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LAW SOCIETY SUBMISSION

Section 118 Legal Services Regulation Act 2015 – Legal Partnerships

LEGAL SERVICES REGULATORY AUTHORITY

16 MARCH 2017

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

Contents

1. Introduction

1.1. The purpose of this submission from the Law Society of Ireland is to respond to the invitation from the Legal Services Regulatory Authority ("the Authority") for submissions in relation to the regulation, monitoring and operation of legal partnerships as part of their initial public consultation on the matter in accordance with section 118 of the Legal Services Regulation Act 2015 ("the Act").

1.2. Legal partnerships are a new form of legal services business structure proposed under the Act. They are defined as:

"..a partnership formed under the law of the State by written agreement, by two or more legal practitioners, at least one of whom is a practising barrister, for the purpose of providing legal services."

1.3. As such, the new business structure proposed comprises partnerships of barristers and barristers, or solicitors and barristers.

1.4. As the Law Society is the representative and regulatory body for solicitors in Ireland, the Society's comments in this submission will be limited to solicitor-barrister legal partnerships. As such, all references to "legal partnerships" in this submission should be read as a reference only to solicitor-barrister legal partnerships, not barrister-barrister legal partnerships.

1.5. Responses to some of the queries raised in the public consultation notice have been amalgamated together, in particular in relation to regulatory matters, for clarity.

2. Executive Summary

2.1. The following submission sets out the Law Society's views in relation to the establishment and regulation of legal partnerships under the Act and recommendations in relation to same.

2.2. The submission covers a range of issues including benefits and risks for clients, ethical implications for legal practitioners in legal partnerships, regulation of legal partnerships and protection of consumers, provision of information to clients, complaints process for legal partnerships, register of legal partnerships, registration requirements for legal partnerships, consequences of breaches of the Act and regulations, and funding the regulation of legal partnerships.

2.3. With regard to regulation of legal partnerships and protection of consumers, the dual regulatory roles of the Authority and the Society in relation to solicitor-barrister legal partnerships will need to be kept in mind, in particular in relation to investigations of legal partnerships, introduction of a more robust saver for the Compensation Fund, dealing with risks associated with access by barristers to client monies, professional indemnity insurance issues, ensuring that inappropriate solicitors such as restricted, suspended or struck-off solicitors are not permitted to act as partners in legal partnerships, consideration of how distressed closures of legal partnerships will be dealt with, and amendments to the Solicitors Acts in relation to the prohibition on sharing fee income.

2.4. With regard to the provision of information to clients of legal partnerships, it is the view of the Society that legal partnerships should have the same requirements and obligations with regard to the provision of information to clients as are in place for solicitor firms, including information on legal costs and professional fees, complaints procedures, professional indemnity insurance, and the limited access of legal partnership clients to the Compensation Fund.

2.5. Similarly, it is the view of the Society that complaints against legal practitioners in legal partnerships should be treated the same as complaints against any other legal practitioners. Data sharing procedures on complaints against solicitors in legal partnerships between the Society and the Authority should be put in place.

2.6. The Society's recommendations with regard to the register of legal partnerships sets out the information that should be included in the register, together with introduction of reciprocal notification requirements between the Society, the Bar and the Authority in relation to information held on the register of legal partnerships, roll of solicitors, register of practising solicitors, and roll of practising barristers.

2.7. This submission sets out in-depth recommendations with regard to registration requirements for legal practitioners in relation to commencement notifications, cessation notifications, notification of specified regulatory changes, and annual updating of information.

2.8. Commencement recommendations cover issues such as time limits for notification of commencement, permission to commence, power to refuse permission to commence,

good standing of legal practitioner partners, information to be provided, professional indemnity insurance, professional names, professional notepaper and website, contact and emergency information, and legal partnership identifier numbers.

2.9. Cessation recommendations cover issues such as time limits for cessation notifications, insurance run-off cover, succeeding practices, types of cessation, post-closure contact details, client files, client monies, and closing accountants' reports.

2.10. It is the Society's view that regulation of legal partnerships should be by way of regulation of the individual legal practitioners, rather than by entity, to ensure that consequences of breaches of the Act or regulations cannot be avoided by simply closing down the legal partnership, or allowing the legal partnership to continue if taken over by another legal practitioner. Breaches of notification requirements could be dealt with by way of fines to be paid to the Authority. It should be made clear that the partners of legal partnerships are jointly and severally liable.

2.11. With regard to funding the regulation of legal partnerships, the Society proposes a structure similar to that in place for funding the Authority and the Legal Practitioners Disciplinary Tribunal, with any fees recovered by the Authority from legal partnerships to be offset against the levy.

2.12. The Society views this document as an initial submission in relation to legal partnerships, and looks forward to further discussions with the Authority on same.

2.13. The recommendations of the Society in relation to solicitor-barrister legal partnerships are as follows:

Recommendation 1 – Harmonisation of regulations and professional codes

It is the recommendation of the Society that regulations and professional codes of solicitors, solicitor firms and solicitor-barrister legal partnerships be harmonized between the Society and the Authority to ensure the same regulatory standards apply for the protection of the public.

Recommendation 2 – Investigation of legal partnerships

It is the recommendation of the Society that measures be put in place to ensure that the Society has the same primary functions of investigation and enforcement in relation to financial regulation matters, and all required investigative powers to inspect documentation and accounts under the Solicitors Acts for solicitor-barrister legal partnerships as exist for solicitor firms.

Recommendation 3 – Reporting accountants' reports

It is the recommendation of the Society that measures be put in place to ensure that solicitor-barrister legal partnerships are required to meet the same annual reporting accountant report requirements as exist for solicitor firms under the solicitors accounts regulations.

Recommendation 4 – Saver for the Compensation Fund

It is the strong recommendation of the Society that further clarifying language be put in place in regulations pertaining to solicitor-barrister legal partnerships, and any future amendments to the Act, to ensure that access to the Compensation Fund will be strictly limited to losses suffered by clients of legal partnerships by reason of dishonesty by a solicitor in a legal partnership, and there will be no access to the Compensation Fund for dishonesty by non-solicitors in the legal partnership.

Recommendation 5 – Compensation Fund information for clients

It is the recommendation of the Society that measures be put in place to ensure that clients of solicitor-barrister legal partnerships are made fully aware of the limitations on their access to the Compensation Fund.

Recommendation 6 – Access to client monies by barristers

It is the recommendation of the Society that consideration be given to the introduction of protection mechanisms for clients monies in solicitor-barrister legal partnerships in relation to access to client monies, including only permitting practising solicitors to act as signatories of client bank accounts and authorised individuals on internet banking, and that barristers be legally precluded from receiving client monies or from giving or joining in giving any instruction whatsoever with respect to client monies, with any such receipt or instruction being deemed as null and void and not binding on any other partner in the legal partnership.

Recommendation 7 – Replacement of misappropriated client monies

It is the recommendation of the Society that measures be put in place to compel barrister partners of solicitor-barrister legal partnerships to replace any monies misappropriated by any partner or employee of the legal partnership, and make good any deficits on the client account, in line with similar requirements already in place for solicitors.

Recommendation 8 – Professional indemnity insurance

It is the recommendation of the Society that solicitor-barrister legal partnerships be required to meet the same PII requirements, including minimum level of cover and minimum terms and conditions, as exist for solicitor firms.

Recommendation 9 – Further discussions regarding professional indemnity insurance

It is the recommendation of the Society that further discussions take place between the Society and the Authority in relation to the implications of legal partnerships for current PII regulations, and access to the Assigned Risks Pool and Run-off Fund.

Recommendation 10 – Practising certificate conditions

It is the recommendation of the Society that measures be put in place to ensure that existing practising certificate conditions, in particular those restricting certain solicitors from acting as principals or partners in solicitor firms, also extend to solicitors in legal partnerships.

Recommendation 11 – Data sharing regarding practising certificate conditions

It is the recommendation of the Society that robust data sharing procedures be put in place between the Society and the Authority in relation to practising certificate conditions.

Recommendation 12 – Suspended and struck-off solicitors

It is the recommendation of the Society that suspended and struck-off solicitors, as well as solicitors who have given an undertaking not to practise, be prohibited from acting as partners in solicitor-barrister legal partnerships. In addition, suspended and struck off solicitors should not be permitted to be employed by a legal partnership, or engage in any work in any capacity involving or in connection with the provision of legal services unless granted permission by the Society in accordance with section 63 of the Solicitors Act 1954 (as substituted by section 21 of the Solicitors (Amendment) Act 1994), and section 20 of the Solicitors (Amendment) Act 1994.

Recommendation 13 – Certificate of good standing

It is the recommendation of the Society that the Authority introduce a requirement for solicitor partners in prospective legal partnerships to provide a certificate of good standing from the Society before being permitted to open a legal partnership, or join an existing legal partnership.

Recommendation 14 – Distressed closures

It is the recommendation of the Society that consideration be given as to how distressed closures of legal partnerships will be dealt with.

Recommendation 15 – Prohibition on sharing fee income and rewarding non-solicitors for introduction of business

It is the recommendation of the Society that section 62 of the Solicitors Act 1954 be amended to facilitate the sharing of fee income between solicitors and barristers. The prohibition should remain in place with regard to sharing of fee income with non-solicitors, or rewarding non-solicitors for introduction of business.

Recommendation 16 – Provision of information to clients

It is the recommendation of the Society that solicitor-barrister legal partnerships should have the same requirements and obligations with regard to the provision of information to clients as are in place for solicitor firms, including information on legal costs and professional fees, complaints procedures, limited access to the Compensation Fund, and professional indemnity insurance.

Recommendation 17 – Complaints against legal partnerships

It is the recommendation of the Society that complaints against solicitors and barristers in legal partnerships should be dealt with in the same way as complaints against all other legal practitioners, with the complaint being attributed to the individual legal practitioner rather than the entity in which they work.

Recommendation 18 – Sharing of complaints data

It is the recommendation of the Society that robust data sharing procedures be put in place between the Authority and the Society with regard to complaints made against solicitors in legal partnerships, and any issues uncovered by the Authority in the process of handling such complaints which may indicate a risk to client monies held by legal partnerships.

Recommendation 19 – Information in the register of legal partnerships

It is the recommendation of the Society that the following information be included in the register of legal partnerships:

1 the full name of the legal partnership;
2 the place or places of business;
3 contact details including landline and mobile phone numbers, email and website address;
4 notified date of commencement;
5 notified date of cessation for closed legal partnerships;
6 current professional indemnity insurance details including insurer, date of commencement and cessation of the policy, policy number, broker details, and minimum level of cover;
7 names of current partners and commencement dates;
8 names of all legal practitioners in the partnership, including commencement dates, job titles and professional qualifications;
9 confirmation that legal practitioners in the partnership are all practising solicitors and/or barristers;
10 professional qualifications of partners;
11 historic data including previous names of the partnership, previous places of business, previous partners (including commencement and cessation dates), previous legal practitioner employees (including commencement and cessation dates), insurance details for previous indemnity periods, and details of any preceding or succeeding legal partnerships.

Recommendation 20 – Reciprocal notification requirement

It is the recommendation of the Society that a reciprocal notification requirement be established between the Authority, the Society and the Bar, requiring the Authority to notify the Society and the Bar of any amendments to the register of legal partnerships, and the Society and Bar being required to notify the Authority of any amendments to the roll of solicitors, register of practising solicitors, and roll of practising barristers where such legal practitioners are in legal partnerships.

Recommendation 21 – Time limit on commencement notification

It is the recommendation of the Society that legal partnerships be required to provide written confirmation of commencement no later than one month in advance of their proposed commencement date.

Recommendation 22 – Permission to commence

It is the recommendation of the Society that legal partnerships be prohibited from commencing providing legal services until such time as written permission to commence has been granted by the Authority, together with confirmation of inclusion in the register of legal partnerships

Recommendation 23 – Power to refuse permission to commence

It is the recommendation of the Society that the Authority seeks the express power to refuse a legal partnership permission to commence, and that a notification of commencement not be deemed to be received by the Authority until a properly completed notification form with all prescribed accompanying documentation, and full payment of fees (if applicable) are received by the Authority.

Recommendation 24 – Legal practitioners in good standing

It is the recommendation of the Society that partners in legal partnerships be required to provide a certificate of good standing from their respective professional bodies when applying to commence a legal partnership or join a legal partnership. Certificates of good standing should disclose that, as at the date of the certificate, the legal practitioner is in good standing in that a search of the records of the legal practitioner disclose no orders of findings of misconduct or reprimands to the discredit of the legal practitioner, and no restrictions exist on the legal practitioner's practising certificate that would prohibit them from acting as a partner in a legal partnership.

Recommendation 25 – Commencement information

It is the recommendation of the Society that all information to be included in the register of legal practitioners be required to be provided as part of the commencement notification by the legal partnership.

Recommendation 26 – Confirmation of professional indemnity insurance cover

It is the recommendation of the Society that legal partnerships be required to provide documentary evidence of their professional indemnity insurance, to include dates of commencement and cessation of the policy, participating insurer details, broker details, minimum level of cover, and confirmation that the insurance meets the prescribed minimum terms and conditions.

Recommendation 27 – Professional names

It is the recommendation of the Society that the Authority seek powers in relation to professional names of legal partnerships similar to those in place for solicitor firms under section 4(1) of the Solicitors (Professional Names/Notepaper) Regulations 1996 (S.I. No. 178 of 1996), and that the legal partnership is obliged to meet all prescribed requirements with regard to the approval of their professional name before commencement.

Recommendation 28 – Professional notepaper

It is the recommendation of the Society that the Authority seek powers in relation to professional notepaper of legal partnerships similar to those in place for solicitor firms under the Solicitors (Professional Names/Notepaper) Regulations 1996 (S.I. No. 178 of 1996), and that legal partnerships be required to provide a copy of their proposed headed notepaper to the Authority as part of their commencement notification, and such notepaper should meet the prescribed requirements.

Recommendation 29 – Professional websites

It is the recommendation of the Society that the Authority consider extending powers in relation to professional notepaper to include legal partnership websites, to ensure that the information contained therein meets prescribed professional standards.

Recommendation 30 – Contact and emergency information

It is the recommendation of the Society that specific information be required in the commencement notification with regard to how emergency closure situations will be dealt with by the partnerships, such as death of partners, abandonment of practice, and forced closure by the High Court. Contact information such as home addresses, phone numbers and emails of partners should be sought, as well as a nominated emergency legal practitioner contact who has agreed to assist with the wind-down of the legal partnership in the event of an emergency closure.

Recommendation 31 – Legal partnership number

It is the recommendation of the Society that each legal partnership be assigned a unique legal partnership reference number to act as a unique identifier of that specific legal partnership.

Recommendation 32 – Time limit for cessation notifications

It is the recommendation of the Society that legal partnerships be required to provide prior written notification of cessation to the Authority not less than one month before the date of cessation.

Recommendation 33 – Emergency closures

It is the recommendation of the Society that provision be built into the cessation regulations and professional codes for legal partnerships to deal with emergency closures, such as cessation due to the death or illness of a partner, appointment of a partner as a judge, or forced closure by order of the High Court.

Recommendation 34 – Run-off cover

It is the recommendation of the Society that consideration be given to the issue of run-off professional indemnity insurance cover for closed legal partnerships, and that a requirement to provide the Authority with information on same be included in the cessation notification.

Recommendation 35 – Succeeding practices

It is the recommendation of the Society that legal partnerships be required to include information on any succeeding practices to the closed legal partnership, together with information as to the reason for the cessation, and where partners will be working following cessation of the legal partnership, in the cessation notification to the Authority.

Recommendation 36 – Types of closures

It is the recommendation of the Society that consideration be given to different types of cessation notification and other requirements for different types of closures, including full cessations, mergers and take-overs.

Recommendation 37 – Post-closure contact details

It is the recommendation of the Society that partners of legal partnerships be required to provide post-closure contact details in the cessation notification to the Authority. Such details would be required for contact by the Authority, and also contact details which can be provided to third parties, such as clients, who wish to correspond with the partners following the date of cessation of the legal partnership.

Recommendation 38 – Client files and client monies

It is the recommendation of the Society that the Authority put prohibitions, and notification and managerial requirements in place on closed legal partnerships with regard to live and closed client files, as well as a prohibition on holding client monies, as currently exist for solicitor firms.

Recommendation 39 – Closing reporting accountants' reports

It is the recommendation of the Society that similar reporting requirements with regard to closing reporting accountants' reports be put in place for legal partnerships as currently exist for solicitor firms under the solicitors accounts regulations.

Recommendation 40 – Notification of specified regulatory changes

It is the recommendation of the Society that legal partnerships be required to provide the Authority with written notification of specified regulatory changes within 14 days of such change including the following:

1 change of partner, with details of cessation date of previous partner, commencement date of new partner, and all compliance and information documentation required in relation to the new partner;
2 change of professional name, with details of proposed commencement date of new name and application for approval by the Authority if required;
3 change of legal practitioner employees or consultants, with details of relevant commencement and cessation dates;
4 change of contact details, with new details included;
5 notification of disciplinary issues, such as orders of findings of misconduct against partners or employees of the legal partnership, or imposition of restrictions on the legal practitioners' practising certificates;
6 annual professional indemnity insurance notification, with details of commencement and cessation dates of policy, policy number, insurer, broker, minimum level of cover, and confirmation that the cover meets the prescribed minimum terms and conditions; and
7 notification of change of commencement requirements, if the legal partnership no longer meets the minimum commencement requirements prescribed by the Authority.

Recommendation 41 – Data capture

It is the recommendation of the Society that the Authority carry out an annual data capture process for legal partnerships to ensure the details in the register of legal partnerships is up to date.

Recommendation 42 – Annual approval application process

It is the recommendation of the Society that consideration be given as to whether an annual process should be introduced requiring legal partnerships to reapply on an annual basis for approval to practice.

Recommendation 43 – Consequences for breaches of the Act and regulations

It is the recommendation of the Society that:

1 legal partnerships should be regulated by individual legal practitioner, rather than by the legal partnership entity;
2 breaches of the Act and regulations by legal practitioners in legal partnerships should be treated the same as breaches by all other legal practitioners;
3 the Act should be amended to acknowledge that partners of legal partnerships are jointly and severally liable;
4 consideration should be given to dealing with failure by legal partnerships to meet notification requirements by way of fines to be paid to the Authority.

Recommendation 44 – Funding regulation of legal partnerships

It is the recommendation of the Society that the following funding structure be put in place (as provided for in section 95 of the Act) for the establishment and maintenance of the register of legal partnerships, as well as the ongoing regulation, monitoring and operation of legal partnerships as follows:

1 10% paid *pro rata* by the Bar of Ireland and non-Law Library barristers;
2 10% paid by the Law Society;
3 remaining 80% apportioned *pro rata* between the Law Society, Bar of Ireland and non-Law Library barristers in accordance with the number of solicitor and barristers registered as partners in legal partnerships in that year; and
4 any fees recovered by the Authority from legal partnerships should be offset against the levy sought for the regulation of legal partnerships from the professional bodies and non-Law Library barristers.

3. Regulation of legal partnerships and protection of consumers.

3.1. There are a number of factors that need to be taken into account when considering the regulatory structure to be put in place to ensure protection of clients of legal partnerships including dual regulation, investigations, Compensation Fund, risk to client monies, professional indemnity insurance, practising certificate conditions, suspended and struck off solicitors, practice closures, and prohibition on sharing of fee income.

3.2. Issues relating to complaints, commencement and cessation of legal partnerships will be covered later in this submission.

Dual regulation

3.3. While the Authority has the power under section 116 of the Act to make regulations regarding legal partnerships, regulations made by the Society in relation to solicitors equally apply to solicitor employees and solicitor partners in solicitor-barrister legal partnerships.

3.4. A similar structure currently exists for personal insolvency practitioners ("PIPs"). While the Insolvency Service of Ireland is the regulator for PIPs, solicitor PIPs also fall under the regulatory remit of the Law Society and are subject to all the same regulations and obligations as practitioners in solicitor firms.

3.5. As such, any regulations made by the Authority under section 116 in relation to legal partnerships should not be in conflict with regulations made by the Society in relation to solicitors and solicitor firms, in particular in relation to accounts regulations and professional indemnity insurance.

3.6. It will be important to ensure that regulations for solicitors, solicitor firms, and legal partnerships are harmonised so that legal partnerships (and their partners) have the same regulatory requirements and obligations as solicitor firms (and their principals), and that the regulatory standard that legal partnerships are subject to is no lower than that in place for solicitor firms to ensure maintenance of the current high level of public protection.

3.7. Consideration will also need to be given by the Society to the amendment of all existing solicitor regulations to ensure that all references to solicitor firms extend to legal partnerships.

Recommendation 1 – Harmonisation of regulations and professional codes

It is the recommendation of the Society that regulations and professional codes of solicitors, solicitor firms and solicitor-barrister legal partnerships be harmonized between the Society and the Authority to ensure the same regulatory standards apply for the protection of the public.

Investigations of legal partnerships

3.8. As solicitor partners of legal partnerships continue to be subject to regulation by the Society and constitute a risk to the Compensation Fund, the Society must have the same primary functions of investigation and enforcement in relation to the solicitors accounts regulations, and all investigative powers to inspect documentation and accounts under the Solicitors Acts for legal partnerships as exist for solicitor firms.

3.9. Legal partnerships will also be required to meet existing annual reporting accountant reports requirements as set out in the solicitors accounts regulations.

Recommendation 2 – Investigation of legal partnerships

It is the recommendation of the Society that measures be put in place to ensure that the Society has the same primary functions of investigation and enforcement in relation to financial regulation matters, and all required investigative powers to inspect documentation and accounts under the Solicitors Acts for solicitor-barrister legal partnerships as exist for solicitor firms.

Recommendation 3 – Reporting accountants' reports

It is the recommendation of the Society that measures be put in place to ensure that solicitor-barrister legal partnerships are required to meet the same annual reporting accountant report requirements as exist for solicitor firms under the solicitors accounts regulations.

Compensation Fund

3.10. The Law Society runs a statutory Compensation Fund ("the Fund") to compensate clients of solicitors for losses they have suffered by reason of dishonesty of a solicitor. The solicitors' profession is unique in this jurisdiction as it is the only profession with a fund of such magnitude that offers such a high level of public protection.

3.11. The Fund, which is paid for only by solicitors, remains within the remit of the Society together with the associated regulatory powers, subject to oversight by the Authority. The value of the Fund is significant in terms of public confidence and in terms of restitution to clients of solicitors. The Fund ensures that all clients of solicitors have recourse to compensation where loss arises as a result of the dishonesty of a solicitor, regardless of the size, location, or nature of the solicitor's practice.

3.12. It is envisaged that clients of solicitor-barrister legal partnerships would have access to the Fund solely in relation to losses suffered by reason of dishonesty by a solicitor in a legal partnership. There would be no access to the Fund for dishonesty by non-solicitors in the legal partnership.

3.13. While section 113 of the Act sets out a saver for the Fund to ensure that the Fund is only obliged to consider claims arising from the dishonesty of a practising solicitor in a legal partnership, and is not obliged to consider claims arising from the dishonesty of non-solicitor partners or employees of the legal partnership, it continues to be the view of the Society that this saver is inadequate.

3.14. Areas of risk under the current legislation include the following:

(a) Under section 113 of the Act, if a non-solicitor employee or barrister partner of a legal partnership misappropriates client monies, it should not be possible for the client to make a claim on the Compensation Fund. However the argument could be made that the solicitor partner in the legal partnerships should have had controls in place that prevent misappropriation of client monies and, as such, the client is entitled to make a claim on the Fund. This could lead to Compensation Fund being made liable for dishonesty by non-solicitors.

(b) The Act makes it clear that partners in multi-disciplinary practices will be jointly and severally liable, but is silent on the liability of partners in legal partnerships. If partners in legal partnerships are automatically jointly and severally liable under partnership law, then the argument may be made that the Fund should be made liable for providing compensation for loss suffered due to the dishonesty of the barrister partner or non-solicitor employee. Equally, if partners in legal partnership are not automatically jointly and severally liable under partnership law, absence of a definitive statement in the Act as to the liability of the partners could be argued to mean that it was intended that they be jointly and severally liable, and the Fund is left open to the same type of claim.

(c) There is a danger that, even if the solicitor partner has only the slightest involvement in a transaction that involves fraud, there could be an exposure on the Fund.

3.15. As such, it is the strong view of the Society that further clarifying language should be put in place in any regulations made by the Authority in relation to solicitor-barrister legal partnerships, and any proposals by the Authority for future amendments to primary legislation. The Society is happy to provide a more detailed submission on this matter in future.

3.16. Clients of solicitor firms are aware that they may make a claim on the Fund should they suffer loss due to the dishonesty of their solicitor. However, there is a distinct risk to clients of legal partnerships due to the lack of clarity as to the extent they are protected by the Fund, and in relation to what work carried out by the legal partnership.

Recommendation 4 – Saver for the Compensation Fund

It is the strong recommendation of the Society that further clarifying language be put in place in regulations pertaining to solicitor-barrister legal partnerships, and any future amendments to the Act, to ensure that access to the Compensation Fund will be strictly limited to losses suffered by clients of legal partnerships by reason of dishonesty by a solicitor in a legal partnership, and there will be no access to the Compensation Fund for dishonesty by non-solicitors in the legal partnership.

Recommendation 5 – Compensation Fund information for clients

It is the recommendation of the Society that measures be put in place to ensure that clients of solicitor-barrister legal partnerships are made fully aware of the limitations on their access to the Compensation Fund.

Risk to client monies

3.17. There is a concern surrounding access to client monies by barrister partners or employees of legal partnerships, particularly if the barrister is a signatory on the client bank accounts and is an authorised individual on internet banking.

3.18. Prohibiting legal partnerships from holding client monies would not, in the view of the Society, be an appropriate solution as such function goes to the heart of a number of key legal services offered by solicitors. If legal partnerships were unable to hold client monies, this would significantly reduce the range of legal services that they could offer.

3.19. Consideration could be given to only permitting practising solicitors in legal partnerships to act as signatories on client bank accounts and to act as authorised individuals on internet banking.

3.20. It should be noted that, currently, the Society permits non-solicitors to act as cheque signatories for the client accounts in solicitor firms.

3.21. Under the current accounts regulations, principals of solicitor firms are compelled to replace any misappropriated client monies or rectify any deficits in the client accounts. This requirement would also extend to solicitor partners of legal partnerships.

3.22. Consideration should be given to introducing a power to allow barrister partners of legal partnerships to also be compelled to replace any monies misappropriated by any partner or employee of the legal partnership and any deficits on the client account.

Recommendation 6 – Access to client monies by barristers

It is the recommendation of the Society that consideration be given to the introduction of protection mechanisms for clients monies in solicitor-barrister legal partnerships in relation to access to client monies, including only permitting practising solicitors to act as signatories of client bank accounts and authorised individuals on internet banking, and that barristers be legally precluded from receiving client monies or from giving or joining in giving any instruction whatsoever with respect to client monies, with any such receipt or instruction being deemed as null and void and not binding on any other partner in the legal partnership.

Recommendation 7 – Replacement of misappropriated client monies

It is the recommendation of the Society that measures be put in place to compel barrister partners of solicitor-barrister legal partnerships to replace any monies misappropriated by any partner or employee of the legal partnership, and make good any deficits on the client account, in line with similar requirements already in place for solicitors.

Professional indemnity insurance

3.23. The Authority has the power to make regulations in relation to professional indemnity insurance ("PII") for legal partnerships under section 47 of the Act, other than in relation to practising solicitors in such partnerships. As such, the power of the Society in relation to PII regulations extends to solicitor-barrister legal partnerships.

3.24. It should be noted that solicitors' PII cover is provided by solicitor firm, rather than by individual solicitor. As such, the Society's PII requirements would extend to the entire solicitor-barrister legal partnership rather than just to the individual solicitor.

3.25. It is the view of the Society that legal partnerships should be required to meet the same PII requirements, including minimum level of cover and minimum terms and conditions, as solicitor firms to ensure the same level of protection for clients.

3.26. Further discussion between the Authority and the Society will need to take place in relation to the implications of legal partnerships for current PII regulations, and access to the Assigned Risks Pool (the insurer of last resort) and the Run-off Fund (provider of run-off insurance cover to ceased firms).

Recommendation 8 – Professional indemnity insurance

It is the recommendation of the Society that solicitor-barrister legal partnerships be required to meet the same PII requirements, including minimum level of cover and minimum terms and conditions, as exist for solicitor firms.

Recommendation 9 – Further discussions regarding professional indemnity insurance

It is the recommendation of the Society that further discussions take place between the Society and the Authority in relation to the implications of legal partnerships for current PII regulations, and access to the Assigned Risks Pool and Run-off Fund.

Practising certificate conditions (existing and new)

3.27. Under the Solicitors Acts, the Society and the High Court have the power to impose restrictions on solicitors' practising certificates by way of practising certificate conditions.

3.28. Existing practising certificate conditions which prohibit solicitors from acting as principals in solicitor firms, and similar such conditions, should also apply to solicitors acting as partners in legal partnerships.

3.29. New types of practising certificate conditions will need to be considered with regard to solicitors in legal partnerships.

3.30. Data sharing procedures will need to be put in place to ensure the free and timely sharing of relevant data to and from the Authority and Society in relation to practising certificate conditions to ensure that restrictions are upheld.

Recommendation 10 – Practising certificate conditions

It is the recommendation of the Society that measures be put in place to ensure that existing practising certificate conditions, in particular those restricting certain solicitors from acting as principals or partners in solicitor firms, also extend to solicitors in legal partnerships.

Recommendation 11 – Data sharing regarding practising certificate conditions

It is the recommendation of the Society that robust data sharing procedures be put in place between the Society and the Authority in relation to practising certificate conditions.

Suspended and struck-off solicitors

3.31. Suspended and struck-off solicitors, as well as solicitors who have given undertakings not to practise, are prohibited from acting as principals of solicitors' firms, providing legal services of any kind, or holding themselves out as solicitors.

3.32. They are also prohibited from engaging in any work in any capacity involving or in connection with the provision of legal services until granted permission by the Society.

3.33. In the interests of public protection, it is recommended that such restrictions also apply to solicitors in legal partnerships.

3.34. The Authority may also wish to consider a requirement for solicitor partners in prospective legal partnerships to provide a certificate of good standing from the Society before being permitted open to a legal partnership or join an existing legal partnership.

Recommendation 12 – Suspended and struck-off solicitors

It is the recommendation of the Society that suspended and struck-off solicitors, as well as solicitors who have given an undertaking not to practise, be prohibited from acting as partners in solicitor-barrister legal partnerships. In addition, suspended and struck off solicitors should not be permitted to be employed by a legal partnership, or engage in any work in any capacity involving or in connection with the provision of legal services unless granted permission by the Society in accordance with section 63 of the Solicitors Act 1954 (as substituted by section 21 of the Solicitors (Amendment) Act 1994), and section 20 of the Solicitors (Amendment) Act 1994.

Recommendation 13 – Certificate of good standing

It is the recommendation of the Society that the Authority introduce a requirement for solicitor partners in prospective legal partnerships to provide a certificate of good standing from the Society before being permitted to open a legal partnership, or join an existing legal partnership.

Distressed closures

3.35. The Society currently provides a voluntary file distribution service for distressed closures of solicitor firms, such as closure by High Court order or abandonment of firms.

3.36. Consideration will need to be given as to how distressed closures of legal partnerships will be dealt with.

Recommendation 14 – Distressed closures

It is the recommendation of the Society that consideration be given as to how distressed closures of legal partnerships will be dealt with.

Prohibition on sharing fee income

3.37. Under section 62 of the Solicitors Act 1954 there is a prohibition on sharing of fees with non-solicitors and rewarding non-solicitors for the introduction of business. The objective of the prohibition on the sharing of fee income is to ensure the proper, independent practice of the legal profession, free from undue influence.

3.38. This prohibition will need to be amended to facilitate the legal partnership business model.

3.39. Care should be taken to ensure that any amendment is limited solely to removing the prohibition to allow solicitors to share fees with barrister partners in legal partnerships. The prohibition should remain in place with regard to sharing of fees with all other non-solicitors.

Recommendation 15 – Prohibition on sharing fee income and rewarding non-solicitors for introduction of business

It is the recommendation of the Society that section 62 of the Solicitors Act 1954 be amended to facilitate the sharing of fee income between solicitors and barristers. The prohibition should remain in place with regard to sharing of fee income with non-solicitors, or rewarding non-solicitors for introduction of business.

