



An tÚdarás Rialála
Seirbhísi Dlí
Legal Services
Regulatory Authority

Greater than the sum of its parts?

*Consideration of Unification
of the Solicitors' Profession
and Barristers' Profession*

30 September 2020

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EXECUTIVE SUMMARY

1. The Legal Services Regulatory Authority (the Authority) is pleased to present this report to the Minister for Justice and Equality (the Minister) regarding the unification of the solicitors' profession and the barristers' profession in the State.
2. The Authority was established on 1 October 2016. It is required under section 34 the Legal Services Regulation Act 2015 (the Act) to report to the Minister within four years of its establishment day in relation to the unification of the solicitors' profession and the barristers' profession. Accordingly, this report is submitted to the Minister on 30 September 2020.
3. The Act requires the Authority to address a binary question in this report. Under section 34(4)(c), this report shall contain recommendations as to:
 - (i) *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.*
4. Under section 34(4)(c)(ii) of the Act, if the Authority's recommendation is in favour of unification of the solicitors' profession and the barristers' profession, its report shall contain recommendations as to:
 - (I) *how the professions can be unified, and*
 - (II) *the reforms or amendments, whether administrative, legislative, or to existing professional codes, that are required to facilitate such unification, and*
 - (III) *any other matters that the Authority considers appropriate or necessary.*

The Consultation Process

5. As part of a statutory consultation process under section 34(1)(i) of the Act – which was extended to take into account the impact of Covid-19 on the operational priorities of stakeholders – the Authority received 19 written submissions. Ten were from organisations and nine were from private individuals, all of whom were barristers or solicitors (including one trainee solicitor). These are summarised in Part 4 of this report.
6. While the Authority is grateful for the level of engagement and the detail of the submissions received, it considers that the number of responses was modest given the significance of the matter under consideration and the potential implications of the unification of the legal profession, not only for solicitors and barristers themselves, but also in the context of the statutory objectives of the Authority as set out in section 13(4) of the Act.
7. For any future consultation on this question that may be undertaken, the Authority considers that it would be important to receive the views of a wider range of stakeholders, including legal services users who have no direct professional interest in the question at hand.

Experiences of Other Jurisdictions

8. This report contains details of arrangements in operation in other jurisdictions, including those in which the professions have been unified, as required under section 34(4)(b) of the Act. A unified legal profession is generally regarded as one which is not divided between solicitors and barristers in terms of official functions. A divided or split profession, as exists in Ireland, is one with two distinct branches of solicitors and barristers.
9. The selected jurisdictions examined in detail in Part 5 of this report are those which share Ireland's common law tradition, as this provides a more analogous starting position for the analysis. The jurisdictions are: Australia, Canada, New Zealand, Singapore and England and Wales.
10. The examination illustrates that the structure of the legal profession in each of these jurisdictions has been influenced and shaped, often over centuries, by a complex range of social, economic, cultural and political factors and conditions.
11. The analysis allows the Authority to draw the following findings and conclusions:
 - The development of divided or fused legal professions in parts of the common law world was often heavily determined by local factors and conditions. For example, in the case of Canada and New Zealand, a unified profession was initially made necessary by a shortage of lawyers to support a separate bar.
 - The evidence from other common law jurisdictions indicates that a unified model can operate successfully in terms of regulation and delivery of legal services. However, this does not mean that these jurisdictions do not face issues in relation to

structural efficiencies, costs of legal services and wider issues and concerns related to access to justice and the administration of justice.

- In countries with a unified professional structure, some lawyers still restrict their work to barrister-type work only. For example, in New Zealand a voluntary independent bar comprised of “barristers sole” currently exists alongside a formally fused profession.
- In some jurisdictions with formally divided professions, such as the Australian states of Queensland and New South Wales, joint admissions occur with practitioners admitted as “legal practitioners” or “lawyers”.
- In some jurisdictions where the profession is formally divided, there may be only minor distinctions between the two branches of the profession in terms of their functions. For example, in England and Wales a series of reforms over the years have led to a gradual erosion of distinctions between the work that barristers and solicitors may undertake. The introduction of solicitor advocates, alternative business structures, and wider direct access to barristers than exists in Ireland means that the legal profession in our neighbouring jurisdiction looks very like a fused profession. Yet the professional titles of solicitor and barrister remain and there is currently no indication of any impetus to change the status quo.

Context and Background

12. The Authority’s consideration of the unification question under section 34 of the Act has been undertaken in the context of an evolving regulatory landscape with important developments in the legal services sector envisaged in the Act awaiting implementation or the Authority’s further consideration. In addition, the Authority has made recommendations for reform which would impact on how barristers provide their services.
13. The Authority considers that it is important to reflect on these matters in this report, as they constitute *“matters that the Authority considers appropriate and necessary”* in its consideration of the question of whether the branches of the profession should be unified (section 34(4)(c)(i)(V)). The matters are summarised below and discussed in further detail in Part 2.
14. This report comes at a time of unprecedented uncertainty and challenges for the Irish legal profession and the legal services sector, as well as the domestic and global economy, with the dual threat from the Covid-19 crisis and Britain’s pending departure from the European Union.
15. The Covid-19 crisis has presented challenges for the administration of justice in the State. Since the onset of the pandemic in Ireland in early 2020, it has had a significant impact on the day-to-day operation of the courts and, by extension, court-related work of solicitors and barristers.

16. Brexit too is a significant factor which brings with it many uncertainties in terms of both potential opportunities and risks for Ireland's legal services sector. The fact that Ireland will soon be the only common law system in the EU and the only English speaking country in the economic and political bloc creates growth potential for Irish solicitors and barristers after Brexit.
17. At a more fundamental level, the UK's departure from the EU potentially raises questions for the future of the common law system in a union where a largely homogenous system of civil law dominates.

Authority's Recommendation on Unification Question

18. Based on the evidence it has gathered and its analysis of the unification issue, the Authority's recommendation to the Minister under section 34(4)(c)(i) of the Act is that the solicitors' profession and barristers' profession in the State should not be unified at this time.
19. Having reached the conclusion under section 34(4)(c)(i) that it is not in favour of unification, the Authority is not required to also consider the provisions of section 34(4)(c)(ii) of the Act.
20. The Authority considers that it may be appropriate for it to give further detailed consideration to the unification issue at a future date. Accordingly, it undertakes to return to the matter no less than five years from the date of submission of this report to the Minister.
21. The Authority anticipates that the landscape for legal services provision will be sufficiently evolved in that period in order for it to reconsider the unification question, if it deems it appropriate, in a significantly revised context.
22. In arriving at its conclusion on the binary question posed in section 34(4)(c)(i) of the Act, the Authority has considered issues under this section as they relate to the following: the public interest; the need for competition in the provision of legal services in the State; the proper administration of justice; the interest of consumers of legal services including access by such consumers to experienced legal practitioners; other matters the Authority considers appropriate or necessary.
23. In addition, the objectives of the Act, especially as articulated in section 13(4) are to the forefront of the Authority's conclusions and recommendations. The Authority bases its recommendation on the binary question it was required to address under section 34(4)(c)(i) on the considerations as set out below.

Timelines in the Act and Authority's Ongoing Work

24. The Authority considers that at this stage in its regulatory timeline it would be premature for it to recommend to the Minister that the solicitors' and barristers' professions be unified. The Authority was established on 1 October 2016. The context in which it is now considering

the issue of unification is considerably different to that originally envisaged under the Act. There are several reasons for this as set out below.

1. Legal Partnerships Pending Introduction

25. Had the Act's scheme been followed, the Authority's consideration of the unification question four years into its existence would potentially have benefited from the experience of legal partnerships being operational for a considerable period in advance. Under the Act, the Authority was required to make its initial report to the Minister on the regulation of legal partnerships within six months of its establishment, with their introduction thereafter.
26. Legal partnerships are a new legal practice model introduced by the Act. A legal partnership is a partnership between two or more legal practitioners, at least one of whom is a practising barrister, for the purpose of providing legal services.
27. The introduction of legal partnerships will, for the first time, allow a barrister to enter into a business partnership with another legal practitioner, who can be either a barrister or a solicitor. This is a significant change from the current situation whereby only solicitors may form general and limited partnerships with each other to deliver legal services, and private practice barristers must be sole traders (or employees).
28. Relaxing the rules on barristers forming partnerships with other barristers and/or solicitors will offer more flexibility to legal practitioners, allowing them to work together and provide different and more efficient and competitively priced legal services to consumers. Legal partnerships, by allowing barristers and solicitors to work together within one business entity, mean that consumers can visit a solicitor and barrister operating in the same premises as a "one-stop shop" for the provision of legal services.
29. For a variety of reasons as set out in this report, the introduction of legal partnerships await implementation by means of an amendment to the Act. The Authority therefore considers that it is appropriate for it to await the introduction of legal partnerships before considering structural changes to the legal profession.
30. The Authority must ensure that the introduction of the legal framework for this new form of practice takes place in an orderly fashion and that legal practitioners who wish to form such partnerships are given as much information about regulatory requirements as is required, and at as early a stage as possible.
31. Once introduced, the Authority will have an ongoing role in relation to the regulation of legal partnerships under the Act, with the establishment and maintenance of a register of legal partnerships. The take-up of legal partnerships by legal practitioners will provide guidance to the Authority in relation to the appetite and commercial viability of this new practice model.
32. The Authority intends to monitor and assess the impact of the introduction of legal partnerships in terms of efficiencies, costs, competition and consumer interests.

2. Authority's Further Consideration of Multi-Disciplinary Practices

33. The fact that legal partnerships have not come into operation has had a knock-on effect for the Authority's further consideration of another legal business model contemplated by the Act, namely multi-disciplinary practices or MDPs. MDPs are partnerships of two or more people, including at least one solicitor/barrister. Such partnerships, if introduced, would offer legal and also non-legal services.
34. While the Act contains some suggested regulatory arrangements for the introduction of MDPs in Ireland, it does not pre-empt a decision of the Authority as to whether this new form of business structure should be introduced at all.
35. The Authority has to date not recommended the introduction of MDPs. However, it has committed to giving further consideration to their introduction. It considers that the introduction first of legal partnerships should assist it in further considering the issue of MDPs.

3. Authority's Previous Recommendations on Barristers' Work

36. In a September 2017 statutory report to the Minister, the Authority recommended allowing enhanced direct client access to barristers. While commenting on the need for further direct consultation on the issues before reaching a final position on the matters, the Authority recommended that direct access to barristers be made available to organisational clients in certain circumstances in contentious matters.
37. Currently, direct client access to barristers is prohibited in contentious matters and is allowed in non-contentious matters in limited circumstances. In making its recommendation, the Authority was cognisant of the fact that direct access in contentious matters would be a new departure for the barristers' profession.
38. In the same report, the Authority said it would consider the issue of barristers holding client moneys as part of a legal partnership or multi-disciplinary practice, as part of further consultations and considerations of those issues. Currently, barristers are not permitted to hold clients' moneys, although solicitors may do so.
39. The implementation of the Authority's recommendation on direct access would require an amendment to the Act and the issuing of regulations by the Authority. From a sequencing point of view, therefore, the Authority considers that it would be appropriate for it to oversee the introduction of its recommended scheme of expanded direct access to barristers first, before contemplating further changes to the work and functions of solicitors and barristers.
40. Taken together, these two reforms – that is the creation of legal partnerships and the facilitation of greater direct access to barristers – will mean increased consumer access to barristers. In addition, legal partnerships can add to both competition and choice in the market for legal services.

4. Absence of Compelling Evidence to Support Unification

41. Regardless of the exact form it may take, the introduction of a formally unified legal profession in Ireland could reasonably be expected to have far-reaching consequences not only for legal practitioners themselves, but also for consumers of legal services, the operation of the courts and the wider administration of justice.
42. In the Authority's opinion, having considered the views of respondents to this consultation, and having analysed arrangements in other jurisdictions, there is a lack of compelling evidence to support a recommendation that the profession be unified.
43. This is not to say that there is not an ongoing case for the Authority to continue to examine areas of legal services provision where structural improvements and efficiencies are warranted. This work is fundamental to the fulfilment of its statutory objectives under the Act, including the protection and promotion of the public interest, the promotion of competition in the provision of legal services and the encouragement of an independent, strong and effective legal profession.

5. Other Relevant Provisions of the Act Await Enactment or Amendment

44. The Act contains a number of provisions which have the potential to substantially alter the rules of the legal profession by lifting existing restrictions on barristers, allowing them to operate in new business structures and further facilitating movement between the professions of barrister and solicitor.
 - Section 101 of the Act extends the provision of direct access to barristers for legal advice to all members of the public in non-contentious matters. Currently, barristers may only receive instructions from people other than solicitors in circumscribed circumstances under a scheme operated by the Bar of Ireland. This section has not been commenced.
 - Section 217 of the Act permits the Authority to make regulations to exempt barristers and solicitors seeking to transfer to the other branch of the profession from an unnecessary admission requirement. Before making regulations, the section requires the Authority to consult with the Bar Council, the Law Society and the King's Inns. This section has not been commenced.
 - Section 212 of the Act was commenced on 7 October 2019. It provides that a barrister whose name is entered on the Roll of Practising Barristers may take up employment, and as part of that employment provide legal services for his or her employer, including by appearing on behalf of that employer in a court, tribunal or forum for arbitration. Previously, employed barristers were not permitted to represent their employers, or any other client.
 - In its March 2019 Report to the Dáil and the Seanad under section 6 of the Act, the Authority noted that section 212 is silent on some key issues that require

clarification.¹ These would include whether a solicitor is required to brief a barrister who is representing their employer in a court, tribunal or forum for arbitration and whether a barrister is permitted to provide legal services to his or her employer where their employer acts in representation of third parties. The Authority's report recommended that section 212 be amended to provide clarity as to how it will operate in practice. The Authority is of the view that such amendments are necessary for the effective implementation of the Act. The Authority also notes that there is currently little information available as to the level of utilisation by employed barristers of the new entitlements under section 212.

Structure of Report

45. The report is divided into the following sections:

Part 1 is the introduction which sets out the origin and purpose of this report, the requirements of the Act and the Authority's functions and statutory objectives under the Act.

Part 2 contains detailed information about the context and backdrop to this report in relation to the Authority's work to date and the provisions of the Act. It also summarises previous consideration of issues related to the structure of the legal profession.

Part 3 outlines the structure of the profession in Ireland and the work of solicitors and barristers, including relevant recent changes to their respective functions and transfer arrangements.

Part 4 summarises the consultation process conducted by the Authority and the views received in written submissions.

Part 5 outlines arrangements in place in other jurisdictions, including those where the professions are unified, either formally or functionally.

Part 6 contains the Authority's Conclusions and Recommendation under section 34(4)(c)(i) of the Act.

¹ LSRA (March 2019) Review of the Operation of the Legal Services Regulation Act 2015

PART 1: INTRODUCTION

Origin and Purpose of Report

- 1.1 The Legal Services Regulatory Authority (the Authority) is pleased to present this report to the Minister for Justice and Equality (the Minister) regarding the unification of the solicitors' profession and the barristers' profession in the State.
- 1.2 This report has been prepared in accordance with section 34(1)(b) of the Legal Services Regulation Act 2015 (the Act), which requires the Authority to report to the Minister following an appropriate consultation process. The report contains a summary of the consultation process and the views of respondents. It also contains details of arrangements in operation in other jurisdictions in which the professions have been unified, in accordance with section 34(4)(b) of the Act.

Requirements of the Act

- 1.3 Under section 34(4)(c) of the Act, this report shall contain recommendations as to:
 - (i) 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.*
- 1.4 Under section 34(4)(c)(ii), if the recommendation made by the Authority is in favour of the unification of the solicitors' profession and the barristers' profession, the report shall also make recommendations as to how the professions can be unified and the reforms or amendments, whether administrative or legislative or to existing professional codes, that would be required to facilitate the unification, as well as any other matters that the Authority considers appropriate or necessary.
- 1.5 Under section 34(4)(a) of the Act, this report must be provided to the Minister within four years of the establishment day of the Authority. The Authority was established on 1 October 2016 and this report is therefore due no later than 30 September 2020. The Minister shall cause copies of this report to be laid before each House of the Oireachtas within 30 days of having received it, in accordance with section 34(7).

Functions and Objectives of the Authority

- 1.6 The Authority's core functions, as set out in section 13(1) of the Act, are *"to regulate the provision of legal services by legal practitioners,"* and to *"ensure the maintenance and improvement of standards in the provision of such services in the State"*..
- 1.7 In addition to the issues in section 34(4)(c) of the Act specified for its consideration in this report, the Authority is concerned to ensure that at all times the objectives of the Act, especially as articulated in section 13(4), are to the forefront of its conclusions and recommendations. Section 13(4) specifies that in performing its functions the Authority shall have regard to the following 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 following professional principles:*
- The professional principles under section 34(5) are
- (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.*
- 1.8 The Authority is particularly concerned to ensure that at all times the objectives of the Act are to the forefront of its conclusions and recommendations. This is the statutory context in which this report has been prepared and its recommendation made.

Note on Terminology

- 1.9 A unified legal profession is generally regarded as one which is not divided between barristers and solicitors in terms of functions.² Yet a pure distinction in a legal profession between counsel who represent clients in court and those lawyers who act directly for clients is far from universal.
- 1.10 The Authority therefore generally uses the terms “unified profession” and “fused profession” throughout this report to describe a professional structure where there is no legal or official divide between the work of solicitors and barristers. The report refers to a “bifurcated,” “divided” or “split” profession to generally describe a legal profession which has two distinct branches of barristers and solicitors.
- 1.11 Where the functional distinction between the two branches of a legal profession is not precise, the term “flexible” structures or “dual practise” structures is adopted to reflect local preferences.
- 1.12 For the purposes of this consultation, it is the work of the independent referral Bar that would likely be most affected by unification of the two branches of the profession, and the submissions received reflect this. The Authority of course recognises that there are many practising barristers who provide legal services outside of this context, in particular those working in-house with businesses and public bodies.

² It has been stated that perhaps the only truly fused legal professions are those where lawyers use only one style, and there is no functional or legal division of the profession between court and office work. See Cox, Noel (2009)

PART 2: CONTEXT AND BACKGROUND

Previous Authority Reports

- 2.1 This report follows a series of statutory reports to the Minister for Justice and Equality (the Minister) undertaken by the Legal Services Regulatory Authority (the Authority) since its establishment. As is the case with the current report, all the previous reports were conducted at intervals specified under the Legal Services Regulation Act 2015 (the Act), and all involved research and statutory consultations with a range of stakeholders.
- 2.2 Previous Authority reports in four areas specified under the Act are particularly relevant to the question of unification of the solicitors' profession and barristers' profession that is under consideration in this report. Three of the areas analysed in the prior reports involved consideration by the Authority of complex issues including new business models for legal services provision as set out in Part 8 of the Act. These reports relate to the issues of: Legal Partnerships (reports submitted in March and July 2017); Multi-Disciplinary Practices (reports submitted in March and September 2017); and Certain Issues Relating to Barristers (report submitted in September 2017).
- 2.3 The fourth reporting area concerned legal practitioner education and training. The Authority submitted its first report to the Minister in September 2018. It is, concurrent with this report, preparing its second report to the Minister on legal practitioner education and training. The Authority intends to submit this report to the Minister in the final quarter of 2020, outlining the recommendations it considers appropriate.
- 2.4 Figure 1 below shows the reports' topics and the statutory deadlines for them to be submitted by the Authority to the Minister. The trigger for the reporting intervals under the Act is the establishment day of the LSRA, which was 1 October 2016. Therefore, the first two Authority reports, on legal partnerships and multi-disciplinary practices, were both submitted to the Minister on 31 March 2017, within six months from establishment day.
- 2.5 The Authority considers it useful to include in this report a summary overview of its analysis and recommendations in previous reports where these have a particular relevance for the unification question under consideration in this report. These are set out in detail below.

Figure 1: Authority's statutory reports under the Legal Services Regulation Act 2015



Relevant Sections of the Act

- 2.6 The Act contains a range of provisions which have the potential to substantially alter the rules of the professions by lifting existing restrictions on barristers, allowing them to operate in new legal structures, and facilitating movement between the professions of barrister and solicitor.

1. Relaxing rules on barristers forming partnerships

- 2.7 Part 8 of the Act introduces legal partnerships as a new business structure.³ These will, for the first time, allow a barrister to enter into a business partnership with another legal practitioner who can be either a barrister or a solicitor. Such partnerships are not currently permitted, as Part 8 of the Act has not been fully commenced. Further details on legal partnerships are outlined below, as they have been the subject of two reports and substantial legal preparatory work by the Authority to date.

2. Allowing members of the public direct access to barristers

- 2.8 Section 101 of the Act extends the provision of “direct access” to barristers for legal advice to all members of the public in non-contentious matters.⁴ Currently, barristers may only receive instructions from people other than solicitors in circumscribed circumstances under a scheme operated by the Bar of Ireland which applies to legal opinion only. Section 101 has not been commenced.

3. Permitting employed barristers to represent their employers before courts

- 2.9 Section 212 of the Act allows employed barristers to appear on behalf of their employer before a court, tribunal or forum for arbitration.⁵ As referenced in the Executive Summary, section 212 of the Act was commenced on 7 October 2019.⁶ Previously, employed barristers were not permitted to represent their employers, or any other client.

4. Authority regulations on movement between professions

- 2.10 Section 217 of the Act permits the Authority to make regulations to exempt barristers and solicitors seeking to transfer to the other branch of the profession from an unnecessary admission requirement. Before making regulations, the section requires the Authority to consult with the Bar Council, the Law Society and the King’s Inns. Section 217 of the Act has not been commenced.

³ A partnership of two or more legal practitioners, at least one of whom is a practising barrister.

⁴ Section 101 states: “No professional code shall operate to prevent a barrister from providing legal services as a practising barrister in relation to a matter, other than a contentious matter, where his or her instructions on that matter were received directly from a person who is not a solicitor.”

⁵ Section 212 states: “(1) A barrister whose name is entered on the roll of practising barristers in accordance with Part 9 may— (a) take up paid employment, and (b) as part of that employment, provide legal services to his or her employer, including by appearing on behalf of that employer in a court, tribunal or forum for arbitration. (2) A professional body shall not, through its professional codes or otherwise, prevent or restrict a barrister who is a member of that body from working with, or otherwise doing business with, barristers providing legal services in accordance with subsection (1). (3) In this section “employment” includes part-time employment.

⁶ Legal Services Regulation Act 2015 (Commencement of Certain Provisions) (No. 2) Order 2019 (S.I. No. 502 of 2019), art. 2(p)

5. Authority required to report on profession of conveyancer

- 2.11 Separately, the Authority notes that section 34(1)(c) of the Act requires it to report to the Minister for Justice and Equality on the creation of a new profession of conveyancer. Under section 34(5)(a) this report shall be provided to the Minister within a period specified in a written request by the Minister to the Authority requesting the report. The Minister has not made such a request to date. However, the Authority highlights the issue here as, along with the as yet uncommenced sections of the Act noted above, it forms part of the background and context to this report.
- 2.12 The introduction of a new profession of conveyancer in Ireland could have a significant impact on the solicitors' profession, as conveyancing work is among what is commonly referred to a 'reserved' legal services that can only be provided by solicitors.⁷ In other jurisdictions where the profession of licensed conveyancer has been introduced, it has generally been in the context of wider restructuring and liberalisation of the market for legal services.

Authority's Reports and Recommendations Relevant to Unification Question

- 2.13 The following section contains a more detailed summary of the Authority's work to date on issues related to legal services delivery and new business models. These efforts arise from the Authority's reporting obligations under the Act, as outlined at the start of this chapter. In producing the reports to the Minister as documented below, the Authority has consulted extensively with stakeholders, commissioned reports from external experts and considered in detail the provisions of the Act and the implications of reforms for its statutory objectives.
- 2.14 The Authority is of the view that this prior work is an important aspect of the background and context in which it now considers the unification question. Its analysis and recommendations in previous reports are relevant in substantive terms, because many of the issues the Authority has already considered and reported on to the Minister directly touch on how the legal profession delivers services to consumers. The actions and recommendations arising from previous reports are also relevant for the sequencing and timing of the Authority's reform agenda as set out in the Act.
- 2.15 The reports summarised below relate to the Authority's considerations under the Act of:
1. The regulation, monitoring and operation of legal partnerships;
 2. Certain issues relating to barristers;
 3. The establishment, regulation, monitoring, operation and impact of multi-disciplinary partnerships; and
 4. Legal practitioner education and training.
- 2.16 These reports and their recommendations are also set out in summary format in Table 1 below.

⁷ See section 58 of Solicitors Act 1954

1. Legal Partnerships

Authority's First Report on Legal Partnerships – March 2017

- 2.17 A legal partnership is a new type of partnership under the Act between two or more legal practitioners, where at least one of them is a practising barrister, for the purpose of providing legal services.⁸ The Act thus permits two different types of legal partnership: partnerships only between barristers (barrister partnerships); and partnerships between solicitors and barristers (barrister-solicitor partnerships). Such partnerships will permit a barrister to be employed by a solicitor and a solicitor to be employed by a barrister.
- 2.18 Following its establishment in October 2016, the Authority was required under section 118 of the Act to conduct a public consultation and submit a report to the Minister about how it should exercise the power granted to it under section 116 to regulate and monitor legal partnerships, and also how those partnerships should operate in practice. Section 118 of the Act required the Authority to report to the Minister with recommendations on the regulation, monitoring and operation of legal partnerships within a period of six months following its establishment. Section 118 further provides that the Authority may report to the Minister with recommendations on legal partnership periodically, after the submission of its first report.
- 2.19 The Authority conducted a consultation and submitted its report to the Minister on 31 March 2017.⁹ In its report, the Authority stated that it accepted the statutory commitment to the introduction of legal partnerships and was committed to putting in place an enabling framework, including regulations, as rapidly as possible.
- 2.20 The Authority stated its view that the point of introducing legal partnerships was to offer something new to the legal market in Ireland with the objective of a low cost and effective regulatory framework to allow the required flexibility for legal practitioners to work together and provide different, more efficient and more competitively priced legal services to consumers. It stated that its goal should be to “ensure that the legal market understands that legal partnerships are going to be introduced but that equally that as much information about potential regulatory requirements is given at as early a stage as possible.”¹⁰
- 2.21 The Authority however cautioned that: “there is a risk in introducing legal partnerships prematurely without putting in place a coherent structure for regulating this new model and allowing legal partnerships to become a significant structure for the provision of legal services.”¹¹
- 2.22 The report stated that: *“It would therefore best protect the interests of consumers and the public generally, and would advance an effective, strong and independent legal profession, if those sections of the Act governing the provision of legal services by legal partnerships, are*

⁸ Section 2(1) of the Legal Services Regulation Act 2015 defines a “legal partnership” as “a partnership formed under the law of the State by written agreement, by two or more legal practitioners, at least one of whom is a practising barrister, for the purpose of providing legal services.” Legal practitioner is also defined in the Act, as “a person who is a practising solicitor or a practising barrister”, where “solicitor” can also mean a firm of solicitors.

⁹ LSRA (March 2017) Legal Partnerships

¹⁰ Ibid, page 26, par 107

¹¹ Ibid, page 26, par 106

***not** commenced until the Authority is satisfied that the necessary consultations have been conducted and regulations and other necessary measures prepared so that a robust, yet workable and attractive framework is in place.”¹²*

- 2.23 The Authority’s submitted its report to the Minister on 31 March 2017 and it was laid before the Houses of the Oireachtas on 28 April 2017.¹³

Recommendations on Legal Partnerships – March 2017

- 2.24 The March 2017 report recommended that the following steps be taken before any provisions in connection with legal partnerships, other than section 100 of the Act, are commenced:
1. The Authority consider commencing further statutory consultations under the Act in relation to specific aspects of the regulation, monitoring and operation of legal partnerships.
 2. The Authority will consider the results of the consultation/s, prepare a report and any draft regulations or other draft measures for further specific consultations, and report to the Minister.
 3. The Authority is afforded the opportunity to secure the necessary personnel and other resources to support the establishment and maintenance of a register of legal partnerships and the commencement of other parts of the Act as may be necessary to support the regulation, monitoring and operation of legal partnerships.¹⁴
- 2.25 Section 100 of the Act states that a legal practitioner may provide legal services as a partner in, or an employee of, a legal partnership and a professional body shall not, through its professional codes or otherwise, prevent or restrict a legal practitioner who is a member of that body from working with, or otherwise doing business with, a legal practitioner providing legal services in a legal partnership.
- 2.26 The Authority’s report noted that section 1(3) of the Act provides for the commencement of section 100 within six months of the Authority’s report being laid before the Houses of the Oireachtas.¹⁵
- 2.27 The Authority said its recommendations did not necessarily conflict with the Act, and it had taken legal advice that notwithstanding section 1(3), the provisions within Part 8 relating to legal partnerships need **not** be commenced within six months of the delivery of the report. *“This would afford the Authority the opportunity to consider the extent to which the*

¹² LSRA (March 2017) Legal Partnerships, page 26, par 109

¹³ Houses of the Oireachtas Library and Research Service, Documents Laid, available [here](#). The Authority’s second report on legal partnerships under section 118 was submitted to the Minister on 31 July 2017 and laid before the Houses of the Oireachtas on 18 October 2017

¹⁴ LSRA (March 2017), Legal Partnerships, pages 26 to 28, par 110

¹⁵ Section 1(3) states that: “Section 100 shall come into operation on such day, not later than six months after the laying before each House of the Oireachtas under subsection 4 of section 118 of a report referred to in subsection (2) of that section, as the Minister shall appoint by order.”

“interlocking” parts of the Act would need to be coordinated with the introduction of legal partnerships.”¹⁶

- 2.28 The report concluded by noting that the Authority required time to develop both an appropriate strategy for the introduction of legal partnerships, including further consultations with key stakeholders, as well as the resources to support that strategy. The Authority committed to next reporting to the Minister on the issue by 31 July 2017.¹⁷

Authority's Second Report on Legal Partnerships – July 2017

- 2.29 The Authority, in its second report to the Minister on legal partnerships in July 2017, highlighted the fact that at the time of preparing that report, it was then concurrently involved in two separate consultations in preparation for two further reports to the Minister on issues that inter-locked to a considerable extent with the regulation of legal partnerships, and which required to be considered as a whole.¹⁸
- 2.30 These other two reports were also mandated by the Act, and were required to be delivered to the Minister by September 2017. The first, under section 120, required the Authority to consider issues related to barristers holding clients moneys and receiving instructions directly from clients in ‘contentious matters’ – that is, proceedings addressed by way of legal proceedings before a court, arbitrator or tribunal.¹⁹ The second report, under section 119, related to the establishment, regulation, monitoring, operation and impact of multi-disciplinary practices. These are partnerships between solicitors and barristers with other non-legal professionals to provide both legal and non-legal services.
- 2.31 The Authority stated that, given the interlocking nature of the three issues – legal partnerships, multi-disciplinary practices, and certain issues relating to barristers – they could not be dealt with separately. For example, the Authority’s first report to the Minister on legal partnerships in March 2017 had unearthed substantial issues for detailed consideration should barristers be permitted to hold client moneys within the context of a legal partnership. These related to the potential requirement for a compensation fund, additional accounting regulations, and other related issues.
- 2.32 The report also highlighted the fact that (at that time) the introduction of Parts 3 and 6 of the Act were a key priority for the Authority as, without these, new business models could not be safely introduced. Part 3 of the Act refers to inspections in respect of legal practitioners, while Part 6 covers complaints and disciplinary hearings in respect of legal practitioners. Both parts of the Act were commenced on 7 October 2019.²⁰
- 2.33 The report stated that the detailed consideration of the regulation, monitoring and operation of legal partnerships must await the outcome of Authority’s report on barristers

¹⁶ LSRA (March 2017) Legal Partnerships, page 28, par 111

¹⁷ Ibid, page 28 par 112

¹⁸ LSRA (July 2017) Legal Partnerships, page 3, par 2.6

¹⁹ Under section 99 of the Act, “contentious matter” means “a matter that arises in, and that relates to the subject matter of, proceedings before any court, tribunal or other body or person before which the respective legal rights and obligations of two or more parties are determined, to which the person instructing the practising barrister concerned is a party.”

