http://www.lawlink.nsw.gov.au/report%5Cldp_reports.nsf/pages/ncpf_10.

“Are prohibitions on barristers practising with other professionals warranted? Do they promote, or hamper, the efficient and competitive provision of advocacy services?”³⁹

- In response the New South Wales Bar Association highlighted a number of concerns, which echo many of those which have been outlined by the Council in its previous submissions on legal partnerships and their impact on access to justice. Those concerns included an argument the rules that prevented barristers from entering into partnerships served to ensure the independence of barristers and their availability to clients. In addition, it was argued that the rules prevented agreements being made as to fees or other matters between practitioners which might have anti-competitive effects.⁴⁰
- Importantly, it was argued that the Cab-Rank Rule that obliges barristers to accept instructions from clients (subject only to very limited exceptions) was incompatible with partnership or incorporation because a barrister who practised within such a structure would be constrained by the demands of that partnership or corporation.⁴¹ It was also argued that the rules that ensured that barristers operated only as sole practitioners also led to a reduction in overheads, minimised the risk of conflicts of interest and promoted competition.⁴²

Queensland

- In Queensland, persons are admitted to practise as solicitors or barristers. Separate admission rules, prescribed by the judges of the Supreme Court of Queensland, govern each profession. Practitioners must practise as one or the other and cannot practise as both. The combined effect of the relevant statutory provisions⁴³ and professional conduct rules⁴⁴ prohibit barristers from entering into partnerships.
- In the context of a review undertaken by the Queensland Department of Justice and Attorney-General in its Discussion Paper on Legal Profession Reform in 1998, the Bar Association of Queensland emphasised a number of benefits to the sole practice rule. The Bar Association⁴⁵ noted that the present system whereby most barristers

³⁹ New South Wales, National Competition Policy Review of the Legal Practice Act 1987 (NSW): Issues Paper, http://www.lawlink.nsw.gov.au/report%5Clpd_reports.nsf/pages/ncp_10, Chapter 10, Question

A

⁴⁰ Attorney General’s Department, “*Review of the Legal Profession Act Final Report*”, Chapter 10 http://www.lawlink.nsw.gov.au/report%5Clpd_reports.nsf/pages/ncpf_10.

⁴¹ Ibid

⁴² Ibid

⁴³ Legal Profession Act 2007 is relevant legislation governing the legal professions in Queensland.

⁴⁴ Rule 85 of the Bar Association of Queensland 2007 Barristers Rules.

⁴⁵ Green, “*Legal Profession Reform in Queensland: changing the divide between barristers and solicitors?*” (2002) referring to Bar Association of Queensland Submission in Response to the Queensland Department of Justice and Attorney-General on its Discussion Paper on Legal Profession Reform, 26-27.

can share the administrative and other expenses but conduct practices which compete in every other way represents a robust and modern balance of those private interests and the more important public interest in the administration of justice.⁴⁶

- The Bar Association also contended that the practice of barristers as sole practitioners, rather than as partners or employees of other practitioners, left barristers free from possible conflicts between the interests of their clients and their partners or employers or clients of their partners or employers, which conflicts may undermine the primacy of the duty to the court.⁴⁷

NEW ZEALAND

- In New Zealand practitioners are admitted to the High Court of New Zealand as barristers and solicitors. It is not possible to be admitted only as a solicitor or only as a barrister. However, once admitted as barrister and solicitor it is possible under the *Lawyers and Conveyancers Act 2006* to obtain a practicing certificate either as a business and solicitor or solely as a barrister. It is not possible to obtain a practice certificate solely as a solicitor.⁴⁸
- As of the of the 1st May 2016 there were 11,663 lawyers practising as barristers and solicitors (90% of total) and 1,368 practising as *barristers sole* or independent sole practitioners.⁴⁹
- The relevant professional rules⁵⁰ stipulate that sole practitioner barristers must not practise in partnership or in an incorporated law firm structure.⁵¹

HONG KONG

- In Hong Kong, legal partnerships are not permitted. The Bar of Hong Kong are only at the very early stages of consideration of alternative business structures but have not

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Section 48(1) of Lawyers and Conveyancers Act 2006.