4. Provision of information to clients

4.1. It is the view of the Society that legal partnerships should have the same requirements and obligations with regard to the provision of information to clients as are in place for solicitor firms. This includes information on legal costs and professional fees, complaints procedures, and PII.

4.2. As mentioned previously, clients of legal partnerships will have access to the Compensation Fund that is strictly limited to losses suffered due to dishonesty of a solicitor employee or the solicitor partner of the legal partnership, with no access due to losses suffered due to dishonesty of non-solicitor employees or partners of the legal partnership. As such, legal partnerships should be required to provide the client with detailed information on their limited access to the Compensation Fund.

Recommendation 16 – Provision of information to clients

It is the recommendation of the Society that solicitor-barrister legal partnerships should have the same requirements and obligations with regard to the provision of information to clients as are in place for solicitor firms, including information on legal costs and professional fees, complaints procedures, limited access to the Compensation Fund, and professional indemnity insurance.

5. Complaints process for legal partnerships

5.1. Under the current complaints process for solicitors under the remit of the Society, and the proposed future complaints process for all legal practitioners under the remit of the Authority, complaints are against individual legal practitioners rather than against the firm.

5.2. As such, it is the Society's view that complaints against solicitors and barristers in legal partnerships should be dealt with in the exact same way as complaints against legal practitioners who are not in legal partnerships, in that the complaint is against the individual legal practitioner rather than against the entity in which they work. Legal practitioners in legal partnerships should be held to the same standard as all other legal practitioners.

5.3. Data relating to complaints against solicitors form part of the risk profile for solicitor firms when the Society is determining its investigation schedule. As solicitor-barrister legal partnerships will continue to be under the remit of the Society with regard to accounts regulations, a robust data sharing procedure should be put in place between the Society and the Authority regarding complaints against solicitors in legal partnerships, and any issues uncovered in the process of the handling of such complaints which may indicate a risk to client monies held by legal partnerships.

Recommendation 17 – Complaints against legal partnerships

It is the recommendation of the Society that complaints against solicitors and barristers in legal partnerships should be dealt with in the same way as complaints against all other legal practitioners, with the complaint being attributed to the individual legal practitioner rather than the entity in which they work.

Recommendation 18 – Sharing of complaints data

It is the recommendation of the Society that robust data sharing procedures be put in place between the Authority and the Society with regard to complaints made against solicitors in legal partnerships, and any issues uncovered by the Authority in the process of handling such complaints which may indicate a risk to client monies held by legal partnerships.

6. Register of legal partnerships

6.1. Under section 117 of the Act, the Authority is required to maintain a register of legal partnerships as notified to the Authority, and remove the name of any legal partnerships that have notified the Authority of their cessation. The register must be available to the public for inspection free of charge. The legislation is silent on the information that should be included in this register.

6.2. Under section 104 of the Act, the legal partnership must provide the Authority with prior written notification that it will commence and notify the Authority that it has commenced. The Authority has the power to charge fees for these notifications.

6.3. The Society maintains a register of practising solicitors. The register of practising solicitors is a list of all solicitors who currently hold a practising certificate and contains the following information:

(a) the full name of the solicitor;
(b) the solicitor's place or places of business;
(c) the solicitor's date of admission to the roll of solicitors; and
(d) the details of the solicitor's PII.

6.4. The register of practising solicitors is available for inspection during office hours without payment by the public on application.

6.5. The Society also has online access to information on practising solicitors and live solicitor firms through the "Find a Firm" and "Find a Solicitor" search facilities at https://www.lawsociety.ie/Find-a-Solicitor/Solicitor-Firm-Search/

6.6. With regard to the relationship between the roll of solicitors, the register of practising solicitors, the roll of practising barristers, and the register of legal partnerships, it is the recommendation of the Society that a reciprocal notification requirement be set up between the Authority, the Society and the Bar, requiring the Authority to notify the Society and the Bar of any amendments to the register of legal partnerships, and the Society and the Bar being required to notify the Authority of any amendments to the roll of solicitors, register of practising solicitors, and roll of practising barristers where the legal practitioners are in legal partnerships.

6.7. With regard to the information that the register of legal partnerships should include, the Society would recommend the following:

(a) the full name of the legal partnership;
(b) the legal partnership's place or places of business;
(c) contact details for the partnership include phone, fax, mobile, email and website;
(d) the notified date of commencement of the legal partnership;
(e) for closed legal partnerships, the date of cessation of the partnership;
(f) the current details of the legal partnership's PII (which is updated on an annual basis) including insurer, date of commencement and cessation of the insurance, broker details, and minimum level of cover;

(g) the names of the current partners of the legal partnership and their commencement dates as partners;
(h) the names of all legal practitioners in the legal partnership, including their commencement dates, job titles and professional qualifications;
(i) confirmation that the legal practitioner partners and legal practitioner staff are practising solicitors and/or barristers;
(j) the professional qualifications of the current partners of the legal partnership;
(k) historic data on the legal partnership such as previous names, previous places of business, previous partners (including commencement and cessation dates), previous legal practitioner employees (including commencement and cessation dates), previous insurance details, and details of any preceding or succeeding partnerships.

Recommendation 19 – Information in the register of legal partnerships

It is the recommendation of the Society that the following information be included in the register of legal partnerships:

1 the full name of the legal partnership;
2 the place or places of business;
3 contact details including landline and mobile phone numbers, email and website address;
4 notified date of commencement;
5 notified date of cessation for closed legal partnerships;
6 current professional indemnity insurance details including insurer, date of commencement and cessation of the policy, policy number, broker details, and minimum level of cover;
7 names of current partners and commencement dates;
8 names of all legal practitioners in the partnership, including commencement dates, job titles and professional qualifications;
9 confirmation that legal practitioners in the partnership are all practising solicitors and/or barristers;
10 professional qualifications of partners;
11 historic data including previous names of the partnership, previous places of business, previous partners (including commencement and cessation dates), previous legal practitioner employees (including commencement and cessation dates), insurance details for previous indemnity periods, and details of any preceding or succeeding legal partnerships.

Recommendation 20 – Reciprocal notification requirement

It is the recommendation of the Society that a reciprocal notification requirement be established between the Authority, the Society and the Bar, requiring the Authority to notify the Society and the Bar of any amendments to the register of legal partnerships, and the Society and Bar being required to notify the Authority of any amendments to the roll of solicitors, register of practising solicitors, and roll of practising barristers where such legal practitioners are in legal partnerships.

7. Registration requirements for legal partnerships

7.1. As mentioned previously, under section 104 of the Act, legal partnerships are required to provide prior written notification of commencement to the Authority, and notification of cessation. The Authority has the power to set out the form of the notification and the fee that may be prescribed.

7.2. Under section 105 of the Act, legal partnerships are prohibited from providing legal services unless they have PII in force which complies with regulations under section 47 of the Act (for barrister-only legal partnerships) or section 26 of the Solicitors (Amendment) Act 1994 (for solicitor-barrister legal partnerships).

7.3. As mentioned previously in this submission, solicitors' PII cover is provided to the firm, rather than to the individual solicitor. As such, the Society's PII requirements would extend to the entire solicitor-barrister legal partnership.

7.4. Section 116 of the Act sets out the Authority's regulation-making powers with regard to the operation and management of legal partnerships including the following:

(a) standards in the provision of legal services including professional and ethical conduct, client confidentiality, and the provision of information to the client on duties owed to the client by the practice;
(b) rights, duties and responsibilities of the practice in relation to client monies;
(c) management and control of the practice including meeting professional standards, systems of control including risk management and financial control, conflict of interest procedures, and compliance with the Act and regulations;
(d) maintenance of records;
(e) regulation of practice names;
(f) regulation of advertising.

7.5. With regard to registration requirements for legal partnerships arising from sections 104, 105 and 116, there are a number of areas that need to be considered including commencement, cessation, notifications of changes, and annual updating of information.

Commencement notifications

7.6. Under section 104 of the Act, the legal partnership is required to provide prior notification of commencement to the Authority. However there are a number of key powers and requirements not set out under primary legislation that should be considered by the Authority.

Timescale for prior notification of commencement

7.7. The notification requirement under section 104 of the Act does not include a timescale for the prior notification of commencement. This could cause significant administrative difficulties for the Authority.

7.8. For example, a legal partnership could send in a written notification with one day's notice to the Authority, requiring an immediate review and response from the Authority. This

may not be sufficient to carry out the necessary reviews and investigations to ensure that the application meets all required standards, and the Authority may not have the resources to provide an immediate response.

7.9. As such, it is the recommendation of the Society that legal partnerships be required to provide written notification of commencement no later than one month in advance of their proposed commencement date.

Recommendation 21 – Time limit on commencement notification

It is the recommendation of the Society that legal partnerships be required to provide written confirmation of commencement no later than one month in advance of their proposed commencement date.

Permission to commence

7.10. While the Act includes a requirement for prior written notification of commencement to the Authority, it does not require the Authority to provide written permission to the legal partnership to commence. As such, should the written notification be "lost in the post", the legal partnership could commence providing legal services without the Authority being aware of same.

7.11. As such, it is the recommendation of the Society that legal partnerships be prohibited from commencing providing legal services until such time as written permission for them to do so, and confirmation that they have been included in the register of legal partnerships, is received from the Authority.

Recommendation 22 – Permission to commence

It is the recommendation of the Society that legal partnerships be prohibited from commencing providing legal services until such time as written permission to commence has been granted by the Authority, together with confirmation of inclusion in the register of legal partnerships

Refuse permission to commence

7.12. While the Act gives the Authority the power to prescribe the form and fee for the written notification of commencement, it does not give the Authority the power to refuse permission for the legal partnership to commence if the form of notification is not in compliance with the parameters set out by the Authority, and if the prescribed fees have not been paid in full.

7.13. Where a solicitor applies for a practising certificate to the Society, under the regulations an application is not deemed as being received by the Society until a properly completed application form and full payment of fees are received by the Society.

7.14. Similarly, it is the recommendation of the Society that a notification of commencement not be deemed to be received by the Authority until a properly completed notification form with all required accompanying documentation, and full payment of fees (if the Authority decides to charge fees for such notifications) are received by the Authority.

Recommendation 23 – Power to refuse permission to commence

It is the recommendation of the Society that the Authority seeks the express power to refuse a legal partnership permission to commence, and that a notification of commencement not be deemed to be received by the Authority until a properly completed notification form with all prescribed accompanying documentation, and full payment of fees (if applicable) are received by the Authority.

Good standing

7.15. Partners in the proposed legal partnership should be required to provide a certificate of good standing from their respective professional bodies confirming that as at the date of the certificate, the solicitor or barrister is in good standing in that a search of the disciplinary records of the legal practitioner disclose no orders of findings of misconduct or reprimands to the discredit of the legal practitioner, and no restrictions exist on the legal practitioners practising certificate that would prohibit them from acting as a partner in a legal partnership.

Recommendation 24 – Legal practitioners in good standing

It is the recommendation of the Society that partners in legal partnerships be required to provide a certificate of good standing from their respective professional bodies when applying to commence a legal partnership or join a legal partnership. Certificates of good standing should disclose that, as at the date of the certificate, the legal practitioner is in good standing in that a search of the records of the legal practitioner disclose no orders of findings of misconduct or reprimands to the discredit of the legal practitioner, and no restrictions exist on the legal practitioner's practising certificate that would prohibit them from acting as a partner in a legal partnership.

Commencement information

7.16. It is the recommendation of the Society that the information required for the register of legal partnerships as set out in paragraph 6.6 of this submission be required in the commencement notification.

Recommendation 25 – Commencement information

It is the recommendation of the Society that all information to be included in the register of legal practitioners be required to be provided as part of the commencement notification by the legal partnership.

PII documentation

7.17. Under section 105 of the Act, legal partnerships are required to have a compliant PII policy in place.

7.18. It is the recommendation of the Society that the legal partnership be required to provide documentary evidence of their PII from their insurer, including dates of commencement and cessation, participating insurer details[1], broker details, minimum level of cover, and confirmation that the cover meets the prescribed minimum terms and conditions.

7.19. It should be noted that the indemnity period for solicitor firms, with the exception of solicitors' firms with variable renewal dates, runs from 1 December to 30 November the following year. Brokers are required to providing confirmation of cover through the Society's online portal within 3 working days of 1 December annually. Any firm which fails to provide the required confirmation of cover in the required format will be subject to an application by the Society to the High Court to shut the firm down.

7.20. Further information on solicitor PII can be found on the Society's website at https://www.lawsociety.ie/PII/ .

Recommendation 26 – Confirmation of professional indemnity insurance cover

It is the recommendation of the Society that legal partnerships be required to provide documentary evidence of their professional indemnity insurance, to include dates of commencement and cessation of the policy, participating insurer details, broker details, minimum level of cover, and confirmation that the insurance meets the prescribed minimum terms and conditions.

[1] Participating insurers are those insurers who have signed the Participating Insurers Agreement with the Law Society for that indemnity period. Only participating insurers are permitted to write mandatory PII for solicitor firms. Top-up cover (that is PII cover over and above the minimum terms and conditions) is not regulated.

Professional names

7.21. Solicitor firms are limited in the firm names that can be used without the permission of the Society. The firm names may only consist of the name, or one of the names, of the solicitors, or one or more of the present or former principals of the practice.

7.22. If the solicitor firm wishes to use any other name, prior permission of the Society is required, which is obtained by written application by the firm to the Society including the name sought and the reason for the name. This is then considered by the Regulation of Practice Committee, which committee deals *inter alia* with professional name matters.

7.23. The committee has the power to refuse a name application on the grounds that the name, in the opinion of the committee, could reasonably convey to solicitors and non-solicitors any of the following meanings:

(a) a meaning likely to bring the solicitors' profession into disrepute, or which is in bad taste, or which reflects unfavourably on other solicitors;
(b) a meaning that the solicitor or firm of solicitors concerned has specialist knowledge in any area of law or practice superior to that of other solicitors;
(c) a meaning that the normal business of the solicitor or firm of solicitors concerned has more extensive geographical coverage than it actually has; and
(d) a meaning otherwise misleading to clients, potential clients or the wider public, or otherwise contrary to the public interest.

7.24. It is the recommendation of the Society that the Authority seek similar powers in relation to the professional names of legal partnerships and that the legal partnership is required to meet all requirements with regard to approval of their professional name before commencement.

Recommendation 27 – Professional names

It is the recommendation of the Society that the Authority seek powers in relation to professional names of legal partnerships similar to those in place for solicitor firms under section 4(1) of the Solicitors (Professional Names/Notepaper) Regulations 1996 (S.I. No. 178 of 1996), and that the legal partnership is obliged to meet all prescribed requirements with regard to the approval of their professional name before commencement.

Professional notepaper and website

7.25. The Society has the power to set out the information that must be contained, and the information prohibited, in the professional notepaper of solicitor firms.

7.26. As part of the commencement requirements for solicitor firms, the firm is required to provide a copy of their professional notepaper, which is reviewed for compliance.

7.27. It is the recommendation of the Society that the Authority seek similar powers in relation to professional notepaper.

7.28. Legal partnerships should be required to provide a copy of their proposed headed notepaper with their commencement notification, and such notepaper should meet the standards prescribed by the Authority.

7.29. Consideration may wish to be given to extending powers in relation to professional notepaper to include legal partnership websites, to ensure that the information contained therein meets the required professional standards.

Recommendation 28 – Professional notepaper

It is the recommendation of the Society that the Authority seek powers in relation to professional notepaper of legal partnerships similar to those in place for solicitor firms under the Solicitors (Professional Names/Notepaper) Regulations 1996 (S.I. No. 178 of 1996), and that legal partnerships be required to provide a copy of their proposed headed notepaper to the Authority as part of their commencement notification, and such notepaper should meet the prescribed requirements.

Recommendation 29 – Professional websites

It is the recommendation of the Society that the Authority consider extending powers in relation to professional notepaper to include legal partnership websites, to ensure that the information contained therein meets prescribed professional standards.

Contact and emergency information

7.30. It is the recommendation of the Society that specific information should be sought from legal partnerships to deal with situations of emergency closure, such as death of partners, abandonment of practice, or forced closure by the High Court.

7.31. Such information should include home addresses, phone numbers and emails for the partners, as well as an emergency legal practitioner contact who has agreed to assist with a wind-down of the legal partnership in the event of an emergency closure.

Recommendation 30 – Contact and emergency information

It is the recommendation of the Society that specific information be required in the commencement notification with regard to how emergency closure situations will be dealt with by the partnerships, such as death of partners, abandonment of practice, and forced closure by the High Court. Contact information such as home addresses, phone numbers and emails of partners should be sought, as well as a nominated emergency legal practitioner contact who has agreed to assist with the wind-down of the legal partnership in the event of an emergency closure.

Firm numbers

7.32. Every solicitor firm that opens is given a firm number, in the form of Fxxx, as a unique identifier for that firm.

7.33. Such identifier is used in all regulatory matters pertaining to the firm, including practising certificate applications, regulatory letters, investigations, committee cases, and cases before the Solicitors Disciplinary Tribunal and High Court.

7.34. Consideration should be given to the Authority assigning a unique legal partnership reference number to each legal partnership.

Recommendation 31 – Legal partnership number

It is the recommendation of the Society that each legal partnership be assigned a unique legal partnership reference number to act as a unique identifier of that specific legal partnership.

Cessation notifications

7.35. There are a number of matters that should be considered with regard to cessation notifications for legal partnerships under the Act including timescale for notification, client files, information and documentation to be provided in the notification, insurance run-off cover, and contact details.

Timescale for cessation notification

7.36. Under section 104(2) of the Act, the legal partnership is required to provide a written notification of cessation to the Authority.

7.37. However, unlike the commencement notification under section 104(1), the cessation notification is not required to be provided to the Authority in advance of the legal partnership ceasing to provide legal services.

7.38. This could result in legal partnerships being closed for months, or years, without the Authority being aware of same, and with the register of legal partnerships listing the legal partnership as live.

7.39. As such, it is the recommendation of the Society that legal partnerships be required to provide prior notification of cessation of not less than one month to the Authority.

7.40. Provision for emergency cessations, such as cessation due to death or illness of a partner, appointment of a partner as a judge or other such role, or forced closure due to High Court order, should be built into the requirements.

Recommendation 32 – Time limit for cessation notifications

It is the recommendation of the Society that legal partnerships be required to provide prior written notification of cessation to the Authority not less than one month before the date of cessation.

Recommendation 33 – Emergency closures

It is the recommendation of the Society that provision be built into the cessation regulations and professional codes for legal partnerships to deal with emergency closures, such as cessation due to the death or illness of a partner, appointment of a partner as a judge, or forced closure by order of the High Court.

Insurance run-off cover

7.41. Solicitor firms are automatically provided with run-off cover by the Run-off Fund upon cessation, provided that there is no succeeding practice. There is no fee for the insurance and cover remains in place for so long as the Run-off Fund exists.

7.42. The Run-off Fund is an insurance fund which provides run-off cover to closed firms and is paid for by the participating insurers in the market in accordance with their market share of solicitors' PII. The Run-off Fund is managed by the Special Purpose Fund Manager on behalf of the insurers, which manager is appointed by the Law Society.

7.43. Solicitor firms are required to give the Special Purpose Fund Manager 60 days prior notice of their date of cessation. Failure to do so affects the excesses to be paid by the principals of the solicitor firm and, in future, the level of cover available to the firm in run-off.

7.44. Consideration needs to be given to the provision of run-off cover for legal partnerships, and the provision of information on such run-off cover to the Authority as part of the cessation notification.

Recommendation 34 – Run-off cover

It is the recommendation of the Society that consideration be given to the issue of run-off professional indemnity insurance cover for closed legal partnerships, and that a requirement to provide the Authority with information on same be included in the cessation notification.

Succeeding practice

7.45. Where a legal partnership is ceasing, information should be provided to the Authority on whether a succeeding practice to the legal partnership exists, where the partners of the firm will be working following the cessation or if they will be non-practising, and the reason for the cessation of the legal partnership.

7.46. This captures information on any possible succeeding practices to the legal partnership, which is important with regard to client files and insurance requirements as well as data on the reasons for cessation of legal partnerships which will feed into policy decision making by the Authority on legal partnerships.

Recommendation 35 – Succeeding practices

It is the recommendation of the Society that legal partnerships be required to include information on any succeeding practices to the closed legal partnership, together with information as to the reason for the cessation, and where partners will be working following cessation of the legal partnership, in the cessation notification to the Authority.

Types of closure

7.47. Consideration needs to be given to the different cessation notification requirements for different types of closure of legal partnerships including full cessation, mergers and take-overs, as different cessation types have different information requirements.

7.48. For example, mergers of legal partnerships would actually constitute cessation of the two preceding legal partnerships, and commencement of the succeeding merged legal partnership.

Recommendation 36 – Types of closures

It is the recommendation of the Society that consideration be given to different types of cessation notification and other requirements for different types of closures, including full cessations, mergers and take-overs.

Post closure contact details

7.49. The partners of the legal partnership should be required to provide post-closure contact details, both for the Authority, and correspondence contact details which can be provided by the Authority to any third party, including clients, who wish to correspond with the partners following the cessation of the legal partnership.

7.50. Such details could include home address, phone, mobile phone, and email.

Recommendation 37 – Post-closure contact details

It is the recommendation of the Society that partners of legal partnerships be required to provide post-closure contact details in the cessation notification to the Authority. Such details would be required for contact by the Authority, and also contact details which can be provided to third parties, such as clients, who wish to correspond with the partners following the date of cessation of the legal partnership.

Client files

7.51. Solicitors who no longer hold practising certificates or have ceased practice are prohibited under any circumstances from retaining client files or other documentation, for instance in private storage or in their homes, unless the files are closed files and accessible by a practising solicitor.

7.52. Such solicitors are also prohibited from holding client monies.

7.53. Where a solicitor firm ceases, the principals are required to provide the Society with information in relation to the distribution of live and closed files, and to provide written confirmation that all live files have been forwarded to new solicitors nominated by the clients by a specified date.

7.54. Solicitors are required to return closed files to clients where appropriate, or hold same in storage. Any closed files in storage are required to be accessible by a practising solicitor. The purpose of this requirement is that, if a former client of the solicitor firm contacts the Society to ascertain the whereabouts of their file, the Society can direct the client to the practising solicitor who has access to the files in storage. The principals of the closed firm are required to provide the Society with written notification of the identity of the practising solicitor with access to their closed files, and the location of storage.

7.55. In the event that files are transferred to a practising solicitor, whether current files and/or closed files for storage only, it is required that the solicitor is aware that they solely have the decision making power in relation to the files, other than the power vested in the client as owner of the file.

7.56. All wills in respect of the closed firm are required to be transferred to another solicitor firm or returned to clients. Solicitors often inform their local bar association of their cessation from practice and inform them of arrangement being made in respect of wills. Such information should also be provided to the Society.

7.57. Specified requirements with regard to retention and destruction of client files are also in place.

7.58. It is the recommendation of the Society that the Authority put similar notification and management requirements in place for closed legal partnerships in relation to client files.

Recommendation 38 – Client files and client monies

It is the recommendation of the Society that the Authority put prohibitions, and notification and managerial requirements in place on closed legal partnerships with regard to live and closed client files, as well as a prohibition on holding client monies, as currently exist for solicitor firms.

Closing accountant's report

7.59. Solicitor firms that hold client monies are required to file an annual prescribed reporting accountant's report in relation to client monies held.

7.60. When a solicitor firm closes, it is required to file a closing reporting accountant's report to the date that they cease to receive, hold, control or pay client monies. This report is required to be filed with the Society within two months of the date of cessation of the firm.

7.61. It is the recommendation of the Society that similar reporting requirements be put in place as part of the cessation notification of legal partnerships.

Recommendation 39 – Closing reporting accountants' reports

It is the recommendation of the Society that similar reporting requirements with regard to closing reporting accountants' reports be put in place for legal partnerships as currently exist for solicitor firms under the solicitors accounts regulations.

Notification of specified regulatory changes

7.62. Solicitors are required under primary legislation to provide the Society with written notification of specific regulatory changes within 14 days of such change.

7.63. In order to ensure that the register of legal partnerships is kept up to date, and that the partners in the firm are in compliance with their requirements, a requirement should be introduced that prior written notification of specified regulatory changes should be made to the Authority in writing including the following:

(a) Change of partner – including details of the cessation date of the previous partner, the commencement date of the new partner, and all compliance and information documentation required in relation to the new partner, such as certificate of good standing.

(b) Change of professional name – including proposed commencement date for the new name and application for approval if required.
(c) Change of staff – change of details of any legal practitioner employees including relevant commencement and cessation dates.
(d) Change of contact details – including address, email, fax, phone, mobile phone etc.
(e) Notification of disciplinary issues – partners in the legal partnership should be required to immediately notify the Authority in writing if any orders of findings of misconduct have been made against them, or restrictions placed on their practising certificates.
(f) Annual insurance notification – as insurance cover is provided for a set indemnity period, annual confirmation of PII cover should be provided similar to the mechanism set out above in relation to solicitor's PII.
(g) Notification of change of commencement requirements – If at any point the legal partnership no longer meets the minimum commencement requirements as prescribed by the Authority, they should be required to immediately notify the Authority of same in writing.

Recommendation 40 – Notification of specified regulatory changes

It is the recommendation of the Society that legal partnerships be required to provide the Authority with written notification of specified regulatory changes within 14 days of such change including the following:

1 change of partner, with details of cessation date of previous partner, commencement date of new partner, and all compliance and information documentation required in relation to the new partner;
2 change of professional name, with details of proposed commencement date of new name and application for approval by the Authority if required;
3 change of legal practitioner employees or consultants, with details of relevant commencement and cessation dates;
4 change of contact details, with new details included;
5 notification of disciplinary issues, such as orders of findings of misconduct against partners or employees of the legal partnership, or imposition of restrictions on the legal practitioners' practising certificates;
6 annual professional indemnity insurance notification, with details of commencement and cessation dates of policy, policy number, insurer, broker, minimum level of cover, and confirmation that the cover meets the prescribed minimum terms and conditions; and
7 notification of change of commencement requirements, if the legal partnership no longer meets the minimum commencement requirements prescribed by the Authority.

Annual updating of information

7.64. The Society publishes a Law Directory on an annual basis which includes, among other matters, information on solicitor firms and practising solicitors.

7.65. The Society also has an online “Find a Solicitor” and “Find a Firm” search facility in relation to live firms and practising solicitors, which is updated on a daily basis.

7.66. In order to facilitate provision of accurate information to the public and profession on solicitors and solicitor firms, the Society has three main annual information capture drives, namely the Law Directory data capture, PII renewal and practising certificate renewal.

7.67. For the Law Directory data capture drive, the Society’s current information on firms and their solicitors are sent to solicitor firms in October annually. The firms are asked to provide the Society with any update on their information if the Society’s records are inaccurate or out of date.

7.68. With the PII renewal, all live firms are required to provide confirmation of PII cover through the Society’s online portal within 3 working days of 1 December. This provides a mechanism for capturing information on new firms or ceased firms who have failed to notify same to the Society.

7.69. With the practising certificate renewal, all practising solicitors are required to apply for their practising certificate on an annual basis on or before 1 February each year. This provides a mechanism for capturing up-to-date information on solicitors and their firms, including identifying any solicitors who are non-practising.

7.70. It is the recommendation of the Society that a similar annual data capture procedure is put in place by the Authority for legal partnerships.

7.71. Consideration could also be given as to whether legal partnerships should be required to reapply for approval to practice on an annual basis. It should be noted that this is not a requirement for solicitor firms.

Recommendation 41 – Data capture

It is the recommendation of the Society that the Authority carry out an annual data capture process for legal partnerships to ensure the details in the register of legal partnerships is up to date.

Recommendation 42 – Annual approval application process

It is the recommendation of the Society that consideration be given as to whether an annual process should be introduced requiring legal partnerships to reapply on an annual basis for approval to practice.

8. Consequences for breaches of the Act and regulations

8.1. With regard to breaches of the Act, and regulations made thereunder, by legal practitioners in legal partnerships, these should be treated the same as breaches by legal practitioners providing legal services other than through legal partnerships, with regard to regulatory, disciplinary, enforcement, and protection actions that may be taken against same.

8.2. With regard to the consequences for breaches of the Act, and regulations made thereunder, by legal partnerships as an entity, this raises the question as to whether the legal practitioners within the legal partnership are being regulated, or the legal partnership itself.

8.3. With regard to solicitor complaints, regulatory and disciplinary action is taken against the solicitor, rather than the solicitor firm. Each solicitor, rather than the entity through which they provide legal services, is responsible for ensuring that they comply with the solicitors acts and the relevant regulations.

8.4. With regard to financial regulation, while the solicitor firm is investigated, responsibility for any breaches of the solicitors acts and regulations made thereunder, lies with the principals of the solicitor firm. Any disciplinary cases are taken against the principals, or in some cases a solicitor employee, rather than against the firm as an entity.

8.5. Solicitor firms are required to have at least one practising solicitor principal. Where a solicitor principal is suspended, or struck-off, or otherwise deemed to be non-practising, the firm is automatically deemed to be inactive, and cessation procedures are put in place. As such, taking disciplinary action against a solicitor principal can result in the forced closure of a solicitor firm.

8.6. This principle even applies to PII. PII is held by a solicitor firm for all solicitors in that firm, rather than by individual solicitor. If the solicitor firm does not have PII in place, the Society makes an application to the High Court to have the firm shut down. Disciplinary action however continues to be taken against the principal or principals of that solicitor firm for practising without PII in place.

8.7. If the consequences for breaches of the Act or regulations, falls on the legal partnership as an entity, rather than on the partners as legal practitioners, any serious consequences can be avoided by the partners by simply shutting down the legal partnership, and opening a new legal partnership or solicitor firm or acting as a barrister.

8.8. However, if the consequences for breaches of the Act or regulations, fall on the partners of the legal partnership, this continues to follow them regardless of the status of the legal partnership as an entity. This is also why joint and several liability for partners is recommended.

8.9. Regulation by legal practitioner, rather than by entity, also allows the legal partnership to be taken over, or continued by the innocent partner in the case of serious misconduct. This provides for continuity of service for the clients, while ensuring that disciplinary action is taken against the legal practitioner or practitioners responsible for the breaches.

8.10. With regard to any notification requirements for legal partnerships, such as commencement, cessation and notification of change, failure to meet these requirements could be dealt with by way of fines to be paid by the partners to the Authority.

8.11. As such, it is the recommendation of the Society that legal partnerships are regulated by legal practitioner, rather than by legal partnership entity, and primary legislation be amended to acknowledge that partners of legal partnerships are jointly and severally liable as automatically provided for under partnership law.

Recommendation 43 – Consequences for breaches of the Act and regulations

It is the recommendation of the Society that:

1 legal partnerships should be regulated by individual legal practitioner, rather than by the legal partnership entity;
2 breaches of the Act and regulations by legal practitioners in legal partnerships should be treated the same as breaches by all other legal practitioners;
3 the Act should be amended to acknowledge that partners of legal partnerships are jointly and severally liable;
4 consideration should be given to dealing with failure by legal partnerships to meet notification requirements by way of fines to be paid to the Authority.

9. Funding of regulation of legal partnerships

9.1. Under section 95 of the Act, the Authority will seek payment of a levy by the professional bodies for the annual expenses of the Authority and Legal Practitioner Disciplinary Tribunal with 10% paid *pro rata* by the Bar of Ireland and non-Law Library member barrister, 10% paid by the Law Society, and the remaining 80% apportioned *pro rata* between the professional bodies and non-Law Library barristers according to the number of practising solicitors, and practising barristers and non-Law Library practising barristers.

9.2. It is the recommendation of the Society that a similar funding structure be put in place for the establishment and maintenance of the register of legal partnerships, as well as the ongoing regulation, monitoring and operation of legal partnerships as follows:

(a) 10% paid *pro rata* by the Bar of Ireland and non-Law Library barristers;
(b) 10% paid by the Law Society;
(c) remaining 80% apportioned *pro rata* between the Law Society, Bar of Ireland, and non-Law Library barristers in accordance with the number of solicitors, and barristers registered as partners in legal partnerships in that year.

9.3. In addition, any fees imposed and recovered by the Authority in relation to legal partnerships should be offset against the levy sought for the regulation of legal partnerships from the professional bodies, and non-Law Library barristers.