²⁰ Legal Services Regulation Act 2015 (Commencement of Certain Provisions) (No. 2) Order 2019 (S.I. No. 502 of 2019)

under section 120. In addition, the Authority said it needed to complete its research and analysis in respect of multi-disciplinary practices under section 119 and issues relating to barristers under section 120 in order to have a clear picture of what would work best in the Irish context and in what order changes should be introduced here.²¹

- 2.34 The report also outlined the key steps that the LSRA planned to undertake in preparation for the introduction of legal partnerships at the earliest possible date. These were:
- a. Report to the Minister in relation to Certain Issues Relating to Barristers before the end of September 2017 as per Section 120 of the Act.
 - b. Engage in a direct consultation exercise to obtain the views of all key stakeholders in relation to legal partnerships, multi-disciplinary practices, and issues relating to barristers.
 - c. Continue to prepare for the introduction of the investigatory, complaint and discipline functions of the Authority.
 - d. Continue to put in place the necessary personnel, premises and resources required for the Authority to fulfil its mandate.²²

Sequencing of Legal Partnerships' Introduction

- 2.35 None of the Act's provisions relating to the regulation, monitoring and operation of legal partnerships have as yet been commenced. Subsequent to the Authority's July 2017 report, the LSRA has now prepared the necessary framework for the introduction of legal partnerships. A legislative amendment is required before these can be introduced in order to allow barristers for the first time to form a business partnership with either other barristers or with solicitors.
- 2.36 As noted above, the triggering of the introduction of legal partnerships was hardwired into the Act by section 1(3). Under this scheme, legal partnerships could potentially have been introduced several years before the Authority was required to report to the Minister on the question of unification of the solicitors' profession and the barristers' profession.
- 2.37 Separately, other structures and innovations under the Act have since been introduced, such as the Roll of Practising Barristers and the authorisation of Limited Liability Partnerships (for solicitors' partnerships only).

²¹ LSRA (July 2017) Legal Partnerships, pages 4 and 5, par 2.10

²² Ibid, page 7, par 3.1

2. Barristers' Issues

Authority's Report on Certain Issues Relating to Barristers – September 2017

- 2.38 In September 2017, the Authority submitted to the Minister its Report on Certain Issues Relating to Barristers within the statutory timeline set out in section 120 of the Act.²³ Three specific issues were required under the Act to be considered in this public consultation and report. These were:
- a) The extent, if any, to which the restriction on legal practitioners other than solicitors holding clients' moneys as provided under section 45 of the Act should be retained;
 - b) Whether restrictions on a barrister receiving instructions in a contentious matter²⁴ directly from a person who is not a solicitor should be removed or retained and any reforms required;
 - c) The circumstances and manner in which a barrister may hold clients' moneys including mechanisms for protection of clients' moneys.

Recommendations on Barristers' Issues – September 2017

- 2.39 Whilst commenting on the need for further direct consultation, the Authority's report contained recommendations which are relevant to its current consideration of whether the solicitors' profession and the barristers' profession should be unified. These relate to existing restrictions on barristers which go to the heart of their status as a "referral profession". The recommendations are:

Recommendation: Direct Access to barristers in contentious matters be permitted in certain circumstances

- 2.40 The Authority recommended that barristers be permitted to receive instructions directly from clients, in certain circumstances, in "contentious matters" – that is, proceedings addressed by way of legal proceedings before a court, arbitrator or tribunal.
- 2.41 The Authority said three types of restrictions should apply to direct access to barristers in contentious work as part of a licenced access scheme for organisations only. These were:
- The scheme would be optional for barristers and those wishing to undertake such work would be required to apply to the Authority for authorisation.
 - Clients (only organisations) wishing to directly instruct barristers must be licenced by the Authority.

²³ Section 120(2)(d) required the report to be submitted to the Minister within 12 months of the LSRA's establishment day, (1 October 2016) i.e. not later than 30 September 2017

²⁴ Under section 99 of the Act, "contentious matter" means "a matter that arises in, and that relates to the subject matter of, proceedings before any court, tribunal or other body or person before which the respective legal rights and obligations of two or more parties are determined, to which the person instructing the practising barrister concerned is a party."

- The type of work in which direct access is permissible be specified.²⁵

- 2.42 The Authority's recommendation was that direct access be limited to matters, other than contentious court work, in which a barrister may act. It stated: *"The Authority considers that there are certain categories of litigation where direct access would not be practicable or desirable. Permitting direct access in such cases has the real potential to disrupt the effective administration of justice rather than enhance it."*²⁶
- 2.43 In recommending that direct access in contentious work should not be permitted in matters before the courts at any level at this time, the Authority further stated that: *"Direct access in contentious matters is a new departure for the profession. When it becomes established in areas outside of the courts, consideration can then be given to extending it to court work, if considered appropriate at that time."*²⁷
- 2.44 The Bar of Ireland's Code of Conduct currently prohibits barristers from accepting instructions directly from a client in contentious matters.²⁸ The Code requires, with limited exceptions, that barristers be engaged through a solicitor. The circumstances in which direct client access to barristers is currently permitted are set out in the Bar of Ireland's Direct Professional Access Scheme introduced in 1990. This allows certain pre-approved bodies, including professional and charitable organisations, to have direct contact with barristers for legal advice only (this is termed non-contentious matters).²⁹
- 2.45 The Authority said it considered that the experience to date of direct access to barristers in non-contentious matters in Ireland had been positive and of benefit to the organisations that have availed of that service. It added: *"The Authority considers that there is scope to extend that model to contentious matters, subject to certain safeguards being put in place to protect clients, to ensure the quality of the service being provided and to ensure the effective administration of justice."*³⁰
- 2.46 The significance of this Authority recommendation to the question of unification is clear. The change would remove certain restrictions on how barristers work. It would also potentially have regulatory and other implications for both barristers and clients, as direct access barristers would have an enhanced role in client care in the absence of an instructing solicitor. The introduction of this recommendation would require an amendment to the Act, including provision for the Authority to make regulations.

Recommendation: Barristers, who are not members of a legal partnership or multi-disciplinary practice, should not be permitted to hold client moneys

- 2.47 Based on the discussion and analysis in the report, the Authority recommended that barristers who are not members of a legal partnership or a multi-disciplinary practice should

²⁵ LSRA (September 2017) Certain Issues Relating to Barristers recommendation 4, page 44, par 4.10

²⁶ Ibid recommendation 7, page 46, par 4.17

²⁷ Ibid recommendation 7, page 46, par 4.18

²⁸ Bar of Ireland (2020) Code of Conduct For the Bar of Ireland, rule 3.4

²⁹ For a list of approved bodies under the Direct Professional Access Scheme see: <https://www.lawlibrary.ie/Legal-Services/Direct-Professional-Access/List-of-Approved-Bodies.aspx>

³⁰ LSRA (September 2017) Certain Issues Relating to Barristers, recommendation 4, page 44, par 4.9

not be permitted to hold client moneys.³¹

- 2.48 The only situation in which it may be necessary, or desirable, for barristers to hold client moneys would be where a barrister is a partner within a legal partnership or a multi-disciplinary practice. The Authority said it considered that further consideration of barristers holding client moneys as part of these business models should be undertaken within the context of ongoing consultations and considerations of those issues.
- 2.49 In the absence of the new business models, the Authority recommended that there was no necessity for barristers to have access to client moneys, even where direct professional access in contentious matters was permitted. The use of escrow accounts,³² as in England and Wales, could fulfil any requirements for holding client moneys within the context of direct professional access.³³
- 2.50 The existing prohibition against barristers in independent private practice holding client moneys is found in both the Code of Conduct of the Bar of Ireland³⁴ and section 45 of the Act.³⁵ Had the Authority recommended allowing barristers to hold client moneys, issues of substantial new financial regulation of barristers, including a possible barristers' compensation fund, would have arisen.

Conclusions from experience elsewhere for both direct access and client money rules

- 2.51 The Authority's report noted that the experience of other jurisdictions with split professions maintaining the traditional solicitor/barrister divide suggests the following:
- a. It is possible to run different regimes for holding client money alongside each other with different levels of protection. Were barristers to be permitted to hold client moneys in Ireland it may not necessarily result in an identical regime to that imposed on solicitors;
 - b. There is a growing realisation in other jurisdictions that holding client money is costly and adds significantly to insurance premiums as well as regulatory cost, which are inevitably passed on to clients. Moreover, lawyers may not all practice in ways that require the holding of client money, so choice is increasingly being offered to solicitors as well as barristers as to whether or not they want to hold money.
 - c. It is possible for an independent referral bar in which practitioners do not hold client money (as in Australia) to sit alongside a scheme in which there are classes of barristers who are authorised to hold client money. There are however, no examples

³¹ Ibid, recommendation 1, page 43

³² An escrow account is where moneys are held by a third party on agreed terms

³³ LSRA (September 2017) Certain Issues Relating to Barristers, recommendation 1, page 43, pars 4.1 to 4.3

³⁴ Bar of Ireland (2020) Code of Conduct For the Bar of Ireland, rule 2.16

³⁵ Section 45 of the Legal Services Regulation Act 2015 states that: "(1) Subject to subsection (2), a legal practitioner shall not hold moneys of clients unless that legal practitioner is a solicitor. (2) Notwithstanding subsection (1) the Minister may by regulations prescribe a class or classes of solicitors who may not hold the moneys of clients, or who may hold such moneys subject to such conditions as may be provided for in such regulations. (3) Subsection (1) shall not be construed as permitting a solicitor to hold the moneys of clients where a condition or restriction is placed on a solicitor's practising certificate pursuant to the Solicitors Acts 1954 to 2015 or this Act."

of other jurisdictions in which barristers act as independent self-employed professionals and hold money.

d. All of the jurisdictions examined for this report permit some form of direct access. It can be seen that access can be limited by client type, work undertaken or a combination of both.

e. All jurisdictions have put in place a system which provides for additional conduct rules, guidance and training for lawyers taking on direct access type work.³⁶

Impact of recommendations in relation to barristers on legal partnerships and MDPs

2.52 The Authority's report noted that it was being carried out alongside two other public consultations process, in relation to legal partnerships and multi-disciplinary practices. The Authority stated that it was clear that the outcome of its consultation and report would have "a significant impact on both of these new business models in terms of nature, structure, risk profile, attractiveness, potential for success and regulation."³⁷

2.53 The report stated that, for example, if a barrister partner or employee within a legal partnership or multi-disciplinary practice is permitted to hold client moneys this will have a direct impact on:

- a. the content of Regulations to be made by the Authority under section 116,
- b. the minimum Insurance requirements for such partnerships,
- c. the risk profile of such partnerships, and
- d. the authorisation process for legal partnerships to operate as a Limited Liability Partnership.

2.54 Similarly, the report noted that if direct professional access is permitted for barristers in contentious matters, the attractiveness of legal partnerships to barristers may be diminished. This is because it is assumed that barristers will be attracted to forming a legal partnership due to the potential benefits of being briefed by solicitors within the partnership. If there was already direct access to organisational clients, this element would not be as prominent as might otherwise be the case.³⁸

3. Multi-Disciplinary Practices

Authority's Initial Report on Multi-Disciplinary Practices – March 2017

2.55 Multi-disciplinary practices, or MDPs, are a type of new legal business model contemplated by the Act. MDPs are partnerships of two or more people, including at least one solicitor/barrister. Such partnerships, if introduced, would offer legal and also non-legal services.

³⁶ LSRA (September 2017) Certain Issues Relating to Barristers, page 29, par 3.35

³⁷ Ibid, page 30 par 3.39

³⁸ Ibid, page 30 par 3.41

- 2.56 The Authority was required under section 119 of the Act to submit an “initial report” to the Minister on the establishment, regulation, monitoring, operation and impact of multi-disciplinary practices within six months of its establishment.
- 2.57 This report included an independent expert study³⁹ commissioned by the Authority into the experience of MDPs in other jurisdictions and the likely consequences and impact of their introduction in Ireland, where solicitors and barristers are currently prohibited from entering into partnerships with or sharing fees for legal services provided by non-lawyers.
- 2.58 The study’s authors noted that “although the Act contains some suggested regulatory arrangements for the introduction of MDPs in Ireland, it does not pre-empt the decision of whether this new form of business structure should be introduced at all.”⁴⁰ As required under section 119(3) of the Act, the initial report to the Minister was intended to provide a basis for a public consultation by the Authority leading to a final report to the Minister six months later.
- 2.59 The Authority was required under section 119(2)(b) to examine in its initial report the likely consequences of the introduction of MDPs, including on existing models of legal practice in the State. The expert study concluded that: *“Any potential impact of MDPs on existing models of legal practice, i.e. traditional solicitor firms and barrister practices, will ultimately depend upon the take-up, focus of potential MDPs, and their market share. At this stage, therefore, it is only possible to hypothesize on the possible impact of MDPs based on the current shape of the Irish legal market and experience of introducing similar practices elsewhere.”*⁴¹
- 2.60 The authors went on to assert that “based on information currently available and the restrictions contained within the model for MDPs proposed in the Act, it seems likely that the take up of MDPs, and their impact on the current model of legal practice, would be limited.”⁴²
- 2.61 The Authority in its preliminary conclusions in the report said it expected that it would need to eventually consider a range of options in relation to MDPs. These could include endorsing the approach proposed by the Act whereby a MDP would be controlled by a “managing legal practitioner,” to recommending different MDP models or variants on the model in the Act, proposing a UK model, or recommending that MDPs are not introduced.⁴³

Authority’s Further Report and Recommendations on MDPs – September 2017

- 2.62 Six months after the submission of its initial report on MDPs, the Authority submitted its second report to the Minister on 29 September 2017. In this report, the Authority recommended that its resources should focus on the introduction of legal partnerships and limited liability partnerships and the commencement of its complaints function at the

³⁹ Hook Tangaza (March 2017) (Part 2 of LSRA (March 2017) Multi-Disciplinary Practices)

⁴⁰ LSRA (March 2017) Multi-Disciplinary Practices Part 2, page 5

⁴¹ Ibid, page 68, par 192

⁴² Ibid, page 72, par 205

⁴³ LSRA (March 2017) Multi-Disciplinary Practices, Part I, par 6

earliest date. The Authority said that if its consultations as part of preparation for the introduction of legal partnerships provided additional information and a sufficient evidential basis to support the establishment of MDPs, it would revisit the issue. The introduction of the new business models should themselves assist the Authority in further considering the issue of MDPs.⁴⁴

4. Legal Practitioner Education and Training

Authority's First Report on Legal Education and Training – September 2018

- 2.63 A final aspect of the Authority's deliberative work which also has significance for the topic under consideration in this report relates to legal practitioner education and training.
- 2.64 On 28 September 2018, the Authority submitted its first report to the Minister on legal practitioner education and training in the State under section 34(1)(a) of the Act.⁴⁵ That report was in two parts: the first part was a report from the Authority to the Minister⁴⁶ and the second part was a research report commissioned by the Authority and carried out by an external expert Review Team.⁴⁷
- 2.65 In its report to the Minister, the Authority stated that the 14 detailed proposals contained in the Review Team's report, if implemented, had the capacity to significantly affect the education and training of legal practitioners and the wider legal services sector, and would also require legislative change.⁴⁸
- 2.66 The Authority was of the view that such significant changes should only be made following careful consideration and informed debate on both the proposals for change and their proposed implementation and impact. The Authority concluded that it would make its final recommendations and set out a proposed implementation process following further consultation on the proposals in the review report, as well as engaging with both the providers and users of legal services, and exploring the possible impact of the proposals on legal education and on the wider legal services sector.
- 2.67 As a result, further consultations took place during 2019, comprising: a series of meetings between the LSRA executive and the professional bodies under the Act;⁴⁹ a further round of public consultations; and a one-day symposium on legal education and training in September 2019 attended by approximately 100 people. These additional rounds of engagement allowed stakeholders in legal services, legal education and training and in the wider community to explore the way forward.

⁴⁴ LSRA (September 2017) Multi-Disciplinary Practices, page 34, pars 4.1 to 4.4

⁴⁵ Under section 34(3)(a), the report was required within two years of the LSRA's establishment day. The LSRA was established on 1 October 2016 and its report on education and training was submitted to the Minister on 28 September 2018.

⁴⁶ LSRA (September 2018) Report on the Education and Training of Legal Practitioners (Part 1)

⁴⁷ Hook Tangaza (August 2018) Review of Legal Practitioner Education and Training (Part 2 of LSRA (September 2018) Report on the Education and Training of Legal Practitioners)

⁴⁸ LSRA (September 2018) Report on the Education and Training of Legal Practitioners page 4, par 17

⁴⁹ The Bar of Ireland, The Law Society and the Honorable Society of King's Inns

Authority's Next Steps on Legal Practitioner Education and Training

- 2.68 The Authority has now considered the review report's proposals in considerable detail and has also taken on board the views of stakeholders in the context of its statutory objectives including under section 13(4) of the Act. It intends to submit a further report to the Minister in the fourth quarter of 2020. That report will outline the recommendations which the Authority considers appropriate in relation to arrangements for the provision of legal practitioner education and training in the State as per section 34(3)(b) and (c).

Timing of Authority's Reports on Education and Training and Unification

- 2.69 The Authority considers that issues of timing and sequencing arise in relation to its consideration of proposals on the education and training of legal practitioners and the separate question of the unification of the solicitors' profession and the barristers' profession which is the subject of this report.
- 2.70 The Authority's consideration of these issues arises from the provisions of section 34 of the Act, which include a fixed timetable for the Authority to report to the Minister on specified matters at specific intervals. As has already been outlined, section 34(3)(a) required the Authority to submit its first report on legal practitioner education and training to the Minister within two years of its establishment day. Section 34(4)(a) further requires the Authority to submit the current report on the unification of the solicitors' profession and the barristers' professions within four years of establishment day. The Act therefore provides for a two year gap between the submission of these reports to the Minister.
- 2.71 As has already been outlined above, the Authority's consideration of legal practitioner education and training under section 34 has been ongoing since it submitted its first report to the Minister in September 2018 with a commitment to report again with final recommendations following further consultations. This now means that two different Authority reports under section 34 of the Act, in relation to the separate areas of legal practitioner education and training and the unification question, are being submitted to the Minister at the same time. Changes in either arena would potentially have enormous implications for the professions themselves, the professional bodies, consumers and the wider legal services sector.

Summary: Pending, Proposed and Potential Changes

- 2.72 The foregoing section provides the background and context for this report in terms of the work of the Authority. It has documented how the Authority has conducted analysis and consulted extensively over the past four years on a range of important matters that impact on how legal services are regulated and delivered by both solicitors and barristers and how legal practitioner education and training is supplied. All of this work has been triggered by the Act, which has mandated a series of reports to the Minister at specified intervals.
- 2.73 In summary, the current position in relation to the issues discussed above comprises the following:

- One pending change – the introduction of legal partnerships following legislative amendment.
- One proposed change – direct access to barristers in contentious matters in certain circumstances as recommended by the Authority in an earlier report.
- One potential change – the Authority's future consideration of the issue of multi-disciplinary practices.

2.74 Each of these changes would have a significant impact on the regulatory framework for barristers and solicitors, with an inevitable potential knock on in terms of the delivery of legal services to consumers and, potentially, wider issues related to access to justice and competition. Each would also impact on the work of the Authority as well as other regulatory bodies.

2.75 A status update on the pending, proposed and potential changes is set out in Figure 2 below. In addition, the Authority's second report on legal practitioner education and training will be published in the third quarter of 2020 and will contain recommendations. The impact of these changes are discussed in further detail below.

Figure 2: Status of Pending, Proposed and Potential Changes in Legal Services Delivery



Pending Change – Legal Partnerships

- 2.76 Following its two reports to the Minister, the Authority has now developed an enabling framework for the introduction of legal partnerships as provided for in the Act. Legal partnerships currently await implementation by means of an amendment to the Act.
- 2.77 Legal partnerships, by allowing barristers and solicitors to work together within one business entity, mean that consumers can visit a solicitor and barrister operating in the same premises.
- 2.78 This is a significant change from the current situation whereby only solicitors may form general and limited partnerships with each other to deliver legal services. The planned introduction of legal partnerships has clear implications for the Authority's consideration of the question of unification of the solicitors' and barristers' professions. Legal partnerships open up the organisational possibility for the conjoining of solicitors and barristers in a new practice model.

- 2.79 Once legal partnerships are introduced, the Authority will have an opportunity to analyse the uptake and impact, including success or otherwise, of this new type of partnership. It will also have an ongoing role under the Act in relation to their regulation, monitoring and operation.

Proposed Change – Expanded Direct Client Access to Barristers

- 2.80 The Authority in a 2018 report to the Minister recommended that direct access to barristers be made available to organisational clients in contentious matters in certain circumstances. Contentious matters are proceedings addressed by way of legal proceedings before a court, arbitrator or tribunal. The Authority's recommendation was that direct access would be limited to matters, other than contentious court work, in which a barrister may act. When direct access becomes established in areas outside of the courts, consideration can then be given to extending it to court work, if considered appropriate at the time.
- 2.81 This would involve a significant change to the current rules under which independent barristers are not permitted to receive instructions directly from clients in relation to contentious matters. This recommendation is currently with the Minister for Justice and Equality.

Potential Change – Further Consideration of MDPS

- 2.82 The Authority's stated intention in its report to the Minister in September 2017 was to return to the issue of MDPs following the introduction of both legal partnerships and limited liability partnerships. Limited liability partnerships were introduced in November 2019. As outlined above, legal partnerships will be introduced once the relevant statutory amendment is introduced.

Table 1: Authority's Reports and Recommendations Relevant to Unification Question

Date	Report	Conclusions and Recommendations	Follow Up Actions
March 2017	Legal Partnerships Report I ⁵⁰	<p>Authority committed to putting in place an enabling framework for legal partnerships (LPs) as quickly as possible.</p> <p>Risk in introducing LPs prematurely without a coherent structure for regulating them.</p> <p>Authority requires time to develop strategy around introduction of LPs including resources for a register of LPs, inspections of LPs and commencement of sections of the Act.</p> <p>Sections of Act governing LPs (apart from section 100) should not be not commenced until the Authority is satisfied necessary consultations are conducted and regulations prepared.</p>	<p>Further consultations on specific aspects of regulation, monitoring and operation of LPs.</p> <p>Draft regulations for introduction of LPs prepared.</p>
July 2017	Legal Partnerships Report II ⁵¹	<p>The three issues of legal partnerships, multi-disciplinary practices (MDPs) and consideration of Certain Issues Relating to Barristers are inter-locking.</p> <p>Authority needs to complete its research and analysis on MDPs and Certain Issues Relating to Barristers in order to develop a clear picture of what will work best and in what order changes should be introduced, including LPs.</p> <p>Public consultations so far may not have generated adequate feedback from all key stakeholders.</p> <p>New business models provided for in the Act cannot be safely introduced prior to the introduction of inspection, complaints and disciplinary regime as set out in parts 3 and 6 of the Act.</p>	<p>Authority engaged in focused and direct consultations to obtain views of key stakeholders on three issues.</p> <p>Authority continues preparations for introduction of investigatory, complaint and discipline functions and continues to put in place personnel, premises and resources to fulfil its mandate.</p>

⁵⁰ See: <https://www.lsra.ie/wp-content/uploads/2020/02/s118-Report-Final-April-2017-pdf.pdf>

⁵¹ See: <https://www.lsra.ie/wp-content/uploads/2020/02/S118-Interim-Report-July-2017.pdf>

Date	Report	Conclusions and Recommendations	Follow Up Actions
March 2017	MDPs Report I (including independent study) ⁵²	<p>Decisions on business structures to be used in the legal sector need to take account of the legal system, the environment for regulation and the need to uphold wider public interest.</p> <p>Regulatory environment for MDPs is only one factor – there should also be a demand for the services and demand from non-lawyers to join or form MDPs</p> <p>Issue of more choice around business structures should be recognised as only one tool to improve functioning of legal market.</p>	Authority carry out informed consultation on MDPs, with independent study as its basis.
September 2017	MDPs Report II ⁵³	<p>The Authority's resources are focused on the introduction of LPs, limited liability partnerships (LLPs), and commencement of its complaints function.</p> <p>The Authority would have liked submissions from a broader range of stakeholders to provide a sufficient evidentiary basis on which to make informed decisions on the establishment, regulation, monitoring, operation and impact of MDPs.</p>	MDPs will be further considered after the introduction of LPs and LLPs and commencement of important Authority functions.
September 2017	Barristers Issues Report ⁵⁴	Direct client access to barristers in contentious matters should be permitted in certain circumstances. Barristers who are not members of LPs or MDPs should not be permitted to hold clients' moneys.	Further direct consultations to ascertain views of all stakeholders.
September 2018	Legal Practitioner Education & Training Review & Report I ⁵⁵	Authority considers expert review's 14 proposals for reform have capacity to significantly affect the education and training of legal practitioners and the wider legal services sector, and would require legislative change.	<p>Further LSRA consultations in 2019.</p> <p>Authority's second report to Minister due for publication in fourth quarter of 2020, with recommendations.</p>

⁵² See: <https://www.lsra.ie/wp-content/uploads/2019/09/s119-Report-Final-April-2017-pdf.pdf>

⁵³ See: <https://www.lsra.ie/wp-content/uploads/2019/09/20170929-Section119-Report-FINAL.pdf>

⁵⁴ See: <https://www.lsra.ie/wp-content/uploads/2019/09/20170929-Section120-Report-FINAL.pdf>

⁵⁵ See: <https://www.lsra.ie/wp-content/uploads/2019/09/S34-Cover-Report-from-Authority.pdf>

Previous Consideration of Issues Related to Structure of Legal Profession

2.83 Consideration of issues related to the structure of the Irish legal profession have a long history. These have covered the training of legal professionals, entry and conduct rules for barristers and solicitors, as well as demarcation, business structures and the organisational form in which legal practitioners in Ireland deliver legal services. Below is a summary of the key recommendations in recent decades that are most relevant to the question of unification.

Fair Trade Commission – 1990

2.84 In 1990 the Fair Trade Commission published its *Report of Study into Restrictive Practices in the Legal Profession*.⁵⁶ Its recommendations included:

- On direct access to barristers, all clients should be able to approach barristers directly, both for contentious and non-contentious business, but that individual barristers would be entitled to insist that a solicitor be engaged.
- On business structures, that there should be the greatest possible freedom allowed to solicitors and barristers to decide on the most suitable form of business organisation to offer services, with adequate safeguards to ensure preservation of standards.
- On professional training, the establishment of an Advisory Committee on Legal Education and Training to review education and training and to implement a system of common vocational training for prospective solicitors and barristers.
- On advertising, that barristers be able to advertise freely and that restrictions on advertising by solicitors, such as the prohibition on touting for business and the ban on fee advertising, should be removed.
- On legal personnel in employment, that employed barristers should be allowed to represent their employers in Court and that barristers should be permitted to be employed by other barristers and by solicitors and multi-disciplinary practices.

Organisation for Economic Co-Operation and Development – 2001

2.85 In 2001, the OECD examined the provision of legal services as part of a larger study on Regulatory Reform in Ireland. The *Regulatory Reform in Ireland* study expressly did not address the question of whether the legal profession should continue to be divided into barristers and solicitors. The report identified a number of areas for further reform of the regulation of the legal professions that are relevant:

- The removal of remaining impediments to competition among solicitors and providing incentives on solicitors to ensure that even inexperienced clients receive barristers' services at competitive fees.
- Opening up the service of conveyancing to, for example, banks and financial institutions, would provide additional options to purchases of conveyancing services.

⁵⁶ Fair Trade Commission (March 1990) (Source: Competition Authority (2006))

- Making solicitors responsible to pay barristers their fee would increase solicitors' incentives to ensure cost-effective barristers services.
- Enabling clients to instruct barristers directly would increase efficiency.
- Allowing solicitors and barristers to practice in other business forms could increase efficiency, and other common law systems give legal professional greater scope in this dimension than does Ireland's.
- The control of education and entry of legal professionals should be moved from the self-governing bodies, but close ties as regards quality of entrants and content of education should be maintained.⁵⁷

Competition Authority – 2005 and 2006

- 2.86 In 2006, the Competition Authority issued a report on solicitors and barristers as part of a series on competition in the professions in Ireland. This followed a preliminary report on competition in legal services published in February 2005, which contained preliminary proposals and was intended to provide a basis for further submissions and consultations. The 2005 report contained a proposal to remove restrictions in order to allow lawyers to simultaneously hold the titles of barrister and solicitor. The Competition Authority's final report in 2006 did not include this as a recommendation.

Competition Authority Proposal on Dual Titles – 2005

- 2.87 In its 2005 *Study of Competition in Legal Services Preliminary Report* the Competition Authority proposed that King's Inns, the Bar Council and the Department of Justice, Equality and Law Reform amend their rules/regulations to enable lawyers to simultaneously hold the titles of solicitor and barrister, thereby removing any distinction between solicitors and barristers.⁵⁸
- 2.88 The Competition Authority said it considered that a prohibition on holding both titles restricted competition for clients between solicitors and barristers. It also said that it may be a factor discouraging solicitors from offering one-stop shop services, by deterring them from advocating in court without the title barrister. This in turn reduced choice for clients. Finally, the Competition Authority said the restriction deterred lawyers switching between the professions of solicitor and barrister in response to changes in demand or supply.
- 2.89 The Competition Authority was of the view that: "*Permitting lawyers to hold dual titles may assist the establishment of highly specialised sole practitioners and legal practices that concentrate in certain areas of contentious litigation, for instance construction law.*"⁵⁹

Competition Authority Recommendation on Switching Between Branches – 2006

- 2.90 The Competition Authority's December 2006 report *Competition in Professional Services: Solicitors and Barristers* concluded that the legal profession was in need of substantial reform. It made 29 recommendations to promote greater competition in legal services. The

⁵⁷ OECD (2001) *Regulatory Reform in Ireland*, pages 39 and 40

⁵⁸ Competition Authority (2005) page 70, proposals 8 to 10

⁵⁹ Ibid, page 70, par 6.14

report noted the proposal in its earlier report to allow lawyers to hold dual titles. It said that the focus of the 2006 report was on the restrictions on competition in the market for legal services resulting from legislation, regulation and rules of the Bar Council, Law Society and King's Inns governing who can become a lawyer and how solicitors and barristers must operate.

