LSRA S.34 Invitation for Written Submissions on Admission Policies of the Legal Professions 2021 Annual Report

From – Kieran Fitzpatrick, [redacted]

Interest – Recently (semi)-qualified barrister (July 2019)

• By e-mail to: publicconsultations@lsra.ie • – (Deadline of Wednesday **11 Feb 2022**)

Date :06 January 2021

_____.

Scope of review:

1. The level of demand for the services of practising barristers and solicitors in 2021. – The demand is artificially low due to the absence of rule of law in Ireland, as many don't see the legal system as a means of pursuing their rights, due to prohibitive legal costs and the failure to allow equal participation of persons in the legal professions, and thus the judiciary. The costs are hugely inflated as politicians don't wasn't to implement reforms which would increase efficiency, fairness and equality of opportunity to partake in the legal system.

2. The costs of legal services in 2021 and whether these were available at a reasonable cost to consumers. -There needs to be better access to the professions, particularly the barrister profession, but ultimately, the division of the professions is pointless other than to inflate costs and facilitate greater political control of the system.

3. The standard of education and training for persons admitted to practise. – The devilling system needs urgent reform.

4. The extent to which the admission policies of the legal professions are consistent with the public interest in ensuring the availability of legal services at a reasonable cost, taking into account the demand for services and the need to ensure adequate education and training standards for persons admitted to practise. – Most policies are consistent with the interests of established lawyers/judges/ insider players/politicians and NOT with the public interest.

5. The ongoing impact of Brexit and the Covid-19 pandemic on the above matters. - Covid 19 is another good reason to allow barristers to alone represent clients in court without the "assistance" of unneeded solicitors [as unnecessary mixing may facilitate virus transfer!].

**********.

I include my comments below, as previously submitted, regarding diversity, as most of the points overlap with the general problems of access to the legal professions; these points better elaborate on the above grounds for needed reforms:

The Irish legal system is permeated with insiderisn and elitism both currently and historically, which is antithetical to inclusiveness and diversity.

First, let's look to some historical examples: In the 18th century, Catholics were specifically excluded from being barristers. This was done by an Act of the Old Irish Parliament. The solicitor profession has always been the lower of the two branches of the legal professions, of the multi-layer-caste system. In the 19th century, solicitors were forced to pay fees to the Law Library, even though they

got no benefits from such fees. An attempt to litigate this unfairness failed as the solicitors were deemed not to have standing. At some stage, a deal was done providing the Solicitors with some compo for the historical extortion which was imposed upon them. Despite some reforms since, the caste system remains today, even if some aspects are by unwritten rules.

It is worth reading a speech of Lord Chelmsford in the House of Lords, regarding the problems between solicitors and barristers in Ireland[1] , on Friday 8th April 1870, to appreciate the caste system.

> "The Incorporated Society, in reply, expressed their disappointment at the Benchers not having handed over to them the whole building in their possession, and the cost of which had been defrayed out of their own money, and their hope that, on re-consideration the Benchers would yet do so. The Benchers answered this in the negative; and on their attention being called to the considerable sums in their possession contributed by the solicitors, and to the propriety of a conference with a view to an amicable settlement, they stated that they were not aware of the existence of any claims which rendered a conference necessary. The correspondence was continued without any result; and, unfortunately, the King's Inns, not being a corporation, could not be sued, while the Incorporated Society of Attorneys and Solicitors was also incapable of suing or being sued in its corporate capacity. Moreover, all the Judges, both in law and equity, were members of the King's Inns. Feeling strongly the justice of the claim, he hoped their Lordships would not, by rejecting his Commission, deny the solicitors the only available remedy."

