# Review of the Legal Services Regulation Act 2015 under Section 6

## Supplemental Submission on behalf of the Honorable Society of King's Inns

**18 October 2018**

## I. Proposed Amendment

1. The Honorable Society of King's Inns ("*the Society*") makes this submission in the context of the section 6 review of the operation of the Legal Services Regulation Act 2015 ("*the 2015 Act*"). The Society is grateful to the Legal Services Regulatory Authority ("*the Authority*") for affording it the opportunity to make a supplemental submission.

2. This submission relates to the definition of "*qualified barrister*" in section 2(1) of the 2015 Act. Pursuant to section 2(1), a "*qualified barrister*" means a person who:

> *(a) has been admitted by the Honorable Society of King's Inns to the degree of Barrister-at-Law **or** has been called to the Bar of Ireland, other than where, subsequent to his or her being admitted to that degree **or** being so called –*
>
> *(i) he or she has been admitted as a solicitor,*
> *(ii) he or she, before the date on which Part 6 comes into operation, has been disbarred by the Benchers of the Honorable Society of King's Inns, where that disbarment remains in effect, or*
> *(iii) his or her name has been struck off the roll of practising barristers or the roll of solicitors by the High Court, which order remains in effect,*
>
> *or*
>
> *(b) is a registered lawyer, having the same right of audience as a practising barrister or a solicitor qualified to practise by virtue of Regulation 10 of the European Communities (Lawyers' Establishment) Regulations 2003 (S.I. No. 732 of 2003)*

3. The Society proposes the following amendment to subsection (a):

> A "*'qualified barrister' means a person who (a) has been admitted by the Honorable Society of King's Inns to the degree of Barrister-at-Law **and** has been called to the Bar of Ireland, other than where, subsequent to his or her being admitted to that degree **and** being so called … "*

4. The reason for the proposed amendment is as follows. For centuries, the legal meaning – and popular understanding – of a "*barrister*" is of a person with a right of audience in court. This understanding is reflected in other provisions of the 2015 Act. On one view, the language of the definition of *qualified barrister* in section 2(1) suggests that a person can be a barrister without being called to the Bar and thus without enjoying such a right of audience. It is respectfully submitted that it was not the intention of the Oireachtas to change the definition of a barrister in this way: accepted canons of construction of legislation dictate that such a fundamental change to a pre-existing legal and generally understood state of affairs can only be achieved through clear expression. If unnecessary litigation and confusion around this issue is to be avoided, the definition should be changed to reflect the legally presumed legislative intention and, even as presently worded, probable meaning of the definition.

## II. Failure to Reflect Intention of Oireachtas

5. If the relevant "*or*" in section 2(1)(a) is read disjunctively, any person who has either been admitted to the degree of Barrister-at-Law or who has been called to the Bar of Ireland (absent any of the disqualifying events set out in subsections (i), (ii) and (iii)) would be a qualified barrister. It could not have been the intention of the Oireachtas to define "*qualified barrister*" in such a way as to include a person who has not been called to the Bar. It could not have been intended that a person who has neither the legal capacity nor qualification generally associated with a barrister – the entitlement to appear and be heard in a court of law – could describe themselves as a "*barrister*". Indeed, it cannot have been intended that there could be a category of persons who are qualified legal practitioners yet uniquely amongst such legal practitioners do *not* have a right of audience in court, but who are nonetheless described in law as *barristers*.

### A. Other Provisions of the 2015 Act

6. It is well established that, in interpreting legislation in accordance with established canons of construction, the courts can and do interpret the word "*or*" as entailing a conjunctive (and indeed the word *and* as disjunctive) where the context so requires.[1] Whether the definition of *qualified barrister* in the 2015 Act is one such situation will

[1] *Brown & Co v T & J Harrison* [1927] All ER Rep 195, at 203 and 204, *per* Atkin LJ; *Federal Steam Navigation Co Ltd v Department of Trade and Industry* [1974] 1 WLR 505, at 514, *per* Lord Morris.

(in the absence of legislative change) have to await proceedings in which the issue arises for consideration.