- 2.91 It stated: *"The overall effect on competition of having a mandatory solicitor/barrister distinction between lawyers is, therefore, not considered in this report and the Competition Authority does not make any recommendation in this regard."*⁶⁰
- 2.92 The Competition Authority noted in its report that as a result of then recent rule changes by the Bar Council and King's Inns, it had been made much easier for solicitors to become barristers.⁶¹ However, it also noted that barristers wishing to become solicitors still had to be assessed by the Law Society to identify areas of exemption from study and exams.⁶²
- 2.93 Accordingly, it recommended that: *"The Law Society should follow the lead of the Bar Council and King's Inns and implement the necessary measures to ensure that switching between the professions is frictionless."*⁶³ This, it said, would enable practitioners switch profession in response to changes in demand and/or supply, and would also ensure choice for consumers.⁶⁴

Competition Authority Recommendations on Competition Between Lawyers - 2006

- 2.94 Of the total 29 Competition Authority recommendations in its 2006 report, those related to "restrictions on competition and rivalry between lawyers" included:

On direct access to barristers

- Allow unlimited direct access to barristers for legal advice.
- Further research in the area of direct access to barristers for contentious issues.

On business structures

- Barristers sharing premises be allowed to promote themselves as a practising group.
- Barristers be allowed to form business partnerships.
- Further research into alternative business structures for barristers and solicitors (legal partnerships and multi-disciplinary practices).

On rules for solicitors and barristers

- Allow employed barristers to represent their employers in court.
- Establish objective criteria for awarding the title of Senior Counsel to both solicitors and barristers.
- Remove restrictions on solicitors advocating in court.
- Remove unnecessary restrictions on solicitors' and barristers' ability to advertise.
- Remove unnecessary restrictions on clients' switching solicitors and barristers.

⁶⁰ Competition Authority (2006) page 71 par 4.122

⁶¹ Ibid, page 71, par 4.126

⁶² Ibid, page 71, par 4.126

⁶³ Ibid, page 71, par 4.128

⁶⁴ Ibid, page 71, par 4.129

- Remove unnecessary barriers to switching between the branches of solicitor and barrister.
- Permit practising barristers to exercise part-time occupations.
- Allow new barristers to act for former employers.
- Allow qualified persons other than solicitors to provide conveyancing services.⁶⁵

On a Legal Services Commission

- An overarching Competition Authority recommendation was the establishment of an independent Legal Services Commission with responsibility for regulation of both branches of the legal profession.

LSRA's Recommendations on Barristers' Issues – 2017

- 2.95 As documented earlier in this section, the Legal Services Regulatory Authority in September 2017 recommended expanded direct client access to barristers. This followed a statutory consultation under section 120 of the Act. The Authority's report, *Certain Issues Relating to Barristers*, recommended that barristers be permitted to receive instructions directly from institutional clients on contentious matters in certain circumstances and subject to adequate safeguards.⁶⁶
- 2.96 The three recommended conditions were: barristers wishing to undertake direct access work on contentious matters should be required to apply to the Authority for authorisation; clients wishing to directly instruct barristers in contentious matters should be required to be approved by the Authority; and the type of work in which direct access is permissible should be specified.⁶⁷
- 2.97 In the same report, the Authority also considered in detail the question of whether barristers should be allowed to hold client moneys. The Authority concluded that the only situation in which it may be necessary, or desirable, for barristers to hold client moneys would be where a barrister is a partner within a legal partnerships or a multi-disciplinary practice.
- 2.98 The report stated: *"In the absence of these new business models, there is no necessity for barristers to have access to clients' moneys. This is the case even where direct professional access in contentious matters is permitted."* The report said that the use of escrow accounts,⁶⁸ as is the case in England and Wales, could fulfil any requirements in respect of the holding of client moneys within the context of direct professional access.⁶⁹
- 2.99 The Authority said the further consideration of barristers holding client moneys as part of legal partnerships or multi-disciplinary practices should be undertaken within ongoing consultations and consideration of those issues.⁷⁰

⁶⁵ Competition Authority (2006) pages 77 to 128, recommendations 7 to 21

⁶⁶ LSRA (September 2017) *Certain Issues Relating to Barristers*

⁶⁷ Ibid, recommendations 2 to 11, pages 44 to 48

⁶⁸ An escrow account is where the monies are held by a third party on agreed terms.

⁶⁹ LSRA (September 2017) *Certain Issues Relating to Barristers*, page 43, pars 4.1 to 4.3

⁷⁰ Ibid, page 43, pars 4.4 to 4.5

Oireachtas Debates on the Legal Services Regulation Act 2015

- 2.100 The Legal Services Regulation Act 2015 is silent on what form unification of the solicitors' profession and the barristers' profession in the State should take. Section 34(4)(ii) mandates the Authority, if it is in favour of unification, to recommend how the professions can be unified and the reforms or amendments required to facilitate this.
- 2.101 When introducing the Bill to the Dáil, the then Minister for Justice and Equality said it included several measures aimed at opening up the provision of legal services in a way that takes account of new business models and the significant advances that have been made in business technology. The then Minister stated that: *"While providing for new business structures to deliver legal services, members of both professions will continue to be entitled to deliver legal services under the current structures of solicitors' practices and through the Law Library."*⁷¹
- 2.102 In relation to the Bill's provisions on potential unification of the professions, several legislators raised concerns that a merger would lead to the growth of large law firms attracting the best barristers, garnering commercial and State work, with the knock on effect that access to justice for individual clients would be made more difficult. Others questioned whether having two separate types of lawyer best served the public interest in terms of the duplication of work and the costs for citizens, with one deputy describing the distinction between barrister and solicitor as self-serving.⁷²

⁷¹ See: <https://www.oireachtas.ie/en/debates/debate/dail/2011-12-16/14/>

⁷² See: <https://www.oireachtas.ie/en/debates/debate/dail/2012-02-09/4/> and https://www.oireachtas.ie/en/debates/debate/joint_committee_on_justice_defence_and_equality/2012-03-21/3/

PART 3: STRUCTURE OF THE LEGAL PROFESSION

Overview

- 3.1 The legal profession in Ireland consists of two branches, barristers and solicitors. The origins of this split legal profession lie in the common law legal system of medieval England. The foundation of the regulation of the Irish legal profession is a framework consisting of the Constitution of Ireland, statutes and statutory instruments, principles of common law, and professional codes of conduct.⁷³
- 3.2 The bifurcated nature of the legal profession today is reflected in the definition of a “legal practitioner” in the Legal Services Regulation Act 2015 (the Act) as “a person who is a practising solicitor or a practising barrister”.
- 3.3 Solicitors and barristers have different but sometimes overlapping functions. A solicitor can provide all the services of a barrister, but barristers are not permitted to provide all the services offered by solicitors. For example, unlike solicitors, barristers are not permitted to hold clients’ funds.
- 3.4 Many of the restrictions which apply to the legal profession have been laid down over decades or, in some cases, centuries of self-regulation by the representative bodies. There are currently approximately 12,000 practising solicitors in Ireland and approximately 2,800 practising barristers.
- 3.5 The framework for regulating legal services is based on the reservation of certain rights and activities to individuals holding specific titles. In the case of solicitors, these rights and activities are set out in legislation, notably the Solicitors Acts of 1954, 1960 and 1994, and the Courts Acts. The practice rights of barristers, in contrast, emanate from Common Law.⁷⁴
- 3.6 Legal practitioners are admitted as either solicitors or barristers and are prevented from holding both titles simultaneously.
- 3.7 Since 7 October 2019, the LSRA is responsible for receiving and investigating complaints about solicitors and barristers for inadequate standards of legal services, excessive costs and misconduct under the Act. This follows the commencement of Part 6 of the Act which transferred responsibility for complaints handling from the professional bodies to the LSRA.
- 3.8 This section describes the structure of the barristers’ profession and the solicitors’ profession in Ireland. It includes an overview of their respective roles and functions, the legal services they provide, and how these have evolved in recent times.

⁷³ Hosier, Maeve (2017)

⁷⁴ Hook Tangaza (2018), page 11, par 9

Solicitors in Ireland

- 3.9 There were 11,959 solicitors with practising certificates in Ireland on 31 December 2019.⁷⁵ Solicitors can be divided into those in private practice and those who are employed as in-house solicitors by businesses or State bodies. The majority of solicitors work in private practice, operating either as sole practitioners, with other solicitors in partnerships, or as associate solicitors i.e. non-partner members of a firm. Approximately one in five solicitors work in-house in business or the public sector, providing legal services to their employers only.⁷⁶ The profession is split almost evenly between men and women.⁷⁷
- 3.10 The majority of solicitors' firms are small and local; of the 2,325 firms in the country, 1,638 (71%) have one or two solicitors.⁷⁸ These traditional firms exist in cities, towns and villages across the country, and typically compete with similar sized firms for business from private clients. They offer "general practice" legal services directly to the public such as conveyancing, probate and the provision of legal advice and representation to their clients in areas including litigation, family law and criminal law.⁷⁹ Solicitors have a statutory right of audience in all courts and receive training in advocacy as part of their professional training.
- 3.11 At the opposite end of the scale, there were 29 firms with 21-plus solicitors in 2018.⁸⁰ Large law firms are mostly located in Dublin. They provide a wide range of legal services to corporate and commercial clients, and do not generally compete with smaller firms for individual private clients. Almost one in four practising solicitors in 2019 worked in the top twenty law firms.⁸¹ Once admitted to the profession, solicitors must hold certificates issued annually by the Law Society in order to practise. Solicitors are jointly regulated by the Legal Services Regulatory Authority and the Law Society.
- 3.12 In its submission to this consultation, the Law Society pointed out that the role of Irish solicitors has expanded in recent years, reflecting the need for legal advice in response to the regulatory and legal issues arising in an increasingly sophisticated and globalised economy. Accordingly, solicitors are often on hand for boardroom decisions, or in negotiating or documenting financial transactions.
- 3.13 Since 2020, experienced or specialist solicitors have been entitled to apply for a patent of precedence to use the title senior counsel, a position which was traditionally only open to barristers. This change was introduced under Part 12 of the Legal Services Regulation Act 2015. In September 2020, a total of 17 solicitors were among the first group of 37 legal practitioners awarded the title. Solicitors appointed as senior counsel remain solicitors.

⁷⁵ Law Society Gazette (February 2020)

⁷⁶ A total of 2,496 solicitors worked in house as at December 2019. This figure excludes those working in the full time service of the state who are not required to hold a practising certificate. Source: Law Society

⁷⁷ Law Society of Ireland Annual Report and Accounts 2018/2019, page 39

⁷⁸ Law Society of Ireland Annual Report and Accounts 2018/2019, page 17

⁷⁹ An analysis by Indecon-London Economics identified personal injury and conveyancing as the largest practice areas of solicitor firms in Ireland in 1999, accounting for 33% and 31% of fee income respectively. Trust/probate services and criminal/litigation work accounted for a relatively small proportion of the fee income generated in that year, namely 10% and 3% respectively. Source: Indecon (2003)

⁸⁰ Law Society of Ireland Annual Report and Accounts 2018/2019

⁸¹ A total of 2,926 solicitors (24%) of the total of 11,959 solicitors holding practising certificates at the end of 2019. Source: LSRA (2020) Pathways to the Professions, page 25, par 4.13

- 3.14 Solicitors are bound by a range of rules of professional conduct that derive from both statutory and non-statutory sources. The main legislative framework for the regulation of solicitors are Solicitors Acts 1954 to 2015, and the regulations made under these acts, as well as the Legal Services Regulation Act 2015.
- 3.15 The Law Society's Guide to Good Professional Conduct for Solicitors states that: *"In addition to the legislative requirements, solicitors are also required to observe general core principles of conduct, in particular honesty, independence, confidentiality and the avoidance of situations of conflict of interest. A solicitor should at all times observe and promote these core values of the profession and avoid any conduct or activities inconsistent with those values".*⁸²

Barristers in Ireland

- 3.16 There are 2,761 barristers on the Roll of Practising Barristers, a public register of all barristers entitled to provide legal services in the State.⁸³ The Roll was established in December 2018. It is maintained and published by the Legal Services Regulatory Authority on its website.⁸⁴
- 3.17 Barristers must be entered on the Roll of Practising Barristers in order to provide legal services in the State. Under section 136 of the Act, it is a criminal offence for an unqualified person to provide legal services as a practising barrister, where an unqualified person is defined in the Act as including a qualified barrister whose name is not entered on the Roll.
- 3.18 Barristers can be divided into self-employed barristers and employed barristers. Most barristers are in private practice, providing services in court advocacy and the provision of legal advice and opinions, including through publicly funded aid schemes and work for private clients. Self-employed barristers must operate as independent sole traders and may not incorporate or, currently, form partnerships.
- 3.19 In 2019, four out of five barristers on the Roll of Practising Barristers were members of the Law Library.⁸⁵ Members of the Law Library constitute what is called Ireland's independent referral Bar. Membership of the Law Library is not mandatory in order for a barrister to practise. The governing body for barristers who are members of the Law Library is the Bar of Ireland. It operates the Law Library, which is generally available only to its members.
- 3.20 The Law Library provides facilities for its members in Dublin at the courts complex and in Cork adjacent to the courthouse. Barristers (in Dublin and beyond) may have offices outside the Law Library buildings, even where they are members of the Bar of Ireland (e.g. the Bar of

⁸² Law Society (2013) A Guide to Good Professional Conduct for Solicitors, page 2, par 1.3

⁸³ Figure for the Roll of Practising Barristers as at 7 September 2020

⁸⁴ See <https://www.lsr.ie/for-law-professionals/roll-of-practising-barristers/>

⁸⁵ A total of 2,198 barristers out of 2,735 on the Roll of Practising Barristers at 31 December 2019 were members of the Law Library. Source: LSRA (2020) Pathways to the Professions, page 28, par 4.6. In its May 2020 submission to this consultation, the Bar of Ireland stated that the current membership of the Law Library was approximately 2,170 practising barristers

Ireland offers a 'country membership'). Barristers who practise on the 'circuit' of courts around the country may use bar rooms or 'robing rooms' in local court buildings.⁸⁶

- 3.21 Barristers (or counsel) are divided into junior and senior counsel. Junior counsel provide legal opinions, draft pleadings and other documents (e.g. correspondence, terms of settlements, contracts and leases) and negotiate settlements, as well as appearing in the District, Circuit and Superior Courts.⁸⁷
- 3.22 Senior counsel, who are more experienced advocates, generally represent clients in the Superior Courts, but sometimes also appear in the Circuit Courts. Senior counsel may "lead" junior counsel at hearings. In cases where a senior counsel runs a case at hearing, the junior counsel often conducts the pre-hearing motions (such as discovery). Approximately 13% of barristers currently hold the title of senior counsel.⁸⁸
- 3.23 Employed barristers are employed by public bodies or businesses, including larger solicitors' firms. In 2019, 9% of barristers on the Roll of Practising Barristers were recorded as working in the full-time service of the State.⁸⁹ As already noted, section 212 of the Act, which commenced in October 2019, permits an employed barrister to appear on behalf of their employer in a court, tribunal or forum for arbitration.
- 3.24 Barristers have rights of audience in all courts in Ireland by virtue of holding the title of "barrister". The title is conferred by the Chief Justice of Ireland who admits barristers by calling them to the Bar following graduation from the barrister-at-law degree course provided by the King's Inns law school.
- 3.25 While qualified barristers have full rights of audience as soon as they are called to the Bar, members of the Law Library must undergo an unpaid apprenticeship of at least one year with an established barrister, called a "master," before they are allowed to practise on their own. This is known as "pupillage" or "devilling" and the pupil does not receive any fee for this work. During the pupillage period, pupils are entitled to accept work on their own behalf.
- 3.26 There are statutory and non-statutory rules by which barristers may perform their work.⁹⁰ These are: a Code of Conduct issued by the Bar of Ireland which applies to members of the Bar;⁹¹ a Professional Code issued by the King's Inns for all barristers;⁹² any code of practice that may be issued by the Legal Services Regulatory Authority; the Act, and any regulations issued under it.

⁸⁶ The administration of justice involves courts travelling the country on 'circuits'. The country is divided into eight circuits for the purposes of the Circuit Court. These are: Dublin, Cork, Eastern, Midland, Northern, South Eastern, South Western and Western

⁸⁷ The Superior Courts are the High Court, Court of Appeal and Supreme Court

⁸⁸ There were 345 Senior Counsel and 2,410 Junior Counsel on the Roll of Practising Barristers administered by LSRA as at 29 July 2020. The LSRA points out that the column in the Roll entitled 'Senior Counsel' is not formally part of the Roll. The information contained therein has been furnished by the Bar of Ireland and/or the practising barristers themselves and the LSRA cannot guarantee the accuracy or completeness of same

⁸⁹ A total of 237 barristers comprising 205 non-Law Library members and 32 members, as at 31 December 2019

⁹⁰ Separate to requirements of the general law of contract, tort, criminal law or equity

⁹¹ Bar of Ireland (2020) Code of Conduct for the Bar of Ireland

⁹² Kings Inns (2018) Professional Code of the Honorable Society of Kings' Inns

- 3.27 Since 7 October 2019, the Legal Services Regulatory Authority receives and investigates complaints against barristers for inadequate legal services, excessive costs and misconduct following the commencement of Part 6 of the Act.
- 3.28 Barristers have a number of core duties as set out in their codes of conduct, including a duty to promote and fearlessly protect clients' best interests and a duty of independence. They have an *"overriding duty to the Court to ensure in the public interest that the proper and efficient administration of justice is achieved and they must assist the court in the administration of justice and must not deceive or knowingly mislead the court."*⁹³

Summary - Modern Changes to Functions of Barristers and Solicitors

- 3.29 The origins of Ireland's split legal profession lie in the common law legal system of medieval England. Solicitors and barristers traditionally served different functions; solicitors interacting directly with clients and managing court documents, and barristers being drafted in to present arguments in court and offer specific legal expertise or opinion.
- 3.30 Traditionally, barristers were required to act only on the instructions of a solicitor and could not accept private employment from individual members of the public. This has created what has been called "an inter-reliant profession in the practice of law,"⁹⁴ with the Bar developing over the years as a referral profession.⁹⁵
- 3.31 In modern times, the distinction between the two branches has devolved significantly.⁹⁶ However, certain defining features of the respective professions also remain and are discussed further below.

Rights of Audience in Courts

- 3.32 Both solicitors and barristers have rights of audience in all courts.⁹⁷ One of the main changes in Ireland occurred in 1971, when the Courts Act permitted solicitors to advocate on behalf of their clients in all Irish courts.⁹⁸ In certain types of cases, solicitors now conduct all aspects of litigation on behalf of a client on a "full service" basis. The right of audience for solicitors in all courts means that there is no aspect of the work normally carried out by barristers which cannot be done by solicitors.
- 3.33 In practice, solicitors' court work tends to focus on representing clients in the District Court and the Circuit Court. Solicitors only rarely exercise their right of audience in the High Court, Appeal Court and the Supreme Court. Instead, they generally call upon the services of barristers to present their cases in those Superior Courts.

⁹³ King's Inns Code (2018), page 3, par 20 and the Bar of Ireland Code (July 2020), page 10 par 2.5

⁹⁴ Donnelly, Cormac (2020)

⁹⁵ Flood, John and Whyte, Avis (2009)

⁹⁶ Donnelly, Cormac (2020)

⁹⁷ Lay individuals also have a right of audience in relation to any proceedings that they issue or defend in a personal capacity. Lay litigants may be accompanied by so-called "McKenzie Friends," individuals who can provide assistance and support but are prevented under section 58 of the Solicitors Act 1954 from providing legal advice or assisting in the preparation of legal documents.

⁹⁸ Section 17 of the Courts Act 1971 gave solicitors rights of audience before the Superior Courts

Key Distinctions between Solicitors and Barristers

- 3.34 Restrictions on barristers mean they are not permitted to provide all the services that are normally offered by solicitors. The key distinctions between a solicitor and a barrister are that a barrister cannot:
- Hold money on behalf of a client;
 - Take instructions directly from clients (with limited exceptions);
 - Handle conveyancing transactions such as a house purchase or sale;
 - Bind a client or a client's property by promises or undertakings to banks or financial institutions.
 - Form business partnerships.⁹⁹
- 3.35 Since 1990, a number of bodies, including professional and charitable organisations, approved by the Bar of Ireland may directly seek legal opinions from barristers under its Direct Professional Access Scheme.¹⁰⁰ The scheme does not extend to contentious matters (for example, court appearances). Further detail of this scheme is included below.

The Work of Solicitors

- 3.36 Solicitors are legal practitioners who have direct contact with clients and provide various legal services including legal advice and representation. A solicitor's clients can be individuals, groups, private companies or public sector organisations. The Solicitors Acts 1954 to 2015 place a number of limitations on the provision of legal services.¹⁰¹ The Acts provide that certain legal services, commonly referred to as restricted/reserved legal services, may only be provided by solicitors, and provision of these restricted/reserved legal services by a non-solicitor constitutes an offence.¹⁰²
- 3.37 Section 55 of the 1954 Act, as amended by section 63 of the Solicitors (Amendment) Act 1994, provides that an unqualified person shall not act as a solicitor and that a person who contravenes this provision shall be liable to criminal prosecution. Section 56 of the 1954 Act, as amended by section 64 of the Solicitors (Amendment) Act 1994, prohibits any person who is not a solicitor from pretending to be a solicitor.
- 3.38 Private practice solicitors are office based and their work includes the administrative side of running a firm. In many types of work, such as conveyancing, probate and corporate matters, solicitors do not need to instruct a barrister on behalf of a client.
- 3.39 The main functions of solicitors are as follows:¹⁰³

⁹⁹ Source: Allen, Catherine (2018) and Bar of Ireland

¹⁰⁰ See <https://www.lawlibrary.ie/legal-services/direct-professional-access.aspx>

¹⁰¹ It should be noted that some legal services can be provided by persons other than solicitors and barristers. For example, accountants may provide advice on legal aspects of taxation

¹⁰² Section 58 Solicitors Act 1954

¹⁰³ Source: Competition Authority (2006), page 13, par 2.8, and submissions to this consultation from legal professional bodies

- Providing legal advice about non-contentious matters such as buying or selling property (conveyancing services) or drafting a will;
- Acting as an agent or representative in commercial transactions, for example mergers;
- Providing legal advice and representation in relation to family law issues or disputes or disagreements with another party such as an employer or neighbour;
- Providing legal advice in relation to taking or defending a legal case, for example in the event of a road traffic accident or an accident at work;
- Managing a court case on behalf of a client by acting as representative in dealings with the other party, including filing court documents and contacting witnesses.
- Instructing a barrister (where necessary) on behalf of a client by providing a 'brief' with an overview of the client's case and supplying necessary documents and information; and
- Representing clients in court – typically in the District Court and the Circuit Court, and very rarely in the Superior Courts – that is, the High Court, Court of Appeal and Supreme Court.

Solicitors and Conveyancing

- 3.40 Section 58 of the Solicitors Act 1955 restricts the preparation of legal documents for payment for conveyancing and trust/probate work to solicitors.¹⁰⁴

Holding Clients' Funds

- 3.41 One of the key distinctions between solicitors and barristers is that solicitors are permitted to hold client moneys,¹⁰⁵ whereas barristers currently are not.¹⁰⁶ There are particular areas of work that solicitors routinely carry out that require them to hold funds on behalf of their clients. For example, in conveyancing transactions, solicitors assisting clients to buy or sell property will hold clients' deposits and purchase funds in their accounts for periods of time before transferring them. In litigation matters, damages awarded are usually paid to the solicitor who should in turn pay the costs of expert reports or witnesses before transferring the balance to the client. There are extensive regulations that cover the circumstances in which solicitors may hold clients' moneys and how they deal with them.¹⁰⁷

¹⁰⁴ Under Section 58 of the Solicitors Act 1954, individuals can still carry out their own conveyancing, conduct their own litigation and extract letters of administration on their own account

¹⁰⁵ Solicitors Accounts Regulations 2014, S.I. 516 of 2014. Under section 2(1) Clients' moneys means "moneys received, held or controlled by a solicitor arising from his or her practice as a solicitor for or on account of a client or clients, whether the moneys are received, held or controlled by him or her as agent, bailee, stakeholder, trustee or in any other capacity, including moneys received by the solicitor on account of outlays not yet discharged;..."

¹⁰⁶ Section 45(1) of the Legal Services Regulation Act 2015 provides that: "Subject to subsection (2), a legal practitioner shall not hold moneys of clients unless that legal practitioner is a solicitor. Section 45 (2) states: Notwithstanding subsection (1) the Minister may by regulations prescribe a class or classes of solicitors who may not hold the moneys of clients, or who may hold such moneys subject to such conditions as may be provided for in such regulations

¹⁰⁷ Solicitors Accounts Regulations 2014

Solicitors' Partnerships including Limited Liability Partnerships

- 3.42 In addition to operating as sole practitioners, solicitors may provide legal services through partnerships with other solicitors (but not with non-solicitors or barristers). Since November 2019, partnerships of solicitors have been entitled to apply to the LSRA for authorisation to operate as Limited Liability Partnership (LLP). LLPs are permitted under the Legal Services Regulation Act 2015 (the Act).¹⁰⁸
- 3.43 Authorisation of a partnership of solicitors to operate with limited liability under the Act does not create a new business entity. Instead, it authorises existing partnerships of solicitors to limit their personal liability. The effect of authorisation means that each partner in an LLP will not be personally liable for the debts, obligations or liabilities of the LLP, of himself or herself in their capacity as a partner in the LLP, or of another partner in the LLP, or any employee, agent or representative of the LLP.
- 3.44 As required by section 126(1) of the Act, the LSRA has established a public Register of Limited Liability Partnerships which is published on its website and updated regularly. As of 4 September 2020 a total of 208 solicitors partnerships were authorised to operate as LLPs by the LSRA.¹⁰⁹
- 3.45 Barristers may not currently form business partnerships and accordingly are not permitted to apply to the LSRA for authorisation to operate with limited liability. However, the Act permits legal partnerships, once established, to apply for LLP status.¹¹⁰ Legal partnerships under the Act may be barrister-only partnerships or barrister-solicitor partnerships.

Litigation and Advocacy

- 3.46 As referenced above, solicitors have had full rights of audience before the Irish courts since 1971.¹¹¹ In certain types of cases, solicitors conduct all aspects of litigation on behalf of a client on a "full service" basis. These would typically involve matters such as minor road traffic offences, landlord and tenant disputes, and civil claims in the District Court which have a monetary value of less than €15,000.

Solicitors' As Senior Counsel and Judges

- 3.47 The title of senior counsel is awarded by the government to experienced legal practitioners as a mark of excellence in quality of services. Since 2020, solicitors are entitled to apply for a patent of precedence to use the title of senior counsel (abbreviated as SC), which was previously only open to barristers.¹¹² Solicitors who are awarded the title still remain solicitors and, unlike barristers who become senior counsel, are not admitted to the Inner Bar. To date, 17 solicitors have been granted a patent of precedence.¹¹³

¹⁰⁸ Legal Services Regulation Act 2015 (Limited Liability Partnerships) (Section 130) Regulations 2019 (S.I. No. 519/2019) on the 23 October 2019. Under Section 125 of the Legal Services Regulation Act 2015

¹⁰⁹ Source: LSRA register of LLPs as at 4 September 2020. See <https://www.lsr.ie/for-law-professionals/limited-liability-partnerships/>

¹¹⁰ Under section 99 of the Act, a legal partnership is a "relevant business" which may apply for authorisation to operate as a LLP

¹¹¹ Section 17 of the Courts Act 1971 gave solicitors rights of audience before the Superior Courts

¹¹² Under section 174 of the Legal Services Regulation Act 2015

¹¹³ In September 2020, a total of 17 solicitors were among 37 legal practitioners recommended for the grant of a patent of precedence to use the title senior counsel. See: <https://www.lsr.ie/list-of-37-legal-practitioners-to-be-granted-title-of-senior-counsel/>

- 3.48 Since 2002, solicitors may be appointed as judges to all courts, including the Superior Courts.¹¹⁴ Previously, only barristers could be made judges of Superior Courts.

The Work of Barristers

- 3.49 Barristers (also called counsel) are legal practitioners who specialise in court advocacy and the provision of legal advice and opinions. As already stated, barristers in private practice must operate as sole traders and may not incorporate or form partnerships.
- 3.50 Barristers may also be employed, working “in-house” for private companies or for State bodies. In general, solicitors engage barristers on a client’s behalf to represent them in court, and they instruct the barrister in relation to the details of a client’s case.
- 3.51 The main functions of barristers are:¹¹⁵
- Drafting legal opinions, for example on whether or not a person has a “good case” in the context of litigation or in relation to specialised legal matters;
 - Preparing court documents for exchange between the parties in a case, (known as writs or pleadings);
 - Negotiating settlements; and
 - Representing clients in court (advocacy), putting legal arguments to judges and juries and cross-examining witnesses.

Cab Rank Rule

- 3.52 Barristers in independent private practice are subject to the Bar Council’s “cab rank” rule.¹¹⁶ This provides that barristers requested to act for a client must do so, if they are available, subject to their usual fees. There are limits to this rule, for example where there is a conflict, the barrister has other professional commitments or other special circumstances apply.
- 3.53 The purpose of the cab rank rule is to ensure that all litigants can obtain the services of a barrister no matter how unpopular their cause or the size or resources of the solicitors’ firm. According to the Bar of Ireland, “the thinking is that if barristers are permitted to pick and choose their clients, there is a real danger some litigants will find it impossible to get legal representation.”¹¹⁷

Voluntary Assistance - Pro Bono Scheme of the Bar

- 3.54 The Bar of Ireland has operated a Voluntary Assistance Scheme (VAS) since 2004. This provides for *pro-bono* assistance to be made directly by barristers to charities, non-government organisations and civil society groups. VAS does not provide services in family

¹¹⁴ Section 5 of the Courts (Supplemental Provisions) Act 1961, as amended by section 4 of the Courts and Court Officers Act 2002, and section 11 of the Court of Appeal Act 2014, provides that:

“a person shall be qualified for appointment as a judge of the Supreme Court or the Court of Appeal or the High Court if the person is for the time being a practising barrister or practising solicitor of not less than 12 years standing who has practised as a barrister or a solicitor for a continuous period of not less than two years immediately before such appointment.”

¹¹⁵ Competition Authority (2006), page 14, par 2.12

¹¹⁶ Bar of Ireland (2020) Code of Conduct for the Bar of Ireland, rule 3.10

¹¹⁷ O'Higgins, Micheál (2020) Independence: A Public Good

law, child care law or criminal law, which are covered by State legal aid schemes.¹¹⁸

- 3.55 The VAS scheme makes available every service which barristers ordinarily provide to clients. Barristers can become involved at any or for all stages of a legal issue. The barrister can provide assistance:
- to the organisation itself – for legal issues arising for the organisation, or
 - to an individual as a client of a requesting organisation, but only via the requesting organisation.