⁴⁹ <https://www.lawsociety.org.nz/practice-resources/new-zealand-law-society-guide-for-new-lawYERS/becoming-a-lawyer>

⁵⁰ Rule 14.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

⁵¹ With one exception that provides for independent sole practitioner barristers to practise in an incorporated law firm model where that barrister is the sole director and shareholder.

undertaken any studies as of yet. Solicitors in Hong Kong have only very recently been permitted to form limited partnerships between themselves.⁵²

SCOTLAND

- While Scotland has seen the recent introduction of alternative business structures, advocates are not permitted to join these business models. Practising advocates must be independent sole practitioners and are not permitted to enter partnerships.⁵³

NORTHERN IRELAND

- Legal partnerships are not permitted in Northern Ireland.⁵⁴ Following a comprehensive review of the legal services sector in Northern Ireland, the Bain Report⁵⁵ concluded that the prohibition on barristers entering partnerships with other barristers should remain.⁵⁶ In doing so the Bain Report identified a number of features of the legal system in Northern Ireland that bear important similarities to the legal system in the Republic of Ireland.
- It was noted in the report that the general practice model of solicitors' practices providing advice to clients throughout Northern Ireland and supported by an independent Bar Library from which approximately 560 independent barristers compete for work was a model that generally fostered competition. The Report stated:

"...We believe that competition is in the best interests of the consumer and hence to be welcomed. We found that it exists in Northern Ireland, with a general practice model of solicitors' practices providing advice to consumers throughout Northern Ireland, supported by an independent Bar Library from which about 560 barristers compete with each other to provide advocacy services to clients.

⁵² <http://www.hkba.org/content/about-barristers-hong-kong>

⁵³ <http://www.advocates.org.uk/about-advocates/what-is-an-advocate>

See also Rule 1.2.5 of the Faculty of Advocates Guide to the Professional Conduct of Advocates, 5th Ed. available at: <http://www.advocates.org.uk/media/1417/guide-to-conduct-fifth-edition.pdf>.

See also recent Law Society studies in relation to alternative business structures and submission made by the Scottish Law Society to the Scottish Government which can be viewed at <http://www.lawscot.org.uk/members/legal-reform-and-policy/new-legislation-to-grow-legal-services/>

⁵⁴ Bar of Northern Ireland Code of Conduct (see <http://www.barofni.com/page/code-of-conduct>), in particular 10.6 and 10.7.

⁵⁵ Legal Services Review Group, *Legal Services in Northern Ireland: Complaints, Regulation, Competition*, 2006, "Bain Report"

⁵⁶ Bain Report, paragraphs 2.48, 6.43, 6.47 and 5.52.

We were impressed by the existing model that gives anyone in any part of Northern Ireland the chance to obtain advice on any matter from the top barristers in Belfast. While we considered the alternative models being proposed in England and Wales – Legal Disciplinary Practices and Multi-Disciplinary Practices – we believe that allowing such models in Northern Ireland would not have the desired effect of increasing competition. Indeed, we consider that they could actually reduce it. We accordingly leave the existing restrictions on such parties as they are. We also concluded that allowing external ownership of legal firms could carry with it unwanted problems, and we recommend no change to this restriction for Northern Ireland...”⁵⁷

ENGLAND AND WALES

- England and Wales represents the jurisdiction that has brought in the most substantive changes to the practice models for legal practitioners. However, the Council cautions that a direct comparison between the market for legal services in England and Wales and the market for legal services in this jurisdiction cannot be made and the changes made in England and Wales should not be assessed on a like for like basis.
- For instance, due account would have to be taken in any assessment of the market for legal services in this jurisdiction that there is a proliferation of small solicitors firms throughout the country which rely on the Bar to provide expert advice and advocacy services to their clients. In addition, the difference between the solicitor profession in England and Wales and in the State itself concerning the right of audience to address the court is a significant issue which may have had an impact on the changes made there but which does not apply here.
- The *Legal Services Act 2007* (the 2007 Act) established the Legal Services Board as the oversight regulator of the legal services sector and also allowed for the adoption of alternative structures for legal practice. In the years since the enactment of the 2007 Act, barristers in the United Kingdom have had the option of practising:
 - As part of “legal disciplinary practices” (LDPs) regulated by the Solicitors Regulation Authority (SRA);
 - As part of “Bar Standards Board (BSB) authorised bodies” as regulated by the Bar Standards Board; and,
 - As part of “Alternative Business Structures” regulated by the Solicitors Regulation Authority (and, soon, by the Bar Standards Board).

