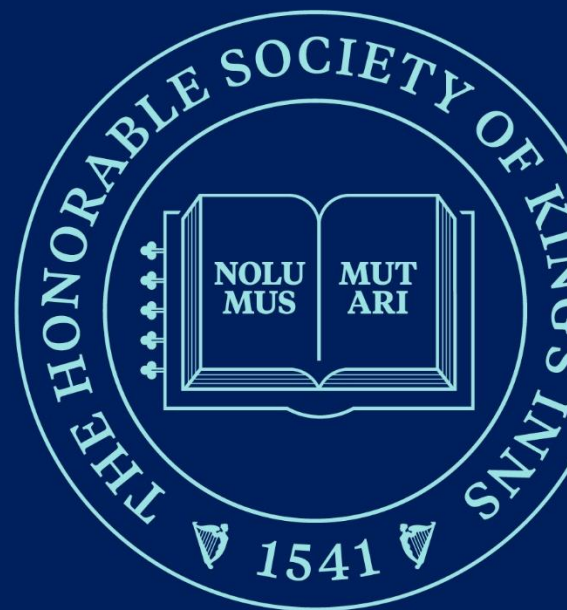


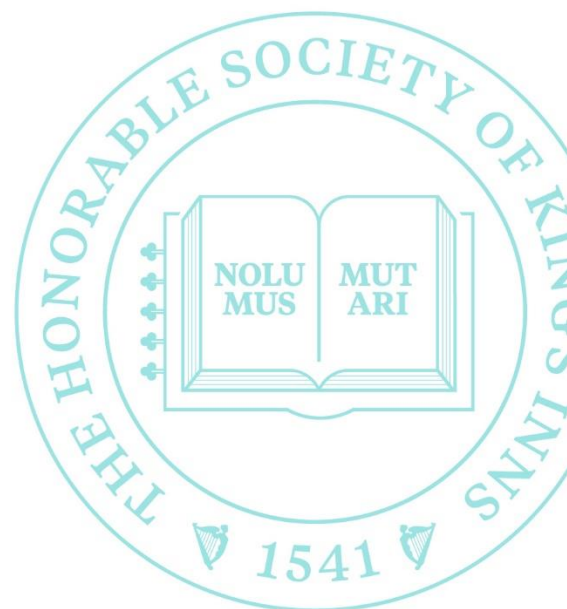
**SUBMISSION TO THE
LEGAL SERVICES
REGULATORY
AUTHORITY REPORT
ON THE CREATION OF A NEW
PROFESSION OF
CONVEYANCER**

THE HONORABLE SOCIETY OF KING'S INNS
4 JANUARY 2022



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SUBMISSION TO THE REPORT

Introduction

The Honorable Society of King's Inns is pleased to have the opportunity to make this submission to the Legal Services Regulatory Authority, as part of the statutory consultation process regarding the potential creation of a new profession of conveyancer.

Subject to the concerns outlined below being adequately addressed, King's Inns has a neutral view on the question of whether such a new profession should be created. King's Inns offers this submission primarily in the light of its role in the education and training of barristers.

Requirement for updated evidence and analysis

The first, and overriding, concern of King's Inns is that there does not appear to be sufficient evidence that would allow the LSRA to properly form a view on whether the creation of a new profession of conveyancer is necessary or desirable in the public interest.

In this regard, it is noted that the proposal for the creation of the profession of conveyancer was first contained in the 2006 report of The Competition Authority on solicitors and barristers and that report is referred to in the terms of reference for the current consultation. It is certainly open to question whether the same economic and other factors that existed in 2006 still prevail some 15 years later.

King's Inns submits that up-to-date analysis and research in connection with the issues identified in The Competition Authority's report should be undertaken before the LSRA forms a view on the creation of a new profession.

In particular, the proposition advanced in The Competition Authority's report that there is a causal link between the creation of a new profession of conveyancer and a reduction in legal costs must be analysed further, given that it was the ultimate reason advanced for the introduction of a new profession in the State. Any analysis of costs must take into account the additional costs which would arise from the regulatory oversight and to new training required for the new profession.