Direct Client Access to Barristers

- 3.56 Under the Bar of Ireland Code of Conduct,¹¹⁹ barristers cannot accept instructions directly from any clients in contentious matters (e.g. court appearances).¹²⁰
- 3.57 In relation to non-contentious matters, direct access to private practice barristers – that is access between a client and a barrister without the intermediary services of a solicitor – is currently allowed under a Bar of Ireland-run scheme.
- 3.58 Under the Direct Professional Access scheme, operational since 1990, a limited number of pre-approved organisations and institutions and their members can approach barristers directly for legal opinions.¹²¹ Approved bodies for the scheme include professional, representative and regulatory bodies as well as charities and public office holders. For example, these currently include government departments and statutory bodies, the Education and Training Boards, Barnardos and the Irish Congress of Trade Unions.¹²²
- 3.59 Barristers are not obliged to accept direct professional access clients, but instead may choose whether to participate in the scheme. The Bar of Ireland states that it maintains a list of those barristers who have indicated willingness to accept such work.
- 3.60 Organisations must apply for inclusion as approved bodies under the scheme and must satisfy the Bar of Ireland that:
1. Their members provide skilled and specialist services; and
 2. The body has a significant need for a barrister's services.
 3. The body must also show that their affairs and conduct are regulated by a constitution that governs:
 - their standards
 - how people become members of their body; and
 - how the body handles discipline and unethical or dishonourable conduct.

¹¹⁸ See: <https://www.lawlibrary.ie/legal-services/voluntary-assistance-scheme/how-vas-provides-assistance.aspx>

¹¹⁹ Bar of Ireland (2020) Code of Conduct for the Bar of Ireland, rule 4.1. Also see *Bond v Dunne*, Unreported Judgment, Gillian J., 4 July 2017

¹²⁰ "Contentious matter" as defined in section 99 of the Legal Services Regulation Act 2015 means a matter that arises in, and that relates to the subject matter of, proceedings before any court, tribunal or other body or person before which the respective legal rights and obligations of two or more parties are determined, to which the person instructing the practising barrister concerned is a party

¹²¹ The Public Affairs Committee of The Bar of Ireland decides who should have access to the scheme. This access may be conditional and sometimes may only be allowed for an initial trial period. Source: Bar of Ireland

¹²² As at September 2020. See list of professional bodies approved by the Bar of Ireland under the Direct Professional Access Scheme: <https://www.lawlibrary.ie/legal-services/direct-professional-access/list-of-approved-bodies.aspx>

Transfers Within the Profession

3.61 A legal practitioner cannot hold the titles of solicitor and barrister simultaneously. Transfer arrangements enable solicitors and barristers to move into the other branch of the legal profession. Transfers are open to practitioners with three years' post-qualification experience. In both cases, transfer is by way of a short non-examined course together with some procedural steps. In addition, barristers wishing to become solicitors may have to gain up to six months work experience in a law firm.

3.62 The ability for solicitors and barristers to switch branches was simplified following criticisms by the Competition Authority in 2005 and 2006.

Barristers Becoming Solicitors

3.63 Under section 51 of the Solicitors (Amendment) Act 1994, barristers who qualified in Ireland can transfer to become solicitors without undergoing the full training programme for trainee solicitors.

3.64 Barristers may apply to become solicitors where they have been called to the Bar of Ireland and, since then, for a minimum of three years have: practised as a barrister in the State; been a member of the Judiciary; been employed in the provision of services of a legal nature; and/or been employed by the State in the provision of services of a legal nature.

3.65 As part of the application process, barristers must submit detailed documentation to the Law Society of Ireland, along with an application fee of €70. Applicants may be called for interview by Law Society representatives. The application is then referred to the Education Committee of the Law Society for a decision on whether the applicant is eligible to be admitted to the Roll of Solicitors and what conditions, if any, may apply.

3.66 Applicant barristers wishing to become solicitors may be obliged to spend up to six months in the office of a practising solicitor, "for the purpose of receiving due instruction and obtaining experience in the practice and profession of a solicitor." This six month requirement may, in exceptional circumstances, be waived/modified. This is a matter for the interviewing panel and the Education Committee. On completion of any in-office period, the applicant must submit a letter from the practice confirming the period worked, the experience obtained and whether the work done was equivalent to that of a solicitor.

3.67 All transfer applicants must also attend the Law Society's four week Essentials of Legal Practice (ELPC) course which runs annually in August/September. The course covers professional conduct, solicitors' accounts, probate and taxation and conveyancing. Attendance at all modules is compulsory. There is no examination. The fee for the 2020 ELPC is €2,860 or €3,230.

3.68 On completion of the ELPC, the in-office period and on satisfaction of any other conditions outlined by the Education Committee, the applicant may apply to be admitted to the Roll of Solicitors by the Law Society. The fee for enrolment is €300.¹²³ In order to practise, solicitors must hold an annual practising certificate issued by the Law Society.

¹²³ Source: Law Society of Ireland <https://www.lawsociety.ie/Public/Become-a-Solicitor/Barristers/>

Solicitors Becoming Barristers

- 3.69 Solicitors may be admitted as barristers if they have continuously held a practising certificate from the Law Society for three years or more. Prior to admission, a transferring solicitor must submit detailed documentation to the King's Inns.¹²⁴
- 3.70 The transferring solicitor must attend a four week Solicitor Transfer Course at the King's Inns which is held in June each year. This course focuses on areas of specific relevance to the Bar in which solicitors may not have had practical experience. It includes procedural rules of civil and criminal litigations, the Code of Conduct for the Bar of Ireland, drafting skills, legal opinions, witness examination and cross-examination and running a criminal trial and civil hearing. Attendance is compulsory and there is no examination. The course fee in 2020 was €3,000.¹²⁵

Numbers of Legal Practitioners Switching Professions

- 3.71 A total of 28 barristers transferred to become solicitors and were admitted to the Roll of Solicitors in 2019. A total of three solicitors became barristers in 2019.¹²⁶
- 3.72 The total number of barristers who have become solicitors since 2004 is 217, while the number of solicitors becoming barristers in the same period was 62, according to figures supplied to this consultation by the Law Society. The numbers of barristers becoming solicitors in particular has been on the rise in the past decade, from 6 in 2011 to 34 per year in 2016 and 2017, and 30 in 2018.

¹²⁴ Source: King's Inns <https://www.kingsinns.ie/members/specially-qualified-applicants>

¹²⁵ Source: King's Inns

¹²⁶ LSRA (2020) Pathways to the Professions page 31, par 4.32

PART 4: CONSULTATION PROCESS AND SUMMARY OF RESPONSES

The Consultation Process

- 4.1 In order to gather evidence and views to feed into this report, the Authority undertook a statutory consultation as required under section 34(1) of the Legal Services Regulation Act 2015 (the Act) between 11 February and 9 June 2020. The Authority initiated the consultation process on 11 February 2020 by writing directly to the professional bodies named in the Act inviting written submissions. The professional bodies are the Bar Council (Bar of Ireland) the Law Society, and the Honorable Society of King's Inns (King's Inns).
- 4.2 In addition, the LSRA issued a call for submissions by email on 13 February 2020 to a total of 303 recipients in 177 organisations on the LSRA's consultations mailing list. A consultation notice inviting submissions was published on the LSRA's website on 17 February 2020. The consultation notice is published in Annex 1.
- 4.3 The original deadline for receipt of submissions was 12 May 2020. This was extended to 9 June 2020 due to the Covid-19 crisis, with a fresh notice to this effect issued to all mailing list recipients on 11 May 2020.
- 4.4 The extended deadline facilitated a consultation period of approximately four months, which falls within the suggested timescales contained in the guidance on public consultations published by the Department of Public Expenditure and Reform.¹²⁷

Consultation Invitation

- 4.5 The consultation notice invited respondents' views on the following:
- 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.
 - 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 Act states that the Authority's report shall contain details of arrangements in operation in other jurisdictions in which the professions have been unified.)

¹²⁷ Department of Public Expenditure and Reform (January 2019) Public Consultation Principles and Guidance

- 4.6 The consultation notice advised that the Authority may, if appropriate, make recommendations to the Minister as to 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.
- 4.7 The consultation notice indicated that the Authority intended where appropriate to publish submissions received on the LSRA website. Therefore, respondents were asked to highlight in their submissions any commercially sensitive or confidential information which they would not wish to be disclosed. None of the respondents highlighted any information that was commercially sensitive or confidential. Therefore, the full submissions will be published in due course on the LSRA's website.

Breakdown of Responses

- 4.8 A total of 19 written submissions were received, 10 from institutions and 9 from individuals, all of whom are barristers or solicitors (including one trainee solicitor). The respondents are listed in Table 2 below in alphabetical order. The Authority is grateful to all of the respondents who took the time to make a submission.

Table 2: Respondents to Unification Consultation

Organisations		Individuals	
1	Association of Chartered Certified Accountants	11	William Aylmer solicitor
2	Association of Judges in Ireland	12	James Dennison solicitor
3	Bar of Ireland ¹²⁸	13	Mark Elliot trainee solicitor
4	Department of Education and Skills	14	Andrew McKeown BL
5	Dublin City Council Law Department	15	Danny Morrissey solicitor
6	DCU School of Law and Government	16	Liam Nolan BL
7	Dublin Solicitors' Bar Association	17	Hazel Ann Smyth BL
8	Enterprise Ireland	18	Norman Spicer solicitor
9	King's Inns	19	Kieron Wood BL
10	Law Society of Ireland		

- 4.9 The Authority is pleased that the number of written submissions received was higher than for several previous statutory consultations on other issues related to legal practitioners and the legal services market and business structures.¹²⁹

¹²⁸ The Bar of Ireland's submission was made by its Council, the General Council of the Bar of Ireland, which is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library.

¹²⁹ Including: five written submissions to the section 119 public consultation for the Report on Multi-Disciplinary Practices (March 2017); eight submissions to the section 120 public consultation for the Report on Certain Issues Relating to Barristers (September 2017); eight submissions to the section 118 public consultation for the Report on Legal Partnerships (March 2017)

- 4.10 However, while the Authority is grateful for the level of engagement and the detail of the submissions received, it acknowledges that the number of responses was still relatively modest given the significance of the matter under consideration and the potential implications of the unification of the solicitor and barrister professions, not only for the professions themselves, but also for consumers of legal services and the wider context of the statutory objectives of the Authority under section 13(4) of the Act.
- 4.11 The Authority is mindful of the fact that certain categories of stakeholders, whose experiences of accessing legal services under existing professional structures would be relevant and useful, did not make written submissions to this consultation either at all, or in sufficient numbers.
- 4.12 In particular, the views of respondents with sector-specific expertise who have no direct professional interest in the question at hand may have offered a more diverse range of insights for the Authority to consider. Regardless of whether or not such respondents hold a view on the binary question under consideration, their experiences of the current system and any potential consequences of unification would have been of benefit to the Authority.
- 4.13 Categories of additional relevant stakeholders include, but are not limited to, the following:
- Consumer representative bodies and competition authorities;
 - Individual academics and educational institutes including providers of legal education;
 - Individual businesses and national and regional representative bodies;
 - Industry representatives including from the insurance and mediation sectors;
 - Public sector bodies including government departments and agencies which are among the largest consumers of legal services in the State;
 - Solicitors' firms of various sizes, geographical location and specialisations;
 - Non-governmental organisations including trade unions and charities providing legal advice and using the services of barristers and solicitors;
 - Individual members of the judiciary;
 - Individual legal practitioners including sole practitioners, those working for firms and those working in-house;
 - Law students and trainee solicitors and barristers.

Summary of Responses to the Unification Question

- 4.14 In providing their views on the question of unification of the solicitors' profession and the barristers' profession in the State, respondents offered useful insights into the structure and operation of the split legal profession in Ireland. Many also helpfully addressed the issues that the Authority is required to have regard to under section 34(4)(i) of the Act in considering this question. These are: the public interest; the need for competition in the provision of legal services in the State; the proper administration of justice; the interests of consumers of legal services, including access by such consumers to experienced legal

practitioners; and any other matters that the Authority considers appropriate or necessary.

- 4.15 The submissions from the Association of Judges in Ireland, the Bar of Ireland and the King's Inns expressed the strongest reservations about the implications of unification. The submission from the Law Society collated the possible advantages of fusing the profession and considered the arguments against fusion, concluding that it would not recommend compulsory fusion of the profession. The Dublin Solicitors' Bar Association also considered points in favour of and against a merger, concluding that it cannot recommend a merger of the professions at this time. Those respondents who did not express a direct view on the unification question nevertheless provided a range of relevant insights.
- 4.16 On the binary question under section 34(4)(i) of the Act, on whether the solicitors' profession and barristers' profession in the State should be unified, the overall position of respondents is as follows:
- Of the ten organisations which made written submissions, a total of five expressly stated that they were not in favour of the unification of the professions of solicitor and barrister. These were the Association of Judges in Ireland, the Bar of Ireland, the Dublin Solicitors' Bar Association, the King's Inns and the Law Society. The other five organisations did not express a direct view on the binary question, although the Law Department of Dublin City Council in its submission strongly cautioned as to the negative impacts of unification on both its work and the wider administration of justice.
 - Of the nine individuals who made written submissions to the consultation, seven expressly stated their opposition to unification of the two branches of the legal profession. Of the other two individuals, one expressly supported unification while the other advocated instead for an appropriate direct public access model for barristers as a viable alternative to unification.
- 4.17 Table 3 sets out the views of respondents, where these were expressly stated, on the binary question that the Authority is required to address under section 34(4)(i) of the Act. This is followed by a brief introduction to all respondents and a summary of the rationale offered by each for their overall position on the binary question, where such a view was expressed. Further detail on the substantive issues raised by respondents then follows.

Note on submissions' focus on independent referral barristers

- 4.18 The written submissions received largely focus on the structure of the profession in terms of the legal services provided by solicitors working both in private firms and in-house, and private practice barristers working at the independent referral bar. This covers the work of the vast majority of solicitors and barristers practising in the State.¹³⁰ For the purposes of this consultation, it is the work private practice barristers that would likely be most affected by unification of the two branches of the profession, and the submissions received reflect this. The Authority of course recognises that there are many practising barristers who

¹³⁰ Approximately one in five solicitors work in-house in business or the public sector, providing legal services to their employers only. Approximately four in five practising barristers work at the independent referral Bar. Source: LSRA (April 2020) Pathways to the Professions

provide legal services outside of this context, and in particular those working in-house with businesses and public bodies.

Table 3: Respondents' Position on Unification Question

Should the solicitors' profession and the barristers' profession in the State be unified?			
Organisations		Individuals	
Association of Chartered Certified Accountants	No view expressly stated	William Aylmer solicitor and Notary	No
Association of Judges in Ireland	No	James Dennison solicitor	No
Bar of Ireland	No	Mark Elliot trainee solicitor	No
Dublin City Council Law Department	No view expressly stated	Andrew McKeown BL	No
DCU School of Law and Government	No view expressly stated	Danny Morrissey solicitor	No
Dublin Solicitors' Bar Association	No	Liam Nolan BL	No
Department of Education and Skills	No view expressly stated	Hazel Ann Smyth BL	Yes
Enterprise Ireland	No view expressly stated	Norman Spicer solicitor	Yes
King's Inns	No	Kieron Wood BL	No
Law Society	No		

Rationale of Professional Bodies and Organisations on Unification Question

The Association of Chartered Certified Accountants (ACCA)

- 4.19 **The ACCA** is the global body for professional accountants. While not expressing a view on the question of unification, the ACCA said that if the key objective of a merger of the professions is to increase access to high quality legal services, then simply focusing on cost of access will not fully achieve this objective. To be successful, any proposed merger of the professions would need to focus equally on transparent regulation and assurance over the quality of the services delivered, and not just on the cost of provision.

The Association of Judges in Ireland (AJI)

- 4.20 **The AJI** is a representative body which represents the interests of its members, although it does not represent the judiciary as such. Its submission stated that: *"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."* The AJI added that it *"believes that the present system has served the judiciary well. Judges enjoy a high level of trust among the public. Specialist advocates have contributed to the maintenance of this trust and have facilitated the proper administration of justice."* It submitted that *"the LSRA should recommend the maintenance of the existing system and should not propose the unification of the professions of barrister and solicitor."*

The Bar of Ireland¹³¹

- 4.21 **The Bar of Ireland** is the representative body for barristers who are members of the Law Library in Ireland. It said the unification of the profession is unnecessary for the achievement of any of the objectives set out in the Act, or for any other reason. It stated that: *“A policy decision to enforce a unification of the legal profession, would likely cause the eradication of an independent referral bar, and give rise to serious consequences both economically and in terms of access to justice.”* **The Bar of Ireland** submitted that the continued existence of the independent referral bar safeguards the public interest in the provision of legal services and access to specialist legal practitioners, including that of all persons who wish to access justice, and best serves the vital interest of the proper administration of justice. The existence of an independent referral bar has been a positive influence on the development of the law, including the protection of individual rights for the citizens of the State, and it is well-placed to continue to deliver specialist advocacy legal services to all those who require them in the State.

Dublin City Council (DCC) Law Department

- 4.22 **DCC Law Department** is the largest local authority legal office in the country. It provides legal advice and services to the Chief Executive and all Council departments. It stated that the unification of the solicitors' profession and barristers' profession may have a profound effect on the public at large, consumers, the administration of justice and legal practitioners themselves. Such a change may result in a distortion of the legal services market with the most specialist of legal experts being siloed in large resource rich firms who serve only high net worth individuals. At its most benign, it may simply lead to a change in the titles of solicitors and barristers with little else changing and the legal practitioners reverting to the roles which have served the public well since the foundation of the State.

Dublin City University (DCU) School of Law

- 4.23 **(DCU) School of Law** identified opportunities and challenges that might arise from unification of both branches of the professions. Notwithstanding the potential opportunities, the law school acknowledged the merits of maintaining the status quo, which for the most part, operates effectively. As educators of future solicitors and barristers, the school said it did not envisage that there would be any substantive change to the content or delivery of core law modules arising from any unification of the professions.

The Dublin Solicitors' Bar Association (DSBA)

- 4.24 **The DSBA** is an independent association of solicitors which operates as both a representative and educational body. It does not hold any regulatory functions. The DSBA's submission considered points in favour of and against a merger of the profession. It submitted that given the numbers involved and the practicalities about holding clients' money, it appears that the result of a merger between the professions would be for all to become solicitors. The DSBA concluded that: *“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.”*

¹³¹ The Bar of Ireland's submission was made by its governing General Council

The Department of Education and Skills

- 4.25 **The Department of Education and Skills** did not express a view on the question of unification. Its submission drew the Authority's attention to Directive 2018/958/EU on a proportionality test before adoption of new regulation of professions. The Proportionality Directive obliges Member States/Competent Authorities to carry out a proportionality assessment before introducing new or revising existing national legislative, regulatory or administrative provisions affecting access to or exercise of a regulated profession.¹³² The Department said the aim of the Directive is to establish a transparent and predictable framework for Member States to assess proportionality before adopting new regulation.

Enterprise Ireland

- 4.26 **Enterprise Ireland** is a government organisation responsible for the development and growth of Irish enterprises in world markets. It said it does not have a strong view on the potential unification of the solicitors' and barristers' professions, which could present both benefits and risks. Its principle concern is that quality legal advice be available to its client companies regardless of their size or location.

The Law Society of Ireland

- 4.27 **The Law Society** is the educational, representative and co-regulatory body of the solicitors' profession in Ireland. Its submission considered the structure of the legal profession in a range of jurisdictions and also collated the possible advantages of fusing the profession in Ireland and considered the arguments against fusion. It stated that: *"While the Society would recommend that both branches of the profession should be treated equally and be subject to the same professional standards where applicable, the Society would not recommend compulsory fusion of the profession because the current model offers clients (and solicitors) greater choice and flexibility and proposed changes are unlikely to achieve significant cost savings or other tangible public benefit."*

The King's Inns

- 4.28 **The King's Inns** school of law is the sole provider of the Barrister-at-Law degree course in Ireland. It submitted 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 [LSRA's] statutory imperatives."* **The King's Inns** also submitted that "the continued separation of the professions is in keeping with the regulatory objectives and professional principles" as set out in the Legal Services Regulation Act 2015.

Rationale of Individual Barristers and Solicitors on Unification Question

- 4.29 **Mr William Aylmer**, a practising solicitor and Notary Public, said the current tri-profession system of notary, barrister and solicitor works well and that the legal services market in Ireland is too small to justify a unified profession of solicitors and barristers. A unified profession would be a retrograde step in terms of making legal services equally available and

¹³² Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions. According to the Department, the directive was due to be transposed into Irish law by 30 July 2020. This was delayed due to the Covid-19 pandemic

accessible to all.

- 4.30 **Mr James Dennison**, a practising solicitor, said he believed unification of the solicitors' profession and the barristers' profession would lead to a reduction in the quality of service available to citizens. Many solicitors act in a role similar to that of a general medical practitioner, choosing barristers who specialise in certain areas and referring clients to relevant specialists. If both professions are unified, the citizens will lose out on this facility.
- 4.31 **Mr Mark Elliott** said that as a trainee solicitor, the rapid changes in legal education and the regulation of the legal profession are unsettling. The enormous investment of time and money to train seems as though it is leading to a watered down professional career. He was of the opinion that legal advisors need to become more highly specialised, and that a move to unification would seem to go against the grain.
- 4.32 **Mr Andrew McKeown BL**, a practising barrister, submitted that the interests of justice are better served by the unfused professions of barrister and solicitor. The law is better practised and justice better administered in the existing divided system.
- 4.33 **Mr Danny Morrissey**, a practising solicitor, said he was against any unification of both professions, which he compared to entering uncharted waters that would result in many difficulties and would be a waste of taxpayers' money. Mr Morrissey asserted that the existing system has stood the test of time. If there are concerns in relation to any issues with the current system, then problems and inefficiencies should be identified and addressed.
- 4.34 **Mr Liam Nolan BL**, a practising barrister, submitted that no measurable benefit accrues to either profession or to the general public on foot of unification of the two professions under any European or North American combined or united profession of "lawyer". Mr Nolan further submitted that unification of the profession will not satisfy the objectives set out in section 34(4)(c)(i) I-V of the Act which the authority must have regard to in forming recommendations on the issue. Mr Nolan proposed instead expanded direct public access to barristers in all matters as a valid and viable alternative to unification. This model, he submitted, was not intended to create a new category of lawyer, an alternative version of a solicitor, or threaten the concept of an independent referral bar. It would rather remove the existing barriers to competition in the provision of legal services and obstacles to access to legal services for members of the public posed by the Bar of Ireland's direct access rules for barristers.
- 4.35 Mr Nolan submitted that the: *"Introduction of an appropriate Direct Public Access Model will lead to a competitive, cost-efficient and much-needed legal environment and framework, which will benefit the consumer of legal services and contribute to the better administration of justice."*¹³³ The model he suggested would not create a new category or lawyer or alternative vision of a solicitor, and would not impinge on solicitors' conveyancing activities or the holding of client moneys.
- 4.36 **Mr Norman Spicer**, a practising litigation solicitor who previously worked as a litigation attorney at the New York State Bar, said he strongly believed the professions should be

¹³³ Mr Nolan's submission references his previous detailed submission to the LSRA's statutory review of the Act under Part 6, available [here](#)

merged, with benefits to the public and in terms of a more diverse, modern, transparent, cost-effective and dynamic legal system. Drawing on his US experience, Mr Spicer proposed that in a united profession of 'attorneys' those with a Barrister-at-Law degree should be given a specialist designation such as 'specialist in litigation'.

4.37 **Ms Hazel Smyth BL**, a qualified barrister working as a company lawyer said it was her strongly held view that the profession of solicitor and barrister should be unified. This would be better for the legal profession, for clients/the general public and for Ireland.

4.38 **Mr Kieron Wood BL** said in a brief submission that merger of the legal professions has not worked where it has been tried.

Summary of Responses Under Issues for Authority's Consideration

4.39 The debate around a unified legal profession, both in Ireland and elsewhere, traditionally revolves around a number of key concepts and issues, all of which are comprehensively reflected in the submissions to the Authority's consultation.

4.40 For the purposes of this report to the Minister, section 34(4)(c)(i) of the Act requires that it contains recommendations as to whether the solicitors' profession and the barristers' profession in the State should be unified having regard to the following matters: the public interest; the need for competition in the provision of legal services in the State; the proper administration of justice; the interest of consumers of legal services including access by such consumers to experienced legal practitioners, and any other matters that the Authority considers appropriate or necessary.

4.41 This section accordingly provides a summary of respondents' submissions under the following five headings:

1. The Public Interest
2. Competition in the Provision of Legal Services
3. The Proper Administration of Justice
4. The Interests of Consumers including Access to Experienced Legal Practitioners
5. Other Issues or Matters

4.42 As is to be expected, there is considerable cross-cutting and overlap in terms of the issues under the five headings. For example, consideration of issues related to the public interest may touch on issues of access to justice, and both are also intimately connected to the proper and efficient administration of justice.

1. The Public Interest

4.43 The impact of a split legal profession on the public interest covers several areas, including society's needs for quality affordable and efficient legal services and the importance of an independent, ethical, and diverse the legal profession in providing these. Many of those respondents who are not in favour of a fused profession maintain that the current split structure is both cost-effective and efficient and/or that unification is unlikely to achieve

significant cost savings for consumers.

- 4.44 On the other hand, those in favour of fusion, as well as some of those who expressed no view on the binary question of unification, cited potential efficiency gains in a scenario where all clients were able to obtain the entirety of their legal services from one firm, as well as the reduced costs that would likely ensue from not having to pay two separate sets of fees for solicitors and barristers, including separate instruction costs.

1.1 Views on Current Model and Efficiencies

- 4.45 From a public interest perspective, a key impetus for increased efficiencies in the delivery of legal services must be to reduce costs and improve access to justice. A number of respondents, including the professional bodies for barristers and solicitors, pointed to efficiencies intrinsic in what some termed the “division of labour” between solicitors and barristers.
- 4.46 **The Bar of Ireland** stated that society benefits from an independent referral bar, the continued existence of which safeguards the public interest in the provision of legal services. It submitted that: *“The independent referral bar is a resource and a pool of expertise to which all members of society have access and ensures a division of labour between barristers and solicitors. In that division of labour, the barrister and the instructing solicitor undertake distinct but complementary roles.”* **The Bar of Ireland** stated that in properly conducted litigation the work done by the solicitors will not be repeated by the barristers and vice versa. The costs thus remain the same, but consumers enjoy the advantage of receiving specialist legal services.
- 4.47 **Dublin City Council Law Department** said it was not apparent how the unification of the professions would be in the public or consumers interest. If fusion occurred, it said it would restrict access by the public at large to specialist advice provided by counsel through their solicitor, with the risk that *“specialist knowledge and expertise would be harvested by only the wealthiest individuals”*.
- 4.48 **The Dublin Solicitors' Bar Association (DSBA)** stated that while 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 rather than a duplication of effort, with solicitors adding to work flow at key junctures which create efficiencies. According to the DSBA, the *“grafting on of a self-employed professional to a case can be a low-cost way of importing expert knowledge, skills and added value for the clients.”*
- 4.49 **The DSBA** pointed to the fact that since at least the turn of the century, legislation and the operation of the courts have become more complex. For example, in 2001 the Circuit Court Rules ran to 211 pages, but are now more than 2,000 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 while the solicitor is freed up to focus on preparing, running and managing the case, keeping the client informed, organising witnesses, and settling accounts at the conclusion of a case.

- 4.50 **The DSBA** also advanced a practical argument in relation to the structure of the courts, the method of listing cases and the low number of judges in Ireland per inhabitant. Many cases are listed for the same day with the result that all litigants, their witnesses and their lawyers must wait for their case to be called on. Under the current bifurcated system, a barrister, as a self-employed court based professional, can keep tabs on the movement of the list and be available to deal with a case quickly and more easily than an office based 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.
- 4.51 **The King's Inns submitted** that 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. It said: *"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, and alongside a barrister's overriding duty to the court, plays a crucial role in the administration of justice."*
- 4.52 **The King's Inns** also stressed the cost efficiencies that flow from the fact that barristers' specialist and expert advisory services can be retained on an *ad hoc* basis without the need for a solicitor's firm to permanently retain experts and advocates across an increasing range of specialist practice areas. This *ad hoc* feature was one of the two most significant implications of the current consultation (the other being the access to specialist and expert advisory and advocacy services for all consumers).
- 4.53 **Mr Andrew McKeown BL** submitted that *"an analysis of international common law costs indicates that the suggestion that the unfused system produces a duplication of work, and therefore an increase in legal fees, is incorrect."* He highlighted a 2013 report by the US Chamber Institute for Legal Reform on International Comparisons of Litigation Costs. Mr McKeown said it found that the common law jurisdictions of the United States of America and Canada, where the legal profession is fused, had higher liability costs as a percentage of GDP than Ireland or the UK, where there is an unfused system.
- 4.54 Not all respondents saw cost efficiencies in the current bifurcated model. The most frequently referenced point was that consumers were "paying twice" for solicitors and barristers. **DCU School of Law and Government** stated that the current model in which clients must first consult a solicitor before a solicitor then instructs a barrister *"is arguably inordinately costly for many and creates barriers in accessing legal services."*
- 4.55 **Liam Nolan BL** said barristers are currently "severely constrained" by the Bar of Ireland's professional Code of Conduct. Under this code (as underpinned by numerous provisions of the Act) barristers may not take instructions directly from any member of the public. Currently, he submitted, barristers may not, except in certain limited circumstances and including non-contentious matters, deal directly with any member of the public qua clients, and must in contentious matters ensure that a solicitor is retained in order for the barrister to continue to advise and to provide other professional services as a barrister. Mr Nolan

asserted that: *“this constitutes a significant barrier to competition in the provision of legal services and constitutes an obstacle to access to legal services for members of the public.”*

- 4.56 **Hazel Smyth BL** said there is no reason why opinions sought from senior counsel could not be sought from well-seasoned solicitor partners in law firms. Drawing on her experience as an in-house barrister, Ms Smyth said the nature of the work that in-house solicitors and barristers do is the same on a day to day basis.

1.2 Views on Impact of Unification on Current Model and Efficiencies

- 4.57 **Dublin City Council Law Department** said the notion that fusion shall reduce costs is one that assumes a duplication of work between counsel and solicitor, which is not its experience. It predicted that were the professions to be fused, the costs which former barristers would have to bear would undoubtedly increase. **The Law Department** said the complex clerical work currently carried out by a solicitor in a situation where counsel are instructed would not simply disappear as a result of the fusion of the professions. Such tasks would remain a necessity and therefore the cost of same would remain. This work could not easily or adequately be carried out by most practitioners solely and any attempt to do so may merely result in the degradation of the quality of service offered to the public.
- 4.58 **The Dublin Solicitors' Bar Association (DSBA)** submitted that there is no reason that the benefits and efficiencies associated with the current division of labour could not continue to exist post-unification. In other jurisdictions, it is possible for a solicitor to develop expertise in a particular area of law and to offer a full service to clients without requiring the input of a barrister. However, **the DSBA** cautioned that while such a business model may work in city with a large population, the Irish legal market is small and solicitors' overheads are large. Outside of the centre of Dublin, it said it would be difficult to envisage such a solicitor-specialism working economically. For a barrister who is a member of the Law Library where overheads are more modest, a specialism of this nature is a working economic model.
- 4.59 **William Aylmer**, a solicitor and Notary Public, said there are very few firms in Ireland whose litigation practices are large enough to justify full time expert advocates.