⁵⁷ Bain Report Chapter 6, paragraphs 17 & 18

- The regulatory structure in the United Kingdom is complicated, multi-layered and has been amended and updated on a number of occasions.
- The Council believes that consideration of the operation of the regulatory structure in England and Wales, in this specific context, will offer the Authority some insight into the main challenges to regulation posed by these types of business models.
- Part 2 of Schedule 16 of the 2007 Act introduced amendments to the *Administration of Justice Act 1985*, which allowed for the creation of “legal services bodies”.⁵⁸ As barristers fell within the definition of the type of legally qualified persons who were entitled to own such bodies, this opened the door to barristers becoming partners in what the Solicitors Regulatory Authority would ultimately term “*legal disciplinary practices*” or LDPs.⁵⁹ Barristers choosing to practice in this way are, therefore, amenable to the jurisdiction of the Solicitors Regulatory Authority and the Solicitors Disciplinary Tribunal.
- Having overcome certain legislative complexities, the Bar Standards Board ultimately passed amendments to its Code of Conduct with effect from 26th March 2010, permitting barristers⁶⁰ to provide legal services as a manager or employee of a “*recognised body*”.⁶¹ The issue of barristers entering into partnerships was considered in detail by the Bar Standards Board prior to amending its Code of Conduct to allow for barristers to practise as part of Legal Disciplinary Practices.⁶²
- However, as the Solicitors Regulatory Authority was initially the only approved regulator in relation to such bodies, barristers were not generally permitted to enter into partnerships composed solely of barristers. In later versions of the Bar’s Code of Conduct, the term “*recognised bodies*” became a subset of the term “*authorised bodies*”.⁶³ That term included bodies licenced under the 2007 Act to practise as licensed bodies (also known as “alternative business structures” or ABSs) within

⁵⁸ Under an inserted section 9A of the 1985 Act, a legal services body “*is a body (corporate or incorporate) in respect of which*” (a) at least 75% of the ownership, management and control of the body is with legally qualified persons (all non-legally qualified persons with an ownership interest or in a management position must be approved by the SRA); and, (b) least one manager (defined by section 207 of the 2007 Act; the term includes partners in partnerships and members of an LLP) of the body is a solicitor, registered European lawyer or a qualified body (s.9A (3) of the Administration of Justice Act 1985 as inserted).

⁵⁹ The Council for Licensed Conveyancers was also given the power to regulate LDPs but such LDPs could not conduct litigation. BSB, “Guidance on Practice in LDPs and Entities etc. Permitted by Amendments to Code of Conduct (November 2011).

⁶⁰ BSB, “Guidance on Practice in LDPs and Entities etc. Permitted by Amendments to Code of Conduct (November 2011).

⁶¹ Article 205 of the Old Code of Conduct of the Bar of England and Wales.

⁶² All relevant consultation papers and advices are available online at: <https://www.barstandardsboard.org.uk/about-bar-standards-board/consultations/closed-consultations/legal-services-act-2007-legal-disciplinary-practices-and-partnerships-of-barristers/>.

⁶³ Then defined as “*a body that has been authorised by an approved regulator to practise as a licensed body or recognised body*”. These were approved by the Legal Services Board in a decision notice dated 24 August 2011.

which barrister were also permitted to practise. As of the adoption of the BSB Handbook,⁶⁴ which replaced the Code of Conduct, bodies such as LDPs which were formerly deemed to be recognised bodies have been subsumed into the more general definition of “*authorised (non-BSB) bodies*”.⁶⁵

- The law in relation to LDPs changed following the commencement of Part 5 of the 2007 Act in 2011. Thus, LDPs which were owned and/or managed by non-lawyers such that they fell within the definition of a licensable body were required to become licensed bodies/ABS within a transitional period and to comply with the rules in relation to such bodies.⁶⁶
- In 2010 – 2011, the Bar Standards Board carried out a consultation process in relation to whether it should seek approval from the Legal Services Board to regulate firms or entities. In particular, YouGov were commissioned to conduct a survey on the Regulation of New Business Structures by the BSB.⁶⁷ Approval was sought from the Legal Services Board and this was granted by decision notice dated 28th November 2014. The BSB began regulating entities on a contractual basis from April 2015.⁶⁸
- The regulation of entities by the BSB is governed by the second edition of the BSB Handbook which was adopted in April 2015.⁶⁹ That Handbook sets out rules in relation to “*BSB authorised bodies*”, which differ from LDPs in that all managers and owners of the partnership, LLP or company concerned⁷⁰ must be authorised

⁶⁴ First edition adopted in January 2014 with the second edition being adopted in April 2015.

