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DSBA SUBMISSION TO LSRA
RE: UNIFICATION OF THE PROFESSIONS

1. Background:

The Legal Services Regulatory Authority (LSRA) has invited submissions as part of a public consultation prior to a report to the Minister for Justice and Equality in relation to the unification of the solicitors' profession and the barristers' profession pursuant to their obligations under Section 34(1)(b) of the Legal Services Regulation Act 2015 (2015 Act).

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2. Dublin Solicitors' Bar Association

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

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

The DSBA is the largest independent provider of continuous professional development courses for solicitors in Ireland, averaging three CPD seminars per month as well as numerous smaller CPD events.

3. Executive Summary:

DSBA has considered the possibility of merging the professions.

The current situation:

Most legal work in Ireland is carried out by solicitors.

There are low barriers to movement between the profession of solicitor and barrister.

The current model is a shared work-load between solicitor and barrister rather than a doubling up of professionals to work on a case.

There may be a public perception of "paying twice" when solicitor and barrister work on a case.

Considering points against a merger:

Court work is now more complex due to rules of procedure and legislation meaning that regardless of whether there is one solicitor and one barrister or two solicitors, in many cases there is a need for more than one legal professional in litigation matters tried before the higher Courts.

The unique structure of the Law Library means that all litigants have access to the same pool of counsel.

It is more cost effective for a solicitor to engage a self-employed professional to carry some of the workload rather than employing another professional.

Section 150 of the Legal Services Regulation Act 2015 ['the 2015 Act'] means that litigants have a great deal of foresight and control over whether they wish for experts including counsel to be engaged and if they require such experts, that an estimate of their costs is furnished in advance.

There may be economic barriers which militate against solicitor advocacy.

Considering points in favour of a merger:

The division between solicitor and barrister is artificial

There is a lack of public confidence in having to have two professionals working on a case.

Conclusion

As the existing court system operates, we could not recommend a merger at present.

The existing system provides a choice for litigants – a merger might remove that choice.

A study into the true costs of merger for litigants would be advised before commencing unification. Reform of court listing system might also be necessary.

4. Introduction

This consultation asks for submissions regarding a possible unification of the professions.

Nearly all legal work in Ireland is carried out by solicitors. Some areas of law do not concern the courts (e.g. conveyancing, probate, and commercial contracts etc). Barristers generally do not engage in this work apart from occasional advisory assistance in the form of opinions. Where matters are contentious and involve litigation, nearly all cases before the Courts are heard before the District Court and the majority of these cases are run by solicitors without the involvement of a barrister.

In general, barrister's involvement is reserved to the Circuit Court and Courts of higher jurisdiction. While complex and higher profile, this represents a small percentage of the over-all legal work carried on in Ireland. This is evidenced in the numbers in each of the professions – there are 20,351[1] solicitors and 2,746[2] barristers.

The mood music in the background seems to indicate that a fusion of the professions is on the horizon. The 2015 Act provides that there is a common regulator for barristers and solicitors and mostly makes reference to the term "Legal Practitioners[3]", encompassing solicitors and barristers under the same heading. The Act also makes provision[4] for a solicitor to apply for a patent of precedence. The Mediation Act contemplates[5] certain obligations for barristers similar to those in force for solicitors at present in the event of a merger of the professions in the future.

When contemplating the unification of the professions, it is important to consider what consequences could follow, such as whether it would result in all legal practitioners becoming solicitors? Is such unification contemplated as part of an overall re-haul of the legal system or changing one part of it? This is not clear from the statutory provision calling for consultation.

Given the numbers involved and the practicalities about holding client money, it appears that the result of a merger between the professions would be for all to become solicitors.

We should not want to hold onto the division between lawyers for traditional or sentimental reasons. The object in the provision of legal services should be

[1] From Annual Report of Law Society 2018/2019. There are approximately 11,400 holders of a Practising Certificate. Figure correct as of 30th June 2019

[2] From Roll of Barristers maintained by LSRA. Figure correct as of 19th March 2020

[3] Section 2, Legal Services Regulation Act 2015

[4] Section 4, Legal Services Regulation Act 2015

[5] Section 15, Mediation Act, 2017

to prioritise access to justice and efficiency in time and money for the client. That said, there are aspects of the current arrangement which work well and would be prudent to try and preserve. In addition, the current court structure may have to change to facilitate unification should this be pursued in the future due to the way cases are listed for hearing.

