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Submission from an individual recently qualified barrister

• By e-mail to: publicconsultations@lsra.ie • Date: 2 Feb 2020— (Deadline – 3 February 2020)

In my 30th August 2019 submission regarding the S.34 supplemental consultation on education and training, I outlined the problems with devil-ship/pupillage for newly "qualified" barristers.

This system can pose an insurmountable barrier for "admission" into the barrister Profession and needs urgent reform.

Here is a copy of part of my earlier Submission (Purple font):

> ## Devil-ship/ Pupillage [*standards required to practise*]:
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> The system needs to be put on a statutory footing[1], 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.
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> Fees are prohibitively expensive for many pupils - and are currently about €3450.00 .
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> 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.
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> 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.
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> 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.
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> 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

[1] 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…..".

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.

Summary of problems:

1) The King's Inns is not a statutory body and its rules/laws are difficult if not impossible to Judicially review as: (a) a court previously held that the King's Inns entrance exam was not judicially reviewable AND (b) due to the involvement of Judges in the running of the King's Inns, the impartiality of any Judicial review is undermined, as judges may be judges in their own cause.
2) The King's Inns rules currently only allow the Bar of Ireland to nominate Masters – this limits the number of potential masters unnecessarily, even though the LSRA Act clearly envisages that Barristers should be allowed to operate outside of the Law Library.
3) Masters can only commence a pupillage on a yearly cycle - this is an unnecessary barrier to entry as pupils should be able to commence at any time of the year.
4) Fees payable are very high, from 3450 to 4450 euro per year, but pupils are not allowed to earn money as barristers.
5) The finances of the King's Inns and the Bar of Ireland are intertwined (See: the Rules of the King's Inns), meaning that there are financial conflicts of interest in the King's Inns deciding which entities should be licenced to certify barristers to act as Masters.
6) Masters have no obligation to take on pupils, and some potential pupils may be unpopular, for whatever reasons, and may be unfairly excluded from practice, without any appeal system, or without the ability to recruit a master from outside of the Law Library, who may be both qualified and willing to offer a pupillage.
7) Up till 2014, EU procurement law allowed a blanket exemption for legal services. The 2014 EU Procurement Directive carves out specific legal service contracts which require procurement, but the exemptions are so vague and extensive, that most legal service contracts are exempt from public procurement, in practice. This system is totally against the public interest and generates a huge level of obsequiousness amongst legal practitioners and stifles advocacy for reform within the political system and the civil service. Allowing civil

servants to allocate legal service contracts, without independent oversight, or public tendering (generally) is currently technically "legal", but, is not consistent with the goal of an independent legal profession which robustly challenges governmental power, and, is not compatible with the concept of **equality of opportunity,** which is viewed by most as a tenet of democracy. The current system is more akin to the conduct of autocratic dictatorships.

8) The vested interests within the political class benefit from a legal system which lacks accountability overall. Restrictions/hurdles on "entry" into the professions, and post entry, push up legal costs, and combined with an oppressive legal-costs regime, which does not provide adequate costs protection to those challenging governmental power, allows government to intimidate potential litigants with legal costs to deter accountability via the courts. Most politicians appear to see themselves as latter-day-Maharajas entitled to undemocratic privileges above their electorate. Most people are aware of this but are afraid to call out this as an undemocratic breach of separation of powers. Hence, very few barristers/law students are willing to partake in public consultations on the issue of reform of the current unviable legal system, as upsetting the vested-interests risks reducing the prospects of future work. Thus, even though there are some within the system who understand the need for reform, a form of 'locked-in syndrome' prevents them from publicly challenging the political stalemate. Simply, "the Emperor has no clothes".
9) Many insurance underwriters are pulling out of the Irish market, perhaps due to their observance of the failure of most politicians to support legal reform and the perceived threat to the rule of law that this represents. It may take an exacerbation of the insurance crisis to create the pressure wave needed to overcome the lethargy of the politicians.

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Conflicts of Interest need to be curtailed:

Entry into the practice of the barrister profession should not be exclusively controlled by current practitioners, especially when that process is not on a statutory footing.