⁶⁵ Defined as “*a partnership, LLP or company authorised or licensed by another approved regulator to undertake reserved legal activities*”.

⁶⁶ The UK Law Society website indicates that it was intended that LDPs would transition to being ABSs by October 2012 (<https://www.lawsociety.org.uk/support-services/advice/practice-notes/legal-disciplinary-practice/>) but this appears to have been delayed – see <https://www.sra.org.uk/sra/news/press/ldps-advised-abs-transition.page>. The Legal Services Board has not yet sought to bring an end to the transitional period under Part 5 of the Second Schedule of the 2007 Act – http://www.legalservicesboard.org.uk/Projects/alternative_business_structures_and_special_bodies/index.htm.

⁶⁷ YouGov, “Survey on Bar Standards Board Regulation of New Business Structures” (July 2010).

⁶⁸ It is noteworthy that the BSB proposed to regulate entities on a contractual basis and this was approved by the Board. An Order under section 69 of the 2007 Act has been proposed which would give the BSB’s powers a statutory underpinning and which allow the BSB to licence Alternative Business Structures under the 2007 Act. It does not appear that this Order has yet been finalised: http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/2016/2016_08_30_BSB_s69_order_consultation_FINAL.pdf.

⁶⁹ The first edition of the BSB Handbook was adopted on 6 January 2014 and superseded the old Code of Conduct.

⁷⁰ Rule S82 permits applications for BSB authorised body status by partnerships, LLPs or companies.

individuals (i.e. lawyers).⁷¹ As of 2017 the BSB regulates some 77 BSB authorised bodies.⁷²

WHAT CAN BE LEARNED FROM THE EXPERIENCES OF COMPARATOR JURISDICTIONS

The jurisdictions considered above can be grouped under two headings; (a) jurisdictions where legal partnerships of the type contemplated under the 2015 Act are prohibited; and (b) England and Wales, where barristers have been permitted to operate together within certain practice models as created under the regulatory regime in force there.

The Council believes that the continuing prohibition on legal partnerships in many of the comparator jurisdictions should inform the Authority's approach in identifying the safeguards that should be in place prior to the introduction of these practice models in this jurisdiction so that access to justice, competition and ethical issues are adequately addressed before such legal partnerships are established.

With regard to England and Wales the Council believes that analysis of the operation of the various alternative business models in that jurisdiction will offer the Authority insight into the practical operation, monitoring and regulation and the challenges they present.

Clients and the right of access to independent legal representation

- The Council believes that the analysis shows that legal partnerships have been prohibited in a number of the comparator jurisdictions because it has not been possible to reconcile the related concepts of independence, clarity of the role of the lawyer in providing legal services to the client and access to justice with the features inherent in the legal partnership model. Thus, the advantages of the split profession in those jurisdictions have outweighed movement towards "*innovation*" in the majority of those jurisdictions while the experience in England and Wales shows the complications that will arise in the regulation of these entities.

Independence

- During the review on practice models undertaken in the Australian States, the Australian bar associations argued that the "*sole practice rule*"⁷³ highlighted the personal nature of the ethical duty owed by barristers, to both the client and to the court, by reinforcing the *individual* nature of that duty.⁷⁴ Similar submissions were

⁷¹ Rule S84.

⁷² https://www.barstandardsboard.org.uk/media/1663530/1_bsb_entities_register_as_at_03_03_2017_use.xlsx.

⁷³ Law Council of Australia, "A Discussion Paper: *Challenges for the Legal Profession*" (September, 2001) https://www.lawcouncil.asn.au/lawcouncil/images/Discussion_Paper.pdf, 12.

⁷⁴ *Ibid.*

made by the New South Wales Bar Association during the review in that jurisdiction.⁷⁵ The Council believes that these values are also important to understand and consider in the context of the establishment of legal partnerships here and how that can be done while maintaining the value of independence.

