



# THE BAR OF IRELAND

*The Law Library*

## Submission by Council of The Bar of Ireland to the Legal Services Regulatory Authority concerning a review of the operation of the Legal Services Regulation Act 2015

25th July 2018

## **PART 1: EXECUTIVE SUMMARY**

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,200 practising barristers.

The Bar of Ireland is long established and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

In approaching this submission, the Council is mindful that the pace of implementation of the *Legal Services Regulation Act 2015* has been very slow, primarily arising from the fact that it is a newly established organisation that has not been provided with the appropriate level of resources in order to deliver on its full remit as set out in the Act.

In addition, the statutory deadlines laid down in the Act to consult and report to the Minister for Justice & Equality in relation to a number of areas, including Legal Partnerships, MDPs, certain issues relating to barristers and a review of the education and training of legal practitioners in the State, caused the Authority to focus its limited resources in those areas at the expense of establishing its core role in the regulation of the legal profession and ensuring that standards in legal services are maintained and improved.

As there are large swathes of the Act that have not yet been commenced, it is impossible to make any detailed submissions on the operation of an Act that has not yet come into force.

Therefore, the extent of this submission will be confined to two main areas:

1. The pace of implementation of the 2015 Act to date; and
2. The application of the Levy as provided in Part 7 of the 2015 Act

Regard has been had to the regulatory objectives set down in Section 13 of the Act:

- (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 professional principles of independence and integrity, acting in the client's best interests, compliance with duties owed to the court and confidentiality.

## **PART 2: SCOPE OF THE CONSULTATION**

Section 6(1) of the *Legal Services Regulation Act, 2015* requires the Legal Services Regulatory Authority (the Authority) to commence a review of the operation of the Act no later than 18 months after the establishment day and to make a report within 12 months to each House of the Oireachtas of its findings, including under section 6(1)(b), such recommendations to the Minister for Justice & Equality as the Authority considers appropriate.

The Authority's invitation for submissions of the 8<sup>th</sup> June 2018 invited submissions as part of this public consultation.

Section 6 provides as follows:

### **Review of the Act**

6. (1) *The Authority shall—*

*(a) not later than 18 months after the establishment day, and not later than the end of each subsequent 3 year period, commence a review of the operation of this Act, and*

*(b) not later than 12 months after the commencement of a review under paragraph (a), make a report to each House of the Oireachtas of its findings and conclusions, including such recommendations (if any) to the Minister resulting from that review as it considers appropriate.*

*(2) Recommendations under subsection (1)(b) shall include such recommendations (if any) for amendments to this Act (including amendments to Part 7), the Solicitors Acts 1954 to 2015 or any instrument made under those Acts, as the Authority considers appropriate arising from its findings and conclusions.*

*(3) In conducting a review under this section, the Authority shall consult with the Competition and Consumer Protection Commission, professional bodies and such other persons as the Authority considers appropriate for such purpose.*

## **PART 3: OBSERVATIONS ON THE IMPLEMENTATION OF THE ACT**

### **LEGAL COSTS**

Part 10 of the *Legal Services Regulation Act 2015* sets out an improved structure for the manner in which legal costs will be adjudicated through the Office of the Legal Costs Adjudicator.

As was the case when the Act was before the Oireachtas as a Bill, the Council continues to lend its full support for this enhanced mechanism to address legal costs. It will benefit both those who obtain legal services in the State and the legal practitioners concerned.

There is growing frustration with the slow pace of implementation of this Part of the legislation and we urge the LSRA to highlight that the commencement of Part 10 of the Act should occur in as expeditious a manner as is possible.

Furthermore, the Council considers that the appropriate resources, both in terms of legal costs adjudicators and support staff, need to be provided so that the commencement of Part 10 of the Act results in a more efficient and expeditious resolution of legal costs disputes into the future.

Delays in the taxation process are a frequent complaint by lawyers and do nothing to assist the development of the market for legal services here. They also result in uncertainty for clients and lawyers alike. This should be addressed when Part 10 of the Act is commenced.