The top layer of the caste are the judges, or the superior court judges; these have inappropriate and unaccountable power outside of their adjudicatory roles. They act as legislators within the King's Inns, on Statutory Rules committees and various other bodies; this undermines separation of powers, when/if anyone seeks to challenge any rules made by them alongside other rule makers.[2]

Judges play a role in regard to entry into the barrister profession, promotion to Senior Counsel (despite the constitution specifically outlawing positions of nobility), and have influence in nominating lawyers to be promoted to judges, particularly to the higher courts, which play a role in controlling access to the legal profession, via their role as Benchers of the King's Inns. In my view, judges should be confined to their adjudicatory roles near exclusively.[3]

---

[1] https://hansard.parliament.uk/Lords/1870-04-08/debates/a695e3ab-fa28-4e07-abc8-c4a36d40d727/PetitionMotionForAnAddress?highlight=king%27s%20inns#contribution-f3461be5-1341-4d63-a2af-ce987263782c

[2] Separation of powers requires that legislators do not hand over their legislative power, to other bodies generally, but, particularly the judiciary. Inherent to separation of powers is accountability in the exercise of power. But, judges are not elected and cannot be dis-elected. Also, oppressive defamation laws, coupled with un-reformed non-statutory contempt of court laws, prevents proper media scrutiny of judges' actions. And court access is compromised, when judges are called upon to be judges in their own cause.

[3] *What is the Rule of Law*? by Leon Louw; "The principle of division of powers requires that the making of laws, the interpretation of laws and the day-to-day administration of laws should be done by three separate and essentially independent arms of government – the legislature, the executive and the courts. The justification of this principle (validated by long experience) lies in the fact that each of these functions requires very different procedures to be undertaken by people with different qualifications. **Legislation should be devised by direct representatives of the people. The process must be transparent.** It can, and indeed should be comprehensive, allowing for ample debate and deliberation." http://eolstoragewe.blob.core.windows.net/wm-122664-cmsimages/WhatistheRuleofLaw_LeonLouw.pdf

It should be noted that it appears that many judges are coerced to play along with the above system by successive governments which fail to respect separation of powers, the constitution and the rule of law[4], and risk being black-balled if they highlight the inherent inequity of the system.

Today, many of the hurdles are less clear, but are equally problematic.

I have serious doubts if government can remedy the current elitism, even if well-intentioned, without tackling the **totally unfair system of awarding of legal service contracts by government departments and QUANGOS;** Because most politicians benefit from the status quo, most TDs and Senators will be unlikely to vote for significant reform proposals. The *carrots and sticks* currently deployed by the insider system are extremely influential and difficult to side-step.

The "Carrots":

Under the EU 2014 Procurement Directive, most legal service contracts are exempt from public tendering. In fact, even those contracts which might be naturally captured, may well be sub-divided to avoid being so captured. This means that many departments of government and QUANGOS (and likely local governments too) can award to contracts to the "insiders". To qualify as an insider, is clearly both somewhat unclear but better known to the insiders! Friends, family members and political cronies of politicians/ senior civil servants/ senior QUANGO personnel and even certain media players are on the inside track. As the state is involved in over half of all litigation, the pot of "carrots" amounts to hundreds of millions of Euro. How the spoils are divided out among the various groups would only be known to the insiders themselves, but clearly, any disputes among them is kept hush-hush, for obvious reasons. Presumably, it is a well-rehearsed formula, given its historical success, in dragging into the fold, even the majority of so-called "opposition" politicians for several decades.

The culture created by the insider legal contracts system permeates much of the entire legal system and legal academia. Few academics ever speak out about what is a clear violation of the rule of law, hoping to be rewarded by their silence with better promotion prospects or permanency of employment in an area of often temporary contracts of employment.

The benchmarking of salaries system, particularly the system which operated up until relatively recently, in another "carrot" against reform. By linking the salary historically, of Ministers, the AG and top civil servants and high court judges, a system was created which financially incentivised most important players in the political system from reforming the prohibitively expensive and anti-competitive legal professions, particularly the barrister profession. Even though aspects of this system have been abandoned, in recent decades, elements of remnant magnetism of the system remain in force, undermining advocacy for reform.

Because of the elitism of the barrister profession and senior counsel system, in the UK and Ireland, top judges in the UK and Ireland are the highest paid in Europe. Thus, the EU court judges are aligned to the highest paid judges and not the average. Even, EU Commissioners [112%], EU civil servants and MEPs salaries [38.5%] are set at a percentage of EU judges' salaries. Thus, the elitism of entry and survival within the Irish barrister profession advances [or formerly advanced] the salaries of many important cohorts both nationally and at an EU level. Is it surprising then, that we have an EU procurement Directive which facilitates exemptions for legal service contracts, which

[4] "The rule of law ... refers to a structural exercise of rule as opposed to the idiosyncratic will of kings and princes." – Nelson Mandela

causes a violation of the rule of law in Ireland, in violation of all of the purported values expounded within the EU treaties?

