

**Legal Services Regulatory Authority Public Consultation on the Unification of the
Solicitors' Profession and the Barristers' Profession**

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

8 May 2020

I. Introduction

1. The Honorable Society of King's Inns ("King's Inns") makes this submission in connection with the preparation by the Legal Services Regulatory Authority ("LSRA") of a report on the potential unification of the solicitors' profession and the barristers' profession. Section 34(4)(c)(i) of the Legal Services Regulation Act 2015 requires the LSRA to include in its report recommendations as to whether the professions should be unified having regard to the following matters:

- (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) and any other matters that the LSRA considers appropriate or necessary.

2. In addition to the section 34(4)(c)(i) matters, the LSRA will also be guided in its recommendations by the regulatory objectives and professional principles contained in section 13 of the 2015 Act. Section 13(4) lists the following regulatory objectives:

- (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 specified in section 13(5).

3. Section 13(5) of the 2015 Act identifies the following professional principles:

- (a) that legal practitioners shall –
 - (i) act with independence and integrity,
 - (ii) act in the best interests of their clients, and
 - (iii) maintain proper standards of work,
- (b) that legal practitioners who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court by virtue of being legal practitioners, shall comply with such duties as are rightfully owed to the court, and

(c) that, subject to any professional obligation of a legal practitioner, including any obligation as an officer of the court, the affairs of clients shall be kept confidential.

4. It is the submission of King's Inns that appropriate consideration of all relevant factors, in particular the respective roles of barristers and solicitors in the justice system and the services they provide to consumers, leads to the inevitable conclusion that the continued separation of the professions serves each of the statutory imperatives set out above. King's Inns also submits that the continued separation of the professions is in keeping with the regulatory objectives and professional principles. The rationale for these submissions is set out in detail below.

II. Solicitors and Barristers

5. The nature of the professions of barrister and solicitor, their roles and functions in the justice system, and the legal services they provide in general, differ considerably, albeit they interact to a significant extent and are highly complementary.

6. The most significant distinction for the purposes of the current consultation may well be that solicitors offer a wider range of legal services than barristers; the corollary of this being that barristers provide a more specialised service. Generally speaking, barristers provide specialised advisory and advocacy services directly connected with litigation, and as such their work is directly and intimately connected with the administration of justice by the courts.¹ Generally speaking, a significant component of a solicitor's practice will relate to matters other than those directly connected with litigation. Solicitors generally offer what may be described as a "full service" offering to consumers whereas barristers offer a specialist service that is generally focused on litigation and in particular legal advocacy. This clear distinction between the scope of the services provided by the respective professions has important implications for the current consultation, and in particular for the section 34(4)(c)(i) matters. In short, the two most significant implications are, first, the access to specialist and expert advisory and advocacy services that it facilitates for all

¹ This submission examines the differences between the services provided by barristers and solicitors that are most relevant to the current public consultation. This necessarily entails a focus on the specialised, litigation-oriented advisory and advocacy services provided by the vast majority of practising barristers (*i.e.*, barristers practising at the independent referral Bar). King's Inns recognises that there are many practising barristers who provide legal services outside of this context, and in particular in employment. However, for the purposes of this consultation, it is the work (and the continued existence) of the independent referral Bar that would be most affected by unification of the professions and this submission focuses on this category of barristers accordingly.

consumers; and, second, the cost efficiencies that flow from the ability to retain such services on an *ad hoc* basis without the need for a solicitor's firm to retain on a permanent basis experts and advocates across an increasing range of specialised practice areas.

III. Unification would be Unnecessary

7. An important consideration in the context of this consultation is the relative ease with which solicitors and barristers can transfer between the respective professions and the full rights of audience enjoyed by solicitors. Consequently, there is no real demand or need to unify the professions. If a barrister wishes to practise as a solicitor, he or she may readily transfer to that profession. As solicitors enjoy full rights of audience before the courts, they can provide consumers with a full range of legal services without recourse to the expertise of the Bar. However, for various reasons, all of which serve to further the interests of consumers and the public interest, solicitors generally recommend the instruction of a barrister for certain advisory work and a large proportion of advocacy work. This is also the free choice of many clients. This reality, it is respectfully submitted, is a powerful argument against unification of the professions. If there were any real demand or need to unify the professions, it seems likely that the solicitors' profession would have already become the *de facto* unified profession. Indeed, there would even be no need for a formal unification of the professions (with the attendant regulatory changes and costs), but rather the barristers' profession would slowly disappear. This has not happened. There remains a strong demand from consumers and solicitors alike for the independent and specialised services provided by barristers. Unification of the professions would not only be unnecessary, but it would be detrimental to the interests of consumers, would lessen competition in the provision of legal services, restrict choice and would have an adverse effect on the administration of justice generally. It would deprive consumers (and the administration of justice) of specialised advisory and advocacy services for which there is a strong demand.

IV. Access to Experienced Legal Practitioners

8. One of the major disadvantages of unifying the professions is the effect it would have on consumer access to skilled legal advocacy and advisory services. At present, a combination of the "cab-rank rule" pursuant to which, subject to limited exceptions, barristers are obliged to accept instructions from solicitors in respect of any client,² and

² Rule 32 of the Professional Code of King's Inns provides as follows:

the independent sole trader nature of most members of the profession, means that solicitors from all across the country, irrespective of the size or geographic location of their firm, are able to instruct any barrister to represent or advise their clients. Unification of the professions, absent any overriding justification to undertake such a radical restructuring, would imperil the survival of this model to the obvious detriment of consumers nationwide. The “cab-rank rule”, which continues to thrive within the independent referral Bar, prevents major consumers of advocacy services such as the State, banks, insurers or other large institutional or corporate interests from monopolising the services of the leading advocates. It ensures that consumers of legal services, in any part of the country, have access to the same quality of legal advice and representation available to the State and to large organisations, thus safeguarding the principles of access to justice and equality of arms before the law.