Recommendation 44 – Funding regulation of legal partnerships

It is the recommendation of the Society that the following funding structure (as provided for in section 95 of the Act) be put in place for the establishment and maintenance of the register of legal partnerships, as well as the ongoing regulation, monitoring and operation of legal partnerships as follows:

5 10% paid *pro rata* by the Bar of Ireland and non-Law Library barristers;
6 10% paid by the Law Society;
7 remaining 80% apportioned *pro rata* between the Law Society, Bar of Ireland and non-Law Library barristers in accordance with the number of solicitor and barristers registered as partners in legal partnerships in that year; and
8 any fees recovered by the Authority from legal partnerships should be offset against the levy sought for the regulation of legal partnerships from the professional bodies and non-Law Library barristers.

LAW SOCIETY SUBMISSION

Section 120 Legal Services Regulation Act 2015

Barrister Issues

Legal Services Regulatory Authority

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Introduction

1.1 The purpose of this submission from the Law Society of Ireland ("the Society") is to respond to the invitation from the Legal Services Regulatory Authority ("the Authority") for submissions under section 120(1) of the Legal Services Regulation Act 2015 ("the Act") in relation to the following matters relating to barristers:

a) the extent, if any, to which the restriction on legal practitioners, other than solicitors, holding the moneys of clients, as provided under section 45, should be retained;

b) the retention or removal of restrictions on a barrister receiving instructions in a contentious matter, directly from a person who is not a solicitor, and the reforms, whether administrative, legislative, or to existing professional codes, that are required to be made in the event that the restrictions are retained or, as the case may be, removed; and

c) the circumstances and manner in which a barrister may hold clients' moneys and the mechanisms to be applied for the protection of clients' moneys which may be so held.

1.2 This submission contains the Society's views on the issues which arise in respect of barrister matters under section 120. It sets out the Society's opposition to the removal of restrictions on a barrister receiving instructions in a contentious matter directly from a person who is not a solicitor. It also addresses the consequential regulatory requirements that would arise should barristers be permitted to hold client moneys and if direct professional access in contentious matters is introduced.

1.3 Responses to some of the queries raised in the public consultation notice have been amalgamated together, for clarity.

2. Executive summary

2.1 The following submission sets out the Society's views in relation to certain matters relating to barristers including whether the restriction on barristers holding client moneys should be retained, whether barristers should be permitted to accept instructions directly from non-solicitors in contentious matters, and the regulatory framework that would be required if a barrister was permitted to hold clients' moneys, including the mechanisms that would need to be applied for the protection of clients' moneys in such circumstances.

3.1 The Society does not support any proposal to remove restrictions on a barrister receiving instructions in a contentious matter directly from a person who is not a solicitor. The Society does not believe that such a move would be in the best interests of consumers and is satisfied that solicitors are best placed to make informed choices about the need for, and the choice of, barristers in contentious matters. In addition, the Society believes that giving barristers the right to hold client moneys and granting the right of direct professional access by non-solicitors in contentious matters would, in effect, amount to a fusion of the professions by the back door. If these reforms took place there would be little to distinguish between the two professions except their form of training and their title.

2.2 The Society has identified a series of recommendations in this submission with regard to the regulatory processes and systems that would need to be put in place should the stated restrictions on barristers be removed, in order to ensure protection of the public and client moneys to the same standards as currently exist for solicitors.

Direct professional access on contentious matters

2.3 In chapter 3 of this submission, a number of issues and requirements surrounding the introduction of direct professional access to barristers by non-solicitors on contentious matters are considered. Such matters include anti-money laundering requirements, section 150 obligations, recovery of fees, professional indemnity insurance, run-off insurance, files of barristers who have ceased practising, and impact on professional codes.

2.4 The Society also sets out a number of other issues that should be considered when deciding whether or not to lift the restrictions on barristers. In particular, there is a concern that lifting the restrictions would create a *de facto* fusion of the professions in all but title and training, which would pre-empt the consultation and report on unification of the professions mandated under section 34 of the Legal Services Regulation Act.

2.5 The ease with which solicitors and barristers can transfer between the professions, and the option of clients to have a solicitor represent them directly before the courts to reduce legal costs is also examined.

2.6 Given the substantial cost of introducing a new financial regulatory system for barristers, and the probability of that cost being passed on to clients through legal costs, it seems clear that lifting the foregoing restrictions on barristers would not be of any substantial benefit to the public or to the administration of justice.

Client moneys

2.7 As the issues of barristers holding client moneys, and the circumstances and manner in which a barrister may hold client moneys and the protection mechanisms that should be applied with regard to the holding of client moneys by barristers are all related matters, they have been dealt with together in chapter 4 of this submission.

2.8 The Society believes that, if the restrictions on barristers holding client moneys are to be lifted, then barristers must be held to the same regulatory standards as solicitors in the interests of the protection of the public, protection of client moneys, and equity between the professions. If barristers are permitted to hold client moneys and are subject to lighter regulation than that in place on solicitors, this would grant an unfair competitive advantage to barristers, at the expense of public protection. More importantly, it would be to the detriment of clients and the administration of justice if a lesser standard was applied to the monitoring, inspection and system of recompense for the clients of those barristers permitted to handle client moneys.

2.9 The purpose of client account regulations for solicitors is the protection of clients' moneys, and by implication the Law Society's Compensation Fund and the public generally. The Society believes that similar accounts regulations would have to be put in place for barristers if they are to be permitted to hold client moneys, in order to ensure the maintenance of proper accounts and accounting procedures.

2.10 The Law Society's Compensation Fund is a statutory fund established to compensate clients of solicitors who have suffered pecuniary loss due to the dishonesty in the provision of legal services by a solicitor, and not by any other legal service provider. This Fund is paid for through annual contributions by solicitors as part of their practising certificate fees and has been built up over many years. If barristers are to be permitted to handle client moneys, then a similar Compensation Fund should be established to compensate clients of barristers who have suffered loss due to the dishonesty of their barrister, which fund should be paid for by barristers, and maintained by a competent body. The issue of whether the Authority or the Bar of Ireland would be the appropriate competent body is discussed further in the submission.

2.11 The introduction of a financial regulatory system to regulate barristers who hold client moneys is also discussed further in this submission, including recommendations for inspections of barristers who hold client moneys by forensic accountants,

establishment of a regulatory committee to deal with breaches of barristers' accounts regulations and the powers required for such a committee including powers of referral to the Legal Practitioners Disciplinary Tribunal and powers to apply to the High Court for freezing and suspension orders.

2.12 Recommendations have also been made with regard to barristers who hold client moneys who are adjudicated bankrupt, enter into personal insolvency arrangements or have unsatisfied judgments, due to the possible greater risk that such practitioners could pose to client moneys.

2.13 Consideration has also been given to the education requirements that would arise for the barristers' profession on client moneys matters, professional indemnity insurance issues, and the possible consequential impact on legal costs of barristers holding client moneys.

Recommendations

2.14 The recommendations of the Society in relation to the matters under review by the Authority are summarised below:

A. Direct Professional Access

Recommendation 1 – Current Restrictions

No change should be made to the current restrictions on a barrister receiving instructions in a contentious matter directly from a person who is not a solicitor. Solicitors are uniquely well-placed to decide how best to manage litigation, including identifying those cases where the involvement of a barrister is appropriate and, thereafter, deciding which particular individual might be engaged.

Recommendation 2 – Anti-money laundering procedures

Consideration should be given to the impact of direct professional access in contentious matters on the anti-money laundering due diligence and reporting obligations for barristers, on the additional regulation and education requirements, and the possible consequential increase in costs for the barrister and, by extension, the client.

Recommendation 3 – Section 150 obligations and recovery of fees

Consideration should be given to the impact of direct professional access in contentious matters to barristers' section 150 obligations and the possible consequential increase in legal costs, in addition to the recovery mechanisms for barristers in relation to unpaid fees for completed work.

Recommendation 4 – Client files of barristers who have ceased practising

Consideration should be given to the need to enact legislation to deal with files from barristers who cease practice, and to the introduction of a file distribution service for distressed closures, to be

provided by their competent body.

Recommendation 5 – Professional codes

Consideration should be given to the requirement to change the Bar of Ireland's code of conduct, including changes to the cab-rank rule, if direct professional access for contentious matters is introduced.

B. Client Moneys and Regulatory Framework

Recommendation 6 – Regulatory standards

Any legal practitioner who holds client moneys should be held to the same regulatory standards as solicitors to ensure there is no competitive advantage given to a class of legal practitioners who are held to a lower regulatory standard and also to ensure proper monitoring, inspection and recompense for clients.

Recommendation 7 – Barristers' Compensation Fund

In the event that barristers are allowed to hold client moneys, a barristers' Compensation Fund should be set up by way of levy on the barristers' profession only and to be maintained by the designated competent regulatory body, together with the appropriate financial regulatory system.

Recommendation 8 – Claims handling system

If a barristers' Compensation Fund is established, there will be a need for their competent body to establish and maintain a claims handling system.

Recommendation 9 – Demarcation between and guidance on access to compensation funds

If a barristers' compensation fund is established, a clear demarcation will need to be established on which clients have access to which Compensation Fund (either the solicitors' or barristers' Fund), especially for legal partnerships, and guidance regarding same should be required to be provided to clients of solicitors and barristers.

Recommendation 10 – Regulatory body

A competent body other than the Law Society would have to be given the statutory obligation under primary legislation to act as regulator in relation to the holding of client moneys by barristers, which would include an obligation to protect client moneys and to establish and maintain the new Compensation Fund for barristers. Regulatory powers including investigative, disciplinary, protective and enforcement powers to oversee those barristers who would be permitted to receive, hold or

control client moneys to ensure the protection of the public and client moneys would have to be granted to the competent body, together with powers to make regulations in relation to the financial regulation of those barristers permitted to handle client moneys.

Recommendation 11 – Barristers' accounts regulations

A rigorous set of accounts regulations would have to be enacted to ensure practising barristers who were permitted to receive, hold or control client moneys were subject to strict oversight.

Recommendation 12 – Inspection regime for barristers holding client moneys

Inspections of barristers' accounts would have to be provided for in primary legislation and accounts regulations, to be conducted on a regular basis and on the basis of an assessment of risk by forensic investigating accountants to ensure compliance with those regulations.

Recommendation 13 – Annual reporting accountants' reports

Barristers who were permitted to hold client moneys should be required to submit an annual reporting accountants' report to the regulator which report should disclose any breaches of the applicable accounts regulations, in particular any deficits on client accounts.

Recommendation 14 – Establishment of a regulatory committee

The competent regulatory body would have to establish a regulatory committee to deal with barristers who breached the accounts regulations and to consider claims on the barristers' Compensation Fund.

Recommendation 15 – Powers of regulatory committee

The competent regulatory body would have to be given all the relevant statutory powers to deal with barristers who breached the accounts regulations as are currently held by the Society, including the right to refer the barrister to the Legal Practitioners Disciplinary Tribunal, which powers could be delegated to a regulatory committee if appropriate.

Recommendation 16 – Refusal to issue barristers' practising certificates, or imposition of practising certificate conditions

Consideration would need to be given to granting the competent regulatory body the power to impose conditions on barristers' practising certificates, or to refuse to issue a practising certificate, for breaches of the accounts regulations in order to protect client moneys.

Recommendation 17 – Right to apply to the High Court

The competent regulatory body would have to be given the statutory power to apply to the High Court to freeze a barrister's accounts and/or assets to protect client funds, and/or suspend the barrister from practice.

Recommendation 18 – Suspension due to bankruptcy

Barristers permitted to hold client moneys who are adjudicated bankrupt should be automatically suspended from practice with immediate effect. Provisions allowing the barrister to apply to the competent body to lift the barrister's suspension on such terms as the competent body sees fit should be considered.

Recommendation 19 – Refusal of practising certificate, or imposition of practising certificate conditions where a solicitor has been adjudicated bankrupt, entered into a personal insolvency arrangement, and/or has unsatisfied judgments

The competent body would have to be given the power to refuse a practising certificate, or impose such conditions as they deem fit on the practising certificate of a barrister who has at any time or in any jurisdiction been adjudicated bankrupt, entered into a personal insolvency arrangement, and/or has unsatisfied judgments, for the protection of client moneys.

Recommendation 20 – Education of barristers on client account matters

Both practising barristers and prospective barristers should be educated to a standard similar to solicitors in relation to administering client moneys.

Recommendation 21 – Professional indemnity insurance

Barristers holding client moneys should be subject to the same professional indemnity insurance standards as solicitors to ensure there is no competitive advantage given to a class of legal practitioners who are held to a lower regulatory standard to the detriment of client protection.

Recommendation 22 – Assigned Risks Pool

An Assigned Risks Pool should be established as an insurer of last resort for barristers who are unable to obtain professional indemnity insurance in the market in any year.

Recommendation 23 – Run-off insurance cover

Run-off insurance cover provisions for barristers, including duration of cover, how cover is paid for, and relevant regulations, should be reviewed in light of a possible consequential increase in run-off premium caused by any lifting of the restriction on barristers holding client moneys and direct professional access in contentious matters.

Recommendation 24 – Legal costs consequences of barristers holding client moneys

Consideration should be given to the possible consequential increase in legal costs that may arise due to the costs of the financial regulatory structure required to protect client moneys having to be established and maintained by barristers.

3. Direct professional access to barristers in contentious matters

3.2 Section 120(1)(b) of the Act asks respondents to consider the following:

"The retention or removal of restrictions on a barrister receiving instructions in a contentious matter, directly from a person who is not a solicitor, and the reforms, whether administrative, legislative, or to existing professional codes, that are required to be made in the event that the restrictions are retained or, as the case may be, removed."

3.3 At present, all practising barristers who are members of the Law Library are only allowed to accept briefs from either practising solicitors or approved bodies from which the Bar Council of Ireland allows direct professional access. The direct professional access scheme is limited in nature for non-contentious matters and does not extend to contentious matters. If matters become contentious, a client is obliged to engage the services of a solicitor to allow the barrister to continue to act.

3.4 The Law Society believes that the current system is the most efficient system and provides the best value and service for consumers. Solicitors are uniquely well-placed to decide how best to manage litigation, including identifying those cases where the involvement of a barrister is appropriate and, thereafter, deciding which particular individual might be engaged.

3.5 Receiving instructions from a solicitor means that a barrister can be assured that due diligence has been conducted by the solicitor including risk profiling and anti-money laundering compliance. Removing this layer will require practising barristers to conduct their own due diligence on clients instructing them directly.

3.6 The argument for allowing direct professional access to barristers by clients in contentious matters seems to be predicated on the assumption that there is a duplication of work between the solicitor and barrister, and therefore a higher level of fees than if the work was done solely by either the solicitor or the barrister. This argument is flawed as, in such contentious matters, both the solicitor and the barrister have discrete areas of work. If all matters are to be handled by the barrister, the same level of work will need to be done, albeit by one person, so it is unlikely that the fees will be reduced.

Recommendation 1 – Current Restrictions

No change should be made to the current restrictions on a barrister receiving instructions in a contentious matter directly from a person who is not a solicitor. Solicitors are uniquely well-placed to decide how best to manage litigation, including identifying those cases where the involvement of a barrister is appropriate and, thereafter, deciding which particular individual might be engaged.

3.7 If the restriction on barristers receiving instructions directly from a person who is not a solicitor are removed, some of the following issues will arise.

Anti-money laundering measures

3.8 While barristers are already considered to be "designated persons" under the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013, customer due diligence and reporting obligations in relation to anti-money laundering ("AML") in practice currently rests predominantly with the solicitor on acceptance of instructions from the client.

3.9 If direct professional access was introduced, any AML prevention and governance requirements would need to be met by barristers, as the AML customer due diligence and reporting obligation would shift from the solicitor (who would no longer be involved in such cases) wholly to the barrister. The current law applies an AML-compliance equivalence between the two branches of the profession.

3.10 Given the complexity and higher risk involved, particularly if the barrister is also permitted to hold client moneys, the reporting and administrative burden on the barrister would now be much higher, increasing the cost for the client.

3.11 Further education and guidance would also be required for the barristers' profession on the complexities of AML due diligence and reporting in contentious matters.

3.12 The regulatory requirements on the Bar of Ireland, as a 'competent authority' under the legislation, to monitor and take measures against barristers who did not meet their statutory AML obligations, would also increase, which could result in an increase in the annual practising fee for barristers.

Recommendation 2 – Anti-money laundering procedures

Consideration should be given to the impact of direct professional access in contentious matters on the anti-money laundering due diligence and reporting obligations for barristers, on the additional regulation and education requirements, and the possible consequential increase in costs for the barrister and, by extension, the client.

Section 150 obligations and recovery of fees

3.13 A significant portion of the complex requirements under section 150 of the Act in relation to legal costs will be dealt with directly by solicitors in contentious matters if both a solicitor and barrister are instructed. However, if direct professional access in contentious matters is permitted, the legal cost and update notification requirements

under the Act will fall solely on the barrister, increasing the barrister's administrative burden with possible consequential increases in legal fees.

3.14 While solicitors can sue clients to recover fees owed on completed work, barristers are currently not permitted to do so. This can lead to barristers having to write off a certain amount of business as bad debts. In contentious matters, particularly in matters where the fees may be high, the ability of the solicitor to sue clients for recovery of fees (including the barrister's fees) is very useful to the barrister in recovery of their fees.

3.15 If direct professional access on contentious matters is permitted, but barristers are still not entitled to initiate debt recovery proceedings against clients who have failed to pay fees for completed work, this could lead to a high level of default on payment of legal fees. As such, a mechanism would need to be considered, either by way of barristers being permitted to issue proceedings against clients in respect of unpaid fees in contentious matters, or by an alternative mechanism, for recovery of barristers' fees.

.**Recommendation 3 – Section 150 obligations and recovery of fees**

Consideration should be given to the impact of direct professional access in contentious matters to barristers' section 150 obligations and the possible consequential increase in legal costs, in addition to the recovery mechanisms for barristers in relation to unpaid fees for completed work.

Professional indemnity insurance and run-off insurance

3.16 Consideration should be given to the increased exposure for negligence claims against barristers' PII that will result from permitting direct professional access by clients in contentious matters. Currently, the involvement of the solicitor in such cases acts as a buffer, with the risk of claims being largely borne by the solicitor. With direct access, and the potential for higher claims in contentious matters, there may be a consequential increase in PII costs for barristers, which costs may be passed on to the client.

3.17 As stated in chapter 4 of this submission, the current requirements for run-off cover for barristers may need to be reviewed if the restrictions on holding client moneys and/or direct access for contentious business are lifted, due to the likely increase in run-off premiums and the impact on whether barristers can afford to retire.

3.18 Barristers given direct instructions from a non-solicitor will continue to require a form of run-off insurance cover either by way of individual cover, or a run-off fund similar to the fund that provides run-off cover for closed solicitor firms. Given possible affordability issues, consideration may need to be given to the duration of the run-off cover (currently 6 years) and the manner in which the cover is provided (through the market or through a run-off fund). Recommendations in relation to these issues are contained in Chapter 4.

Files of barristers who have ceased practising

3.19 Self-employed barristers accepting work from non-solicitors in contentious matters would need to be in a position to maintain their own comprehensive client files. There may be the need to consider legislative input to ascertain how client files are dealt with when a barrister retires from practice.

3.20 In the event of an orderly wind down of a barrister's practice, the barrister would have to organise to transfer remaining live files to their clients or another practising barrister or practising solicitor nominated by their clients and make arrangements for closed files to be securely stored and made accessible to a practising barrister or practising solicitor for the relevant statutory period.

3.21 Consideration should be given to introducing legislation relating to client files in emergency scenarios whereby a barrister ceases practice either through regulatory intervention such as a suspension from practice, or in the case of death.

3.22 The Society runs a practice closures system for distressed closures. If a solicitor firm is closed by order of the High Court, or the solicitor has abandoned the practice, or in some cases where the principal of the firm has died in practice, the Society may obtain an order of the High Court permitting the Society to take up the files of the practice. The Society then redistributes the files to the clients, or to their new nominated solicitors. This is a voluntary service provided by the Society for the protection of clients which is only triggered as a last option to protect client files. In such cases the Society may also obtain a High Court order for the Society to take client moneys in order to protect same.

3.23 Consideration should be given to the introduction of a similar system for barristers in order to protect client files.

Recommendation 4 – Client files of barristers who have ceased practising

Consideration should be given to the need to enact legislation to deal with files from barristers who cease practice, and to the introduction of a file distribution service for distressed closures, to be provided by their competent body.

Existing professional codes

3.24 The code of conduct for the Bar of Ireland would need to change significantly in its content if the restriction on barristers receiving instructions from non-solicitors is lifted. Currently the code is geared towards barristers receiving instructions only from solicitors and through the Bar of Ireland's direct professional access scheme.

3.25 Currently practising barristers are obliged to accept instructions in any area in which they profess to practice subject to the payment of a proper professional fee. Allowing

barristers to receive instructions directly from a client may make this an impractical rule to uphold.

3.26 Barristers given instructions from non-solicitors in contentious matters will have to carry out their own due diligence in a manner similar to that employed by solicitors to determine whether they can accept instructions in a given matter.

3.27 Barristers may wish be in a position to decline to act for a client giving direct instructions in contentious matters. Reasons a barrister may wish to decline to act for a client could include the following:

a) accepting instructions in the furtherance of a crime or unprofessional conduct;

b) where the matter may raise a conflict of interest; or

c) if the barrister is unable to carry out the instructions sufficiently.

3.28 In England and Wales the 'cab rank' rule does not apply to direct access. A number of restrictions on direct access in England and Wales still remain including:

a) barristers may not instruct expert witnesses;

b) barristers may not take responsibility for the handling of clients' affairs, or the handling of clients' money; and

c) a barrister remains under a continuing obligation to consider whether given work would be better served by the instruction of a solicitor.

Recommendation 5 – Professional codes

Consideration should be given to the requirement to change the Bar of Ireland's code of conduct, including changes to the cab-rank rule, if direct professional access for contentious matters is introduced.

Fusion of the professions

3.29 Both barristers and solicitors have many similarities in their respective professions. Both professions are entitled to draw up restricted documents and they have full rights of audience in all courts.

3.30 Giving barristers the right to hold client moneys and granting the right of direct professional access by non-solicitors in contentious matters would, in effect, amount to a fusion of the professions by the back door. If these reforms took place there would

be little to distinguish between the two professions except their form of training and their title.

3.31 In addition, unification of the solicitors' profession and the barristers' profession is meant to be the subject of a report by the Authority to the Minister following public consultation in accordance with section 34(1)(b) of the Act. In effect unifying the professions in all but title and training in advance of such consultation and report could render this separate and complex statutory study effectively meaningless.

3.32 Fusion of the two professions by the back door would result in two separate regulatory systems for two professions that would now only be differentiated by title and training, rather than by their respective areas of legal work. This duplication of regulatory function, with its consequential costs, would result in an increase in the overall costs of regulating legal practitioners, costs that would ultimately be passed on to the consumers of legal services.

Transfer between professions

3.33 For barristers of at least 3 years' professional practice (or alternative legal employment) who wish to transfer from being a barrister to a solicitor, there is a relatively simple application procedure available to them via the Society. A similar application may be made by a solicitor wishing to transfer to the Bar of Ireland. This too requires 3 years' professional practice (or alternative legal employment) and an application may be made by a solicitor to the Honorable Society of King's Inns.

3.34 The ease of transfer between the professions means that any barrister who genuinely wishes to hold client moneys and accept instructions directly from clients has a method available to them to do so by transfer to the solicitors' profession. In addition, the costs of transferring between the professions are borne by the applicants and not by the profession as a whole.

Solicitor representation before the courts

3.35 If the purpose of permitting barristers to hold client moneys and granting direct professional access in contentious matters is to reduce legal costs for clients, it should be noted that solicitors are already entitled to hold client moneys, and to represent clients before any court in the State from the District Court to the Supreme Court.

3.36 As such, if clients wish to reduce their legal costs in relation to instructing both a barrister and solicitor in contentious matters, they are free to instruct their solicitor to advocate on their behalf directly before the courts, rather than instructing a barrister.

Work required to implement changes proposed, and cost of same

3.37 If the proposed changes in relation to the lifting of the restriction on barristers holding client moneys and direct professional access in contentious matters were to be

introduced, there would be the requirement for a substantial number of legislative changes in order to implement same. It would also require the establishment of a regulatory system for financial matters at a significant cost to the barristers' profession.

3.38 This would also require the establishment and maintenance of a barristers' Compensation Fund which is likely to be funded by way of a levy on the barristers' profession. This could take a number of years to properly fund, establish minimum reserves, insure and maintain.

3.39 The new regulatory system would have to be as rigorous and as strictly enforced as the current regime for solicitors. To introduce a regulatory system with a lower standard would put one profession at a competitive advantage over the other and, more importantly, would put clients at risk. This could lead to a scenario where many practitioners and aspiring practitioners would choose the profession with the lower (and less costly) standards of regulation.

3.40 The enhancements required to the education system for barristers would require a great deal of planning. While the Society has not gone into any great detail on the Bar of Ireland's code of conduct, it would most likely have to be substantially overhauled to permit such changes.

3.41 It is uncertain at this time what proportion of the barristers' profession would be willing to work with and be comfortable with the above reforms. Those in the profession that would resist such changes might have to subsidise the costs of setting up and maintaining a new regulatory system for those colleagues choosing to handle clients' monies and accept direct professional access in contentious matters. This would place the costs of regulating the profession on an upwards trajectory. The ramifications of these changes could lead to a situation whereby the increase in costs would become a barrier to entry to the barristers' profession. The likely increase in costs of regulation could also impact on the costs of legal services to consumers.

3.42 Given that solicitors are already permitted to hold client moneys, have the appropriate regulatory system in place, and are fully capable of representing their clients directly before any court, the question remains as to what benefits, if any, the proposed changes to the barristers' profession under section 120 of the Act would afford to clients.

4. Holding client moneys and protection mechanisms for clients

4.1 Section 120(1)(a) of the Act asks respondents to consider the following:

"The extent, if any, to which the restriction on legal practitioners, other than solicitors, holding the moneys of clients, as provided under section 45, should be retained"

4.2 Section 45 of the Act provides as follows:

"(1) Subject to subsection (2), a legal practitioner shall not hold moneys of clients unless that legal practitioner is a solicitor.

(2) Notwithstanding subsection (1) the Minister may by regulations prescribe a class or classes of solicitors who may not hold the moneys of clients, or who may hold such moneys subject to such conditions as may be provided for in such regulations.

(3) Subsection (1) shall not be construed as permitting a solicitor to hold the moneys of clients where a condition or restriction is placed on a solicitor's practising certificate pursuant to the Solicitors Acts 1954 to 2015 or this Act."

4.3 Section 120(1)(c) of the Act asks respondents to consider the following:

"The circumstances and manner in which a barrister may hold clients' moneys and the mechanisms to be applied for the protection of client moneys which may be so held."

4.4 As the two matters set out in sections 120(1)(a) and (c) are closely related, the Society has amalgamated its responses to these matters together.

Regulatory standards

4.5 The holding of client moneys is a responsibility that should only be entrusted to those of the highest integrity and requires strict regulation in order to protect the interests of the public. In Ireland, there are a very limited number of professions legally entitled to hold and control client moneys in prescribed circumstances.

4.6 It is the view of the Society that, if the proposed changes with regard to barristers holding client moneys under section 120 are introduced, any legal practitioner who holds client moneys should be held to the same regulatory standards as solicitors, including a requirement to establish a separate Compensation Fund, in the interests of public protection and equity between the professions. To do otherwise would bestow a competitive advantage on the class of legal practitioners who are held to lower regulatory standards. More importantly, clients of barristers deserve the same level of monitoring, inspection and recompense as clients of solicitors.

Recommendation 6 – Regulatory standards

Any legal practitioner who holds client moneys should be held to the same regulatory standards as solicitors to ensure there is no competitive advantage given to a class of legal practitioners who are held to a lower regulatory standard and to ensure proper monitoring, inspection and recompense for clients.

Regulation of solicitors holding client moneys

4.7 Practising solicitors with unrestricted practising certificates are the only legal practitioners in Ireland who can currently receive, hold or control client moneys. These solicitors are subject to the stringent provisions of the Solicitors Accounts Regulations 2014 (S.I. No. 516 of 2014) regarding the holding of client moneys and must keep a designated client account for these moneys.

4.8 Solicitors must only pay moneys from the client account in prescribed circumstances for the purposes of conducting business on behalf of their client, in line with their client's instructions.

4.9 Solicitors must keep strict accounting records for the purposes of holding client moneys and are subject to regular inspection from the Society's investigating accountants to ensure compliance with the regulations. The regulations require a solicitor to maintain proper books of account at all times and to preserve all necessary supporting documentation.

4.10 Solicitors' practices are also required to submit an annual reporting accountant's report to the Society confirming whether the practice has complied with accounts regulations for the financial year covered by the report. Such report must be filed with the Society within 6 months of the stated financial year end of the firm, and failure by the firm to submit the report is considered to be misconduct.

Purpose of solicitors accounts regulations

4.11 In *Giles J. Kennedy & Co v. Law Society of Ireland* High Court, October 5, 1999[1], Kearns J. held that the whole purpose of the regulations was the protection of client moneys and by implication the Law Society's Compensation Fund and the public generally. The regulations set out to achieve this by requiring the maintenance of proper accounts and accounting procedures.

[1] *Giles J. Kennedy carrying on practice under the style and title of Giles J. Kennedy & Company, Applicant –v- The Law Society of Ireland, Patrick Joseph Connelly and Aisling Foley, Respondents* [2000] 2 IR 104

4.12 The Society has refined the current system of protecting client funds over many years. The many challenges presented to the Society in regulating client moneys over the last 60 years has resulted in the Solicitors Accounts Regulations 2014 which are under constant review to ensure maximum protection of the public.

Law Society's Compensation Fund

4.13 The Law Society's Compensation Fund is a statutory fund established under the Solicitors Act 1954 to compensate clients of solicitors who have suffered pecuniary loss due to the dishonesty in the provision of legal services by a solicitor.

4.14 The Society has statutory responsibility to maintain and protect the Fund, and protect client moneys.

4.15 The Fund is an additional layer of protection for consumers of legal services provided by solicitors, in conjunction with professional indemnity insurance which deals with losses suffered due to negligence. The Fund was originally established as clients of solicitors had no adequate form of redress against a solicitor where moneys were lost due to the dishonesty, rather than the negligence, of the solicitor.

4.16 The Law Society's Compensation Fund is only open to clients of solicitors who suffer financial loss through dishonesty by the solicitor in the provision of legal services. For any other type of loss suffered by a client of a solicitor they must pursue their claim against the solicitor's professional indemnity insurance.

4.17 The Society requires all practising solicitors to contribute annually towards the maintenance of the Law Society's Compensation Fund through their practising certificate fees, whether or not the solicitor holds client moneys.

4.18 Monetary fines imposed by way of penalty on solicitors may also be directed to be paid into the Fund.

Regulation of barristers holding client moneys

4.19 Altering the legal system so that all legal practitioners may hold client funds would require a dual system of regulation and enforcement for solicitors and barristers run by separate competent bodies. A regulator for barristers, either the Authority or the Bar of Ireland, which specifically regulates practising barristers holding client moneys in the interest of public protection would need to be designated.

4.20 This would require a number of legislative changes including, as mentioned previously, the introduction of a barristers' Compensation Fund and a claims-handling and financial regulation system to deal with claims on the new Fund and protection of the fund and clients' moneys.

4.21 As stated previously, if so permitted, barristers holding client moneys should be held to the same regulatory standards as those imposed on solicitors, which would require a regulatory system of a similar standard to that in place for the regulation of solicitor firms that hold client moneys. As such, the following recommendations are based on the regulatory standards and regulatory system in place for solicitors who hold client moneys.

New Compensation Fund for barristers

4.22 In the event that barristers are given the right to hold client moneys, consideration will need to be given to the introduction of a form of redress open to clients whose moneys are misappropriated through dishonest acts by barristers in the course of the delivery of legal services.

4.23 Consideration would be required to establishing a form of barristers' Compensation Fund to compensate clients of practising barristers who suffer financial loss due to the dishonesty of a barrister in the provision of legal services. This would offer an additional layer of protection to clients alongside professional indemnity insurance (which provides cover for acts of negligence by the barrister).

4.24 The model scheme for redress in this regard is the Law Society's statutory Compensation Fund as outlined previously in this submission.

4.25 The barristers' Compensation Fund would probably require to be established by way of levy on the barristers' profession over a number of years in order to establish a minimum funding level. Once the minimum funding level was reached, the competent body would have to go about insuring the Fund.

4.26 In order for the Fund to be insured, the competent body would have to demonstrate to insurers that their financial regulation functions were rigorous and that the insurers' exposure was kept to a minimum. Access to grants from the Fund should only be made in defined and limited circumstances.

