

# **ASSOCIATION OF JUDGES OF IRELAND**

## **LEGAL SERVICES REGULATORY AUTHORITY PUBLIC CONSULTATION ON THE UNIFICATION OF THE SOLICITORS' PROFESSION AND THE BARRISTERS' PROFESSION**

### **Submission on behalf of the Association of Judges in Ireland**

#### **INTRODUCTION**

1. The Association of Judges in Ireland ("AJI") makes this submission in response to the call for submissions by the Legal Services Regulatory Authority ("LSRA") on the potential unification of the solicitors' profession and the barristers' profession.

#### **NATURE AND FUNCTION OF AJI**

2. The AJI was formed on the 18th of November 2011. It is a representative body and represents the interests of its members. Although it does not represent the judiciary as such, the AJI's membership comprises the vast majority of the judges in the Supreme Court, the Court of Appeal, the High Court, the Circuit Court and the District Court. The AJI's mandate is set out in detail in its Constitution and includes the protection and enhancement of judicial independence, the improvement of the administration of justice and the promotion of a better public understanding of the role played by the judiciary, both within the justice system and as an arm of government.
3. The aims and objectives of the AJI are:
  - a. To maintain and promote the highest standards in the administration of justice
  - b. To promote the interests of its members in their professional capacity
  - c. To promote the independence of the judiciary
  - d. To promote the highest standards of judicial conduct amongst its members.

- e. To promote the general interests of its members, including those interests arising upon retirement from the Bench.
- f. To promote the exchange of ideas on the administration of justice.
- g. To further the cultural, intellectual and legal proficiency of its members.
- h. To promote and maintain contacts with judges and magistrates abroad, with national and international associations and, in particular, national and international associations of judges.
- i. To represent its members in any forum where that is necessary
- j. To own and manage the website of the Association, subject to and in accordance with any protocol in that regard adopted by the Association.

## **CALL FOR SUBMISSIONS**

- 4. The AJI makes this submission pursuant to the request of the Legal Services Regulatory Authority (“the LSRA”) in the context of the forthcoming report in relation to a possible unification of the solicitors’ profession and the barristers’ profession.
- 5. The LSRA consultation paper has invited submissions on the following:
  - Views on existing business structures for the delivery of legal services, as well as any opportunities or challenges that might arise from the unification of both branches of the legal profession.
  - Views on planned or potential developments - within the legal services sector or external to it - which might impact on current and future business structures for legal services in the State.
  - The experience of arrangements in operation in other relevant jurisdictions. Section 34(4) of the 2015 Act states that the Authority’s report shall contain details of arrangements in operation in other jurisdictions in which the professions have been unified.
  - Whether the solicitors’ profession and the barristers’ profession in the State should be unified having regard to, among other things:
    - i. the public interest,
    - ii. the need for competition in the provision of legal services in the State,

- iii. the proper administration of justice,
- iv. the interest of consumers of legal services including access by such consumers to experienced legal practitioners, and
- v. any other matters that the Authority considers appropriate or necessary.

## **OVERALL POSITION OF AJI ON UNIFICATION**

- 6. It is the view of the AJI that there are very strong arguments for maintaining the current separation of the professions of barrister and solicitor and that the proper administration of justice may be adversely affected by the unification of the professions.

## **ADMINISTRATION OF JUSTICE IN IRELAND**

- 7. Before addressing the question of unification of the two professions, it is necessary to put the AJI's submission in context by recalling the function and manner of operation of the judiciary. Article 34.1 of the Constitution of Ireland provides that "*[j]ustice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public*". Since the establishment of the Court of Appeal, there are now five different layers in the court system – the District Court, the Circuit Court, the High Court, the Court of Appeal and the Supreme Court. In all layers except the District Court, parties are almost invariably represented by barristers unless they are lay litigants representing themselves. In the District Court, which deals with summary criminal trials, and civil disputes with a value of less than €15,000, parties are often represented by solicitors although barristers also regularly appear, reflecting the increasing complexity of the work done in the District Court.
- 8. The courts provide a forum for determining in accordance with the laws of the State, all controversies of a justiciable nature arising within the territory of the State, and for that purpose they exercise the authority of the State over persons and property. They are independent and impartial, and every judge makes and subscribes to a declaration that he or she will execute their office "*without fear or favour, affection or ill-will towards any man*", and "*will uphold the Constitution and the laws.*" Accordingly, the decision of any court is based upon the evidence and relevant legal provisions and



nothing else. It is for this reason that justice is said to be blind, and why it is often depicted by a blindfolded figure holding scales in one hand. The justice system must also, where necessary, be coercive and that is why the same figure is usually also depicted with a sword in the other hand.

