



Legal Services Regulatory Authority

Certain Issues Relating to Barristers

Report to the Minister for Justice and Equality, Mr Charles Flanagan TD

29th September 2017

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PART 1: Introduction

- 1.1. The Legal Services Regulatory Authority (“the Authority”) was established on the 1st of October 2016 pursuant to the provisions of the Legal Services Regulation Act 2015 (“the Act”).

Functions and Objectives:

- 1.2. The functions of the Authority are to regulate the provision of legal services by legal practitioners and to ensure the maintenance and improvement of standards in the provision of such services in the State.
- 1.3. Section 13(4) specifies that in performing its functions, the Authority shall have regard to the following objectives: -
- 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 adherence to the following professional principles: -
 - i. that legal practitioners shall –
 - 1. act with independence and integrity,
 - 2. act in the best interests of their clients, and
 - 3. maintain proper standards of work,
 - ii. that legal practitioners who exercise before any court a right or audience, or conduct litigation in relation to proceedings in any court by virtue of being legal practitioners, shall comply with such duties as are rightfully owed to the court, and
 - iii. that, subject to any professional obligation of a legal practitioner, including any obligation as an officer of the court, the affairs of clients shall be kept confidential.
- 1.4. This consultation and report have been undertaken with these objectives in mind. As will be seen in Part 3 of this report, the potential outcomes of this report have been benchmarked against our statutory objectives to ensure that the discussion and analysis has been undertaken within the framework of our statutory objectives.

Issues Relating to Barristers:

- 1.5. S.120 of the Act requires the Authority to engage in a consultation process on three issues relating to barristers:
- a. the extent, if any, to which the existing restriction on barristers holding client moneys should be retained,
 - b. the retention or removal of restrictions on a barrister receiving instructions in a contentions 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 which may be so held.
- 1.6. The Authority is then required to report to the Minister, not later than 30th September 2017, setting out its recommendations in relation to these matters.

Current Position:

Holding of Client Moneys:

- 1.7. There are particular areas of practice which may currently require solicitors to hold moneys on behalf of a client. This would occur most frequently in the areas of conveyancing, probate and litigation.
- 1.8. In conveyancing transactions whether a client is buying or selling a property, moneys are paid to the solicitor rather than directly to the client. This ensures that existing mortgages are cleared, that any new mortgage is registered and that all stamp duty and registration fees are paid.
- 1.9. In probate matters it would be usual for all the assets in an estate to be paid into the solicitors' client account and all debts discharged. The balance is then distributed to the beneficiaries.
- 1.10. In litigation matters any award of damages would usually be paid to the solicitor. Any amounts due, such as the costs of expert reports, can then be paid and the balance paid over to the client.
- 1.11. There are extensive regulations that cover the circumstances in which solicitors may hold client moneys and how they deal with such moneys.

- 1.12. The Solicitors Accounts Regulations 2014¹, provide rules that cover the following issues:
- a. the requirement that client moneys be held in a separate account,
 - b. dealing with trust moneys,
 - c. insolvency arrangements,
 - d. maintaining accounting records,
 - e. furnishing an annual accountant's reports, and
 - f. investigation of solicitors' practices.

Any breach of these regulations is misconduct and the solicitor concerned may be subject to disciplinary proceedings that could result in a restricted practising certificate, being suspended or being struck off the roll of Solicitors.

- 1.13. Losses arising from dishonesty on the part of a solicitor are normally not covered by professional indemnity insurance but provision is made in the Solicitors Acts for a 'Compensation Fund'². This fund is designed to compensate clients who have suffered pecuniary loss due to the dishonesty, in the course of the provision of legal services, of a solicitor.
- 1.14. The Fund is administered by the Law Society³. All solicitors are required to contribute to the fund each year irrespective of whether they hold client moneys.
- 1.15. Barristers are currently prohibited from handling client moneys by the Code of Conduct for the Bar of Ireland.⁴

Direct Access:

- 1.16. Barristers are currently prohibited from accepting instructions in contentious matters directly from a client⁵.
- 1.17. In respect of non-contentious matters the Bar Council operates a 'Direct Professional Access Scheme'⁶. Under this scheme members of professional bodies, approved by the Bar Council, may directly seek legal opinions from barristers. To become an 'approved professional body' an organisation must satisfy the Bar Council that:
- a. their members provide skilled and specialist services; and
 - b. the body has a significant need for a barrister's services.
 - c. The body must also show that their affairs and conduct are regulated by a constitution that governs:
 - i. their standards;
 - ii. how people become members of their body; and

¹ S.I. 516 of 2014

² See part III of the Solicitors (Amendment) Act 1960

³ See <https://www.lawsociety.ie/Public/Compensation-Fund/> for more details.

⁴ Rule 2.19 of the Code of Conduct.

⁵ Rule 3.8 of the Code of Conduct. Also see Bond v Dunne unreported judgment Gillian J. 4th July 2017.

⁶ See <https://www.lawlibrary.ie/Legal-Services/Direct-Professional-Access.aspx>

iii. how the body handles discipline and unethical or dishonourable conduct.

- 1.18. The Bar Council also operates a Voluntary Assistance Scheme⁷. This scheme provides for *pro bono* assistance by barristers to charities, non-government organisation and civic society groups. The scheme makes available every service which barristers ordinarily provide to clients. Barristers can become involved at any or for all stages of a legal issue. The barrister can provide assistance:
- a. to the organisation itself – for legal issues arising for the organisation, or
 - b. to an individual as a client of a requesting organisation, but only via the requesting organisation.
- 1.19. Under the VAS scheme barristers are not permitted to act in court proceedings without there being an instructing solicitor.

Key Definitions and Terms:

- 1.20. In this report certain terms have specific meanings. The following is a list explaining the meaning of the most common terms used: -

‘The Act’ means the Legal Services Regulation Act 2015.

‘Bar Council’ means the Council of the Bar of Ireland which is the representative body for barristers in Ireland. It also regulates barristers⁸.

‘Cab-rank Rule’ means the rule of conduct whereby a barrister must accept instructions in any case in the field in which they profess to practice subject to the payment of a proper professional fee. There are exceptions to this rule. For example, where there is a conflict, the barrister has other professional commitments or other special circumstances apply⁹.

‘Client Moneys’ means moneys received, held or controlled by a solicitor arising from their practice as a solicitor, for or on account of a client in any capacity¹⁰.

‘Code of Conduct’ means the Code of Conduct for the Bar of Ireland, July 2014 edition. Barristers are obliged to comply with this code¹¹.

‘Compensation Fund’ means the fund operated by the Law Society to compensate clients of solicitors who have suffered a pecuniary loss due to the dishonesty, in the provision of legal services, by a solicitor¹².

⁷ See <https://www.lawlibrary.ie/Legal-Services/Voluntary-Assistance-Scheme.aspx>

⁸ See www.lawlibrary.ie.

⁹ See rule 2.14 of the Code of Conduct

¹⁰ See Regulation 2(1) of the Solicitors Accounts Regulations 2014, (S.I. No. 516 of 2014) for the full definition.

¹¹ <https://www.lawlibrary.ie/About-Us/What-We-Do/Regulation/Code-of-Conduct.aspx>

¹² See part III of the Solicitors (Amendment) Act 1960 and <https://www.lawsociety.ie/Public/Compensation-Fund/> for more details.

'King's Inns' means the Honorable Society of King's Inns which is the body responsible for the training and education of Barristers. It also deals with serious issues of misconduct by barristers referred to it by the Bar Council¹³.

'Law Society' means the Law Society of Ireland which is the representative body for solicitors. In conjunction with the High Court and the Solicitors Disciplinary Tribunal it has a role in the regulation of solicitors¹⁴.

'Legal Partnership' means a business partnership between a barrister and another legal practitioner, who can be either a solicitor or barrister. Such partnerships are not currently permitted but will be introduced by Part 8 of the Legal Services Regulation Act 2015.

'Legal Practitioner' means either a solicitor or a barrister.

'Multi-disciplinary Practices', or 'MDP's' means a business partnership between a legal practitioner and another person, for the purposes of providing legal and non-legal services. Such partnerships are not currently permitted but may be introduced by Part 8 of the Legal Services Regulation Act 2015.

'Solicitors Accounts Regulations' means the current legislation regulating how solicitors are permitted to hold client moneys¹⁵.

¹³ See www.kingsinns.ie.

¹⁴ See www.lawsociety.ie.

¹⁵ Solicitors Accounts Regulations 2014, ([S.I. No. 516 of 2014](#))

PART 2: Consultation Process and Responses Received:

The Consultation Process:

- 2.1. The Authority initiated the public consultation process by publishing a consultation notice on its website on the 6th of April 2017, in the national press¹⁶ and by circulating it to various bodies by email. The notice is reproduced at **Appendix 1** and the list of recipients of the email notification are detailed at **Appendix 2**.
- 2.2. Written submissions were sought in respect of the three issues outlined in section 120 of the Act. Respondents were asked to set out their reasons and to provide any available evidence that may be deemed relevant. The notice indicated that the Authority may publish submissions received on their website or otherwise, therefore, respondents were asked to highlight any commercially sensitive or confidential information contained in their submissions.
- 2.3. The Authority received eight submissions from the following persons and organisations:
 - a. Bar Council
 - b. Competition and Consumer Protection Commission
 - c. Kieran Fitzpatrick
 - d. King's Inns
 - e. Padraig Langsch
 - f. Law Society
 - g. William McLoughlin
 - h. Mental Health Commission
- 2.4. None of the respondents highlighted any information that was commercially sensitive or confidential. Therefore, the full submissions will be published by the Authority in due course.
- 2.5. The Authority is grateful to all of the respondents who took the time to make a submission. The submissions received were of a uniformly high standard and provided the Authority with many highly relevant and useful observations.
- 2.6. Overall the number of responses was disappointingly low. The Authority is particularly concerned that the voices of certain key stakeholders are not being heard *via* this public consultation. So while the Authority is very pleased with the level of engagement and the detail of the submissions received, the Authority is concerned that there was a relatively modest response by and on behalf of both individual legal practitioners and also consumers of legal services.

¹⁶ The Notice was placed in the Irish Times, Irish Independent and the Examiner.

- 2.7. The Authority considers that the views of the following groups are required to ensure that any recommendations of the Authority on this issue are fully informed by the views of all stakeholders: -
- a. the business community including representative bodies,
 - b. public service (including civil service Departments) and public sector organisations,
 - c. professions and their representative bodies, including unions,
 - d. health and education service providers, including hospitals, schools and third level institutions,
 - e. solicitors firms of various sizes, geographical location and specialisation,
 - f. members of the junior bar¹⁷,
 - g. members of the senior bar,
 - h. consumers and consumer representative bodies,
 - i. insurance industry.
- 2.8. In the absence of such views, the Authority considers it to be premature to arrive at final recommendations on this issue. Part 3 of this report details the importance of these issues and their relevance in the context of any recommendations that may be made in respect of the new business structures envisaged by the Legal Services Regulation Act¹⁸.
- 2.9. Therefore, as will be seen in part 4, the Authority is recommending a further direct consultation process to ascertain the views of all stakeholders. It is intended that this process will assist the Authority in gathering important data on the market for legal services generally and will feed into all aspects of the work of the Authority in the future.