### **COMPLAINTS & DISCIPLINE**

The core function of the Legal Services Regulatory Authority (LSRA) is to regulate the provision of legal services by legal practitioners and ensure the maintenance and improvement of standards in the provision of legal services in the State. This function is fulfilled primarily through Part 6 of the Act – Complaints and Disciplinary Hearings.

While complaints and discipline is a key function of the Legal Services Regulatory Authority, according to the Authority's strategic plan this part will not commence until mid-2019.

Again, the Council is disappointed with the slow progress in commencing this section of the Act and is keen to see resources appointed at the earliest opportunity to enable the LSRA to fulfil its role in that regard.

It is somewhat difficult for the Council to make any further detailed submissions on this matter. However, the Council does make two observations about particular issues at this juncture.

Firstly, the Council observes that the definition of professional misconduct in s.50 of the Act refers, *inter alia*, to an act or omission by a legal practitioner which "*consists of the commission of an arrestable offence*" in s.50(1)(j) of the 2015 Act.

The Council queries whether the language in s.50(1)(j) is clear and precise where it refers to a “*commission*” of such an offence. The operation of the presumption of innocence in such circumstances is unclear where the requirement is to report the “*commission*” of such an offence even though it may be denied or where the allegation in question is bare in its terms. For instance, if a bare assertion of “*fraud*” is made does that constitute an allegation involving the commission of an arrestable offence under the *Criminal Justice (Theft and Fraud Offences) Act, 2001* such that it must be investigated by the Authority?

Further, interaction of this subsection with the criminal justice system does not appear to be referred to in explicit terms in the 2015 Act. It is not clear whether the Authority should investigate such complaints parallel to or instead of the relevant State agency, i.e. An Garda Síochána, and this might be clarified.

It appears to the Council that it would be opportune for the Authority to consider this matter further as legislative machinery to deal with these issues could prevent uncertainty and difficulties arising in the future regarding complaints under this heading.

Secondly, the Council makes the following observations about s.52(1) – (3) of the Act insofar as it affects the Council itself.

Pursuant to s.51(3) of the 2015 Act, complaints under Part 6 may only be made to the Authority. But this is qualified in that subsection with an explicit reference to s.52 of the Act.

Thereafter, s.52 of the Act requires complaints made to the Council of The Bar of Ireland to be referred to the Authority where they are made by “clients” of barristers and which relate to acts or omissions to which s.51(1) or (2) apply.

However, unlike s.51(5) of the 2015 Act s.52(1) does not contain any provision for the Council to form an opinion that the complaint does, in fact, relate to s.51(2) of the 2015 Act (concerning misconduct) before it is referred to the Authority itself.

It appears to the Council that the precise role of the Council in relation to such complaints should be clarified with due regard to the fact that the Council of The Bar of Ireland will operate its own Code of Conduct for its members and the fact that complaints may be made to the Council which do not fall within s.51(2) of the 2015 Act itself.

One manner of dealing with this might be to amend s.51(3) of the 2015 Act so that it requires, without any qualification, that all complaints may only be made to the Authority for matters contained in s.51(1) and (2) of the Act. This would result in the need to delete s.52(1) – (3) inclusive as they would be unnecessary and, perhaps, confusing to such complainants.

If the Authority decides that the complaint does not come within those subsections it could refer the complaint to the Council. Section 55 of the Act already enables the Authority to make regulations for the handling of complaints. The Authority could prescribe that if a person

complains to the Council about a particular matter any such person should be directed by the Council to make their complaint to the Authority instead.

The principal concern with such a modification would relate to the possible increase in costs and delay if complaints are made to the Authority which fall outside of s.51(2) of the 2015 Act where it would be preferable that such complaints are dealt with by the Council itself at an early juncture.

