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Section 120 public consultation
Legal Services Regulatory Authority
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Dear Sir/Madam,

I am writing to you in my personal capacity as a barrister and member of the Bar of Ireland in order to make submissions in accordance with Section 120 of the Legal Services Regulation Act 2015. For the avoidance of any doubt, my submissions are solely my own and are not made on behalf of any institution or organisation. Any views and opinions expressed are purely my own.

I strongly believe that all restrictions should be removed from direct access to barristers.

I believe the current restrictions that forbid barristers from representing members of the public on contentious matters are only found in the Bar's code of professional conduct, have no standing in law nor they are justified on any legal basis whatsoever.

Order 6 of the Rules of the District Court does not explicitly forbid a barrister being directly instructed by a member of the public. Order 6 lists categories of persons with a right of audience that includes "a council instructed by such party [to proceedings]" as per Order 6.1.c of the District Court Rules 1997 (S.I. No. 93 of 1997) that was inserted by the "District Court Rules Committee" by virtue of Section 91 of the Courts of Justice Act 1924, Section 72 of the Courts of Justice Act 1936, Section 17 of the Interpretation Act 1937 (as applied by Section 48 of the Courts (Supplemental Provisions) Act 1961) and Section 34 of the Courts (Supplemental Provisions) Act 1961.

In simple terms, the District Court Rules Committee inserted the line "counsel instructed by such party" into Order 6.1.c of the Rules of the District Court in 1997 thereby creating an implied restriction against direct access/representation. The District Court Rules Committee were entitled to do this because they drafted and enacted S.I. No. 93 of 1997 (via delegated

legislation) which was, at the time, practically lifted word-for-word into the Rules of the District Court. As such, the District Court Rules Committee are able to amend the Rules of the District Court via a new statutory instrument that may remove the restriction, remove order 6.1.c or rewrite Order 6, if so desired, as an alternative to an act of the Oireachtas in permitting representation without an instructing solicitor.

The details of the current District Court Rules Committee are currently available on the courts website¹. So in terms of my submission, and with respect to all parties involved, it appears there is no express statutory or legal mandate forbidding barristers from representing members of the public without an instructing solicitor save for an implied restriction under Order 6.1.c of S.I. No. 93 of 1997 that was not enacted by the Oireachtas or a Minister for Justice.

By comparison, the Rules of the Circuit Court or the Rules of the Superior Courts appear to be silent on a barrister's right of audience, i.e. there appear to be no rules forbidding barristers from representing members of the public without an instructing solicitor in the Circuit or Superior Courts.

In other words, there is no Circuit or Superior Court equivalent to Order 6.1.c of S.I. No. 93 of 1997 (that applies only to the District Court) that implies a restriction against barristers representing clients without an instructing solicitor.

Based on the above, it appears there is no real reason or express statutory provision forbidding barristers from representing members of the public on contentious matters or appearing on their behalf without an instructing solicitor. Therefore, it makes no logical sense to continue this unjustified restriction.

With due respect, I believe that calling for the current restriction to remain serves no purpose other than maintaining the status quo and depriving both the public and members of the junior bar of real competition; both lose as the public don't know they can choose their own barrister (as opposed to who their solicitor automatically appoints) and that they can negotiate rates with that barrister if they so wish.

Barristers cannot advertise or promote themselves under the Bar's professional code of conduct, they have to rely on solicitors to give them work; solicitors and contacts are the gate keepers in this profession.

Some solicitors take advantage of this reliance and simply don't pay barristers – indeed the Bar recognised this as becoming such a problem that the Bar set up its own debt collection service where barristers can pass outstanding debts due from solicitors for collection (with a starting fee of 6.5%).

Before I entered the legal profession, I worked in sales, corporate accounts and even ran my own business – the barrister's profession is the only profession I know where you are not allowed to promote yourself or advertise. It makes no commercial or business sense not to advertise in this economy yet the Bar's insistence on this archaic restriction shows how out of touch they are with modern society.

¹<http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/6DD28E34C9205BD280257FC00050BEBD?opendocument>

In a recent Irish Times Article entitled “Tough times at the Bar? Fees for top lawyers skew reality” (13/6/16) Mr. Colm Keena wrote of the reality of barristers working for pittance in order to build a career. Traditionally, junior barristers would spend years on minor cases, unable to make a proper living wage in order to build their practice that would result in larger, more profitable cases later in their careers. This model no longer works for a number of reasons, partly because of the reduced fees in legal aid cases.