In conducting such an analysis, it is submitted that the LSRA would need to review whether there has been a general reduction in legal fees for non-contentious work (adjusted for inflation) over the period since The Competition Authority's report in 2006, whether a greater proportion of land was registered over that period, the changes in population, and whether there are now more solicitors, and therefore arguably more competition, in the profession.

The proposal for the creation of a new profession of conveyancer in The Competition Authority's report seems to be based on the premise that there would be more competition from a range of persons to do the relevant work after the creation of the new profession and

that cost savings to the consumer would ensue as a result. That, however, presupposes either that there is a shortage of conveyancing solicitors at present, or that members of the new profession of conveyancer will be able to provide their services at a lower cost than solicitors. It seems to be implicit in the foregoing that some supposed “cost-saving” in the process to qualify as a conveyancer will be achievable, compared to the cost and length of time now required to qualify as a solicitor. It is this latter issue – the training required for a person to be a competent conveyancing professional – which most concerns King’s Inns.

Extent of study and training required

While commendable efforts have been made in recent years to codify and consolidate land and conveyancing law in Ireland, it remains a complex area. The principles of land and conveyancing law are dispersed across multiple statutes, some of which long pre-date the formation of the State, and also arise from case law. The modernisation of the law by the Land and Conveyancing Law Reform Act 2009 and the compulsory registration of all land on sale have simplified some of the law in the area. However, even the conveyance of registered title is often less than straightforward, as will be illustrated below.

The proposal to create a new profession of conveyancer risks assuming that a different – and simpler – system of conveyancing is in place throughout the State. The Competition Authority’s report, for example, appears to assume that conveyancing is a simple and straightforward area of law that requires limited legal training. However, the fact that certain conveyancing matters may be straightforward to solicitors or barristers does not mean that they are, in fact, simple or straightforward. Proper legal training is required to identify the relevant issues and to identify whether a matter is simple and straightforward or more complex.

Some aspects of the conveyancing transaction may indeed be straightforward and are frequently completed by legal executives in a solicitor’s practice. However, the conveyance is straightforward only insofar as the title to the land is clear and that other relevant areas of legal import to the contract or the title have been resolved. The completion of the transaction once the title is accepted is a formal matter, but the completion of the formal deeds of conveyance assumes that all pre- and post-contract matters are resolved to the satisfaction of the parties.

Any conveyancing professional, in order to properly understand and be able to advise and practise in the area, must also have a proper understanding of a range of areas of law including, for example, land law generally, landlord and tenant law, contract law, tort (including misrepresentation and negligence), equity and trusts, family law, tax law, succession and probate, and planning and environmental law. It is King’s Inns experience that students find land and conveyancing law a conceptually difficult area of study. The practice of conveyancing is studied by a student who has already taken an extensive course of study in land and other foundational areas of law. It must be emphasised that even apparently “routine” or “simple” conveyancing transactions can raise complex issues of land law, equity and trusts, family law or planning and environmental law.

It must be noted that the Law Society’s standard General Conditions of Sale and standard Requisitions on Title require a knowledge of a wide range of legal principles, including trusts, planning and environmental law, and family law to enable a professional person to answer requisitions or, on the part of the purchaser, to fully interrogate those answers.

To take an example which presents a very real risk for consumers, if the course of study and training required for the proposed new profession of conveyancer was not such as to equip a conveyancer to fully understand and advise in relation to the special conditions in a contract for the sale of land, a situation could easily arise where contracts of sale were unnecessarily restrictive as to the title to be provided, or so as to limit requisition with the consequence that the purchaser would be prejudiced. Another example of potentially complex issues arising in apparently “straightforward” conveyancing matters concerns the issue of pre-contract representations, which requires all conveyancing professionals to have an understanding of the relevant area of tort law and contract law.

It must be recalled in that context that whilst the Register of Title is conclusive of title in registered land, certain interests can bind title under section 72 of the Registration of Title Act 1964 and a reading of the Folio is only a part of the task engaged by the solicitor acting for a vendor or purchaser. Matters such as easements, matrimonial claims or rights of persons in occupation, planning and environmental issues, and the complex area of adverse possession or possessory title are matters that arise in most cases and require a depth of knowledge to identify and resolve. The consumer, whether purchaser or vendor, is not well served by a person who does not have this depth of knowledge. Again, by way of example, much rural land in the State is registered in the name of a long-deceased and sometimes remote family member to a person in possession of the land, and the law of succession and adverse possession in this area is hugely complex.

