LAW SOCIETY OF IRELAND

LAW SOCIETY SUBMISSION

SUBMISSION IN RELATION TO THE UNIFICATION OF THE SOLICITORS' PROFESSION AND THE BARRISTERS' PROFESSION

Legal Services Regulatory Authority

JUNE 2020

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the *Solicitors Acts 1954 to 2011* in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and supports.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. INTRODUCTION

1.1 The purpose of this submission from the Law Society of Ireland ("the Society") is to respond to the invitation from the Legal Services Regulatory Authority ("the Authority") for submissions in relation to a public consultation under section 34(1) of the Legal Services Regulation Act 2015 ("the 2015 Act").

1.2 Section 34(1) of the 2015 Act states that the Authority is required to engage in "appropriate" public consultation and prepare separate reports for the Minister of Justice in relation to specific issues as set out in the 2015 Act.

1.3 As per section 34(1)(b), the Authority is required to prepare and furnish a report to the Minister for Justice ("the Minister") on the "*unification of the solicitors' profession and the barristers' profession*".

1.4 Unification of the two legal branches of the profession is also often referred to as fusion of the profession.

1.5 The Authority is required to complete this report on fusion and submit it to the Minister within four years of the Authority being established.[1]

1.6 Sections 34(4)(b) and (c) set out issues which the Authority must take into consideration in preparing their report. The report must contain "*details of arrangements in operation in other jurisdictions in which the professions have been unified*".[2]

1.7 The report must also contain recommendations as to whether the legal profession should be unified while having regard to, "*among other things*", the following points:

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."*[3]

1 Section 34(4)(a) of the Legal Services Regulation Act 2015

2 Section 34(4)(b).

3 Section 34(4)(c).

1.8 The Society welcomes the opportunity to make a submission to the Authority in relation to the issue of fusion of the legal profession as part of the Authority's consultation processes in the preparation of its report.

2. EXECUTIVE SUMMARY

2.1 The following submission sets out the Society's views in relation to the Authority's public consultation on the unification of the solicitors' profession and the barristers' profession.

2.2 The Society's submission considers the fusion of the profession as it currently stands in other comparable common law jurisdictions. The submission also considers jurisdictions that operate a civil law system and whether fusion has been favoured in those jurisdictions. Consideration is given to other jurisdictions of interest before providing a summary of the arguments in favour and against the fusion of the profession.

2.3 The Society's submission is made with the objective of protecting the public interest and ensuring high standards of legal services.

2.4 The Society reviews the position in common law jurisdictions beginning with England and Wales as this is Ireland's most closely affiliated jurisdiction which retains a divided legal profession comprising solicitors and barristers. The debate concerning changes to the structure of the legal profession including fusion has been under consideration in England and Wales since the 1970s. As a result, significant changes have taken place in England and Wales which have led to closer alignment of the provision of legal services provided by solicitors and barristers. Importantly, fusion has not taken place in England and Wales.

2.5 The submission considers the development of the legal profession in Australia which has a mixture of fused and divided models in its six states and two territories. The states or territories where there is a fused legal profession may be partly attributable to the sparse population distribution. Nevertheless, in those states where there is a fused profession it is notable that an independent bar has been cultivated.

2.6 It is observed that the development of the legal profession in New Zealand is a fused one with all practitioners being admitted to the profession as "barristers and solicitors". A small minority may elect to practice as "barristers sole" which, in all but name, manifests a division in the profession.

2.7 The submission also considers the legal profession in Canada which has ten provinces, nine of which have a fused common law legal profession and one which operates a civil law system. The nine provinces in Canada provide a good example where the legal profession has been successfully fused.

2.8 The Society provides a brief overview of the legal profession within civil law jurisdictions suggesting that these are not directly comparable to their common law counterparts. Although the legal profession in civil law jurisdictions is a fused one, there is generally a greater variety of other types of legal roles outside the legal

profession as such (and as understood from a common law perspective) than exists in common law jurisdictions.

2.9 Consideration is given to other comparable jurisdictions including Scotland which retains a divided legal profession. The Scottish model provides a common education system to all undergraduate students whom, after receiving their initial qualification to practise, may proceed to further education in order to become an advocate.

2.10 The profession in South Africa provides an example where the legal profession is divided in a similar way to Ireland with advocates and attorneys. A change in the structure of the legal profession has been undertaken in 2014. Although plans were in place in that jurisdiction concerning fusion of the profession, to date this has not occurred and the division remains.

2.11 The Society reviews the legal profession in the United States of America which is a fused profession. However, even within the fused profession, lawyers have developed their own functional division including corporate lawyers, trial lawyers and litigation specialists amongst others.

2.12 The submission collates the possible advantages of fusing the profession which includes the maintenance of a common pool of resources, a single regulatory structure and disciplinary regime as well as the potential for lower costs to consumers of legal services. Whether legal costs would be reduced in the event of fusion is currently unknown and would require a detailed study by a more appropriate body than the Society.

2.13 The Society considers the arguments against fusion, noting that in response to the Competition Authority in its Preliminary Report "Study of Competition in Legal Services" in February 2005 that transfer between the two branches of the legal profession has been simplified.