9. Justice is administered in Ireland through an adversarial system rather than an inquisitorial one. This means that the parties to the litigation come before the court and each side has an opportunity to argue their case and to be heard, following which the judge (or jury in certain criminal matters) delivers a decision or verdict. The quality of that judicial decision is dependent to a large extent on what is put before the court by the parties, both in relation to facts and law. The judge (or judges, in the case of the appeal courts) are obliged to adjudicate upon the material placed before them by the parties to the litigation. They are not endowed with investigative fact-finding powers, nor is it their function independently to research the law separately from the parties. Those features are the hallmarks of an adversarial system. Without skilled advocates mindful of their duties to the court as well as to the party they represent, the access of the court to the evidence and the law would be seriously undermined. This would inevitably impact upon the ability of the court to render a just and correct decision. Seen in this light, the significance of the advocate in the system of administration of justice becomes readily apparent.

## **CURRENT SEPARATION OF THE PROFESSIONS**

10. The LSRA is well familiar with the distinct roles of solicitors and barristers<sup>1</sup> and their respective spheres of operation and does not propose to describe them in any detail in this submission. In summary, solicitors generally offer a “full service” offering to clients through an organisational structure including legal partnerships and firms. Clients generally access the services of barristers through solicitors. Solicitors have full rights of audience before all courts in Ireland which they have enjoyed since the enactment of section 17 of the Courts Act, 1971. Barristers offer a specialist advocacy service in the context of litigation, as well as a specialist advisory service in discrete

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<sup>1</sup> The majority of barristers who exercise their rights of audience on a regular basis before the courts in Ireland come from the independent referral Bar and as such are free to take instructions from any solicitor.

areas of the law. They have traditionally been sole practitioners and are entirely independent. Save in exceptional circumstances, they may not have any direct contact with the clients who retain them. They are typically retained exclusively through a solicitor, acting on behalf of the client. All instructions from the client come through the solicitor. Barristers are not permitted to hold clients' monies.

11. The AJI see two core disadvantages associated with unification: (a) significant diminution in the availability of lawyers with specialist advocacy and advisory skills/experience and (b) the potential that the independence of advocates appearing before the courts will be lessened.

### **SPECIALISED ADVOCATES**

12. The skill of the advocate is applied to every step of litigation. It encompasses advising whether a client should litigate or not, identifying the cause of action, pleading the case, advising on the necessary proofs for the case i.e. the requisite evidence, researching the law, identifying and presenting relevant legal authorities, writing legal submissions (where required), participating in all the necessary pre-trial steps, and finally presenting the case in the court (sometimes over an extended period of time), examining and cross-examining witnesses, making oral submissions and responding to queries from the court. Appeals to the higher courts naturally involve similar but not identical skills.
13. The centrality of a good advocate to the administration of justice has been touched upon above. Reducing the availability of lawyers specialising in advocacy skills or limiting access to them to a small pool of clients, will make it significantly harder for judges to correctly identify the issues before them, to avoid factual and legal mistakes, and to deliver comprehensive, well-reasoned judgments that command the respect of the parties. Inexperienced advocates are more likely to expend court time inefficiently due to insufficient preparation, a failure to identify the key issues and a lack of familiarity with the law. In an English case, *Abse & Ors v Smith*<sup>2</sup>, dating from 1986, Sir John Donaldson, Master of the Rolls, observed as follows in respect of the limitation of rights of audience to qualified persons:

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<sup>2</sup> [1986] 2 W.L.R. 322

*"These limitations are not introduced in the interests of the lawyers concerned, but in the public interest. The conduct of litigation in terms of presenting the contentions of the parties in a concise and logical form, deploying and testing the evidence and examining the relevant law demands professional skills of a high order. Failure to display these skills will inevitably extend the time needed to reach a decision, thereby adversely affecting other members of the public who need to have their disputes resolved by the court and adding to the cost of the litigation concerned. It may also, in an extreme case, lead to the court reaching a wrong decision" (p. 326-327).*

14. It is increasingly common that disputes coming before all courts (and in particular before the High Court, Court of Appeal and Supreme Court, but also increasingly before the Circuit Court and the District Court) are governed by complex legal rules in specialised areas that necessitate a consideration of extensive statutory provisions (including those deriving from EU law) and both Irish and EU case law. Those cases require the advocates to have a detailed knowledge of that area of the law. Specialised advocates of this sort are vital for the proper functioning of the administration of justice. This means that judges can hear and determine cases, even where the judge does not have specialist expertise in the area of law engaged by the dispute. Instead, the judge must be able to rely on the expertise of counsel to educate the court on the relevant legal requirements. This promotes efficiency, for example avoiding the necessity to have highly specialised courts, which would introduce an undesirable lack of flexibility and additional expense into the court system.
15. However, the AJI has a real concern that, over time, the unification of the professions is likely to both significantly shrink the pool of lawyers that specialise in advocacy and have specific areas of expertise, and limit access to those that remain. Insofar as the shrinking of the pool is concerned, unification will likely mean that the majority of barristers will become absorbed into existing firms of solicitors. Initially, they may continue to practice exclusively in advocacy from within that firm. However, very few firms will have the same volume of advocacy work available to that advocate as would have been available to her or him when a sole trader available for to be retained by all. Over time, it is probable that the only advocates within firms who appear before the



courts on a regular basis will be those working in very large law firms. The remainder will take on more non-advocacy work within the firm and their experience of advocacy will be diluted or reduced accordingly. This is likely to have an adverse impact upon the quality of advocacy before the courts and a loss of specialisation in the skills of advocacy.