9. If the professions were unified, it is likely that the leading barristers would be recruited by the largest firms of solicitors, predominantly Dublin based, with the result that the services of these (former) barristers would be exclusively available to the clients of that firm and no longer available to those of smaller firms. This would restrict the access of many consumers and solicitors throughout the country to the professional services of the leading barristers. It would deprive many individual litigants of their services, which would in all likelihood have a negative impact on the litigants’ ability to assert their legal rights in a cost effective manner and have further negative consequences for access to and the administration of justice. Indeed, even for the clients of the larger firms, their choice of (former) barristers to represent them would likely be diminished as they would inevitably have to draw on the smaller pool of advocates within a given firm.
10. The disadvantages associated with unifying the professions are further amplified when one considers that in many key specialised areas of law (e.g. tax, planning, etc.) there may only be a handful of experts in the field. The negative impact on access to justice and competition would be immediately apparent upon unification of the professions were the

“Save insofar as legal services as a barrister are being provided under a contract of service, having regard to the anticipated length and complexity of a case and having regard to their other professional commitments and the provisions of the Code, barristers are bound to accept instructions in any case in the field in which they profess to practise (having regard to their experience and seniority) subject to the payment of a proper professional fee. A barrister may be justified in refusing to accept instructions where a conflict of interest arises or is likely to arise or where he/she possesses relevant or confidential information or where there are other special circumstances.”

small number of leading practitioners from certain specialist areas to enter partnerships or otherwise become unavailable to the wider market.

V. Efficient and Cost-Effective Model

11. The current organisation of the legal profession in Ireland involves a division of labour between solicitors and barristers with undoubted benefits to consumers, not only in terms of the range of expertise and the quality of the advice and skilled advocacy services available to each solicitor and each consumer throughout the country, but also in terms of the flexibility and cost at which such services are available. Solicitors and their clients can draw upon the experience and expertise of any individual member of the independent referral Bar for any individual set of proceedings, or item of work. Furthermore, solicitors can offer a full service to consumers without the need to retain on a permanent basis experts across a broad range of areas by drawing upon the experience and expertise provided by the Bar. The current model of the barrister practising, in most cases, as a sole practitioner without the ability to hold and deal with client's funds or the requirement to manage client documentation (with the consequent need to maintain additional support staff) means that a barrister can operate at a lower cost base than a solicitor and thus offer his/her services at a lower cost to the benefit of the consumer. In light of the section 34(4)(c)(i) imperatives and the section 13 regulatory objectives, it is a cause of great concern that unification of the professions would eliminate the benefits of a split profession without itself providing any obvious benefits of such magnitude as would justify such a change.

VI. Independence of Barristers

The unification of the professions would fundamentally alter the independent role of the barrister, potentially adversely affecting the administration of justice and causing detriment to the public interest. In their specialist advisory and advocacy roles (and as a function of the prohibition on barristers receiving direct instructions in contentious matters), barristers generally become involved in contentious matters at a later stage than solicitors, have limited direct interaction with clients, and have no role in the gathering of evidence. As a result, barristers are able to examine matters independently, objectively, and from a fresh perspective. This long-established and oft-asserted independence of the barrister, is an important offering to consumers of legal services and, alongside a barrister's overriding duty to the court, plays a crucial role in the administration of justice. Importantly, barristers are not exposed to the range of conflicts of interest that potentially limit the

provision of services by large firms of solicitors. They frequently act for and against particular parties, e.g. the State – something which is unheard of in certain countries and a very valuable service currently available to Irish consumers. Unification of the professions would thus result in a restriction of supply.

12. The role of the independent barrister possessing a specialist knowledge and expertise who can advise objectively upon a legal dispute and conduct highly skilled legal advocacy (on which the interests of the client and the administration of justice depend) must not be underplayed, and the value of this service to individual clients, to solicitors and to the administration of justice as a whole cannot be overstated. The unification of the professions would result in (former) barristers being part of a firm that is directly instructed by their clients in relation to all aspects of a dispute, resulting in the elimination of this valuable function.

VII. Conclusion

13. In conclusion, the rationale for making no mandated change in the current split structure of the legal profession is clear. There is no clear mischief that has been demonstrated or requires to be addressed. The overall benefits of a split profession are manifest. It promotes and serves each of the matters set out in 34(4)(c)(i) of the 2015 Act, as well as each of the regulatory objectives and professional principles enshrined in section 13. The current organisation of the legal profession does not impede the provision by solicitors of a full legal service without recourse to the expertise of the Bar, and yet it fosters the development of barristers' expertise in specialised areas, widens access to experienced legal practitioners, and ensures that barristers can continue to provide, in the public interest, independent and objective legal advice and specialist advocacy services.
14. No one is obliged to retain the services of a barrister. They do so as a matter of free choice. The fact that the market has evolved to provide consumers with this free choice of legal services, with no regulatory compulsion to avail of such services, is itself a powerful argument that demonstrates that the split profession serves the objective of consumer welfare and is an equally powerful argument against interfering in the market so as to restrict choice.