Structural problems need to be addressed: Tinkering with a few minor reforms, without recognising the overall anti-democratic structure of the system will likely only allow the unviable system to continue for longer. Judges should not be promoted by politicians as this undermines the independence of judges when those judges are called on to adjudicate important constitutional challenges against unconstitutional laws passed by politicians. As judges act as appeal judges in legal costs adjudications, and rules relating to legal costs, the linkage or the demand for linkage of judges pay to the pay of senior counsels, via a benchmarking system, undermines judges' impartiality, as the costs awarded, or decisions made, significantly affect the salaries of Senior Counsels. The impartiality of decisions relating to how many lawyers should be awarded costs, such as whether two Senior counsels should be sanctioned, is compromised by a system where judges salaries are partially set in relation to Senior Counsels salaries. [It would be better if judged salaries were set as a multiple of the average industrial wage. Also, it would be better if judges were appointed for single term of 12 years, with no right of promotion, once appointed.] Similarly, judges should preferably not act as effective legislators, on Rules Committees, as this undermines separation of powers, if persons seek to challenge the constitutionality of such rules. Also, judges may be reluctant to recommend rule changes, if they believe that their potential future promotors do not approve,

despite such changes being in the public interest. Ideally, all rule-making bodies need to be subject to democratic accountability, independent JR and public participation.

Allowing solicitors to act as sole advocates in the higher courts, illustrates some of the duplicity of politicians. The "permission" seeks to further the notion that solicitors are treated equally and have an equal chance of being promoted to a judgeship. In reality, many solicitors quietly advise clients, that they fear that some judges might "frown upon" the idea of a solicitor trotting into the higher courts, in defiance of the expected formation of at least one Senior counsel, one junior and one solicitor. The imagined risk of being "frowned upon" is viewed as too great, as demonstrated by how few solicitors act as sole advocates despite often being better skilled than their barrister advocates. Everyone knows that if solicitors advocating in the higher courts became the norm, the continuance of the split profession and the privileges attaching to its hierarchical structure would be undermined.

The current legal system is evolved from the undemocratic British legal system originated from the time of the Magna Carta [1215], which was essentially a carve-up of power between two elites, the King and the Barons, with few rights being granted other than to land-owning "freemen". The legal system allowed a chosen elite to become barristers and mainly only the wealthy had access to the civil courts both as litigants and as lawyers. The current Irish legal system has only slightly evolved from its feudal heritage, with little other than tokenistic concessions to inclusiveness. The structure of establishment in the barrister profession is elitist, allowing few but those of wealthy family backgrounds to survive the thinning-out process of early starvation years, where barristers have to fork out fees, with little prospect of earning a livelihood, unless enjoying the "right connections". The dual handicaps of preventing direct access, and not allowing in-house barristers to practice, assists the gentrification of the profession, by amplifying the role of connections. It seems that most politicians believe, that reform in the public interest may not be so advantageous to the current privileged group, which they seem to identify with, if reform is advocated. Hence, near political silence.

The "caste" system needs to be replaced with an evolved understanding of equality: The top layer of the caste are the politicians, who can pass unconstitutional laws, reasonably confident that the middle classes will be deterred from taking court action, due to prohibitive legal costs. The next layer are the judges. Then we have the Senior Counsels, who have about a 25% chance of being appointed a judge in the future. Then we have the barrister survivor class, i.e. those who can obtain enough work to make a living. Then we have the solicitor caste, who, as long as they generally accept their lower status relative to survivor barristers, may obtain work from the main legal employer (government or governmental agencies). Then, there is the "squeezed-out" barrister group, those who had insufficient "right-connections", or could never even get a pupillage. Next, there is the lay-litigant-caste, who are probably the second-lowest caste. But, really, the lowest caste is the public, who looking at a dysfunctional system, can never really aspire to seek civil justice, unless penny-less. Equality requires closing down the divisions of the professions – there should just be lawyers, and no Senior Counsels. Costs protection needs to be facilitated for governmental challenges. As with other caste systems, of social stratification, "…any attempt to get rid of it evokes massive opposition from many upper-caste groups and politicians.". [2]

It may not be practical for government departments/QUANGOS to tender for each requirement for legal services. In such cases, the government should set up an in-house group of lawyers, which can

[2] https://www.washingtonexaminer.com/opinion/op-eds/why-the-world-must-confront-the-caste-system

be farmed-out to various government departments or QUANGOS. The current system is not compatible with the protection of the independence of the legal professions.

