

LSRA Consultation on Code of Practice for Practising Barristers (“draft Code”)

SUBMISSION OF THE HONORABLE SOCIETY OF KING’S INNS

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- *Part 1 sets out observations with respect to employed barristers.*
- *Part 2 includes observations of general application which can be considered as part of the overall response.*

LSRA Consultation on Code of Practice for Practising Barristers (“draft Code”)

Part 1:

Application of the draft Code to practising barristers in employment

Introduction

- 1.1. The definition of “practising barrister” in the Legal Services Regulation Act 2015 (“the Act”) covers qualified barristers who provide legal services to their employer under a contract of service. Practising barristers in employment, whether in full-time service of the State or otherwise, must be registered on the roll of practising barristers (“the Roll”) along with all other practising barristers.
- 1.2. Having regard to the Roll as published on the Authority’s website as of 7 April 2024, of the 3045 barristers listed on the Roll, a portion of these barristers (304) were in full-time service of the State. The remaining number comprises primarily of Law Library members, but also includes, e.g., barristers in employment in the private sector and lawyers registered under the European Communities (Lawyers' Establishment) Regulations 2003.
- 1.3. The Authority proposes to apply the draft Code, to varying degrees, to all practising barristers, including those in full-time employment. The nature of an employed barrister’s practice may differ from members of the Law Library, including by reference to their

practice areas, the balance of non-contentious work, method of delivering legal services (e.g., the balance of advisory work), their engagement with other legal practitioners, how they receive work and manage their workload. Given that the draft Code seeks to set standards for practising barristers, the Authority should take particular care that such standards are clear and reasonable, taking account of differences that exist between different groups.

- 1.4. Barristers may also provide legal services to an entity or person as part of a contract for services (e.g., contractors, consultants). Because such services may be similar to those provided by barristers in employment under a contract of service, the observations made in this submission to barristers in employment may be relevant to this group and, as such, should be read as applying to them where appropriate.
- 1.5. The draft Code refers in some places to the application, or otherwise, of specific provisions to barristers in employment. There are certain provisions that appear to have been drafted with the independent referral Bar in mind; however, these have not been disapplied or modified in order to take account of the position of employed barristers. In this regard, the Society seeks to set out some suggested changes to the draft Code as part of this submission.
- 1.6. It is recommended that further research is carried out with respect to the profile of employed barristers, the nature of their practices and the manner in which they deliver legal services to their employers. This may provide valuable information and insights for use when regulating this cohort, both in the context of developing the draft Code and more generally.

2. Preliminary (Part 1 of the draft Code)

- 2.1. Paragraph 1.5 states that the draft Code is not intended to be an exhaustive statement of the rules applicable to practising barristers and that other rules may be found in the Act, general law and professional codes. Practising barristers may also be subject to statutory or contractual obligations relevant to the provision by them of legal services (e.g., under a contract of service or contract for services) and, as such, this should also be reflected in this paragraph.

2.2. Barristers providing legal services to their employer, either on a part-time or full-time basis, may also, as part of their contract of employment, provide other services to their employer falling outside the scope of the provision of legal services (e.g., company secretarial or compliance activities, etc.) As such, the draft Code should expressly clarify that, for the avoidance of doubt, it only applies to the provision of legal services within the meaning of the Act.

3. Requirements to practice as a barrister (Part 2 of the draft Code)

3.1. Part 2, section II, of the draft Code requires all practising barristers to have in place a policy of professional indemnity insurance in respect of the legal services provided by them unless exempted by the Authority. This section is expressly stated to apply to employed barristers, whereas a separate set of regulations will exempt *“an employee providing legal services exclusively to his or her employer.”* For clarity and consistency, this exemption should also be expressly included in the draft Code and be applied to both full-time and part-time employees.

4. General obligations (Part 3 of the draft Code)

4.1. The fundamental obligations set out in Part 3, section I, of the draft Code apply to all practising barristers, including the requirement to act with independence.¹ Given that employed barristers may owe specific contractual or statutory duties to their employer, it would be helpful if the Authority issued guidance, including by reference to specific examples, on how the principle of professional independence operates in this context.