The "Sticks":

The *carrots and sticks* are often two sides of the one coin- Student barristers seek appointment as pupils of barristers, barristers seek work from legal firms/solicitors, and legal firms/solicitors seek contracts from the insider network in the absence of public tendering; Most of these persons may perceive that support for the continuation of the insider system, is generally essential to the advancement of their interests. Most clearly understand that any speaking out of turn, (other than tokenistic support for equality [tolerated pretend-advocacy by the insiders]), may result in them being black-balled, and thus side-lined from promotion or receiving more desirable legal service contracts.

Judges acting as rules legislators, and legal costs rules interpreters, and as appeal courts in legal costs disputes, are clearly conflicted, objectively from a financial perspective, as they clearly have an interest in ensuring that Senior Counsels are awarded high fees. Thus, judges also have a financial interest in limiting access to the barrister profession and limiting the numbers who are appointed as Senior Counsels. They also, as do most politicians, objectively, have an interest in ensuring that those who are appointed to the role of Senior Counsels and higher court judges are not overly supportive of reform of the elitist system, even if a few occasionally break ranks.

Locked-In-Syndrome

The above system of insiderism, with is its highly honed defense system of "Carrots and Sticks" operating over centuries, discourages even those players who possess a conscience from speaking out. Even politicians, who are critical of the system, as legislators, have huge forces operating against them if they seek to act in the public interest. Within most political parties, the amplification of political power, is a huge imperative, and those who seek better separation of powers and accountability via a more independent and accessible legal system, risk being side-lined in their political careers. The goodies bag, in terms of legal service contracts, may also be withheld from their indirect benefit, though, the insiders, will be careful to not to incentivise too many rebel politicians who might demand real reform. I believe that there may well be examples of some politicians, who advocated reforms of specific aspects of the insider legal system, who later found that their political support had waned.

Also, many independent politicians [those outside of established political parties], are motivated for different reasons from advocating reform. Many seek to sell their ability to use their political influence to sort out constituents' problems, which is a currency not compatible with an equal-access to rights system, more aligned to equality and rule of law. As many media outlets depend on big-business advertising revenue, editors are often not supportive of a more affordable and accessible legal system, which would provide better access to workers/consumers/small business rights, which big business interests (who are less stifled by the expensive legal system) do not want; hence, media do not focus on the lack of diversity in the barrister profession which is intertwined with the elitism of it.

Additionally, by compromising the independence of the legal profession, via the obsequiousness generated by the absence of public tendering, politicians risk undermining the judiciary, as they are mainly chosen from those who have tolerated the inequities of the barrister system. Thus, the politicians can often pass laws, which are unconstitutional, knowing that few will be ale to challenge such laws, via a prohibitively expensive legal system, anchored down by status quo preservers. This allows better pandering to key electoral bases at the expense of individual rights.

Thus, we have the perfect storm, whereby, all those within society, with perhaps a few exceptions, who should give voice to inequity are "bought off" or are intimidated from speaking out – Academics, media outlets, politicians, lawyers and judges. When viewed through this lens, the barriers should be obvious:

The Barriers:

The absence of legal service public procurement is hugely problematic for both professions, in terms of the independence of lawyers, and the establishment of a legal businesses, without the insider connections. I'm going to focus on the barrister profession primarily, and the additional barriers:

1) Judges should not play a key role in setting rules regarding access to the barrister profession, and the right to practice as barristers, as they have a huge conflict of interest in keeping the senior counsel system in place (which also needs to go), and in keeping the salaries of senior counsels high. This should be handed to the LSRA or another independent body.
2) There should be online access to most court documents – restrictions on access prevent young barristers from accessing templates for filing cases --- this generates dependence, which is adverse to the independence of the barrister profession. This problem is particularly problematic, in regard to filing any constitutional challenge. Again, this undermines separation of powers and accountability. And makes the value of a young barrister less in the marketplace.
3) The monopoly of the King's Inns needs to be undone. I, for example, have been offered a pupillage by a barrister operating outside of the King's Inns, but because the experienced barrister is not a member of the Law Library, a rule of the King's Inns presents a problem in participating in such a pupillage.[5] The rule does not explicitly declare that new barristers cannot pupil with barristers outside of the Law Library, (who apparently make up some one third of practising barristers). However, there is no mechanism for barristers, outside of the Law Library with 7-years practice, to be recognised as Masters. And though the rule refers to "a relevant professional body" which could grant an exemption, there appears to be no pathway for an alternative professional body to be recognised by either the LSRA or the King's Inns. So, a risk exists, which is a sufficient deterrent in most cases, that if a pupil were to engage in a pupillage, outside of the recognised route, that the pupil might be deemed to have breached the rules of the King's Inns. The King's Inns is not on a statutory footing, making any legal challenge to its rules or activities more difficult. The Benchers of the King's Inns (or sub-committees established by the Counsel) control the rules, but consists of about

[5] See code of conduct: "60. Barristers shall not, unless exempted by the Society or a relevant professional body, represent clients before courts without undertaking a continuous period of not less than nine months' pupillage with a barrister of at least seven years' standing whose practice involves regular appearances before the courts representing clients." https://www.kingsinns.ie/cmsfiles/RULES/KI-CODE-OF-CONDUCT-09042018.pdf , accessed 11.50am, 23/5/21.

75% men, even though women make up about 50% of the Junior Bar. The Office of the Information Commissioner has ruled that the King's Inns is not subject to the FOI Act 2014.

4) A further rule of the King's Inns presents a huge barrier to barristers outside of the "Pale". Only barrister primarily based in Dublin can act as Masters. This is a totally unfair rule and prevents many from outside of Dublin from even completing a pupillage. Everyone knows that persons owning or renting a home will be reluctant to pay for high rents in Dublin, at a time when almost no income can be earned as a pupil barrister. How some young barristers survive, boggles the mind, and some are inevitably under severe financial stress.[6] All barristers, of two years' experience, both inside and outside the membership of the Law Library should be allowed to act as Masters, and should preferably be regulated by a statutory body. Better still, the pupillage system should be phased out, by better training and better pre-qualification experience.
5) The prevention of direct-access, if one were to economically survive a pupillage, is another huge barrier and serves no public interest. It prevents young barristers from seeking work and presents perverse incentives for solicitors in the hiring of barristers. Solicitors have to be mindful of keeping the insiders happy, in the gifting out of barrister jobs. Hence, young barristers who have connections within the system, have huge unfair advantages over their possibly more skilled but not-connected former barrister classmates. Hence, the prevention of direct access, coupled with the insiderism-system of awarding of most legal service contracts, provides a near impossible hurdle, for non-connected barristers. Thus, persons from other countries, particularly of a different race or religion, face a huge uphill battle in getting any work from the solicitor profession, as the insiders demand that most "desirable" jobs, should be given to the politically connected cronies.
6) The first year's fees for pupils in the Law Library are very high and present another barrier.
7) The requirement to have a solicitor, attached to the most minor matters before the district court, means that most persons will prefer to hire just a solicitor, rather than a solicitor/barrister combo, in what should be the teeth-cutting opportunities for young barristers -- representing persons in minor maters at a very cheap price , to help establish a reputation and a career. Not in Ireland.
8) Even the unnecessary costume of barristers adds to the costs of practice – robes and formal dress shirts are more expensive than the adequate normal suit wear of solicitors.
9) The ban on cameras in courts is also anticompetitive. If cameras were allowed, the public would be able to see that some new barristers are more competent than many established players - this would help new barristers get work based on skill rather than connections. TV cameras would help to flag up the lack of diversity among lawyers and judges.
10) The prevention of a chambers system, which could provide for better "teeth-cutting" opportunities for new barristers, presents another barrier to those without well-off parents to support them.
11) The prevention of direct access holds a particular additional problem for persons of certain backgrounds, thus adversely affecting diversity. It is well known that some people in Ireland are racist. Some Solicitors may also be racist, and thus dis-inclined to hire barristers of a particular race, even if his/her client were not racist. Alternatively, a client of a non-racist lawyer could be racist. However, for ethical reasons, for business reasons, to be seen to be politically correct, or to simply avoid embarrassment, a solicitor may prefer to not suggest the hiring of a non-white-Irish barrister to a client, lest the client be racist. Hence, even "non-racist" solicitors may be disinclined to engage persons of more diverse backgrounds, to

[6] These two rules were operative as of July 2019 – I don't know if any reform has happened since?

avoid potentially embarrassing their clients. Also, as most new barristers of a more diverse background won't be connected to the insider group, there is a double incentive for solicitors to not give them a break.