1.3 Views on Access to Justice

- 4.60 Several respondents asserted that by its nature the independent referral bar operates to ensure that access to justice is not restricted to clients who can afford to engage barristers on a full service basis.
- 4.61 **The Bar of Ireland** said many barristers regularly accept instructions on a “no win no fee” basis and this in effect operates as a free legal aid system. **The Dublin Solicitors' Bar Association** said many cases for poor or indigent clients are taken on a contingency basis, meaning that the legal professional is only paid if the client wins the case and recovers costs.
- 4.62 **The King's Inns** said the “cab rank” rule, which thrives within the bar, prevents the monopolisation of the services of leading advocates by major consumers of legal services including banks, the State and insurers. *“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,” it said.

- 4.63 **Andrew McKeown BL** submitted that the cab rank rule has been characterised as being part of the “ideology of service” which obliges lawyers “to serve society by providing, maintaining and sustaining justice. It confers upon the professional obligations of upholding legal order and facilitating access to legal processes and institutions within a conception of responsibility to others.” The rule applies to barristers in independent practice at the Bar of Ireland, while those in fused systems, such as counsel in US law firms, only accept those briefs in which their firm accepts instructions.

1.4 Views on Impact of Unification on Access to Justice

- 4.64 **The Bar of Ireland** said in the event of unification, and with barristers in direct competition with solicitors and exposed to increased administration and regulation costs, they will be more likely to agree to work and only accept instructions in cases where fee recovery can be guaranteed. This means they will be less likely to accept instructions on a “no win no fee” basis and will be less likely to operate a cab rank rule model of practice. “In essence, the Council believes that the unification of the profession would lead to the commercialisation of the specialist legal services provided by barristers and that this will have the outcome of restricting access to specialist advocacy and advisory services to those who can afford to engage barristers on a full service basis,” the Bar of Ireland stated.
- 4.65 **The Dublin Solicitors’ Bar Association** said access would be narrowed because a merged legal profession would inevitably morph into the architecture of a solicitors’ firm, rather than the Law Library. That means the commercial reality of barristers joining top solicitors’ firms with more profitable and dependable work. “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,” it stated.

1.5 Views on Costs of Legal Training for Barristers and Diversity at the Bar

- 4.66 The high costs for barristers of their professional training and unpaid Law Library apprenticeships was raised by some respondents as a factor that prohibits students from modest or disadvantaged backgrounds from working as independent advocates, thereby reducing diversity at the Bar which is desirable from a public interest perspective.
- 4.67 **The Association of Chartered Certified Accountants (ACCA)** noted that an occasional feature of both the legal and the accountancy professions is unpaid internships. The ACCA said it “believes that unpaid internships or similar arrangements are a barrier to social mobility and should be strongly discouraged in our professions and in the economy as a whole. Any proposal to merge the two professions should include a requirement to pay at least the minimum wage and any direct costs of training for people undergoing ‘devilling’ or whatever replaces this training regime in any new unified profession.”
- 4.68 **DCU School of Law and Government** said it was its experience that many students who would otherwise wish to practise at the Bar find the high barriers to entry and the ongoing costs for the first number of years prohibitive, and that this reinforces existing social inequalities. It pointed out that DCU has a higher average proportion of law students from

disadvantaged socio-economic backgrounds.¹³⁴ It submitted that allowing for merged practices where students could specialise as litigators would have tangible benefit for students who wish to practise before the Superior Courts but who are prohibited by their economic situation under current arrangements.

- 4.69 **Hazel Smyth BL** said the existing unpaid 'devilling' apprenticeship requirement of the barrister profession (that can last from between one to two years) is prohibitive for many people who are not in a position to work without payment for this length of time. Ms Smyth noted from her own time studying at the King's Inns that: *"This led to exceptional barristers with top grades declining to pursue work as a barrister-at-law; not because they didn't want to work as barristers, but because they couldn't afford to work for no payment."*
- 4.70 **Ms Smyth** asserted that this has and will continue to lead to a decline in the quality (and quantity) of those who decide to pursue careers as barristers. *"The unification of the solicitor and barrister professions would allow (i) solicitors who happen to be talented orators to practise within the courts, on a needs-be basis and (ii) barristers to act as 'litigation solicitors', where they can be guaranteed payment for their work and continue to develop their advocacy skills."*
- 4.71 On a related point, **Mr Andrew McKeown BL** pointed out that the nature of solicitors' work means that they cannot usually undertake any supplementary work. Barristers on the other hand regularly work as lecturers, legal editors, journalists, etc. If the professions were fused, Mr McKeown submitted that it would irrevocably change the working conditions of all lawyers and have a knock-on effect on all of the other realms where young barristers work. *"Unification would have a profound effect on the members of the bar, who would face huge costs and change in working conditions in transforming into a new, unprecedented and unsought role,"* he said.

2. Competition in the Provision of Legal Services

2.1 Views on Competition in the Current Model

- 4.72 **The Bar of Ireland** said there are currently approximately 2,200 independent referral sole-trader barristers competing directly with each other for a limited pool of work, and this acts to drive costs downwards. The Bar of Ireland said it believes that the independent referral bar *"assists rather than detracts from competition in the delivery of legal services by providing advice and advocacy services when required to the solicitor profession."*
- 4.73 Further, **the Bar of Ireland** stated that there is *"no indication that the restrictions, which mean that barristers cannot provide certain legal services, have any material anti-competitive or otherwise detrimental effect on the market for legal services."* **The Bar of Ireland** also pointed out that barristers do not currently compete with solicitors directly as they do not operate a model of full service legal practice, due to restrictions on holding

¹³⁴ The School cited costs of approx. €12,900 p/a for the King's Inns BL degree, in addition to ancillary costs. Barrister pupillages are for the most part unpaid and instead rely on self-funding and benefits in kind. It said that typically a pupil is also required to pay some €3,600 in their first year for liability insurance and access to the Law Library, and related costs. *"This sum increases year-on-year for the first seven years of practice and for most students of modest means is unaffordable, therefore creating barriers to entry."*

clients moneys and direct access. Instead, barristers provide *“a varied but ultimately limited range of specialist services, and services which are generally not provided by solicitors.”*

- 4.74 **Dublin City Council (DCC) Law Department** submitted that competition would be adversely affected by fusion. It said the current referral system allows any person to seek, through one of the over 12,000 solicitors throughout the country, the services of one of approximately 2,000 barristers with varying specialisms. The referral system means relatively small overheads for sole practitioner barristers, which in turn lends itself to the cab rank rule and indeed permits counsel to take on cases on a “no foal no fee” basis thereby assuring access to the courts regardless of a client’s means.
- 4.75 Were the professions to be fused, **DCC Law Department** said the costs to be borne by former barristers would undoubtedly increase and this would damage competition in two ways. Firstly, a decreasing number of practitioners would be open to acting on a no foal no fee basis due to financial pressures. Secondly, in light of such financial pressures, practitioners, particularly those of a particular niche specialism, would likely be attracted to larger firms with high net worth clients, placing their services outside the grasp of all but the wealthiest of individuals.
- 4.76 **DCC Law Department** concluded that: *“The access the general public would have through the extensive countrywide solicitors’ network to the knowledge and expertise of the current bar would be damaged and it is submitted not be conducive to the competition a low overhead referral bar offers.”*
- 4.77 **DCU School of Law and Government** on the other hand said there would be real efficiency gains if clients could obtain the entirety of their legal advice from a single firm. *“The current model arguably artificially partitions the market for legal services and is ultimately undesirable from a competition perspective,”* it said.
- 4.78 **Enterprise Ireland** said that from its perspective the availability of specialist legal expertise when needed by Irish companies of all sizes in all parts of the country is important. In this regard, small solicitors’ practices currently rely on counsels’ opinions to supplement their knowledge of areas of the law. This might particularly be the case in complex areas of commercial law. *“Were a unification of the professions to result in reduced availability of such expertise to small firms, such a development could have an adverse impact on small and medium sized enterprises,”* it added.
- 4.79 **The King’s Inns** said that if the professions were unified, it is likely that the leading barristers would be recruited by the largest firms of solicitors, predominantly Dublin based. The result would be that the services of these (former) barristers would be exclusively available to the clients of those firms and no longer available to smaller firms.
- 4.80 **The King’s Inns** submitted that: *“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.”

2.2 Views on Transferring Within the Profession

- 4.81 Several respondents drew attention to the degree of ease with which solicitors and barristers can transfer between the two branches as an important consideration for the current consultation, as it makes formal unification less significant than it might otherwise be if there was no such facility. In this context, respondents also highlighted that fact that, since 1971, solicitors have had rights of audience before all courts.
- 4.82 **The Bar of Ireland** said existing transfer arrangements are well established and do not appear to present any obstacles to either profession. **The Dublin Solicitors' Bar Association** said the barrier for legal practitioners to transfer from one profession to another is low, meaning that practitioners have a choice of business model. **Dublin City Council Law Department** said there is “great ease” for transfers between the professions after a rudimentary application to the relevant body.
- 4.83 **The King's Inns** stated that: *“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.”*
- 4.84 For other respondents, the transfer facility and the existing rights of audience for solicitors represented a factor in favour of formal unification on the basis that the professions can effectively do each other's work through these mechanisms already. In-house barrister **Hazel Smyth BL** cited both of these factors, in addition to elements of cross over in the day to day work of solicitors and barristers, in support of her view that the professions should be unified, and the training processes merged.
- 4.85 **Ms Smyth** pointed out that, for example, Irish barristers are often asked to provide guidance on matters not covered in great detail within the barrister-at-law course, such as wills and probate. Many Irish barristers soon discover that they would prefer not to act as advocates within the courts and many are choosing to work as in-house legal counsels. The skills learnt from the barrister-at-law course and many of those taught through the [solicitors'] PPC1 and PPC11 courses would be equally helpful for those choosing to work as in-house legal counsel.
- 4.86 **The Law Society** highlighted the fact that it has previously expressed concern over any possible legislative move to create a fused legal profession in Ireland, such as the proposal from the Competition Authority in its Preliminary Report *Study of Competition in Legal Services* in February 2005 to remove the restriction on holding dual titles, so that legal professionals could qualify as a “barrister and solicitor”.¹³⁵
- 4.87 **The Law Society** pointed out that it had publicly responded to the Competition Authority's Preliminary Report by way of a submission in July 2005. According to the Society, its submission *“emphasised that, from the point of view of the solicitors' profession, there is little or no distinction between what a solicitor and a barrister can do. Therefore, in reality, either the retention of dual titles leading to a de facto fusion of the profession, or an*

¹³⁵ Competition Authority (2005)

otherwise explicit move to unify the legal profession would have minimal impact upon the actual professional capabilities of a solicitor and the solicitors' profession. The Society noted the desirability of easier transfer between the two branches of the legal profession as an alternative to this proposal of the Competition Authority."

- 4.88 **The Law Society** also said that it had reiterated its views in its recent submission to the Legal Services Regulatory Authority on barrister issues, *"acknowledging that both barristers and solicitors have many similarities in their respective professions but advising that if fusion was brought in by the back door, it would lead to a duplication of regulatory function with knock on costs for consumers."*
- 4.89 **The Law Society** pointed out that the "basic statutory requirements" for transferring from being a barrister to a solicitor are set out in section 51 of the Solicitors (Amendment) Act 1994. It said that approximately seven years ago it had "simplified" both the application process and its transfer course requirements for barristers wishing to transfer to the solicitors' rolls. "Before 2008 the transfer process was more complicated and drawn out," it added.
- 4.90 **The Law Society** said that in 2007 it agreed on a reciprocal course model with the Bar Council, with the rationale of the transfer courses being to cover areas of education unique to the branch of the profession the transferee is moving to. It added: *"The numbers transferring between the two professions before the current system came into operation were very small as the process involved a great deal of time and the sitting of an unknown number of examinations. Thus, the Society has taken action in respect of facilitating "easier transfer between the two branches of the profession"."* (For details on transfer numbers see Part 3 of this report.)

2.3 Views on Costs Transparency Rules

- 4.91 Several respondents referenced the legal costs transparency rules introduced in section 150 of the Legal Services Regulation Act 2015, which commenced in October 2019. They submitted that the provisions, by requiring barristers and solicitors to provide clients with upfront, timely and detailed information about legal costs, would address some of the criticisms of the lack of transparency in the current regime, particularly in relation to barristers' costs.
- 4.92 **The ACCA** cautioned that information on cost may be considered important in driving competition, but it is of negligible value without the corresponding information on the quality of the services being provided.
- 4.93 **The Bar of Ireland** submitted that: *"The barrister is obliged to provide an estimate of his or her professional fees, and this will allow the client to compare the prices and rates of other barristers. Clients and their solicitors are therefore encouraged to shop around to take full advantage of the manner in which all barristers compete with each other for work; this drives down prices and promotes competition amongst barristers who compete for a limited pool of work."*
- 4.94 **The Dublin Solicitors' Bar Association** said since the commencement of section 150 *"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.”

- 4.95 **Barrister Hazel Smyth BL** focused on the existing poor level of transparency in relation to the relationship between client and lawyer. She said the fact that clients have no choice over what barrister is engaged by a solicitor, the lack of communication between a client and a barrister and the lack of transparency over what the solicitor intends to pay, or the barrister intends to charge the solicitor, is and should be of great concern to all. Ms Smyth said clients deserve some decision-making ability in terms of who their advocate in the courts should be, and how much they are willing to pay them, and should be able to liaise with them.

2.4 Views on Organic Stratification of the Professions

- 4.96 Several respondents submitted that the legal profession in all countries naturally and organically organises itself into sub-categories of practitioners and that, in the event of fusion, an independent bar would likely emerge.
- 4.97 **The Bar of Ireland** said that regardless of how the profession has evolved and how it is organised, *“the legal profession itself organically stratifies into sub-categories of practitioners with distinct skills and practice areas, thereby rendering a theoretical unification of the professions as a meaningless exercise.”*
- 4.98 **Mr Andrew McKeown BL** submitted that the legal profession in all countries naturally and organically organises itself into positions of litigators and advocates, by whatever titles.
- 4.99 **Mr Norman Spicer**, a litigation solicitor with experience as a New York attorney, said merging the professions tomorrow will not see solicitors, rural or otherwise, decide they now want to appear in the High Court without counsel for a 2-week trial. *“Rather for such occasions, specialist trial lawyers will still be needed and utilised. It may have the effect that solicitors will do more of the appearances in court which would help with continuity and would probably cut down on fees certainly where routine motions etc are before the court. Similarly, barristers would now be able to step back to the office and engage with the public directly. Barristers could set up LLPs with solicitors and a more holistic system could be adopted,”* he added.

3. The Administration of Justice

3.1 Views on Barristers as Specialised Advocates

- 4.100 The importance of the specialist nature of the advocacy and advisory services provided by barristers was stressed in the submissions several respondents. These respondents highlighted the benefits of the availability of a large body of specialist advocates to each and every litigant in the State through the independent referral bar. The system ensures that the public, including in rural areas, have access through their solicitors to specialist advice provided by counsel.
- 4.101 The **Association of Judges in Ireland (AJI)** emphasised the vital role of specialised advocates for the proper functioning of the administration of justice in the context of Ireland's adversarial justice system. It stated that it is a hallmark of this system *“that courts are not*

endowed with investigative fact finding powers, nor is it their function independently to research the law separately from the parties.”

- 4.102 **The AJI** submitted that the quality of judicial decisions is dependent to a large extent on what is put before the court by the parties, both in relation to facts and law, with judge/s obliged to adjudicate on material put before them. It stated that: *“Without skilled advocates mindful of their duties to the court as well as the party they represent, the access of the court to the evidence and the law would be seriously undermined. This would inevitably impact on the ability of the court to render a just and correct decision. Seen in this light, the advocate system of administration of justice becomes readily apparent.”*
- 4.103 In addition, the **AJI** stated that having specialised advocates means that judges can hear and determine cases, even where they do not have specialist expertise in the area of law engaged by a dispute. This promotes efficiency, for example by avoiding the necessity to have highly specialised courts, which would introduce an undesirable lack of flexibility and additional expense.
- 4.104 **The Bar of Ireland** stated that for the most part barristers in Ireland have special expertise in either a general area such as civil or criminal litigation, or a specific area such as for example medical negligence law, planning law, consumer law etc. In complex cases, barristers are engaged to provide legal advice and opinion, prepare court documents or pleadings and, if the matter proceeds to trial, conduct the trial of a case before court. In addition, the **Bar of Ireland** said that independent barristers who are expert in a particular area contribute to *“a deeper understanding of fundamental legal principles such as, by way of example, in the area of constitutional law, which is not an area in which solicitors generally specialise.”*
- 4.105 **Dublin City Council Law Department** submitted that the fusion of the professions would, through its potential to distort rather than encourage access to the expertise, knowledge and experience of the body of barristers in this jurisdiction, not aid the proper administration of justice. It said that *“In order to provide legal services over a broad range of specialist areas the departments solicitors utilise their specialist knowledge supplemented with the specialist knowledge and expertise provided by a wide panel of barristers. Were the professions fused, this may have a profound effect on how the department does this and indeed its ability to do so.”*
- 4.106 **Enterprise Ireland** said the availability of specialist legal expertise when needed by Irish companies of all sizes in all parts of the country is important. Small solicitors' practices currently rely on counsels' opinions to supplement their knowledge of areas of the law, and this might particularly be the case in complex areas of commercial law.
- 4.107 **The King's Inns** stressed that in many key specialised areas of law (e.g. tax, planning, etc.) there may only be a handful of expert barristers. The negative impact on access to justice and competition would be immediately apparent upon unification of the professions were the small number of leading practitioners from certain specialist areas to enter partnerships or otherwise become unavailable to the wider market.
- 4.108 **Mr Andrew McKeown BL** said the public interest is best served by a system where specialised advocates carry out advocacy in the courts.

- 4.109 An alternative view was put forward by **Mr Norman Spicer**, an Irish-based litigation solicitor who has also practiced in New York as a litigation attorney. Mr Spicer highlighted the use in New York of lawyers known as 'Per Diem' (per appearance) attorneys, who had considerable experience in litigation and were effectively barristers. They did not work directly for any one office, but rather appeared in court on motions/trials/conferences for different firms. In addition, in law firms themselves, not every lawyer went to court daily or regularly, while those who did court work adopted the informal title of 'trial lawyer' and were trained in advocacy skills by the firms. Mr Spicer said the professions should be merged with anyone who has a barrister-at-law degree given exclusive right to use a designation such as 'specialist in litigation'.

3.2 Views on Independence of Barristers

- 4.110 For common law practitioners, the term independence used in relation to private practising barristers includes both independence from third parties (so that practitioners can be devoted to client interests) and independence from clients (so that practitioners can observe wider duties, for example to the administration of justice).
- 4.111 **The Association of Judges in Ireland (AJI)** in its submission set out the independence of barristers in the following terms: They 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 own no duties to partners in a firm or employers; they earn no salary; they do not have the conflicts of interest arising, for example, from obligations a law firm may have towards existing clients. The **AJI** submitted that "*All of this means they bring an independent and objective approach to a case.*" It said these characteristics were well described in a recent High Court judgment in the context of the benefits that a member of the independent referral bar bring to a case, as compared with a lay litigant. (See below for further details of this judgment)
- 4.112 From the point of view of a judge hearing a case, the **AJI** said this independence and objectivity is vital. Because the system is adversarial, judges are hugely dependent upon the advocates to open the law fully to them. Barristers have an obligation to open law to the court both for and against the proposition being argued, and are obliged not to mislead the court. Because barristers generally appear daily before the courts and are known to judges, they are usually acutely aware of their obligations, which form part of their training and code of conduct. Equally, their robust independence assists them in discharging those duties.
- 4.113 **The Bar of Ireland** said solicitors, clients and the courts rely on barristers to be able to offer an entirely independent and objective point of view and that the importance of this function cannot be overlooked. Barristers currently practice in an environment in which the exercise of independence before the court is not only facilitated but required. The Bar's Council said it also believes that access to independent legal advice acts as a guarantee that a client can be confident that his or her legal advisors are providing legal assistance without fear of interference or sanction.
- 4.114 **The King's Inns** said the 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. 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.

- 4.115 **The Law Society** said it that it has *“consistently highlighted that, as there is no difference between what a solicitor and barrister can do, the real crux of the fusion issue in fact lies with the importance of “the independent existence of a referral Bar”.*¹³⁶ **The Law Society** further stated that it *“believes the maintenance of an independent referral bar is a cornerstone of common law systems.”*
- 4.116 **Andrew McKeown BL** also stressed the important role of the independent advocate in the administration of justice. Both **Mr McKeown** and the **AJI** referenced a recent High Court judgment by Ms Justice Mary Rose Gearty who summarised the characteristics of the independent referral barrister in the context of the benefits that such a practitioner brings to a case as compared with a lay litigant.
- 4.117 The judgment stated that: *“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 clients 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.”*¹³⁷

3.3 Views on Impact of Unification on Independence

- 4.118 **The Association of Judges in Ireland (AJI)** submitted that unification *“is likely to alter the independent role of the barrister, with potential adverse implications for the administration of justice.”* The AJI was of the view that *“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.”*
- 4.119 **The Bar of Ireland** submitted that *“a policy decision to enforce a unification of the legal profession would likely cause the eradication of an independent referral bar, and give rise to serious consequences both economically and in terms of access to justice.”*
- 4.120 **The King’s Inns** stated that 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 the valuable function of the independent barrister to clients, solicitors and the administration of justice.

¹³⁶ The Law Society referenced its submission to the Competition Authority Response of the Law Society of Ireland to the Preliminary Report of the Competition Authority Study of Competition in Legal Services of 24th February 2005, July 2005, at para 6.4.

¹³⁷ Fogarty v The Governor of Portlaoise Prison [2020] IEHC 154

4. Interests of Consumers

4.1 Views on Low-Overhead Barrister Model Impact on Costs

4.121 The benefits of the relatively low-overhead model of practice by self-employed barristers in terms of costs for consumers of legal services and competition among barristers were highlighted by some respondents.

4.122 **The Bar of Ireland** said the model translates to:

- A self-employed barrister with lower overheads can offer services on a flexible basis and at a lower cost than a solicitor in a full service practice, to the benefit of clients/consumers.
- For solicitors, the fact that Law Library barristers have much lower overheads than solicitors makes it economical to obtain specialist legal advice for clients.
- The State, as a large consumer of legal services, has the benefit of the full range of expertise available without the attendant costs of training, employment, continuing professional development, office services and pensions.
- Greater competition between barristers acts to drive costs downwards.
- With a lower costs model of practice comes a greater willingness by barristers to adhere to the 'cab rank' rule, which ensures access to expert legal expertise for a greater number of clients.
- A lower costs base also leads to a greater willingness on the part of barristers to accept instructions on a 'no win no fee' basis.

4.123 **The King's Inns** said 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. It said: *"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."*

4.2 Views on Impact of Unification on Low-Overheads, Costs and Competition

4.124 Several respondents highlighted the lack of economic data upon which to assess the potential impact that unification might have on costs.

4.125 **The Bar of Ireland** said no clear economic case has been made for a unification of the professions, and in the absence of a comprehensive and economic analysis, questions remain over the economic feasibility of unification.

4.126 **The Dublin Solicitors' Bar Association** said 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 listings may need to be reviewed. A study into the true costs of merger for litigants would be advised before commencing unification and that reform of the court listing system might also be necessary.

- 4.127 **The Law Society**, in setting out the arguments in favour of fusion, stated that fusion could “theoretically lower legal costs for the consumer and theoretically allow for greater direct access to lawyers”. **The Law Society** added that: *“However, this would require a full economic analysis by an appropriate body to evaluate whether this would lead to lower costs for consumers of legal services. Pending the carrying out of such an exercise, the Society’s view is that such savings may be illusory.”*

4.3 Views on Impact of Unification on Access to Experienced Legal Practitioners

- 4.128 Several respondents cautioned that unification would carry a risk of reducing access to the specialist advocacy skills and expertise of barristers who, rather than practising at the independent referral Bar, would end up working in large firms on a full-service basis.
- 4.129 **The AJI** said it had *“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.”* In relating to shrinking the pool, the AJI submitted that unification will likely mean that majority of barristers will be absorbed into existing firms of solicitors. Over time, it is probably that only those advocates in very large firms will appear before the courts on a regular basis. The remainder will take on more non-advocacy work within the firm and their experience of advocacy will be reduced, with the likely adverse impact on the quality of advocacy before the courts.
- 4.130 In relation to access limitations, the **AJI** submitted 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.”* The **AJI** said there is a real risk that unification will undermine current access by all litigants to specialist advocates which facilitates the proper administration of justice. *“It may also result in underfunded litigants representing themselves in the absence of a cadre of readily available specialist advocates.”*
- 4.131 **The AJI** further submitted that *“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 judgements 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 addition disputes coming before all courts are increasingly governed by complex legal rules in specialised areas that necessitate a consideration of extensive statutory provision, including those deriving from EU law, and both Irish and EU case law. *“Those cases require advocates to have a detailed knowledge of that area of the law. Specialised advocates of this sort are vital for the proper administration of justice,”* it added.
- 4.132 **Dublin City Council Law Department** said fusion *“may result in a distortion of the legal services market with the most specialist of legal experts being siloed in large resource rich firms which serve only high net worth individuals.”*

- 4.133 It submitted that: *“If an independent referral bar was not available to provide expertise in what can often be complex and niche areas of law, the law department would be faced with the difficult task of retaining specialist legal practitioners on a full service basis. “To employ the requisite number of specialists on a full service basis would prove costly, and could prove beyond the reach of a publicly funded local authority.”* In areas of specialism such as planning and environmental law there are players in the private sphere who wield significant financial resources. *“Such private resources could be used to ensure that local authorities do not have access to the most specialised of counsel who would not be governed by the cab rank rule if the professions were fused,”* it added.
- 4.134 **The Dublin Solicitors' Bar Association (DSBA)** said that in other jurisdictions with larger legal markets, specialist solicitors may be able to offer a full service to clients without requiring the input of a barrister. However, in Ireland outside of the centre of Dublin it would be difficult for such solicitor specialism to work economically in areas of low population density. The DBSA said there is already an issue with too few solicitors' firms outside of Dublin and efforts should be made to ensure that the problem is not exacerbated.

4.4 Views on Consumer Choice

- 4.135 Several respondents highlighted the fact that since 1971, solicitors have full rights of audience before all courts and may offer legal services on a full-service or “one-stop shop” basis for clients without any change in the structure of the professions. They asserted that this provides consumers with choice about whether to instruct a solicitor or a solicitor and barrister.
- 4.136 **The Bar of Ireland** pointed out that solicitors frequently act on a full-service basis for clients in the District Court, in both the civil and criminal contexts and that consumers who do not want to engage a practising barrister do not have to do so. The **Bar of Ireland** said it believed that the occasions where solicitors have provided full litigation services and those where they and their clients have chosen to engage the services of a barristers, most notably in higher jurisdiction courts and more complex cases, best serves both access to and administration of justice.
- 4.137 **Dublin City Council (DCC) Law Department** further pointed out that the solicitors' Code of Conduct dictates that counsel are to be retained by solicitors only where the client so instructs. Given this, and indeed the relatively low uptake in the Bar's Direct Access Scheme, which the department said was admittedly a restrictive scheme, it would appear there remains a strong demand for a referral bar even where the option remains to use solicitors as a one-stop shop.
- 4.138 **Both DCC Law Department and the Dublin Solicitors' Bar Association** made the further point that clients can opt to instruct a solicitor solely to deal with all aspects of a case, with the law department observing that the facts would appear to reveal a lack of public appetite to do so.
- 4.139 **The King's Inns** pointed out that 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 the free choice of many clients. This reality is a powerful argument against

unification. It stated: *“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.”*

- 4.140 **Dublin City Council Law Department** submitted that it should be borne in mind that the fusion of the professions will not likely result in a reduction in the actors involved in legal proceedings. It said: *“The same work as is required of a solicitor in a case in which counsel is instructed will subsist. If it is the aim that such work shall be completed by one practitioner rather than solicitor and counsel working in tandem this may go too far. An attempt to so do may neither be in the interest of the legal practitioners who would bear this increased burden or the public who would suffer a reduction in quality of service from a practitioner placed under increasing pressure to deliver a quality service with less resources. This would in turn lead to a reduction in the quality of advocacy before the Courts, which would be a barrier to the Courts proper administration of justice.”*

5. Other Issues

5.1 Views on Increased Regulation of Barristers

- 4.141 **The Association of Chartered Certified Accountants (ACCA)** said that should unification go ahead, it would have some concern as to the operation of the Solicitor Accounts Regulations (SARs) in the context barristers’ undertaking solicitor type work. It submitted that: *“There will be a requirement to amend the SARs and to amend the reporting requirement for accountants reporting on the operation by a solicitor or barrister of the SARs.”*
- 4.142 **The ACCA** said several issues will need to be addressed including whether barristers will need “nil SAR” reports where they continue to only operate as traditional barristers and not hold client money. There will also be a need to implement a training programme for barristers who start to undertake solicitor type activities and, therefore, need to comply with new SAR rules. *“We strongly recommend that should the merger go ahead that the merged regulatory body consult at an early stage with the accounting profession on the required changes to the SARs and to the role and scope of work of the Reporting Accountant in respect of the SARs,”* it added.
- 4.143 **Dublin City Council (DCC) Law Department** said that the removal of the distinction between counsel and solicitors would result in a greater regulatory burden on practitioners who previously practised as barristers. New obligations would include the requirement to undertake Anti-Money Laundering compliance, increased regulations in respect of handling of clients’ money, together with greater cost of professional indemnity insurance. This cost would in turn likely be passed on to the client.

5.2 Views on Cause for Unification

- 4.144 Several respondents made the point that there was no clear cause or rationale for unification. **The King's Inns** said: *"There is no clear mischief that has been demonstrated or requires to be addressed"* while the overall benefits of a split profession are manifest. **The Bar of Ireland** said it is of the view that *"a proposal to unify the legal professions, where the objective for such a change is unstated and unclear, would result in adverse outcomes that are inimical to the interests of clients and inimical to the interests of justice."* **The Bar of Ireland** said its Council is to date *"unaware of a demand, from any quarter, for a unification of the legal professions."* There is no indication of any unmet demand for services provided exclusively by solicitors and barristers.
- 4.145 **The AJI** said the loss of 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 said it has not been able to identify any such benefits.

5.3 Views on the Legal Services Regulation Act 2015

- 4.146 **The Bar of Ireland** submitted that the Legal Services Regulation Act 2015 is premised upon and reproduces the existing divisions of the legal professions. The regulatory regime largely mirrors the existing well-established obligations placed on barristers and solicitors by their respective professional bodies, with separate and distinct obligations for each. Unification of the professions would necessitate an overhaul of these recently introduced regulatory obligations, which reflect the divided professions. **The Bar of Ireland** also said that while its submission did not set out any 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, it wished to draw the Authority's attention to its previous submissions on legal partnerships, multi-disciplinary practices and the restrictions on certain issues relating to barristers.
- 4.147 **The Dublin Solicitors' Bar Association (DSBA)** took a different interpretation of the Act. It stated that *"the mood music in the background seems to indicate that a fusion of the professions is on the horizon."* The Act provides for a common regulator for barristers and solicitors and mostly makes reference to the term "legal practitioners," encompassing solicitors and barristers. The **DSBA** also pointed out that the Act makes provision for a solicitor to apply for a patent of precedence to be awarded the title of senior counsel previously only held by barristers. In addition, it noted that section 15 of the Mediation Act 2017 contemplates 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.
- 4.148 Several respondents referenced the planned or potential developments in the Act itself which may impact on current and future business structures for legal services. **The Bar of Ireland** drew attention its previous submissions to the Authority on legal partnerships, multi-disciplinary practices and the restrictions on certain issues relating to barristers (these issues are discussed in detail in Part 3). It said changes in the delivery of services under the Act, principally in relation to allowing legal partnerships, should be given appropriate space and time to be observed.