Clarity

- The Council believes that the experience of England and Wales offers insight into how a multi-layered regulatory framework, necessitated by the complex and multi-faceted nature of alternative practice models for legal practitioners, can impinge on the clarity that clients have previously enjoyed in understanding the role of the solicitor and the barrister in providing them with legal advice and representation. The risks of confusion caused to clients in the legal service provided to them should be avoided.

Access to justice

- During the reviews undertaken in Australia it had been argued that the sole practice rule enables barristers to provide their services in a flexible manner and in a way that places emphasis on freedom of choice.⁷⁶ Similarly, in Northern Ireland the Bain Report concluded that the operation of alternative business models there may actually lead to a reduction in competition.
- A number of features of the legal system in Northern Ireland are similar to those of the legal system in the State (relatively small population, many smaller sized solicitors' firms, collective of independent barristers who compete for work) and for that reason the Council considers the conclusions of the Bain Report should be borne in mind when considering the introduction of legal partnerships and how that can be achieved without undermining access to justice.
- The Bain Report noted the general practice model that sees solicitors' practices providing advice to clients throughout Northern Ireland was supported by an independent referral bar.⁷⁷ Noting that the members of the central bar library compete with each other to provide advocacy services, the Bain Report stated:

"...We were impressed by the existing model that gives anyone in any part of Northern Ireland the chance to obtain advice on any matter from the top barristers in Belfast. While we considered the alternative models being

⁷⁵ Attorney General's Department, "Review of the Legal Profession Act Final Report", Chapter 10 http://www.lawlink.nsw.gov.au/report%5C1pd_reports.nsf/pages/ncpf_10.

⁷⁶ Law Council of Australia, "A Discussion Paper: Challenges for the Legal Profession" (September, 2001) https://www.lawcouncil.asn.au/lawcouncil/images/Discussion_Paper.pdf, 12.

⁷⁷ Bain report para 6.43.

proposed in England and Wales – Legal Disciplinary Practices and Multi-Disciplinary Practices – we believe that allowing such models in Northern Ireland would not have the desired effect of increasing competition. Indeed, we consider that they could actually reduce it...”⁷⁸

- Furthermore, the Report noted:

“[T]he market for advocacy services in Northern Ireland is “competitive” in the economists sense of that term: a large number of sellers (barristers) offer, without any collusion between them, a relatively homogenous product (advocacy services) to a large number of buyers (solicitors).”⁷⁹

CASE STUDY – The *real world* operation of BSB Authorised Bodies

A number of alternative practice structures operate in England and Wales, namely:

- Legal Disciplinary Partnerships (LDPs) created under the Administration of Justice Act 1985 (as amended by the Legal Services Act 2007);
- Licensed bodies/alternative business structures (ABSs) as licensed by the Solicitors Regulatory Authority (SRA); and
- Bar Standards Board (BSB) authorised bodies.

As noted above, barristers in England and Wales have been permitted to practice within different types of practice models, to include LDPs and BSB authorised bodies. However, the practice models are not the same as legal partnerships as contemplated under the 2015 Act. In fact, the models allow for restricted forms of practice subject to a comprehensive framework of regulation. In a number of instances, barristers who operate within the authorised body model will be subject to multiple and sometimes apparently conflicting regulatory regimes.

Certain features of the BSB authorised body model correspond with features of the legal partnership model and, accordingly, certain challenges posed regarding regulation and the solutions that have been implemented to mitigate against those challenges warrant consideration in this submission.

Key features of BSB regulated / authorised bodies

- As noted above, the BSB authorised body model is more restrictive in nature than the legal partnership model. BSB authorised bodies **cannot** hold client money and

⁷⁸ Bain Report, Chapter 6, para 18.