4.0 Historical Context:

The division of lawyers into sub-categories is not a recent phenomenon. In Ireland prior to 1877 the professions of scrivener, proctor, solicitor and attorney existed independently only for the profession of solicitor to swallow up the others like Aaron's Rod. Post the commencement of the Supreme Court of Judicature Act 1877[6], the surviving legal professions were reduced to Notary Public[7], Solicitor and Barrister.

In Ireland the barrister has traditionally acted on the instructions from a solicitor, as advocate and in the drafting of papers. A solicitor's job was to engage with the client, advise on the law and, when appropriate, instruct a barrister and other experts in a case.

[6][S. 2 rep. 57 & 58 Vic c 56 (SLR)]

[7] Notary Public is not considered in this submission as the consultation is limited to the unification of the solicitors and barrister's profession.

4.1 Evolution of Professions

Since then gradual changes can be observed. One of the biggest changes came in 1971[8] when solicitors were given the right of audience before the Superior Courts. For many years, few solicitors exercised their advocacy skills in the higher courts but this evolved over time to the point where, now, many solicitors regularly appear before the Circuit Court and a few before the High Court and above. It is still the exception rather than the rule and a possible reason for this is noted below.[9]

Similarly, the role of the Barrister has expanded to tasks such as engaging in Discovery and providing advisory services which were previously exclusively the remit of solicitors. Up to the recent past it was unusual for a member of the professions to be referred to as anything other than "barrister" or "solicitor" whereas now it is common for practitioners to refer to themselves as "lawyers".

[8] Section 17 Courts Act, 1971

[9] See final paragraph page 13 *infra*

4.2 Movement between the professions

There are low barriers for professionals to move from one part of the legal profession to the other. For a barrister to become a solicitor after three years practice, there is a short conversion course available. A similar arrangement exists for solicitors to become barristers.

In addition, many in-house counsel are qualified as barristers and work alongside solicitors performing the same work. In recent years there has been an increase[10] in the number of practitioners choosing to change discipline, perhaps because they felt that their skill set or practice had evolved to a point where the structure of the alternative discipline more suited their needs or the needs of their clients. This is particularly evident in specialist areas such as tax, funds or company law where practicing barristers seek to be added to the roll of solicitors to facilitate working in a more advisory role in a team setting for specialist clients. Similarly, in areas such as criminal defence and employment law, solicitors seek to be called to the bar so that they may specialise and focus on advocacy.

The LSRA now regulates both professions. It might be considered that it would be better for there to be one profession to regulate rather than two. In order to consider this further, we should look at the current work carried out by the two professions which is considered in more detail below.

[10] See Law Society Gazette November 2018.

5.0 Division of Legal Work Model[11]:

5.1 Sharing the work-load

It may initially appear that by engaging a solicitor and barrister a client is paying twice for the same representation. This is not necessarily the case. While some overlap takes place, this is usually in the form of collaboration at key junctures rather than a duplication of effort.

For the most part, the traditional division between solicitor and barrister is divided along a workflow spectrum that begins when solicitors are engaged directly by the client. The Solicitor considers the instructions, advises on the law and where appropriate, researches the matter and puts a case together to send to the barrister in the form of a legal brief.

A solicitor will then consider the client's requirements and match these needs against a barrister with the appropriate skill, knowledge and persona to serve the client's case. The barrister will then draft the papers and act as advocate before the court.

[11] The term "Division of Work Model" was previously used in the *"Submissions of the Bar of Ireland to the Legal Services Regulatory Authority on certain issues relating to barristers, 2nd June 2017"*

5.2 Complexity & Access to Justice

Separately, the division of work model provides the solicitor in running his/her client's case with the option of adding skills and expert knowledge to the matter. The grafting on of a self-employed professional to a case can be a low-cost way of importing knowledge skills and added value to the matter for the client[12].

Since at least the turn of the century, legislation and the operation of the courts has become more complex. An example of this can be seen in the development of court procedure. In 2001 the Circuit Court Rules ran to 211 pages. They now run to over 2000 pages. By instructing a barrister to deal with the drafting of proceedings and advocacy, the client is obtaining a second independent opinion on the merits of the case, and benefitting from an alternative perspective. The solicitor is then free to focus on preparing the case, running and managing it and keeping the client informed, organising witnesses and settling the various accounts at the conclusion of the case. Of course, there is no reason that this effect could not be replicated by a firm of solicitors without the involvement of a barrister.

