

LSRA S.34 Consultation (supplemental) on education and training

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- By e-mail to S34Consultation@lsra.ie • Date - 30 August 2019 – (Deadline – 31 August 2019)

The Authority will consult with interested parties making submissions-

The Report included **14 proposals** set out by the Hook Tangaza Review team. The Review team proposed:

Proposal 1. *A clear definition of the competencies and standards required to practise as either a solicitor or a barrister should be developed for both solicitors and barristers.*

Response: The LSRA draft code of practice for barristers, appears to propose to allow two regulators to operate simultaneously. (See: reference to, “and the Professional Code of the Honorable Society of Kings’ Inns (which is applicable to all Qualified Barristers), and “This Code is not intended to be an exhaustive statement of the rules..”). This creates confusion, as to what constitutes “a conflict” and this goes against **OECD guidelines** on good regulation, which advises as a **number one principle**, that **“Role clarity is essential for a regulator to understand and fulfil its role effectively.”**¹

Does any dual regulatory role, as seemingly proposed, apply only until Part 6 is commenced, or does it extend beyond that point? It would be helpful to have this issue clarified by the Authority.

A dual-regulatory system would pose some problems: When is the LSRA to introduce fees for barristers to enter the Roll of Barristers? And how much will those fees be? If there are to be two regulators, will the Fee subscription renewal date overlap with the Law Library/King’s Inns? If not, how will the inevitable problems be resolved? For example, if a new barrister pays fees of €3450 to the Law Library in September 2019, and then the LSRA introduces a fee of, say €900, on 1 January 2020, what will happen to the barrister, if she cannot the afford the extra €900?

The Authority would need to avoid levying new fees, ‘mid-term’ of the second private regulator. Alternatively, the Authority would need to introduce a regulation, allowing a barrister to retire from the profession, and to seek a refund of fees pro-rata from the Law Library. When a barrister is commencing on a business, a barrister needs to estimate the costs involved, with some predictability. Alternatively, the LSRA Authority, should offer a pro-rata refund of Law Library fees to any barrister who feels that they do not wish to continue in practice, with such a dual regulatory fee requirement.

I understand that the Authority is seeking new funding methods as mentioned in the Section 6 report. Avoiding any duplication of regulation is vital to keep costs down and to provide an opportunity for newly qualified barristers to survive during the initial years of practice. It would be helpful if the fees levied took account of the income earned by barristers and the number of years in practice.

¹ <https://www.oecd.org/gov/regulatory-policy/governance-regulators.htm>

I disagree with the proposal to amend legislation as proposed in the Section 6 report regarding Recommendation 32²- It would be sufficient that that the King's Inn be notified that a barrister has been removed from the LSRA Roll. It can then apply its own rules to remove persons.

The LSRA should keep its own directory of qualified barristers (separate from any other roll) and require the King's Inns (or any new qualifying institution) to forward a list of all qualified barristers each year. This system is operated by the Irish Medical Council regarding doctors.³ This approach would provide a more convenient platform for any future potential reforms which are being considered, such as the new architecture of governance recommended in the HT review.

Consideration should be given by the Authority, as to whether requiring EU lawyers, to potentially register with both the Law Library/King's Inns/Law Society and the LSRA Authority, complies with the EU Lawyers' Directive [98/5/EC]; Article 3 states:

"1. A lawyer who wishes to practise in a Member State other than that in which he obtained his professional qualification shall register with **the competent authority** in that State."

The Directive does not demand registration with **two authorities**, and also, the EU principle of effectiveness needs to be considered, when imposing an unnecessary administrative burden.

Devil-ship/ Pupillage [*standards required to practise*]:

The system needs to be put on a statutory footing⁴, if deemed necessary, and the Law Library should not have exclusivity in providing pupillage, via its members, as the LSRA clearly envisages that qualified barristers can operate outside of the Law Library.

Fees are prohibitively expensive for many pupils - and are currently about €3450.00 .

Only pre-approved barristers on the list can be masters. And the list is locked-down in June or so, meaning, that one cannot engage a barrister to become a listed master, in September, for example. The requirement to only pupil under barristers who are primarily based in Dublin is a hugely problematic restriction which makes it more prohibitively expensive for non-Dublin based pupils.

Further, there is no obligation on masters to take on pupils. This means that some barristers may not be able to obtain a master and there is no other available system for on the job training.