- 4.149 **The Law Society's** submission, in the section setting out arguments against fusion, referenced two changes introduced in the Act. The first is section 101 of the Act which extends the provision of direct access to barristers for non-contentious work to all members of the public and has not yet been commenced. The second is the creation of legal partnerships, provided for in section 100 of the Act, which permits barristers to become partners with other barristers or solicitors. **The Law Society** also noted that the provisions of the Act permitting legal partnerships have not yet been commenced.

5.4 Views on Recommendations of Competition Authority and Troika

- 4.150 **The Bar of Ireland and the Law Society** both pointed out that the 2006 Competition Authority report on solicitors and barristers did not recommend that the professions be fused.¹³⁸ **The Law Society** submitted that in its view it appeared that the Competition Authority reached this conclusion on the basis that *"there would be little to be gained from forcing the profession to undergo a lengthy and complicated process of fusion, when in practical terms it seems likely that the existence of an independent referral bar will continue regardless of such efforts."*
- 4.151 **The Bar of Ireland** further pointed out that during the passage of the Legal Services Regulation Bill through the Oireachtas it was stated by the then government that the Bill was to give effect, *inter alia*, to commitments then owed by the State under the Memorandum of Understanding between Ireland and the Troika. **The Bar of Ireland** submitted that the Troika did not advocate for a unification of both branches of the profession.

¹³⁸ Competition Authority (2006)

PART 5: ARRANGEMENTS IN OTHER JURISDICTIONS

Introduction and Overview

- 5.1 The Authority is required under section 34(4)(b) of the Legal Services Regulation Act (the Act) to include in this report details of arrangements in operation in other jurisdictions in which the professions have been unified. A unified legal profession is generally regarded as one which is not divided between barristers and solicitors in terms of legal or official functions. The term “fused profession” is often used to denote the same phenomenon of a profession where there is no formal divide between barristers and solicitors.
- 5.2 In countries with a unified profession there may be one single profession of “barrister and solicitor,” “advocate and solicitor” or simply “lawyer”. In such dual practise situations, lawyers may act as barristers or solicitors at their choice. A lawyer who chooses to undertake court or opinion work, and minimise his or her contact with clients, may be called a “barrister sole,” to distinguish them from a “barrister and solicitor”. Perhaps the only truly fused professions are those where lawyers use only one style, and there is no functional or legal division of the profession between court and office work.¹³⁹
- 5.3 When looking at how unified legal professions operate elsewhere, it is important to recognise that in each jurisdiction the structure of the legal profession has been influenced and shaped by its own complex range of social, economic, historic, cultural and political factors. The means by which legal professional structures were originally introduced and subsequently nurtured or modified are unique to each jurisdiction.
- 5.4 Likewise, the way in which lawyers or legal practitioners are regulated today varies widely from jurisdiction to jurisdiction. For example, some countries, like Ireland, protect the titles of regulated lawyers like “solicitor” and “barrister” and regulate specific services (reserved activities). Others, like some states in the USA, India and the Philippines, may adopt very wide definitions of the services reserved to lawyers, which amount in effect to a monopoly for lawyers in “whatever a lawyer does”.¹⁴⁰
- 5.5 In England and Wales, solicitors and barristers are among a range of regulated professionals providing “reserved legal activities”. These also include conveyancers, costs lawyers and patent agents. In France, where the legal profession has been traditionally divided into many autonomous professions, consolidation of these professions into a more unified bar is a recent development.¹⁴¹
- 5.6 These distinctions are significant for this discussion in so far as they illustrate that there is no single acceptable way for lawyers to deliver legal services, as what only a lawyer does and is permitted to do varies so significantly in different parts of the world.

¹³⁹ Cox, Noel (April 2009) page 2

¹⁴⁰ LSRA (March 2017) Multi-Disciplinary Practices, page 19, par 28

¹⁴¹ Boigeol, Anne and Willemez, Laurent, (2005)

Distinctions Between Common Law and Civil Law Jurisdictions

- 5.7 Legal systems in countries around the world generally belong to one of two main legal traditions – the common law and civil law systems. There are roughly 150 countries that have what can be described as primarily civil law systems, whereas there are about 80 common law countries.¹⁴² Ireland is a common law jurisdiction.
- 5.8 Common law legal systems place greater emphasis on previous court decisions and judicial opinions than do civil law jurisdictions, such as those in France, Germany and other European countries. This means that lawyers working in common law jurisdictions like Ireland need to work more closely with case-law (previous cases that have come before the courts) than do lawyers operating in civil law countries.¹⁴³
- 5.9 The division between barristers and solicitors survives in many common law jurisdictions, though it is perhaps less rigid than at the height of the nineteenth century.¹⁴⁴ Academic Andy Boon from the University of London's Centre for Professional Legal Practice has summed up the historical divergence between the civil law and common law world in terms of the relationship between legal practitioners and the State:

*“The common law world was dominated by private practice; the adversarial system so central and dominant that judges had to come from the ranks of practitioners. In civil law countries, by contrast, elite lawyers were jurists employed by the state and expected to serve the state as judges, prosecutors and civil servants. In many civil law jurisdictions membership of some legal occupations depended on direct appointment by the state. While there was often a cadre of specialist advocates, the value of legal advocacy was less significant than in a common law system. The nature of the inquisitorial system, and the perception that lawyers served the state rather than citizens, led to state control of private practice lawyers in many civil law states.”*¹⁴⁵

- 5.10 Apart from Ireland, the solicitor/barrister distinction exists in the common law jurisdictions of England and Wales, Northern Ireland, Hong Kong, the Australian states of Queensland, New South Wales and Victoria (on a *de facto* basis), and in some hybrid jurisdictions such as Scotland and Mauritius.¹⁴⁶
- 5.11 In the common law world, a unified structure exists in the USA,¹⁴⁷ Bangladesh, Canada, India, most Australian jurisdictions and New Zealand, as well as in countries with mixed legal systems including Cyprus, Nigeria and Bangladesh.
- 5.12 The French civil law tradition has influenced the legal systems in Indonesia, Vietnam, Cambodia and Laos. The Philippines in some respects have been influenced by the American common law tradition and, in others, the civil law tradition. Thailand has been influenced by both French and German models. There are examples of fused professions in the civil law jurisdictions of Germany, Spain and Luxembourg.

¹⁴² See: <https://onlinelaw.wustl.edu/blog/common-law-vs-civil-law/>

¹⁴³ Source: <https://www.lawlibrary.ie/Legal-Services/The-Courts-System.aspx>

¹⁴⁴ Cox, Noel (2009)

¹⁴⁵ Boon, Andrew (2017) *The Regulation of Lawyers and Legal Services*, page 5

¹⁴⁶ Maharg, Paul, Ching, Jane and Crew, Jenny (2018) page 183

¹⁴⁷ With the exception of Louisiana which is a mixed civil-common law system

- 5.13 In France, where the legal profession has been traditionally divided into many autonomous professions, consolidation of these professions into a more unified bar is a recent development. In 2011, the French professions of conseils juridiques (legal counsel) and avoués (solicitors) were unified into a new profession of avocat.¹⁴⁸ This consolidation is understood to have been a response to the challenge from the internationalisation of the economy, the construction of Europe as an economic and political reality, and competition from international law firms.¹⁴⁹

Selected Jurisdictions of Interest

- 5.14 For the purpose of this report, the Authority considers it most useful to look at jurisdictions that share a common law tradition with Ireland, as this provides for a more analogous starting position for the analysis. The analysis in this section therefore concentrates on the common law jurisdictions of Australia, Canada, New Zealand and Singapore where the profession is either formally unified or the structure is “flexible”. Where the term “flexible” is used, it generally means that there are few, if any, distinctions of a legal or official nature between barristers and solicitors.¹⁵⁰
- 5.15 In examining the arrangements in place in other jurisdictions, the Authority has included socio-political factors that have shaped the structure and functions of the professions going back several centuries. These dynamics are important in order to understand the impetus for both historic and modern developments in these jurisdictions, including the strength and position of the legal professionals themselves vis-à-vis the State, as well as other relevant actors.
- 5.16 Given the unusual situation prevailing in Australia, which has a mixture of fused and divided models in its six states and two territories, the report looks at arrangements in place in a number of jurisdictions. The Authority also considers it appropriate to include in its analysis our neighbouring common law jurisdiction of England and Wales, which retains a divided profession, and from which Ireland inherited its professional structures.
- 5.17 One trend noticed, even in jurisdictions where the formal titles of barrister and solicitor remain in statute, is that there may be only very minor degrees of divisions between the professions in terms of what they can legally do or their reserved activities.
- 5.18 For example, although the legal profession in England and Wales remains divided, reforms in modern times have led to an erosion of the distinctions between barristers and solicitors to a considerable extent. The profession there may look like more of a fused profession than currently exists in Ireland, yet the distinct professional titles of barristers and solicitor remain in place and there is currently no indication of any impetus to change the status quo.
- 5.19 The examination in this report of arrangements in other jurisdictions where a unified profession exists also shows that even within such unified structures there may be degrees of variation between how lawyers chose to practise. For example, in New Zealand and some

¹⁴⁸ Under Loi no. 2011-3331 du 28 mars 2011 de modernisation des professions judiciaires ou juridique et certaines professions réglementées

¹⁴⁹ Boigeol, Anne and Willemez, Laurent, (2005)

¹⁵⁰ For further discussion on these terms, see NSW Law Reform Commission (1982), page 32

Australian states which have common admissions and a formally unified professional structure, some lawyers still voluntarily restrict their work to barrister-type work only and voluntary bar associations have been established in recent decades.

1. Australia

- 5.20 The legal profession in Australia consists of both barristers and solicitors. All Australian lawyers have full rights of audience in the courts.
- 5.21 Australia is a federation of six States and two territories.¹⁵¹ The legal profession in the country has developed over time with different structures as follows:
- a. In New South Wales and Queensland, a profession that is formally divided into barristers and solicitors.
 - b. In the smaller jurisdictions of South Australia, Victoria, Western Australia and the Australian Capital Territory, the professions of barrister and solicitor are fused. An independent bar is maintained for those wishing to practise solely as barristers, regulated by the Legal Practice Board of the jurisdiction.
 - c. In Tasmania and the Northern Territory, the profession is fused, although a very small number of practitioners operate as an independent bar.¹⁵²
- 5.22 As outlined above, the fact that the profession is fused in some Australian jurisdictions has not prevented groups of practitioners from establishing voluntary bar organisations with rules restricting the way they practise. Each state and territory has an independent bar made up of practitioners who are either admitted separately as a barrister, or who are jointly admitted and elect to practise in the style of a barrister.¹⁵³ The Australian Bar Association, established in 1963, is the peak body representing barristers who are members of state and territory Bar Associations.¹⁵⁴
- 5.23 As commentators have pointed out, the distinction between those Australian jurisdictions where the legal profession is fused and where it is divided is not precise.¹⁵⁵ There are lawyers who practise exclusively as barristers, as well as lawyers who practise exclusively as solicitors, or as both barristers and solicitors. Some Australian legal authorities and commentators refer to divided and “flexible” structures in preference to the more traditional distinction between divided and fused or unified structures.¹⁵⁶

Historical Overview

- 5.24 The English profession's structure at the time of colonisation influenced Australia's structure of law and lawyering. The first lawyers in the colony were those called to the profession in England. It has been noted that throughout Australia there was in the earliest days of

¹⁵¹ The foundation colony of New South Wales was divided in 1859, becoming the independent nation of New Zealand and the Australian States of Victoria and Queensland

¹⁵² Source: Australian Bar Association. See: <https://austbar.asn.au/for-the-community/what-is-the-bar>

¹⁵³ Green, Cathy (2002) page 18

¹⁵⁴ See: <https://austbar.asn.au/about-the-aba/about-us>

¹⁵⁵ Green, Cathy (2002) page 2

¹⁵⁶ New South Wales Law Reform Commission (1982) page 32

settlement a tendency to the establishment of a fused profession, just as there had been in the United States and Canada, and for the same reasons; “the number of trained lawyers of any kind was small and they had to cope with all legal business.”¹⁵⁷

- 5.25 The geographical settlement of the Australian colonies laid the foundation for locally oriented professions, which developed different types of structures and restrictions.¹⁵⁸ Even after federation, the practise of law was almost universally at State level and it was rare for practitioners to appear in other jurisdictions.¹⁵⁹
- 5.26 However, as soon as high level courts were established in the early 19th century and staffed by judges appointed from the English Bar, there was immediate pressure from these gentlemen to establish the divided profession, a move which was supported by English barristers who came to the colony to practise.¹⁶⁰
- 5.27 In 1823, the Third Charter of Justice for the Supreme Court was passed, allowing the Court to admit lawyers to practice. Since then, the attitude of the Australian legal profession has waxed and waned as to whether to have a fused profession, adopting a diverse range of approaches as it went from colonies to federated nationhood in 1900.¹⁶¹
- 5.28 Each Australian State jurisdiction introduced reforms to their professions during the 1970s, 1980s and 1990s, all replacing their nineteenth century Acts. These reforms included moderating the rigid divisions between barristers and solicitors.¹⁶²
- 5.29 Today, the common admission of all legal practitioners has been introduced in all states and territories. In South Australia, the Australian Capital Territory and Tasmania, admission is as a “barrister and solicitor”; in the Northern Territory and Queensland as a “legal practitioner”; and in New South Wales, Victoria and Western Australia as a “lawyer”.
- 5.30 Since 2009, Australia has been working towards a ‘uniform profession’ across the country, which involves admission in any one Australian state or territory resulting in a lawyer becoming an officer of all Supreme Courts and holding an Australian practising certificate.
- 5.31 Under the Legal Profession Uniform Law 2014 admitted lawyers may practise in a range of different ways, including as a barrister. The law, which has been implemented in New South Wales and Victoria by local application Acts since 2015, creates a uniform system of regulation for these two states.¹⁶³ The law means that, for the first time, there is a common market for legal services across NSW and Victoria, encompassing 70% of Australia’s legal practitioners.¹⁶⁴ The Uniform Law scheme is in the process of being implemented in Western Australia.
- 5.32 The two distinguishing features of barrister practice in Australia are independent, sole practice and a prohibition against holding client money. There has been debate around

¹⁵⁷ Sawyer, Geoffrey (1965) page 247

¹⁵⁸ Ibid, page 270

¹⁵⁹ Ibid

¹⁶⁰ Ibid

¹⁶¹ Bartlett, Francesca and Haller, Linda (2017) page 165

¹⁶² Thornton, Margaret (2005)

¹⁶³ The Legal Profession Uniform Law (Uniform Law) commenced on 1 July 2015 in Victoria and New South Wales.

¹⁶⁴ Legal Services Council (2018)

direct access and holding of client money by barristers.¹⁶⁵

Direct Client Access to Barristers

- 5.33 In Australia, direct access work was expanded under the Uniform Legal Profession Act 2014. It is now permitted for corporations, accounting firms or government departments who do not employ their own in-house solicitors. The Australian Bar has suggested that direct access may be appropriate for urgent applications, less complex litigation or advisory work.¹⁶⁶

Barristers Holding Client Money

- 5.34 As a general principle, trust accounting rules in Australia are similar to those applied in other common law jurisdictions. However, under section 130 of the Uniform Act 2014, a state or territory may disapply or modify the ability of “specified law practices or classes of law practices” to hold client money in general, or specified kinds of trust money.

Business Structures

- 5.35 Two kinds of non-lawyer practice are permitted in Australia: Multi-Disciplinary Partnerships (MDPs) and Incorporated Legal Practices (ILPs). ILPs are permitted across Australia, though in varying forms. They allow for non-lawyer investment and ownership in law practices. MDPs are permitted in New South Wales, Victoria, Australian Capital Territory, Tasmania, Queensland and Western Australia.
- 5.36 By the end of 2014, after two decades, there were around 30 MDPs in NSW and a handful of others in Victoria, Queensland and SCT. Examples of businesses choosing this model included lawyers providing legal services together with real estate agents, financial advisers or chartered tax advisers.
- 5.37 These partnerships are inevitably small due to the constraints of the partnership model and have been largely overshadowed by the ILP structure, which has generally been preferred.¹⁶⁷ According to an independent study commissioned by the LSRA in 2017, the Australian experience suggests that new forms of business structure can seemingly happily coexist with traditional structures and both may be valid choices for different types of business.¹⁶⁸
- 5.38 An overview of the historical development of the professions and the modern structures that exist in some Australian states and territories is outlined below.

New South Wales

- 5.39 New South Wales (NSW) is the largest state profession. The legal profession is comprised of two branches: solicitors and barristers. The divided profession was established in NSW by judicial direction which took effect in 1834.¹⁶⁹ This division was accepted and supported by subsequent legislation dealing with the legal system of the state, which at the time included areas subsequently to become Queensland and Victoria.

¹⁶⁵ LSRA (2017) Certain Issues Relating to Barristers, page 25 par 3.15

¹⁶⁶ Ibid, page 25 par 3.16

¹⁶⁷ LSRA (March 2017) Multi-Disciplinary Practices, page 22

¹⁶⁸ Ibid page 29

¹⁶⁹ A Supreme Court ruling in 1829 divided the profession but because of strong solicitor opposition, this was not approved until 1834. Source: Ross, Stan (1997) page 271

- 5.40 Qualifying graduates are all admitted as “lawyers” to the Supreme Court of NSW.¹⁷⁰ Once admitted by the Supreme Court of NSW or another state of Australia, a practitioner may elect to practise as either a “barrister” or as a “solicitor and barrister”.¹⁷¹ Barristers’ practising certificates are issued by the NSW Bar Association and solicitors’ practising certificates are issued by the Law Society of NSW. A practitioner cannot simultaneously hold certificates issued by both bodies. Barristers and solicitors have full rights of audience in the courts.
- 5.41 Statutory conduct rules for barristers made under the Legal Profession Uniform Law state that a barrister must be a sole practitioner. The rules also stipulate that a barrister must not practise in a partnership, as the employer of a legal practitioner or the employee of any person, as a director of an incorporated legal practice, or through an unincorporated legal practice.¹⁷² Independent practising barristers commonly work alongside other barristers in chambers. Barristers may work full-time for government, for example as crown prosecutors or defenders. Only barristers may be appointed as senior counsel.
- 5.42 Statutory conduct rules for solicitors do not restrict their business structures in the same way.¹⁷³ A solicitor may practise in any form of legal entity including a partnership, a sole practice or as an employee of a corporation or government.
- 5.43 NSW barristers generally work through referrals from solicitors’ firms. They can also accept direct instructions from in-house corporate or government lawyers who hold practising certificates. Under their statutory conduct rules, barristers are not obliged to accept instructions directly from a person who is not a solicitor. Where a barrister proposes to accept a direct brief from a client without an instructing solicitor, they must comply with certain disclosure rules. These include disclosing to the prospective client that a solicitor may be required for instructions on short notice and any other disadvantage which the barrister believes may possibly be suffered by the client by not retaining an instructing solicitor.¹⁷⁴
- 5.44 NSW barristers are subject to a “cab rank” principle which obliges them to accept any work in a field in which they hold themselves out as having competence to practise.¹⁷⁵
- 5.45 In 1992, legislation was introduced to open up domestic conveyancing to licensed lay conveyancers, whose rights were subsequently extended to also include commercial retail and rural property transfers.¹⁷⁶ Both Multi-Disciplinary Partnerships and Incorporated Legal Practices exist in NSW.
- 5.46 Reforms introduced in NSW followed concerns about the professions’ restrictive and anti-competitive practices and recommendations by the NSW Law Reform Commission arising from its comprehensive *Legal Profession Inquiry* between 1976 and 1984 and the Trade

¹⁷⁰ Under Part 2.2 of the Legal Professions Uniform Law (NSW) 2015

¹⁷¹ Holders of practising certificates issued by the Law Society may use the title 'solicitor and barrister' as a result of amendments made by the Legal Profession Amendment (National Practising Certificates) Act 1996. Previously, this category of practitioners was only permitted to use the title 'solicitor'.

¹⁷² Legal Profession Uniform Conduct (Barristers) Rules 2015, rule 12

¹⁷³ Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015

¹⁷⁴ Legal Profession Uniform Conduct (Barristers) Rules 2015, rules 21 and 22

¹⁷⁵ *Ibid*, rule 17

¹⁷⁶ Conveyancers Licensing Act 1992 (NSW) now the Conveyancers Licensing Act 1995 (NSW)

Practices Commission's *Study of the Legal Profession* which began in 1989.¹⁷⁷

- 5.47 The Law Reform Commission identified disadvantages and weaknesses with the divided structure of the profession, including in relation to costs, duplication of labour, efficiencies and supply and accessibility issues.
- 5.48 The Commission, in one of its series of reports, said the divided structure of the profession involved a combination of, on the one hand, legal and official distinctions between barristers and solicitors, and, on the other hand, restrictive practices at the Bar. *"This combination substantially restricts practitioners' flexibility and freedom of choice in relation to the style in which they practise,"* it stated.¹⁷⁸
- 5.49 The Commission stated that each of the legal and official distinctions between barristers and solicitors should be examined to consider whether it is justified. It stated: *"If unjustified distinctions between barristers and solicitors were removed, restrictive practices at the Bar will be less likely to constitute unreasonable restraints on practitioners. Nevertheless, restrictive practices should be reconsidered to see whether they are contrary to the public interest, and, if so, whether they should be relaxed or abolished, either voluntarily or otherwise."*¹⁷⁹
- 5.50 The Commission emphasised that it did not give serious consideration to the introduction of a structure in which practising in the style in which barristers practise would be prohibited or discriminated against.
- 5.51 It stated that: *"We know of no-one who proposes such a structure, and we regard it as clearly unjustifiable. The important question, in our view, is whether the present divided structure gives practitioners sufficient freedom to practise in the style which best suits them and their clients, whether that be the style in which barristers now practise or some other style. We do not consider that the continued existence of a strong and vigorous Bar depends upon the maintenance of a divided structure. The experience of the legal professions in South Australia, Western Australia, New Zealand and elsewhere demonstrates the correctness of that view."*¹⁸⁰

Queensland

- 5.52 The Queensland legal profession is divided into two branches: barristers and solicitors. Qualifying graduates are jointly admitted as "legal practitioners."¹⁸¹ Solicitors must hold a practising certificate issued by the Queensland Law Society while barristers' practising certificates are issued by the Bar Association.
- 5.53 Queensland inherited the divided legal profession structure when it separated from the colony of New South Wales in 1859. Legal historians have noted that the colony experienced pressure from mercantile interests to amalgamate the branches, although moves for reform

¹⁷⁷ Trade Practices Commission (1994)

¹⁷⁸ New South Wales Law Reform Commission (1982) page 58, par 3.81

¹⁷⁹ Ibid

¹⁸⁰ Ibid, page 46, par 3.34

¹⁸¹ Under the Legal Profession Act 2007 (Qld)

over several decades were not successful.¹⁸²

- 5.54 In modern times, the early 1990s saw government plans to implement a system of common admission for Queensland lawyers which were not pursued. This was introduced in the Legal Profession Act 2007 (Qld) which replaced separate admission rules. Since 1973, solicitors in Queensland have had the right to appear in all courts.

Victoria

- 5.55 The legal profession in Victoria is fused by law. Qualifying graduates are admitted to the Australian legal profession as “an Australian lawyer” by the Supreme Court of Victoria, having been granted a compliance certificate from the Victorian Legal Admissions Board.¹⁸³
- 5.56 Each lawyer admitted to legal practice in Victoria is entitled to engage in work traditionally done by a solicitor or by a barrister or by both. All legal practitioners who have a current practising certificate have unlimited rights of audience in all courts and most tribunals.
- 5.57 In practice, the branches remain quite separate, with Victorian lawyers historically divided into two main groups – those who practise exclusively as barristers and those who practise either solely as solicitors or as both solicitors and barristers. Lawyers’ practising certificates are issued by the Victorian Legal Services Board, which also publishes an online register of lawyers.¹⁸⁴
- 5.58 There are nine different types of practising certificates in Victoria for the following categories of lawyer: a principal of a law practice authorised to receive trust money; a principal of a law practice not authorised to receive trust money; an employee of a law practice; a barrister; a corporate legal practitioner; a principal legal practitioner of CLS with or without trust money authorisation; an employee legal practitioner of CLS; a government legal practitioner; and a volunteer at a CLS/pro bono.
- 5.59 Both solicitors and barristers have to complete a law degree and undertake either further studies or work placements before they can be admitted to practice. Solicitors in Victoria practise in various areas of law and can work in a variety of employment situations as sole practitioners, small partnerships, medium and large firms, and in government.
- 5.60 To be eligible to practise as a barrister in Victoria, lawyers must qualify for and complete an eight-week long Readers’ Course provided by the professional association for barristers, the Victorian Bar, and work under the guidance of a senior barrister at the Victorian Bar for a period of seven months.
- 5.61 Members of the Victorian Bar voluntarily undertake to practise exclusively as a barrister. As Victoria is a uniform law state, barristers there are bound by same uniform conduct rules as those in New South Wales. Under these rules, barristers must practise as sole traders and are not permitted to practise in partnerships or as an employee, or as the employer of a legal practitioner. In addition, barristers in Victoria are also bound by a “cab rank” rule under

¹⁸² Green, Cathy (2002) page 3

¹⁸³ The Board is responsible for the operation of the Legal Profession Uniform Admission Rules 2015 which govern the admission of Australian lawyers in Victoria. See: <https://www.lawadmissions.vic.gov.au/>

¹⁸⁴ See: <https://lsbc.vic.gov.au/>

which they must generally accept any brief request.¹⁸⁵

- 5.62 Barristers in Victoria generally work through referrals from solicitors' firms. They can also accept direct instructions from in-house corporate or government lawyers who hold current practising certificates.
- 5.63 Lawyers who practise exclusively or substantially as counsel, are eligible to apply to the Chief Justice of the Supreme Court of Victoria to be appointed as senior counsel.

Historical Overview

- 5.64 Victoria inherited a divided professional structure when it separated from New South Wales to become a separate colony in 1851. However, the Victorians had been acquainted with the fused profession already established in South Australia and there were repeated efforts through the 1800s to introduce a fused profession in law, all of which were defeated in the Legislative Council where lawyers were strongly represented.¹⁸⁶
- 5.65 Despite resistance from judges and barristers, the legal profession in Victoria originally became fused under the (now repealed) Legal Practice Act 1891 (Vic), and has remained fused in law since then.¹⁸⁷ Victoria has been described as perhaps the only example in the British Commonwealth of fusion being adopted as a matter of legislative policy, and certainly the only example of separation being maintained or re-established in the face of such policy.¹⁸⁸
- 5.66 As Australian legal academic Geoffrey Sawer has observed, the 1891 Act made amalgam practice possible, but did not compel practitioners to adopt it. The Victorian profession therefore remained, and remains, effectively divided. Writing in 1965, Sawer noted that, despite sporadic grumblings, *"it is not now firm policy with any group in the profession or of any political party to interfere with the system as so stabilised."*¹⁸⁹

South Australia

- 5.67 In South Australia the legal profession is fused. Every legal practitioner is admitted and enrolled as a "barrister and solicitor" of the Supreme Court of South Australia under the Legal Practitioners Act 1981 (SA).
- 5.68 Whether legal practitioners are styled as barristers, solicitors or both is their commercial choice. All admitted legal practitioners have the same right to practice before any federal court. Practising certificates are issued by the Law Society of South Australia. It publishes an online Register of Practising Certificates, which lists each holder as either a "lawyer" or a "barrister."¹⁹⁰
- 5.69 There are four categories of practising certificates issued under the Rules of the Legal Practitioners Education and Admission Council 2018. These are: for law practice principals

¹⁸⁵ Legal Profession Uniform Conduct (Barristers) Rules 2015

¹⁸⁶ Sawer, Geoffrey (1965) page 247

¹⁸⁷ Ross, Stan (1997) page 272

¹⁸⁸ Sawer, Geoffrey (1965) page 246

¹⁸⁹ Ibid, p 254

¹⁹⁰ See https://www.lawsocietysa.asn.au/Public/Community/Register_Practising_Certificates.aspx

who are entitled to receive and manage trust monies; for principals who are not allowed to do so, including as a barrister; for employees; and for volunteers.¹⁹¹

- 5.70 The South Australia Bar Association is a voluntary bar association established in 1964. In order to become a member of the association, practitioners must undertake to practise exclusively as a barrister. It is generally recognised that the first lawyer to practise exclusively and independently as a barrister in Southern Australia did so in 1955.¹⁹²
- 5.71 Most South Australian barristers voluntarily practise in the same way as their interstate colleagues, including operating from chambers, although some larger legal firms employ or retain “in house” barristers, also known as special counsel.¹⁹³
- 5.72 The cab rank rule applies in South Australia, which means barristers who are members of the state Bar Association are generally obliged to accept any brief for that barrister’s normal fee.¹⁹⁴ All legal practitioners are eligible to be appointed as senior counsel and also Queen’s Counsel in South Australia.¹⁹⁵
- 5.73 There has been debate from time to time within the legal community in South Australia as to whether the profession should be divided. An Ordinance of 1845 conferred power on the Judges of the Supreme Court to divide the legal profession if they considered it appropriate, but this has never occurred.¹⁹⁶ Two efforts were made by judges during the 20th century to divide the professions, but the proposals were defeated in plebiscites conducted by the Law Society.¹⁹⁷
- 5.74 Prior to 1993, the Legal Practitioners Act 1981 (SA) allowed the Supreme Court, on application of the Law Society, to divide legal practitioners into the separate classes of barristers or solicitors. The Act was later amended to affirm the fused nature of the profession, but it does not prohibit the development of a separate bar on a voluntary basis.
- 5.75 Section 6 of the 1981 Act (inserted by way of amendment in 1993) states that: *“It is Parliament’s intention that the legal profession should continue to be a fused profession of barristers and solicitors”* and *“the voluntary establishment of a separate bar is not, however, inconsistent with that intention, nor is it inconsistent with that intention for legal practitioners voluntarily to confine themselves to practice as solicitors.”*
- 5.76 Writing in 1997, the academic barrister Stan Ross noted that “there appears to be no drive to have full division”¹⁹⁸ of the profession in South Australia.