4.27 In order to maintain the barristers' Compensation Fund, including minimum reserve levels, the competent body would have to establish a resilient system of control and risk management in order to protect the Fund. This could include matters such as regulations, education and powers of inspection.

4.28 Giving another competent body the power to control a new Compensation Fund may raise regulatory issues. The competent body would have to have clear lines of communication open between itself and the Authority. Clients of barristers would have to be made aware that there was no possibility for them to claim on the Law Society's Compensation Fund.

4.29 A claims management system would need to be put in place to manage claims on the barristers' Compensation Fund to compensate clients for loss in the event of dishonesty by the barrister and a financial regulatory system would need to be put in place to protect client moneys and the new barristers' Compensation Fund.

4.30 In the context of legal partnerships between barristers and solicitors, a situation could arise whereby a client who suffered financial loss could be uncertain of which Compensation Fund applied. This could be confused further if the loss suffered was a result of receiving legal services from both a barrister and a solicitor within that legal partnership.

Recommendation 7 – Barristers' Compensation Fund

In the event that barristers are allowed to hold client moneys, a barristers' Compensation Fund should be set up by way of levy on the barristers' profession only and to be maintained by the designated competent regulatory body, together with the appropriate financial regulatory system.

Recommendation 8 – Claims handling system

If a barristers' Compensation Fund is established, there will be a need for their competent body to establish and maintain a claims handling system.

Recommendation 9 – Demarcation between and guidance on access to compensation funds

If a barristers' compensation fund is established, a clear demarcation will need to be established on which clients have access to which Compensation Fund (either the solicitors' or barristers' Fund), especially for legal partnerships, and guidance regarding same should be required to be provided to clients of solicitors and barristers.

Regulator

4.31 Giving practising barristers access to client funds would require strict financial regulation by a competent body similar to that carried out by the Society in relation to solicitor firms that hold client moneys.

4.32 As mentioned previously, this competent body could be the Bar of Ireland or the Authority. The competent regulatory body would require powers similar to those in place for solicitors to ensure that client moneys are protected from the possibility of misappropriation and/or misuse by a practising barrister, and to protect the new barristers' Compensation Fund.

4.33 The competent body should have the power to appoint investigating accountants, who are forensic accountants who have a detailed understanding of the regulations as authorised persons for inspection. The investigating accountants would require powers to investigate self-employed practising barristers as well as those engaged in legal partnerships and multi-disciplinary practices.

4.34 The competent body should be in close communication with the other regulatory bodies as there would be a need to share information particularly in the context of legal partnerships and multi-disciplinary practices that might include both barristers and solicitors.

Recommendation 10 – Regulatory body

A competent body other than the Law Society would have to be given the statutory obligation under primary legislation to act as regulator in relation to the holding of client moneys by barristers, which would include an obligation to protect client moneys and to establish and maintain the new Compensation Fund for barristers. Regulatory powers including investigative, disciplinary, protective and enforcement powers to oversee those barristers who would be permitted to receive, hold or control client moneys to ensure the protection of the public and client moneys would have to be granted to the competent body, together with powers to make regulations in relation to the financial regulation of those barristers permitted to handle client moneys.

Client accounts and accounts regulations

4.35 As stated previously, in order for practising barristers to be able to hold client moneys, strict regulations would be required to ensure that the public was adequately protected, including the introduction of barristers accounts regulations to deal with the handling of client moneys by barristers.

4.36 The model for regulating client moneys by legal professionals in this regard is the Solicitors Accounts Regulations 2014. These regulations are the product of years of experience by the Society from scrutinising the accounts of solicitors in order to ensure the safeguard of client funds and, by extension, the Law Society's Compensation Fund. The regulations are appended to this submission.

4.37 If a new regime is introduced permitting access to client moneys by barristers, a raft of rules would be required. A barrister wishing to hold client moneys should be required to set up a client account or client accounts, as necessary. These bank accounts should be clearly designated for the purposes of client funds only. Any barrister who receives, holds or controls client moneys should pay such moneys into the client account without delay. The barrister should be only allowed pay moneys from the client account in specific circumstances in accordance with their client's instructions.

4.38 The barrister should maintain a client ledger account in respect of each separate client matter, including different client matters for the same client. There should be very limited circumstances whereby moneys could be transferred between separate client ledger accounts to prevent the possibility of misappropriation.

4.39 The barrister would also require an office account or office accounts for the purposes of paying in any moneys which they were beneficially entitled to receive. This account should receive all professional fees.

Recommendation 11 – Barristers' accounts regulations

A rigorous set of accounts regulations would have to be enacted to ensure practising barristers who were permitted to receive, hold or control client moneys were subject to strict oversight.

Inspections of barristers holding client moneys

4.40 As stated above, the barristers' accounts regulations would need to be drafted so that they contained clearly defined rules as to how client funds were to be received, handled and controlled. A practising barrister would also have to keep clear books of account with vouching documentation so that all client moneys were readily identifiable and available for inspection.

4.41 The competent body would have to oversee the enforcement of these accounts regulations to ensure that the highest standards were maintained. In order to allow barristers to receive, hold or control client moneys the competent body would need a financial regulation department with forensic investigating accountants with particular expertise in ensuring compliance with the regulations.

4.42 Currently, the Society investigates all solicitors' practices through a number of designated investigating accountants who are appointed as an *'authorised person'* by the Registrar of Solicitors. The method for selecting solicitors' practices for inspection is done through both a rotational basis and on the basis of risk management procedures. An inspection of a practice may also be triggered through a complaint made to the Society by a client.

4.43 Practising barristers given access to client funds would have to be subject to similar inspections of their accounts on a regular basis by a forensic investigating accountant on behalf of the regulatory body. It would also be prudent to consider inspecting such barristers on the basis of risk profiling depending on the nature of their practice.

4.44 A requirement to submit an annual reporting accountant's report to the competent body, similar to the annual reporting accountants' reports submitted by solicitor firms who hold client moneys, would need to be introduced to assist with identifying and assessing high risk barristers.

4.45 It would need to be made clear that a breach of the regulations would be treated as a matter of professional conduct. Any breaches of professional conduct in relation to accounts matters could result in regulatory intervention, referral to the Legal Practitioners Disciplinary Tribunal for an inquiry into the legal practitioner's conduct and/or a referral to the High Court.

4.46 Protective powers would need to be put in place to allow the relevant regulator to make applications to the High Court to obtain suspension and freezing orders in the event that misappropriation or deficits on the client account were identified. This is considered further below.

Recommendation 12 – Inspection regime for barristers holding client moneys

Inspections of barristers' accounts would have to be provided for in primary legislation and accounts regulations, to be conducted on a regular basis and on the basis of an assessment of risk by forensic investigating accountants to ensure compliance with those regulations.

Recommendation 13 – Annual reporting accountants' reports

Barristers who were permitted to hold client moneys should be required to submit an annual reporting accountants' report to the regulator which report should disclose any breaches of the applicable accounts regulations, in particular any deficits on client accounts.

Regulatory committee and disciplinary powers

4.47 The competent body should be required to establish a regulatory committee to deal with barristers' accounts regulations matters, and claims on the barristers' compensation fund, similar to the Society's Regulation of Practice Committee.

4.48 In the event that there are breaches of regulations, the regulatory committee should have a range of powers open to them to deal with such breaches. Such powers would include:

(a) power to call barristers to a meeting of the committee;

(b) power to compel barristers to comply with directions of the committee, including production of relevant documentation and books of account;

(c) imposition of reprimands;

(d) levying of contributions towards the costs of the inspection;

(e) imposition of practising certificate conditions;

(f) refusal to issue a practising certificate;

(g) referral of serious breaches to the Legal Practitioners Disciplinary Tribunal;

(h) direction that an application be made to the High Court for a suspension order or a freezing order.

4.49 For minor breaches of the barristers' accounts regulations, the imposition of reprimands or a contribution towards the cost of the inspection that identified the breaches, or the imposition of minor practising certificate conditions (such as requirement for further education in specific areas) might be appropriate.

4.50 For more serious breaches of the barristers' accounts regulations (which do not reach the threshold of seriousness that would warrant referral to the Legal Practitioners

Disciplinary Tribunal), stiffer practising certificate conditions might be considered, such as a requirement for a barrister to have an approved supervisor in place, or a requirement to have a second signatory in place for all client account cheques (or electronic equivalent).

4.51 Under the Solicitors Acts 1954 to 2011, practising certificate conditions can be put in place either when a solicitor applies for a practising certificate[2], or on a practising certificate already in force[3]. Similar powers might be considered in relation to barristers.

4.52 The Solicitors Acts also permit the Society to refuse to issue a solicitor with a practising certificate under specified circumstances[4]. Similar powers might be considered in relation to barristers.

4.53 As any practising certificate conditions could materially impact on a barrister's right to earn a livelihood, a right of appeal would need to be built into the system. For solicitors, a right of appeal exists against the imposition of practising certificate conditions, or refusal of a practising certificate, with the appeal being made to the President of the High Court.

4.54 The committee would need to have jurisdiction to refer barristers who have breached the accounts regulations to the Legal Practitioners Disciplinary Tribunal for further inquiry into whether the matter constitutes misconduct. The Legal Practitioners Disciplinary Tribunal would need the power to make findings of professional misconduct against barristers for breaches of the barristers' accounts regulations.

4.55 The issue of referral to the Legal Practitioners Disciplinary Tribunal will require careful consideration and possible amendment to primary legislation as currently, under section 77 of the Act, the Authority and the Society are the only two bodies eligible to make applications to the Tribunal. If a competent body other than the Authority is designated to regulate barristers holding client moneys (such as the Bar of Ireland), such powers would need to be extended to that competent body.

4.56 Circumstances could arise where a barrister dishonestly misappropriated client funds. This might be discovered by the competent body by way of inspection (either risk or rotation based), through the annual accountant's report, or through the complaint of a client. In such circumstances statutory powers would be needed by the competent body to apply to the High Court to freeze the accounts and/or assets of the barrister and suspend the barrister from practice in order to protect client funds.

4.57 The Society currently has the power under section 20 of the Solicitors (Amendment) Act 1960 (as amended) to apply to the High Court for certain orders in respect of a solicitor's bank accounts and assets. Such applications may be made, on the direction of the Society's Regulation of Practice Committee, in circumstances where the Society

[2] Section 49 of the Solicitors Act 1954, as substituted by section 61 of the Solicitors (Amendment) Act 1994, as amended by section 2 of the Solicitors (Amendment) Act 2002

[3] Section 59 of the Solicitors (Amendment) Act 1994

[4] Section 49 of the Solicitors Act 1954, as substituted by section 61 of the Solicitors (Amendment) Act 1994, as amended by section 2 of the Solicitors (Amendment) Act 2002

has formed the opinion that there has been dishonesty in the solicitor's practice. A similar application may also be made where the Society is of the opinion that a sole principal has abandoned their practice. The Society may also apply for the suspension of the solicitor in such cases. Broadly similar powers for the competent regulator would need to be considered if practising barristers are permitted to hold client moneys.

Recommendation 14 – Establishment of a regulatory committee

The competent regulatory body would have to establish a regulatory committee to deal with barristers who breached the accounts regulations and to consider claims on the barristers' Compensation Fund.

Recommendation 15 – Powers of regulatory committee

The competent regulatory body would have to be given all the relevant statutory powers to deal with barristers who breached the accounts regulations as are currently held by the Society, including the right to refer the barrister to the Legal Practitioners Disciplinary Tribunal, which powers could be delegated to a regulatory committee if appropriate.

Recommendation 16 – Refusal to issue barristers' practising certificates, or imposition of practising certificate conditions

Consideration would need to be given to granting the competent regulatory body the power to impose conditions on barristers' practising certificates, or to refuse to issue a practising certificate, for breaches of the accounts regulations in order to protect client moneys.

Recommendation 17 – Right to apply to the High Court

The competent regulatory body would have to be given the statutory power to apply to the High Court to freeze a barrister's accounts and/or assets to protect client funds, and/or suspend the barrister from practice.

Bankruptcy, personal insolvency arrangements and unsatisfied judgments

4.58 If barristers are given the right to hold client moneys, they should also be required to be subject to the same rules regarding bankruptcy, personal insolvency arrangements and unsatisfied judgments as apply to solicitors in order to protect client moneys.

4.59 The protective measures that are put in place for solicitors who are adjudicated bankrupt, enter into a personal insolvency arrangement and/or have unsatisfied judgments are not put in place because of any moral failing attributed to the solicitor's actions, but rather because such solicitors may be under significant financial pressure and, therefore, constitute a much higher risk to client moneys.

4.60 Under section 50 of the Solicitors Act 1954 a solicitor is immediately and automatically suspended from practice when adjudicated bankrupt. The suspension remains in place until the bankruptcy is annulled or the Society lifts the suspension in accordance with such conditions as the Society deems fit under section 51 of the Solicitors Act 1954.

4.61 Practising barristers who handle client moneys and are adjudicated bankrupt should also be suspended from practice with automatic and immediate effect to ensure protection of client moneys.

4.62 An effective right of appeal against this suspension for solicitors exists under section 51 of the Solicitors Act 1954 whereby the Society can, upon application by the solicitor, lift the suspension imposed under section 50 under such terms as the Society deems fit. Such terms may include imposition of practising certificate conditions that such solicitors cannot have access to client moneys and can only act as an assistant solicitor under supervision. Such provisions should also be considered for barristers.

4.63 With regard to solicitors being involved in personal insolvency arrangements and having unsatisfied judgments, the Society has the power under section 49 of the Solicitors Act 1954, as substituted by section 61 of the Solicitors (Amendment) Act 1994, and under section 59 of the Solicitors (Amendment) Act 1994, to refuse a practising certificate, or impose practising certificate conditions where a solicitor has entered into an arrangement with their creditors (such as a personal insolvency arrangement) or has unsatisfied judgments. The power to refuse a practising certificate or impose conditions if a solicitor has been made bankrupt in any jurisdiction also exists under these sections.

4.64 The practising certificate conditions imposed on solicitors in situations where the solicitor has entered into a personal insolvency arrangement or has unsatisfied judgments range from prohibiting solicitors from acting as a principal in a practice and requiring the solicitor to act only as an assistant solicitor under the direct control and supervision of a solicitor of at least 10 years' standing to be approved in advance by the Society, to requiring the solicitor to have a second signatory on all client account cheques or the electronic equivalent.

4.65 Similar powers would need to be granted to the competent body with regard to the regulation of barristers who are permitted to hold client moneys who have, at any point or in any jurisdiction, been adjudicated bankrupt, entered into personal insolvency arrangements or who have unsatisfied judgments, in order to safeguard client moneys and, by extension, the barristers' Compensation Fund.

Recommendation 18 – Suspension due to bankruptcy
Barristers permitted to hold client moneys who are adjudicated bankrupt should be automatically suspended from practice with immediate effect. Provisions allowing the barrister to apply to the competent body to lift the barrister's suspension on such terms as the competent body sees fit should be considered.

Recommendation 19 – Refusal of practising certificate, or imposition of practising certificate conditions where a solicitor has been adjudicated bankrupt, entered into a personal insolvency arrangement, and/or has unsatisfied judgments

The competent body would have to be given the power to refuse a practising certificate, or impose such conditions as they deem fit on the practising certificate of a barrister who has at any time or in any jurisdiction been adjudicated bankrupt, entered into a personal insolvency arrangement, and/or has unsatisfied judgments, for the protection of client moneys.

Education

4.66 The current system for educating prospective barristers in the Honorable Society of King's Inns does not address the holding of client funds, as barristers are currently prohibited from holding same. The system for educating barristers would have to be substantially amended to provide for education on this matter, should barristers be permitted to handle client moneys.

4.67 Barristers currently in practice would also require education on how to treat client funds and how to administer a client account for their practice. They would have to be educated to a standard that would ensure the protection of the public and would require ongoing continuing professional development on this matter. Such education would also assist in satisfying the barristers' professional indemnity insurers that exposure to risk is minimised.

4.68 Educational courses would require a detailed understanding of how to maintain accounts, the regulations that would apply and an understanding of how the inspection process would work. Barristers would need to understand the ramifications of potential breaches of the accounts regulations and how this might impact on their right to practice.

Recommendation 20 – Education of barristers on client account matters

Both practising barristers and prospective barristers should be educated to a standard similar to solicitors in relation to administering client moneys.

Professional indemnity insurance

4.69 Practising barristers who are members of the Law Library are currently subject to the Bar of Ireland's code of conduct which requires barristers to hold minimum levels of professional indemnity insurance.

4.70 Under section 47 of the Act, the Authority is required to make regulations for the professional indemnity insurance requirements of practising barristers. This section

has not yet been commenced and until such time as it is, the Bar's code of conduct will prevail.

4.71 Giving barristers the entitlement to hold client moneys would inevitably impact on the premium rate for professional indemnity insurance they would have to pay on an annual basis. The range of insurers who would be willing to enter into insurance contracts with barristers who were permitted to hold client moneys should also be considered.

4.72 Currently under the Solicitors Acts 1954 to 2011 (Professional Indemnity Insurance) Regulations 2016 (S.I. No. 534 of 2016) solicitor firms are required to have insurance with a minimum level of cover of €1.5m for each and every claim. Barristers who hold client funds would have to be required to maintain a similar minimum level of cover in their practice for each and every claim to ensure public protection at the same level as that afforded to clients of solicitors.

4.73 If an entitlement for barristers to hold client moneys is introduced, in order to keep their insurance overheads at a minimum, barristers may have to consider limiting their practice to certain fields of expertise rather than general practice, and not holding client moneys despite being permitted to do so.

4.74 Consideration would have to be given to the establishment of an assigned risks pool for barristers, similar to that which exists for solicitors, as an insurer of last resort in order to maintain insurance for barristers who were unable to obtain cover in the open market in any given year. The ARP would prevent the insurance market from inadvertently being given the power to dictate the type of work barristers might or might not engage in if the barrister wished to obtain insurance. The parameters for access to this fund would require careful deliberation and would require regulations to be effective.

4.75 Run-off insurance is provided to eligible ceased solicitor firms through the Run-off Fund. This fund was established as it was found that the cost of run-off insurance through the market for solicitors who were ceasing practice was too high for retiring solicitors to afford. As such, the Run-off Fund provides run-off cover to each eligible ceased firm at no cost at point of entry to the firm, and cover is in place for so long as the fund exists. The fund is paid for by participating insurers in the solicitors' professional indemnity insurance market in accordance with the insurer's market share by premium, and the cost of the fund are recovered by the insurers from live solicitor firms through their annual premium.

4.76 While barristers are currently required to hold run-off cover for 6 years after ceasing to practise, further consideration would need to be given to run-off insurance requirements for barristers, should barristers be permitted to hold client moneys in future, in light of possible consequential increases in the run-off premium which might make run-off cover unaffordable. Matters such as the duration of such cover, and how the cover would be paid for, and creation of regulations in relation to same would need to be reviewed in light of any potential increase in run-off premium. Further

consideration of the requirements to hold run-off cover for barristers in relation to direct professional access is dealt with later in this submission.

Recommendation 21 – Professional indemnity insurance

Barristers holding client moneys should be subject to the same professional indemnity insurance standards as solicitors to ensure there is no competitive advantage given to a class of legal practitioners who are held to a lower regulatory standard to the detriment of client protection.

Recommendation 22 – Assigned risks pool

An Assigned Risks Pool should be established as an insurer of last resort for barristers who are unable to obtain professional indemnity insurance in the market in any year.

Recommendation 23 – Run-off cover

Run-off insurance cover provisions for barristers, including duration of cover, how cover is paid for, and relevant regulations, should be reviewed in light of a possible consequential increase in run-off premium caused by any lifting of the restriction on barristers holding client moneys and direct professional access in contentious matters.

Consequential impact of barristers holding client moneys on legal costs

4.77 When consideration is given to whether to allow barristers to hold client moneys, the additional costs of the regulatory regime that needs to be put in place to protect client moneys, and the consequential possible increase in legal costs, need to be kept in mind.

4.78 As set out in this chapter, the legislative changes and regulatory requirements to ensure protection of client moneys, and to ensure that a comparable regulatory system between solicitors and barristers exists, are substantial. The cost of same for barristers is likely to be a considerable and unwelcome additional financial burden which may be passed on to clients through legal costs.

4.79 As a matter of comparison, the financial regulatory system for solicitors cost the Society €6.5m in 2016. This would be on a recurring annual basis. It should be noted that this financial regulatory regime covers approximately 2,298 solicitor firms who hold client moneys.

4.80 It should also be noted that the cost of the new financial regulatory system would need to be entirely borne by barristers, as solicitors already pay for their own financial regulation. It would be unreasonable to expect solicitors to pay for both their own financial regulation and that of barristers.

4.81 The additional cost of a barristers' Compensation Fund contribution on an annual basis by barristers on top of the fees that they currently pay the Bar of Ireland for their annual practising certificate will need to be recovered by barristers, which could result in increasing legal costs. The annual Compensation Fund contribution for solicitors for 2017 was €760 per solicitor, regardless of whether or not the solicitor held client moneys.

4.82 It must also be understood that holding client moneys would raise the risk profile for any practising barrister. This would have ramifications in terms of professional indemnity insurance costs potentially acting as a barrier to entry to the profession and requiring professional indemnity insurance regulatory requirements for practising barristers to become more rigorous and complex to deal with the additional risk of holding client moneys.

4.83 Adding the inevitable increase in costs of contributing to a Compensation Fund, paying for a financial regulatory regime, and increased professional indemnity insurance would likely impact the costs of the provision of legal services. These costs are likely to be borne by consumers leading to higher prices for legal services.

Recommendation 24 – Legal costs consequences of barristers holding client moneys

Consideration should be given to the possible consequential increase in legal costs that may arise due to the costs of the financial regulatory structure required to protect client moneys having to be established and maintained by barristers.

LAW SOCIETY SUBMISSION

Section 118 Legal Services Regulation Act 2015 – Legal Partnerships

LEGAL SERVICES REGULATORY AUTHORITY

20 July 2017

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

Contents

1. Introduction

1.1. The purpose of this second submission from the Law Society of Ireland ("the Society") is to issue a response to the report ("the report") from the Legal Services Regulatory Authority ("the Authority") to the Minister for Justice dated 31 March 2017. The report was written having regard to the submissions made to the Authority in relation to the regulation, monitoring and operation of legal partnerships as part of their initial public consultation in accordance with section 118 of the Legal Services Regulation Act 2015 ("the Act"). The report was subsequently laid before the Houses of the Oireachtas by the Minister for Justice on 28 April 2017.

1.2. As the Society is the representative and regulatory body for solicitors in Ireland, the Society's comments in this submission will be limited to solicitor-barrister legal partnerships. As such, all references to "legal partnerships" in this submission should be read as a reference only to solicitor-barrister legal partnerships, not barrister-barrister legal partnerships.

1.3. The Society limits this second submission to addressing certain matters that arise in the report from the Authority which have led to some concerns regarding the possible introduction of 'light touch' regulation for solicitor-barrister legal partnerships.

2. Executive summary

2.1. The following submission sets out the Society's views in relation to the report on legal partnerships submitted by the Authority to the Minister for Justice dated 31 March 2017.

2.2. This submission proposes to address the issue of the regulation of legal partnerships and the possibility of differing standards of regulation being applied to legal partnerships as suggested in the initial report from the Authority.

2.3. While the Society recognises that legal partnerships will be commenced in Ireland under the Act, the Authority should be aware of the potential risks in implementing the establishment of these structures without ensuring they are regulated to the same high standard as currently applies to solicitor firms.

2.4. Chapter 3 of this submission considers the Authority's report and the Society's concerns about the suggestion that lower regulatory standards might be applied to legal partnerships. The Society notes the importance of changes in the provision of legal services as provided for in the Act but expresses its concern about the standard of regulation of the delivery of those services through legal partnerships.

2.5. Chapter 4 sets out the regulatory powers of the Authority and the Society in relation to solicitors, different levels of regulation of solicitors depending on how they practise, and the need for harmonisation of regulatory standards.

2.6. Chapter 5 considers possible risks to the solicitors' profession if lower standards of regulation are introduced in relation to legal partnerships, including the creation of a two-tier profession, risks to the Society's Compensation Fund, education and training, and matters relating to professional indemnity insurance.

2.7. Chapter 6 considers possible consequential public protection risks associated with the introduction of lower regulatory standards for legal partnerships, including the exploitation of legal partnership structures by the minority of solicitors who might take advantage of this weakness, two-tier protection for clients, and effects on client fees.

2.8. Chapter 7 considers the risks associated with 'light touch' regulation, the reputation of legal partnerships, and the Authority's required objectives under the Act.

2.9. It is the recommendation of the Society that solicitors in legal partnerships be subjected to the same regulatory standards as solicitors practising outside of legal partnerships in the interests of protection of the public and the profession, the reputation of the regulatory system, protection of the Society's Compensation Fund, and the confidence of the public in legal partnerships as a structure.

3. The Authority's report

3.1 The initial report from the Authority to the Minister for Justice dated 31 March 2017 took into account the views of eight different parties through their respective submissions. The report has also considered comparative aspects of the regulation of solicitors and barristers in England and Wales.

3.2 The Society acknowledges that the Authority is seeking to augment the provision of legal services through the introduction of different legal structures including legal partnerships. The Society notes that the Authority is of the view that these structures should not be commenced until the necessary consultations have been conducted and an appropriate framework is in place.

3.3 Nevertheless, the Society wishes to express its apprehension with regard to some of the matters expressed in the Authority's report.

3.4 Paragraph 21 of the report states as follows:

"If it is decided to merely extend the concept of solicitor regulation to legal partnerships, it may not succeed in widening the variety of offerings of legal services in Ireland. If, on the other hand, the introduction of legal partnerships is used as a mechanism for introducing different types of regulation for differing categories of lawyers working collectively under different practice requirements, then these legal partnerships may add value to the market. In other words, simply regulating legal partnerships as regulated solicitor-owned law firms, may add nothing to the market. Creating partnerships which have different scopes of practice authorisations, may facilitate the regulation of these entities in new ways."

3.5 The Society is concerned that this may be interpreted that the Authority is considering applying lower regulatory standards to legal partnerships than are currently applied to solicitor firms.

3.6 The Society recognises the importance of innovation in the provision of legal services, but this should not come at the possible expense of public protection. While novel methods of regulation are worth considering, lower standards of regulation should not be accepted.

3.7 The Society sees the application of lower regulatory standards to legal partnerships as unnecessary, inappropriate and with the potential to damage public confidence in the legal professions, as well as damaging the professions themselves. Regulatory standards should be universal across the solicitors' profession and should not be conditional on the basis of the entity through which a legal practitioner provides legal services unless such differences in standards are reasonable, proportionate and do not constitute an increased risk to public protection.

3.8 It is unclear from the report what lower standards are being referred to, how these standards would be applied, and whether such standards would only be applied to barrister-barrister legal partnerships or to all types of legal partnerships. The centrepiece of the Authority's powers, once enacted, relate to processing complaints against solicitors and barristers. The

view could be taken from the report that the threshold for legitimate complaints against legal practitioners in a legal partnership could therefore be higher than complaints against other legal practitioners.

4. Regulatory powers

Society's regulatory powers

4.1 Notwithstanding the powers of the Authority when additional parts of the Act are commenced, the Society will retain a number of key regulatory powers in relation to solicitors including issuing practising certificates, professional indemnity insurance, financial regulation, anti-money laundering obligations and powers of inspection. The Society also maintains and controls the statutory Compensation Fund which administers grants to clients who suffer financial loss through the dishonest actions of solicitors in the provision of legal services.

4.2 In the interests of protecting the Society's Compensation Fund and the public, the Society will continue to inspect practices, require solicitors to submit annual accountants' reports and a closing accountants' report and will prosecute breaches of the Solicitors Accounts Regulations 2014 (S.I. No. 516 of 2014).

4.3 The Society has developed a risk-based system for choosing firms for financial investigations rather than using a purely cyclical basis. This means that firms are chosen for inspection based upon a number of matters including complaints made against solicitors in any given firm. Any reduced standard of regulation that would not alert the Society to potential risks could distort the Society's risk assessment system, and constitute a risk to the Society's Compensation Fund.

Current differing levels of regulation

4.4 There are differing levels of regulation that currently apply to different subsets of solicitors depending on the nature of their practice. These differences are reasonable and proportionate as they do not put the public or the reputation of the profession at increased risk. Such different levels apply to solicitors firms that do not hold client monies, in-house solicitors in relation to professional indemnity insurance, and non-practising solicitors in relation to requirement to hold a practising certificate and insurance.

4.5 The Society allows a different level of financial regulation for firms that do not receive, hold or control client monies. The compliance partner or sole practitioner of a firm may make a statutory declaration to the Society confirming that the firm does not receive, hold, control or pay client monies and this would mean that a firm does not have to provide an annual accounting report to the Society nor are they normally subject to inspections from the Society's investigating accountants. However, the Society reserves the right to inspect such firms and does so from time to time. This declaration is made to the Society on an annual basis and it is professional misconduct to make a false declaration to the Society representing that a firm does not receive, hold, control or pay client monies.

4.6 As at 19 June 2017, there are 62 firms out of 2,302 firms in Ireland that have filed statutory declarations that they do not hold client monies and are therefore not subject to further

regulatory requirements pertaining to the handling of client monies unless the Society has reason to inquire into those declarations.

4.7 In-house solicitors are not required to hold professional indemnity insurance as they only provide legal services to their employer. The liability of in-house solicitors is covered by their employment contract and principles of vicarious liability.

4.8 Non-practising solicitors (that is solicitors who are not providing legal services of any kind or holding themselves out as a solicitor entitled to practise) are not required to hold a practising certificate nor are they required to hold professional indemnity insurance. They are also not subject to the regulatory requirements concerning the holding of client monies.

4.9 In these scenarios, the lower level of regulatory obligations placed on such solicitors is directly proportionate to the reduced risk that such solicitors pose to the public and the Society's Compensation Fund. The Society would not have an issue with similar concessions being granted to legal partnerships, such as in relation to legal partnerships that do not hold client monies.

4.10 However, the Society's concern is that lower regulatory requirements for legal partnerships will be put in place merely by virtue of the fact that the legal service is being provided by a legal partnership, rather than by virtue of the fact that the legal partnership poses a lower regulatory risk. It would be difficult to justify why solicitors providing the same legal service through different structures should be subject to different regulatory standards.

The Authority's regulatory powers

4.11 The Authority will have regulatory powers over solicitors in legal partnerships and other practice entities in terms of dealing with complaints from members of the public under Part 6 of the Act, once commenced. The Authority will also have the power to make regulations in terms of the operation and management of legal partnerships under section 116 of the Act, once commenced. The Authority will also have competence to make advertising regulations under section 218 of the Act for *inter alia* legal partnerships.

4.12 The Authority may make regulations under section 116 (3) providing for:

(a) the standards to be observed in the provision by the practice of legal services to clients, including standards relating to:

(i) the professional and ethical conduct of persons providing legal services to clients;

(ii) the obligation of such persons to keep the affairs of clients confidential;

(iii) the provision of information to a client in relation to the duties owed by the practice to him or her,

(b) the rights, duties and responsibilities of a practice in respect of moneys received from clients,

(c) the management and control of the practice so as to ensure that:

(i) the standards referred to in paragraph (a) are at all times observed;

(ii) it has in place appropriate systems of control, including systems for risk management and financial control;

(iii) where, in the provision by it of services, a conflict of interest or potential conflict of interest arises, this is dealt with adequately and in accordance with any relevant code of conduct or professional codes;

(iv) its obligations under this Act and regulations made under it are complied with,

(d) the maintenance by the practice of records,

(e) the regulation of the names that may be used by a practice,

(f) the regulation of the advertising by the practice of its services.

4.13 The Authority would not have the power to set regulatory standards for the following matters in relation to solicitors:

a) professional indemnity insurance;
b) the Society's Compensation Fund;
c) Solicitors Accounts Regulations;
d) anti-money laundering matters;
e) issuing of solicitors' practising certificates.

4.14 Solicitors in legal partnerships should be subject to the same rules and requirements as solicitors in other forms of practice in relation to these matters, and regulatory standards between legal partnerships and solicitor firms should be harmonised.

5. Risks to the solicitors' profession

5.1 There are inherent risks to the solicitors' profession if there is any consideration given to operating a lower regulatory standard for legal partnerships.

Two-tier solicitors' profession

5.2 The regulatory standards that currently apply to solicitors have been established over a number of decades through experience and are maintained to protect the public, the Compensation Fund and the reputation of the profession. Regulation does not remain static and must be kept under review to adapt to changes in the market.