Outline of Submissions Received:

- 2.10. The content of the submissions can be summarised in the following table.

Table 1: Outline of Submissions Received

Respondent:	Should Barristers hold client moneys?	Should there be direct access in contentious matters?
Bar Council	No	No
Competition and Consumer Protection Commission	Yes	Yes
Kieran Fitzpatrick	Yes	Yes

¹⁷ A submission was received from one practising barrister and another person currently studying for the bar.

¹⁸ See part 8 of the Act.

King's Inns	No	No
Padraig Langsch	No view expressed	Yes
Law Society	Recommends protection measures if to be allowed.	No
William McLoughlin	No view expressed	Yes
Mental Health Commission	No view expressed, save that 'appropriate controls' should be in place if allowed.	Yes

2.11. The contents of each submission will now be summarised¹⁹.

The Council of the Bar of Ireland:

Overall Summary:

- 2.12. In summary the position of the Council is that:
- a. The restriction on legal practitioners, other than solicitors, holding client moneys should be retained.
 - b. Mechanisms should not be devised to facilitate the holding of client moneys by barristers.
 - c. Barristers should not be permitted to accept instructions in contentious matters from persons other than solicitors.

Current Position:

2.13. The current Code of Conduct of the Bar prohibits barristers from 'directly or indirectly administering or handling the funds or assets of any client...'²⁰. Solicitors are subject to a multi-layered regulatory framework in relation to their handling of client moneys including account regulations, inspections and a statutory compensation fund. The Law Society retains their inspection functions under the new Act and also administration of the compensation fund.

2.14. The current Code of Conduct for barristers requires, with limited exceptions, that barristers be engaged through a solicitor. Since 1990 direct access in non-contentious matters has been permitted to certain approved bodies. Solicitors may provide all and any of the services provided by barristers. Solicitors enjoy full rights of access to all courts.

Advantages of the Split Profession Model:

2.15. Clients from all corners of society will continue to have access to a pool of legal expertise on a flexible and cost effective basis. Due to low administration costs, barristers remain more likely to accept work on a 'no foal, no fee' basis. The benefits

¹⁹ Where possible these summaries have followed the layout of the submission received.

²⁰ See Rule 2.19.

of an independent referral bar are maintained, (cab-rank rule, direct competition between barristers, engagement only when required, development of specialist expertise.) Additional costs are not currently incurred due to the holding of client moneys. Barristers will continue to bring fresh, independent and objective perspectives to a case.

Cost-effective and efficient nature of current model:

- 2.16. Barristers primarily provide specialist advocacy and advisory services. Barristers compete directly with each other for a limited pool of work. Barristers do not currently compete directly with solicitors as they provide different services. This model provides flexibility and results in; wider access to specialist services for a wider number of people, greater competition between barristers which drives down costs and the delivery of a legal service on the client's own terms.

Greater access to justice:

- 2.17. The current administration costs are a fraction of those in running a full service legal practice. This results in a greater willingness to take cases on a 'no foal, no fee' basis. This is unlikely to be the case were the restrictions to be lifted. The relaxation of the current restrictions will lead to the commercialisation of the specialist legal services currently provided by barristers.

Competition between Barristers:

- 2.18. The client is guaranteed access to specialist legal services as barristers are obliged to accept the work, subject to a number of limited exceptions. Barristers are obliged to provide an estimate of their fees which enables clients and solicitors to 'shop around'.

Delivery of specialist services in a flexible manner on client's own terms:

- 2.19. Clients will often engage a barrister on a 'once off basis.' This encourages a client to only engage a barrister when a need arises.

Benefits inherent in the 'division of labour' model:

- 2.20. The current model does not result in a 'doubling up' of labour as currently solicitors and barristers fulfil distinct roles. The roles are akin to that of a GP and a Consultant.

Benefits to clients:

- 2.21. There is little justification for the relaxation or removal of key distinguishing features between the professions. Currently clients only engage barristers if and when the

need arises. Clients can ‘shop around’ and take advantage of the manner in which barristers compete for work. The current model encourages barristers to develop specialist skills.

Regulation – cost and risk:

- 2.22. If barristers were to handle client moneys an all-encompassing code, similar to that currently in place for solicitors, would be required to be introduced. This would be extremely costly. It is unclear how these costs would be met.
- 2.23. In the interests of maintaining independence, members of the Law Library will not handle client money and will not accept instructions directly from clients in contentious matters. Therefore, members of the Law Library cannot be called upon to fund such a scheme.
- 2.24. Similar to the conclusions the UK Bar Standards Board reached in 2012, the handling of client moneys creates one of the greatest areas of regulatory risk. The costs of a scheme of regulation to mitigate such risk far outweighs any potential benefits.

The benefits of independence in the administration of justice:

- 2.25. As barristers fulfil a different role to that of a solicitor, they have limited interaction with the client. This enables them to consider a case in an objective manner and to approach a case from a fresh perspective.
- 2.26. Solicitors and clients rely on barristers to be able to offer an entirely objective point of view. Members of the public have a fundamental right to obtain legal advice from persons who are in no way influenced by, or beholden to, other person or entities. The current model maintains an important degree of separation between the client and the barrister.

England and Wales:

- 2.27. In England and Wales, barristers are currently prevented from holding client moneys. Direct access is permitted in two situations; “Public Access” and “Limited Access”.
- 2.28. Limited Access permits certain bodies direct access to barristers. Barristers must be licensed under this scheme. Additional restrictions apply, eg the barrister must advise the client if it is in their interest that a solicitor be involved at any stage.
- 2.29. Public Access permits members of the public to access a barrister directly. The barrister must be registered with the Bar Council as a public access barrister and must have received specialist training. Barristers cannot accept instructions if it is in

the interests of the client and/or justice that a solicitor be instructed. This is an ongoing obligation.

- 2.30. There are significant restrictions on public access. Barristers cannot handle client moneys. Barristers cannot undertake the general management, administration or conduct of a client's affairs. Barristers cannot conduct a case in court if they have previously investigated or collected evidence in the case. Barristers may not 'conduct litigation' unless specifically licensed. The conduct of litigation includes the issuing of proceedings and filing documents at court.

The Case for the Retention of the S.120 Restrictions:

- 2.31. No clear economic case has been made out for a relaxation or removal of the restrictions. The proposed changes would result in a fundamental restructuring of the legal system and the fusion of the professions. There is a complete absence of any justification or basic reasoning offered for this radical restructuring. There has been no call, from any quarter, for these changes.
- 2.32. A comprehensive and independent economic analysis should be undertaken prior to any decision being taken.
- 2.33. The position in England and Wales does not allow for a full service model. There are restrictions on the litigation services that can be provided.
- 2.34. A relaxation of the S.120 restrictions will lead to the commercialisation of the specialist legal services provided by barristers. This will restrict access to those who can afford to engage barristers on a full service basis.
- 2.35. Barristers may currently be engaged by solicitors from all corners of the country. The 'cab-rank' rule ensures access to expert legal expertise for a greater number of clients. Currently barristers are only engaged if and when the need arises. Clients are encouraged to shop around. Barristers are encouraged to develop expertise and specialist skills in limited areas.
- 2.36. The cost of the additional regulation that would be required is not passed on to clients. Clients are not currently exposed to increased regulatory risk. The nature of the specialist advisory role enables barristers to provide an entirely independent and objective point of view.

Competition and Consumer Protection Commission:

Client Moneys:

- 2.37. The CCPC consider the retention on the current restrictions to be a major barrier to the successful operation of the new business structures permitted by the Act.
- 2.38. The issue requires to be resolved in order for Legal Partnerships to operate properly. If barristers are not permitted to hold client moneys, this would reduce the likelihood of barristers and solicitors forming Legal Partnerships. Any initiative in relation to this issue should be easily applicable to the other proposed business models of MDP's, LLP's and also the new profession of 'conveyancer'.
- 2.39. New regulations may be required for barristers that mirror the Law Society regulations relating to the handling of client moneys. Any regulatory scheme should undergo a 'Regulatory Impact Analysis' in order to determine the most efficient and lowest cost form available. Consideration should also be given to how non-legal partners are to be regulated in relation to the handling of client moneys in MDP's.
- 2.40. There is potential for the LSRA to consider a new approach to regulation in this area rather than simply replicating existing structures. The change will promote competition in that barrister partnerships will be able to compete with solicitors. This is also the case with the other new business structures proposed.

Direct Access:

- 2.41. The CCPC supports the removal of restrictions on direct professional access.
- 2.42. The current restriction increases the costs of legal services as there is a double mark-up. It also restricts competition as between barristers and between barristers and solicitors. The current arrangement has potential for the barrister to consider the solicitors needs over their clients. This is particularly so in relation to fees. There is also increased potential for misunderstanding. The removal of the restriction will reduce the costs of clients who, in some cases, are fully capable of briefing a barrister directly.
- 2.43. The restriction will prevent Legal Partnerships from functioning effectively as the barrister partners cannot be accessed directly unlike their solicitor counterparts.
- 2.44. The experience in the UK indicates that direct access will be utilised in smaller cases. Larger cases will be unaffected. If the current system is more efficient, then it will persist. Barristers should have the freedom to choose how they operate and clients should be permitted to dispense with the services of a solicitor if they so wish.
- 2.45. There is no evidence that the UK experience has led to a decline in the quality of the service offered or an increase in the costs paid. If direct access is to be permitted, new rules in relation to advertising will be required for barristers

Kieran Fitzpatrick:

Client Moneys:

- 2.46. Barristers may have to hold funds less often than solicitors. A system of escrow accounts would provide adequate protection. A compensation type fund would not be required.

Direct Access:

- 2.47. The Cab-rank rule should not prevent direct access. It is unclear if it is capable of enforcement. There is no credible reason for maintaining it. The reduction of costs of litigation would increase the volume. This would allow greater specialisation and facilitate greater access.
- 2.48. It is the independence of individual barristers that is important rather than the representative group. The requirement to be instructed by a solicitor, does not enhance their independence. This two lawyer rule for barristers, does not apply to solicitors. Barristers may prioritise the interests of solicitors over that of their clients in order to secure work.
- 2.49. The two lawyer model leads to prohibitive costs in legal proceedings. This prevents meritorious cases being taken due to the fear of having to pay the other sides costs. It also leads to an increase of lay-litigants.
- 2.50. The two lawyer rule may be a breach of the Aarhus Convention which requires legal costs in environmental disputes not to be prohibitive.
- 2.51. In criminal matters a defendant who is not entitled to legal aid may only be able to afford a single lawyer. If this has to be a solicitor, it can prevent them having access to the barrister of their choice.
- 2.52. The 2005 Competition Authority report found that even if the preservation of an independent referral bar is regarded as a valid objective, the restriction was disproportionate to the achievement of that objective.
- 2.53. Any system should allow two-way referrals. Barristers should be able to refer clients to solicitors and vice versa.
- 2.54. The costs of solicitors attending barristers in court could be avoided by direct access.

- 2.55. The argument that barristers can convert to become a solicitor if they wish to provide direct access ignores that barristers have always marketed themselves as a profession consisting of superior advocates. The public may fear that they would not be as well represented by a solicitor as they would be by a barrister before the higher courts.
- 2.56. Permitting direct access would lessen the financial hardships on junior barristers. This would reduce the very high drop-out rates. The financial burdens particularly discriminates against those from a less privileged background.