⁷⁹ The Bain Report, at paragraph 6.39.

are obliged to adhere to the Cab-Rank Rule. It is also anticipated that authorised bodies will only provide legal services that correspond with the services more traditionally associated with barristers.⁸⁰

Areas of competency

- Pursuant to the provision of the BSB Handbook, a BSB authorised body must take reasonable steps to manage its practice, or carry out its role within its practice, competently and in such a way as to achieve compliance with its legal and regulatory obligations.⁸¹ Importantly, Rule C21 of the BSB Handbook imposes an obligation on regulated bodies not to accept instructions to act in a particular matter if *inter alia*:
 - the instructions require them to act other than in accordance with law or with the provisions of the Handbook (Rule C21(6));
 - they are not authorised and/or otherwise accredited to perform the work required by the relevant instruction (Rule C21(7)); and
 - They are not competent to handle the particular matter or otherwise do not have enough experience to handle the matter (Rule C21(8)).

Dual regulation or regulated / authorised bodies

- As noted above, barristers may also practice within certain SRA regulated bodies. The BSB Handbook recognises the regulatory overlap and manages the system of dual regulation by reference to the following provision:

“If you are a BSB authorised individual who is employed by or a manager of an authorised (non-BSB) body and is subject to the regulatory arrangements of the Approved Regulator of that body, and the requirements of that other Approved Regulator conflict with a provision within this Handbook then the conflicting provision within this Handbook shall not apply to you. You will instead be expected to comply with the requirements of that other Approved Regulator and, if you do so, you will not be considered to be in breach of the relevant provision of this Handbook.”⁸²

- The Council considers that this duality of regulation is ill-suited to the protection and advancement of the interests of clients. It is a recipe for confusion that lawyers providing services to a client might dis-apply provisions of one code of conduct or

⁸⁰ The BSB, in its Entity Regulation Policy Statement, has stated that it would consider it appropriate to regulate entities where “a substantial part of the services to be provided are advocacy and/or litigation services and expert legal advice” and “the entity is not intending to provide high-volume, standardised legal transactional services”

https://www.barstandardsboard.org.uk/media/1668991/entity_regulation_policy_statement.pdf.

⁸¹ Core Duties 10.

⁸² Rule 18 of the BSB Handbook.

professional code and then have to comply with some other set of rules. In addition, the costs of regulation (with consequent costs to the client) are likely to be increased.

- In relation to BSB authorised bodies, the BSB has introduced further criteria and safeguards.⁸³ To be eligible to practice as a BSB regulated body the body:
 - (a) Must have arrangements in place designed to ensure at all times that any obligations imposed from time to time on the BSB authorised body, its managers, owners or employees by or under the BSB's regulatory arrangements, including its rules and disciplinary arrangements, are complied with and confirm that the BSB authorised body and all owners and managers expressly consent to be bound by the BSB's regulatory arrangements (including disciplinary arrangements);
 - (b) Must ensure at all times that any other statutory obligations imposed on the BSB authorised body, its managers, owners or employees, in relation to the activities it carries on, are complied with;
 - (c) Must confirm that it has or will have appropriate insurance arrangements in place at all times in accordance with the BSB's rules and will be able to provide evidence of those insurance arrangements if required;
 - (d) Must confirm that, in connection with its proposed practice, it will not directly or indirectly hold client money in accordance with the BSB's rules or have someone else hold client money on its behalf other than in those circumstances permitted by the rules;
 - (e) Must confirm that no individual that has been appointed or will be appointed as a Head of Legal Practice, Head of Finance and Administration, manager or employee of the BSB authorised body is disqualified from acting as such by the BSB or any Approved Regulator pursuant to section 99 of the 2007 Act⁸⁴ or otherwise as a result of its regulatory arrangements;
 - (f) Must have a practising address in England or Wales and, if a Limited Liability Partnership (LLP) or company (as permitted under the regulatory regime there), must be incorporated and registered within the United Kingdom.

⁸³ See Rule S83 of the BSB Handbook adopted in April 2015.

⁸⁴ Section 99(3) specifies grounds for the disqualification of Heads of Legal Practice and Heads of Finance and Administration of licensed bodies. Such persons can be disqualified if they (intentionally or through neglect) breach a relevant duty or cause, or substantially contribute to, a significant breach of the terms of the licensed body's licence.

Pursuant to Directive 98/5/EC,⁸⁵ companies incorporated in other EU member states which are registered as overseas companies under United Kingdom law, or which are incorporated and registered in a member state as a *societas Europaea*, may also apply.