In the opinion of King’s Inns, the paradigm of the “routine conveyance” is misleading. Even in the sale or purchase of a registered residential premises, perhaps the most obvious example of a presumed “simple” transaction, issues can and often do arise such as the giving of security or the purchase from a mortgagee, the grant or releases of rights of residence or the choice of the creation of a joint tenancy or tenancy-in-common, an issue arising in many purchases by intended unmarried co-habitants.

King’s Inns is doubtful whether any adequate course of study leading to qualification as a conveyancer could exclude the wider study of such important areas of law. The proposal for the creation of the profession of conveyancer seems to be predicated on the assumption that an abridged course of study or training when compared to that required to qualify as a solicitor or barrister would be sufficient. However, King’s Inns is not at all convinced that that assumption would be borne out in reality and it is difficult to see how a person could be properly trained as a conveyancer without undertaking a substantial course of legal training and education, which may not be substantially different to that required to qualify as a solicitor or barrister. King’s Inns suggests that if the study requirements are broadly similar there would be no incentive to a person to qualify for the “lesser” or more restricted role.

King’s Inns encourages the LSRA to test the assumptions around education and training for potential conveyancers further, in the interests of its statutory aims to protect consumers of legal services, to ensure the maintenance of proper standards in the legal profession, and to promote the proper and effective administration of justice.

Role of barristers in conveyancing matters

While barristers are not involved directly in the conveyancing process, they are frequently instructed by solicitors to provide expert advice and expertise in land and conveyancing transactions. This is particularly the case where title is complex or uncertain, where pre-contract representations are argued to form a term of the contract for sale or where either purchaser or vendor refuses to complete. This is an important service provided by barristers and which is to the benefit of the client as a consumer of legal services. Therefore, if a new profession of conveyancer is created, it is important that a conveyancer be able to instruct a barrister directly to provide these services.

Barristers are also involved in conveyancing matters where they become contentious and are instructed by solicitors in relation to litigation. It is presumed that it is not intended that a conveyancer would be able to act in litigation. It seems likely in that regard that the conveyancer could not be competent to even threaten legal action, say regarding a purchaser who is refusing to close, or a vendor who has not returned a deposit, or to threaten to commence a Vendor and Purchaser summons. Therefore, it appears necessary to establish the principle that once a conveyancing matter becomes contentious or the subject of litigation, it must be handed over to a solicitor. The solicitor may then, as appropriate, instruct a barrister in relation to the matter.

Further, it is the case that many transactions are closed on the giving of a solemn undertaking, usually by the solicitor for a vendor, to complete certain transactions, for example release an encumbrance on title, and the policing of these undertakings by the High Court offers important and unique protection for the consumer. Were the professional conveyancer to be subject to the sanction and supervision of the High Court in this manner, the conveyancer would need the knowledge, training and indemnity cover of a solicitor and it is difficult to see in that context what advantage there would be for a person to offer the limited service of a conveyancer, without having the benefit of being able to act in other respects as a qualified lawyer.

Impact on smaller firms of solicitors

While outside of its remit as a professional body for the barristers' profession, King's Inns is also concerned at the possible unintended consequences the creation of the proposed new profession of conveyancer could have for the solicitors' profession. There would seem to be particular concerns in relation to the viability of smaller firms, and the preservation of smaller (often rural) practices. The concomitant negative impact the loss of such firms would have on consumers of legal services and the broad availability of services is likely to negatively impact the statutory aim of encouraging a strong and effective legal profession. Again, we believe this is a matter which merits careful study and analysis by the LSRA before proceeding.

Conclusion

Overall, while maintaining a neutral view on the fundamental question of whether or not the profession of conveyancer should be created, King's Inns believes that the matter would benefit from an up-to-date analysis of the market for legal services in conveyancing as well as more detailed consideration of the extent of the course of study and training required to practise effectively as a conveyancer.

King's Inns view is that it would be difficult to envisage a course of study to equip such a professional that was in any material respect less than a full study of the broad range of legal areas that are inherent in the sale and purchase of land.

King's Inns would be pleased to contribute further to the LSRA's work on this important topic should it be invited to do so.