The Honorable Society of King's Inns:

- 2.57. The King's Inns made submissions on both issues. They were not in favour of barristers holding client moneys or direct professional access being permitted in contentious matters.

Restriction on barristers holding client moneys:

- 2.58. The restriction on barristers holding client moneys ought to be retained as in the absence of compelling reasons for relaxation of the rule, in circumstances where the necessary protections are not in place and it is difficult to see how they could be put in place; any such relaxation would expose clients to unnecessary risks.
- 2.59. There would need to be a compensation fund similar to that operated by the Law Society. The administration burden in operating such a fund is difficult to overstate. There are 5 times less barristers than solicitors which would make funding any compensation fund costlier for individual barristers. There would also be significant administration costs. The costs to individual barristers would be significant and would lead to an increase in the costs of barristers' services.
- 2.60. It is unnecessary for barristers to hold client moneys. The work undertaken by solicitors and barristers is different. Solicitors provide conveyancing and probate work where it is necessary to hold client moneys. Barristers do not provide such services and there is no proposal to permit them to do so. Therefore, it appears that it is, to a considerable degree, unnecessary to permit barristers to hold client moneys.
- 2.61. The issue is connected to the question of direct professional access. The Society is of the view that the restriction on direct access should be retained. Therefore, where a barrister is instructed by a solicitor, it is unnecessary for the barrister to hold client moneys.

- 2.62. In relation to litigation, there is no need to permit barristers to hold client moneys. In the UK a model has been developed for a third party company to manage funds required to facilitate the provision of legal services directly by barristers.

Restrictions on barristers receiving instructions in contentious matters directly from non-solicitors:

- 2.63. If a client currently wishes to directly instruct the lawyer who will conduct the litigation and advocate on their behalf, they can at present instruct a solicitor to do so. Solicitors have full rights of audience in all courts. If a client wishes to instruct a barrister whose focus is on matters of speciality of barristers, namely drafting, advice, advocacy, negotiation, they may do so by instructing a solicitor and barrister.
- 2.64. In the UK direct access is provided for. In the UK solicitors do not enjoy full rights of audience as they do here. Of the c. 15,000 practicing barristers in England and Wales only 59 offer direct access litigation services. This is a strong contra-indication to any argument as to the necessity, practicability or desirability for direct access in contentious matters.
- 2.65. Owing to the ease with which barristers and solicitors may transfer between professions there is even less need to change the current system. If a barrister wishes to provide the services currently provided by a solicitor, they may do so by becoming a solicitor.
- 2.66. The junior members of the Bar have raised concerns in relation to the lack of direct access at the District Court level. The Society is of the view that any change is not in the interest of the profession as a whole, nor in the best interests of clients or the administration of justice. The concerns raised may be more effectively addressed *via* other measures and reforms.

Padraig Langsch²¹:

Direct Access:

- 2.67. The current prohibition on direct access to barristers in contentious matters may be a breach of the Constitution, the European Convention of Human Rights and the EU Charter of Fundamental Rights and Freedoms.
- 2.68. Pursuant to those documents it is arguable that persons have a right to choose who they wish to represent them in court. This could be a barrister and the requirement

²¹ Mr. Langsch had previously published his submission as an article on LinkedIn in February 2017

that access to a barrister must be through a solicitor could be seen as a breach of such a right.

- 2.69. There is also an argument that without the possibility of direct access impoverished litigants are being denied their right to a fair hearing. Lay litigants now account for a substantial portion of the cases before the courts. Such cases inevitably take longer to hear and the lay litigant is often not in a position to properly present their case or to properly challenge their opponent's case.
- 2.70. The junior members of the Bar are often looking for opportunities to gain experience in the superior courts and would be likely to take on such cases on a *pro bono* basis. If direct access to such barristers were permitted lay litigants could be represented leading to benefits for all parties.
- 2.71. Currently, solicitors are unlikely to take on such cases as the costs involved are prohibitive and the likelihood of recovering costs, even if successful, is diminishing in certain cases due to recent Supreme Court rulings.
- 2.72. This submission is relevant to the Authority's objectives of:
- a. Protecting and promoting the public interest,
 - b. Supporting the proper and effective administration of justice,
 - c. Promoting competition in the provision of legal services, and
 - d. Encouraging an independent, strong and effective legal profession.

The Law Society:

- 2.73. The Society recommends no change to the current restrictions on barristers receiving instructions in a contentious matter directly from a person who is not a solicitor. The Society made a number of recommendations relating to the protection mechanisms that would be required were barristers permitted to hold client moneys.

Client Moneys:

- 2.74. If barristers are to be permitted to hold client moneys they 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.
- 2.75. Solicitors are currently subject to the stringent requirements of the Solicitors Accounts Regulations 2014. There is also a statutory Compensation Fund to compensate clients of solicitors who have suffered pecuniary loss due to the dishonesty in the provision of legal services by a solicitor. The fund was established as clients had no adequate form of redress where monies were lost due to the

dishonesty, rather than the negligence, of the solicitor. Negligence claims are dealt with under a solicitor's professional indemnity insurance.

- 2.76. A barrister compensation fund will be required to be established on a legislative basis together with a claims handling system by the Authority or the Bar Council. There will also be a requirement for a demarcation between the Law Society Fund and the barrister's fund. This will be more acute with the introduction of Legal Partnerships and the possible introduction of Multi-disciplinary Practices.
- 2.77. There will be a requirement for a financial regulator for barristers, similar to how the Law Society currently regulates solicitor's accounts. Such a regulatory system would include detailed rules, an inspection regime, annual accountant's reports, regulatory committees, disciplinary powers and limited practicing certificates.
- 2.78. Provision would have to be made for the automatic suspension from practice of a barrister who is adjudicated bankrupt. Conditions may need to be imposed, via a practicing certificate arrangement, where a barrister has a personal insolvency arrangement or unsatisfied judgments.
- 2.79. Additional education would be required both for existing barristers as well as for prospective barristers.
- 2.80. There would be implications for the type and level of professional indemnity insurance to be taken out by barristers. There would be a need for an 'assigned risks pool' as an insurer of last resort for barristers who are unable to obtain insurance in the market. Run-off cover²² would also be required for barristers who have ceased to practice.
- 2.81. All of the additional regulation and protections that would be required to be put in place will inevitably have an impact on the cost of legal services provided by barristers. The financial regulatory costs of the Society in 2016 was €6.5 million. This cost was spread amongst 2,298 firms. All solicitors contribute to the Compensation Fund, irrespective of whether they hold client moneys or not. In 2017 the contribution was €760 per solicitor.

Direct Access:

- 2.82. 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. Currently barristers can be assured that due diligence has been conducted by the solicitor including risk profiling and anti-money laundering

²² Most insurance policies operate on a claims made basis. This means that there must be a policy of insurance in place at the time the claim is made rather than when the loss arose. Where a solicitor has ceased practice, 'run-off' cover is provided to cover claims that may be made after the solicitor has ceased in practice.

compliance. There appears to be an assumption that providing direct access will eliminate duplicated work. The work done by solicitors and barristers is different. If direct access is provided the same amount of work will be required to be carried out, albeit by one person.

- 2.83. While barristers are currently 'designated persons' under the anti-money laundering legislation, in practice it is the solicitor who carries out customer due diligence and reporting obligations on receipt of instructions. If direct access is permitted barristers will be obliged to take on these responsibilities. This will require further education and increased regulatory oversight of barristers. These costs would be passed on to the client.
- 2.84. The obligations under the Act in relation to giving information to the client in respect of legal costs will now fall on barristers. This will be an increased administrative cost. The current position whereby barristers are not permitted to sue clients for recovery of fees will have to be changed.
- 2.85. Direct access will result in increased exposure for negligence claims with consequential impact on the cost of Professional Indemnity insurance. Run-off cover may be required if barristers are permitted to hold client moneys and/or direct access is permitted. This issue is covered in comments on barristers holding client moneys above.
- 2.86. Barristers would need to maintain their own comprehensive client files. Legislation may be required to deal with client files when a barrister retires or when they are suspended from practice or suddenly die. A similar procedure for 'distressed closures' may be required to that currently operated by the Law Society.
- 2.87. The current professional codes will need to be changed. It might not be possible to apply the 'cab rank rule' for direct professional access.
- 2.88. Permitting barristers to hold client moneys and providing direct professional access would amount to a fusion of the professions by the back door. This would be to preempt the consultation and report on the unification of the professions that the Authority will be undertaking in accordance with S. 34(1)(b) of the Act.
- 2.89. The ease of transfer between the professions, for those with 3 years professional practice, allows barristers who may wish to hold client moneys, or have direct professional access to do so by becoming a solicitor.
- 2.90. If clients wish to reduce the costs of engaging both a solicitor and barrister in contentious matters, they are free to instruct their solicitor to advocate on their behalf directly before the courts.

- 2.91. There would be a substantial cost to barristers in permitting the holding of client moneys and in providing direct professional access. There may be those in the profession who want neither and will be forced to subsidise the regulatory and other costs involved.

William McLoughlin:

- 2.92. The current restrictions are only found in the Bar Council code of conduct and have no standing in law and are not justified. The Rules of the District Court would appear to currently permit direct access. There may be an implied restriction in the rules. There are no rules on the issue in the rules relating to the Circuit or higher courts.
- 2.93. Maintaining the status quo deprives the public and the junior bar of the benefits of real competition. It is increasingly difficult for the junior bar to stay in the profession. Direct access would assist the public in easily obtaining a 'second opinion' in relation to their case. 'Second opinions' are common in other professions – eg medicine, but not at the Bar.
- 2.94. The traditional business model is now 'dead'. There is a shift away from litigation to other methods of dispute resolution. The Law Society is training solicitors in areas traditionally the preserve of the Bar such as advocacy and court skills.

Mental Health Commission:

Direct Access:

- 2.95. The Mental Health Commission is in favour of allowing direct access to barristers as it appears to be aimed at reducing costs and improving efficiency.
- 2.96. It would have been beneficial for the MHC to have been able to engage counsel without the need to have instructed a solicitor first. The MHC has specialist knowledge in their area. The MHC is aware that solicitors have full rights of audience without the need to engage a barrister. The MHC encourages such an approach.

Client Moneys:

- 2.97. The MHC does not propose to comment on this, save to say that appropriate controls to protect client moneys should be in place.

PART 3: Discussion & Analysis:

- 3.1. The Authority has examined with great interest the approach taken to handling of client monies and to direct access in a number of other Common Law jurisdictions and their experience is summarised below.

England and Wales:

- 3.2. England and Wales has a legal profession which is similarly split into a solicitor's and barrister's branch. However, changes have been introduced to the English and Welsh system over the past decades which are worth noting in the context of this review.