16. Those who work within the large law firms may practise exclusively as advocates but access to them will inevitably be reduced such that only clients of those firms will be able to avail of those specialised advocacy and advisory skills. At present the system operates so that any solicitor from across the country, irrespective of the size or geographic location of their firm, can retain any barrister. The “*cab rank*” rule (which is strongly supported by the AJI) means that, subject to limited exceptions, barristers are obliged to accept instructions from solicitors in respect of any client. Barristers are currently not required to operate and maintain client accounts and are not exposed to the costs associated with running a full-service legal practice (staff costs, administrative costs, insurance, buildings etc.). This facilitates barristers accepting instructions, as many do, on a “*no win no fee*” basis, thus maximising access to their services. However, that widespread access to specialised advocates may be significantly reduced if barristers become either wholly or largely, partners in, or employed by, law firms. In that case, significant consumers of advocacy services such as the State, banks, insurers or other large institutional or corporate interests may well obtain exclusive access to the services of leading advocates, as their services will only be available to clients of that firm.

17. In short, the current system means that all litigants have available to them a group of lawyers that (a) specialise in advocacy before the courts and (b) many of whom have one or more areas of expertise in specific legal topics. This gives all litigants, irrespective of their size or position, access to the same quality of legal advice and representation and ensures equality of arms. Such access facilitates the proper administration of justice. There is a real risk that unification will undermine that access. It may also result in underfunded litigants resorting to representing themselves in the absence of a cadre of readily available specialist advocates.

## INDEPENDENCE OF BARRISTERS

18. The unification of the professions is likely to alter the independent role of the barrister, with potential adverse implications for the administration of justice. As the LSRA is aware, barristers are generally not permitted to have a direct relationship with clients and may only communicate with them through solicitors. They will usually be retained on a once off basis for a specific case or advice. They owe no duties to partners in a firm or to employers. They earn no salary. They do not have the conflicts of interest arising, for example, from obligations a law firm might have towards existing clients. All of this means they bring an independent and objective approach to a case. These characteristics have been well described in a recent High Court judgment<sup>3</sup>, in the context of the benefits that a member of the independent referral Bar bring to a case, as compared with a lay litigant.
19. From the point of view of the judge hearing a case, this independence and objectivity is vital. Because the system is adversarial, as described above, judges are hugely dependent upon the advocates to open the law fully to them. There is an obligation on barristers to open law to the court against the proposition being argued for, as well as that in favour of it. To the same end, barristers have an obligation not to mislead the court. Because barristers generally appear on a daily basis before the courts, and are well known to the judges, they are usually acutely aware of their obligations in this regard. It forms part of their training as barristers and is an essential part of their code of conduct. Equally, their robust independence assists them in discharging those duties.

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<sup>3</sup> See *Fogarty v The Governor of Portlaoise Prison* [2020] IEHC 154 [https://beta.courts.ie/view/judgments/dde972f3-5f08-4882-80f6-405154888664/3ef4bd34-a60f-4706-9728-352518938f01/2020\\_IEHC\\_154.pdf/pdf](https://beta.courts.ie/view/judgments/dde972f3-5f08-4882-80f6-405154888664/3ef4bd34-a60f-4706-9728-352518938f01/2020_IEHC_154.pdf/pdf), decision of Gearty J. of 27 March 2020, paragraph 3.3: “*The personal investment of the litigant in the outcome of the case is in stark contrast with the position of the professional lawyer, and in particular the independent referral barrister, who has no financial or personal interest in the outcome of the case. The practical implications of her role include duties of independence and absolute good faith. The self-employed barrister is singled out, not because solicitors are not independent, generally speaking, but because the barrister is not beholden to any other person: she has no duties to partners and is not in receipt of a salary, she has no ongoing relationship with the client and she is as independent as it is possible to be. This is the reasoning behind the professional model adopted by the referral Bar. The independent lawyer is in the best position to see the facts clearly, assess them clinically, and is concerned only to argue her side of each issue to the best of her ability. Just as importantly, she will assess what is not in issue and focus on the true crux of the case*”.



The loss of that well-established objectivity and independence, deeply ingrained in barristers, might well have significant implications for the quality of decision making in the courts and should only be entertained if clear and obvious benefits outweighing the obvious detriment can be identified. The AJI has not been able to identify any such benefits.

## **CONCLUSION**

20. The AJI believes that the present system has served the judiciary well. Judges enjoy a high level of trust amongst the public. Specialist advocates have contributed to the maintenance of this trust and have facilitated the proper administration of justice. The core interest of judges is to ensure that skilled and experienced advocates, fully cognisant of their duties to the court as well as to the parties, continue to appear before them. The unification of the professions would tend to undermine that interest for the reasons identified above. Accordingly, the AJI submits that the LSRA should recommend the maintenance of the existing system and should not propose the unification of the professions of barrister and solicitor.

21. The AJI thanks the LSRA for the opportunity to make these submissions.

9 June 2020

Association of Judges of Ireland