5.3 Any lowering of those regulatory standards for legal partnerships would grant an immediate and unfair competitive advantage to a defined class of solicitors which would bring about an imbalance by creating a two-tier form of solicitors' profession between those solicitors in legal partnerships and those practising outside legal partnerships.

5.4 The application of any lower regulatory standards to legal partnerships would reduce protections to clients and would ultimately be a risk to the public. It may lead to a situation where solicitor firms could employ a single barrister in order to benefit from the lower regulatory standards applied to legal partnerships, to the detriment of the clients.

5.5 This could also lead to confusion for members of the public as there would be differing regulatory standards applied to different classes of solicitors. It would be unreasonable for a client accessing a legal service through a solicitors' firm to be offered greater protections than a client accessing the same service through a legal partnership. It would also be unjust to hold certain solicitors to a higher standard by virtue of their practice structure.

Parallel regulatory structures

5.6 Any consideration of operating a parallel regulatory scheme for legal partnerships would be an expensive and unnecessary exercise. The costs of establishing and maintaining a regulatory scheme for legal practitioners in legal partnerships would be disproportionate to the aims to be achieved and difficult to justify.

Regulatory standards

5.7 There is also a concern that solicitor partners in legal partnerships would be held to a higher regulatory standard than barrister partners. It would be unfair and inappropriate to create a situation where the regulatory burden for legal partnerships rests disproportionately on the shoulders of the solicitor partners. It is the view of the Society that it would be more appropriate that solicitors and barrister partners in legal partnerships be held to the same regulatory standards, and share regulatory responsibilities equally.

Education and training standards

5.8 Solicitors are currently trained to a required standard before they can be admitted to the Roll of Solicitors. This requires a trainee solicitor to successfully complete the education and in-office training requirements of the Society. If a trainee solicitor were to complete their in-office training in a legal partnership, they could be at a disadvantage in terms of their understanding of regulatory requirements. The trainee solicitor would be trained to the lower regulatory standard which would not be of a sufficient standard to commence practice in a solicitors' firm.

5.9 A newly qualified solicitor who has completed their in-office training in a legal partnership could jeopardise their own career by commencing practice in a solicitors' firm as they would then be held to the higher standard of regulation which they would be unprepared for.

Society's Compensation Fund

5.10 Legal partnerships that include practising solicitors will be entitled to hold client monies and as such they will constitute a potential risk to the Society's Compensation Fund. The Society has already made its representations regarding the possible risks to the Compensation Fund in its first submission.

5.11 The application of lower standards of regulation to legal partnerships could attract a minority of non-compliant solicitors that seek to exploit those lower standards. This could lead to the scenario whereby dishonest solicitors in legal partnerships could cause an increase in the number of claims made on the Society's Compensation Fund.

5.12 If there is a lower regulatory standard for complaints against solicitors within a legal partnership than solicitors in other forms of practice, this could lead to an imbalance in the Society's risk-based assessment system for financial investigations, thereby constituting a risk to the Society's Compensation Fund.

5.13 This could put the Society in the invidious position of being liable for an increase in claims made on the Compensation Fund by clients of those solicitors who seek to take advantage of lower regulatory standards in legal partnerships. As the Society would have no power to regulate those standards, this could affect the ability of the Society to secure insurance for the Society's Compensation Fund.

5.14 Any increase in grants paid out from the Society's Compensation Fund would likely be reflected in higher practising certificate fees for solicitors. It would be unreasonable for the largely compliant members of the solicitors' profession to suffer due to lower regulatory standards put in place on legal partnerships.

Professional indemnity insurance

5.15 Legal partnerships that include solicitors will be subject to the relevant professional indemnity insurance regulations made by the Society.

5.16 If there are to be any lower regulatory standards applied to legal partnerships, this is likely to impact the risk profile of these structures in the view of insurers. Any perceived increase in risk by insurers is likely to manifest itself in higher professional indemnity insurance premiums charged to legal partnerships.

5.17 Given that professional indemnity insurance is a free market in Ireland, some insurers may not wish to assume the risk of underwriting legal partnerships or only do so at an inflated price. This could have the effect of pushing up premium levels charged by those insurers who would underwrite legal partnerships.

6. Public protection issues

6.1 Any deviation in regulatory standards will impact members of the public in their dealings with legal partnerships. The public expects and deserves high standards from legal practitioners and those standards should be applied consistently.

6.2 A reduction in regulatory standards for legal partnerships could have the unintended consequence of attracting solicitors who would use such structures in order to circumvent more rigorous regulatory standards which would apply to other classes of solicitors.

6.3 This could in turn lead to a situation whereby a solicitor could enter into a legal partnership with a barrister in a nominal capacity in order to gain the benefit of lower regulatory standards. This could ultimately damage protection of the public, the administration of justice, and the reputation of the profession.

Fees

6.4 Any dilution of regulatory standards is unlikely to reduce fees charged by legal partnerships. There is no empirical evidence available to suggest that lower standards of regulation will offer any financial benefits for clients.

6.5 Further to this, as noted in paragraph 5.17, any higher premiums charged for professional indemnity insurance to legal partnerships would most likely be reflected in the fees charged by the partnership to their clients.

6.6 As such, any reduction in regulatory standards at the expense of public protection would likely not result in any substantive reduction in fee levels.

Two-tier protection for clients

6.7 The Society is apprehensive that the purpose of lowering regulatory standards for legal partnerships would be to create a cheaper form of legal provider by reducing client protections and safeguards. Protection of the public is a fundamental tenet of the provision of legal services. The level of protection a client receives from their professional legal provider should not be dependent on the level of fees that the client can afford. The Society is of the opinion that the public has high expectations with regard to standards applied to legal practitioners and that lower regulatory standards can only damage public confidence in the legal system.

7. Risks of 'light touch' regulatory framework

7.1 A regulatory framework should be consistent with and responsive to the evolution of the profession or industry it seeks to regulate. The framework should be monitored, amended and updated as necessary in order to adjust to changes in the wider environment. Setting poor foundations to a regulatory framework at the outset will almost inevitably lead to collapse and rebuilding can be a costly exercise.

7.2 A regulatory system must ensure that it maintains the confidence of the public. Reconstruction of public confidence after the failure of regulatory mechanisms can take a great deal of time.

7.3 There have been numerous examples in both Ireland and internationally whereby regulatory malfunction has failed the public interest, in particular as a result of 'light touch' regulation. These include the failure to adequately regulate the insurance industry and failure to adequately regulate banking activities. The fallout from the failure of regulation in these two areas alone has caused widespread financial difficulties and damage to public confidence. Further to this, it has damaged the public perception of the regulators themselves.

7.4 While no regulatory framework can possibly envisage all risks, the establishment and maintenance of high standards of regulation should be an aspiration of the Authority in order to secure public confidence in its regulatory role.

7.5 The introduction of legal partnerships could be seen unfavourably in the eyes of the public, the professions and the courts if solicitors within legal partnerships were not held to the same high regulatory standards as those solicitors who practise outside such structures. It may result in legal partnerships gaining a reputation as poor quality, under-regulated and second class providers of legal services.

7.6 The Act requires the Authority to have regard to the objectives specified under section 13 (4) of the Act. Those objectives are as follows:

a) Protecting and promoting the public interest,

b) Supporting the proper and effective administration of justice,

c) Protecting and promoting the interests of consumers relating to the provision of legal services,

d) Promoting competition in the provision of legal services in the State,

e) Encouraging an independent, strong and effective legal profession, and

f) Promoting and maintaining the professional principles specified in subsection (5).

It seems unlikely that lowering regulatory standards would assist the Authority in promoting and vindicating these objectives.

Recommendation of the Society

7.6 As such, it is the recommendation of the Society that regulatory standards should be applicable to all solicitors on an equal and unambiguous basis. The application of lower regulatory standards by virtue of the structure within which a solicitor practises would likely reduce public protection, damage the reputation of the solicitors' profession, increase risks for the Society's Compensation Fund, and damage the public perception of legal partnerships as a legal service provider.

7.7 Proportionate and reasonable standards for legal partnerships, similar to those in place for solicitors, would be appropriate, such as alternative financial regulatory obligations where legal partnerships do not hold client monies.

LAW SOCIETY SUBMISSION

Legal Services Regulation Act 2015

Draft Code of Practice for Practising Barristers

Legal Services Regulatory Authority

26 October 2018

ABOUT THE LAW SOCIETY OF IRELAND

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Contents

1. Introduction

1.1 The purpose of this submission from the Law Society of Ireland ("the Society") is to reply to the invitation from the Legal Services Regulatory Authority ("the Authority") for submissions on the draft Code of Practice for Practising Barristers ("the Code"). Before the Authority issues a Code of Practice, under section 22(3) of the Legal Services Regulation Act 2015 ("the Act") the Authority is required to consult in such manner as it considers appropriate with:

(a) a professional body, the members of which will be subject to the proposed code of practice, and

(b) such other interested parties, including legal practitioners who are not members of a body referred to in paragraph (a) who will be subject to the proposed code of practice, as the Authority considers appropriate.

1.2 It is observed that the Code has drawn from the current Code of Conduct for the Bar of Ireland adopted by a general meeting of the Bar of Ireland on 23 July 2014.

1.3 While the Society has no regulatory powers over practising barristers, the Society takes an interest in the draft Code due to the requirement for interaction between practising solicitors and practising barristers. Further to this, the Society notes the imminent commencement of legal partnerships which will see practising solicitors and practising barristers being permitted to go into partnership together for the first time.

1.4 The Society also recognises that a practising solicitor who retains the services of a practising barrister should be in a position to advise their client concerning a possible complaint to the Authority about a practising barrister's conduct. Circumstances may also arise where a practising solicitor may make a complaint to the Authority about a practising barrister for breaches of the Code. In either of these circumstances, a practising solicitor should have an understanding of the contents of the Code.

1.5 The Society proposes to review sections of the Code and make recommendations and observations before the Authority issues a final Code of Practice for Practising Barristers.

2. Executive Summary

2.1 The following submission sets out the Society's views in response to the public consultation notice dated 26 September 2018 issued by the Authority in relation to the Code.

2.2 The Society's submission is made with the objective of protecting the public interest and ensuring high standards of legal services.

2.3 The Society provides suggested amendments to the Code, including widening the forums before which a practising barrister owes a duty of candour, tighter restrictions on barristers receiving instructions in contentious matters and defining the class of persons who may directly instruct a barrister without a solicitor.

2.4 The Society also considers the provisions in the Code which relate to advertising and whether those provisions are sufficient pending the commencement of advertising regulations which will be drafted by the Authority. The Society also notes that until the provisions of Part 6 of the Act are commenced there are no enforcement procedures available to the Authority for breaches of the Code.

2.5 Finally the Society suggests that the Code provide definitions for terms used in the Code for the purposes of clarity and to prevent ambiguity.

3. Sections recommended for review

Appearing before a Court or tribunal

3.1 Clause 3.1 of the Code states *"Where he or she appears before a Court or tribunal established by the State, a Practising Barrister owes a duty of candour to the Court or Tribunal, which duty prevails over any conflicting duty owed to his or her client, any other legal practitioner associated with the proceedings or any other party to the proceedings"*.

3.2 The Society notes that there are many tribunals and disciplinary committees that operate in Ireland which are not established by the State, that is to say they are not commenced by the passing of an Act of the Oireachtas.

3.3 The Society recommends removing the phrase *"established by the State"* from clause 3.1 of the Code as in its current format this would exempt a practising barrister from owing a duty of candour to a tribunal or any other forum that was not established by the State. It is suggested that the Code adopt similar wording to section 2(4)(b)(i) of the Act which provides as follows:

"For the purposes of this Act—

> *(b) a person provides legal services as a barrister where he or she does one or more than one of the following:*
>
> > *(i) in relation to proceedings before a court, tribunal or forum for arbitration, whether in the State or in another jurisdiction, or the Personal Injuries Assessment Board"*

Recommendation 1 – Widening of the definition of Tribunal
It is the recommendation of the Society that clause 3.1 of the Code be broadened to encompass the wide range of forums before which practising barristers may appear by adopting the language from the Act which could be worded as follows:

"Where he or she appears before a Court, tribunal or forum for arbitration, whether in the State or in another jurisdiction, or the Personal Injuries Assessment Board, a Practising Barrister owes a duty of candour to the Court or Tribunal, which duty prevails over any conflicting duty owed to his or her client, any other legal practitioner associated with the proceedings or any other party to the proceedings".

Taking instructions in contentious matters

3.4 Clause 3.11 of the Code states that *"In contentious matters, save where otherwise expressly stated in this Code, a Practising Barrister should not take instructions directly from a client"*. This section mirrors the language used in the current Code of Conduct for the Bar Council of Ireland.

3.5 It is submitted that leaving the words *"should not"* may expose the Authority to potential difficulties in the future as practising barristers may attempt to test the boundaries of this phrase.

3.6 The Society notes the High Court in *Bond and Others v Dunne and Another*[1] prohibited a barrister from providing direct access counsel to clients in a contentious matter without an instructing solicitor. It is suggested that the Code make this requirement clear and unambiguous for the avoidance of doubt.

3.7 The Society suggests that clause 3.11 should read *"In contentious matters, save where otherwise expressly stated in this Code, a Practising Barrister shall not take instructions directly from a client."*

Recommendation 2 – Taking instructions in contentious matters
It is the recommendation of the Society that the Code expressly prohibit barristers from taking instructions in contentious matters from persons who are not practising solicitors, except in prescribed circumstances, which could be worded as follows:

"In contentious matters, save where otherwise expressly stated in this Code, a Practising Barrister shall not take instructions directly from a client."

[1] [2017] IEHC 646

Taking instructions in non-contentious matters

3.8 The Code provides for persons who may directly instruct a barrister. It is presumed that this will be limited to non-contentious matters. However, there is no definition within the Code of what class of persons may directly instruct a practising barrister without the requirement of engaging a practising solicitor. It is suggested that the Code be amended to clarify the class of persons who may instruct a barrister directly.

Recommendation 3 – Direct access to practising barristers in non-contentious matters
It is the recommendation of the Society that the Code explicitly define persons who may directly instruct a barrister in non-contentious matters without the requirement of engaging a practising solicitor.

Client moneys

3.9 Clause 3.18 states *"A Practising Barrister shall not hold moneys of clients. This applies whether the Practising Barrister is a self-employed barrister, an employed barrister, or a barrister in a Legal Partnership"*. The Society suggests that this form of wording is loose and would not prevent a practising barrister in a legal partnership from being a cheque signatory on the client account. This language would also not prevent a practising barrister from receiving client moneys.

3.10 For the avoidance of doubt and to prevent any ambiguity, the Society suggests that this clause is widened to ensure that practising barristers are prohibited from any dealings with client moneys. An alternative to the current clause in the Code could be worded as follows:

"A Practising Barrister shall not hold, receive, control or pay moneys of clients nor shall a Practising Barrister be a signatory on a client account."

Recommendation 4 – Client moneys
It is the recommendation of the Society that clause 3.18 of the Code be widened to ensure that practising barristers are prohibited from any dealings with client moneys. The suggested wording of this clause could be as follows:

"A Practising Barrister shall not hold, receive, control or pay moneys of clients nor shall a Practising Barrister be a signatory on a client account."

3.11 Clause 5.6 of the Code states that *"A Practising Barrister in a legal partnership shall ensure that he or she assists the Legal Partnership in complying with all relevant legal and regulatory requirements placed on the entity in respect of data protection and client confidentiality."*

3.12 Similarly, the Society recommends that a further clause be inserted under Part E of the Code specifically prohibiting practising barristers in a legal partnership from performing any act or omission that may interfere with a solicitor partner's obligations under the Solicitors Accounts Regulations (S.I. No. 516 of 2014), the Solicitors (Money Laundering and Terrorist Financing) Regulations 2016 (S.I. No. 533 of 2016) and the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013 or any Act or regulation amending or extending that Act or those regulations. The Code should clearly provide that a breach of this vicarious duty will be deemed misconduct.

Recommendation 5 – Prohibition on interfering with solicitor's obligations
It is the recommendation of the Society that Part E of the Code specifically prohibits practising barristers in a legal partnership from performing any act or omission that may interfere with a solicitor partner's obligations under the Solicitors Accounts Regulations (S.I. No. 516 of 2014), the Solicitors (Money Laundering and Terrorist Financing) Regulations 2016 (S.I. No. 533 of 2016) and the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013 or any Act or regulation amending or extending that Act or those regulations. The Code should clearly provide that a breach of this vicarious duty will be deemed misconduct.

Reporting matters to the Authority

3.13 Clause 3.31 of the Code provides as follows:

"*A Practising Barrister <u>should</u> forthwith report to the Authority:*

(a) a conviction for an arrestable offence;
(b) a conviction for a criminal offence outside the State which, if committed within the State, would be an arrestable offence;
(c) his or her suspension or disbarment by the Benchers of the Honorable Society of King's Inns.
(d) his or her disbarment, or any restriction or condition placed on his or her provision of legal services, by a legal regulatory authority in any other jurisdiction in which he or she has or continues to practise."

3.14 In the Society's experience, the use of the word *"forthwith"* often leads to uncertainty and does not impose a defined, immediate obligation under which action should be taken. The Society suggests inserting a specified timeframe of 14 days within which a practising barrister should report any of these matters to the Authority.

3.15 The Society suggests, for the purposes of preventing any ambiguity, that the use of the words *"…should forthwith report to the Authority…"* be replaced with *"…shall report to the Authority within 14 days after the occurrence of any of the following matters…"* in order to place an obligation on a practising barrister to report such matters to the Authority within a specified time.

Recommendation 6 – An obligation to report within 14 days
It is the recommendation of the Society that clause 3.31 of the Code is amended to place an obligation on practising barristers to report the matters set out in that clause to the Authority within 14 days. Suggested wording is as follows:

"*A Practising Barrister shall report to the Authority within 14 days after the occurrence of any of the following matters:*

(a) a conviction for an arrestable offence;
(b) a conviction for a criminal offence outside the State which, if committed within the State, would be an arrestable offence;
(c) his or her suspension or disbarment by the Benchers of the Honorable Society of King's Inns.
(d) his or her disbarment, or any restriction or condition placed on his or her provision of legal services, by a legal regulatory authority in any other jurisdiction in which he or she has or continues to practise."

Definitions

3.16 The Society recommends that the Code provide definitions to ensure there is no ambiguity in relation to the language used. The Code gives a comprehensive definition of a Practising Barrister but does not provide for any other definitions which would be beneficial to the reader.

3.17 For example, the Society suggests that a definition of *"practising solicitor"* is provided for in the Code. This is to definitively prevent practising barristers from instructing solicitors who are not entitled to practice by reason of suspension from practice, solicitors who have been struck off the Roll of Solicitors or solicitors who have given an undertaking to the High Court not to practice. It would also exclude solicitors who are not enrolled on the Irish Roll of Solicitors.

3.18 The Society recommends that a definition of *"practising solicitor"* be inserted to provide as follows:

"A practising solicitor is a solicitor:

(a) whose name is on the Roll of Solicitors in Ireland;
(b) who is not suspended from practice;
(c) who is either a solicitor in the full-time service of the State or a solicitor with a practising certificate in force; and
(d) who does not have an undischarged undertaking to the High Court that he or she will not act as a solicitor."

3.19 The Society also considers a *"client"* could be defined under the Code as follows:

"A person on whose behalf a practising barrister has been instructed by a practising solicitor or a person authorised to avail of direct access services as set out in this Code as amended from time to time".

3.20 There may be other examples of language used throughout the Code that require definition on which the Society would be happy to engage with the Authority prior to the finalised Code of Practice being issued.

Recommendation 7 – Definitions under the Code
It is the recommendation of the Society that the Code contain readily identifiable definitions of words used in the Code for the benefit of readers.

4. Further observations

Enforcement mechanisms

4.1 The Society observes that, when the Authority issues a final Code of Practice for Practising Barristers, there will be no mechanisms in place for the Authority to enforce breaches of the Code. As the Code will neither be a provision of the Act nor a regulation made under the Act, the Authority will have no means to seek an order from the High Court under section 35 of the Act.

4.2 The Society notes that Part 6 of the Act will commence in the second quarter of 2019 but until that time, there will be no method for the Authority to address breaches of the Code by practising barristers.

Advertising

4.3 Clause 3.27 of the Code allows a practising barrister to advertise only in a manner that is permitted by regulations made pursuant to section 218(2) of the Act. Clause 3.28 of the Code advises that, pending the making of such regulations, a practising barrister should not advertise in a manner which would come, or be likely to come, within the scope of section 218(5)(d) of the Act.

4.4 The Society notes that both of these clauses refer to sections of the Act that have not yet been commenced. The provisions of section 218(5)(d) are dependent on regulations drafted under section 218(2) of the Act and therefore cannot be commenced on a standalone basis without those regulations first being drafted.

4.5 Accordingly, the Authority will have no power to prevent practising barristers from advertising in a manner contrary to the provisions of section 218(5)(d) until such time as the commencement of the relevant provisions and regulations under section 218(2).

4.6 The Society would advise that this will provide practising barristers who are not members of the Law Library with a distinct advantage over practising solicitors pending the commencement of such regulations, as solicitors will continue to be bound by the provisions of the Solicitors (Advertising) Regulations 2002 until the relevant sections of the Act are commenced.

4.7 The Society would note its concern about unregulated advertising by practising barristers who are not members of the Law Library. This is particularly the case as the Authority's First Strategic Plan 2018-2020 does not provide a timeline within which advertising regulations are likely to be made.

Further consultation

4.8 The Society has provided a number of recommendations and observations within this submission to assist the Authority in the publication of a final Code of Practice for Practising Barristers. Should the Authority have any queries or require any elaboration on any of the matters raised in this submission the Society would be happy to provide further assistance upon request.

LAW SOCIETY SUBMISSION

Legal Services Regulation Act 2015

Draft Regulations on Legal Partnerships

Legal Services Regulatory Authority

14 December 2018

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

Contents

1. Introduction

1.1 The purpose of this submission from the Law Society of Ireland ("the Society") is to express the views of the Society to the Legal Services Regulatory Authority ("the Authority") on the draft regulations on legal partnerships ("the draft regulations") under section 116 of the Legal Services Regulation Act 2015 ("the Act").

1.2 Legal partnerships are a new form of legal services structure under the Act. They are defined as:

"..a partnership formed under the law of the State by written agreement, by two or more legal practitioners, at least one of whom is a practising barrister, for the purpose of providing legal services."

1.3 The new business structure will comprise of partnerships of barristers or solicitors and barristers.

1.4 The Society firmly holds the view that the draft regulations in their current format require significant revision and further consideration before commencement. A number of the draft regulations are nebulous and are unlikely to be enforceable by the Authority in any meaningful way. Others may cause difficulties for legal practitioners and clients alike and require further deliberation.

1.5 The Authority is introducing for the first time a completely new legal business model and it behoves good regulatory governance that the regulations underpinning this model are:

1. Clear, precise and workable;
2. Prescriptive;
3. Balanced;
4. Proportionate; and,
5. Enforceable.

For the purposes of this submission, the Society will refer to these as the "guiding principles". These guiding principles will ensure the protection of clients of these new entities and also assist those legal practitioners who wish to avail of them.

1.6 The Society, in preparing this submission, is offering its views based on its own practical experience in drafting regulatory Statutory Instruments with the aim of reducing potential dangers to the public and the profession.

1.7 The Society proposes providing its views on the draft regulations in a sequential manner and would be happy to engage further with the Authority on the matters raised in this submission.

2. Executive Summary

2.1 The Society's submission is made with the objective of protecting the public interest and ensuring high standards of legal services in legal partnerships, once introduced.

2.2 The Society submits that a number of the draft regulations are not prescriptive enough and will pose difficulties of enforcement for the Authority as currently drafted. The Society also notes that there are matters in the draft regulations that are inappropriate as they have already -and more correctly- been addressed in the Act.

2.3 The Society also suggests specifically prohibiting barristers in legal partnerships from performing any act or omission that would interfere with a solicitor's statutory obligations.

2.4 The Society notes that the draft regulations require a legal partnership to furnish clients with a significant amount of information which may not be practical to provide and that is unlikely to make legal partnerships attractive to legal practitioners.

2.5 The Society is concerned about the conflicts of interest provisions as these could lead to significant difficulties for legal partnerships and clients alike. The draft regulations also seek to prevent a legal practitioner from accepting instructions in a matter where they are likely to be a witness. The Society advises that this is not included as it will hinder the provision of legal services to clients by legal practitioners and do not reflect the reality of the true relationship between client and legal practitioner.

2.6 The Society also recommends the draft regulations specifically refer to the continuing obligation for solicitors to comply with the Solicitors Advertising Regulations (S.I. No. 528 of 2002) pending the commencement of the Authority's own advertising regulations.

2.7 The Society proposes for reasons of clarity that the draft regulations be divided into three parts which provide for matters exclusive to barrister-solicitor legal partnerships, matters exclusive to barrister-barrister legal partnerships and common provisions to all legal partnerships.

3. Part B – General obligations

Standards, procedures and policies

3.1 Draft regulation 4 fails to meet any of the guiding principles as it is fundamentally flawed and unworkable. The draft regulation imposes legal obligations on legal practitioners on vague grounds and any regulatory action taken under this section would very likely be open to legal challenge. It is also outside the Authority's remit to regulate employees of a legal partnership who are not legal practitioners.

Recommendation 1 – Standards, procedures and policies

It is the recommendation of the Society that draft regulation 4 is deleted as it is fundamentally flawed, unworkable and would very likely be open to legal challenge.

Regard to the Solicitor's Guide

3.2 Draft regulation 5 not only fails utterly to meet the guiding principles but is also fundamentally flawed and unworkable in requiring legal partnerships to *"have regard to the Solicitor's Guide (as applicable), any Code of Practice, measure and/or guidelines as issued by the Authority in their standards, procedures and policies"*. The words *"have regard"* are not prescriptive and do not provide legal practitioners with a definitive statement of their obligations.

3.3 The Guide to Good Professional Conduct for Solicitors ("the Solicitor's Guide") contains a statement of the accepted principles of good conduct and practice for the profession. It represents the Society's policy and recommendations as at the date of publication. The consequences of non-compliance may only be considered however on a case-by-case basis and as such breaches of the Solicitor's Guide do not *per se* amount to professional misconduct. It should also be noted that legal partnerships were not envisaged when the Solicitor's Guide was published.

Recommendation 2 – Regard to the Solicitor's Guide

It is the recommendation of the Society that draft regulation 5 is deleted as it is not prescriptive and does not provide legal practitioners with a definitive statement of their obligations in circumstances where legal partnerships were not envisaged when the Solicitor's Guide was published.

Responsibilities of legal partnership and partners

3.4 The Society's view is that draft regulation 6 is unclear, does not meet the guiding principles and will be difficult for the Authority to enforce. Without prejudice to this position, the Society suggests that the first sentence of draft regulation 6 should read *"It shall be the responsibility…"* as it is noted the definite article is absent from the draft.

Recommendation 3 – Responsibility of legal partnership and partners to comply with obligations

It is the recommendation of the Society that draft regulation 6 be deleted as it is unclear and would be difficult for the Authority to enforce.

Compliance or obligations under the Act

3.5 Draft regulation 7 requires each legal practitioner in a legal partnership to ensure that he/she complies with obligations under the Act, the Regulations and such other measures and/or guidelines as may be issued from time to time by the Authority. The anticipatory nature of unmade measures/guidelines creates a very weak basis for good regulation. It usurps secondary legislation and runs contrary to the principles of the Irish legal system. It is suggested that it is ultra vires, unenforceable and open to direct challenge.

3.6 The Society notes that section 50(m) of the Act provides that an act or omission of a legal practitioner may be considered as constituting misconduct where that act or omission constitutes a breach of the Act or regulations made under it. Accordingly, the Society fails to see any reason for an express regulation requiring legal practitioners to ensure their compliance with the Act or regulations made under it.

3.7 In the Society's opinion, the Authority will not be successful in taking regulatory action against a legal practitioner for breaches of draft regulation 7.

Recommendation 4 – Complying with obligations under the Act or regulations made under the Act

It is the recommendation of the Society that draft regulation 7 be deleted as there are sufficient provisions available under the Act for the Authority to take action against legal practitioners who do not comply with their obligations under the Act or any regulations made under it.

4. Part C – Requirements applicable to Legal Partnerships

Ceasing to provide legal services

4.1 The Society notes that there is no defined timeline in draft regulation 10 within which a legal partnership that ceases providing legal services should notify the Authority. The Society suggests that the Authority should require a minimum notice period of 14 days from a legal partnership that intends to cease the provision of legal services. Otherwise, a legal partnership that has ceased providing legal services could provide notice of cessation - and the fees to the Authority - some months after the fact and would not be in breach of draft regulation 10.

Recommendation 5 – Minimum notice period

It is the recommendation of the Society that draft regulation 10 is amended to provide for a minimum notice period of 14 days to the Authority in advance of its cessation.

Client moneys

4.2 The Society submits that draft regulation 11 does not effectively prohibit practising barristers in a legal partnership from handling client moneys.

4.3 The Society suggests that this wording would not prevent a practising barrister in a legal partnership from being a cheque signatory on the client account. Nor would this wording prevent a practising barrister receiving client moneys.

4.4 For the avoidance of doubt and to prevent any ambiguity, the Society suggests that this clause is widened to ensure that practising barristers are prohibited from any dealings with client moneys. An alternative to the current draft regulation could be worded as follows:

"A practising barrister shall not hold, receive, control or pay moneys of clients nor shall a practising barrister be a signatory on a client account. This shall apply whether the practising barrister is either an employee or a partner in a legal partnership."

Recommendation 6 – Handling client moneys

It is the recommendation of the Society that draft regulation 11 be widened to ensure that practising barristers are prohibited from any dealings with client moneys. The suggested wording of this clause could be as follows:

"A practising barrister shall not hold, receive, control or pay moneys of clients nor shall a practising barrister be a signatory on a client account. This shall apply whether the practising barrister is either an employee or a partner in a legal partnership."

4.5 Furthermore, there should be a specific prohibition in the draft regulations on practising barristers in a legal partnership from performing any act or omission that may interfere with a solicitor partner's obligations under the Solicitors Accounts Regulations (S.I. No. 516 of 2014), the Solicitors (Money Laundering and Terrorist Financing) Regulations 2016 (S.I. No. 533 of 2016) and the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013 or any Act or regulation amending or extending that Act or those regulations.

Recommendation 7 – Prohibition on interfering with solicitor's obligations

It is the recommendation of the Society that the draft regulations specifically prohibit practising barristers in a legal partnership from performing any act or omission that may interfere with a solicitor partner's obligations under the Solicitors Accounts Regulations (S.I. No. 516 of 2014), the Solicitors (Money Laundering and Terrorist Financing) Regulations 2016 (S.I. No. 533 of 2016) and the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013 or any Act or regulation amending or extending that Act or those regulations.

Confidentiality / protection of information

4.6 The Society considers draft regulation 13 to be excessively brief and lacking in any detail and would advise that there is already a duty on all legal practitioners to keep the affairs of their clients confidential. The obligations of confidentiality posed by draft regulation 13 are no different to the obligations on legal practitioners since time immemorial.

4.7 While client confidentiality is a cornerstone of a legal practitioner-client relationship, the Society doubts that this should be in the draft regulations.

4.8 The laws to which draft regulation 13 refers are extensive, complex and impossible to summarise and put into regulations. This attempt to import the obligations of legal practitioners into regulations is unworkable and not advisable given the reach of these obligations.

Recommendation 8 – Duty of confidentiality

It is the recommendation of the Society that draft regulation 13 be deleted as there is already an existing duty of confidentiality on legal practitioners.

Information to client

4.9 The Society submits that draft regulation 14 is overly prescriptive and requires amendment for the purposes of making legal partnerships an attractive structure to legal practitioners. Draft regulation 14 requires a client be furnished with an inordinate amount of documentation and information that is unlikely to assist the legal practitioner-client relationship.

4.10 The amount of information required in particular under draft regulation 14(iii), (iv) and (vii) is vast to the point of making it impossible for legal practitioners to comply with. It is noted that these requirements are unique to legal partnerships and do not apply to individual barristers or solicitor firms.

Information concerning legal practitioner(s) providing services

4.11 The obligations under draft regulation 14(a)(i) and (ii) are unnecessary and inflexible. It is considered to be over-regulation. It is suggested that complications will arise when handling client matters that change the types of legal services required and/or the identity of the legal practitioners within the practice providing those services. This will result in inadvertent breaches by legal practitioners of draft regulation 14(a)(i) and/or (ii).