Direct Access:

- 3.3. The Bar in England and Wales offers three types of direct access²³ to barristers:
- a. International access – which enables clients based overseas to directly access a barrister practicing in England and Wales.
 - b. Licensed access – which enables organisations or individuals with particular expertise or experience to obtain a licence from the Bar Standards Board to instruct barristers directly. Currently there are 162 such organisations ranging from accountants and professional associations through to organisations providing advice and support to individuals for employment, debt and tax matters. Barristers who undertake direct access have additional rules which apply above and beyond their general code of conduct and licence holders for direct licensed access are also bound by regulations.
 - c. Public access – which is permitted in circumstances in which professional litigation support is not deemed necessary. This is governed by conduct rules and requires barristers to be trained to undertake such work. In addition, they must maintain a log of Public Access cases they have dealt with, including any issues or problems which have arisen. They must make this log available, on request, to the BSB for review; and seek feedback from their Public Access clients on the service provided. In 2013, public access was widened to enable junior barristers of fewer than 3 years' practising experience to also undertake Public Access work if they complete the new Public Access training.
- 3.4. The BSB rules²⁴ for both forms of direct access are similar and include the following:
- a. Barristers must have received approved training for public access work,

²³ For an interesting discussion of the operation of direct access in the UK see Flood & Whyte, 'Straight there, no detours: direct access to barristers', *International Journal of the Legal Profession*, Vol. 16, NOS. 2-3, July-November 2009. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1427889

²⁴ See rules rC119 to rC141 together with the 'Public Access Scheme Guidance for Barristers' document. Both available on www.barstandardsboard.org.uk

- b. Barristers must ascertain whether it would be in the best interests of the client to instruct a solicitor or other professional client. This is an ongoing requirement throughout the case and may result in the barrister withdrawing from the matter if the client refuses to instruct a solicitor.
- c. Barristers must take such steps as are reasonably necessary to ensure that the client is able to make an informed decision about whether to apply for legal aid or whether to proceed with public access.

3.5. Recent research undertaken jointly by the Bar Standards Board and the Legal Services Board showed that:

- a. Just over half of the barristers registered on the public access scheme surveyed had undertaken up to five cases in the past year. While a relatively small proportion of barristers' overall caseload, it has increased markedly over the past three years.
- b. Public access is most commonly used in family, chancery, employment, commercial and general common law.
- c. The barristers surveyed considered that: There have been relatively modest benefits for consumers as a result of the reforms to public access in 2013, with respect to widening choice, improving timeliness of access to services and reducing costs but the volume of public access work is expected to continue to increase over the next few years. A barrier to take up of the scheme has been lack of awareness of its existence. There were no perceived problems with the regulatory framework surrounding the scheme.

Holding of Client Moneys:

3.6. In England and Wales, a range of authorised legal professionals are permitted to hold client money (including solicitors, licensed conveyancers, legal executives, patent and trade mark attorneys) and the accounts rules which apply to them vary somewhat. All of the legal professions accounts rules contain basic requirements on holding money separately, reporting on it and accounting for it. The level of protections which apply, mandatory levels of insurance and the potential access to compensation do vary across the professions. This does not appear to have caused undue confusion amongst consumers of legal services, nor prompted a 'race to the bottom'. The ability of lawyers to choose a regulator of their entity as a result of the Legal Services Act 2007, has prompted a number of solicitors who wish to operate without client accounts to sign up to be regulated as entities under the lower cost regulatory model through the Bar Council.

3.7. In England and Wales, barristers who are not instructed by solicitors are able to use a third party escrow agent (BARCO - a 3rd party company operated by the Bar

Council²⁵) to hold money on their behalf. Barristers will ask their clients to pay funds for fees, disbursements, settlements or other costs associated with legal services into a specific BARCO bank account using a unique reference number. Once the funds are received by BARCO, the parties shall have a contractual right only to be paid or repaid in accordance with the agreement. When funds are required to be released from that account, the barrister liaises with BARCO to organise that transfer which must comply with what has been agreed in the contract. As a 3rd party escrow agent, BARCO is regulated by the Financial Conduct Authority and is therefore subject to the protections and controls which apply to any deposit taking institution.

- 3.8. It is the stated view of the Bar Council that where money is held by BARCO, there are fewer vulnerabilities, as the money is only released at the clients consent and in accordance with a contractual agreement. All funds received by BARCO remain in a segregated BARCO Client Monies Account and are protected by insurance against negligence, unauthorised payments or losses arising from fraud.

New Zealand:

- 3.9. In New Zealand, there is a single fused legal profession in which all lawyers, regardless of whether they choose to specialise in advocacy or general practice, are required to fulfil the same conditions on admission. But once admitted, a New Zealand lawyer can choose to obtain a practising certificate as a 'barrister sole'. Barristers sole are not permitted to practise in partnership with other lawyers but may employ other barristers and incorporate, in order to limit their liability, provided that the barrister is the sole director and shareholder. In 2016 there were 13,121 lawyers holding practising certificates in New Zealand of which 1,339 had opted to become barristers sole.

Direct Access:

- 3.10. New Zealand has been widening direct access to barristers sole in recent years, notwithstanding the fact that the rest of the profession is fused. Direct access by non-lawyers to barristers sole is permitted when they undertake the following work:
- a. Providing legal opinions;
 - b. Acting as a duty lawyer;
 - c. Providing pro bono assistance to a non-profit legal advice service;
 - d. In refugee status matters under the United Nations Convention on the Status of Refugees;
 - e. Representing a client under the Mental Health (Compulsory Assessment and Treatment) Act 1992;
 - f. Representing a prisoner in an internal disciplinary hearing.

²⁵ See <http://www.barcouncil.org.uk/supporting-the-bar/barco/>

- 3.11. Barristers sole are not automatically entitled to take direct instructions and must first qualify to do so by fulfilling three conditions. They must:
- a. be practising on their own account as a barrister sole (ie. They cannot take instructions as an employed barrister working for a barrister sole);
 - b. have completed a training course (the Law Society's Intervention Rule Webinar or a training module on practising on own account); and
 - c. have satisfied the Law Society that they are suitable to accept direct instructions. This requires disclosure of upheld complaints and the provision of arrangements for running their practice should they become incapacitated.
- 3.12. In addition, the barrister sole must inform clients in writing of: a) their capacity and experience in relation to the requested service; b) their advocacy experience; and c) any disadvantage which the barrister believes may be suffered by the prospective client if no instructing lawyer is retained. The sort of circumstances in which direct access may be contrary to the interests of the client or justice which the New Zealand Law Society explicitly identifies include: Cases involving a significant volume of discovery/disclosure, and instructions for which work may need to be undertaken concurrently. Clients must also be informed of (a) The basis on which the fees will be charged, and when payment of fees is to be made (b) The barrister's professional indemnity arrangements. If a barrister sole is not indemnified, this must be disclosed in writing to the client. (c) The fact that the Lawyers' Fidelity Fund does not provide any cover in relation to a barrister as he or she does not hold client's funds. (d) The procedures in the barrister sole's practice for the handling of complaints by clients, and advice on the existence and availability of the Law Society's complaints service and how to contact the Law Society to make a complaint.

Handling of Client Money:

- 3.13. A law firm or lawyer (not barrister sole) working in sole practice must have a principal registered with the New Zealand Law Society as the Trust Account Supervisor (TAS). In order to be a TAS, a lawyer must complete a course of training, and pass an examination in trust accounting, prescribed by the New Zealand Law Society. Lawyers may choose not to hold money, in which case they will need to make a declaration to the NZLS to that effect. Where a law firm or lawyer does hold client money, they need to supply a monthly certificate to the NZLS when the trust account has been written up and balanced for the month. They must also report to clients on at least an annual basis in relation to money and assets held on their behalf. Lawyers/law firms which opt out of holding client money do not need to pay the levy for the compensation fund (reducing their cost of practising from the equivalent of €1300 per head to €1100 per head). There are only a small number of law firms who choose not to hold trust accounts.
- 3.14. Barristers sole cannot receive or hold money for, or on behalf of, another person as they are not permitted to operate trust accounts. They are also unable to receive

fees in advance as these are deemed to be trust funds until an invoice has been issued for work and services undertaken. Fees paid to barristers sole in advance must either be held by an instructing solicitor in a trust account; or held by an escrow agent in accordance with the rules of the New Zealand Law Society.

Australia:

3.15. Since 2008, Australia has been working towards a ‘uniform profession’ across the country which involves admission in any one Australian state or territory resulting in a lawyer becoming an officer of all Supreme Courts and holding an Australian practising certificate. A Uniform Model law was adopted in 2014 although it has so far only been implemented by New South Wales and Victoria. Under the Model Law, admitted lawyers may practise in a range of different ways, including as a barrister. The two distinguishing features of barrister practice are independent, sole practice and a prohibition against holding client money. On the other hand, all Australian lawyers have full rights of audience, so the distinction is one of choice on the part of both practitioners and clients. Despite the ability of clients to access legal practitioners with full rights of audience, there is a debate around direct access and holding of client money by barristers.

Direct access:

3.16. In Australia, direct access work was expanded under the Uniform Legal Profession Act 2014. It is now permitted for corporations, accounting firms or government departments who do not employ their own in-house solicitors. The Australian Bar has suggested that direct access may be appropriate for urgent applications, less complex litigation or advisory work.

3.17. In its submission to the Australian Productivity Commission’s enquiry on civil justice²⁶, the NSW Bar Association strongly supported the direct briefing of barristers, saying:

“[There is] judicial authority for the proposition that, where appropriate, the early and direct briefing of counsel is a cost-effective option for litigants, improving access to justice, both in terms of cost benefits for parties, and efficiencies for the civil justice system. Direct briefing is highly effective in circumstances involving sophisticated clients, such as in-house counsel.

The removal of external solicitors from the litigation process can save legal costs. The New South Wales Barristers’ Rules in some circumstances facilitate the direct briefing of the bar by clients, and

²⁶ <http://www.pc.gov.au/inquiries/completed/access-justice/report>

set additional professional standards for barristers in these circumstances and direct involvement of a barrister can save time and money.”

Holding money:

- 3.18. As a general principle, trust accounting rules in Australia are similar to those applied in other common law jurisdictions. However, under the Uniform Act 2014, a State or Territory may modify or disapply the ability of “specified law practices or classes of law practices” to hold client money in general, or specified kinds of trust money. In Victoria, for example, a proportion of client account must be deposited with the Legal Services Commission where it acts as some insurance against defalcation and provides a source of interest income which is retained and used to support research into the legal sector and access to justice projects. Practices may also apply for a waiver not to hold client money.

Singapore:

- 3.19. Singapore has a fused legal profession so the question of direct access does not arise. There are, however, provisions relating to the handling of client money which might be relevant to the debate here.
- 3.20. Broadly speaking, the approach to holding client money in Singapore is similar to the rest of the common law world. Client monies must be held separately and accounted for, and there are training, inspection and reporting obligations in place as well as a compensation fund.
- 3.21. However, Singaporean lawyers may choose not to hold any client money and thus obtain an exemption from the requirement to provide an annual accountant’s report as part of the practise certificate renewal process as well as an exemption from the fidelity fund contribution (equivalent to €65 per lawyer in the firm per year). As an alternative, the lawyer can opt to use the Singapore Academy of Law (SAL), which is a statutory body, as an escrow agency in conveyancing transactions and similar arrangements. The SAL levies a service fee of €100 per conveyance, which replaces the cost of paying for accountants’ reports, the cost of the fidelity fund to the firm and the cost which is likely to be reflected in a higher professional indemnity insurance premium.

