



## **DUBLIN SOLICITORS' BAR ASSOCIATION**

### **SUBMISSION TO LEGAL SERVICES REGULATORY AUTHORITY**

**July 2018**

### **AS PART OF A PUBLIC CONSULTATION PRIOR TO A REPORT TO THE MINISTER FOR JUSTICE AND EQUALITY ON THE OPERATION OF THE LEGAL SERVICES REGULATION ACT 2015**

DUBLIN SOLICITORS BAR ASSOCIATION

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#### **A. BACKGROUND**

The Dublin Solicitors Bar Association ['DSBA'] which was established in 1935 is the largest independent association of solicitors in Ireland, with a membership of over 3,000 practitioners. Our membership includes solicitors firms of all sizes from the sole practitioner to the largest firms in Ireland.

The DSBA is solely a representative and educational body for solicitors, and does not have any regulatory function in relation to solicitors in Ireland.

In its representative capacity the DSBA has been extensively involved over the last seven years in the review of the Legal Services Regulation Bill (as published in 2011) through to its enactment in late 2015 (including making various submissions to the Department of Justice), and since then has engaged directly with the new Legal Services Regulatory Authority ["Authority"] as it rolls out the new legislation.

The DSBA is thus uniquely placed, and with an independent voice, to provide a perspective on the needs of solicitors in the State as legal practitioners with regard to the governing legal and regulatory framework provided for under the Solicitors Acts 1954 to 2015 ["Solicitors Acts"], as including most recently the Legal Services Regulation Act 2015 ["2015 Act"].

Under Section 6 of the 2015 Act, the Authority is tasked with bringing forward such *"recommendations (if any) for amendments to this Act..., the Solicitors Acts 1954 to 2015 or any instrument made under those Acts as the Authority considers appropriate arising from its findings and conclusions."*

This Submission focuses on a small number of recommendations we wish to put before the Authority for its consideration in that regard. Our recommendations envisage a number of suggested amendments to the existing governing legal and regulatory framework for solicitors in the interests of better balancing the relationship as between solicitors as providers, and the public as recipients, of legal services.

We do not in this Submission address the existing regulatory and structural framework governing the provision of legal education in the State to prospective and practicing solicitors, and whether any changes to that framework would necessitate any amendments to the Solicitors Acts – noting that the Authority is presently conducting a review of the provision of legal education in the State, as to which our Submission to the Authority in June 2018 refers.

#### **B. COMPLAINTS**

##### ***Double Jeopardy***

The existing legal and regulatory framework governing practice related complaints against solicitors allows for the subject matter of such complaints to be brought before the Law Society (through its Regulation of Practice Committee and the Solicitors Disciplinary Tribunal) and now (when activated under the 2015 Act) before the Authority [each herein a "regulatory

authority”]; but also, and depending on the subject matter of the complaint, before the Courts whether before or after the complaint is filed with the regulatory authority. Thus, whilst the Law Society may have a policy not to deal with a complaint which, or the substance of which, is before the Courts, that does not assist where a complaint is disposed of by the Law Society in favour of the solicitor yet the very same complainant then subsequently issues legal proceedings before the Courts in respect of (in substance) the same subject matter. The solicitor may thus be exposed to ‘double jeopardy’ in relation to the subject matter of the complaint.

To take an example, a complaint as to an ‘inadequate standard’ (as referred to in Section 50 of the 2015 Act) relating to the provision of a legal service is or can, in substance, be much the same as an allegation of negligence.

The double jeopardy is caused by having dual forums as may hear and decide upon (in substance) the same complaint, and is compounded by the fact that even if the solicitor is successful in defending the complaint before a regulatory authority, all costs and expenses incurred by the solicitor in doing so are for his/her own account and are not recoverable from the complainant or from any standard professional indemnity insurance [“PII”] policy available to solicitors.

To take a comparative example which operates (on a statutory basis) to prevent double jeopardy, where an employee wishes to pursue a dismissal complaint against his/her employer, the employee is in effect required to choose between making a complaint as to ‘unfair’ dismissal through the Workplace Relations Commission or, alternatively, to issue a ‘wrongful dismissal’ claim before the Courts (per section 15 of the Unfair Dismissals Act 1977 as amended) – that is one or other of the available reliefs, but not both. This requirement is evidently designed to provide a necessary balance in the relationship between the employer and the employee, and thus is not viewed as contrary to the public interest.

We would recommend an amendment to the 2015 Act (such as by inserting one or more subsections at the end of existing Section 50) which provides that a complainant is prohibited from bringing any claim against a solicitor before the Courts in respect of (and to the extent) the subject matter of the claim was in substance included in a complaint (being one as to ‘misconduct’) made before a regulatory authority which was disposed of in favour of the solicitor – and vice versa if the claim is first made before the Courts.

The foregoing is without prejudice to the hearing of a complaint on appeal in the Courts in respect of any decision of a regulatory authority whether at the instance of the complainant, the regulatory authority or the solicitor concerned. It would also be without prejudice to the power of the Court or the regulatory authority to determine whether the substance requirement is or is not satisfied in the circumstances.