7. It is submitted that it is clear from other provisions of the 2015 Act that the use of "*or*" instead of "*and*" in the definition of "*qualified barrister*" was not intended to effect a fundamental change in the definition of the term "*barrister*" nor to redefine the function of a barrister as ordinarily understood. This is evident from a consideration of section 134 which governs the entry of names onto the roll of practising barristers. A disjunctive reading of "*or*" is repugnant to and renders section 134 absurd. Section 134(1) provides as follows:

> *A person who has been called to the Bar of Ireland and who intends to provide legal services as a barrister shall apply to the Authority to have his or her name, and additional information relating to him or her, entered on the roll and the Authority, on being satisfied that the person is a qualified barrister, shall enter the name of that person and the additional information concerned on the roll.*

8. The statutory obligation to apply to the Authority to have one's name entered on the roll applies to persons who have been called to the Bar of Ireland. It does not therefore extend to all "*qualified barristers*", as currently defined. Consequently, if the definition is not amended (and if "*or*" is read disjunctively) persons who have been admitted to the degree of Barrister-at-Law but who have not been called to the Bar – yet intend to provide legal services as qualified barristers – will be under no obligation to apply to get on the roll. Furthermore, section 134(1) requires the Authority, following an application to it for entry onto the roll, to satisfy itself that the applicant is a qualified barrister. However, under the current section 2(1) definition, a person need not have been called to the Bar to be a qualified barrister; admission to the degree is sufficient. Therefore if a person applies under section 134(1) for entry on the roll of practising barristers, the verification process required to be undertaken by the Authority – whether the person is a "*qualified barrister*" – will not actually confirm that the person is eligible to apply under section 134. This suggests that a definition of "*qualified barrister*" which depends upon "*or*" being construed in a disjunctive way does not reflect the intention of the legislature in passing the 2015 Act.

9. Section 85(7) of the 2015 Act also indicates that the true intention of the Oireachtas was for "*or*" in section 2(1) to mean "*and*". Section 85(7) sets out the orders which the High Court may make when considering a disciplinary matter referred to it by the Disciplinary Tribunal. Section 85(7)(e) provides that the High Court may direct "*where the legal practitioner is a barrister, that the Authority, in accordance with Part 9, strike the name of the person off the roll of practising barristers and inform the Chief Justice and the Honorable Society of King's Inns of the fact*". This provision reflects the indivisibility of admission to the degree and call to the Bar and the legislature's understanding thereof. If admission to the degree and call to the Bar were, as a disjunctive reading of section 2(1) would imply, separate and alternative, the Oireachtas would instead, in section 85(7)(e), have required the Authority, having struck a person's name off the roll of practising barristers, to inform the Chief Justice *and/or* the Society. If a person could qualify as a barrister (and therefore be liable to a strike off) solely by admission to the degree or call to the Bar, the requirement in section 85(7)(e) to inform both the Chief Justice and the Society would not make sense. A disjunctive reading of "*or*" in section 2(1) would give rise to this absurdity. Interpreting the phrase as conjunctive would not.

B. <u>A Radical Change</u>

10. It is clear also from a consideration of the historical role and public understanding of the profession of barrister that it could not have been intended that the use of "*or*" in the definition of "*qualified barrister*" was intended to operate disjunctively. The legislation should be amended to reflect that evident intent more clearly.

11. Unless "*or*" is read conjunctively (or, preferably, amended to "*and*"), a possibility arises where there would be a category of qualified barristers without a right of audience before the courts (those who had been admitted to the degree but not called to the Bar). In fact, they would be the only qualified lawyers in Ireland without a right of audience. This, having regard to the historical function and public understanding of the profession, is a patent absurdity and, it is respectfully submitted, could not have been the intention of the Oireachtas. It might even be viewed as a misrepresentation to consumers (and it would certainly be misleading) to include on the roll of practising barristers persons without a right of audience. The 2015 Act would have, with one minor (and unintended) step, a step which was not followed through in the rest of the Act, overturned the historical meaning of what a barrister is, and crucially what the public understands a barrister to be.

12. Historically, barristers enjoyed an exclusive right of audience in the courts derived from the common law. That right is conferred on barristers at their call to the Bar by the Chief Justice. In order to extend that right to solicitors, it was necessary to enact section 17 of the Courts Act 1971.[2]

13. It would be perverse for the 2015 Act, absent obvious rationale or explicit intention, to create a category of lawyers, "*qualified barristers*" at that, without a right of audience. A right of audience is synonymous with the legal profession. It is wholly unlikely that such a radical change to what constitutes a barrister would be effected by a single word in the definitional section of the 2015 Act without further accompanying provisions or other clear manifestation of the legislative intention. There is a principle of statutory interpretation to this effect: the presumption against implicit alteration of law:

> *[It is presumed that] the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intentions with irresistible clearness ...*[3]

## III. Relationship between Degree and Call

14. Furthermore, the current definition in section 2(1) (read disjunctively) fails to reflect the relationship between admission to the degree of Barrister-at-Law and call to the Bar. This submission has so far focused on the absurdity of a person who has not been called to the Bar being a qualified barrister. The corollary of this presents a further problem which adds weight to the call for amendment. It could not have been envisaged by the Oireachtas that a person who has not been admitted to the degree of Barrister-at-Law could be called to the Bar. In this regard, the degree of Barrister-at-Law and the call to the Bar are inseparable because the Chief Justice will not call to the Bar a person who has not been admitted to the degree. By not reflecting this,

[2] See *In Re Coffey* [2013] IESC 11, para 24, *per* Fennelly J.
[3] *Minister for Industry and Commerce v Hales* [1967] IR 50, 76, *per* Henchy J.

the current definition of "*qualified barrister*" fails to describe accurately the route to professional qualification as a barrister. This is confusing and potentially misleading. It would be preferable for the 2015 Act to be amended so that it accurately describes the route to qualification within the very profession it regulates.

15. The only route to a Bar calling is via prior admission to the degree of Barrister-at-Law. The Chief Justice calls to the Bar of Ireland those persons in respect of whom he has received, from the Benchers of the Society, a representation that they are eligible and competent to practise as barristers.[4] The Benchers of the Society will only make such a representation in respect of a person who has been conferred with the degree of Barrister-at-Law. Thus there can be no call to the Bar without prior admission to the degree.

16. Admission to the degree of Barrister-at-Law is a prerequisite to being called to the Bar of Ireland even for qualified lawyers from outside of Ireland and solicitors within Ireland, albeit the process of admission to the degree may be accelerated. Solicitors who have been in continuous practice in the State for three years or more and who have held a practising certificate from the Law Society of Ireland for the entirety of that period may, at the discretion of the Benchers of the Society, and provided that they procure their removal from the roll of solicitors and cease to practise as a solicitor, be admitted to the degree of Barrister-at-Law and called to the Bar without undertaking the Society's course of education and without keeping terms provided certain other requirements are met. Members of the Bar of Northern Ireland who have been in practice for at least three years immediately preceding an application may, at the discretion of the Benchers of the Society, be admitted to the degree

[4] The nature of this relationship is reflected by the declaration made by the Chief Justice when calling a person to the Bar of Ireland: "*The Benchers of the Honorable Society of King's Inns having been pleased to admit you to the degree of Barrister-at-Law, I now admit you to practice in the courts of Ireland and you will take your place accordingly.*"

Section 3 of the Legal Practitioners (Qualification) Act 1929 (repealed by the Legal Practitioners (Irish Language) Act 2008) recognised in statute the relationship between admission to the degree and call to the Bar in the context of calling members of other Bars to the Bar of Ireland: "*No person shall be admitted by the Chief Justice to practise as a barrister-at-law in the Courts of Saorstát Eireann unless before such person is so admitted he satisfies the Chief Justice, by such evidence as the Chief Justice shall prescribe, that he possesses a competent knowledge of the Irish language: Provided always that nothing in this section contained shall prevent the Chief Justice from admitting to practise as a barrister-at-law in the Courts of Saorstát Eireann any member of three years' standing at any other Bar who has been admitted to the degree of barrister-at-law by the Benchers of the Honourable Society of King's Inns, Dublin, pursuant to a reciprocal arrangement whereby members of the Bar of Saorstát Eireann may be admitted to practise at such other Bar.*"

without submitting to any examination provided certain requirements are complied with. Persons, namely qualified lawyers from other EU Member States, who are entitled to seek to practise the profession of barrister in Ireland pursuant to Directive 2005/36/EC may apply to be admitted to the Society and to the degree of Barrister-at-Law. Only holders of the degree may be called to the Bar of Ireland by the Chief Justice and admitted to practise in the courts of Ireland as members of the Bar of Ireland.

17. Admission to the degree is thus an essential prerequisite to call to the Bar. And as outlined above, call to the Bar grants barristers a right of audience in the courts. It would be preferable for the definition of "*qualified barrister*" in section 2(1) not to give the misleading impression either that it is possible to be a qualified barrister without a right of audience or that it is possible to be called to the Bar in Ireland without first having been admitted to the degree of Barrister-at-Law. The simple amendment proposed herein would remedy this confusion.