In the USA, for example, many internship programs are made available to law students (in summer) and graduates, and both are allowed to be hired by state agencies and private companies. Prosecutors allow beginners to prosecute minor offences, and to progress with experience. The restriction on teeth-cutting opportunities, is exacerbated by the government's refusal to commence the inhouse barrister section of the LSRA Act. The blockage on Chamber systems has a similar effect.

² Recommendation 32: It is recommended that a new section 85(10) be inserted with the following suggested wording: 8 | Page "Where the Court makes an order under subsection 7(e) directing the Authority to strike the name of a person who is a barrister off the roll of practising barristers, that person shall thereupon stand disbarred and be removed from the Register of Members maintained by the Honorable Society of King's Inns."

³ <https://www.medicalcouncil.ie/Registration-Applications/First-Time-Applicants/Internship-Registration.html> - "On conferring day the Medical Council will receive from your university a list of those who have been conferred with medical degrees."

⁴ For example, under the Medical Council Act 2007, S.7(4); "The Council shall,... promote efficiencies in the delivery of specialist training and intern training through the development of standard practices.....".

A system similar to that currently applied to medical interns could operate: The DPP could insist that state prosecutors allow a group of interns to tag along with a prosecution team. Similarly, state entities, subject to civil suits, or judicial review, could insist that the assigned lawyers allow pupil barristers to be part of an extended team. Barristers operating as Judicial assistants could be given some credit towards pupillage for their assistant practice. **Pupillage/training is currently a major bottleneck.** The long summer closure of many courts adversely affects the opportunities for the training of lawyers and pushes up the cost of the legal system (wasted resources) and restricts the ability of lawyers to earn a living. At least, state bodies should be able to employ lawyer-interns over the summer and should be encouraged to do so, even if no pay is offered (though pay is preferable).

A more flexible on-the-job training system is required: A year-long training program could be broken up into various **modules**, such as: (1) group attendance at various trials (2) training with government departments, such as the AG's office, the DPP's office or the Legal Aid board, (3) in-house training with local prosecutors, (4) local Circuit Court experience with barristers, with perhaps fewer than 7-years-experience, (5) Incorporation with defence teams of government agencies defending Judicial Review, or the state's claims agency. (6) acting as a Judicial assistant to Judges of both the Circuit Court and the higher courts. (7) Acting as volunteers for free legal advice centres (Negligence liability should be reduced [by statute] to a Gross liability standard [akin to occupier's liability], so that proper advice can be offered and not just information). (8) Attendance at European courts such as the CJEU and the ECHR court or UN committees. (9) Attendance at administrative tribunals such as An Board Pleanala hearings, Refugee tribunals, the Labour court or RTB hearings. (10) A month-long internship for Barristers in a Solicitor's practice to become familiar with various practices, such as the drafting of a witness summons, in anticipation of future possible unification or direct access. (Trainee Solicitors could similarly shadow barristers for a month.). In regard to certain modules, consideration could be given to recognising the practical legal education modules currently run by some universities as part of law degree programs, (and which would help encourage same).

Additionally, both the in-house barrister system and Chamber system is needed. Senior Counsels could also be allowed to take on pupils.

2. Roles and responsibilities of stakeholders in the legal education and training system should be reformed by the Authority establishing a Legal Practitioner Education and Training (LPET) Committee, which would be responsible for setting the statement of competence and defining standards, which legal practitioners would achieve on qualification. The LPET Committee would require existing provider of legal education to demonstrate how they met these standards and to enable new providers to explain how they would seek to meet them.

Response: I agree, subject to qualifications. Costs should be saved/reduced, by removing Judges from being Benchers of the Kings Inns - currently, the Court Service spends over €60,000 on the membership fees of the judges. As more judges are appointed, (as is proposed to the Court of Appeal), this requires more and more fees to be paid to the King's Inns. Apparently, there is a rule, that for every new Judicial Bencher appointed, a non-judicial bencher must be appointed. Presumably, there is some expense associated with having more benchers, which must be passed on to barristers and consumers.

Ireland is a small country, so per capita costs of any regulation system is much higher, than in the UK, for example. Some of this function, such as the barrister at law degree program, and the exam process, could be housed within the current HEA authority, thus avoiding a duplication of regulation.

3. An accreditation and validation framework should be developed for legal education and training.

- YES.

4. Programmes offered by existing and new providers to be accredited against the competency framework.

- YES.

