

Legal Services Regulatory Authority

Public Consultation in relation to the review of the Legal Services Regulation Act 2015 under Section 6

Submission from the Competition and Consumer Protection Commission

Overview

The Competition and Consumer Protection Commission (the “CCPC”) welcomes the opportunity to respond to the Legal Services Regulatory Authority (“the LSRA”) consultation on the review of the Legal Services Regulation Act 2015 (“the Act”).

The CCPC has responded to the individual consultations issued by the LSRA to date but takes this opportunity to comment on the operation of the Act and the progress of the LSRA more generally, as well as responding to specific questions.

While the progress that has been made by the LSRA since the Act came into effect in 2015 is positive, it must be noted that the pace of work and the impact on the sector has been slow¹. The issues which led to the establishment of the LSRA, including low levels of competition, barriers to entry, self-regulation and resulting high legal costs, largely remain. The CCPC acknowledges the recent increase in the resources available to the LSRA but suggests that the full complement of resources which the LSRA needs to fulfil its statutory functions should be allocated and recruited as a matter of urgency.

The publication of the LSRA’s Statement of Strategy 2018 – 2020 which sets out a timeline of goals and actions for delivery by the LSRA of its strategic objectives is noted as a further positive development towards addressing the issues in the sector. The CCPC also welcomes the mission, vision and values set out in that Statement and the pathway established by the Statement of Strategy for the further implementation of aspects of the Act.

¹ In its most recent European Semester country report on Ireland, the European Commission noted the following in respect of the legal sector:

“Barriers in the market for legal services continue to represent a challenge. They affect mostly small businesses as they hamper competition and increase litigation costs. The new Legal Services Regulation Act led to the creation of the Legal Services Regulatory Authority in October 2016, but the key regulatory work that needs to be done for the Act to be implemented has been slow. Furthermore, regulations are not expected to take full advantage of open-ended provisions in order to minimise the impact on competition and reduce costs of legal services. Public consultations, a pre-requisite to implementing legislation are experiencing significant delays.”

https://ec.europa.eu/info/sites/info/files/2018-european-semester-country-report-ireland-en_1.pdf

The CCPC also:

- Recommends the commencement of Part 14 of the Act making provision for switching between the professions at the earliest possible juncture.
- Recommends that consideration be given to empowering the LSRA to give direction to the professional bodies in relation to recommendations arising from the review of education and training arrangements.
- Recommends that the LSRA establish a function enabling it to monitor cost and price trends in the legal services market.
- Reiterates our concerns regarding certain matters which can be considered by the Office of the Legal Costs Adjudicator in determining whether costs are reasonable.

A final high level point relates to Brexit which is being increasingly cited as an opportunity for the legal profession in Ireland to gain additional international work and for Ireland to become a global centre for legal services². It is suggested that if this is to happen, then the reforms of the sector which the LSRA is working towards would need to be significantly accelerated.

Context for reform

In its report 'Competition in Professional Services - Solicitors and Barristers' one of the CCPC's predecessor agencies, the Competition Authority, recommended the establishment of a Legal Services Commission. It was recommended that the prospective Legal Services Commission be empowered to perform a number of functions including regulating the legal profession and the legal services market. Following an extensive lobbying campaign by the legal profession's various representative bodies, a large number of amendments proposed by members of the Houses of the Oireachtas - including last minute amendments - and significant delays in the legislative process, the Act made provision for the establishment of a Legal Services Regulatory Authority.

The Chairperson of the CCPC, in a speech to the Burren Law School in 2016, posed the question 'Does the law protect incumbents?' In that context, the speech highlighted the paucity of competition in the legal services market, the power of the representative bodies in delaying the passage of the legislation and their efforts to dilute aspects of the Bill, not least the considerable access they were able to achieve to policymakers in comparison to that available to agencies such as the CCPC and others. In response to concerns raised by the CCPC a late amendment was included in the Act to provide for a review of the Act by the LSRA. That provision has now given rise to the current public consultation.

² <https://www.lawlibrary.ie/media/lawlibrary/media/Secure/Promoting-Ireland-as-a-leading-centre-globally-for-international-legal-services.pdf>

Operation of the Legal Services Regulation Act 2015

The CCPC has a strong interest in all aspects of the reform of the legal professions and the market for legal services, as did its predecessor agencies the Competition Authority and the National Consumer Agency. Our engagement has been guided by our analysis that the legal services market could be significantly more competitive and that if reforms were introduced to drive higher levels of competition that consumers would benefit from that as well as the professions themselves. The process of reform continues to be slow but there is now at least much greater potential for structural reforms which would be of benefit to Ireland's competitiveness.