As the current system exists, this junction creates efficiencies that ensure that both practitioners time and talent is used as efficiently as possible. The solicitor's efforts ensure the barrister is provided with a refined work product which they can then consider and furnish advices and draft proceedings. The Solicitor will then bring these proceedings to the point of settlement or trial where the Barrister can be engaged with the benefit of the information distilled by the solicitor to resolve the case.

This ensures that the Barrister's time is focused so that they have sufficient bandwidth to accept multiple instructions from numerous solicitors with clients from different backgrounds with various issues.

This collaborative effort maximises the skill set of both disciplines and the client's ability to present their case to a court in a formal concise and systematic manner that is expertly researched, organised and in a format most convenient for the court. These cumulative and compounding efforts by each discipline and the efficiencies they create are passed on and assist with the proper and efficient functioning of the courts.

There is no reason that these benefits and efficiencies could not continue to exist post-unification. The difficulty might arise however as to the size of the firm that would need to exist to provide the same service to the client as the solicitor and barrister model.

[12] Given that barristers have lower overheads than solicitors; the cost of retaining an additional solicitor in the same firm could be much higher, depending on how often the assistance of additional counsel was required.

This in turn may create difficulties around access to justice. Many cases taken for poor or indigent clients are taken on a contingency basis meaning that the legal professionals are only paid if the client wins their case and recovers their costs. It would otherwise be very difficult for some litigants to access the courts. The current system allows the risk that costs are not recovered to be split between two self-employed professionals.

One of the unique features of the barrister's profession in Ireland is the fact that it is organised for rather quaint reasons around a Law Library.
The Law Library system means that (for the most part) the barrister's place of work is at or near the Four Courts in Dublin. Barristers are not permitted to organize themselves in chambers and are self-employed professionals. The Library system enjoys a reputation of independence and availability to all. The Code of Conduct provided by the Bar Council[13] means that the cab-rank rule is kept and that all litigants have access to excellent advocates whether they are a small farmer in Leitrim or a multi-million-euro corporation.

The library system also means that barristers' overheads are much less than solicitors' making it economical for the client to obtain specialist legal advice.

In other jurisdictions, it is possible for a solicitor to develop an expertise in a particular area of law and practice one part of that and nothing else and offer a full service to clients without requiring the input of a barrister. It is quite possible for this business model to work well within a city with a large pressure of population.

The Irish legal market however is much smaller. Overheads for solicitors are large due to having to keep an office, pay rates, rent, staff, the costs of regulation and the handling of client money. Accordingly, outside of the centre of Dublin it would be difficult to envisage such a solicitor-specialism working economically. For a barrister who is a member of the Law Library the overheads are much more modest and accordingly a specialism of this nature is a working economic model.

The Sole Practitioner Solicitor and the small solicitor's firm[14] is the most common form of Practice in Ireland. The Sole Practitioner or small firm allows access to justice for many who might otherwise be denied representation. At present there is no formal referral system for solicitors to engage other solicitors outside their firm to assist them with their work. This might not even be possible in a small town or rural community. The availability of barristers is therefore an important resource for the small firm and their client. It provides the solicitors with a way to obtain expertise and input on their file without having to engage another person to work in their firm. The variety of expertise provided through the Law Library system means that the small firm can carry

[13] Not all barristers are members of the Law Library but most are
[14] See Annual Report of Law Society 2018/2019 where sole practitioners comprised 45% of firms.

a range of cases and so provide the owner with a viable working business model.

5.3 Knowledge and Skill Networking

The horizontal interchange between the different practitioners creates a 'weave' effect where practitioners in both disciplines cross and re-cross one another constantly and in doing so transport skills, knowledge and ideas across the profession that educate, benefit and strengthen the legal system as a whole.

The merging of the professions might dissolve these horizontal paths of interaction replacing them with vertical paths that would inevitably act to insulate skills, knowledge and ideas within institutional pipelines.

A merged profession would inevitably morph to mirror the architecture of solicitor's firms rather than the Law Library. Commercial reality would dictate that the more skilled and experienced Barristers would seek to align themselves with the more dependable and profitable work offered by large firms.