Hence, the prohibition of direct access amplifies any inherent racism within a society, as the percentage of solicitors who will elect to not consider a person of a diverse background will be a multiple of the percentage of racists among his/her potential clients. This amplification of racism is not just theoretical. In the UK a now Queen's Counsel said that he was told by his clerks , in his early years at the bar, that he, "had not been considered for a case because the solicitors felt that their client would not accept a black barrister."[7]
Hence, the split profession with restrictions on direct access is structurally and un-reformably antagonistic to greater diversity within the barrister profession.

I understand that many of those of a diverse background, though having managed to get a pupillage (which is difficult in itself) , find that they have had to migrate to the solicitor profession or drop out of practice entirely, within a few years, due to the lack of work offered to them by solicitors. Though this problem is faced by most new barristers, I suspect that the problem is much greater for persons of a diverse background.

There are other barriers, but unless the above are addressed, there is little point dwelling on the more minor issues. Ireland in a country where most politicians do not support real separation of powers, which requires a competitive and independent legal profession. The caste system needs to be dismantled, of which the above barriers help to maintain. I wish the best of luck to those who seek to reform the system, but, it is hard to see much change happening anytime soon, given how seldom politicians surrender privilege and power, in the absence of widespread public protests.

Longer term, diversity within the legal profession requires more deep-rooted reforms: The idea of appointing judges for life-terms needs to be re-assessed. Perhaps, a system where a judge can only be appointed for a single fixed term of 12 years would be better. A system whereby judges can be promoted by government is inherently not compatible with independence. The legal costs system needs total reform as it violates constitutional demands in multiple areas. The Irish legal system follows the UK one despite Ireland supposedly having a "constitution"- The UK system overtly promotes parliamentary supremacy, while the Irish one covertly does the same (via prohibitive legal costs). Both promote male white power at the expense of diversity and inclusiveness. The majority of senior/queen's counsels are men, leading to about 30% women higher court judges. The unnecessary complexity of the legal system caused by the failure to consolidate legislation feeds into the need for longer years of experience to develop legal skills. For example, contract law could be codified leading to more easily accessible rules and access to most court documents online, would demystify the filing of cases; this would take some income from the more established barristers, but would facilitate the proliferation of legal skills. Creating specialist courts[8], where judges could become specialised via shorter career timeframes would allow more women judges to be appointed. This could then allow for earlier specialisation within the lawyer professions allowing for easier development of an economically viable legal career, which would facilitate more persons from less wealthy backgrounds to participate. Malta [though formerly being a British colony] has 53% female judges[9], as do most EU countries [close to equal participation).

[7] https://ukhumanrightsblog.com/2020/08/05/bame-representation-at-the-bar/
[8] Some legal commentators believe that the Irish constitution may present a barrier to the establishment of a broad array of specialised courts, which if true, presents another barrier to greater diversity.
[9] https://newsbook.com.mt/en/four-of-six-new-judicial-appointments-are-female/

Further, the system whereby judges can have their retirement extended , each year, for up to 5 years, at the consent of the government, is inconsistent with the independence of the judiciary, and violates the spirit of the constitutional requirement that judges salaries should not be diminished while in office. Hence the governments power to both promote judges, and to remove them from office in their likely last 5 years of their judicial careers , significantly undermines the objective independence of the judiciary, and coupled with the absence of public tendering for most legal service contracts, appears to quell critical commentary from within the professions of a system which violates the rule of law, democracy and equality, at several levels.

Kieran Fitzpatrick (Semi-qualified barrister, and an economically unviable potential lawyer).