4.2. Part 3, section II, sets out specific rules governing how practising barristers accept instructions and these rules appear to be primarily relevant to members of the independent referral Bar. These provisions may be difficult to apply to an employed barrister's practice and, as such, the intention behind these rules in that context may be unclear or confusing.

¹ Paragraph 22 of the Professional Code provided a description of independence that could be incorporated into the Code: *“It is the duty of barristers to be independent and free from influence, especially such as may arise from their personal interests or external pressure, in the discharge of their professional duties. Barristers must avoid any impairment of their independence and be careful not to compromise their professional standards in order to please their client, the court, third parties, or, as the case may be, their employer(s) or partner(s).”*

- 4.3. For instance, an employed barrister may not, in practical terms, formally “accept instructions” to act in a matter, but rather provide services on a continuous basis to their employer pursuant to their contract of service. Similarly, the concept of refusing instructions, or receiving and returning briefs, may not be readily applicable or transferrable to the reality of how they provide legal services to their employer.
- 4.4. The section also envisages instructions being received from a solicitor, or through a direct access scheme, neither of which may be reflective of the manner in which an employed barrister is assigned work or provides legal services. They may work in a legal team consisting of both barristers and solicitors, perhaps acting as in-house counsel without distinction, with different reporting lines and organisational structures. Indeed, they may be the only legal practitioner in their organisation. Employed barristers may be integrated into their employer’s governance structures and provide legal services in a number of ways, e.g., written or oral requests from the employer’s officers and employees or through their attendance or membership of committees or working groups. In many cases, an employed barrister does not receive instructions from a solicitor or a direct access scheme, nor are they required to, and to imply otherwise may give rise to unintended consequences or cause confusion as to the Authority’s intentions under this section. Furthermore, the manner in which an employed barrister manages their time, workload and commitments will primarily be assessed by reference to their contractual obligation and any internal management procedures.
- 4.5. As a result of the foregoing, it is proposed the section be expressly stated not to apply to practising barristers with respect to the provision of legal services under a contract of service. Employed barristers would still be subject to the fundamental obligations under section I and the conflict of interests obligations under section IX.
- 4.6. In the alternative, if the Authority does not accede to the request to generally disapply section II to barristers in employment, a statement should be inserted to the effect that section II is not intended to interfere with the manner in which a practising barrister in employment’s work is assigned, managed or completed and, in this regard, does not introduce any additional requirements, rules or standards.
- 4.7. Paragraph 3.11 states that practising barristers must be attended in court by their instructing solicitor, save for specific exemptions. This should be expressly stated to apply only to situations where a practising barrister is appearing before the Court as counsel in

the relevant case. This would make clear that the provision does not apply to an employed barrister who may also be present in court as a representative of their employer but not otherwise appearing as counsel before the Court.

- 4.8. The Society notes that Part 3, section III, reflects section 45 of the Act in the context of holding clients' money. Additional guidance with specific examples explaining how this operates from the perspective of employed barristers would be helpful.
- 4.9. Part 3, section IV, of the draft Code sets out specific rules with respect to the protection of data and client confidentiality. Paragraph 3.19 includes a list of circumstances in which barristers are not prevented from disclosing information. Given the importance of information-sharing by employed barristers with their colleagues, an additional ground should be added to this list, along the lines of the text highlighted below:

"This Rule does not prevent a practising barrister from:

...

"in the case of practising barristers in employment, disclosing information in an appropriate manner with officers, employees or agents (including other legal practitioners) of their employer or its related persons including parent undertakings, holding companies and subsidiaries, without prejudice to relevant statutory or contractual obligations."