Recommendation 9 – Information concerning legal practitioner(s) providing services

It is the recommendation of the Society that draft regulations 14(a)(i) and (ii) are deleted from the draft regulations as they are unnecessary and inflexible.

Information on client's rights as a client of the legal partnership

4.12 Draft regulation 14(a)(iii) will cause an unnecessary amount of bureaucracy for any legal partnership, in particular those legal partnerships comprised of a small number of partners. Providing an exhaustive list of the rights available to clients can only result in increased costs and is unlikely to make legal partnerships appealing to legal practitioners. The rights available to clients of a legal practitioner are many and varied and it would be a laborious task to attempt to enumerate every last one to each and every client. It is noted that the obligations envisaged are more onerous on legal partnerships than on current structures.

Recommendation 10 – Clients rights as a client of a legal partnership

It is the recommendation of the Society that draft regulation 14(a)(iii) be deleted as it will cause an unnecessary amount of bureaucracy for legal partnerships.

Duties owed to the client by the legal partnership

4.13 Draft regulation 14(a)(iv) is similar and it would be unduly onerous to require a legal partnership to provide each and every client with all the duties owed in a legal practitioner-client relationship.

Recommendation 11 – Duties owed by legal partnership to clients

It is the recommendation of the Society that draft regulation 14(a)(iv) is deleted from the draft regulations as it would cause an unnecessary amount of bureaucracy for legal partnerships.

Internal complaints procedure

4.14 Draft regulation 14(a)(vi) places an obligation on legal partnerships to ensure there is a functioning complaints procedure available to clients. It is suggested that in order for this to be feasible, further guidance will be required from the Authority to provide a framework for legal partnerships to address complaints.

Recommendation 12 – Complaints procedures

It is the recommendation of the Society that the Authority provide further guidance on the complaints procedure proposed in draft regulation 14(a)(iv) for legal partnerships.

Provision of regulations to client

4.15 Draft regulation 14(a)(vii) is a very onerous obligation to impose on a legal practitioner. It would require a solicitor to provide information concerning the Solicitors Accounts Regulations 2014 (S.I. No. 516 of 2014), the Solicitors Professional Indemnity Insurance Regulations 2018 (S.I. No. 351 of 2018) and the Solicitors (Continuing Professional Development) Regulations 2017 (S.I. No. 529 of 2017) amongst many others.

4.16 It is unlikely the provision of such a large volume of information will provide any practical benefit to clients and may increase the costs of providing the legal services. This will also make legal partnerships less desirable structures to legal practitioners.

Recommendation 13 – Provision of regulations to clients

It is the recommendation of the Society that draft regulation 14(a)(vii) be deleted as being very onerous on the legal partnership and of little practical benefit for clients.

Provision of information required by section 150 of the Act

4.17 Draft regulation 14(a)(viii) is completely unnecessary as legal practitioners will be under an obligation to comply with the provisions of section 150 of the Act, once commenced.

Recommendation 14 – Provision of information as required under section 150

It is the recommendation of the Society that draft regulation 14(a)(viii) be deleted as this is provided for under section 150 of the Act.

Clients to be informed of material events

4.18 The provisions of draft regulation 14(b) are ambiguous and aspirational. The phrase "material events" is so inherently subjective and open to interpretation as to be unworkable. Nor does it comply with the guiding principles. It will be impossible for the Authority to enforce its provisions against a legal practitioner whether as a result of a complaint by a dissatisfied client or by the Authority.

Recommendation 15 – Duty to inform clients of material events

It is the recommendation of the Society that draft regulation 14(b) be deleted as it is so inherently subjective and open to interpretation that it will be impossible to enforce.

Issuing a bill of costs to client

4.19 Draft regulation 14(c) mirrors the concerns raised in paragraph 4.17 above. These matters are provided for in the Act and do not require restatement.

Recommendation 16 – Provision of information as required under section 152

It is the recommendation of the Society that draft regulation 14(c) is deleted from the draft regulations as this is provided for under section 152 of the Act.

Conflicts of interest

4.20 The Society has grave concerns about draft regulation 15. Laws and generally accepted practice relating to conflicts of interest are too vast to encapsulate in a single regulation. Commencing a regulation in this fashion is inherently unsound and will stifle the legal profession. The introduction of this regulation is likely to make legal partnerships a wholly undesirable business model for legal practitioners. It is also observed that these obligations are unique to legal partnerships and do not exist for sole practitioner barristers or solicitors.

4.21 Draft regulation 15(a) states *"A legal partnership, a partner or employee of a legal partnership, shall not accept instructions to act in any matter in which the legal partnership, or a partner or employee of the legal partnership, is acting for, or has previously acted for, the opposing or counter party, unless:—*

(i) both parties are given full information about the proposed acceptance of instructions;
(ii) both parties consent to the acceptance of such instructions; and,
(iii) information and communications of and related to the two parties are fully segregated and protected against disclosure (subject to disclosure with the consent of both parties)."

4.22 For example the wording could mean that a legal partnership or an employee or partner of a legal partnership, who had ever acted for a bank, would be prohibited from acting in any matter opposing that bank into the future. This would apply even where the subject matters are widely different and are wholly unrelated.

4.23 Further, it could have the wholly unintended consequence that legal partnerships would be allowed to accept instructions from a client on only one occasion thereby impeding the business prospects of the legal partnership.

4.24 The application of the proviso will be burdensome on legal practitioners and legal partnerships as a whole. The legal partnership, when seeking to accept instructions, would have to conduct investigations as to whether any legal practitioner in the partnership had ever acted for the opposing side.

4.25 Draft regulation 15(a) also suggests that there are only two parties in relation to any particular matter. In commercial litigation, there may be multiple parties to an action, where conflicts of interest are important matters to consider. Accordingly, the use of the words *"two"* and/or *"both"* in this section does not take into account matters that involve several parties.

4.26 Draft regulation 15(a) would appear to be completely at variance with the provisions of section 13(4) of the Act which, *inter alia,* requires the Authority to protect and promote the interests of consumers relating to the provision of legal services and to promote competition in the provision of legal services in the State.

Recommendation 17 – Conflicts of interest where legal practitioner has previously acted for a party on opposing side

It is the recommendation of the Society that draft regulation 15(a) be deleted as it will cause serious difficulties for legal practitioners by restricting the range of clients that may instruct them.

4.27 The term *"significant pecuniary interest"* in draft regulation 15(b) is ambiguous and open to interpretation. It will require the legal partnership to conduct exhaustive investigations into the pecuniary interests of all its partners and other employees.

Recommendation 18 – Instructions where a partner or employee has a significant pecuniary interest

It is the recommendation of the Society that draft regulation 15(b) is deleted as it is ambiguous, open to interpretation and requires a legal partnership to conduct exhaustive investigations into the pecuniary interests of all its partners and employees.

4.28 The Society notes draft regulation 15(c) requires a partner or employee of a legal partnership not to accept instructions in a matter where it is likely they will be witnesses. It is submitted that this will lead to significant problems as it is entirely possible and appropriate for legal practitioners to find themselves giving evidence in the course of providing legal services.

4.29 This draft regulation bears no reality to the proper conduct of legal practice as overseen by the judiciary. A legal practitioner must be able to give evidence in their client's cause if and when the need arises and subject to the well-recognised rules of conducting litigation before the Courts.

Recommendation 19 – Legal practitioners not to accept instructions where they are likely to be a witness

It is the recommendation of the Society that draft regulation 15(c) be deleted as it will further impede the provision of legal services by legal practitioners in legal partnerships.

4.30 The Society would advise that conflicts of interest must take into account a wide number of varied matters and could be the subject of a standalone project to be undertaken by the Authority in the fullness of time.

Recommendation 20 – Conflicts of interest

It is the recommendation of the Society that the Authority consider addressing conflicts of interest as a standalone project instead of including them in the draft regulations.

Names of legal partnerships

4.31 It is noted that draft regulation 16 is very restrictive and only allows the name of the legal partnership to consist of the names of some or all of the partners or former partners of the legal partnership.

4.32 The Solicitors (Practice, Conduct and Discipline) Regulations 1996 (S.I. No. 178 of 1996) require solicitor firms to carry on business under the name or names of the solicitors or one or more of the present or former principals of the firm. These regulations allow solicitor firms to seek the written approval of the Society for a name other than the name or names of the solicitors or one or more of the present or former principals of the firm.

4.33 The Society submits that the Authority consider allowing legal partnerships to make an application for a name other than the name or names of the current or former partners.

Recommendation 21 – Names of legal partnerships

It is the recommendation of the Society that consideration is given by the Authority to allow for applications by legal partnerships to be made in a name other than the name or names of the current or former partners.

4.34 In order to be more precise, it is suggested that draft regulation 16 read as follows *"Where the Legal Partnership is also a Limited Liability Partnership, the name shall also comply with section 125(8) of the Act"*.

Recommendation 22 – Legal partnership also a limited liability partnership

It is the recommendation of the Society for the purposes of clarity that draft regulation 16 be amended to read as follows:

"Where the Legal Partnership is also a Limited Liability Partnership, the name shall also comply with section 125(8) of the Act".

Advertising

4.35 The Society notes that the Authority intends to make regulations in relation to advertising as required under section 218 of the Act. The Society nevertheless recommends that draft regulation 18 make explicit reference to the continuing existence and enforcement against solicitors of the Solicitors Advertising Regulations 2002 (S.I. No. 518 of 2002) by the Society until such time as section 218 of the Act is commenced.

Recommendation 23 – Advertising

It is the recommendation of the Society that draft regulation 18 make explicit reference to the continuing existence and enforcement against solicitors of the Solicitors Advertising Regulations 2002 (S.I. No. 518 of 2002) by the Society until such time as section 218 of the Act is commenced.

5. Part E - Supervision

Draft regulation 20

5.1 Draft regulation 20 fails to meet the guiding principles and will be unenforceable for vagueness. It fails to provide the obligations and responsibilities for a compliance partner, the partner responsible for financial affairs or the partner responsible for assessing and monitoring risks.

5.2 In the Society's view, draft regulation 20(b) which requires a legal partnership to have a partner responsible for the financial affairs will be problematic for the Authority to enforce. The word "responsible" is lacking in sufficient clarity and detail. In legal partnerships where there is a solicitor partner, they will have to bear this (as yet undefined) responsibility.

5.3 Given the prohibition on barristers handling client moneys as set out under section 45 of the Act, the Society strenuously objects to a barrister in a legal partnership being in a position of responsibility for its financial affairs. There is a real danger that the barrister responsible for financial affairs could access client moneys. This represents a potential risk to clients and the Society's Compensation Fund which should only be accessible by clients of solicitors.

Recommendation 24 – Supervision

It is the recommendation of the Society that draft regulation 20 is deleted as it fails to meet the guiding principles and will be unenforceable for vagueness. Draft regulation 20(b) also represents a serious risk to clients and the Society's Compensation Fund.

6. Further matters

Measures and / or guidelines

6.1 Draft regulations 5, 6 and 7 indicate that legal practitioners will be required to comply with, *inter alia,* measures and/or guidelines as may be issued by the Authority. The Society objects to as yet undefined measures or guidelines which seek to use a Statutory Instrument for enforcement.

Separate sections for the draft regulations

6.2 The Society suggests that the draft regulations should be structured in three separate parts which would assist in clarifying the parameters of matters relating to solicitor-barrister and barrister-barrister legal partnerships. The Society therefore suggests dividing the draft regulations into common provisions, provisions relating to barrister-barrister legal partnerships only and provisions relating to solicitor-barrister partnerships only.

Recommendation 25 – Separate sections for the draft regulations

It is the recommendation of the Society that the Authority consider dividing the draft regulations into common provisions, provisions relating to barrister-barrister legal partnerships only and provisions relating to solicitor-barrister partnerships only.

Further engagement

6.3 The Society has provided a non-exhaustive review of the draft regulations for the Authority's consideration. As matters stand, it is the considered view of the Society that legal partnerships will require more detailed regulations before there will be adequate protections in place for both clients and legal practitioners. The Society is happy to engage further with the Authority in due course.

Recommendation 26 – Further engagement

It is the recommendation of the Society that the Authority engage further with the professional bodies before commencing the draft regulations to ensure there are adequate protections in place for both legal practitioners and the public.

Private and Confidential

Dr Brian Doherty
Legal Services Regulatory Authority
Regus House
Harcourt Centre
Harcourt Road
Dublin 2

15 February 2019

Our ref: JE/EOS/ST

Your ref:

Re: Legal partnerships

Dear Brian

I am writing to you to follow up our meetings held in the Society's offices on 30 January 2019 and 6 February 2019 in relation to the above matter.

I note the Authority has considered our views as set out in the submission provided in December 2018. While the Society broadly welcomes the updated draft regulations for legal partnerships, there are a number of outstanding matters that I hope the Authority will consider in advance of commencing the draft regulations as a Statutory Instrument.

The Society requests that its views are put before the Board of the Authority prior to its next scheduled meeting to be held on 21 February 2019.

1) Draft regulation 2 – Compensation Fund

Draft regulation 2 defines the Society's Compensation Fund as follows:

""Compensation Fund" is as defined in the Solicitors (Amendment) Act 1960 (as amended by the Solicitors (Amendment) Act 1994."

The Solicitors Acts 1954 to 2015 does not provide as such for a statutory 'definition' of the Compensation Fund but merely rather provides a 'description' of the Compensation Fund. The Society suggests that this definition is amended to state as follows:

"Compensation Fund" is as described and set out in Section 21 and 22 of the Solicitors (Amendment) Act 1960 as substituted by Sections 29 and 30 of the Solicitors (Amendment) Act 1994 and amended by Section 16 of the Solicitors (Amendment Act) 2002."

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2) Draft regulation 10(a) – Information to client

The Society has considered whether the draft regulations should make reference to the Solicitor's Guide to Good Professional Conduct ("the Guide"). The Guide makes it clear in the introduction that it is *"...a statement of the accepted principles of good conduct and practice for solicitors"*. It is also stated in the introduction that *"The Guide does not have the force of law. If a decision has to be made as to whether certain acts or omissions of an individual solicitor constitute misconduct, this can only be done following a hearing of the Solicitors Disciplinary Tribunal, which will consider the facts of the particular case."*

Given the above, the Society believes that it would not be appropriate for the draft regulations to make any reference to the Guide as it may be misleading to infer that the Guide has the force of law.

Under draft regulation 10(a)(iii) the Society suggests that the duties owed by the partnership to the client which specifically have to be notified to the client are limited to those duties specific to legal partnerships deriving from the Legal Services Regulation Act 2015 ("the Act") or regulations particular to legal partnerships. Similarly, draft regulation 10(a)(v) could either be merged with draft regulation 10(a)(iii) or deleted.

3) Draft regulation 14 – Clients' moneys

The Society recognises the regulatory limitations that arise under section 45(1) of the Act and would agree that this section appears legally inadequate, perhaps even frail, having regard to the complexities surrounding the holding of clients' moneys and the many business and consumer scenarios such dealings encompass.

The Society has long experience of the complexity surrounding these issues. The Society's position is that ideally section 45 would benefit from an amendment to primary legislation or detailed Ministerial regulations akin to the Solicitors Accounts Regulations 2014 as envisaged by section 45(2) of the Act, but in the interim the Society strongly recommends that the proposed regulations be drafted in a more expansive form to give fuller effect to section 45(1). It is the Society's view that precision in relation to clients' moneys is essential for the protection of clients.

By providing for a broad description of the word 'hold' the Society would be of the view, if challenged, the Courts would be obliged to interpret this regulation in a positive or purposive manner having regard to the issues at hand, namely the protection of moneys of clients processed by legal practitioners from dishonest legal practitioners, including barristers.

The Society could envisage a practising barrister attempting to argue that it is possible to receive and pay out clients' moneys without holding them. Therefore, the Society suggests the draft regulations use the phrase "shall not hold or receive clients' moneys". The regulations should include a prohibition based on defining the word 'hold' so as to include 'receive or hold'.

The phrase "moneys of clients" is materially different to the phrase "clients' moneys" as that expression is used in the regulation of solicitors. It may be argued that "moneys of clients" would restrict the regulations to moneys received directly from or for a client. Solicitors use client accounts to hold money for or on account of a client or clients, whether the monies are received held or controlled by him as agent, bailee, stakeholder

or trustee or in any other capacity, including moneys received on account of outlay not yet discharged.

The phrase "clients' moneys" does not cover moneys received in respect of controlled trusts or non-controlled trusts and the Society expresses concern as to whether the phrase "moneys of clients" would cover trust moneys. Thus a barrister could hold money as executor of an estate as they are not covered under the definition of "clients' moneys" under the Solicitors Accounts Regulations and we cannot be certain are covered by the phrase "moneys of clients". The Solicitors Accounts Regulations 2014 contain specific provisions for the holding of moneys as a controlled trustee and a non-controlled trustee which requires a solicitor acting as controlled trustee or non-controlled trustee to pay such moneys into a controlled trust account or non-controlled trust account.

The Society has considered whether the draft regulations should be expanded to prohibit barrister from holding clients' moneys, controlled trust moneys and non-controlled trust moneys.

"Moneys of clients" is not defined either under the Act or the draft regulations and it is not a case of simply referring to "clients' moneys" as per the Solicitors Account Regulations. Therefore, it is recommended that consideration be given to using the phrase "clients' moneys", "controlled trust moneys" and "non-controlled trust moneys" using similar definitions as provided for under the Solicitors Accounts Regulations 2014.

The Society must also advise that the Solicitors Accounts Regulations 2014 do not apply to employed solicitors. Accordingly, the Solicitors Accounts Regulations 2014 would not apply to an employed solicitor in a barrister only legal partnership.

I am taking this opportunity to enclose a copy of the Solicitors Accounts Regulations 2014 to illustrate the real complexity of the issues and the strong need for robust client protection.

4) Draft regulation 14(b) – Solicitors Accounts Regulations

Regulation 14(b) should be expanded to provide a full reference to the Solicitors Acts 1954-2015 and the Solicitors Accounts Regulations 2014 and any amendments thereto, rather than only the Solicitors Accounts Regulations 2014. This would prevent the Authority having to issue new regulations if and when the Solicitors Accounts Regulations 2014 are updated.

5) Draft regulation 12(b) – Name

For the sake of completeness, draft regulation 12(b) could be amended by the addition of "or other legal practitioners" to the end of the sentence in order to extend the prohibition in relation to superior knowledge.

6) Drafting point – Legal Partnership

The Society notes that the term "Legal Partnership" appears in the draft regulations in upper case in seven places. However, this term in upper case is not defined under the Act or under the draft regulations. The Society suggests for the purposes of accuracy to change the term to lower case throughout the draft regulations so that it meets the definition as set out under section 2 of the Act.

Yours sincerely

pp Simon Tu

John Elliot
Registrar of Solicitors
and Director of Regulation

Enc.

LAW SOCIETY OF IRELAND

LAW SOCIETY SUBMISSION

SUBMISSION IN RELATION TO THE UNIFICATION OF THE SOLICITORS' PROFESSION AND THE BARRISTERS' PROFESSION

Legal Services Regulatory Authority

-132-

JUNE 2020

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the *Solicitors Acts 1954 to 2011* in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and supports.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

CONTENTS

1. INTRODUCTION

1.1 The purpose of this submission from the Law Society of Ireland ("the Society") is to respond to the invitation from the Legal Services Regulatory Authority ("the Authority") for submissions in relation to a public consultation under section 34(1) of the Legal Services Regulation Act 2015 ("the 2015 Act").

1.2 Section 34(1) of the 2015 Act states that the Authority is required to engage in "appropriate" public consultation and prepare separate reports for the Minister of Justice in relation to specific issues as set out in the 2015 Act.

1.3 As per section 34(1)(b), the Authority is required to prepare and furnish a report to the Minister for Justice ("the Minister") on the "*unification of the solicitors' profession and the barristers' profession*".

1.4 Unification of the two legal branches of the profession is also often referred to as fusion of the profession.

1.5 The Authority is required to complete this report on fusion and submit it to the Minister within four years of the Authority being established.[1]

1.6 Sections 34(4)(b) and (c) set out issues which the Authority must take into consideration in preparing their report. The report must contain "*details of arrangements in operation in other jurisdictions in which the professions have been unified*".[2]

1.7 The report must also contain recommendations as to whether the legal profession should be unified while having regard to, "*among other things*", the following points:

i. *"the public interest,*

ii. *the need for competition in the provision of legal services in the State*

iii. *the proper administration of justice*

iv. *the interest of consumers of legal services including access by such consumers to experienced legal practitioners, and*

v. *any other matters that the Authority considers appropriate or necessary."*[3]

1 Section 34(4)(a) of the Legal Services Regulation Act 2015

2 Section 34(4)(b).

3 Section 34(4)(c).

1.8 The Society welcomes the opportunity to make a submission to the Authority in relation to the issue of fusion of the legal profession as part of the Authority's consultation processes in the preparation of its report.

2. EXECUTIVE SUMMARY

2.1 The following submission sets out the Society's views in relation to the Authority's public consultation on the unification of the solicitors' profession and the barristers' profession.

2.2 The Society's submission considers the fusion of the profession as it currently stands in other comparable common law jurisdictions. The submission also considers jurisdictions that operate a civil law system and whether fusion has been favoured in those jurisdictions. Consideration is given to other jurisdictions of interest before providing a summary of the arguments in favour and against the fusion of the profession.

2.3 The Society's submission is made with the objective of protecting the public interest and ensuring high standards of legal services.

2.4 The Society reviews the position in common law jurisdictions beginning with England and Wales as this is Ireland's most closely affiliated jurisdiction which retains a divided legal profession comprising solicitors and barristers. The debate concerning changes to the structure of the legal profession including fusion has been under consideration in England and Wales since the 1970s. As a result, significant changes have taken place in England and Wales which have led to closer alignment of the provision of legal services provided by solicitors and barristers. Importantly, fusion has not taken place in England and Wales.

2.5 The submission considers the development of the legal profession in Australia which has a mixture of fused and divided models in its six states and two territories. The states or territories where there is a fused legal profession may be partly attributable to the sparse population distribution. Nevertheless, in those states where there is a fused profession it is notable that an independent bar has been cultivated.

2.6 It is observed that the development of the legal profession in New Zealand is a fused one with all practitioners being admitted to the profession as "barristers and solicitors". A small minority may elect to practice as "barristers sole" which, in all but name, manifests a division in the profession.

2.7 The submission also considers the legal profession in Canada which has ten provinces, nine of which have a fused common law legal profession and one which operates a civil law system. The nine provinces in Canada provide a good example where the legal profession has been successfully fused.

2.8 The Society provides a brief overview of the legal profession within civil law jurisdictions suggesting that these are not directly comparable to their common law counterparts. Although the legal profession in civil law jurisdictions is a fused one, there is generally a greater variety of other types of legal roles outside the legal

profession as such (and as understood from a common law perspective) than exists in common law jurisdictions.

2.9 Consideration is given to other comparable jurisdictions including Scotland which retains a divided legal profession. The Scottish model provides a common education system to all undergraduate students whom, after receiving their initial qualification to practise, may proceed to further education in order to become an advocate.

2.10 The profession in South Africa provides an example where the legal profession is divided in a similar way to Ireland with advocates and attorneys. A change in the structure of the legal profession has been undertaken in 2014. Although plans were in place in that jurisdiction concerning fusion of the profession, to date this has not occurred and the division remains.

2.11 The Society reviews the legal profession in the United States of America which is a fused profession. However, even within the fused profession, lawyers have developed their own functional division including corporate lawyers, trial lawyers and litigation specialists amongst others.

2.12 The submission collates the possible advantages of fusing the profession which includes the maintenance of a common pool of resources, a single regulatory structure and disciplinary regime as well as the potential for lower costs to consumers of legal services. Whether legal costs would be reduced in the event of fusion is currently unknown and would require a detailed study by a more appropriate body than the Society.

2.13 The Society considers the arguments against fusion, noting that in response to the Competition Authority in its Preliminary Report "Study of Competition in Legal Services" in February 2005 that transfer between the two branches of the legal profession has been simplified.

2.14 The Society believes the maintenance of an independent referral bar is a cornerstone of common law systems. It is observed that in a number of the jurisdictions where the profession has been fused there is the natural development of a group of specialist practitioners who form an independent bar within that profession.

2.15 The division of the profession in Ireland as it currently stands allows an equal level of access to specialist legal services for clients of both small and large firms alike. This benefits clients, particularly disadvantaged clients, who retain access to the specialist advocacy bar, through whatever firm of solicitors they retain. This has the collateral effect of enabling smaller and regional solicitors' firms to offer a wider range of legal services as, without the independent referral bar, specialists would tend to be subsumed by the larger city firms.

2.16 It is suggested that in the event the professions were fused in Ireland, the likelihood is that an independent bar would naturally develop.

2.17 The Society notes the changes brought in by the 2015 Act including the commencement of legal partnerships which will allow barristers to enter partnerships with other barristers and / or solicitors once these provisions have commenced. This will provide easier access for clients and should address any perceived requirement for fusion.

2.18 The 2015 Act also makes provision for direct access to barristers in non-contentious matters for all members of the public once these provisions are commenced.

2.19 It is considered that fusing the professions will lead to large short-term costs increases for the purposes of establishing a common education and regulatory regime. The benefits brought by this fusion may be difficult to justify in the long-term given the strong likelihood the independent bar will re-emerge.

3. COMMON LAW JURISDICTIONS AND FUSION OF THE LEGAL PROFESSION

3.1 As noted, the Authority is required by the 2015 Act to consider other jurisdictions where fusion has taken place when compiling its report.

3.2 A brief synopsis will be provided in this section in relation to other common law jurisdictions – England and Wales, Australia, New Zealand and Canada – and the issue of fusion of the legal profession.

3.3 By way of background, the type of work engaged in by solicitors and barristers can be generally differentiated as follows:

- Solicitors are instructed by clients; they usually handle client monies and oversee the conduct and management of the client's file from its beginning to its conclusion. The role of Irish solicitors has expanded in recent years, reflecting the need for legal advice in response to the regulatory and legal issues arising in an increasingly sophisticated and globalised economy. Accordingly, solicitors are often on hand for crucial boardroom decisions, or in negotiating or documenting complex financial transactions as well as being required to help private individuals manage their legal affairs. While barristers have traditionally specialised in court work, solicitors have traditionally undertaken a broader role, helping individual and corporate clients understand their legal rights and obligations and also helping them comply with their obligations, reduce legal risk and manage their legal affairs appropriately.
- Generally, solicitors instruct barristers (where necessary) on behalf of the client in litigation matters by providing the barrister with an overview of the client's case, supplying relevant documentation, and requesting the barrister's advice. In many types of legal work, the solicitor will not need to instruct a barrister, such as in most conveyancing, probate, corporate or commercial matters.
- Barristers do not normally deal directly with clients as they are instructed by solicitors. They do not handle client monies. They are typically engaged by solicitors to represent the client in court. They do so by way of oral and written pleadings and submissions (the drafting of these legal documents can often be a joint process between the solicitor and barrister) and by arguing the case in court. Usually, they are instructed in litigation that may require particular specialist legal

advice and advocacy. The Bar Council of Ireland provides a limited direct professional access scheme for approved professional bodies which is for non-contentious matters and does not extend to contentious matters.

3.4 Broadly speaking, the perceived advantages to retaining a divided profession relate to the importance of independence and specialisation, and to a certain extent equality of arms before the law. A divided profession may also be the most efficient way in many cases to enable clients to be effectively represented in litigation.

3.5 The "cab rank rule", in theory at least, requires barristers to take any and all clients whatever their background or alleged offence or wrongdoing. The principle behind the "cab rank rule" is that it assists the fair and equal working of the legal system, as it theoretically offers access to counsel for all clients.

3.6 The fact that barristers are generally retained by solicitors, rather than directly by the ultimate clients, is thought to ensure the barristers' independence of judgment, and to ensure a standard of professional advocacy which is not overly influenced by any close connection (personal or financial) with the client whose interests are at issue. That said, it is also important that Solicitors should remain independent in providing legal services to their clients so to provide objective advice.

3.7 Solicitors directly deal with the clients and may engage the barrister for legal argument in court. Solicitors assist the client by recommending and briefing suitably qualified counsel.

A) ENGLAND AND WALES

3.8 In England and Wales, the legal profession operates in a fashion similar to that of Ireland with two branches - barristers and solicitors. The legal training differs for each qualification as does the form of practice undertaken.

3.9 The division in the profession is a very old one, and may have arisen by historical accident – "*On closer examination, it becomes clear that the divided bar was largely*

the result of historical accident, driven by class distinctions and economic turf protection."[4]

3.10 Although the roots of the role of "advocate" in a formal adversarial context can be traced back to Ancient Rome, and the Roman conquest of Britain, the first clear distinction between the two branches of the profession, as we would recognise them today, emerged in the 13th century when the first lawyers – known as "Serjeants at Law" or "pleaders" - were appointed to plead on behalf of plaintiffs in the "King's Courts".[5]

3.11 By the 14th century, the four Inns of court had developed. Other types of legal practitioner began to emerge, such as solicitors and attorneys. Some would argue that at this point "*a gradual separation of functions began between barristers – advocacy and advisory specialists for whom the higher courts were reserved – and other lawyers, such as 'attorneys' and 'proctors'*"[6] and that this continued over the following centuries. However, others consider that the demarcation between the two was far from clear, and that the strict and historic division between solicitors and barristers, as we know it, only effectively began when the Inns, and later the courts, began broadly adopting a policy of excluding attorneys from the late 19th century.[7]

3.12 This formal division continues but as of the late 20th century (the late 1970s) there has been debate around the issue of fusion of the profession. For example, as part of its review of legal services the "Royal Commission on Legal Services of 1979" (the Benson Commission)[8] largely focussed on whether the structure of the legal profession should be unified. Ultimately, it decided against recommending fusion.[9] In 1986, the Law Society of England and Wales and the Bar Council established the "Marre Committee", to look at a range of issues affecting legal services, including the structure of the legal profession. Its 1988 report did not recommend fusion but it did

4 Judith L. Maute, *Alice's Adventures in Wonderland: Preliminary Reflections on the History of the Split English Legal Profession and the Fusion Debate (1000-1900 A.D.)*, (2003) 71 Fordham L. Rev. 1357, 1358.
<http://ir.lawnet.fordham.edu/flr/vol71/iss4/7>.

5 Ibid at 1359 - 1360.

6 http://www.2hb.co.uk/history.

7 Harry Cohen, *The Divided Legal Profession in England and Wales - Can Barristers and Solicitors Ever Be Fused*, (1987-1988) 12 Journal of the Legal Profession 7, 12.
<http://www.law.ua.edu/pubs/jlp_files/jlp_issues.php?page=issues&vol=12>

8 Benson, Final Report: Volume 1, (1979).

9 See Grania Langdon-Down, *Shifting Values,* Law Society Gazette of England and Wales (17 December 2004).

recommend extending rights of audience to solicitors in the Crown Court, that professions other than solicitors be permitted direct access to the bar, and that solicitors should be eligible for appointment as High Court judges.[10]

3.13 In July 2003, Sir David Clementi was appointed by the Secretary of State for Constitutional Affairs to review the regulatory framework for legal services in England and Wales. The final report of the "Review of the Regulatory Framework for Legal Services in England and Wales" ("the Clementi Review") was published in 2004. The terms of reference for the Clementi Review were as follows:

> *"To consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector; and*
> *To recommend a framework which will be independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified."*11

3.14 In the context of its broad mandate to consider changes in the public interest to the legal services sector, the Clementi Review only very briefly referred to the fusion of the legal profession in the foreword of the final report. It was firmly of the view that the issue was a matter for the professional bodies. Therefore, fusion was clearly not considered an issue fundamentally connected to any "public interest" reform of the legal services sector.

> *"…a number of observers have wondered whether I might recommend that there should be fusion between the Bar Council and the Law Society. There would be advantage in such a move in areas such as education, and it would ease some of the existing regulatory and competition issues. But I do not make such a recommendation in this Review, because I regard issues of mergers between overlapping professional bodies, or for that matter de-mergers within existing professional bodies, as ones for the bodies*

10 Ibid.

11 *Review of the Regulatory Framework for Legal Services in England and Wales*, Final Report, Sir David Clementi, December 2004.
http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/content/report/report-chap.pdf.

themselves and their members. The regulatory framework needs to be able to accommodate either merger or de-merger."