Hong Kong:

- 3.22. The legal profession in Hong Kong is a traditional common law, split profession, comprised of solicitors, who are regulated by the Hong Kong Law Society and a referral bar which is regulated by the Hong Kong Bar Association.

Direct Professional Access:

- 3.23. Hong Kong barristers are allowed, under limited circumstances, to take direct instructions. The “Direct Professional Access Scheme” enables barristers to accept direct instructions from recognised professional bodies and their members. The Hong Kong Bar Association has sole authority to grant this status. In order to obtain recognition, the members of the professional body concerned must provide skilled and specialist services and be regulated by an internal written constitution which has entry requirements and a disciplinary code. They must also be able to demonstrate the likelihood of their members having a significant demand for barristers’ services. Recognised bodies include the Taxation Institute of Hong Kong, the Hong Kong Institute of Surveyors and the Estate Agents Authority.
- 3.24. Members of professional bodies wishing to instruct barristers must demonstrate that the issues on which they are seeking advice or representation fall within their professional expertise, that the services of a barrister would be of benefit to their clients and/or employers and that they hold professional indemnity insurance.
- 3.25. Barristers can only accept direct instructions if they hold indemnity insurance which would be considered reasonable given the value of the work to be undertaken. They are prohibited from accepting direct access work which involves:
- receiving or handling clients’ money;
 - appearing in the Court of Final Appeal, the High Court, the District Court or Magistrate’s Court; or
 - where it would be in the client’s best interests to instruct a solicitor.
- 3.26. Barristers are not required to undertake additional training before accepting direct access work but are bound by additional conduct and record-keeping requirements, and are encouraged to follow the recommended standard terms of engagement published by the Bar Association.²⁷
- 3.27. Hong Kong barristers may also take direct instructions from overseas clients under the overseas rules.

Client money:

- 3.28. Hong Kong solicitors may handle client money under rules that are similar to those operated by the Law Society of Ireland. Client money must be held separately from money belonging to the solicitor’s practice, in a bank account explicitly designated as a “client account” and a range of accounting and reporting requirements apply to the management of client money and to withdrawals from client account.

²⁷ See <http://www.hkba.org/content/direct-professional-access>.

- 3.29. Hong Kong Barristers, in contrast, may not receive or handle clients' money. However, in the case of Direct Professional Access work, barristers are entitled to require payment of their fees at the time of accepting instructions and may submit interim fee notes at intervals of not less than two months.

South Africa:

- 3.30. Historically South Africa has had two separate legal professions: Attorneys, whose functions are similar to solicitors, and advocates whose professional duties and practice are similar to barristers. Following the passage of the Legal Practice Act 2014 (the Act)²⁸, attorneys and advocates are now known collectively as 'legal practitioners' and will, from 2018, be regulated by a single body, the Legal Practice Council (LPC). This body is in the process of being set up and will operate as the legal profession's sole regulator from 2018 onwards, replacing the South African Bar Council and absorbing the provincial law societies. Despite the creation of a single regulator, it will still be possible for legal practitioners to act only as an advocate, undertaking a separate training route and adhering to a different code of conduct. From 2018, when the new Legal Practice Council takes effect, advocates will be able to practise as traditional advocates or 'trust account advocates'.

Direct Access:

- 3.31. Under s.34(2)(a)(ii) of the Legal Practice Act, advocates may provide legal services directly to members of the public without restriction. This will be governed by further detailed rules which will be made by the new Legal Practice Council once it is established in the course of 2017/18. However the National Forum on the Legal Profession, which is acting as a preparatory body prior to the establishment of the LPC, has promulgated a new code of conduct for legal practitioners which will be effective from 2018. This new code contains detailed rules around the acceptance of direct access instructions, including the requirement for cost estimates, information about fee rates and an outline of work to be done.

Holding client money:

- 3.32. The new Act starts from the premise that all legal practitioners, including both advocates and attorneys, are entitled to hold client moneys. Advocates may choose to practise either as traditional referral barristers without the ability or need to hold client money, or they may opt to become 'trust account advocates' which entitles

²⁸ See Legal Practice Act 2014 See

<http://www.lssa.org.za/upload/documents/Legal%20Practice%20Act%20GG%2038022%20of%2022%20September%202014.pdf>.

them to take direct access instructions and hold client money. Trust account advocates must:

- have a Fidelity Fund²⁹ certificate; and
- notify the South African Legal Practice Council of their intention to practice with a Fidelity Fund Certificate.

3.33. In order to register as eligible to take direct access instructions, advocates will be required to apply to the LPC³⁰. They will then need to complete a legal practice management course approved by the LPC. The application is accompanied by an upfront fee and contributions must be paid to the Fidelity Fund thereafter. If granted, client monies must be held in a trust account opened at a bank that complies with the Act's requirements concerning trust accounts. Additionally, the Act gives rise to rigorous accounting and reporting standards in respect of these trust accounts. As in other jurisdictions, clients' money must be held entirely separate from practitioners' money and/or assets.

3.34. It should be noted that none of these provisions have yet come into effect and therefore it is not possible at this stage to consider how they will operate in practice.

Conclusions to be drawn from experience elsewhere:

3.35. The experience of other jurisdictions with split professions maintaining the traditional solicitor/barrister divide suggests the following:

- a. It is possible to run different regimes for holding client money alongside each other with different levels of protection (see for example, England and Wales). Were barristers to be permitted to hold client moneys in Ireland it may not necessarily result in an identical regime to that imposed on solicitors;
- b. There is a growing realisation in other jurisdictions that holding client money is costly and adds significantly to insurance premiums as well as regulatory cost, which are inevitably passed on to clients. Moreover, lawyers may not all practice in ways that require the holding of client money, so choice is increasingly being offered to solicitors as well as barristers as to whether or not they want to hold money.
- c. It is possible for an independent referral bar in which practitioners do not hold client money (as in Australia) to sit alongside a scheme in which there are classes of barristers who are authorised to hold client money. There are however, no examples of other jurisdictions in which barristers act as independent self-employed professionals and hold money.

²⁹ The Fidelity Fund itself is a statutory body which protects the public against losses suffered as a result of the theft of funds by practitioners. See <http://www.fidfund.co.za/claims-procedure/losses-covered-by-the-fund/>.

³⁰ The exception being if the practitioner is in the full time employ of the South African Human Rights Commission, or a State advocate, and handles the money and/or property in the course of their employment.

- d. All of the jurisdictions examined for this report permit some form of direct access. It can be seen that access can be limited by client type, work undertaken or a combination of both.
- e. All jurisdictions have put in place a system which provides for additional conduct rules, guidance and training for lawyers taking on direct access type work.

Other Ongoing Authority Reports on New Business Models:

- 3.36. This public consultation and report is being carried out alongside two other public consultation processes that the Authority has been undertaking. These relate to the issues of Legal Partnerships³¹ and Multi-disciplinary Practices³².
- 3.37. Legal Partnerships, or LP's, are a new type of partnership between lawyers to be introduced by the Act. They will permit for the first time barristers to form a business partnership with another barrister and for solicitors and barristers to form business partnerships. Within such partnerships it will also permit barristers to be employed by a solicitor and also for solicitors to be employed by a barrister.
- 3.38. Multi-disciplinary Practices, or MDP's, if introduced, are another new type of legal business model contemplated by the Act. MDP's will allow a solicitor or barrister to form a business partnership with a non-lawyer to provide legal and other services. For example a solicitor, barrister and accountant may form a partnership offering legal and accounting services to clients.
- 3.39. It is clear to the Authority that the outcome of this consultation and report will have a significant impact on both LP's and MDP's in terms of nature, structure, risk profile, attractiveness, potential for success and regulation.
- 3.40. For example, if a barrister partner or employee within a LP or MDP is permitted to hold client moneys this will have a direct impact on:
 - a. the content of Regulations to be made by the Authority under S.116,
 - b. the minimum Insurance requirements for such partnerships,
 - c. the risk profile of such partnerships, and
 - d. the authorisation process for LP's to operate as a Limited Liability Partnership.
- 3.41. Similarly, if direct professional access is permitted for barristers in contentious matters, the attractiveness of LP's to barristers may be diminished. This is because it is assumed that barristers will be attracted to forming a LP due to the potential

³¹ For further details see <http://lsra.ie/en/lsra/pages/section118legalpartnerships>

³² For further details see <http://lsra.ie/en/lsra/pages/section119multi-disciplinarypractices>

benefits of being briefed by solicitors within the LPs. If there is direct access, this element will not be as prominent as might otherwise be the case.

- 3.42. This emphasises the requirement for the Authority to ensure that all voices have been heard during this consultation process. The recommendations to be made, if accepted and acted upon by the Minister, could fundamentally alter the structure of the legal profession in the State.

Possible Outcomes of Recommendations:

- 3.43. The Authority considers that for the purposes of discussion, it would be useful to consider the potential recommendations that could be made. As can be seen below, there are four possible outcomes³³. By considering each outcome separately, the Authority has been able to consider and discuss all the issues that would arise for consideration as a result of each outcome.

- 3.44. The four outcomes can be shown in table form as follows:

	Should barristers hold client moneys?	Should there be direct professional access in contentious matters?
Outcome 1	Yes	Yes
Outcome 2	No	Yes
Outcome 3	Yes	No
Outcome 4	No	No

- 3.45. Each outcome will also be benchmarked against the statutory objectives of the Authority as set out at paragraph 1.3 earlier.

Outcome 1: Barristers holding client moneys and providing direct access in contentious matters.

Compensation fund:

- 3.46. There is a general consensus, in the submissions received, that the protection of clients must be a central component of any proposals. The submissions refer to a compensation fund type arrangement having to be put in place.
- 3.47. The Authority notes that not all regulated professions which hold client moneys operate a compensation fund.

³³ It will be seen in the discussion that there are in fact other outcomes to be considered as well. For example, some barristers may be permitted to hold client moneys whilst others may not. These sub-outcomes have not been listed.

- 3.48. Personal Insolvency Practitioners, PIP's, are regulated by the Insolvency Service of Ireland pursuant to the Personal Insolvency Act 2012 as amended. To become an authorised PIP a person must be³⁴: -
- a. a solicitor with a current practicing certificate,
 - b. a barrister called to the bar,
 - c. a qualified accountant and a member of a prescribed accountancy body,
 - d. a qualified financial advisor³⁵, or
 - e. the holder of a qualification in either law, business, finance or other appropriate similar qualification to the satisfaction of the Insolvency Service of Ireland.
- 3.49. Of these categories only solicitors, as a profession, operate a compensation fund for the benefit of clients.
- 3.50. The relevant regulations that deal with the accounts of PIP's provides as follows³⁶: -
- “A personal insolvency practitioner shall put in place and maintain on a constant basis robust controls and arrangements to safeguard funds received from or on behalf of debtors or held to the credit of debtors and to prevent the use of these funds for the own account of the personal insolvency practitioner or any person other than the creditor or debtor entitled thereto.”
- 3.51. Provision is also made for accounting records, inspections, enforcement matters and minimum levels of insurance. No provision is made for a compensation fund.
- 3.52. This example demonstrates that a compensation fund should not be assumed to be a mandatory requirement in every situation where a person holds client moneys, in order to adequately protect clients.
- 3.53. It is important to note that under this outcome barristers would not be permitted to offer two types of legal services which would account for a substantial portion of a client account - conveyancing and probate work. There would, however, be client moneys held in relation to litigation cases.
- 3.54. The restriction on these 'reserved activities'³⁷ only being carried out by solicitors would be maintained. Therefore, barristers will not be providing the services that give rise to a substantial number of claims on the Law Society Compensation fund.