The resulting narrowing of access to legal expertise may act as an 'engine of inequality' in wider society where the application of the commercial model would encourage settlement on terms unfavourable to the poorer party resulting in a less just outcome.

The streamlining of briefing solicitors, clients and resources to a single firm/ location would also pivot the convenience of being based in the Law Library or its surrounds to the firm's offices further isolating barristers from one another and solicitors outside their new firm. The weave effect would disentangle and the benefits it provides to the development of the legal zeitgeist would be lost.

A change in location could potentially result in further damage to access to justice within our society. In many rural areas the local solicitor's firm provides a conduit to the speciality that exists in the Bar. Existing relationships within the community and local knowledge enable this solicitor to advise local residents of their rights and to provide an avenue to instruct a specialist Barrister. Low population density would prohibit such firms operating a speciality practice that would attract merger with Barristers and would thus render such firm incapable of providing a range of services to the community. There is already an issue with too few firms outside of Dublin and efforts should be made to ensure that the problem is not exacerbated.

5.4 Costs

Since the commencement of Section 150 of the 2015 Act[15] the client has a very large degree of control and foresight in respect of legal costs which should hopefully address the concern of "paying twice" for legal advice.

In addition, given that solicitors have the right to appear before all Courts, should the client wish it, they can instruct a solicitor not to engage a barrister and have the solicitor deal with all aspects of the case.

Separately, the availability of a self-employed professional who is not employed by the solicitor is of advantage to the client and the solicitor and should result in reduced fees as it frees the solicitor to take on a larger caseload. If the same solicitor had to manage the case, draft the court proceedings and advocate, it is likely that the fees would be higher as, no doubt, more staff would be needed and additional time for preparation and support would be required. In this way, it can be demonstrated that the involvement of a solicitor and a barrister in a case is not necessarily doubling up of work, it is the sharing of the work.

The structure of the Courts and the method of listing cases must also be considered in relation to the division of the professions and the costs of running a case.

Our current court system evolving slowly over hundreds of years has changed little since the late 19th century notwithstanding a substantial increase in population and development of law. Ireland has the lowest number of Judges per 100,000 inhabitants out of 47 countries examined by the European Commission in 2010[16]. Consequently, many cases are listed for the same day meaning that the litigants, their witnesses and their lawyers must all wait for their case to be called on.

One could argue that a unification of the professions would not change this situation. That said, with the current division of the professions, a self-employed court based professional (the barrister) is at his place of work at the courts and can therefore keep tabs on the movement of the list and be available to deal with the case quickly and more easily than an office based professional (the solicitor). By engaging the barrister for the advocacy part of the case, the solicitor is free to attend to other work (in theory) while waiting for the case to come on for hearing.

This precise point was considered in an article by Kerridge and Davis some years ago[17]. The article was based in part on co-operation with the University

[15] Commenced 7 October 2019

[16] Taken from the Association of Judges in Ireland website - *Who are the Judiciary*

[17] *Reform of the Legal Profession: An Alternative "Way Ahead"* The Modern Law Review, November 1999, 807 by Roger Kerridge and Gwynn Davis

of Bristol and solicitors, barristers, barrister's clerks and judges were interviewed on an anonymous basis. While 20 years old, this article highlights many of the concerns around the practice of law that Irish legal professionals would sympathise and agree with.

Under the heading "Economic barriers to solicitor advocacy"[18], solicitors viewed the economics of their business model as militating against in-house trial advocacy and believed that there would be no cost advantage to their client or themselves in providing such a service. One of the factors which deterred solicitors from advocacy was that they might waste several hours waiting for their case to come on for hearing. The writers felt that if more fixed hearing dates were available then more solicitors would engage in advocacy.

[18] Ibid, page 811

6.0 Is there anything to be said for a merger?

So far, this submission has covered the best parts of the current arrangement of the division between the professions and the reasons why a continued division might be beneficial.

For completeness, we now turn to the reasons why a merger might be beneficial.