- (g) Must confirm that at least one manager or employee is an authorised individual⁸⁶ in respect of each reserved legal activity which it wishes to provide; and
 - (h) Must confirm that it will pay annual fees as and when they become due.
- Given the complexities that will arise for the operation of legal partnerships in this jurisdiction, whether barrister-barrister or solicitor-barrister in nature, the Council believes that somewhat similar regulation of partnerships may be required.

Oversight/Regulation by the Authority:

- Firstly, there is no equivalent of the Bar Standards Board provided for under the 2015 Act. Rather, the Authority is the independent body responsible for overseeing the regulation of all legal practitioners in Ireland and is, therefore, more analogous to the Legal Services Board in England and Wales. But the Authority should note the “hands-on” approach of the Bar Standards Board to the regulation of the entities in which barristers are involved in England and Wales as it gives some insight into the range and depth of work that is required to put such practice models on a sound regulatory footing prior to them being allowed to operate.
- Secondly, the question arises as to how the functions of legal partnerships involving barristers is to be supported by an appropriate Code of Conduct/Practice, the imposition of rules and regulations concerning the management of the legal partnership, accountability of the partnership and its members to the Authority itself, the continuance of the Cab-Rank Rule and “conflicts of interest” rules for barristers in partnerships and how to reconcile those matters with provisions of the *Partnership Act, 1890*.
- Further, the question arises as to how a regulatory regime can be funded and resourced given the importance, in the public interest, of having such similar matters regulated for barristers in partnerships in this jurisdiction as is carried out by the Bar Standards Board in the United Kingdom?

⁸⁵ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

⁸⁶ Authorised either by the BSB or another approved regulator.

Holding client money

- BSB regulated bodies are **not** permitted to hold client money.
- In the case of barrister–solicitor partnerships envisaged in the 2015 Act s.45(1) of the 2015 Act only permits solicitors to hold client money. This is addressed further hereunder.
- A Code of Conduct for solicitor-barrister partnerships would likely have to address the circumstances in which a barrister can be part of a partnership which holds client money given the strictures of s.45 of the 2015 Act. Indeed, the accommodation of that prohibition alongside the “partnership” structure envisaged under the *Partnership Act, 1890* would appear to the Council to require some further research and consideration.

Maintenance of the Cab-Rank Rule

- In the case of both solicitor-barrister and barrister-barrister partnerships, codes of conduct may be required to consider to what extent such bodies (or barristers acting within them) should be required to comply with the Cab-Rank Rule. This was the subject of much consideration by the English Bar Standards Board in its consultation process.⁸⁷
- It is noteworthy that BSB authorised bodies (whether barrister-barrister or barrister-solicitor) appear to be subject to the Cab-Rank Rule. Indeed, Rule C29 of the BSB Handbook provides that where instructions are received from a professional client, and subject to certain limited exceptions, that self-employed barrister, individual employed by a BSB authorised body or BSB authorised body itself must accept the instructions of that client.
- However, it is not clear how this interacts with the potential for conflicts of interest if another partner of a partnership is doing work for another party involved in the same action/matter/proceedings. There is a duty on BSB authorised bodies, pursuant to Rule C94(5),⁸⁸ to use reasonable endeavours to procure that the body shall have suitable arrangements to ensure that conflicts of interest are managed appropriately and that the confidentiality of clients’ affairs is maintained at all times. This

⁸⁷ <https://www.barstandardsboard.org.uk/about-bar-standards-board/consultations/closed-consultations/legal-services-act-2007-legal-disciplinary-practices-and-partnerships-of-barristers/>.

See in particular the advices and supplementary advices of Peter Roth QC.

⁸⁸ If you are a BSB authorised body , you must at all times have (or, if you are a BSB regulated individual working in such BSB authorised body , you must use reasonable endeavours (taking into account the provisions of Rule rC95. to procure that the BSB authorised body shall have) suitable arrangements to ensure that:
...(5)- *conflicts of interest are managed appropriately and that the confidentiality of clients’ affairs is maintained at all times;*

obligation also applies (though with lesser force) to BSB authorised individuals working within BSB authorised bodies.⁸⁹

- The BSB Handbook does not contain guidance as to what arrangements are appropriate in the context of a BSB authorised body. However, the equivalent conflict of interest provision in the Handbook relating to chambers includes the following guidance note at gC134 in relation to confidentiality:

“Your duty under [the rule] to have proper arrangements in place for ensuring the confidentiality of each client’s affairs includes:

- 1 putting in place and enforcing adequate procedures for the purpose of protecting confidential information;*
- 2 complying with data protection obligations imposed by law;*
- 3 taking reasonable steps to ensure that anyone who has access to such information or data in the course of their work for you complies with these obligations; and*
- 4 taking into account any further guidance on confidentiality which is available on the Bar Standards Board’s website...”*⁹⁰

- Again, in relation to chambers, Rule C90(3) provides that what it is reasonable for any individual member to do will depend on *inter alia* the independence of individual members from one another. The guidance at C137 in relation to this provision states that this:

“...means that you should consider, in particular, the obligation of each individual members of chambers to act in the best interests of his or her own client ... and to preserve the confidentiality of his or her own client’s affairs ..., in circumstances where other members of chambers are free (and, indeed, may be obliged by the cab rank rule...) to act for clients with conflicting interests.”

- Thus, the system of regulation in respect of chambers appears to rely to some extent on the independence of the individual members. No guidance is provided for BSB authorised bodies where the individuals concerned would enjoy a much lesser degree of independence from one another.

⁸⁹ Pursuant to Rule C95, the steps which it is reasonable for a BSB authorised individual to take will depend on all the circumstances, including but not limited to: (1) the arrangements in place in the BSB authorised body for the management of it; and, (2) any role which the BSB authorised individual plays in those arrangements.

⁹⁰ Accessible at <https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/code-guidance/>.

Corporate Governance

- Such codes of conduct or professional codes practice may also need to include corporate governance requirements in relation to the managerial structures to be put in place in such bodies, corporate governance requirements of such bodies and functional responsibility.
- In England and Wales, Rule C91 of the BSB Handbook requires that a BSB authorised body has at all times a person appointed by it to act as its Head of Legal Practice and a person who shall be Head of Finance and Administration. Appointments to these positions must be approved in advance by the BSB.⁹¹
- The Council notes that certain guides and codes of the Central Bank of Ireland set corporate governance rules and standards in the context of different types of undertakings, to include credit institutions and insurance undertakings.⁹² The Council believe that, given the concerns addressed in this Part of the submission, any professional codes or codes of conduct should be supplemented by provisions that will allow for the regulation and monitoring of corporate governance within legal partnerships.
- Similarly, given the potential for confusion to arise in the eyes of the public about the respective roles of the barristers and/or solicitors in such partnerships, the Council believes that it will be necessary to include in any code of conduct or professional codes provisions that ensure that clients are aware of the precise nature of the services they can expect from the person they are dealing with in the partnership and whether that service will be undertaken by him or her or by another person in the partnership.
- By way of example the Council notes that under Chapter 4 of the Consumer Protection Code 2012⁹³ issued by the Central Bank of Ireland a number of requirements concerning the provision of information to consumers are set out. Regulated entities are required:
 - To ensure that all information provided to consumers is clear, accurate, up to date and written in plain English. Key information must be brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information;
 - To supply information to a consumer on a timely basis;

⁹¹ See Rules C91, S83, S90 and S110. See also the suitability criteria for such roles at Rules S104 – rS110.

⁹² Corporate Governance Requirements for Insurance Undertakings 2015, Corporate Governance Requirements for Credit Institutions 2015.

⁹³ <https://www.centralbank.ie/regulation/processes/consumer-protection-code/documents/consumer%20protection%20code%202012.pdf>.

- Where the entity communicates with a consumer using electronic media, it has in place appropriate arrangements to ensure the security of information received from the consumer and the secure transmission of information to the consumer.
- Chapter 4 also requires regulated entities to provide consumers with information about the regulated entity as well as its regulated activities. A regulated entity must draw up its terms of business and provide each consumer with a copy prior to providing the first service to that consumer.⁹⁴
- Similar codes apply in the context of mortgage arrears⁹⁵ and moneylending.⁹⁶
- The Council believes that given the nature of the concerns identified in this Part of the submission that any regulations enacted by the Authority should be supported and supplemented by similar provisions to those identified in the Central Bank of Ireland's codes.

⁹⁴ Page 23.

⁹⁵ The Code of Conduct on Mortgage Arrears 2013.

⁹⁶ Consumer Protection Code for Licensed Moneylenders.