- 4.10. While paragraph 3.24 is, in general terms, consistent with proper recordkeeping and document retention practices, it contains elements that may not be directly relevant to employed barristers, including the concepts of receiving briefs and being on retainer. To avoid creating unintended obligations for employed barristers, the paragraph should state that it does not intend to introduce any obligations or procedures for practising barristers in employment additional to those that may already form part of their employment relationship.
- 4.11. Part 3, section IX, sets out how practising barristers should manage conflicts of interest. Paragraph 3.35 appears to relate specifically to the appearance by counsel in court in contentious matters. For the avoidance of doubt, this context should be expressly stated in the paragraph.

5. Conduct of work (Part 4 of the draft Code)

5.1. Part 4, Section II sets out rules with respect to the conduct of cases by practising barristers. While this section appears to apply predominantly to proceedings before a court in contentious matters, certain provisions are unintentionally ambiguous in this regard. For example, paragraph 4.7 includes rules with respect to managing scheduling difficulties but does not expressly state this arises in the context of cases before courts or other bodies. As stated above, rules of this nature may not correspond to the manner in which barristers in employment provide legal services including in non-contentious matters. For the avoidance of any doubt, section II should be prefaced with an express statement to the effect that it applies to cases before a court or other body. This could be effected by moving paragraph 4.16 of the draft Code to the start of section II in order to more clearly establish the section's scope, with the following highlighted amendments:

“The Rules set out in this section governing a practising barrister’s obligations when conducting cases ~~also~~ apply where a practising barrister appears **before a Court or other body** or in a mediation.” ~~or before an arbitrator or any other person or persons exercising judicial or quasi-judicial functions, or before the sole member or members of Tribunals appointed under Statute or by the Oireachtas or any other investigating body.”~~

5.2. The Professional Code defines “*Court or other body*” as “*any court of law, arbitrator, tribunal, statutory or other body, board or person exercising judicial or quasi-judicial functions.*” For clarity and consistency, this definition could also be included in the draft Code with relevant amendments made throughout.

5.3. Section VI sets out certain rules with respect to drafting documents. In this regard, paragraph 4.42 refers to any “pleading, witness statement, affidavit, notice of appeal and any other document” (emphasis added). While the context suggests this section applies to cases before a Court or other body, this should be expressly clarified in order to avoid unintended application of the provision, i.e., to documents not prepared in the context of litigation. Paragraph 4.42 reflects paragraph 38 of the Professional Code, but importantly the latter is stated to apply “*to the conduct of practising barristers before any court or other body*” (paragraph 33 of the Professional Code). For consistency and the avoidance of doubt, paragraph 4.42 or, indeed, all of Part 4 of the draft Code, should be expressly stated to apply only to the conduct of practising barristers before any court or other body.

Part 2:

Observations of general application

1. Introduction

- 1.1. Paragraph 1.13 should expressly state that the relevant professional bodies and other interested parties will be consulted in the event that the Authority proposes to amend the Code.

2. Purpose and Scope of the Code

- 2.1. Part 1, section II, provides that the *“purpose of the Code is to set requirements, rules and standards that apply to every person who is a practising barrister in Ireland as defined in the Act”* (emphasis added). The draft Code proceeds to use the terms “requirement”, “rule” and/or “standard” to varying degrees in different contexts and without any clear consistency or specific meaning assigned to each term. The Authority should use consistent language that falls within the scope of its statutory powers under section 22 of the Act.

3. General obligations

- 3.1. Part 3, section VII, provides, inter alia, that *“a practising barrister must undertake the continuing education and professional development necessary to ensure an adequate level of knowledge and competence in their area(s) of practice.”*
- 3.2. Continuing legal education should have at its objective the acquisition of new knowledge and skills or building on existing ones. Acquiring knowledge and competence in areas of legal practice that may be new to a practising barrister may allow them to expand their areas of practice or to better understand areas adjacent to their current practice. The reference to *“their area(s) of practice”* in paragraph 3.32 of the draft Code may be overly restrictive because it may only take into account education and professional development that can be linked to a barrister's *existing* areas of practice when assessing a barrister's compliance with the provision. As such, the paragraph should be amended to refer to *“their **present or proposed** area(s) of practice.”*