The possibility of a merger has been considered in a recent article in the Trinity College Law Review[19]. The points in favour of merger are summarized below:

- The increased costs of instructing a barrister and solicitor
- In the US costs orders are rare – in Ireland costs follow the event and the losing party pays the costs of a solicitor and barrister for the other side
- High costs inhibit access to justice

No evidence regarding costs savings appears to be available in either argument for or against the retention of two professions and neither was it addressed in this article. The issues of training and high overheads for solicitors was not addressed. The issue of high costs inhibiting access to justice is a fair point[20]. The issue of how litigants might access the courts without costs orders is not dealt with. Paragraph 5.2 *infra* deals with how solicitors and barristers have effectively operated an *ad-hoc* quasi legal aid service to indigent litigants. This might help but is not access to justice.

A merger was also contemplated some 30 years ago in an article by Harry Cohen in the Journal of the Legal Profession[21]. The arguments for merger can be summarized as follows:

- The division between Solicitor and Barrister is artificial; prior to 1870s solicitors had the right of audience to higher courts;
- The division is a waste of talent and economic resources;
- The client's needs and wishes become secondary to the observance of established practices;
- The expense of litigation would be reduced if a solicitor handled the matter to its conclusion;
- There is a lack of public confidence in a divided profession;

[19] *Public Access in Law – a Challenge to the Bar? Cormac Donnelly* March 2020

[20] See judgment of Clark CJ cited in the article above "*SPV OSUS v HSBC Institutional Trust Services*: 'I remain very concerned that there are cases where persons or entities have suffered from wrongdoing but where those persons or entities are unable to vindicate their rights due to the cost of going to court" [2018] IESC 44

[21] The Journal of the Legal Professsion, Vol 12, November 1987

The first two points are not entirely relevant in today's world – the historical situation is what it is and one way or another the current situation is that two professions exist. Regarding the waste of talent, the author was concerned about the absence of solicitors on the Bench- happily, this is no longer an issue in this jurisdiction and there are a number of solicitor-judges in the Higher Courts. He was also concerned about the difficulty in young barristers obtaining a place in chambers – again this is not the situation in Ireland given that the Bar operates a Law Library system.

Regarding the point about client's needs and wishes becoming secondary to the observance of established practices, this merits further consideration. This can be linked to the point about the lack of public confidence in a divided profession. The author here is driving at the necessity to instruct solicitor and barrister and, in certain cases, senior counsel. In addition, he refers to "the exchange of briefs between barristers where solicitors are hard pressed to explain the substitution of a stranger for the originally instructed barrister". Every solicitor has felt his heart sink into his boots with disappointment for the client when this happens, but this is mostly caused by the current case listing systems rather than the practices which have developed over time by the Bar.

Separately, the modern client is well educated and has a large deal of foresight over their costs in advance[22]. There is nothing preventing a client having a solicitor deal with the entire of the case including advocacy should they wish for that.

In respect of the expense of litigation being reduced by solicitor-only acting, no hard evidence has been found of the costs saving and we have previously made the point above about the necessity of two lawyers (of whatever branch) being involved in litigation, especially at hearing given the complexity of the issues and rules which arise in the twenty-first century as well as the current system of case listing in the courts.

[22] Section 150 of the 2015 Act

7.0 Conclusion

In conclusion, at present the existence of two legal professions provides potential litigants with choice. They are free to choose a solicitor who will provide a full service or to engage a solicitor and barrister or other expert.

The barrier for legal practitioners to transfer from one profession to another is low, meaning that practitioners have a choice of business model.

Section 150 of the 2015 Act provides the client with advance notice of the costs involved and they decide whether to engage a barrister or other professional to work on their case.

The current system provides solicitors' practices with the ability to engage a barrister to assist in a case without having to employ them or create a permanent link between them and the barrister. This affords the litigant with access to specialist knowledge.

In turn, the ability of smaller firms to access specialist knowledge means that access to justice is provided, in that all litigants have access to the same specialists regardless of the litigant's social or financial standing.

The complexity of the law and the court rules mean that it is often necessary to have two legal practitioners (of whatever profession) working on a case. There is an economic argument that costs could be saved by a solicitor engaging a barrister to carry out some of that work thereby grafting on a self employed professional rather than having to employ a second solicitor with all the overheads that would entail.

Should a merger of the professions be contemplated in the future, it would not necessarily result in costs savings – other parts of the legal landscape such as the current method of case listing may need to be reviewed.

In conclusion, we cannot recommend a merger of the professions at this time. If unification is contemplated, then consideration of the true costs to the litigant and a reform of the courts would also need to be contemplated.