In those circumstances an alternative suggestion is that s.52(1) of the Act might be amended, insofar as it relates to the Council, so that if a “client” of a barrister complains to the Council and the matter does not relate to s.51(1) of the Act the Council is to form an opinion as to whether the act or omission of a barrister constitutes “misconduct” under the Act before it refers it to the Authority.

Such an explicit reference might ensure a clear delineation between complaints which are investigated by the Authority and ensure greater clarity about the role of the Council if it receives a complaint itself.

A client may complain to the Council about a matter which they perceive does not relate to any matter in s.51(2) of the Act and it would be appropriate to give the Council the same power to form an opinion on such a complaint before referring it to the Authority, similar to the power as exists in s.51(5) of the Act for the Law Society relating to its functions under the *Solicitor Acts 1954 to 2015*.

## **APPLICATION OF THE LEVY TO FUND COMPLAINTS AND DISCIPLINE**

Part 7 of the *Legal Services Regulation Act 2015* provides for the imposition of a levy on professional bodies and certain barristers to cover expenses of the Authority and Disciplinary Tribunal.

However, there are also other public interest functions entrusted to the LSRA in the legislation, including:

- (1) Structures under which legal practitioners may practice, i.e. Legal Partnerships, Limited Liability Partnerships, Multi-Disciplinary Practices;
- (2) The restriction on barristers holding the money of clients;
- (3) The restriction on a barrister receiving instructions in a contentious matter;
- (4) The education and training arrangements in the State for Legal Practitioners.

It is arguable that it is the Authority itself, with the support of the State, who should bear the cost of fulfilling this aspect of the Authority’s functions for two reasons:

- (1) To ensure the independence of the Authority, and
- (2) To avoid placing an unreasonable cost on the profession.

## **UNFAIR APPORTIONMENT OF THE LEVY**

As at 30<sup>th</sup> June 2017, there are 17,604<sup>1</sup> names on the Roll of Solicitors in Ireland.

At 30<sup>th</sup> June 2018, there are 2,146 members of the Law Library and an unknown number of practising barristers who are not members of the Law Library.

Despite the ratio of 89:11 in the professions and the fact that barristers are prohibited from holding client monies, 20% of the approved expenses of the Authority under Part 6 and 20% of the expenses of the Disciplinary Tribunal will be levied as follows:

- 10% to barristers on the Roll of Practising Barristers (apportioned by number of members and non-members of Law Library)
- 10% to the Law Society.

The Council maintains that this anomaly in the legislation lacks fairness and is inconsistent with the approach taken in sections 95(7)(a)(iii) and 95(7)(c)(iii) of the Act.

It is the view of the Council that this anomaly should be corrected to apportion 100% of the costs for both areas in accordance with section 95(7)(a)(iii) and 95(7)(c)(iii) or, alternatively, to apportion the 20% of the costs for both areas in proportion to the number of practising solicitors and the number of practising barristers on the Roll of Practising Barristers.

The Council is aware that the Authority itself has commissioned expert input into the manner in which the levy is constructed in the Act and that there are challenges relating to its implementation arising from the legislative drafting as currently provided. The Council would welcome the opportunity to be consulted on any proposed legislative amendments that may be put forward in due course to address the anomalies that have arisen.

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<sup>1</sup> Law Society Annual Report 2016/2017

#### **PART 4: CONCLUSION**

The Council of The Bar of Ireland makes this submission to assist the Authority and the Minister in relation to the operation of the 2015 Act although it is difficult to do so where so many of those functions have not been commenced and, therefore, remain untested and where the resources required for other provisions of the 2015 Act have not been made available.

In order for core policies and structures as enacted in the legislation - namely the introduction of a reformed legal costs regime and the introduction of new disciplinary structures for lawyers - to operate in an efficient, effective manner in the public interest while maintaining access to justice for all, appropriate financial resources and personnel will have to be assigned to the Authority itself and to the new legal costs adjudicators.

The Council reserves its right to make further submissions to the Minister for Justice in relation to the final report of the Authority on this review and in relation to all aspects of the 2015 at any appropriate juncture.



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