The CCPC welcomed the establishment of the LSRA in 2016 and notes that, following a period in which it was severely under-resourced, it is now in a better position to deliver on its objectives as set out in Section 13(4) of the Act. Those objectives include, among other things, a welcome focus on protecting and promoting the public interest, protecting and promoting the interests of consumer and promoting competition in the provision of legal services in the State. The CCPC further welcomes the publication of the LSRA's Statement of Strategy 2018-2020 in which it has elaborated a complementary statement of mission, vision and values. As detailed in the overview above the CCPC suggests however that the full complement of resources which the LSRA needs to fulfil its statutory functions should be allocated and recruited as a matter of urgency.

The CCPC recognises that the delay in establishing and resourcing the LSRA has had implications for the pace at which aspects of the Act have been commenced. To that end we welcome the strategic objectives as set out in the Statement of Strategy which will permit the commencement of further aspects of the Act. These strategic objectives include, among other things, the establishment of the roll of practising barristers, the process for collecting the levy to fund the LSRA and the Legal Practitioners Disciplinary Tribunal, the process of transferring the complaints function to the LSRA from the Law Society and Bar Council, and the process of introducing regulations for the establishment of Legal Partnerships. Due to the delay in commencing much of the Act, the CCPC is of the view that it would be premature to make an assessment of the operation of the provisions of the Act at this review. The CCPC notes that the LSRA will be obliged under Section 6 of the Act to engage in another review in three years' time and we expect that that will provide an opportunity for more informed discussion on how the operation of the Act might be improved.

The CCPC does however believe that, as soon as is practicable, Section 217 of the Act should be commenced in order to provide for regulations on switching between the professions. In our previous submission on the education and training arrangements for legal practitioners we highlighted the continued frictions that can arise for individuals wishing to switch between the professions. These frictions include opportunity costs and financial cost. The LSRA should be facilitated in exercising its power to make

regulations in this area particularly in light of the forthcoming framework for Legal Partnerships and the potential they represent for change in the structure of the legal profession.

Potential Amendments

The CCPC wishes to make a number of observations in respect of potential amendments to the Act for consideration by the LSRA in making a report to the Minister.

Powers of the LSRA

The CCPC appreciates that the LSRA will issue a report to the Minister for Justice and Equality in September 2018 on the education and training arrangements for legal practitioners in the State. If that report were to recommend changes to the current arrangements, which are the preserve of the Law Society of Ireland and the Honorable Society of King's Inns, it may be most effective to empower the LSRA so as to ensure that the incumbent providers of education and training do not present an obstacle to the delivery of those reforms. Currently the Law Society's role in this regard is governed by the Solicitors Acts 1954 – 2011, while the power of the Honorable Society of King's Inns is derived from historical custom and practice. The LSRA will be well served by an ability to make decisions in respect of crucial aspects of structural reform in the legal services market. In regard to arrangements for education and training, changes in this regard could have long-lasting effects on the nature of the market. It is essential that the LSRA has the appropriate means at its disposal to deliver on any potential reforms and suitable amendments might be made to Section 13(2) in that regard.

Legal Costs

The CCPC welcomes the establishment of the Office of the Legal Costs Adjudicator and hopes that in time it will provide a source of downward pressure on legal costs. The CCPC has, however, in the past expressed its concern in regard to Schedule 1 of the Act which sets out the Principles Relating to Costs. That schedule is intended to be used by the Office of the Legal Costs Adjudicator in determining whether costs in dispute are reasonable. In advance of the passage of the Act the CCPC wrote to the Minister for Justice and Equality expressing our concern regarding the contents of that schedule. The CCPC reiterates its view that the 12 matters set out in paragraph 2 of the Schedule involve a number of overlapping factors which are likely to be used as a basis for justifying increases in legal costs rather than providing a basis for reducing the cost of legal services in Ireland. For example, references to overlapping factors such as "complexity", "difficulty", "novelty" and "specialised knowledge" and to factors that do not relate to the nature or quality of the service provided, such as "the importance of the matter to the client" and "the value of the property" are likely to result in higher legal costs than would be justified by reference simply to the work actually and appropriately done. To that end the CCPC believes that the schedule should be amended as outlined here.

Notwithstanding our concerns in regard to Schedule 1, the CCPC believes that the Office of the Legal Costs Adjudicator has the potential, in addition to a role in applying downward pressure on costs, to also provide a valuable source of information for the LSRA in regard to costs. The LSRA should consider, possibly as part of its research function, establishing a method of tracking the evolution of legal costs over time. In turn the LSRA might issue annual reports on cost and price trends. This would be in keeping with the function of the LSRA under Section 13(2)(g) to promote public awareness and disseminate information to the public in respect of legal services, including the cost of such services.