In *Wilson*[3] the CJEU observed that the Luxemburg Bar could effectively use the pretext of consumer protection to eliminate competition from foreign lawyers.[4] - The CJEU held that language requirements should not be used to prevent new entrants to the Bar of Luxemburg. The court mentioned that it was in the interests of current members to exclude new entrants – this amounted to a conflict of interest.

It is worth recalling part of the *Wilson* judgement –

> "[para 57] In those circumstances, a European lawyer whose registration on List IV of the Bar Register has been refused by the Bar Council has legitimate grounds for concern that either all or the majority, as the case may be, of **the members of those bodies have a common interest contrary to his own, that is, to confirm a decision to remove from the market a competitor who has obtained his professional qualification** in another Member State, and for suspecting that the balance of interests concerned would be upset (see, to that effect, Eur. Court HR Langborger v. Sweden, judgment of 22 June 1989, Series A No 155, § 35)."

In *Wilson*, the issue was the exclusion of foreign lawyers; however, the effects on competition of the exclusion of home-state originated lawyers is similar to the exclusion of foreign lawyers, even if EU law is not engaged.

So, why is it ok, for current Masters to be the sole gatekeepers of the Irish Barrister profession? Unlike the Bar of Luxemburg, Irish Masters don't even have to give any reasons for failing to take-on a pupil. There is no appeal system whatsoever.

This is not a fair system. It undermines public confidence in the rule of law and equality of opportunity and risks wasting taxpayers' funds which have gone into the subsidization of the expensive legal education of newly qualified barristers. Even those who may complete a pupillage have only a slim chance of avoiding "starvation" due to the bans on in-house barristers, a chambers system and direct access.

Proposals:

The LSRA Authority needs to be given control of the regulation of the practice of the barrister profession, at least, post a BL graduate being "called to the Bar". Barristers, who operate outside of the Law Library, need to be allowed to operate as master barristers, to allow persons to complete pupillage, when Bar of Ireland masters are not disposed, for whatever reasons, to give such persons a pupillage. I have outlined above, an alternative on-the-job training scheme, as a more inclusive system of participation, which avoids coercing masters to take on pupils, which they may not wish to work with; any compulsive element could present significant problems.

The concept of "admission" into the barrister profession should not be viewed in isolation, such as being "called to the bar" which is an illusory concept without access to a pupillage. Rather,

[3] Case C-506/04 *Wilson v Ordre des avocats du barreau de Luxembourg* [2004] CJEU

[4] Anna Louise Hinds and Laurent Pech 'When the Public Interest Masks Lawyers' Interests: Luxembourg's Failure to Adhere to Directive 98/5' IJEL (2007), Vol 14, No. 1 & 2 (161-187)

“admission” needs to be viewed as permission to practice in an economically viable model of legal service provision, which is not primarily dependent on having the “right-connections”.

The system of entry into the solicitor professions is also problematic. Students can spend a lot of money on FE1 entrance exams, and then find it difficult to obtain a trainee contract. Again, a system which relies on the goodwill of current practitioners to be the sole gatekeepers of entry into the profession is unsatisfactory.

Reform of the system is needed to ensure pursuit of the stated LSRA goals: of helping consumer choice, of promoting an independent profession, of supporting the admin. of justice and of assisting competition in the provision of legal services. Whereas the focus of this consultation is on whether admission policies meet “current demand” for legal services, among other issues, the bigger -- question of whether current demand is artificially stymied by a mendacious determination by most politicians to thwart access to justice and accountability, and to help ensure that many state legal contracts are channelled to connected providers, needs to be asked. General media indifference to embedded conflicts of interest may either fuel public cynicism or allow the status quo to prevail. –

End of submission.