³⁴ See regulation 3 of SI 209 of 2013, Personal Insolvency Act 2012 (Authorisation and Supervision of Personal Insolvency Practitioners) Regulations 2013.

³⁵ Being a person who holds a current qualification from the Life Insurance Association of Ireland, the Insurance Institute or the Institute of Bankers School of Professional Finance.

³⁶ Reg. 3(1) of S.I. 247 of 2013, Personal Insolvency Act 2012 (Accounts and Related Matters) Regulations 2013.

³⁷ See S. 58 of the Solicitors Act 1954, as amended.

3.55. It is the case that most jurisdictions which have ‘solicitors’ as a recognised profession, do provide for a statutory compensation type fund³⁸.

Barristers Compensation Fund:

3.56. Any proposed compensation fund for barristers would have to be put on a statutory footing, similar to that operated by the Law Society³⁹. It would need to be sufficiently resourced to meet claims as and when they are made. Such a fund does not currently exist and an issue arises as to where the initial funding would come from. This raises the following possibilities:

- a. Any fund be established by statute and required to reach a certain level prior to barristers being permitted to hold client moneys.
- b. The fund be financed via a loan from the exchequer to be repaid in due course.
- c. The fund would be solely financed from subscriptions made by barristers. As the fund is new, there will be a period of time before claims would be received. By the time claims were received, the fund would be at a sufficient level to meet those claims.
- d. The current compensation fund operated by the Law Society be merged with the new barristers’ fund to provide a ‘legal practitioners fund’. Both branches of the profession would be obliged by statute to contribute to the fund in proportion to their numbers/claims made.

3.57. The legislation would need to appoint a body to be the administrator of the fund and to undertake the supervisory and regulatory role currently undertaken by the Law Society in respect of solicitors.

Account Regulations:

3.58. There would also be a need to introduce account regulations similar to the current Solicitors Accounts Regulations. The Society helpfully provided as part of their submission, a copy of the current ‘Solicitors Accounts Regulations 2014’⁴⁰ as an example of the type of regulations that would be required to be put in place.

3.59. Such regulations would be required to deal with the following issues:

- a. a requirement for a separate account for client moneys,
- b. dealing with trust moneys,
- c. insolvency arrangements,
- d. maintaining accounting records,
- e. furnishing an annual accountant’s reports, and
- f. investigation of solicitors’ practices.

³⁸ See the recent study undertaken by the Solicitors Regulation Authority available at: <https://www.sra.org.uk/documents/SRA/comparative-study.pdf>

³⁹ See PART III of the Solicitors (Amendment) Act 1960 as amended.

⁴⁰ See S.I. No. 526 of 2014.

- 3.60. An organisation, such as the Authority, will need to be in charge of the administration and regulation of barristers' accounts.
- 3.61. Were a barrister not to be in compliance with these regulations there would need to be a mechanism for them to be suspended from practice. There would also need to be a practicing certificate arrangement, whereby an annual practicing certificate was withheld if the barrister was not in compliance with such regulations.

Licensed to Hold Client Moneys:

- 3.62. There is the also possibility that where barristers wish to hold client moneys, they apply to the Authority to be licensed for that purpose. This would permit the Authority to make additional regulations solely in respect of those barristers.
- 3.63. Such an approach would permit those barristers who saw a commercial or competitive advantage in holding client moneys to do so without burdening the other members of the profession with the additional costs of compliance with regulations.

Legal Partnerships & Multi-Disciplinary Practices:

- 3.64. This outcome has the greatest impact on the nature of legal partnerships and multi-disciplinary practices.
- 3.65. Under this outcome barristers may hold client moneys. Therefore, the concerns raised in the consultations on Legal Partnerships and Multi-disciplinary Practices in relation to the joint and several liability of barrister partners without having control over client funds, are largely addressed as they would have access to client moneys.
- 3.66. This outcome does raise the issue as to whether there is to be one client account of a Legal Partnership to which both the solicitor and barrister partners have access. If so, it would seem logical that only one Regulator have jurisdiction over that account. This would mean choosing whether the Law Society or the barrister financial Regulator would have jurisdiction. Similar issues arise for consideration in MDP's.
- 3.67. Consideration could be given to only permitting barristers who are partners in a LP or a MDP to hold client moneys. Where a barrister is not a partner in such a body, there would not seem to be as great a need for them to hold client moneys.
- 3.68. The provision of an escrow arrangement in England and Wales, see para. 3.7 above, is a useful example of how client moneys could be dealt with in a direct access model without permitting barristers to hold the moneys themselves.

3.69. If the holding of client moneys was restricted to these ‘barrister partners’ the issues in relation to a compensation fund and other issues identified in the report on Legal Partnerships⁴¹ remain.

Direct Access:

3.70. Under this outcome direct access to barristers is also permitted. This would allow barristers to provide a more comprehensive service to their clients. However, it should be emphasised, that direct access under this outcome does not involve barristers offering the same services as solicitors.

3.71. As indicated at paragraph 3.53 above the restriction on barristers providing conveyancing and probate services would remain. The maintenance of this restriction goes some way to meeting the objection that this outcome would result in a fusion of the professions ‘by the back door’ and would pre-empt the report to be prepared by the Authority on the issue⁴².

3.72. The submission of the Mental Health Commission provides an example of a client who would benefit from this outcome. In their case they submitted that due to their ‘specialist knowledge’ they would have benefited from being able to brief counsel directly in contentious matters.

3.73. Where clients would not have the level of ‘specialist knowledge’ that the Mental Health Commission, or other similar bodies, would have it would be important for the client to be made fully aware of the position. The UK has provided for a ‘client care’ letter to be issued by barristers when receiving instructions directly. The professional conduct rules also focus on whether it is in the best interests of the client not to engage a solicitor. If it is not the barrister may be obliged to refuse to act further in the matter⁴³.

3.74. Direct access need not be mandatory for barristers⁴⁴. This means that a barrister would not be obliged to take instructions directly from a client if they did not wish to do so. This would allow those barristers who saw an advantage in providing direct access to do so, whilst leaving the others free to only accept instructions from a solicitor.

3.75. The Authority notes that this is the current position under the ‘Direct Access Scheme’ operated by the Bar Council since 1990. Barristers must opt in to that scheme and it

⁴¹ See

<http://lsra.ie/en/LSRA/s118%20Report%20Final%20April%202017%20pdf.pdf/Files/s118%20Report%20Final%20April%202017%20pdf.pdf>

⁴² S.34 of the Legal Services Regulation Act requires the Authority to report on the unification of the professions by the 1st October 2020.

⁴³ See rules rC119 to rC141

⁴⁴ This is the position in England and Wales where barristers must agree to provide direct access.

is not mandatory on all barristers. Therefore the 'cab rank rule' does not apply as approved bodies, under the scheme, can only instruct barristers who offer direct access.

- 3.76. The advantages of the 'cab rank rule,' as outlined in the submissions, would be retained to a large degree. If a client wished to avail of the benefits of the rule, they may do so by first engaging a solicitor who would then instruct counsel under the cab rank system.
- 3.77. Where direct access in contentious matters is to be permitted, additional regulations would be required in relation to the administration of barristers' practices and the maintaining of client files.
- 3.78. It would seem to follow that the additional practice management costs could result in an increase in fees. However, as direct access is not mandatory, barristers can consider such matters when deciding whether or not to offer direct access. It will ultimately be up to consumers/clients to determine whether there are savings to be made in availing of a direct access service.
- 3.79. The submissions also point out that the rule prohibiting barristers from suing for their fees would have to be amended, as would the rules of court, insofar as they require a barrister to be attended by a solicitor in court.
- 3.80. Without an instructing solicitor barristers would have a greater burden under the Anti-money Laundering legislation in relation to due-diligence and reporting obligations.

Lay-Litigants & Junior Barristers:

- 3.81. The Authority notes the submission that direct access could assist lay litigants in dealing with the courts where they are unable to afford traditional legal representation. This would be achieved where the reduced costs of hiring a barrister directly would allow a lay litigant to obtain representation.
- 3.82. This option would appear to be open to lay litigants currently in that they could hire a solicitor to present their case to court. The current difficulty would appear to be that lay litigants cannot afford any legal representation at all, be it a solicitor, or a solicitor and barrister.
- 3.83. The Authority notes the submission that direct access would result in junior barristers accepting direct instructions from a lay litigant on a 'no win no fee' basis in order for the barrister to obtain experience of superior court advocacy⁴⁵.

⁴⁵ See the submission of Padraig Langsch.

- 3.84. The Authority also notes that there are already several organisations that offer representation to persons who cannot afford representation. The Bar Council has run a ‘Voluntary Assistance Scheme’⁴⁶ since 2004. Under this scheme assistance is provided on a *pro bono* basis to a requesting organisation or their client in certain areas of law.
- 3.85. There are also eight NGO’s that provide legal advice and, where appropriate, legal representation on a *pro bono* basis. These are the Free Legal Advice Centres (FLAC), Community Law and Mediation, Ballymun Community law Centre, Immigrant Council of Ireland, Irish Refugee Council, Mercy Law Resource Centre, Phoenix Project and Transparency Legal Advice Centre.⁴⁷
- 3.86. It is also the case that individual solicitors firms represent clients on a *pro bono* basis in certain matters. This can occur in an *ad hoc* manner or through a more formal partnership with an NGO⁴⁸. The Public Interest Law Alliance also runs a “Pro Bono Referral Scheme” that connects social justice organisations with free legal expertise⁴⁹.
- 3.87. Therefore there is an active *pro bono* sector within the legal professions currently⁵⁰.

Quasi-Judicial Bodies:

- 3.88. The legal work undertaken by barristers is not confined to the traditional courts system. Barristers also appear before various quasi-judicial bodies on behalf of clients. The rules preventing direct access equally apply to these bodies as they do to the courts⁵¹.
- 3.89. There would appear to be greater scope for direct access in contentious matters before quasi-judicial bodies than before the traditional courts. Often the procedures of such bodies are not as formal as those of the courts, and the need for a traditional solicitor service may be reduced.
- 3.90. It would also be the case that certain representative bodies would currently appear on behalf of their members before such bodies and may wish to instruct a barrister from time to time in a particularly difficult matter⁵².

⁴⁶ See <https://www.lawlibrary.ie/Legal-Services/Voluntary-Assistance-Scheme.aspx>

⁴⁷ See <http://www.independentlawcentres.ie/who-we-are.html>

⁴⁸ See for example the *pro bono* scheme run by A&L Goodbody solicitors in conjunction with the Irish Refugee Council in the area of asylum law. http://www.algoodbody.com/Corporate_Responsibility_Pro_Bono

⁴⁹ See <https://www.pila.ie/help/>

⁵⁰ See the survey undertaken by PILA in 2015 on *pro bono* work in the Irish legal sector.

<https://www.pila.ie/news-events/2015/03/16/survey-irish-lawyers-ready-willing-and-able-to-hel/>

⁵¹ See rule 5.23

⁵² For example, Trade Union officials frequently appear on behalf of their members before employment Tribunals.