3.15 As a result of many government green and white papers regarding the provision of legal services (government papers spurred on by the OFT "*Competition in the Professions*" Report in 2001[12] and the Clementi Review in 2004), significant legislative reforms were introduced in England and Wales by way of the *Legal Services Act 2007*, which radically changed the provision and regulation of legal services.[13]

3.16 Some changes introduced were along the lines of what had previously been recommended by the Marre Committee and had the effect of diminishing some of the formal differences between solicitors and barristers; i.e. higher rights of audience may now be acquired by solicitors after passing an Advocacy Assessment14 while barristers may now be instructed by members of the public directly under the Public Access Scheme[15]. It is arguable that "*while total fusion of the two professions has not yet taken place, the more accurate way to characterise the current system is one of partial assimilation*."[16]

3.17 The issue of fusion continues to arise as a topic for debate in England and Wales, particularly in the context of the many regulatory changes which its legal system has undergone more recently. Nevertheless, it would appear that, for the moment, it remains solely as an issue for discussion amongst legal practitioners and commentators, rather than featuring on any government legislative agenda.[17]

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12 The *Report on Competition in Professions* was published by the Office of Fair Trading in March 2001, and reviewed the restrictions on competition in the legal, accountancy and architects professions.
http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf

13 See 9 above.
See the website of the Legal Services Board, England and Wales, which briefly outlines the decade of reform leading to the Legal Services Act 2007 and the creation of the of the LSB.
http://www.legalservicesboard.org.uk/about_us/history_reforms/index.htm.

14 <http://www.sra.org.uk/solicitors/accreditation/higher-rights-of-audience.page>.

15< https://www.barcouncil.org.uk/bar-council-services/for-the-public/direct-access-portal.html>.

16 The Wilberforce Society, *Reform of the Legal Profession* (February 2012), at p. 17.

17 For example: Paul Rogerson, *Roundtable: Solicitor-Advocates,* The Law Society Gazette (13 December 2013) <http://www.lawgazette.co.uk/people/roundtable-solicitor-advocates/5039130.article>.
Joshua Rozenberg, *Advocacy Time Bomb ticking*, The Law Society Gazette (19 May 2014) <http://www.lawgazette.co.uk/analysis/comment-and-opinion/advocacy-time-bomb-ticking/5041266.article>.

3.18 When considering some of the views expressed by members of the Law Society of England and Wales and the Bar Council of England and Wales, it would seem that many practitioners consider that fusion has already occurred (or at least started to occur) in practical terms, and continues to occur naturally within the profession in England and Wales.

3.19 For example, in 2012 the then President of the Law Society of England and Wales, John Wotton, delivered the "President's Oxford lecture at the Saïd Business School", entitled "*Fission or fusion, independence or constraint?*", observing:

> *"…the barrister/solicitor division, which was originally based on higher court advocacy being reserved to barristers and the conduct of litigation (and some other non-contentious legal services) to solicitors is unknown in the civil law world and increasingly anomalous in today's common law world, surviving in a handful of jurisdictions internationally.*
>
> *With solicitors gaining higher court advocacy rights, one of the key functional planks supporting the division of the profession by two separate titles has already been removed.*
>
> *It is on the other hand particularly at the more experienced and specialised end of the advocacy market that economic and public interest considerations favour the existence of an independent, referral-based Bar, whose services are potentially available to all law firms and their clients.*
>
> *I assume, however, that the two separate professional titles of barrister and solicitor will survive for the foreseeable future, if only because there is no strong current of opinion in favour of fusion. The Bar has a well-established, relatively low-cost model for its traditional work, from which it will not lightly depart (though I harbour doubts about the long term sustainability of the low fees charged by junior barristers in some cases). One might, however, envisage a time at which* ***the distinction between barrister and solicitor is more a matter of tribal culture than function****."*[18] (Emphasis added)

Baroness Deech of Cumnor DBE, *The Legal Profession – Regulating for Independence* (Gresham College, London, 9 May 2012) <www.gresham.ac.uk/lectures-and-events/the-legal-profession-regulating-for-independence>.

18 John Wotton, *Fission or fusion, independence or constraint?* (President's Oxford Lecture, Said Business School, Oxford University, 24 January 2012).

3.20 Thus, Mr Wotton considered that the distinction between the two branches of the profession would probably remain in existence but more so as a matter of form or "*tribal culture*", rather than as a clear and impenetrable divide in function as between the types of work undertaken by solicitors and barristers. The same observation could be made in an Irish context.

3.21 In an earlier speech, in 2010, the then Chairperson of the Bar Council of England and Wales, Nicholas Green QC, set out his view of fusion and how in practical terms, it was already in existence in England and Wales:

> *"In my view there is a strong public interest in the preservation of a discrete cadre of specialist advocates and advisors. Fusion is to be avoided. The "f" word crops up in numerous conversations I have had with the profession; it is a "hot topic". The old Bar but also the new and Young Bar wish to remain discrete and independent. They do not wish to be regulated by the SRA. It has frequently been put to me that we must at all costs avoid fusion. Yet there is a great deal of misunderstanding about the meaning of the phrase.*
>
> ***In one sense the legal profession is already fused and has been for a considerable period of time. Any barrister who has wished to work with solicitors has long been able to be employed by a firm. That is fusion**: barristers and solicitors working together in the same partnership albeit that until very recently the barrister has been an employee not a partner. Since the decision the BSB took in November 2009 to permit barristers to go into partnership in solicitors' firms the oddity that a barrister could be employed but not a partner has disappeared so even that lingering asymmetry has now gone. **Secondly, if by fusion what is meant is that barristers and solicitors do the same thing – functional fusion – then again that has been more or less true for a considerable period of time.** Solicitors have had higher rights of audience since 1990 and barristers have had (limited) public access since 2004. There has been licensed access to the Bar by professionals for 20 years and licensed access for other organisations and*

See also: John Wotton, *Is the legal profession looking at fission or fusion?* The Law Society Gazette (2 February 2012) <https://www.lawgazette.co.uk/analysis/is-the-legal-profession-looking-at-fission-or-fusion/64099.article>.

individuals for the last 10 years. So although there are some functional differences they are not as great as is first supposed."[19] (Emphasis added)

3.22 Thus, he considered that fusion was already a reality in practical terms in two ways:

(i) barristers and solicitors can form a legal services partnership;

(ii) there is little distinction between the types of work that can be carried out by a solicitor or barrister.

3.23 However, a recent Independent Review of Legal Services Regulation in England and Wales, while not considering the issue of fusion *per se*, did observe in its Interim Report that it did *"not envisage that professional titles would or should disappear in the future, or that they should be merged (as in the recurrent issue of fusion of barristers and solicitors)"*.[20]

B) AUSTRALIA

3.24 The legal profession in Australia retains a mixture of fused and divided models amongst its six states and two territories.

3.25 In summary, the breakdown amongst these states and territories is as follows: [21]

i. Two retain a divided legal profession (New South Wales and Queensland);

ii. Five have a unified or fused legal profession (Western Australia, South Australia, Australian Capital Territory, Northern Territory, and Tasmania);

19 Nicholas Green QC, *The Future of the Bar* (Future of the Bar Symposium, 10 June 2010), at p. 60.
See also: *Bar Council Chairman sets out radical and progressive vision for the future of the bar,* The Bar Council (Press Release, 11 June 2010).

20 Professor Stephen Mayson, (September 2019) *Independent Review of Legal Services Regulation: Findings, Propositions and Consultation, LSR Interim Report*, at p.49, available at https://www.ucl.ac.uk/ethics-law/sites/ethics-law/files/irlsr_interim_report_1909_final_4.pdf.

21 The Competition Authority, *Study of Competition in Legal Services* (Preliminary Report, 24th February 2005), Appendix A, para A.22-A.55.

iii. One has a fused legal profession by virtue of its legislation but in reality it is divided, as lawyers must choose to be registered as a solicitor *or* barrister (Victoria).

3.26 Thus in the majority of the Australian states and territories, the legal profession is fused and has been for many years, often since the late 18th and early 19th centuries.

3.27 As noted in the preceding section, some consider that the model of a divided legal profession in the common law system of England and Wales came about as a result of "*historical accident, driven by class distinctions and economic turf protection*". Similarly, it is arguable that the widespread adoption of a unified model in the younger common law jurisdictions essentially resulted from "*historical accident*" as well, driven by factors stemming from the difficulties encountered in the early colonisation of these new continents. What is certain is that it is evident that a unified legal profession is the norm in most common law jurisdictions which historically were once colonies of the British Empire.

3.28 Alternatively, it could be said that it is the result of more than mere "accident" as the adoption of fusion throughout these jurisdictions probably stemmed from the need to find immediate and practical solutions for the difficulties encountered in early colonial life and the sense of creating a new "social order" for the "new world"; i.e., the practical difficulties faced by the first European settlers in these lands included, for example, sometimes coping with a sparse population, adapting to a more relaxed social hierarchy, and explosive new flourishing economies.

3.29 A very brief historical overview of when fusion originated in some of the Australian states and territories is outlined below.

3.30 In relation to New South Wales and Victoria:

> *"**Throughout Australia, there was in the earliest days of settlement a tendency to the establishment of a fused profession, just as there had been in the United States and Canada and for the same reasons; the number of trained lawyers of any kind was small and they had to cope with the business.** As soon as high level courts were established (1823 on) and staffed by judges appointed from the English Bar, there was immediate pressure from these gentlemen to establish the divided profession with which*

they were familiar, and this move was supported by English barristers who came to the colony to practise. The colonials who had carried on an amalgam practice were sometimes of convict origin and in any event not gentlemen, and these considerations increased the desire of some judges and English barristers to avoid the necessity for unduly close contact with such practitioners. Thus in New South Wales a divided profession was created in the first place by judicial direction which took effect in 1834, and this division was accepted and supported by subsequent legislation dealing with the legal system of the state, which at the time included the areas subsequently to become Victoria and Queensland. Victoria accordingly took over the same division when it separated from New South Wales in 1851 and Queensland when it separated in 1859.

But the Victorians were acquainted with the fused profession already established in South Australia; also, as in that state, radical political ideas and Chartist and Benthamite proposals for law reform had considerable influence, especially after the gold rushes of 1851-62 brought new settlers with new ideas. *Hence it is not surprising that from the establishment of responsible as well as representative government (1856), proposals were made to amalgamate the profession."*[22] (Emphasis added)

3.31 In the case of South Australia, Tasmania and Western Australia:

"In these three states, ***early enactments provided for the continuation of the type of amalgam practice which had at first become established in fact.*** *In each case, however, as with the Victorian Act of 1891, the terms of these enactments acknowledged the potential separate existence of practice as a barrister and as a solicitor."*[23] (Emphasis added)

3.32 In the case of the Australian Capital Territory, the "*small size of the population and the profession made amalgamation the only feasible system at first. Hence it is not surprising that the Seat of Government (Administration) Ordinance 1930, section 15, explicitly adopted fusion … the section provides: 'Any person entitled to practise as a*

22 Geoffrey Sawer, *Division of a Fused Legal Profession: The Australasian Experience* (1966) The University of Toronto Law Journal, Vol. 16(2), 245, 247.

23 Ibid at 255.

barrister or solicitor in the High Court of Australia shall have the right to practise as a barrister or solicitor, or both, in the Territory.'"[24] Similarly, it was small population size that ultimately made fusion the only viable option for the Northern Territory.[25]

3.33 Despite the prevalence of the fused model in Australia, what really proves remarkable is the fact that in each of the Australian states or territories which have a fused profession, an independent bar has developed.[26] As hinted at above, many jurisdictions which provide for a fused profession by statute also allow for practitioners to choose to practise as either a barrister or solicitor, should they so wish. As a result, legal practitioners can *choose* to operate solely as barristers *or* solicitors, rather than by their fused title of "barrister and solicitor". In these jurisdictions, a practitioner working only as a barrister is termed a "barrister sole".[27]

3.34 Professor Geoffrey Sawer, a leading Australian legal and political science academic, made the following observations in 1966 regarding the advantages to the development of an independent bar in jurisdictions with fused or "amalgam" legal professions:

> *"But as the Australasian experience shows, not every feature of the English division needs to be imitated. There is much to be said for the Victorian situation, likely to develop in the other states where fusion is legally possible, of a strong de facto Bar whose privileges depend on performances and not on legal guarantee. This* ***gives great flexibility to the system;*** *it ensures that as soon as a particular class of litigious work no longer requires specialized advocacy, it can be carried out by the lawyer who takes the client's instructions; it prevents the Bar from developing folie de grandeur, and from making unreasonable financial demands, since the possibility of competition from amalgams is always available. There is much to be said for a single*

24 Ibid at 259.

25 Ibid at 260.

26 The Competition Authority, *Competition in Professional Services, Solicitors and Barristers* (Report, December 2006), Appendix 3, p. 160.

"*The legal profession in Australia consists of both barristers and solicitors. In some States, the profession is integrated, in others it is not. Interestingly, in those States where the profession is formally integrated, an independent Bar has nevertheless emerged in relatively recent times. The legal profession as a whole is represented nationally by the Law Council of Australia, but there are also local representational bodies in the different States. Barristers in Australia have their own professional representational bodies, both nationally and regionally. They may also – and in some cases, must – belong to the Law Society of their particular region*."

27 Ibid at para 4.123 (p. 71).

basic training system for the whole profession, and for the Western Australian principle of an all-embracing professional organisation as well as a special Bar council.

….

However, while the general issues of probity and of the choice of the judiciary are, in my view, the principal objective reasons for advocating a divided profession, I doubt whether they have been the main factors in preserving or creating a divided profession in Australasia where provision for an amalgamated profession existed or exists. ***The main issue has been that of advocate efficiency. Only a very large firm of attorneys can afford to have a specialist in advocacy who spends most of his time in court.*** *The judges like and encourage this sort of specialization, since it makes their task so much easier. Once a practitioner gets to the stage where he spends most of his time in court, he begins to wonder whether he might not do better for himself and the profession if he does this as an independent contractor - that is, as a barrister, English style."*[28] (Emphasis added)

3.35 In short, some division within what is otherwise a unified profession is inevitable given that the majority of lawyers will naturally wish to specialise for reasons of greater efficiency and competitiveness. Interestingly, in Western Australia which features a unified legal profession, the Legal Practice Board (state regulator), is currently dealing with the issue of legal practitioners using the title of "Senior Legal Counsel" in a misleading manner. Following objections to the Board's request for those practitioners to amend their titles, the Board is allowing further submissions and responses to allow them to consider the matter further. [29]

C) NEW ZEALAND

3.36 Similar issues faced New Zealand, as those encountered by Australia, when its fledgling legal profession was first being established:

28 Geoffrey Sawer, *Division of a Fused Legal Profession: The Australasian Experience* (1966) University of Toronto Law Journal, Vol. 16(2), 245, 265 – 266.

29 *Use of the title Senior Legal Counsel*, Legal Practice Board of Western Australia, 18 March 2020, https://www.lpbwa.org.au/Legal-Profession/News/Use-of-the-term-%E2%80%98Senior-Legal-Counsel%E2%80%99.

"More than in the case of any Australian state, the history of the legal profession in New Zealand reflects the agony of mind of men[30] *with a considerable bias in favour of the English-style division but forced to accept the practical necessity of fusion in circumstances where population is scanty and litigation sporadic."*[31]

In New Zealand, the legal profession is fused. All practitioners have similar legal training and are admitted to the High Court of New Zealand as "barristers and solicitors" and hold practising certificates with this title. After admission, the vast majority of legal practitioners continue to be styled as "barrister and solicitor" but a small minority elect to become barristers sole, generally specialising in advocacy, similar to the situation noted in other jurisdictions. Often individuals only become barristers sole after they have practised in a law firm for a number of years. Indeed, they require three years' experience in a law firm or similar environment before becoming a barrister sole.[32] Barristers sole are subject to the same regulatory body as solicitors.

3.37 The role of the vast majority of individuals who remain styled as barristers and solicitors depends on whether they are engaged in purely transactional work or also act in disputes. The role of transactional lawyers would be similar to solicitors in an Irish law firm. The fused profession is more relevant to litigation lawyers in law firms. Being both barristers and solicitors, such individuals would generally exercise their rights of audience in New Zealand courts more frequently than solicitors would exercise such rights of audience in Ireland. The default position in most New Zealand litigation would be for law firms to perform the roles associated with both barristers and solicitors and this is seen as reducing costs for the client. However, the "independent bar" is also available to clients when required. Accordingly, in practice, litigation specialists in New Zealand law firms are likely to discharge both functions in many circumstances, with independent counsel often engaged for more

30 Of course it was *"men"* in those days. Fortunately, the profile of the New Zealand profession, like the Irish, has developed since then - a majority of law graduates are female as in Ireland, although Ireland was of course the first jurisdiction to have a majority of the profession female.

31 Ibid at 261.

32 32 The Competition Authority, *Study of Competition in Legal Services* (Preliminary Report, 24th February 2005), Appendix A, para A.56.

complex matters, or for cases in the appellate courts or where particular expertise is required or where it is more cost effective to employ such a barrister sole.

D) CANADA

3.38 In Canada, the legal profession is unified in nine of the ten provinces, the exception being Québec which in any event has a different legal system with its civil law tradition.[33]

3.39 In each Canadian Province or Territory, a single "Law Society" functions as the regulator of the legal profession in that Province or Territory. For example; the Law Society of British Columbia, the Law Society of Alberta, Law Society of Yukon, etc. Each lawyer is required by law to be a member of a Law Society.[34]

3.40 This system applies to Canada's 10 provinces and 3 territories. The one exception is Quebec as there the profession is divided between attorneys and notaries, and therefore there are two distinct law societies in Quebec – the "*Barreau du Québec*" and the "*Chambre des Notaires"*.

3.41 In effect, the Law Societies "*set the standards for admission to the profession and the conduct of members in their province or territory. They audit and monitor the use of trust funds held by members of the profession. They also investigate complaints and discipline members of the profession who violate the required standards of conduct.*"[35]

3.42 Canada provides an excellent example of a jurisdiction with a well-established fused or unified legal profession which has been in place, there or thereabouts, since the early 19th century.[36]

33 The Competition Authority, *Competition in Professional Services, Solicitors and Barristers* (Report, December 2006), Appendix 3, p. 159.

34 Federation of Law Societies of Canada < https://flsc.ca/ >.

35 Ibid.

36 For example, see the website of The Law Society of Ontario <http://www.lsuc.on.ca/with.aspx?id=427>.

3.43 Unlike the experience in other common-law jurisdictions with fused legal professions (such as New Zealand and Australia), there does not appear to be an independent bar in Canada.

3.44 In considering the application of fusion to England and Wales, one commentator of the Law Society Gazette (of England and Wales) has described the fused profession in Canada as follows: "*Perhaps Canadian lawyers have the most seamlessly fused profession in the Commonwealth*."[37]

3.45 While there is no sign of an emergent independent bar in Canada, it can be assumed that a comparable type of division amongst the legal profession might nonetheless be identifiable, and that to a certain extent, this division could have a somewhat similar effect in practice to that of a fully independent bar being in existence. In the simplest terms, it is probable that some Canadian lawyers are likely to choose to specialise either as "litigators" (i.e. barristers as we know them, or "sole barristers" as in Australia and New Zealand) or as office-based lawyers (i.e. solicitors as in this jurisdiction), rather than practising as both.

3.46 The most obvious reasons for a pronounced separation in legal specialisation, a separation which is essentially based along the lines of the traditional common law solicitor/barrister divide, stem from considerations such as practicality and economic feasibility. For some legal practitioners, it would arguably be a more economically viable solution for them to choose to focus their labours in one particular area of practice. Additionally, it is clear that in all types of professions there are categories and degrees of specialisation, and, the legal profession is the same.

3.47 Nevertheless, the likelihood that Canadian lawyers retain the option of choosing a specialisation to focus on either court or office-based work, if they so wish, cannot be viewed as equating with either; (a) retaining a formally divided legal profession or (b) having a genuinely independent bar in addition and parallel to an otherwise unified profession.

37 *Competitive edge -- last year, Law Society President Robert Sayer reignited the debate over fusion of the profession -- a look at the issue both here and abroad, where it has already happened,* The Law Society Gazette (10 February 2000) <https://www.lawgazette.co.uk/news/competitive-edge-last-year-law-society-president-robert-sayer-reignited-the-debate-over-fusion-of-the-profession-a-look-at-the-issue-both-here-and-abroad-where-it-has-already-happened-/21140.article.

4. EUROPEAN CIVIL LAW JURISDICTIONS

4.1 Civil law has its roots in ancient Roman law. More particularly, it can be traced back to the compilation of Roman laws (legislation, etc.) and jurists' legal writing at the direction of emperor Justinian[38] in the 6th century and known as "Justinian's Code".

4.2 The civil law tradition is the legal system followed in continental Europe. The most significant codifications of modern civil law were the French Civil Code (the Napoleonic Code, 1804) and the German Civil Code (1900). Each of these influenced most other European states. For example, Spain and Belgium followed the French tradition, while Austria and Switzerland followed the German code.

4.3 In very general terms, civil law can be described as primarily based on "*legal codes*" and legislation (i.e., the law is codified) *rather* than case law or precedents. In contrast, the common law system has its origins in Middle Ages England, and is largely based on case law precedents, with no definitive collection or codification of legislation or rules (i.e. a decision is legally binding on all subsequent similar cases unless a higher court reverses it).

4.4 In more recent times, it is clear that the increasing interrelation and connection between legal statute and case law for both civil and common law traditions is often overlooked, with the focus instead remaining on the existing differences between the two legal systems. Nonetheless, although the sources of law for both systems are becoming more alike, the structure of the common law and civil law professions continue to reflect their contrasting origins.

4.5 Generally speaking, the common law division in the legal profession does not have an exact equivalent in the civil law jurisdictions in Europe. As far as we would recognise a divided profession along the lines of solicitor and barrister, the equivalent profession of legal practitioners in Europe is a fused one. Notwithstanding this, it has to be acknowledged that there are variations amongst the broader legal profession in many continental jurisdictions, depending on the type of legal specialisation chosen.

38 Justinian I ruled from 527-565 AD. At that stage, the vast Roman Empire had been politically and culturally divided for centuries into the Western and Eastern (or Byzantine) empires. The Western Empire collapsed in 476 due to Germanic invasions. So the Roman empire of Justinian was the Eastern Empire.

For example, there would be a much richer tradition and variety of other legal qualifications such as notaries, state prosecutors provided for by legislation, different types of lawyers for different higher courts of appeal or specialty, qualified court clerks, and property and/or commercial registrars.[39]

4.6 For example, in France, there is no split along the lines of the common law solicitor/barrister divide amongst what we would view as its "liberal" ("free and independent") legal profession of "*avocats*". Some "*avocats*" specialise in legal advisory work only and therefore do not go to court but all "*avocats*" have the same status.[40] However, there are a variety of other legal professionals and specialisations such as "*avoués",* state appointed lawyers who can appear before the Court of Appeal, and "*avocats au Conseil d'Etat et à la Cour de cassation*", state appointed lawyers who can appear before the two superior courts in France. There are also "*notaires*", who can advise in relation to property and certain commercial matters.[41]

4.7 Similarly, in Germany there is no corresponding division in legal qualifications and roles as exists in Ireland in relation to solicitors and barristers. In order to become a fully qualified lawyer, an individual must first have a law degree and then pass two sets of state exams. After the first set of state exams, an individual can work as a "legal advisor" in a law firm but cannot act as "counsel" for a client (i.e., appear and argue in court on behalf of the client) or become a judge. To become a fully practising lawyer – "*volljurist*" – the person must then pass a second set of exams, which entitles them to appear in court, be a lawyer in a law firm, and become a judge.[42]

4.8 Given the fundamental differences between the structure of the common law and civil law legal professions, there is little to be gained in extensively comparing and contrasting each and every civil legal profession with our own. Differences abound in the variety of the many different types of legal practitioner in each jurisdiction. It is the

39 The website of the *European Judicial Network in civil and commercial matters* (European Commission) provides a detailed overview of the legal professions in the EU. <http://ec.europa.eu/civiljustice/legal_prof/legal_prof_gen_en.htm>.

40 See the IBA website for further information on how one becomes a lawyer in France. <https://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/ITILS_France.aspx>.

41 See 39. <http://ec.europa.eu/civiljustice/legal_prof/legal_prof_fra_fr.htm>.

42 See the IBA website for further information on how one becomes a lawyer in Germany. <http://www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_Germany.aspx>.

Society's view that there is more to learn in examining the situation of legal practitioners in comparable common law jurisdictions.

5. OTHER JURISDICTIONS OF INTEREST

5.1 Although the civil law jurisdictions can provide little insight for analysing the structure of our legal profession, and the prominent common law jurisdictions of England and Wales, Australia, New Zealand and Canada have already been considered in this paper, there are a few other jurisdictions which are of interest, namely Scotland, South Africa and the United States.

A) SCOTLAND

5.2 In Scotland, the legal profession is broadly similar in structure to that of England and Wales and comprises solicitors, "advocates" (barristers), solicitor-advocates (as in England and Wales, since 1990 solicitors who have undergone specialist training may apply for rights of audience in the higher courts) as well as conveyancing and executry practitioners.

5.3 One interesting divergence amongst the legal profession in Scotland as opposed to Ireland or England and Wales is that of the education model used for solicitors and barristers. Although there is a divided legal profession in Scotland, the legal education model for qualifying is not correspondingly divided as in Ireland or England and Wales. It is a "progressive qualifying system".[43] All aspiring lawyers take the same 26-week vocational course, the Scottish "Diploma in Legal Practice", after which an in-office two-year traineeship must be completed. On completing the traineeship, the student becomes a qualified solicitor and is only at this point that the legal training for advocates splits. Those wishing to qualify and work as advocates must then apply to the "Faculty of Advocates" (the equivalent of the Bar Council), pass the required exams, and complete a period of devilling (8-9 months) before being a qualified advocate and admitted as a member of the Faculty of Advocates.[44]

5.4 There was recent reform in Scotland in the provision of legal services with the enactment of the *Legal Services (Scotland) Act 2010*; however, no aspect of the reform related to the fusion of the legal profession.

43 The Wilberforce Society, *Reform of the Legal Profession* (February 2012), at p. 12.

44 See the website of the Scottish Faculty of Advocates - *Becoming an Advocate* - http://www.advocates.org.uk/about-advocates/becoming-an-advocate.

5.5 The Scottish government website states that the *Legal Services (Scotland) Act 2010*[45] was intended to deliver benefits to both the profession and consumers, and would "*reduce the restrictions on solicitors entering into business relationships with non-solicitors, allowing investment by non-solicitors and external ownership, within a robust regulatory framework*."[46] Amongst other reforms, the Act was to "*set out regulatory objectives and professional principles which will apply to all legal professionals*" and "*codify the framework for regulation of the Faculty of Advocates*".[47]

5.6 In somewhat greater detail, the primary aim of the Act was described on the Scottish government website as follows:

> *"The primary aim of the Legal Services (Act) 2010 ("the Act") is to remove the current restrictions in the Solicitors (Scotland) Act 1980 on how solicitors can organise their businesses. It will allow solicitors to form partnerships with non-solicitors and to seek investment from outside the profession (although a majority share in any such business must remain with solicitors or other regulated professionals). The Act is enabling rather than prescriptive, so solicitor firms that do not want to operate under the new business arrangements will be under no obligation to do so.*
>
> *The Act will create a tiered regulatory framework in which the Scottish Government will be responsible for approving and licensing regulators ("approved regulators"), who in turn will regulate licensed legal services providers ("licensed providers")…"*[48]

5.7 It would appear that the focus of recent legal services reform was firmly upon the creation and regulation of multi-disciplinary partnerships, etc. Fusion of the profession does not appear to be a particular issue of concern in Scotland.

45 Legal Services (Scotland) Act 2010 <http://www.legislation.gov.uk/asp/2010/16/contents>.

46 See the Scottish Government website <http://www.scotland.gov.uk/Home>. Particularly, see the webpage <http://www.scotland.gov.uk/Topics/archive/law-order/17822/10190/profession-reform-1>.

47 See the Scottish Government website at - <http://www.scotland.gov.uk/Topics/archive/law-order/17822/10190/profession-reform-1/Bill>.

48 Ibid.

5.8 Part of the reason for this lack of interest in fusion may lie with the Scottish model of legal education, which is essentially uniform in structure, providing a broad and common shared legal training for both solicitors and advocates.

5.9 Another contributory factor may be that, aside from the shared legal training, those who choose to practice as solicitors may also acquire rights of audience in the higher courts by becoming solicitor-advocates, as in England and Wales. Thus, they can choose to remain a solicitor but also acquire the right to represent clients in the higher courts without having to formally choose to practice as an advocate and undergo such training to become a qualified advocate (a Scottish barrister).

B) SOUTH AFRICA

5.10 In South Africa, the legal profession is primarily split between advocates (barristers) and attorneys (solicitors). Attorneys can also be registered to practice as notaries and/or conveyancers. The system is currently broadly similar to Ireland in that it is a referral legal system – meaning that there is no direct public access to advocates, they are instructed by attorneys who in turn are instructed by the client. Attorneys also have limited rights of higher audience since 1995.[49] The structure and organisation of the legal profession in South Africa has been the subject of intense debate for a number of years, and significant changes were introduced with the implementation of the Legal Practice Act 28 of 2014[50] ("Legal Practice Act").

5.11 In 2014, the legal profession began the process of undergoing major reform with legislation passed to establish a new regulatory organisation for the legal profession in South Africa. One of the principal aims of the Legal Practice Act was "*to create a single unified statutory body, the Council, in order to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of an*

49 Right of Appearance in Courts Act, no. 62 of 1995 (South Africa). < http://www.saflii.org/za/legis/num_act/roaica1995278/ > Section 3(1) *"Any attorney shall have the right to appear on behalf of any person in any court in the Republic, except the Supreme Court and the Constitutional Court."*
Section 3(2) "*Any attorney who wishes to acquire the right to appear on behalf of any person in the Supreme Court may apply to the registrar of a provincial division of the Supreme Court in the manner provided for in section 4(1)."*

50 Legal Practice Act 28 of 2014. Published in the Government Gazette, Vol 591, Cape Town, 22 September 2014, No. 38022. Accessible at - <https://www.gov.za/documents/legal-practice-act>.

accountable, efficient and independent legal profession".[51] There are 12 "Objects of Council" listed in the Legal Practice Act.[52]

5.12 This new body is called the "South African Legal Practice Council" and deals with all regulatory aspects of the legal profession encompassing all advocates and attorneys (i.e., "all legal practitioners") - from education, to admission and regulation (including disciplinary proceedings). In addition, a new "*Office of Legal Services Ombud*" will also be established by the Legal Practice Act.[53] Part of its statutory role will be to "*ensure the fair, efficient and effective investigation of complaints of alleged misconduct against legal practitioners*".[54]

5.13 The Legal Practice Act is interesting as it adopted an incremental approach to the reform of the legal profession whereby a "National Forum" was first established to make recommendations to the Justice Minister and act as a transitional body before the "South African Legal Practice Council" was established. These recommendations covered a number of issues such as the election procedure for the "Legal Practice Council", educational requirements of "candidate attorneys" (those undergoing vocational training to become attorneys or "pupils" to become advocates), and the right of appearance of "candidate legal practitioners" (those undergoing vocational training to become either an advocate or an attorney).[55] The explanatory memorandum to the Legal Practice Bill outlines the approach:

> *"A National Forum on the Legal Profession (the National Forum) will fulfil a key role in the first phase of implementation, paving the way for the establishment of the permanent South African Legal Practice Council (the Council) and putting systems and procedures in place for the second and subsequent phases of the implementation process. The powers and functions of the National Forum relate largely to aspects in respect of which there are still differing views between the various categories of legal practitioners*

51 See the *Revised Memorandum on The Objects of the Legal Practice Bill, 2012* at S.2(c), see <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/131105memorandum.pdf>.

52 Legal Practice Act 28 of 2014, section 5.

53 Ibid at Chapter 5.

54 Ibid at section 46.

55 Ibid at section 97.

among themselves, on the one hand, and between the Government and the legal profession, on the other."[56]

5.14 The Legal Practice Act 2014 was enacted on 22 September 2014, signalling the formal start to the transfer of regulation of the legal profession to the Legal Practice Council. The Legal Practice Act was amended by the Legal Practice Amendment Bill 2017[57] which was enacted in December 2017 and addressed practical and technical issues of a non-contentious nature. From 2015 to 2017, the National Forum held ten meetings culminating with the submission of their recommendations to the Minister on 26 October 2017, with the Amendment Bill passed the following month.