It is not uncommon for a junior barrister to be expected to travel across the country for a minor criminal aid matter and only be paid €25 for the entire day’s work (reimbursement for travelling expenses are not permitted so it could actually cost the barrister money to work). If a barrister refuses instructions then they won’t be instructed again. As stated, the traditional view was that if a junior barrister stuck with it then they’d end up with a career or growing practice but that’s simply not the case anymore; the junior bar are dying out but they’re being replaced as quickly as die.

In my view, direct access would make it easier for members for the public to get a ‘second opinion’ on their case by directly contacting a barrister and asking them to review their file. Differences of opinion are common, and expected as that is the nature of opinions, but a second opinion may give a person reassurance or just cause for concern. Regardless, second opinions are often used in the medical profession but I have rarely seen it in practice at the Bar.

The traditional barrister business model that existed for generations is now dead. The current market has shifted away from litigation and legal services; successive governments introduced procedures to avoid litigation (PIAB, PRTB, Mediation under Rules of Court, etc.), the Law Society of Ireland’s expansion into education of skills that was once the preserve of The Honourable Society of King’s Inns (advocacy, court skills, etc.), and the increased jurisdictions of the District and Circuit Court combine to decimate the market/demand for barristers.

As this submission directly relates to proposed changes in a professional code, specifically changes to the Bar’s code of professional conduct, I must submit concerns over the code itself. In my view, any changes to the Bar’s code regarding direct access or advertising must also ensure that fair procedures are protected and maintained throughout the code.

In my view, the Bar’s current code falls short when compared with that of the Law Society whose code is based on the Solicitor’s Acts. As such, the principles of natural and constitutional justice apply to the Law Society’s codes and their processes are amenable to judicial review; an essential recourse to ensure impartiality.

In other words, every step of a complaint against a solicitor is enshrined in fair procedure under law (right to a fair hearing, right to know the charges against you, right to examine the evidence against you, right of appeal, etc.) and any question as to procedural fairness can be settled by a court via judicial review.

By comparison, the Bar’s code of professional conduct is not based on any rule of law and is not subject to natural and constitutional justice. A barrister does not have the same protections as a solicitor if they are subjected to a complaint; both can lose their careers and reputations as a result - but only one is guaranteed to be treated fairly.

At present, the Bar is effectively a private members club that can do what they like with little recourse by members. It appears the recent judgment of Justice Barrett in *White v Bar Council of Ireland* [2016] IEHC 406 supports this 'private members club' view where the honourable judge states, with regard to the applicant having to be a member of the Law Library (Bar Council) to work as a criminal defendant at Part 4, s. 24, "The court will not grant an order forcing the Law Library, in effect a private members' club, to admit Mr. While even though he will not sign up to Rule 5.2.1. [of the code of conduct]".

In simple terms, the Bar is a private organisation that has *carte blanche* powers to exclude any barrister from practicing in the Law Library located in the Four Courts (which is a State owned building) for any reason without any recourse.

With respect, any change to the Bar's code of conduct is meaningless unless the code itself complies with the principles of natural and constitutional justice. In other words, there is no point in changing the code if the Bar can do what they want with no oversight from anyone, no right of appeal for members and no recourse via judicial review.

I believe the current arrangements by the Bar will be held as being unconstitutional when the full weight of the Legal Services Regulation Act is in force because, as stated, the Bar's code of professional conduct as it currently stands does not follow the principles of natural and constitutional justice.

I also have ongoing concern as to the lack of transparency of the Bar and how this affects the public's perception and access to barristers; I suspect it may even put off some people from engaging with a barrister as the profession may be seen as not being truly independent or 'an old boys club'.

In my view, this lack of transparency is relevant as the Bar portrays a public image of being the sole voice of the profession but this is simply not the case; I am just one of many dissenting voices. There are an increasing number of barristers operating outside of the Law Library who are not governed by the Bar's code but who will be affected by decisions of the Legal Services Regulatory Authority.

I don't believe the Bar can objectively represent the interests of its members on any matter relating to direct access or advertising.

I believe the Bar has become a business; an entity that profits off its members from a consortium of business interests that range from the provision of insurance services to property management, and any change to the rules against direct access endanger the status quo and risk profitability.

I respectfully ask the Legal Services Regulatory Authority to consider the needs of individual barristers whose voices may be drowned out by the Bar, consider the needs of the public who are entitled to 'shop around' for better value and consider the future of a once noble profession that is in danger of becoming irrelevant due to the failure of the Bar to adapt to modern society and allow direct access to barristers.

I respectfully ask the Legal Services Regulatory Authority for the same right that every other sole trader in this country has; the right to promote oneself.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Will. McLoughlin', with a long horizontal flourish extending to the right.

William McLoughlin BL