Professional Indemnity Insurance & Risk Profile:

- 3.91. Under this outcome the risk profile of barristers would be altered from its current form. Receiving instructions directly and holding client moneys would expose barristers to greater risks of negligence actions than is currently the case. Greater risks would likely⁵³ lead to an increased professional indemnity insurance premium.
- 3.92. Under this outcome there is the possibility that direct access and handling of client moneys may not be compulsory for all barristers. This raises the possibility of an increased insurance premium only being payable by those barristers who opt in to the direct access system and those who choose to hold client moneys.
- 3.93. Provision would have to be made for an assigned risks pool, which would operate as an insurer of last resort for barristers who are unable to obtain insurance in the marketplace⁵⁴. Run off cover would also have to be available.

Associated Costs:

- 3.94. This outcome results in additional regulatory and compliance costs. Assuming that such costs would be levied on the relevant professions it is likely that such additional costs are likely to be passed on to the consumer.
- 3.95. It is unclear from the information currently available to the Authority, that there would be any significant savings achieved in permitting barristers to hold client moneys that could offset the additional regulatory/practice costs.
- 3.96. The CCPC in their submission identified increased competition between barristers and solicitors for the same work as a probable outcome of the removal of restrictions. Such increase in competition, it is argued, would lead to a saving in costs for the consumer. This may well be the case, however if barristers and solicitors are competing for the same work, this could be seen as a *de facto* fusing of the professions which would be to pre-empt the outcome of the report due to be prepared by the Authority on the unification of the professions⁵⁵.

Outcome 1 Benchmarked Against the Authority's Statutory Objectives:

- 3.97. This outcome would appear to promote the objective of promoting competition as it permits barristers to offer a new service to the market.

⁵³ Ultimately it will be a matter for the insurance market to price the increased risk. As outlined at para 2.7 the views of the insurance industry on these matters are unknown.

⁵⁴ See Reg. 11 of the Solicitors Professional Indemnity Regulations 2016. S.I. 534 of 2016.

⁵⁵ S.34(1)(b) requires the Authority to prepare a report on the unification of the professions within 4 years of establishment.

- 3.98. The professional principle to be promoted relating to acting in the best interests of clients, could be promoted by the requirements, similar to those in England and Wales, whereby barristers are obliged to ensure that their clients would not be better served by instructing a solicitor.
- 3.99. Both the Bar Council and King's Inns consider that this outcome would undermine the independence of barristers.
- 3.100. The objective of promoting the interests of consumers requires a balance to be found between 'protection' and 'promotion'. The current protections for client moneys held by solicitors is via the compensation fund, mandatory insurance and associated regulation. This comes at a regulatory and administrative cost, which is ultimately passed on to the consumer via the level of cost of legal services.
- 3.101. If consumers were to be exposed to a higher level of risk, there could be a reduction in the costs of legal services. This could be seen to be promoting the interests of consumers through a reduction in the cost of legal services. It would however, be reducing the current level of 'protection' afforded to consumers.
- 3.102. The evidence from the consultation indicates that the professional bodies favour a high level of protection to be afforded to consumers. No submission, from any party, suggested that it would be in the interests of consumers to reduce the level of protection afforded to consumers in order to benefit consumers by reducing legal costs. It is also notable that the Competition and Consumer Protection Commission favoured a high level of protections, similar to that afforded to clients of solicitors, should barristers be permitted to hold client moneys. The Commission was anxious that any such protections be the most efficient and cost effective.
- 3.103. This outcome could be seen as promoting the interests of consumers by permitting consumers to have direct access to barristers in contentious matters. This would be a new option for consumers not currently available to them. In particular this outcome would promote the interest of those consumers who would have a level of 'specialist knowledge'⁵⁶ over and above that of the average consumer.
- 3.104. The administration of justice would be served by having lay-litigants represented by a direct access barrister where the alternative is that they would be unrepresented before a court.

⁵⁶ See submission of the Mental Health Commission.

Outcome 2: Barristers not be permitted to hold client moneys but be permitted to receive instructions directly from clients in contentious matters.

Client moneys:

3.105. As the prohibition on holding client moneys in S.45 is being maintained in this outcome, the issue of the substantial new financial regulation of barristers does not arise.

Direct Access:

3.106. Under this outcome barristers would be providing direct access without being permitted to hold client moneys.

3.107. The issues relating to direct access as discussed under outcome 1 would equally apply here.

3.108. As barristers will not be holding client moneys under this outcome, provision could be made for third party payment options, similar to the position in the UK⁵⁷. This would cater for dealing with client moneys in direct access situations without the barrister holding the moneys.

3.109. Clients would have to be informed that by using such a service, as opposed to dealing with a solicitor, they do not have the protection of the Compensation Fund.

Outcome 2 Benchmarked Against the Authority's Statutory Objectives:

3.110. This outcome does not raise issues of financial protection of consumers to the same degree as outcome 1. In particular, where barristers are not permitted to hold client moneys the issues of a compensation fund and associated regulation does not arise for consideration.

3.111. There is an issue to be considered relating to what protections are afforded to consumers who use a third party payment service.

3.112. There is an issue in relation to consumers being protected by direct access barristers having to maintain proper records. It is suggested that this is mitigated by regulating the obligation to maintain certain records.

3.113. The interests of consumers could be considered to be promoted by this outcome in that they now have the option of instructing barristers directly in contentious matters where that was not an option previously available.

⁵⁷ See <http://www.barcouncil.org.uk/supporting-the-bar/barco/> for more details of the position in the UK.

3.114. Barristers can now offer a new service to the market which can be seen as promoting competition.

3.115. As with option 1, the barrister professional bodies consider that this outcome would undermine the independence of barristers.

Outcome 3: Barristers may hold client moneys but not be permitted to receive instructions directly in contentious matters.

3.116. This outcome is most relevant for its potential impact on Legal Partnerships and Multi-Disciplinary Practices.

3.117. Barrister partners of LP's and MDP's would want access to client moneys in order to ensure that appropriate controls are in place. This would be vital as they are joint and severally liable for the actions of their non-barrister partners.

3.118. Without direct access there seems to be little need for barristers not in a LP or MDP to hold client moneys as all instructions must come via a solicitor. Therefore, it would appear that it would only be barrister partners in LP's of MDP's that would be permitted to hold client funds under this outcome.

3.119. Under this outcome the entire barrister's profession need not incur the substantial regulatory and compliance costs discussed above where it is only barrister partners who are permitted to hold client moneys.

3.120. The issues discussed under outcome 1 in relation to a potential compensation fund and associated regulations equally apply here.

Outcome 3 Benchmarked Against the Authority's Statutory Objectives:

3.121. This outcome can be seen as promoting competition if it enhances the likelihood of Legal Partnerships or Multi-Disciplinary Practices being successful.

Outcome 4 No direct access and barristers do not hold client moneys.

3.122. This outcome results in no change to the current position as outlined in Part 1.

3.123. This outcome will have an impact on the position of the barristers partners in Legal Partnerships and MDP's. They will be joint and severally liable for the actions of their partners in relation to client moneys, whilst having no control over those moneys.

3.124. The lack of direct access in contentious matters under this outcome, may make LP's and MDP's more attractive to barristers.

Outcome 4 Benchmarked Against the Authority's Statutory Objectives:

3.125. This outcome could be seen as being in the public interest and promoting the interests of consumers if it is considered that the current model is the most appropriate model for consumers, and the wider general public.

3.126. It could not be said to be promoting competition, as no new legal services, or modes of delivery are envisaged.

3.127. If this outcome hinders the attractiveness or feasibility of the new business models of LP's and MDP's, then this outcome could be seen to be contrary to the objective of promoting competition.

PART 4: Recommendations:

Issue 1: Barristers Holding Client Moneys:

Recommendation 1: Barristers, who are not members of a Legal Partnership or a Multi-disciplinary Practice, should not be permitted to hold client moneys.

- 4.1. From the discussion and analysis set out in Part 3, the Authority has concluded that the only situation in which it may be necessary, or desirable, for barristers to hold client moneys would be where a barrister is a partner within a legal partnerships or a multi-disciplinary practice.
- 4.2. In the absence of these new business models, there is no necessity for barristers to have access to clients' moneys. This is the case even where direct professional access in contentious matters is permitted.
- 4.3. The use of escrow accounts, as is the case in England and Wales⁵⁸, could fulfil any requirements in respect of the holding of client moneys within the context of direct professional access.

Recommendation 2: The possibility of barristers holding client moneys as part of a legal partnership or a multi-disciplinary practice to be considered as part of the ongoing consultations and consideration of those issues.

- 4.4. The most recent report by the Authority to the Minister on the issue of Legal Partnerships indicated that the three issues, legal partnerships, multi-disciplinary practices and issues relating to barristers, cannot be dealt with separately as they are inter-locking to a considerable extent and require to be viewed and considered as a whole.⁵⁹
- 4.5. The Authority considers that the further consideration of barristers holding client moneys as part of a Legal Partnership or a Multi-disciplinary Practice should be undertaken within those consultations.

Recommendation 3: The regulatory and associated costs of barristers holding client moneys as part of a legal partnership or multi-disciplinary practice should be borne by those barristers in so far as is possible unless such an approach would make those business models uneconomical.

⁵⁸ An escrow account is where the monies are held by a 3rd party on agreed terms. See para. 3.7 for an explanation of the position in England and Wales.

⁵⁹ See para [2.6] of S.118 Report 31st July 2017.

- 4.6. As a consequence of recommendation 1, not all members of the barristers' profession will be permitted to hold client moneys. It may only be those who are members of a legal partnership or a multi-disciplinary practice. In those circumstances the Authority considers that there is merit in the contention that the regulatory and other associated costs should not be borne by the entire barristers' profession. If a barrister wishes to avail of the opportunity afforded by the new business models, they should be prepared, in principle, to take on the extra regulatory costs involved. If a barrister does not, it would appear to be somewhat unfair that they should bear the regulatory and associated costs where they receive no benefit.
- 4.7. The Authority is aware that such an approach may make the new business models unattractive and uneconomical to those barristers who wish to avail of them. It may be the case that the regulatory and associated costs prove too great for those barristers to bear alone. The actual costs involved remain to be determined as part of the ongoing consultations being undertaken by the Authority in relation to legal partnerships and multi-disciplinary practices.
- 4.8. The take up of Legal Partnerships by legal practitioners will provide guidance to the Authority in relation to the appetite and commercial viability of these new business models.

Issue 2: Direct Access in Contentious Matters:

<p>Recommendation 4: Direct Access to Barristers in contentious matters be permitted in certain circumstances.</p>

- 4.9. The Authority considers that the experience to date of direct access to barristers in non-contentious matters has been positive and has been of benefit to those organisations that have availed of that service. The Authority considers that there is scope to extend that model to contentious matters, subject to certain safeguards being put in place to protect clients, to ensure the quality of the service being provided and to ensure the effective administration of justice.
- 4.10. The Authority considers that three types of restrictions should apply to direct access in contentious matters subject to the following conditions:
- a. Barristers wishing to undertake such work must be licenced by the Authority to do so, (recommendation 5), and
 - b. Clients wishing to directly instruct a barrister must be licenced by the Authority in order to do so, (recommendation 6).
 - c. The type of work in which direct access is permissible be specified, (recommendation 7).