5.15 It seems that a key motivation behind the introduction of the Legal Practice Act was to radically restructure the organisation and regulation of the legal profession. The explanatory memorandum states that one of the main goals of the Legal Practice Act was to "*provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld*".[58]

5.16 The Legal Practice Act allows the public to directly instruct advocates (i.e., direct public access to barristers).[59] It will also simplify the process (somewhat) for attorneys applying for rights of audience before the Constitutional and Supreme Courts.[60]

5.17 It is interesting to note that longstanding plans to introduce fusion of the two branches of the legal profession were ultimately omitted from the final legislation.[61] This is despite the fact that legal fusion was often a source of fierce political and legal debate from the late 1990s onwards in South Africa. Some of the intensity of the arguments in favour of fusion appeared to stem, at least in part, from South Africa's traumatic past, and the belief that a divided profession was a colonial and apartheid

56 See the *Revised Memorandum on the Objects of the Legal Practice Bill, 2012* at < http://pmg-assets.s3-website-eu-west-1.amazonaws.com/131105memorandum.pdf >.

57 Legal Practice Amendment Bill 2017, see <https://www.justice.gov.za/legislation/bills/2017-LegalPracticeAmendmentBill.pdf>.

58 Ibid at p. 63 (section 2 of the Revised Explanatory Memorandum).

59 Section 34(2)(a)(ii) of the Legal Practice Act 28 of 2014.

60 Section 25(3) of the Legal Practice Act 28 of 2014.

61 Seth Nthai, *Bill both bolsters and threatens legal profession's independence,* Business Day (South Africa, 19 December 2013) <https://www.businesslive.co.za/archive/2013-12-19-bill-both-bolsters-and-threatens-legal-professions-independence/>.

relic of antiquated institutions, and one which resisted the reality of a newly diverse and egalitarian South African society. It was felt that by retaining a split legal profession, South Africa "*would effectively be retaining old colonial distinctions and would not contribute to the constitutional imperative for the transformation of the legal profession*."[62]

5.18 Nonetheless, some commentators considered that the approach of having a single regulating body for both branches of the profession was an attempt to introduce some element of fusion; "*(T)he idea of fusing the professions of advocates and attorneys was abandoned, but the Legal Practice Bill survived through five justice ministries. It is fusion in disguise. The thinking behind the Bill has been perfectly honestly stated by ANC members of the justice committee: it is still what it was five ministers ago, namely fusion – but now by other means.*"[63]

C) UNITED STATES OF AMERICA

5.19 The legal profession in the United States is fused. Practising lawyers are also known as "attorneys" or "counselors".

5.20 In a similar manner to other countries with a history of English colonisation, there were numerous practical constraints in the early days of colonisation which constrained the development of the legal profession along the lines of the traditional structure which existed in England. These constraints resulted in what was an

62 Wyndham Hartley, *Legal Practice Bill forced through despite opposition,* Business Day (South Africa, 13 November 2013) <http://www.bdlive.co.za/national/law/2013/11/13/legal-practice-bill-forced-through-despite-opposition>.
See also John Jeffery, Dene Smuts, *Legal Practice Bill: Fusion in disguise Mail and Guardian* (South Africa, 29 November 2013) <http://mg.co.za/article/2013-11-28-legal-practice-bill-fusion-in-disguise>.
In relation to the arguments in favour of fusion as a means of doing away with "colonial influences", it was stated: "*Dr Mathole Motshekga cited the case of Zimbabwe, where he was present when fusion was effected at transition. But he does not say, or remember, that 99% of advocates in Zimbabwe were white and had sole right of appearance in the higher courts. To fellow MP Jonas Ben Sibanyoni, the divided legal profession is the inherited 'old order'. The logic and applicability of his argument are not clear, unless advocates are assumed to be the embodiment of the inherited old order.*"

63 Ibid. John Jeffery, Dene Smuts, *Legal Practice Bill: Fusion in Disguise,* Mail and Guardian (South Africa, 29 November 2013).
See also, Wyndham Hartley, *Legal Practice Bill forced through Despite Opposition,* Business Day (South Africa, 13 November 2013) – "*The bill, which, when it becomes law, will create a single legal practice council, has been criticised as being the death knell of the advocates profession and a move by the ANC to take control of the legal profession. While Justice Minister Jeff Radebe argued that the differences between attorneys and advocates remained, and the original intention of "fusing" the two branches of the profession had been abandoned, opposition parties claimed that the bill provided for fusion by stealth.*"

essentially unified legal profession developing from the outset of colonial American society; practical difficulties such as sparse colonial populations (at first), developing infrastructural resources, and the establishment of a "New World" society modelled initially on that of Western Europe and in particular, England.

5.21 The American Revolution also had a significant impact upon the burgeoning legal profession both directly and indirectly. Firstly, many prominent (English) lawyers were lost (some were killed in the Revolution, and some had remained loyal to the British crown and left the colonies), and secondly, a "*particularly bitter antipathy*" grew towards all things English, including "*the English way of administering justice*".[64] The widespread economic recession that followed the Revolution also had an impact.[65] In summary, the early days of the "American" (post-revolution) legal profession were fraught and filled with great difficulties.

> *"Although America's legal system is derived from the English common law, its formation was not complicated by centuries of history, in which modern forms of practice evolved from historical accident and struggles over social status and turf protection by the predecessors of the two branches of legal practitioners.*
>
> *…*
>
> *As a new country, settled by refugees, melting-pot America enabled the development of a legal profession that was considerably more democratic and less hidebound than its predecessor. Over the last 170 years, American legal ethics improvised solutions to situations as they became problematic. By contrast, the English legal system and practice of law evolved over more than a thousand years, in a long course of specific, piecemeal adjustments."*[66]

64 Anton-Hermann Chroust, *The Rise of the Legal Profession in America, Volume 2, The Revolution and the Post-Revolution Era* (1st Edition, University of Oklahoma Press, 1965) at p. 5.

65 Ibid at p. 11.

See also pp. 11 – 19. The vast majority of legal proceedings related to debt collection, rent collection, tax collection, and insolvency. This coupled with lengthy and slow court proceedings led to the public viewing the legal system and the profession with great suspicion and hostility. This open public antagonism towards the profession caused difficulties in the development of common legal education and training as well as regulation of the profession and even judicial appointments.

66 Judith L. Maute, *Alice's Adventures in Wonderland: Preliminary Reflections on the History of the Split English Legal Profession and the Fusion Debate (1000-1900 A.D.),* (2003) 71 Fordham L. Rev. 1357, 1370. <http://ir.lawnet.fordham.edu/flr/vol71/iss4/7>.

5.22 However, in a similar fashion to the Canadian legal profession, there is a pronounced and extensive variety of legal specialisation, albeit with no "independent referral bar" as such in existence. Once more, it is evident that a pronounced divide in legal specialisation is inevitable, particularly given the breadth and range of areas of law. Divisions in the legal profession will naturally occur in some form or other; either by way of the "stratification" of the legal profession amongst various types of legal practice, or perhaps primarily by way of a functional divide. As one commentator observed on considering the divided legal profession in England and Wales; "*Just as the American legal profession is stratified into subcategories of practitioners with distinct skills and practice areas, those functional separations are likely to remain in the British profession*."[67]

5.23 An American legal article from 1998 illustrates this type of separation in legal practice with the example of Chicago, by comparing the findings of two surveys of Chicago lawyers, the first conducted in 1975 and the second in 1995.[68] In summary, an outline of its findings are as follows:

> *"This article compares findings from two surveys of Chicago lawyers, the first conducted in 1975 and the second in 1995. The earlier study indicated that the Chicago bar was then divided into two broad sectors or 'hemispheres,' one serving large corporations and similar organizations and the other serving individuals and small businesses. Analyses of the structure of co-practice of the fields of law indicate that the hemispheres are now less distinct. The fields are less tightly connected and less clearly organized - they became more highly specialized during the intervening 20 years and are now organized in smaller clusters. Clear indications of continuing separation of work by client type remain, however. Estimates of the amount of lawyers' time devoted to each field in 1975 and 1995 indicate that corporate practice fields now consume a larger share of Chicago lawyers' attention, while fields such as probate receive a declining percentage. Growth is most pronounced in the litigation fields, especially in business litigation. The organizational contexts within which law is practiced both reflect and contribute to these changes. The scale of those organizations has increased greatly, and the allocation of*

67 Ibid at 1371.

68 John P. Heinz, Edward O. Laumann, Robert L. Nelson, *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, (1998) 32(4) Law & Society Review, 751-776.

work within them has been divided along substantive, doctrinal lines. As a result, there is a greater disaggregation of work and workgroups within the profession today."[69]

5.24 Many would consider that although there is clearly a great deal of variety of specialisation in the American legal profession, this diversity of legal practice takes place within the context of a fundamentally unified legal profession.

5.25 Nonetheless, it would be accepted as common knowledge that American "trial attorneys" would rarely specialise in any other field of legal practice other than that of litigating cases and engaging in advocacy in court. Therefore, it is at least arguable that depending on the type and the degree of specialisation, it is possible that there is a similar divide amongst the American legal profession between court, or office, based lawyers which mirrors - to a certain extent at least - the divide between solicitors and barristers in this jurisdiction.

69 Ibid at 751.

6. ARGUMENTS IN FAVOUR OF FUSION

6.1 The general assumption underlying some of the arguments in favour of retaining a divided legal profession is that a barrister will always be a specialist lawyer while a solicitor will always be a general practice lawyer. Although this is often true, it is not always the case and in practice the leading experts in many areas of Irish law may be either barristers or solicitors. Facilitating a fused profession would do away with this presumption and present a more pragmatic and streamlined structuring of the legal profession.

6.2 Unifying the profession would thus eradicate arguably archaic and largely redundant distinctions of professional functionality which have their origins in historical accident and tradition rather than modern practice. Such distinctions may be preserved in the current configuration of the legal profession because that is how the profession has been arranged for centuries rather than considering whether such differences continue to serve any real or practical purpose in the public interest (and particularly in the interest of clients).

6.3 In reality, what can be said to be the actual necessity for maintaining a professional split between solicitors and barristers? If there is such a similarity or blurring of functions as between what a solicitor and barrister can do and what they can provide by way of legal services, it is difficult to rationally argue against what must logically be the next stage of simplifying the overall legal professional structure – i.e., the fusion of the profession.

6.4 In terms of both the public benefit and the benefit to lawyers, a fused legal profession would have the result of combining the collective resources and strengths of the branches of the profession. This unified front would assist the legal profession in maximising its public influence to the benefit of its members and the greater public interest. It would provide a more cohesive response from the legal profession to the challenges encountered by lawyers, and also bolster the profession's role in robustly safeguarding the public interest.

6.5 Having one legal profession, united by a common set of practice regulations, disciplinary measures, professional and ethical standards, etc. would best serve the public interest. It would provide greater clarity as to the legal profession's obligations

to the public as the profession would speak with one voice in informing the public as to its responsibilities and duties in providing legal services. The public interest would be better protected by the maintenance of one set of uniform or universal legal practice standards in this manner.

6.6 It is often argued that fusing the two main branches would offer a broader and potentially cheaper choice of legal services to individuals, and generally facilitate greater access to justice A client would no longer have to instruct both a solicitor and a barrister for significant litigation – the same lawyer could undertake both roles, leading to assumed efficiencies and cost savings.

6.7 Fusion would lessen confusion in the public eye about the two main branches of legal profession and simplify matters for individuals seeking to hire the services of a legal professional. The best lawyer for the particular situation would be retained, irrespective of label.

6.8 In theory, legal costs should decrease to some extent, as individuals would not have to pay for two different sets of legal fees due to having to engage both a solicitor and barrister - rather there would only be one set of legal fees.

6.9 There is a perception that unification of the two branches of the legal profession would lead to a reduction in legal costs for consumers of legal services. It should be noted that it is beyond the scope of this submission to confirm whether this perception is correct or not. The Society suggests that a full economic analysis could be undertaken by a more appropriate body to assess the potential for cost benefits for consumers of legal services if the two branches of the legal profession were unified.

6.10 Furthermore, fusion would allow for greater flexibility within the profession as there would be no need to “transfer” between the two branches and only one “pathway” to legal qualification would be required.

IN SUMMARY

6.11 It could be argued that a unified legal profession, united by a common set of practice regulations, disciplinary measures, professional and ethical standards, would best serve the public interest in the provision of legal services.

6.12 A fused profession would combine the collective resources and strengths of both branches of the profession. This will assist the legal profession in maximising its public influence to the benefit of its members and the greater public interest.

6.13 Fusing the profession could theoretically lower legal costs for the consumer and theoretically allow for greater direct access to lawyers. However, this would require a full economic analysis by an appropriate body to evaluate whether this would lead to lower costs for consumers of legal services. Pending the carrying out of such an exercise, the Society's view is that such savings may be illusory. This point is dealt with in greater detail in paragraph 7.37 below.

6.14 A fused profession would require only one form of legal qualification thus simplifying the qualification process for students intending to become lawyers.

7. ARGUMENTS AGAINST FUSION

7.1 The Society has previously expressed concern over any possible legislative move to create a fused legal profession in Ireland, such as changes initially suggested by the Competition Authority in its Preliminary Report *"Study of Competition in Legal Services"* in February 2005 to remove the restriction on holding dual titles, so that legal professionals could qualify as a "barrister and solicitor".[70]

7.2 The Society publicly responded to the Competition Authority's Preliminary Report in July 2005 by way of a submission entitled: "*Response of the Law Society of Ireland to the Preliminary Report of the Competition Authority Study of Competition in Legal Services of 24th February 2005*" ("the submission").[71]

7.3 The Society's submission emphasised that, from the point of view of the solicitors' profession, there is little or no distinction between what a solicitor and a barrister can do.[72] Therefore, in reality, either the retention of dual titles leading to a *de facto* fusion of the profession, or an otherwise explicit move to unify the legal profession would have minimal impact upon the actual professional capabilities of a solicitor and the solicitors' profession. The Society –noted the desirability of "*easier transfer between the two branches of the legal profession is desirable*"[73] as an alternative to this proposal of the Competition Authority.

7.4 The Society reiterated its views in its recent submission to the Authority on barrister issues, acknowledging that both barristers and solicitors have many similarities in their respective professions but advising that if fusion was brought in by the back door, it would lead to a duplication of regulatory function with knock on costs for consumers.[74]

7.5 The basic statutory requirements for transferring from being a barrister to a solicitor are set out in section 51 of the Solicitors (Amendment) Act, 1994[75]; however,

70 The Competition Authority, *Study of Competition in Legal Services (Preliminary Report, 24th February 2005)*, Chapter 6.
71 The Law Society of Ireland, *Response of the Law Society of Ireland to the Preliminary Report of the Competition Authority Study of Competition in Legal Services of 24th February 2005*, July 2005. <https://www.ibanet.org/Document/Default.aspx?DocumentUid=BDABEC0B-FCDB-4E20-808E-DB99D1CC66D2>
72 Ibid at para 6.4. - *"…a solicitor can already do everything that a barrister can do."*
73 Ibid at para 6.5.
74 Law Society of Ireland, *Submission on section 120 Legal Services Regulation Act 2015: Barrister Issues*, para. 3.30-3.32.
75 http://www.irishstatutebook.ie/1994/en/act/pub/0027/sec0051.html#sec51.

approximately seven years ago the Society simplified both the application process and its transfer course requirements for barristers wishing to transfer to the solicitors' rolls. The process is outlined on the Society's website.[76]

7.6 Section 51 the Solicitors (Amendment) Act, 1994 states as follows:

51. The Principal Act[77] is hereby amended by the substitution of the following section for section 43:

"Exemptions for practising barristers

43 – (1) This section applies to a person

(a) Who seeks to be admitted as a solicitor,

(b) Who has been called to the bar of Ireland and has practised as a barrister in the State for such period (not exceeding three years) and at such time or times as may be prescribed,

(c) Who has procured himself to be disbarred with a view to being admitted as a solicitor,

(d) Who has obtained from two of the Benchers of the Honourable Society of King's Inns, Dublin, a certificate of his being in good standing while he was practising as a barrister in the State, and

(e) Who has satisfied the Society that he is a fit and proper person to be admitted as a solicitor.

(2) Subject to subsection (8) of this section, the following provisions shall have effect in relation to a person to whom this section applies:

(a) He shall not be required to obtain a certificate of his having passed any examination of the Society other than the final examination (being the examination or an examination in like form referred to in section 40 of this Act before the coming into operation of section 49 of the Solicitors (Amendment) Act, 1994, as 'a final examination' and in this section referred to as the final examination) and (if obligatory on him) the second examination in the Irish language which is referred to in the said section 40, but he shall not be re-examined in any subject of substantive law

76 http://www.lawsociety.ie/Public/Become-a-Solicitor/Barristers/.
77 The Principal Act as referred to in section 43 is the *Solicitors Act, 1954.* http://www.irishstatutebook.ie/eli/isbc/1954_36.html.

which he has passed or is deemed to have passed as part of a qualifying examination for the degree of barrister-at-law,

(b) He shall be entitled, without being bound under indentures of apprenticeship to a practising solicitor, to apply to present himself for the final examination,

(c) On passing the final examination (except so much of that examination as relates to indentures of apprenticeship and service thereunder) and (if obligatory on him) the second examination in the Irish language, he shall be entitled to apply to be admitted and enrolled as a solicitor.

(3) A person to whom this section applies shall not be required to become bound under indentures of apprenticeship to a practising solicitor but shall attend such courses (if any) and complete such training (if any) and pass such examination (if any) as may be prescribed but he shall not be re-examined in any subject of substantive law which he has passed or is deemed to have passed as part of a qualifying examination for the degree of barrister-at-law.

(4) A person to whom this section applies shall not be required to pass any examination in the Irish language held by the Society under section 40 (3) of this Act if he has passed or was exempted from an examination in the Irish language prescribed by the Chief Justice under section 3 of the Legal Practitioners (Qualification) Act, 1929.

(5) Subject to the provisions of subsection (1) of this section, a person who has attended such courses (if any) completed such training (if any) and passed such examinations (if any) as he shall have been required to undertake pursuant to regulations (if any) made under this section, shall be entitled to apply to be admitted and enrolled as a solicitor.

(6) For the purposes of this section, service by a person as a member of the judiciary in the State, or as a barrister in the full-time service of the State or as a barrister in employment shall be deemed to be practice as a barrister.

(7) In this section-

'barrister in employment' means a barrister who satisfies the Society in the prescribed manner that he has been engaged, under a contract of employment with an employer, full-time in the provision of services of a legal

nature for a prescribed period (not exceeding three years) at such time of times as may be prescribed;

'barrister in full-time service of the State' means a barrister who is required to devote the whole of his time to the service of the State in the provision of services of a legal nature and is remunerated for such service wholly out of moneys provided by the Oireachtas.

(8) Subsection (2) of this section shall stand repealed on the coming into operation of regulations made under subsection (3) of this section."

7.7 To begin with, section 51 provides for a subjective analysis of barristers with more than three years post qualification experience and a decision on what courses and examinations they should take. None of these requirements should repeat any course or examination they took while being admitted as a barrister.

7.8 Before 2008, the transfer process was more complicated and drawn out. In 2007, the Bar Council and the Society agreed on a reciprocal course model. Solicitors and barristers with three years post qualification experience can now apply to take a month long course with the Kings Inns or the Society. On completion of this course (and six months in office training for barristers transferring to become solicitors), they can then transfer over to the other branch of the profession. There are no examinations in either transfer course but they are subject to attendance requirements. The rationale of the transfer courses is to cover areas of education unique to the branch of the profession the transferee is moving to. The Society's course covers Conveyancing, Probate & Administration of Estates, Solicitors Accounts, Ethics and issues relating to running an office. The bar course is focused on civil and criminal litigation procedure and advocacy.

7.9 The below tables show the numbers of barristers who have requalified as solicitors:

2004	2005	2006	2007	2008	2009	2010	2011
2	4	4	3	11	9	6	9

2012	2013	2014	2015	2016	2017	2018	2019
3	10	15	15	34	34	30	28

7.10 The equivalent number of solicitors requalifying as barristers is set out below:

2004	2005	2006	2007	2008	2009	2010	2011
2	1	3	6	3	4	6	10

2012	2013	2014	2015	2016	2017	2018	2019
10	3	0	1	1	3	6	3

7.11 The numbers transferring between the two professions before the current system came into operation were very small as the process involved a great deal of time and the sitting of an unknown number of examinations.

7.12 Thus, the Society has taken action in respect of facilitating "*easier transfer between the two branches*" of the profession.

7.13 The Society has consistently highlighted that, as there is no difference between what a solicitor and barrister can do, the real crux of the fusion issue in fact lies with the importance of "*the independent existence of a referral Bar*".[78] A fused profession would act to negate the existence of an independent referral bar, and it is evident from other jurisdictions where fusion has taken place that an independent bar is an essential feature of common law legal systems. This is particularly apparent in Australia, as in all of the Australian states or territories where the legal profession is or was unified; an independent bar has nonetheless subsequently come into existence.

7.14 On considering the experiences of common law jurisdictions with fused legal professions, such as Australia and New Zealand, there is a clear trend of a distinct group of practitioners inevitably breaking away to practice solely as barristers or advocates. An otherwise unified legal profession is thus voluntarily divided through the creation of an independent bar in effect, through the decision of practitioners, presumably in response to client demand, to specialise in this way. This indicates that, in common law jurisdictions similar to our own, the existence of an independent

78 The Law Society of Ireland, *Response of the Law Society of Ireland to the Preliminary Report of the Competition Authority Study of Competition in Legal Services of 24th February 2005*, July 2005, at para 6.4.

referral bar is a necessary feature of such legal systems, welcomed by clients wishing to avail of the services of such specialist advocates.

7.15 In its Preliminary Report on "*Study of Competition in the Legal Services* of 2005", the Competition Authority observed that in Australian states and territories where there was a fused profession, there remained a consistent tendency amongst the unified profession to split into two distinct branches:

> "*Evidence from abroad indicates that when barristers and solicitors are allowed form partnerships, many choose not to do so. In the majority of Australian states, barristers may join solicitors' firms. But a voluntary independent Bar has been maintained in most states, and, if it is an efficient model, it is likely to be maintained in a similar form here*."[79]

7.16 Similar problems faced New Zealand, as those encountered by Australia, when its fledgling legal profession was first being established.

7.17 Similarly, in jurisdictions such as Canada and the United States where there is a well-entrenched unified legal profession, there is often a distinct path of specialisation for those who wish to practice solely in litigation and advocacy, which to a certain albeit very limited degree, reflects this somewhat natural split or divergence in the legal profession. One practical reason for this is that it is often more economically feasible for a lawyer to choose to focus on one particular type of legal practice (i.e., court work or more office-based work) and to develop their expertise in that particular area of work. It may be impractical, or not cost effective, for to combine the office based demands of a busy solicitor's role (including the need to meet and advise clients) with the need to attend court for significant periods.

7.18 Currently in Ireland, if a solicitor chooses to exercise his advocacy skills and rights of audience, s/he is fully entitled to do so in a manner similar to that of any fused "barrister and solicitor" in Australia or elsewhere. In addition, Ireland already has a well-established and independent referral bar in existence.

79 The Competition Authority, *Study of Competition in Legal Services* (Preliminary Report, 24th February 2005) at para 5.56.

7.19 The advantage of the independent referral bar in Ireland currently allows an equal level of access to specialist barristers for both small and large firms of solicitors. This is an essential feature of the Irish legal system as it allows small firms to provide a comprehensive range of legal services to consumers as well as small and medium enterprises by engaging specialist services for clients when required. If the independent referral bar was no longer in place, specialist barristers would be the preserve of the larger firms which would reduce the types of legal services offered by smaller firms.

7.20 In the final report of the Competition Authority on Solicitors and Barristers in December 2006[80], the Competition Authority ultimately changed its view in respect of the initial suggestion in its Preliminary Report that legal practitioners should hold dual titles. It ultimately stated that it would not be considering, nor would it make any recommendations in respect of, the distinction between solicitors and barristers.[81] It went on to conclude that transferring between the solicitor and barrister professions should be made as easy as possible.[82] It appears that the Competition Authority reached this conclusion on the basis that there would be little to be gained from forcing the profession to undergo a lengthy and complicated process of fusion, when in practical terms it seems likely that the existence of an independent referral bar will continue regardless of such efforts.

7.21 Furthermore, it seems that the proposal of facilitating "*easier transfer between the two branches of the legal profession is desirable*" was considered by the Competition Authority as a more viable option than fusion.[83]

7.22 An extremely important point to note is section 101 of the 2015 Act extends the provision of direct access to barristers for non-contentious work to all members of the public, thus strengthening the independence of the bar.[84] It should be noted that this section of the 2015 Act has not yet been commenced.

7.23 Since 1990, "Direct Professional Access" to barristers has been existence such that members of professional bodies can directly instruct barristers without a need for

80 The Competition Authority, *Competition in Professional Services, Solicitors and Barristers,* (Report, December 2006), <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/03/Solicitors-and-barristers-full-report.pdf >.
81 Ibid at para 4.122.
82 Ibid at paras 4.125 to 4.129.
83 Ibid at para 6.5.
84 Section 101 states: *"No professional code shall operate to prevent a barrister from providing legal services as a practising barrister in relation to a matter, other than a contentious matter, where his or her instructions on that matter where received directly from a person who is not a solicitor."*

solicitors in non-contentious matters.[85] Section 101 now extends this type of direct access for non-contentious work to non-professionals, i.e., to all members of the public.

7.24 The effect of section 101 means that the bar remains an independent referral bar for contentious work but will also become a *fully* independent bar for non-contentious work, in the sense that any individual can contact and engage a barrister directly in non-contentious legal matters.

7.25 The Society has already set out its views in relation to extending direct professional access to contentious matters in its response to the Authority's consultation on barrister issues. As previously stated in that submission, the Society *"…does not support any proposal to remove restrictions on a barrister receiving instructions in a contentious matter directly from a person who is not a solicitor."* The submission continues by stating *"…giving barristers the right to hold client moneys and granting the right of direct professional access by non-solicitors in contentious matters would, in effect, amount to a fusion of the professions by the back door."*[86] .

7.26 A second structural change introduced by the 2015 Act is the creation of legal partnerships provided for under section 100 of the Act. This will permit two or more legal practitioners (solicitors and barristers), of whom one must be a barrister, to establish partnerships for the purposes of providing legal services. The provisions of the 2015 Act permitting legal partnerships have not yet been commenced.

7.27 The creation of legal partnerships, in addition to the facilitation of greater direct access to barristers, will act to lessen any perceived "need" for fusion as the public will have increased access to barristers as a result. Equally, legal partnerships will also enable greater and more open competition in the provision of legal services, allowing for a "one-stop shop" for consumers seeking legal services.

7.28 A practical observation regarding the proposed introduction of greater direct access to barristers is the fact that solicitors, as stated above, already have advocacy rights should they choose or wish to exercise them. Increasing the public's direct access to barristers will reduce some of the remaining differences between solicitors and barristers. This again supports the central argument against fusion - that it is a

85 < https://www.lawlibrary.ie/Legal-Services/Direct-Professional-Access.aspx>.
86 Law Society of Ireland, *Submission on section 120 Legal Services Regulation Act 2015: Barrister Issues*, para.3.1.

redundant and unnecessary exercise given the reality that there remains little practical difference between the branches of the legal profession, and therefore there is no need for fusion.

7.29 In any event, it is clear from the broad summary outlined above, that the current circumstance of the Irish legal profession is very similar to that of the fused legal profession in Australia.[87] This is on the basis of there being no real distinction between the advocacy capabilities of a solicitor and barrister. Therefore, what actual purpose would it serve to fuse the professions in Ireland?

7.30 It seems clear that attempts to fuse the solicitors' and barristers' professions would have little effect other than to create great expense in the short-term by necessitating substantial changes in the regulatory and education systems, with the inevitable long-term result being that the legal branches would naturally divide again anyway.

7.31 At the same time, existing or proposed measures which fall short of allowing or facilitating fusion of the branches of the profession, such as allowing greater direct access to barristers and the introduction of legal partnerships, and perhaps even allowing for even easier transfer between the branches of the profession, are already bringing the position of the Irish legal profession even closer to that of the "fused" Australian states.

IN SUMMARY

7.32 The first and foremost practical argument against fusion is that, even if fusion was ultimately introduced, the (re)emergence of a specialist independent bar, would almost certainly be a likely outcome. This has already been demonstrated in the common law jurisdictions of Australia and New Zealand and presumably reflects the conclusion, across various common law jurisdictions, that clients wish to avail of the services of independent barristers on occasion.

7.33 The advantages of pressing for the fusing of the legal profession in Ireland are unclear in circumstances where it is extremely likely that an independent referral bar would still be likely to evolve in practice in response to client demand.

87 The Competition Authority, *Competition in Professional Services, Solicitors and Barristers,* (Report, December 2006). The Competition Authority states at para 4.123; "*Solicitors in Ireland are equivalent to those legal practitioners in certain Australian States who practice as "solicitors and barristers". However, to be a member of the independent Bar in those States one must practise only as a barrister. Thus, the term "barrister sole" has emerged to describe members of the independent bar in those jurisdictions.*"

7.34 It is important that barristers and solicitors should be recognised as enjoying the same status as professional legal advisors and subject to the same ethical constraints where applicable. Any differences are for good reason - barristers do not handle client money and are therefore not subject to associated accounting regulations and obligations. However, on core issues such as integrity and honesty and their duties to the court, solicitors and barristers are subject to the same professional obligations.

7.35 Many of the perceived benefits of fusion have already arguably been achieved in Ireland, in that Irish solicitors enjoy full rights of audience, can be appointed as judges to all courts, the 2015 Act will allow barristers to become partners in law firms once those provisions have commenced and it is now relatively easy for solicitors to become barristers and vice-versa.

7.36 The current independent bar clearly has benefits in that it enables clients to have access to specialist advocates of their choosing. It also enables smaller or regional law firms to have such access. It allows solicitors who wish to do so to concentrate on their office work and direct client engagement, leaving the barrister to deal with court work, which is frequently the most efficient way to manage such work. It is not mandatory for clients or solicitors to avail of the services of a barrister in Ireland - solicitors can undertake the court work themselves, and the new provisions of the 2015 Act for legal partnerships will allow solicitors and barristers to work together in partnership. Accordingly, the existing Irish model gives clients the option of access to the independent bar or of recourse to a firm which might tend to more of its own court work. The current model gives solicitors a significant degree of flexibility in that they are not obliged to retain barristers and have full rights of audience while retaining access to the expertise offered by the independent bar. The independent bar also allows solicitors the means to offer a more cost effective service – the ability to have recourse to a barrister who practises on a particular circuit or in a particular area means that a solicitor is better placed to deal with cases in other parts of Ireland and in other areas of expertise. To this extent the current arrangements arguably offer solicitors and clients greater flexibility and choice.

7.37 The main argument for fusion appears to be the perceived cost saving, avoiding the need for both barrister and solicitor to be briefed. However, this may be illusory. For example, even as matters stand, work in the lower courts is frequently undertaken by solicitors rather than by barristers and by much smaller legal teams than in the higher

courts, so it is unlikely that there would be significant savings in these courts if the profession was fused. By contrast, cases in the higher courts will frequently require a team of lawyers (barristers and solicitors) to attend court on behalf of each party. However, experience suggests that this deemed equally necessary in significant litigation in other common law jurisdictions where the profession is fused. The experience of litigation in other common law jurisdictions does not demonstrate that there would be significant cost savings by introducing a greater degree of fusion.

7.38 Ireland has traditionally produced lawyers – both barristers and solicitors – of a high calibre. It is clear that the distinctions between the two branches of the profession are eroding, and the relative importance of the solicitors' branch of the profession is increasing as regulation increases and clients require more frequent access to legal advice to assist them in the day to day conduct of their business and to ensure they comply with the ever increasing regulation to which they are subject. It is also clear that solicitors are increasingly well positioned to undertake work (such as drafting pleadings or court room advocacy) which would traditionally have been referred to the bar in its entirety. However, it is equally true that Ireland has a strong independent bar and that the continued existence of that bar is in the interests of solicitors and clients (as well as the barristers themselves) because it provides access to greater expertise than might otherwise be available within a law firm and because, while this may appear counterintuitive, it may be more cost effective to employ both a barrister and a solicitor than to seek to combine both roles. While the Society would recommend that both branches of the profession should be treated equally and be subject to the same professional standards where applicable, the Society would not recommend compulsory fusion of the profession because the current model offers clients (and solicitors) greater choice and flexibility and proposed changes are unlikely to achieve significant cost savings or other tangible public benefit.

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