### ***Vexatious/Frivolous etc.***

The Law Society in its capacity as a regulatory authority adopts its own modus operandi for dealing with complaints against solicitors. This includes up streamlining of complaints received by the Law Society such that if on initial (internal) evaluation of the complaint, it is regarded that the complaint is frivolous or vexatious or abusive or otherwise without any evident merit, then the complaint may be disposed of without any further action and the complainant advised accordingly. The Law Society in such circumstances does not however (and as a matter of policy it appears) notify the solicitor concerned of the receipt of the complaint or of the disposal

of the complaint without further action. Thus the solicitor is never made aware (unless told by the complainant) that a complaint against him/her has been submitted to the Law Society and has been disposed of, which in turn prevents that solicitor (if he/she so wishes) to take such steps from a client or practice management perspective to ensure there is no repeat of any such complaint (e.g. by ceasing to act for the complainant).

It may be that some solicitors would prefer not to know about the complaint, particularly if notice of the complaint would trigger a corresponding reporting obligation under the PII policy. However, in the interest of fairness and better balance, the solicitor ought to be afforded the entitlement to be made aware of the complaint (and its disposal) upon request by him/her to the Law Society.

Accordingly we would recommend an amendment to the 2015 Act (such as by inserting one or more subsections at the end of existing Section 50) which provides that a solicitor shall be entitled upon request to a regulatory authority to be advised whether such authority has received and disposed of (without reference to the solicitor) any third party complaint against such solicitor, and if so to provide such particulars of the complainant and complaint as the solicitor may reasonably request.

### **C. LEVY**

We understand that the Authority has been considering how to apply Part 7 of the 2015 Act in relation to the funding of the Authority through the levy on professional bodies (and others) referred to therein, and also whether Part 7 requires to be amended in any respect.

We await therefore, and hold counsel on, the implementation of or amendments required to the existing the Levy framework provided for in Part 7 pending sight of whatever recommendations may be made by the Authority in that regard.

However we would recommend that, in the interest of fairness and better balance, the approved expenses framework provided for in Section 97 be amended so as to distinguish between the day to day regulatory costs incurred by the Authority relating to legal practitioners versus what may be called the project costs incurred by the Authority on topics (as so mandated under the 2015 Act and otherwise) relating to the developments in the provision of legal services as may serve better the public interest – to include topics such as the Levy framework, new business practice models, and legal education.

Further, given that there is to continue a dual regulatory structure for solicitors (as between the Authority and the Law Society), and that thus far there has been no indication as to what the Levy cost per legal practitioner is likely to be, we would also recommend that consideration be given to amending the 2015 Act so as to require the Authority to ensure that the Levy is subject to a proportionality fairness test as against the amount to be paid (each year) by practitioners to the Law Society for their practising certificate.

### **D. BUSINESS STRUCTURES**

As the title to the 2015 Act states, one of the aims of the Act is “*to provide new structures in which legal practitioners may provide services together or with others*”. A structure which is provided for by statute in 1994, but not yet activated some 24 years later is the use of a body corporate for the provision of legal services.

In that regard we refer to Section 70 of the Solicitors (Amendment) Act, 1994, amending Section 64(1) of the Solicitors Act 1954 - and which vests in the Law Society, with the concurrence of the Minister for Justice & Equality (given after consultation with the Minister for

Enterprise and Employment), the power by regulations made by the Law Society to allow for “*incorporated practices*” referable to the provision of legal services by solicitors. For whatever reason, and despite being evidently the will of the Oireachtas, no such regulations has been brought into being to allow for incorporated practices.

Thus, and with a view to promoting the activation of incorporated bodies for use by solicitors as a new optional business structure, we would recommend that Section 70 be amended to provide for the Authority to have a review role in relation to the regulations as and when drafted by the Law Society under Section 70. This would be with a view to achieving a consensus on the form of regulations, and as may then be presented by the Law Society to the Minister for Justice and Equality for consideration.

## **E. RECOMMENDATIONS**

1. **(Complaints)** To amend the 2015 Act to provide that that a complainant is prohibited from bringing any claim against a solicitor before the Courts in respect of (and to the extent) the subject matter of the claim was in substance included in a complaint (being one as to ‘misconduct’) made before a regulatory authority which was disposed of in favour of the solicitor – and vice versa if the claim is first made before the Courts.
2. **(Complaints)** To amend the 2015 Act so as to provide that a solicitor shall be entitled upon request to a regulatory authority to be advised whether such authority has received and disposed of (without reference to the solicitor) any third party complaint against such solicitor, and if so to provide such particulars of the complainant and complaint as the solicitor may reasonably request.
3. **(Levy)** To amend the 2015 Act so as to distinguish for Levy application purposes between day to day regulatory related costs & expenses of the Authority (subject to the Levy) versus project costs incurred by the Authority as so mandated under the 2015 Act and otherwise to explore and consider developments relating to the provision of legal services in the State (not subject to the Levy).
4. **(Levy)** To amend the 2015 Act so as to require the Authority to ensure that the Levy is subject to a proportionality fairness test as against the amount to be paid (each year) by solicitors to the Law Society for their annual solicitors practicing certificate.
5. **(Business Structures)** To amend Section 70 of the Solicitors (Amendment) Act, 1994 so as to empower the Authority to review draft regulations as and when prepared by the Law Society under Section 70.

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