Recommendation 5: Barristers wishing to undertake direct access work be required to apply to the Authority for authorisation.

- 4.11. As direct access barristers would not have an instructing solicitor, it would be important that barristers are fully aware of their obligations under various legislative provisions usually fulfilled by their instructing solicitor. For example, a direct access barrister would have obligations in relation to anti-money laundering legislation as well as under the legal costs provisions of the Act. The Authority is also conscious that there would be additional client care issues to be considered.
- 4.12. For these reasons specific requirements should be introduced to ensure that direct access barristers are fully aware of their obligations and that they are fully equipped to deal directly with clients and the associated client care issues that would arise.
- 4.13. Examples of the type of regulations would include:
- a. Training on the obligations arising under the anti-money laundering legislation in the absence of an instructing solicitor.
 - b. Training on client care issues when dealing directly with clients.
 - c. Requirements on maintaining records relating to cases.
 - d. Requirements in relation to costs⁶⁰ where there is no instructing solicitor.
 - e. Professional obligations where it appears to be in the best interest of the client to instruct a solicitor.

Recommendation 6: Clients who wish to directly instruct barristers in contentious matters be required to be approved by the Authority.

- 4.14. The Authority can see the potential for a 'licenced access' scheme to be introduced. Such a scheme would require organisations to apply to the Authority to be permitted to directly instruct barristers in contentious matters.
- 4.15. The types of organisation to be licenced would be those that are experienced in being a party to contentious litigation, and have an ongoing need to instruct counsel. By limiting direct access to such clients, this would reduce the potential to disrupt the effective administration of justice, as such organisations would have to be capable of performing the role currently performed by a solicitor in order to be licenced.
- 4.16. The Authority would licence certain organisations where it was satisfied that the organisation:

⁶⁰ S.150 of the Act sets out the new requirements in relation to informing clients about the likely costs of a case.

- a. Has an ongoing need to instruct counsel in contentious matters,
- b. Has sufficient experience of being a party to contentious litigation, and
- c. Is capable of carrying out the functions that a solicitor would normally carry out in a contentious matter.

Recommendation 7: Direct Access be permitted in contentious matters only in respect of specific categories of cases.

4.17. The Authority considers the approach taken in New Zealand⁶¹ on this aspect of the issue has merit. The Authority considers that there are certain categories of litigation where direct access would not be practicable or desirable. Permitting direct access in such cases has the real potential to disrupt the effective administration of justice rather than enhance it.

4.18. In particular the Authority is of the view that direct access in contentious matters should not be permitted in matters before the courts at any level at this time. Direct access in contentious matters is a new departure for the profession. When it becomes established in areas outside of the courts, consideration can then be given to extending it to court work, if considered appropriate at that time.

4.19. Direct access would therefore be limited to matters, other than contentious court work, in which a barrister may act.

Recommendation 8: Direct Access barristers not be permitted to undertake the functions currently performed by solicitors.

4.20. The Authority is conscious that it is obliged to report on the issue of the unification of the solicitors and barristers profession not later than the 1st October 2020⁶². Therefore it considers that no actions should be taken, at this stage, which could pre-empt the outcome of that report.

4.21. The direct access model being recommended does not include barristers fulfilling the role currently performed by solicitors⁶³. Barristers would continue to offer only the services they currently offer, but without having an instructing solicitor.

⁶¹ See para 3.10

⁶² See S.34(1)(b) & S.34(4).

⁶³ For example the filing and serving of proceedings.

Recommendation 9: Direct Access be optional for barristers.

- 4.22. The Authority considers that the direct access model proposed be optional. This means that barristers must opt-in to the scheme and would not be obliged to accept direct access instructions.
- 4.23. Those barristers who wish to only be instructed by a solicitor may continue to do so by not opting in to the direct access scheme.

Recommendation 10: The regulatory and associated costs of permitting direct access should be borne by those barristers who wish to undertake such work in so far as is possible unless such an approach would make it uneconomical.

- 4.24. As direct access would be voluntary, not all members of the barristers' profession will offer direct access. The Authority considers that there is merit in the contention that the regulatory and other associated costs should not be borne by the entire barristers' profession. If a barrister wishes to avail of the opportunity afforded by the new business models, they should be prepared, in principle, to take on the extra regulatory costs involved. If a barrister does not, it would appear to be somewhat unfair that they should bear the regulatory and associated costs where they receive no benefit.
- 4.25. The Authority is aware that such an approach may make the new business models unattractive and uneconomical to those barristers who wish to avail of them. It may be the case that the regulatory and associated costs prove too great for those barristers to bear alone. The take up by the professions of Legal Partnerships will provide a useful indicator of the market appetite for such new business models and their commercial viability. That learning may be relevant in the introduction of a direct access model.

Recommendation 11: The Legal Services Regulation Act 2015 be amended to provide for direct access to barristers in contentious matters subject to regulations made by the Authority.

- 4.26. Primary legislation will be required to facilitate direct access to barristers in contentious matters. In particular, Chapter 2 of Part 8 of the Legal Services Regulation Act 2015 should be amended.
- 4.27. The amendment should provide that direct access in contentious matters is subject to regulations to be made by the Authority in relation to:-

- a. Providing for minimum levels training and education required for barristers who wish to undertake direct access work,
 - b. Authorisation of barristers wishing to offer direct access,
 - c. Authorisation of clients who wish to instruct barristers directly,
 - d. The type of work a direct access barrister may undertake.
- 4.28. The Authority would also be required to make regulations covering the professional obligations arising from permitting direct access. This would likely be by way of a 'code of practice' issued pursuant to S.22 of the Act.
- 4.29. Specific provision may also have to be made in respect of the insurance requirements for direct access barristers pursuant to S.47. Provision may also have to be made for additional insurance requirements, such as run-off cover etc.
- 4.30. Specific provision may also have to be made for advertising by direct access barristers pursuant to S.218.
- 4.31. In addition to the above changes there are resource implications for the Authority in the implementation and regulation of any direct access scheme.

Appendix 1: The Consultation Notice

LEGAL SERVICES REGULATORY AUTHORITY - PUBLIC CONSULTATION NOTICE ON CERTAIN ISSUES RELATING TO BARRISTERS

Invitation by the Legal Services Regulatory Authority (“the Authority”) for Submissions.

The Authority is now inviting written submissions from members of the public and any other interested organisations in respect of certain issues relating to barristers as part of a public consultation.

The Authority is engaging in this public consultation in accordance with Section 120 of the Legal Services Regulation Act, 2015 (“the Act”). Following completion of the public consultation, the Authority will be submitting a report to the Minister for Justice & Equality no later than September 30th 2017.

Scope of the Consultation

The Authority seeks submissions in respect of the following issues 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 of the Act, 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.

It would be helpful for respondents to set out the reasons for the views expressed in any submission, and to provide any available evidence which may be deemed relevant.

Respondents are requested to indicate on whose behalf they are responding (e.g. as a member of the public, a public representative, an individual or firm within either profession, or a body representing collective interests etc).

Members of the public or other interested parties wishing to contribute should send a written submission as soon as possible but in any event to be received no later than midday on June 2nd 2017.

Submissions may be sent:

- By email to public120@lsra.ie or
- By post to

Section 120 public consultation
Legal Services Regulatory Authority
Floor 2
St Stephen's Green House
Earlsfort Terrace
Dublin
DO2PH42

Freedom of Information

Attention is drawn to the fact that information provided to the Authority may be disclosed in response to a request under the Freedom of Information Act 2014. Therefore, should it be considered that any information provided is commercially sensitive, please identify same, and specify the reason for its sensitivity. The Authority will consult with interested parties making submissions regarding information identified by them as sensitive before making a decision on any Freedom of Information request. Any personal information, which you volunteer to the Authority, will be treated with the highest standards of security and confidentiality, strictly in accordance with the Data Protection Acts 1988 and 2003.

Publication of Submissions

The Authority may also decide to publish any submissions received by it on its website and otherwise. A decision on any such publication may occur without prior consultation with respondents to this consultation process. Thus, it is in the interests of respondents to highlight, in their submissions, any commercially sensitive or confidential information which they would not wish to be disclosed.

Legal Services Regulatory Authority
Thursday April 6th 2017.

Appendix 2: Recipients of the Consultation Notice

1. The Law Society of Ireland
2. The Honorable Society of the King's Inns
3. The Bar Council of Ireland
4. Citizens Information Board
5. Higher Education Authority
6. Competition and Consumer Protection Commission
7. Irish Human Rights and Equality Commission
8. Institute of Legal Costs Accountants
9. Consumers Association of Ireland
10. Legal Aid Board
11. Office of the Director of Public Prosecutions
12. Chief State Solicitor's Office
13. Department of Taoiseach
14. Department of Education and Skills
15. Department of Environment
16. Department of Finance
17. Department of Health
18. Department of Public Expenditure and Reform
19. Department of Justice and Equality
20. Department of Social Protection
21. Department of Transport
22. The Courts Service
23. The Supreme Court
24. The Court of Appeal
25. The High Court
26. The Circuit Court
27. The District Court
28. The Court of Criminal Appeal
29. The Association of Judges of Ireland
30. The Judges Library
31. NAMA
32. IDA
33. Enterprise Ireland
34. National Competitiveness Council
35. Irish Congress of Trade Unions
36. IBEC
37. Irish Farmers Association
38. Economic and Social Research Institute
39. Think-Tank for Action on Social Change
40. PublicPolicy.ie

41. Nevin Economic Research Institute
42. The Economic and Social Research Institute
43. National University of Ireland, Galway
44. National University of Ireland, Maynooth
45. Trinity College Dublin
46. University of Limerick
47. University College Dublin
48. Dublin City University
49. University College Cork
50. Griffith College Dublin
51. The Scottish Law Reform Commission
52. The Jersey Law Reform Commission
53. Carlow Bar Association
54. Cavan Bar Association
55. Clare Bar Association
56. Cork Bar Association
57. West Cork Bar Association
58. Donegal Bar Association
59. Drogheda Bar Association
60. Dublin Solicitors Bar Association
61. Dublin City Council
62. Galway Bar Association
63. Inishowen Bar Association
64. Kerry Bar Association
65. Kildare Bar Association
66. Kilkenny Bar Association
67. Laois Bar Association
68. Leitrim Bar Association
69. Limerick Bar Association
70. Longford Bar Association
71. Louth Bar Association
72. Mayo Bar Association
73. Meath Bar Association
74. Midland Bar Association
75. Monaghan Bar Association
76. Roscommon Bar Association
77. Sligo Bar Association
78. Tipperary Bar Association
79. Waterford Bar Association
80. Wexford Bar Association
81. Wicklow Bar Association
82. Chartered Accountants Regulatory Board
83. Chartered Accountants Ireland
84. Engineers Ireland

85. Institution of Engineers of Ireland
86. Society of Chartered Surveyors Ireland
87. Irish Auctioneers & Valuers Institute
88. Institute of Professional Auctioneers and Valuers
89. Association of Chartered Certified Accountants
90. Irish Institute of Legal Executives
91. Society of Actuaries in Ireland