¹⁹¹ Legal Practitioners Education and Admission Council (2018)

¹⁹² South Australian Bar Association (2010) Being a Barrister

¹⁹³ Legal Services Commission for South Australia Law Handbook

¹⁹⁴ South Australian Bar Association, How to Brief a Barrister

¹⁹⁵ Legal Practitioners (Senior and Queens Counsel) Amendment Act 2020

¹⁹⁶ South Australian Bar Association (2010) Being a Barrister

¹⁹⁷ Ross, Stan (1997) p 271

¹⁹⁸ Ross, Stan (1997) page 273

Western Australia

- 5.77 Western Australia has a fused legal profession. Lawyers are admitted as “lawyers” to the Supreme Court of Western Australia under the Legal Profession Act 2008 (WA). Western Australian lawyers can perform the roles of both solicitors and barristers. Most lawyers work as employees of firms, and some lawyers practise exclusively as barristers or exclusively as solicitors. Lawyers who do not practise exclusively as either solicitors or barristers generally describe themselves as “barrister and solicitors”. All lawyers have the same rights of audience before the courts.
- 5.78 Practising certificates are issued by the Legal Practice Board, which regulates the legal profession in the state. Since 2012, practitioners who intend to practise exclusively as independent barristers may request that a “barrister only” condition be imposed on their practising certificate by the Legal Practice Board.
- 5.79 Holders of “barrister only” practising certificates must practise only as sole practitioners and must not practise in partnerships, as the employer of a legal practitioner or the employee of any person, and must not be a director of an incorporated legal practice or a member of a multi-disciplinary partnership.¹⁹⁹ According to the Legal Practice Board, the arrangement is voluntary, but a legal practitioner who does not agree to the “barrister only” conditions is not entitled to use the name, title or description of “barrister”.²⁰⁰
- 5.80 There has been a voluntary professional Bar Association in Western Australia since 1963. The Western Australian Bar Association states that it was not formed for the purpose of dividing the profession into barristers and solicitors, and that it is an independent branch of the profession for those who elect to practise solely as barristers, rather than a separate branch.²⁰¹
- 5.81 There are a number of barristers’ chambers in the state. Independent practising barristers in Western Australia may elect to accept briefs from corporate counsel, either government or private, without involvement of an external solicitor.
- 5.82 The 1983 *Report of an Inquiry into the Future Organisation of the Legal Profession in Western Australia* concluded that, although the existence of a separate bar offers advantages to the public and the administration of justice and to the remainder of the practising profession, the formal division of the profession in Western Australia was not desirable or necessary.²⁰²

¹⁹⁹ See:

<https://www.lpbwa.org.au/Legal-Profession/Practising-in-Western-Australia/Availability-of-a-Barrister-Only-Condition>

²⁰⁰ Legal Practice Board of Western Australia (2019) page 44

²⁰¹ Western Australian Bar Association (2018)

²⁰² Clarkson, Gresley (1983)

2. Canada

- 5.83 The legal profession in Canada is a unified profession in nine of its ten provinces where common law is practised. The exception is the province of Quebec which has a civil law legal system and is a “distinct society” within Canada in its legal services structure and regulation.²⁰³
- 5.84 The words “lawyer” or the French equivalent “avocat” are used to describe the main body of legal professionals throughout Canada. Although statutes may referred to “barristers” or “solicitors” or “barristers and solicitors”, there is no regulatory or legal distinction between them, as all Canadian lawyers are both barristers and solicitors.²⁰⁴ Regulation does however distinguish a few small legal para-professionals, including Ontario’s licensed paralegals and Quebec’s notaries.²⁰⁵
- 5.85 Canadian lawyers are authorised to provide all legal services, and most such services are reserved for them to provide exclusively. The licensing system is fairly consistent across the country. Lawyers are licensed as “barristers and solicitors” by provincial and territorial Law Societies, or as advocates in Quebec.
- 5.86 There are 14 Law Societies created by statute, one for each of the 10 provinces (two in Quebec) and three territories, to which all members of the legal profession must belong.²⁰⁶ The Law Societies admit persons to practise as lawyers. In all provinces, candidates must obtain a law degree from an accredited law school and must typically also pass an exam and complete articles with a law firm.
- 5.87 All Canadian lawyers can conduct litigation in court, but they may choose to specialise in just one profession. For example, some lawyers by preference concentrate entirely on conveyancing while others focus their practice on litigation.
- 5.88 Clients have direct access to all lawyers, whose practices can be organised in a variety of different forms, including partnerships, limited liability partnerships, professional corporations and sole practices. Self-employed lawyers who practise on a freelance basis are subject to the same rules and regulations governing all lawyers in their respective province. Various lawyers can lease space together and share administrative resources as an affiliation, or in association with one another, and can choose to identify themselves as a chambers.²⁰⁷
- 5.89 There is also no independent referral Bar in Canada. However, there are clear divisions and stratification within the profession. The Canadian legal profession has been described as one which is *“divided by function, clientele and practice setting, ranked in terms of prestige both internally and externally, in varying degrees attracted to anticompetitive arrangements, and in intermittent disagreement over professional policies and public positions.”*²⁰⁸

²⁰³ Semple, Noel (2017), page 97

²⁰⁴ Dodek, Adam (2009)

²⁰⁵ Quebec follows the French tradition of having both lawyers (avocats) and notaries (notaires)

²⁰⁶ In Nova Scotia the relevant body is the Barristers’ Society and in Québec the Barreau de Québec

²⁰⁷ Tayyab, Annie and Daphne Hooper, Affleck Greene McMurtry LLP (2018)

²⁰⁸ Arthurs, Harry; Weisman Richard; and Zemans Frederick (1987), page 531

- 5.90 In terms of the work settings of lawyers, these can be divided into: elite large firms; medium sized metropolitan firms, solo practitioners and small firms in metropolitan areas; practices in smaller centres and lawyers employed in public practice.²⁰⁹

Business Structures

- 5.91 Multi-disciplinary partnerships between lawyers and non-lawyers are forbidden in Canada or tightly restricted by the law societies in the two provinces of British Columbia and Ontario where they are permitted.²¹⁰ At present, non-lawyer ownership in law firms is also limited. In Québec and British Columbia lawyers are permitted to practise and share profits with some other regulated professionals, whilst in Ontario lawyers may practise and share profits both with paralegals and some other regulated professions.²¹¹

Work of Paralegals

- 5.92 It has been pointed out that lawyers in Canada do not have a monopoly over legal services—what they have is an exclusive right to practise law.²¹² The statutes of the various law societies each include a similar definition of the term “practice of law”. Generally, it encompasses a variety of tasks, such as giving legal advice, making representations and drafting legal documents.²¹³
- 5.93 In recent years, two more legal para-professions have come into existence in Canada. At the federal level, Immigration Consultants are regulated non-lawyers authorised by statute to provide legal services in immigration and refugee matters, including representation and advice.²¹⁴
- 5.94 In most jurisdictions, legal assistants, also called paralegals, can provide certain specified legal services on an unregulated basis, under the supervision of lawyers. In certain jurisdictions, members of the public may hire independent paralegals to appear and represent them in small claims court and before most tribunals, boards and agencies. Paralegals may also deal with simple wills, uncontested divorces, incorporations and pardons. In addition, paralegals may undertake work in other fields: for example, paralegals may practise as immigration consultants when registered with the Canadian Society of Immigration Consultants.
- 5.95 In 2007, Ontario became the first Canadian jurisdiction to regulate paralegals, and the first and only jurisdiction in Canada where paralegals are licensed by law to work independently of lawyers.²¹⁵
- 5.96 There are a small set of legal tasks that paralegals in Ontario are permitted to perform independently and in competition with lawyers.²¹⁶ They can represent litigants before courts of limited jurisdiction, such as Small Claims Court and administrative tribunals such as the Workplace Safety and Insurance Board.²¹⁷ Ontario paralegals cannot carry out non-advocacy

²⁰⁹ Ibid

²¹⁰ Semple, Noel (2017) page 105

²¹¹ LSRA (March 2017) Multi-Disciplinary Practices, page 30 par 66

²¹² Trabucco, Lisa (2018) page 463

²¹³ Competition Bureau of Canada (2007)

²¹⁴ They are regulated by the Immigration Consultants of Canada Regulatory Council established in 2011

²¹⁵ Under the Province of Ontario's Access to Justice Act 2006 which amended the Law Society Act

²¹⁶ Semple, Noel (2017) page 104

²¹⁷ Morris, David (2012)

work such as simple incorporations, wills, uncontested divorces and powers of attorney.²¹⁸

5.97 The legislative changes in relation to paralegals in Ontario were criticised by the Competition Bureau of Canada in a 2007 report, which said they restricted the set of suppliers to whom consumers may turn for certain legal services, thereby curtailing the option of working with paralegals and increasing the costs of legal services to consumers. It recommended that that: *“To the extent that paralegals need to be regulated, the proper avenue for this is not through the law societies, given the obvious conflict of interest that arises from having one competitor regulate another. Alternative means of regulatory oversight should be explored”*.²¹⁹

5.98 The Competition Bureau’s report also concluded that many of the restrictions imposed by the law societies, including on services, scope of practice, pricing, conduct, and business models, had the effect of raising costs to consumers.²²⁰ A follow up report by the Bureau in 2009 noted some progress.²²¹

Historical Overview

5.99 The Canadian legal profession emerged from the confluence of two distinct traditions – the American and the English.²²² Unlike in England and Wales, there was no division within the legal profession in Canada at the time of its independence from British rule in 1867. Because of the very limited supply of lawyers with training in English Inns of Courts in early years, coupled with a low population density in a vast territory, it was economically unviable to have a divided structure in the legal profession in the first place.²²³

5.100 The pattern of the legal profession’s development across Canada differs from province to province. In general terms, however, the pattern during early periods of settlement show that very few lawyers in each of the Canadian colonies or territories were largely or entirely foreign trained.

3. New Zealand

5.101 The legal profession in New Zealand is formally fused. Practitioners are admitted to the High Court of New Zealand as a “barrister and solicitor” under the Lawyers and Conveyancers Act 2006.²²⁴

5.102 Once admitted, a lawyer may choose to obtain a practising certificate either as a “barrister and solicitor” or as a “barrister sole” (sometimes referred to as courtroom lawyers). Practising certificates are issued by the New Zealand Law Society, which regulates all lawyers. A lawyer wishing to obtain a practising certificate as a barrister sole must satisfy the

²¹⁸ Competition Bureau of Canada (2007)

²¹⁹ Ibid, page 69

²²⁰ Competition Bureau of Canada (2007)

²²¹ Competition Bureau of Canada (2009)

²²² Girard, Philip (2014) page 145

²²³ Legislative Council Secretariat Research Office (2018)

²²⁴ Part 3 of the Lawyers and Conveyancers Act 2006 (LCA) and Admission Rules made under the Act

Law Society that he or she is a suitable person with relevant legal experience.²²⁵

- 5.103 The New Zealand Law Society maintains an online register of all lawyers holding practising certificates. This shows whether a holder of a practising certificate as a “barrister and solicitor” is a sole practitioner, a partner in a partnership or director of an incorporated law firm, an employed solicitor, or an in-house lawyer.
- 5.104 According to the Law Society, most lawyers, including those who practise only as solicitors in law firms, hold practising certificates as barristers and solicitors. This entitles them to both act as solicitors and to appear in the courts. Solicitors and barristers working in firms include those who specialise in litigation.
- 5.105 Barristers sole may, with a few exceptions, accept instructions only from a solicitor. Barristers sole may work in chambers with other barristers. They are not permitted to practise in partnerships with other lawyers, although they may employ other barristers. An incorporated law firm structure is also open to barristers, as long as the barrister is the sole director and shareholder.
- 5.106 In New Zealand, there is no requirement to engage a barrister to appear in court. Those in practice as solicitors can also exercise their rights of audience as barristers without (as in England and Wales) first having to be licensed as advocates.²²⁶ The Lawyers and Conveyancers Act 2006 reserves certain types of activities to lawyers. This includes appearing before the court (with some minor exceptions).²²⁷
- 5.107 Only barristers sole are eligible to become Queen's Counsel in New Zealand.

Business Structures

- 5.108 Practitioners who wish to practice on their own account, including as a partner in a law firm, or as a barrister sole, must meet extra requirements.²²⁸ Applicants must have had at least three years' legal experience in New Zealand during the preceding five years before they set up on their own account. Other requirements include attending and passing a Stepping Up course.²²⁹
- 5.109 Barristers and solicitors are not permitted to practise in partnership with members of other professions. This is recognised by the prohibition on income sharing between lawyers and non-lawyers in relation to the provision of regulated services.²³⁰ Barristers are not permitted to be members of a law firm and do not have trust accounts.
- 5.110 The Lawyers and Conveyancers Act 2006 allows lawyers to practice in incorporated firms in which all the directors and shareholders are lawyers.²³¹

²²⁵ See: <https://www.lawsociety.org.nz/professional-practice/legal-practice/starting-practice-as-a-barrister/>

²²⁶ McEwin, Ian (2000)

²²⁷ See: <https://www.nzbar.org.nz/faqs-about-barristers>

²²⁸ Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008

²²⁹ See: <https://www.lawsociety.org.nz/for-lawyers/legal-practice>

²³⁰ Section 7(3) Lawyers and Conveyancers Act 2006

²³¹ Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008 r 3.4,3.5

Conveyancers

- 5.111 The occupation of licensed conveyancers was first introduced in the Lawyers and Conveyancers Act 2006,²³² which brought to an end the monopoly which lawyers had in New Zealand in transferring property.

Non-Lawyers' Legal Advice

- 5.112 Non-lawyers are permitted to provide legal advice and charge for it in New Zealand. They may also appear before any tribunal or court which allows them to do so.²³³ The areas of practice which are reserved solely for lawyers are listed in the Act.²³⁴

Independent Referral Bar

- 5.113 New Zealand has had a voluntary Bar Association which aims to promote and encourage a strong separate and independent bar.²³⁵ Membership of the New Zealand Bar Association is open lawyers who hold a practising certificate as a barrister sole.²³⁶ Lawyers practising as barristers and solicitors may be associate members.

Direct Access to Barristers

- 5.114 In many (but not all) cases, a barrister must be instructed by a solicitor and cannot be instructed directly by the client. New Zealand has been widening direct access to barristers sole in recent years. Since 2015, barristers can apply to the Law Society of New Zealand to take direct instructions in some areas of law (e.g. certain areas of criminal law and family law, employment and civil disputes), when providing an opinion and in some other situations.²³⁷ According to the Bar Association, *"this change recognises that in particular areas of work – principally family and criminal – there is less need for an instructing solicitor."*²³⁸

Clients' Money

- 5.115 Barristers sole in New Zealand cannot receive or hold money for, or on behalf of, another person as they are not permitted to operate trust accounts.

Historical Overview

- 5.116 New Zealand inherited its legal system from England. The practice of law in New Zealand has been regulated since the 1840s. New Zealand developed a profession that was theoretically made up of distinctive branches, but, due to pioneer conditions, allowed for the combined or dual practise of its members.
- 5.117 It has been said that: *"More than in the case of any Australian state, the history of the legal profession in New Zealand reflects the agony of mind of men with a considerable bias in favour of the English-style division but forced to accept the practical necessity of fusion in circumstances where population is scanty and litigation sporadic."*²³⁹

²³² The Act came into force on 1 August 2008

²³³ Section 27 Lawyers and Conveyancers Act 2006

²³⁴ Section 6 Lawyers and Conveyancers Act 2006

²³⁵ New Zealand Bar Association (2020)

²³⁶ See <https://www.nzbar.org.nz/>

²³⁷ Rule 14.5.1 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Source: New Zealand Bar Association, FAQs About Barristers: <https://www.nzbar.org.nz/faqs-about-barristers>

²³⁸ See: <https://www.nzbar.org.nz/direct-briefing-of-barristers>

²³⁹ Sawyer, Geoffrey (1965) page 261

- 5.118 The departure in New Zealand from the English system of a divided profession was intended to be temporary. The Supreme Court Ordinances of 1841 and 1844, and an Amendment Ordinance in 1848 expressly permitted barristers to act as solicitors, and solicitors as barristers, in each case for a period of five years after the commencement of the enactment, unless the Court should order to the contrary.²⁴⁰
- 5.119 This five-year period was extended for further five-year periods until 1861, when the first comprehensive Law Practitioners Act was passed.²⁴¹ Since 1982 admission has been both as barrister and solicitor, admission as one or the other having ended. The continued division of the profession derives from the practice in Britain, but is nonetheless a functional one.²⁴²

4. Singapore

- 5.120 The legal profession in Singapore is fused. A qualified person is admitted as an “advocate and solicitor” of the Supreme Court under the Legal Profession Act.²⁴³ An advocate’s role is similar, though not identical to the role of a barrister in England while a solicitor is similar to a solicitor in England.²⁴⁴ Practising certificates for advocates and solicitors are issued by the Law Society of Singapore.
- 5.121 All lawyers have the right of audience to appear before all courts in the country. In practice, some lawyers specialise in litigation whereas others focus on solicitors’ work including conveyancing, and do not appear in court.²⁴⁵ There are also lawyers called locum solicitors who practise law as an advocate and solicitor engaged on a temporary or freelance basis by one or more law firms.²⁴⁶
- 5.122 There is no differentiation as to the rights and privileges of advocates and solicitors, except for precedence rules in relation to addressing the court. A practising advocate and solicitor is exclusively entitled to receive remuneration for conveyancing work, probate and administrative work, the incorporation of limited companies, the writing of letters of demand and the negotiation and settlement of any disputes arising out of personal injuries or death.

Absence of an Independent Referral Bar

- 5.123 There is no independent bar in Singapore, and senior counsel practise as members of law firms. The first senior counsel were appointed in January 1997 following statutory reform in 1996.²⁴⁷ It has been stated that the appointments of senior counsel as highly specialist litigators was intended to encourage home-grown specialised advocates instead of the traditional reliance on the *ad hoc* admission of Queen’s Counsel invited from England to the Singapore Courts.²⁴⁸ However, the practice has continued for difficult and complex cases in

²⁴⁰ Cox, Noel (2009) page 4

²⁴¹ Sawyer, Geoffrey (1965) page 261

²⁴² Cox, Noel (2009) page 5

²⁴³ Section 12 Legal Profession Act 1996 (Chapter 161) as revised

²⁴⁴ Tan, Terence (1999) page 391

²⁴⁵ Lim, Charles (2018) page 2

²⁴⁶ Ibid

²⁴⁷ The Legal Profession (Amendment) Act 1996 (No. 40 of 1996) amended section 30 of the Legal Profession Act (Chapter 161 of the 1994 Revised Edition).

²⁴⁸ Lim, Charles (2009) page 2

which Queen's Counsel have special qualifications or experience and where no domestic senior counsel can be found amid an ongoing lack of availability.

- 5.124 The shortage of domestic senior counsel has resulted in problems faced by litigants in cases involving banking institutions or corporations in securing quality legal representation in commercial cases. One legal academic has attributed this to the fact that not only is Singapore's litigation bar not very large, but it is rendered smaller by the existence of large firms with established dispute resolution practices and stables of senior counsel, who are often unable or unwilling to act in litigation against their institutional clients.²⁴⁹
- 5.125 The Chief Justice of Singapore, Chan Sek Keong, stated in 2006 that he wished to see the litigation bar grow and become stronger, given that litigation was critical to the health of the country's legal system and the vitality of its judiciary. The Chief Justice stated:
*"We must try to equalise this inequality of arms and to increase the number of good independent advocates who are not beholden to big business. Theoretically, one answer to that is a split bar. Then everyone has a chance and you can train up a good litigation Bar."*²⁵⁰
- 5.126 Legal commentators have also suggested that some senior lawyers feel that the increasing use of senior counsel for very complex litigation will in any case lead to a quasi-split profession in Singapore.²⁵¹ More than a decade earlier, when the Chief Justice was Attorney-General, he floated the idea of encouraging certain individual lawyers to do nothing but advocacy.²⁵²

Business Structures

- 5.127 There are various vehicles in Singapore for the setting up of legal practices and cooperative alliances amongst the law firms. Apart from sole proprietorships and partnerships, the legal profession has also seen the creation of the law corporation with limited liability as well as limited liability partnerships.²⁵³

Historical Overview

- 5.128 As a Commonwealth nation, Singapore's legal system has its roots in English law and practice, although the legal profession has been fused since its inception. Its legal system has evolved in a manner that draws from its colonial heritage, dating back to the era of the founding of early modern day Singapore by Sir Thomas Stamford Raffles of the British East India Company in 1819.
- 5.129 The Singapore legal services sector has grown substantially since 1912 when it comprised only 50 lawyers and 17 law practices.²⁵⁴ Recent reforms reflect its aspirations as a self-proclaimed regional hub for legal services and international dispute resolution.²⁵⁵ With a view to positioning Singapore as a legal services hub for south East Asian, the legal profession has undergone important changes with the liberalisation in legal services, increased admission of foreign lawyers and the institution of the Singapore International

²⁴⁹ Lau, Kwan Ho (2012) page 1

²⁵⁰ Singapore Academy of Law (May-June 2006)

²⁵¹ Lim, Charles (2009) page 2

²⁵² In Conversation: An Interview with the Honourable Attorney-General, Mr Chan Sek Keong" (1993) 14 Singapore Law Review 1, 18

²⁵³ Tan, Eugene and Chan, Gary (2019)

²⁵⁴ Review Committee Final Report (January 2014) par 1

²⁵⁵ Chen, Alvin and Whalen-Bridge, Helena (2017) page 45

Commercial Court. Several of these reforms were based on recommendations for liberalisation of the legal sector in a 2007 Report of the Committee to Develop the Singapore Legal Sector.²⁵⁶

5. England and Wales

- 5.130 The legal profession in England and Wales is divided into solicitors and barristers. Solicitors are admitted by the Law Society of England and Wales while barristers are admitted (called to the Bar) by their Inns of Court. Solicitors require a practising certificate in order to practice, and these are issued by the Law Society.
- 5.131 As is the case in Ireland, solicitors form the largest part of the legal profession in England and Wales, and often have direct contact with their clients, providing legal advice and assistance on a range of matters. Solicitors have been able to form limited companies since the passage of the Administration of Justice Act 1985, and Limited Liability Partnerships since the introduction of the Limited Liability Partnerships Act 2000. Solicitors are regulated by the Solicitors Regulation Authority (SRA).²⁵⁷
- 5.132 Solicitors in England and Wales traditionally had rights of audience in the Magistrates' Courts and the County Court. The Courts and Legal Services Act 1990 enabled solicitors to be named as solicitor advocates and acquire rights of audience also in the higher level courts (High Court, Crown Court, Court of Appeal and Supreme Court) which were previously the courts in which barristers were instructed by solicitors to advocate on behalf of clients.²⁵⁸ A solicitor must qualify as a solicitor higher court advocate in order to acquire the same "higher rights" of audience as a barrister.
- 5.133 The first solicitor advocates qualified in 1994. The approval system for solicitor advocates was subsequently simplified in the Access to Justice Act 1999 and then further streamlined in the Higher Rights of Audience Regulations 2011. The Solicitors Regulation Authority currently grants the audience rights, sets the competency standard and undertakes assessments. Solicitor advocates tend to be specialised in litigation in either criminal or civil matters.
- 5.134 English and Welsh barristers, like their counterparts in Ireland, are legal advisers and courtroom advocates. Barristers are not entitled to hold client funds. They are regulated by Bar Standards Board (BSB).²⁵⁹
- 5.135 A total of nine professionals can be authorised to carry out reserved legal activities under the Legal Services Act 2007. These are: solicitors, barristers, notaries, legal executives, licensed conveyancers, trade mark attorneys, patent agents, costs lawyers, and chartered

²⁵⁶ Ministry of Singapore (2007)

²⁵⁷ The Law Society's regulatory functions are delegated to the SRA, established in January 2007

²⁵⁸ Section 27 of The Courts and Legal Services Act 1990 created the route for solicitors to qualify for a grant of higher rights of audience where they had sufficient experience and training. The Act removed from judges the right to decide who could appear before them

²⁵⁹ The BSB's functions were originally carried out by the Bar Council, the barristers' representative body, until 2006 when the Bar Council created the BSB

accountants. Each of these professionals has their own Approved Regulator.

5.136 Under the Legal Services Act 2007 only individuals and businesses authorised by an Approved Regulator or those exempt from the requirement to be authorised are entitled to provide reserved legal activities. The six reserved legal activities are:

- The exercise of a right of audience
- The conduct of litigation
- Reserved instrument activities
- Probate activities
- Notarial activities
- The administration of oaths

Conveyancers

5.137 Licensed conveyancers were introduced in England and Wales in 1987, under the Administration of Justice Act 1985. Under the Courts and Legal Services Act 1990, conveyancing rights were further extended to building societies and banks.

Direct Access to Barristers

5.138 Direct access to barristers in England and Wales is permitted. Licensed access takes two forms, under the Licensed Access Scheme and Direct Public Access.

5.139 The Licensed Access Scheme allows individuals or organisations with an identifiable area of expertise or experience to apply to the Bar Standards Board to be licensed to instruct barristers directly in certain areas of practice. Lists of licence holders on the BSB's website in September 2020 had more than 100 organisations including police forces, fire departments, banks and immigration advisors.²⁶⁰

5.140 Approved licence holders can instruct any member of the Bar for advice and, in some circumstances, representation on their own behalf or another's behalf in the specialist area. Barristers who undertake direct access have additional rules which apply above and beyond their general code of conduct and licence holders for direct licensed access are also bound by regulations.

5.141 The Direct Access (or Public Access) scheme allows members of the public to instruct an authorised barrister directly for legal advice and court representation. Most barristers who offer Direct Access do not offer to conduct litigation.²⁶¹

5.142 Public Access is governed by conduct rules and requires barristers to be trained to undertake such work. In addition, they must maintain a log of Public Access cases they have dealt with, including any issues or problems which have arisen. They must make this log available, on request, to the BSB for review and seek feedback from their Public Access clients on the service provided. In 2013, public access was widened to enable junior barristers of fewer than 3 years' practising experience to also undertake Public Access work if they complete the new Public Access training.²⁶² Not all barristers accept direct access work. The Bar

²⁶⁰ See: <https://www.barstandardsboard.org.uk/for-the-public/list-of-licences-for-instructing-barristers.html>

²⁶¹ See: <https://www.barcouncil.org.uk/bar-council-services/for-the-public/direct-access-portal.html>

²⁶² LSRA (2017) Certain Issues Relating to Barristers, page 21, par 3.3

Council maintains a register of barristers who are authorised as direct access barristers on its website, Direct Access Portal.²⁶³

Rights of Audience

- 5.143 Rights of audience before the higher courts were expanded in the Access to Justice Act 1999. It made it possible for other professional groups, apart from barristers and solicitors, to grant rights of audience to their members for particular purposes. This opened up higher courts advocacy to other professional groups with an interest in litigation, including Legal Executives, Patent Agents, Trademark Attorneys and Law Costs Draftsmen.

Business Structures

- 5.144 New business models in the legal services market were allowed in England and Wales by the Legal Services Act 2007. It introduced “licensed bodies” (also known as “Alternative Business Structures”) that were permitted to provide legal services and which could have up to 100% non-lawyer ownership and no restrictions on corporate form. ABSs cover a range of different types of business model, including multi-disciplinary practices (MDPs) in which lawyers and non-lawyers can work together to provide a mixture of legal and non-legal services. In addition, legal disciplinary practices (LDPs), permitted since March 2009, allow lawyers and non-lawyers to form partnerships and provide legal services, provided non-lawyers do not constitute more than 25% of the partnership. The Bar Standards Board currently allows barristers to be employed by LDPs but not to be managers in them.²⁶⁴

Modern Reforms and Debates on Legal Sector

- 5.145 The 1980s onwards saw a series of official reports, reviews and legal reforms in England and Wales focused on opening up the legal services market to greater competition and in particular encouraging greater competition between different types of lawyer.²⁶⁵ As a result of liberalisation measures, the line of division between barristers and solicitors in England and Wales has become less pronounced.
- 5.146 In 1976, the Royal Commission on Legal Services, the Benson Commission, was set up to examine the structure, organisation, training and regulation of the legal profession. In its 1979 report, the Commission endorsed the then existing model of legal professionalism. It ruled out the possibility of partnerships between barristers and rejected fusion of barristers and solicitors principally because it concluded that this would result in reduced quality of services to the public.²⁶⁶
- 5.147 The Commission stated: “We consider it likely that in a fused profession there would be an unacceptable reduction in the number and spread of the smaller firms of solicitors and an increase in the proportion of larger city firms. This would accentuate the present uneven distribution of solicitors and reduce the choice and availability of legal services. We are satisfied that in the future there will be a greater need for specialisation. Fusion would disperse the specialist service now provided by the Bar and we consider that this would operate against the public interest.”

²⁶³ See: <https://www.directaccessportal.co.uk/>

²⁶⁴ See: <http://www.barstandardsboard.rroom.net/standardsandguidance/LegalServicesAct/>

²⁶⁵ Webb, Julian (2013) p 544

²⁶⁶ Zander, Michael (1980)

- 5.148 Following the liberalisation of the conveyancing market in 1985, the Law Society began to push for extended rights of audience for its members.²⁶⁷ In 1986, in what has been characterised as an attempt to settle areas of dispute between the professional bodies for solicitors and barristers, they set up a Joint Committee on the Future of the Legal Profession, chaired by a lay person, Lady Marre. The Marre Committee's 1988 report, *A Time for Change*, failed to produce an agreed way forward. The government subsequently intervened directly, producing a series of Green and White Papers which led to the Courts and Legal Services Act 1990.

Official Reports and Fusion

- 5.149 A 2000 report carried out for the UK's Office of Fair Trading highlighted restrictions on competition in the legal profession.²⁶⁸ The report did not regard the continued use of the titles barristers and solicitors as detrimental to competition, provided other measures were taken to ease specific restrictions on barristers in relation to direct access to most clients and also restrictions on barristers conducting litigation work. It stated: *"With these reforms in place, and given the ability of barristers and solicitors to transfer more easily between the two roles (a form of supply-side substitution), competition between barristers, solicitors and other professionals/practitioners should be adequate."*²⁶⁹

- 5.150 The Director General of Fair Trading noted in a commentary on the commissioned report that that the dual structure of the legal profession may add unnecessarily to costs, but that this was not addressed in the report.