5. Assessment methodologies should ensure adherence to standards.

YES. International third level education standards of oversight of the exam processes should be required, whereby there is an appeal system, involving persons from other third level bodies, which can overturn the academic judgement of internal examiners. A system of Judicial Review should be available to review any procedural issues. This requires a statute to overturn the precedent set by the case of Quinn v Kings Inns 2004. All exam procedures should be published online, in advance of any fees being paid towards an education program.

6. The LPET Committee should monitor the quality of legal education and training. Legal education and training providers should be required to maintain ongoing quality assurance processes.

In regard to a quality assurance process for trainers, I'm not convinced that there is a need for such regulation at this point, as trainers are highly skilled. The focus needs to be on the subjects/training.

Room for improvement:

Currently, many barristers drop out of the profession, due to inadequate training, and the inability to 'cut their teeth,' so to speak, and the inability to market their skills to the solicitor profession. As barristers are not allowed to access clients directly, training should be provided as to how to best market one's skills to solicitors. There is a huge waste of state and private resources currently, by the huge drop-out rate. In one year, I was advised, that 900 graduated from the BL degree, but that only 50 or so of those still practice today.

The current education/training/ establishment pathway is not workable for perhaps 80% of barrister graduates. I'm not convinced, that any solution, other than direct access, or unification can remedy this problem, but otherwise, some mitigation can be achieved if there is governmental political will.

Specific shortfalls in training/education:

1). Constitutional litigation –

I observe, that I did not receive any specific training in drafting constitutional challenges to legislation, or declarations of violations of Human Rights under the 2003 Act. These are two areas that barristers need to be specifically skilled in, to further citizens' rights. Various blockages to access to court documents, held as a constitutional requirement in a number of open constitutional democracies, present another barrier to self-education for lawyers (and public) in regard to pursuing litigation against government and others. How to proceed with combined challenges, such as Judicial Review and constitutional declarations of invalidity, demands specific training.

2). Education relating to Access to Justice –

Access to justice, and its various barriers, is a totally neglected area of study in both academia and professional legal education. The whole operation of the legal costs system is not covered in most universities and many mis-understandings prevail among lawyers. The constitutional and human rights requirements for legal aid, or court fee waivers, the requirement for affordable access to justice to secure the rule of law, get minimal attention. The subject of comparative legal analysis of alternative legal costs systems and litigation funding is near totally ignored, yet, a broad understanding of these issues is critical to moving towards a society where more than the wealthiest can hope to have access to justice. Many academics have little understanding of how different legal costs systems evolved, in various countries, and their respective effects on access to justice. Human rights, environmental justice, and the intertwined issue of access to justice should rank alongside constitutional law as core subjects of legal education in the 21st century.

7. Admission to programmes of legal practitioner education should be based on achievement of specified competencies at defined standards.

- Yes.

8. The LPET Committee should develop a common set of competencies and standards for admission to the current Professional Practice Course and barrister-at-law degree programmes.

As recommended by the CCPC in its S.34 submission, the education of persons to practice law should be opened up to other providers. The entrance exam process/criteria should take account of the qualifications of persons who have law degrees and the subjects undertaken.

9. Non-law graduates to have alternative means to enter the profession other than through FE-1.

YES. Creating access to legal education within universities, would make access much cheaper and thus affordable. The requirement to move to Dublin is onerous and discriminatory.

10. Additional routes to qualification will encourage diversity and increase access.

The main problem with diversity, is the hurdles created by a split profession: Becoming qualified is less the problem, becoming established post qualification, is the issue.

11. Admission responsibilities of professional bodies to be separated from delivery of education programmes.

Yes, separation is recommended. I agree with the comments of QQI, in page 131 of the HT report. Judges can make recommendations to various bodies, or collectively via the new Judicial Council, without directly (*ex-officio*) being appointed to the Council of the King's Inns. A more robust separation of process would enhance the independence of the judiciary, if and when, rules or regulations, or exam processes need to be brought before the courts, to assess their legality or constitutionality.

12. Transfer arrangements between the professions to be reviewed once a new competency framework is in place.

Merger is required ASAP. This dispenses with transfers. Alternatively, the 3-year rule should be removed, and be resolved by a training module. Any barriers, if present, to advertising that a solicitor was formerly a barrister, or visa-versa, should be removed.

13. The process for foreign (Non-EU) transfers and agreements to be assessed against new competency framework, once in place. -YES.

14. CPD programmes to be linked to competence frameworks and standards. -YES. It would be helpful to clarify how it is envisioned that barristers, who wish to practice outside of the Law Library, can meet any CPD requirements if there is no proposal for the LSRA to accredit CPD providers.