The Director General observed that: *"Government reforms have addressed this issue indirectly, by gradually opening the way for each branch of the profession to be authorised to do the work of the other. But there is some way to go. In my view, rather than pressing now for restructuring to end the dual structure of the legal profession, the best approach is to address its remaining adverse effects through further liberalisation of professional rules mentioned below."*²⁷⁰

Clementi Report 2004 introduces significant new regulatory regime

- 5.151 In 2003 Sir David Clementi was appointed to undertake a review of the legal profession and "consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector."
- 5.152 The December 2004 Clementi Report recommended the setting up a new legal services oversight regulator, reforms to complaints handling and the introduction of Alternative Business Structures within which lawyers could choose to operate.
- 5.153 In the report's foreword, Sir David Clementi observed that that the grain of Government legislation over the years had been in the direction of encouraging greater competition between different types of lawyer, adding that *"the cultures of the Bar Council and Law Society are markedly different; but whilst they may remain separate professional bodies they*

²⁶⁷ Kerridge, Roger and Davis, Gwynn (1999), page 810

²⁶⁸ Law and Economics Consulting Group (2000)

²⁶⁹ Ibid page 74 par 252

²⁷⁰ Office of Fair Trading (2001), page 16, par 49

cannot be regarded as separate professions.”²⁷¹

- 5.154 Turning to the question of whether there should be fusion between the two professional bodies themselves, Sir David continued:

“There would be advantage in such a move in areas such as education, and it would ease some of the existing regulatory and competition issues. But I do not make such a recommendation in this Review, because I regard issues of mergers between overlapping professional bodies, or for that matter de-mergers within existing professional bodies, as ones for the bodies themselves and their members. The regulatory framework needs to be able to accommodate either merger or de-merger. It needs to recognise too that, whilst the Bar Council and Law Society account for a significant part of the legal services industry, there are other bodies that the system needs to accommodate.”²⁷²

- 5.155 The author continued:

“If this Review favours greater competition between lawyers, it also seeks to permit competition between different types of economic units: for example, between sole practitioners, lawyers working in chambers, unlimited partnerships, limited liability partnerships and companies. There are advantages and disadvantages in each type of economic unit. I do not believe that the public and consumer interest are always better served by one type of economic unit as against another. The Review favours a regulatory framework which permits a high degree of choice: choice both for the consumer in where he goes for legal services, and for the lawyer in the type of economic unit he works for.”²⁷³

- 5.156 The Clementi Report laid the foundations for the Legal Services Act 2007 which implemented its key recommendations. The leading UK expert on regulation, Stephen Mayson, has described both the Clementi Report and the 2007 Act “a necessary wrapper for the process of market liberalisation that was long overdue in legal services”.²⁷⁴

Barristers' and Solicitors' Titles and Regulation

- 5.157 Reforms of recent decades, to provide direct access to barristers and allow solicitor advocates, have made the split profession in England and Wales more fluid. While there continues to be debate from time to time on the topic of fusion,²⁷⁵ there do not appear to be any further significant institutional moves on the horizon.²⁷⁶
- 5.158 The debate in recent years in England and Wales has instead focused on legal services regulation and the case for a shift to regulation on the basis of the activities undertaken by providers and not the titles they hold.
- 5.159 The Legal Services Board (LSB), the statutory oversight body for legal services regulators, has proposed that it should in future regulate reserved activities according to the level of risk to the public interest posed by each activity. Its 2016 proposal was that: “a single regulator

²⁷¹ Clementi, David (2004), page 4, par 6

²⁷² Ibid page 4, par 7

²⁷³ Ibid page 4, par 8

²⁷⁴ Mayson, Stephen (2019)

²⁷⁵ For example, in 1999, the then president of the Law Society, Robert Sayer, called for a merger, describing the Bar as an anachronism and calling for a united legal profession within five years.

²⁷⁶ May, Alex (2019)

*covering the whole sector would best deliver the independent and activity focused approach to regulation that we are proposing and would better serve a sector in which distinctions based on titles and types of provider are becoming increasingly blurred”.*²⁷⁷

- 5.160 In relation to professional titles, the LSB summed up its view thus:
“Regulation should not be based on professional title. However, the strong brand power of some protected titles (e.g. solicitor and barrister) means that transitional arrangements will be required during a further shift to activity-based regulation. Award of professional title should therefore continue to be the responsibility of the relevant regulator for the time being, where this is currently the case.”
- 5.161 A 2016 report by the Competition and Markets Authority study found that competition in the legal services sector was not working well for individual consumers and small businesses.²⁷⁸
- 5.162 The report stated that: *“Professional titles are an important factor in consumer decision-making and can be a useful way for consumers to identify high quality or the availability of regulatory protection. However, professional titles also have the potential to distort competition if they result in consumers avoiding unauthorised providers, regardless of their quality, in providing unreserved legal activities.”*
- 5.163 In relation to the role of title, the CMA said: *“We consider that, in a more competitive legal sector, with appropriately scoped risk-based regulation, title might cease to be subject to statutory regulation. Instead, relevant professions could be responsible for the title. However, in the short to medium term, it would be preferable that titles continue to remain subject to regulation. This is because [...] professional titles play an important role in the current market: the majority of legal services are provided by authorised legal providers, mainly solicitors.”*²⁷⁹
- 5.164 The proposed shift to activity-focused regulation was echoed in a 2020 report of an independent review of legal services regulation by academic expert professor Stephen Mayson.²⁸⁰ Rather than seeking to differentiate between professional titles, or between individuals and entities, professor Mayson proposed that an alternative focus for regulation could be a broader notion of a “provider” of legal services, defined in such a way that all forms of the provision of legal services could be captured.
- 5.165 While professor Mayson’s report did not directly consider the issue of fusion, it proposed to expand the “current narrow gateway of entry into the regulatory framework” based on a range of professional titles, including solicitor, barrister, chartered legal executive, licensed conveyancer, patent or trademark attorney, notary, chartered accountant, and so on. The narrow gateway, said the author, represents a barrier to entry for those who do not hold a professional title.

²⁷⁷ Legal Services Board (2016) page 8, par 17

²⁷⁸ Competition and Markets Authority (2016) page 4 par 2

²⁷⁹ Ibid page 216, par 6.87

²⁸⁰ Mayson, Stephen (2020). Mayson’s 340-page report, *Reforming Legal Services: Regulation Beyond the Echo Chambers*, follows a two-year review and has been submitted to the Lord Chancellor, although it was not commissioned by the government

- 5.166 Professor Mayson continued: *"I do not envisage that professional titles would or should disappear in the future, or that they should be merged (as in the recurrent issue of fusion of barristers and solicitors). Consequently, a professional title should continue to give some access to the regulated sector and assurance to consumers, as now. As such, the regulatory emphasis would change from titles being the only route for individual entry, to them being one of two routes – albeit perhaps still the principal basis in fact."*²⁸¹

Historical Overview

- 5.167 The origin of the divided profession in England and Wales is disputed, with various theories proposing that status, overwork or natural evolution motivated the division.²⁸²
- 5.168 The split structure has also been described as largely the result of historical accident, driven by class distinctions and economic turf protection, as barristers in the 19th century agreed to give up all conveyancing work and direct access to clients to solicitors, in return for monopoly rights of audience in higher courts as well as becoming senior judges.²⁸³ Others say the emergence of two branches of the legal profession in England may be regarded as a natural and essential step in the evolution of the practice of the law, based upon necessary principles of division of labour and professional ethic.²⁸⁴
- 5.169 The advocate's role – to speak on another's behalf in a formal adversarial context – has been dated back to ancient Rome and was transported to England by the Roman conquest. Serjeants-at-law, predecessors of barristers, date back to the eleventh century, and as early as 1216, courts limited rights of audience to regular advocates.²⁸⁵
- 5.170 Although the English legal profession was stratified from the outset, the clear split between barristers and solicitors has been traced to the peculiar history of the Inns – facilities created for housing, education and professional activities of legal professionals which began around 1292.²⁸⁶ Whether there was a negotiated settlement or simply an exercise of raw power, barristers' monopoly in the higher courts was eventually established.²⁸⁷ The relationship between the two branches became settled by the end of the 18th century when the forerunner of the Law Society of the United Kingdom was established.²⁸⁸
- 5.171 During the course of the 19th century, certain sub-professions were amalgamated into the two principal branches.²⁸⁹ By the 20th century, their monopolies were largely symbiotic; solicitors dealt with clients directly and instructed barristers for high-level advocacy, specialist drafting or advice.²⁹⁰

²⁸¹ Mayson, Stephen (2020), page 182

²⁸² Berger, Marilyn (1983) page 544

²⁸³ Maute, Judith (2003) page 1358

²⁸⁴ Bentham, R and Bennett, J (1960), page 285

²⁸⁵ Maute, Judith (2003) pages 1359-1360

²⁸⁶ Maute, Judith (2003) page 1366

²⁸⁷ Cohen, Harry (1987) page 12

²⁸⁸ With the decay of the Inns of Chancery which had been the Inns specially appropriated to attorneys, the Society of Gentlemen Practicers in the Courts of Law and Equity was founded in 1739. Source: Bentham, R and Bennett, J (1960) page 285

²⁸⁹ Apart from scriveners and notaries, there have in the past been attorneys, solicitors, proctors conveyancers, special pleaders, equity draughtsmen, advocates and barristers. Source Kerridge, Roger and Davis, Gwynn (1999) page 807

²⁹⁰ Boon, Andrew (2017) page 210

5.172 There was a real possibility during the middle years of the 19th century – the age of reform – that the ‘final fusion’ might come about. But it did not, and the two branches of the profession remained (and remain) separate.²⁹¹

²⁹¹ Kerridge, Roger and Davis, Gwynn (1999) page 807

PART 6: CONCLUSIONS AND RECOMMENDATION

The Consultation Process

- 6.1. As part of a statutory consultation process under section 34 of the Act – which was extended to take into account the impact of Covid-19 on the operational priorities of stakeholders – the Authority received 19 written submissions, ten from organisations and nine from private individuals, all of whom were barristers or solicitors (including one trainee solicitor). These are summarised in Part 4 of this report.
- 6.2. While the Authority is grateful for the level of engagement and the detail of the submissions received, it considers that the number of responses was modest given the significance of the matter under consideration and the potential implications of the unification of the profession, not only for the solicitors' and barristers' professions themselves, but also in the context of the statutory objectives of the Authority as set out in section 13(4) of the Act.
- 6.3. For any future consultation on this question that may be undertaken, the Authority considers that it would be important to receive the views of a wider range of stakeholders, including legal services users who have no direct professional interest in the question at hand.

Experiences of Other Jurisdictions

- 6.4. As required under the Act, this report contains details of arrangements in operation in other jurisdictions, including those in which the professions have been unified. A unified legal profession is generally regarded as one which is not divided between solicitors and barristers in terms of functions. A divided or split profession, as exists in Ireland, is one with two distinct branches of solicitors and barristers.
- 6.5. In countries with a unified profession there may be one single profession of “barrister and solicitor,” “advocate and solicitor” or simply “lawyer”. In such dual practise situations, lawyers may generally act as barristers or solicitors at their choice. Lawyers who chooses to undertake court or opinion work, and minimise their contact with clients, may be called a “barrister sole,” to distinguish them from a “barrister and solicitor”.
- 6.6. Legal systems in countries around the world generally belong to one of two main legal traditions – the common law and civil law systems. Ireland is a common law jurisdiction, a feature it shares with other English speaking countries including Australia, Canada, the United Kingdom, New Zealand as well as some non-English speaking countries such as India.
- 6.7. The selected jurisdictions examined in detail in Part 5 of this report are those which share Ireland's common law tradition, as this provides a more analogous starting position for the analysis. The jurisdictions are: Australia, Canada, New Zealand, Singapore and England and Wales. While the legal profession in England and Wales is a divided one, the report includes analysis of our closest common law jurisdiction as it has had a significant influence on Ireland's legal system and professional structures.

6.8. The examination conducted in this report illustrates that the structure of the legal profession in each jurisdiction has been influenced and shaped over centuries by a complex range of social, economic, cultural and political factors and conditions. The analysis allows the Authority to draw the following findings and conclusions:

- The development of divided or fused legal professions in parts of the common law world was often heavily determined by local factors and conditions. For example, in the case of Canada and New Zealand, a unified profession was initially made necessary by a shortage of lawyers to support a separate bar.
- The evidence from other common law jurisdictions indicates that a unified model can operate successfully in terms of regulation and delivery of legal services. However, this does not mean that these jurisdictions do not face issues in relation to structural efficiencies, costs of legal services and wider issues and concerns related to access to justice and the administration of justice.
- In countries with a unified professional structure, some lawyers still restrict their work to barrister-type work only. For example, in New Zealand a voluntary independent bar comprised of “barristers sole” currently exists alongside a formally fused profession.
- In some jurisdictions with formally divided professions, such as the Australian states of Queensland and New South Wales, joint admissions occur with practitioners admitted as “legal practitioners” or “lawyers”.
- In some jurisdictions where the profession is formally divided, there may be only minor distinctions between the two branches of the profession in terms of their functions. For example, in England and Wales a series of reforms over the years have led to a gradual erosion of distinctions between the work that barristers and solicitors may undertake. The introduction of solicitor advocates, alternative business structures, and wider direct access to barristers than exists in Ireland means that the legal profession in our neighbouring jurisdiction looks very like a fused profession. Yet the professional titles of solicitor and barrister remain and there is currently no indication of any impetus to change the status quo.

Context and Background of Report

- 6.9. The Authority’s consideration of the unification question under section 34 of the Act has been undertaken in the context of an evolving regulatory landscape with important business developments in the legal services sector envisaged in the Act awaiting implementation or the Authority’s further consideration. In addition, the Authority has made recommendations for reform which would impact on how barristers provide their services.
- 6.10. The Authority considers that it is important to reflect on these matters in this report, as they constitute *“matters that the Authority considers appropriate and necessary”* in its consideration of the question of whether the branches of the profession should be unified (section 34(4)(c)(i)(V)). The matters are summarised below and were discussed in further detail in Part 2.

- 6.11. This report also comes at a time of unprecedented uncertainty and challenges for the Irish legal profession and the legal services sector, as well as the domestic and global economy, with the dual threat from the Covid-19 crisis and Britain's pending departure from the European Union.

Covid-19 and the Legal Services Sector

- 6.12. The Covid-19 crisis has presented challenges for the administration of justice in the State. Since the onset of the pandemic in Ireland in early 2020, it has had a significant impact on the day-to-day operation of the courts and, by extension, court-related work of solicitors and barristers.
- 6.13. An initial period of total court lockdown in Spring 2020 resulted in cases being postponed, leading to delays and backlogs. In addition, the continued contraction in court business continues to have an impact on the incomes and livelihoods of solicitors and barristers, and in particular barristers at the independent referral bar whose practices are litigation focused.
- 6.14. The crisis has obliged the legal profession, as well as the judiciary and the courts system, to adapt swiftly to new ways of working that had not until now been contemplated.
- 6.15. This has resulted in an accelerated pace of reform in some key areas, including the increased use of remote hearings and video links to prisons for court business. The enhanced use of technology to facilitate remote working has the potential to bring about both savings and efficiencies in the courts system for legal practitioners as well as consumers.
- 6.16. Some of the new ways of working adopted by legal practitioners in response to the Covid-19 crisis may have lasting impacts. For example, increased reliance on documents due to the constraints of the virtual format has the potential to diminish courts' requirement for detailed oral argument and advocacy. In a new era of "living with Covid-19" many aspects of the how cases are conducted in our courts may not return to what they were before the crisis.
- 6.17. While it is unclear when the Covid-19 crisis will come to an end, it is a certainty that it will leave a lasting impact on the legal services sector and the professionals who work in it.

Potential Impact of Brexit

- 6.18. Brexit is also an additional significant factor which brings with it many uncertainties in terms of both potential opportunities and risks for Ireland's legal services sector. The fact that Ireland will soon be the only common law system in the EU and the only English speaking country in the economic and political bloc creates growth potential for Irish solicitors and barristers after Brexit.
- 6.19. In addition, uncertainty around the enforceability of UK court judgments in the EU after Brexit could make the Irish courts attractive to international litigants seeking the resolution of disputes. At a more fundamental level, the UK's departure from the EU potentially raises questions for the future of common law systems in a union where a largely homogenous system of civil law dominates.

- 6.20. There is already debate underway on what the UK's departure may mean for Ireland, whose legal system and professional structures have been heavily influenced by the English system.²⁹²

Authority's Recommendation on Unification Question

- 6.21. The Authority in this report has analysed the professional rules, laws and practices under which legal practitioners carry out their functions and deliver services to consumers on a day to day basis in Ireland.
- 6.22. It has also outlined key aspects of the current regulation of the legal services market in which solicitors and barristers operate and highlighted important changes introduced by the Act which are awaiting implementation. These changes, in addition to recommendations made by the Authority, will mean adjustments to the current practice model for solicitors and barristers in Ireland.
- 6.23. Based on the evidence it has gathered and its analysis of the unification issue, the Authority's recommendation to the Minister under section 34(4)(c)(i) of the Act is that the solicitors' profession and barristers' profession in the State should not be unified at this time.
- 6.24. Having reached the conclusion under section 34(4)(c)(i) that it is not in favour of unification, the Authority is not required to consider the provisions of section 34(4)(c)(ii) of the Act.
- 6.25. The Authority considers that it may be appropriate for it to give further detailed consideration to the unification issue at a future date. Accordingly, it undertakes to return to the matter no less than five years from the date of submission of this report to the Minister.
- 6.26. The Authority anticipates that the landscape for legal services provision will be sufficiently evolved in that period in order for it to reconsider the unification question, if it deems it appropriate, in a significantly revised context.
- 6.27. In arriving at its conclusion on the binary question posed in section 34(4)(c)(i) of the Act, the Authority has considered issues under this section as they relate to the following: the public interest; the need for competition in the provision of legal services in the State; the proper administration of justice; the interest of consumers of legal services including access by such consumers to experienced legal practitioners; other matters the Authority considers appropriate or necessary.
- 6.28. In addition, the objectives of the Act, especially as articulated in section 13(4) are to the forefront of the Authority's conclusions and recommendations. The Authority bases its recommendation on the binary question it was required to address under section 34(4)(c)(i) on the considerations as set out below.

²⁹² See: <https://www.irishtimes.com/news/crime-and-law/brexit-likely-to-tear-ireland-from-common-law-system-judge-1.3851147>

Timelines in the Act and Authority's Ongoing Work

- 6.29. The Authority considers that at this stage in its regulatory timeline it would be premature for it to recommend to the Minister that the solicitors' and barristers' professions be unified. The Authority was established on 1 October 2016. The context in which it is now considering the issue of unification is considerably different to that originally envisaged under the Act. There are several reasons for this:

1. Legal Partnerships Pending Introduction

- 6.30. Had the Act's scheme been followed, the Authority's consideration of the unification question four years into its existence would potentially have benefited from the experience of having legal partnerships operational for a considerable period in advance. Under the Act, the Authority was required to make its initial report to the Minister on the regulation of legal partnerships within six months of its establishment, with their introduction thereafter.
- 6.31. Legal partnerships are a new legal practice model introduced by the Act. A legal partnership is a partnership between two or more legal practitioners, at least one of whom is a practising barrister, for the purpose of providing legal services.
- 6.32. Legal partnerships will, for the first time, allow a barrister to enter into a business partnership with another legal practitioner, who can be either a barrister or a solicitor. This is a significant change from the current situation whereby only solicitors may form general and limited partnerships with each other to deliver legal services and barristers must be sole traders (or employees).
- 6.33. Relaxing the rules on barristers forming partnerships with other barristers and/or solicitors will offer more flexibility to legal practitioners, allowing them to work together and provide different and more efficient and competitively priced legal services to consumers. Legal partnerships, by allowing barristers and solicitors to work together within one business entity, mean that consumers can visit a solicitor and barrister operating in the same premises as a "one-stop shop" for the provision of legal services.
- 6.34. For a variety of reasons as set out in this report, legal partnerships await implementation by means of an amendment to the Act. The Authority therefore considers that it is appropriate for it to await the introduction of legal partnerships before considering structural changes to the legal profession.
- 6.35. The Authority must ensure that the introduction of the legal framework for this new form of practice takes place in an orderly fashion and that legal practitioners who wish to form such partnerships are given as much information about regulatory requirements as is required, and at as early a stage as possible.
- 6.36. Once introduced, the Authority will have an ongoing role in relation to the regulation of legal partnerships under the Act, with the establishment and maintenance of a register of legal partnerships. The take up of legal partnerships by legal practitioners will provide guidance to the Authority in relation to the appetite and commercial viability of this new practice model.

- 6.37. The Authority intends to monitor and assess the impact of the introduction of legal partnerships in terms of efficiencies, costs, competition, and consumer interests.

2. Authority's Further Consideration of Multi-Disciplinary Practices

- 6.38. The fact that legal partnerships have not come into operation has had a knock-on effect for the Authority's further consideration of another legal business model contemplated by the Act, namely multi-disciplinary partnerships or MDPs.
- 6.39. MDPs are partnerships of two or more people, including at least one solicitor/barrister. Such partnerships, if introduced, would offer legal and also non-legal services
- 6.40. While the Act contains some suggested regulatory arrangements for the introduction of MDPs in Ireland, it does not pre-empt a decision of the Authority as to whether this new form of business structure should be introduced at all.
- 6.41. The Authority has to date not recommended the introduction of MDPs. However, it has committed to giving further consideration to their introduction. It considers that the introduction first of legal partnerships should assist it in further considering the issue of MDPs.

3. Authority's Previous Recommendations on Barristers' Work

- 6.42. In a September 2017 statutory report to the Minister, the Authority recommended allowing enhanced direct client access to barristers. While commenting on the need for further direct consultation, the report recommended that direct access to barristers be made available to organisational clients in certain circumstances in contentious matters. The Authority's recommendation was that direct access in contentious matters should not be permitted in matters before the courts at any level.
- 6.43. Currently, direct client access to barristers is prohibited in contentious matters and is allowed for non-contentious matters in limited circumstances. In making its recommendation, the Authority was cognisant of the fact that direct access in contentious matters would be a new departure for the barristers' profession.
- 6.44. In the same report, the Authority said it would consider the issue of barristers holding client moneys as part of a legal partnerships or multi-disciplinary practice as part of further consultations and considerations of those issues. Currently, barristers are not permitted to hold clients' moneys, although solicitors may do so.
- 6.45. The implementation of the Authority's recommendation on direct access would require an amendment to the Act and the issuing of regulations by the Authority.
- 6.46. From a sequencing point of view therefore, the Authority considers that it would be appropriate for it to oversee the introduction of its recommended scheme of expanded direct access to barristers first before contemplating further changes to the work and

functions of solicitors and barristers.

- 6.47. Taken together these two reforms – that is the creation of legal partnerships and the facilitation of greater direct access to barristers – will mean increased consumer access to barristers. In addition, legal partnerships can add to both competition and choice in the market for legal services.

Interconnected and Cross Cutting Issues

- 6.48. The Authority has previously stated that the three matters outlined above – legal partnerships, multi-disciplinary partnerships and issues relating to barristers – are interlocking to a considerable extent and require to be viewed and considered as a whole. The Authority considers that there is also considerable intersection between these three issues and its consideration of the question of the unification of the solicitors' and barristers' professions.
- 6.49. The introduction of new business models for legal practitioners would mean that those barristers and solicitors who choose to work in these structures would be delivering legal services in new ways and under new rules. For example, barristers operating in legal partnerships with solicitors could receive instructions directly from solicitors with these partnerships. The existing restrictions on direct client access to barristers would therefore be less meaningful to barristers working in legal partnerships than they would be to barristers operating outside such structures at the referral bar.
- 6.50. Issues of sequencing of forthcoming changes must also be considered. For example, careful consideration must be given to how the introduction of legal partnerships would sit alongside the Authority's recommendation for direct access to barristers in contentious matters in certain circumstances, as well as the commencement of section 101 of the Act which extends the provision of direct access to barristers for legal advice to all members of the public in non-contentious matters.
- 6.51. Expanded direct access to barristers in both contentious and non-contentious matters may potentially diminish the attractiveness of legal partnerships for barristers. This is because, as mentioned above, one of the main benefits of being in legal partnerships is that barristers could be briefed directly by solicitors with the partnership.
- 6.52. Overall, the Authority considers that decisions on new business structures used in the legal sector cannot be taken in isolation. They need to take account of the legal system in which they might be used, the environment for regulation on the legal profession and the need to uphold the wider public interest. Changes in all or any of these areas will take some time to be introduced and to bed down and thereafter must be analysed in terms of their impact and success or otherwise, including unintended consequences and unaddressed risks for users of legal services, competition and the administration of justice.

4. Absence of Compelling Evidence to Support Unification

- 6.53. Regardless of the exact form it may take, the introduction of a formally unified legal profession in Ireland could reasonably be expected to have far-reaching consequences not only for legal practitioners themselves, but also for consumers of legal services, the

operation of the courts and the wider administration of justice.

- 6.54. In the Authority's opinion, having considered the views of respondents to this consultation, and having analysed arrangements in other jurisdictions, there is a lack of compelling evidence to support a recommendation that the profession be unified.
- 6.55. This is not to say that there is not an ongoing case for the Authority to continue to examine areas of legal services provision where structural improvements and efficiencies are warranted. This work is fundamental to the fulfilment of its statutory objectives under the Act, including the protection and promotion of the public interest, the promotion of competition in the provision of legal services and the encouragement of an independent strong and effective legal profession.

5. Other Relevant Provisions of the Act Await Enactment or Amendment

- 6.56. The Act contains a number of provisions which have the potential to substantially alter the rules of the profession by lifting existing restrictions on barristers, allowing them to operate in new business structures, and further facilitating movement between the professions of barrister and solicitor.
- Section 101 extends the provision of direct access to barristers for legal advice to all members of the public in non-contentious matters. Currently, barristers may only receive instructions from people other than solicitors in circumscribed circumstances under a scheme operated by the Bar of Ireland which only applies to non-contentious matters. This section has not been commenced.
 - Section 217 permits the Authority to make regulations to exempt barristers and solicitors seeking to transfer to the other branch of the profession from an unnecessary admission requirement. Before making regulations, the section requires the Authority to consult with the Bar Council, the Law Society and the King's Inns. This section has not been commenced.
 - Section 212 of the Act was commenced on 7 October 2019. It provides that a barrister whose name is entered on the Roll of Practising Barristers may take up employment, and as part of that employment provide legal services for his or her employer, including by appearing on behalf of that employer in a court, tribunal or forum for arbitration. Previously, employed barristers were not permitted to represent their employers, or any other client.
 - In its March 2019 Report to the Dáil and the Seanad under section 6 of the Legal Services Regulation Act 2015, the Authority noted that section 212 is silent on some key issues that require clarification.²⁹³ These would include whether a solicitor is required to brief a barrister who is representing their employer in a court, tribunal or forum for arbitration and whether a barrister is permitted to provide legal services to his or her employer where their employer acts in representation of third parties. The Authority's report recommended that section 212 be amended to provide clarity as to how it will operate in practice. The Authority is of the view that

²⁹³ LSRA (March 2019) Review of the Operation of the Legal Services Regulation Act 2015

such amendments are necessary for the effective implementation of the Act. The Authority also notes that there is currently little information available as to the level of utilisation by employed barristers of the new entitlements under section 212.

- Separately, the Authority notes that section 34(1)(c) of the Act requires it to report to the Minister for Justice and Equality on the creation of a new profession of conveyancer. Under section 34(5)(a) this report shall be provided to the Minister within a period specified in a written request by the Minister to the Authority requesting the report. The Minister has not made such a request to date.

Concluding Comments

- 6.57. This is the fifth substantive issue related to the legal services sector upon which the Authority has reported to the Minister in the four years since its establishment. As is this case with this report, all previous reports to the Minister involved detailed consultations with stakeholders in consideration of complex issues as prescribed in the Act. In order to fulfil its statutory reporting commitments, the Authority's executive has in this time commissioned three independent reports and undertaken extensive rounds of consultations with stakeholders.
- 6.58. As already indicated, the Authority considers that it may be appropriate for it to give further detailed consideration to the unification issue at a future date. Accordingly, it undertakes to return to the matter no less than five years from the date of submission of this report to the Minister.

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ANNEXES

Annex 1 - Consultation Notice



Invitation by the Legal Services Regulatory Authority for Submission

The Legal Services Regulatory Authority (LSRA) invites submissions as part of a public consultation prior to a report to the Minister for Justice and Equality in relation to unification of the solicitors' profession and the barristers' profession.

The LSRA was established on 1 October 2016 and is responsible for the regulation of the legal profession and ensuring that standards in legal services are maintained and improved.

The Authority is conducting a public consultation under section 34(1)(b) of the Legal Services Regulation Act 2015 as part of its preparation of a report to the Minister in relation to the unification of the solicitors' profession and barristers' profession.

The consultation is seeking views from a wide range of organisations and individuals in the legal services arena, including service providers and consumers, as well as academics, law firms, statutory agencies, representative bodies, non-governmental organisations and providers of legal training and education.

The LSRA is interested to hear respondents' 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.

The LSRA is also interested in 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.

Responses which provide insight into the experience of arrangements in operation in other relevant jurisdictions would also be useful.

In considering any evidence presented, the LSRA will be guided by the regulatory objectives set down in section 13 of the 2015 Act, which are:

- (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.

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.

In addition, the Authority may, if appropriate, make recommendations to the Minister as to:

- 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.

If the recommendation by the Authority is in favour of unification of the solicitors' profession and the barristers' profession, section 34(4) further states that the Authority shall also make recommendations as to –

- (i) how the professions can be unified, and
- (ii) the reforms or amendments, whether administrative, legislative, or to existing professional codes, that are required to facilitate such unification, and
- (iii) any other matters that the Authority considers appropriate or necessary.

Following the public consultation and other evidence gathering activities, the LSRA will draw up a report to be submitted to the Minister for Justice and Equality by 30 September 2020.

Scope of the Consultation

The Authority now invites written submissions from members of the legal professions, academics, practitioners, experts, consumers of legal services, members of the public and any other interested party in relation to unification of the solicitors' and barristers' professions.

It would be helpful for respondents to consider the scope of the recommendations the LSRA is required to cover in its report (under section 34(4)(c)) and to comment on any of these which they consider relevant. It would be helpful for any views expressed, to be substantiated and if necessary, supported with any available evidence.

Respondents are asked to indicate on whose behalf they are responding, for example as a member of the public, a public representative, an individual or a firm within the solicitor or barrister profession, a client or a body representing collective interests etc.

Members of the public or other interested parties wishing to contribute should send a written submission as soon as possible but in any event to be received no later than 12 May 2020.

The Authority may contact respondents to explore any issues raised in responses in more depth and it will also be gathering evidence to use in its report from a variety of other sources.

Submissions may be sent:

- By e-mail to publicconsultations@lsra.ie or
- By post to
Section 34 Consultation
Legal Services Regulatory Authority
P.O. Box 12906
Dublin 2

Freedom of Information

Attention is drawn to the fact that information provided to the Authority may be disclosed in response to a request under the Freedom of Information Act, 2014. Therefore, should it be considered that any information provided is commercially sensitive, please identify same, and specify the reason for its sensitivity. The Authority will consult with interested parties making submissions regarding information identified by them as sensitive before making a decision on any Freedom of Information request. Any personal information, which you volunteer to the Authority, will be treated with the highest standards of security and confidentiality and in accordance with the Data Protection Acts, 1998 and 2003 and the General Data Protection Regulation (GDPR) when commenced.

Publication of Submissions

The Authority intends where appropriate to publish any submissions received by it on its website and otherwise. Please note that a decision on any such publication may occur without prior consultation with respondents to this consultation notice. It is in the interest of respondents to highlight, in their submissions, any commercially sensitive or confidential information, which they would not wish to be disclosed.

Legal Services Regulatory Authority

13 February 2020

Annex 2 - List of Respondents

Association of Chartered Certified Accountants
Association of Judges in Ireland
William Aylmer solicitor
Bar of Ireland
James Dennison solicitor
Department of Education and Skills
Dublin City Council Law Department
DCU School of Law and Government
Dublin Solicitors' Bar Association
Mark Elliot trainee solicitor
Enterprise Ireland
King's Inns
Law Society of Ireland
Danny Morrissey solicitor
Liam Nolan BL
Andrew McKeown BL
Hazel Ann Smyth BL
Norman Spicer solicitor
Kieron Wood BL



An tÚdarás Rialála
Seirbhísí Dlí
Legal Services
Regulatory Authority



www.lsra.ie



lsra-inbox@lsra.ie