2.14 The Society believes the maintenance of an independent referral bar is a cornerstone of common law systems. It is observed that in a number of the jurisdictions where the profession has been fused there is the natural development of a group of specialist practitioners who form an independent bar within that profession.

2.15 The division of the profession in Ireland as it currently stands allows an equal level of access to specialist legal services for clients of both small and large firms alike. This benefits clients, particularly disadvantaged clients, who retain access to the specialist advocacy bar, through whatever firm of solicitors they retain. This has the collateral effect of enabling smaller and regional solicitors' firms to offer a wider range of legal services as, without the independent referral bar, specialists would tend to be subsumed by the larger city firms.

2.16 It is suggested that in the event the professions were fused in Ireland, the likelihood is that an independent bar would naturally develop.

2.17 The Society notes the changes brought in by the 2015 Act including the commencement of legal partnerships which will allow barristers to enter partnerships with other barristers and / or solicitors once these provisions have commenced. This will provide easier access for clients and should address any perceived requirement for fusion.

2.18 The 2015 Act also makes provision for direct access to barristers in non-contentious matters for all members of the public once these provisions are commenced.

2.19 It is considered that fusing the professions will lead to large short-term costs increases for the purposes of establishing a common education and regulatory regime. The benefits brought by this fusion may be difficult to justify in the long-term given the strong likelihood the independent bar will re-emerge.

3. COMMON LAW JURISDICTIONS AND FUSION OF THE LEGAL PROFESSION

3.1 As noted, the Authority is required by the 2015 Act to consider other jurisdictions where fusion has taken place when compiling its report.

3.2 A brief synopsis will be provided in this section in relation to other common law jurisdictions – England and Wales, Australia, New Zealand and Canada – and the issue of fusion of the legal profession.

3.3 By way of background, the type of work engaged in by solicitors and barristers can be generally differentiated as follows:

- Solicitors are instructed by clients; they usually handle client monies and oversee the conduct and management of the client's file from its beginning to its conclusion. 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 crucial boardroom decisions, or in negotiating or documenting complex financial transactions as well as being required to help private individuals manage their legal affairs. While barristers have traditionally specialised in court work, solicitors have traditionally undertaken a broader role, helping individual and corporate clients understand their legal rights and obligations and also helping them comply with their obligations, reduce legal risk and manage their legal affairs appropriately.
- Generally, solicitors instruct barristers (where necessary) on behalf of the client in litigation matters by providing the barrister with an overview of the client's case, supplying relevant documentation, and requesting the barrister's advice. In many types of legal work, the solicitor will not need to instruct a barrister, such as in most conveyancing, probate, corporate or commercial matters.
- Barristers do not normally deal directly with clients as they are instructed by solicitors. They do not handle client monies. They are typically engaged by solicitors to represent the client in court. They do so by way of oral and written pleadings and submissions (the drafting of these legal documents can often be a joint process between the solicitor and barrister) and by arguing the case in court. Usually, they are instructed in litigation that may require particular specialist legal

advice and advocacy. The Bar Council of Ireland provides a limited direct professional access scheme for approved professional bodies which is for non-contentious matters and does not extend to contentious matters.

3.4 Broadly speaking, the perceived advantages to retaining a divided profession relate to the importance of independence and specialisation, and to a certain extent equality of arms before the law. A divided profession may also be the most efficient way in many cases to enable clients to be effectively represented in litigation.

3.5 The "cab rank rule", in theory at least, requires barristers to take any and all clients whatever their background or alleged offence or wrongdoing. The principle behind the "cab rank rule" is that it assists the fair and equal working of the legal system, as it theoretically offers access to counsel for all clients.

3.6 The fact that barristers are generally retained by solicitors, rather than directly by the ultimate clients, is thought to ensure the barristers' independence of judgment, and to ensure a standard of professional advocacy which is not overly influenced by any close connection (personal or financial) with the client whose interests are at issue. That said, it is also important that Solicitors should remain independent in providing legal services to their clients so to provide objective advice.

3.7 Solicitors directly deal with the clients and may engage the barrister for legal argument in court. Solicitors assist the client by recommending and briefing suitably qualified counsel.

A) ENGLAND AND WALES

3.8 In England and Wales, the legal profession operates in a fashion similar to that of Ireland with two branches - barristers and solicitors. The legal training differs for each qualification as does the form of practice undertaken.

3.9 The division in the profession is a very old one, and may have arisen by historical accident – "*On closer examination, it becomes clear that the divided bar was largely*

the result of historical accident, driven by class distinctions and economic turf protection."[4]

3.10 Although the roots of the role of "advocate" in a formal adversarial context can be traced back to Ancient Rome, and the Roman conquest of Britain, the first clear distinction between the two branches of the profession, as we would recognise them today, emerged in the 13th century when the first lawyers – known as "Serjeants at Law" or "pleaders" - were appointed to plead on behalf of plaintiffs in the "King's Courts".[5]

3.11 By the 14th century, the four Inns of court had developed. Other types of legal practitioner began to emerge, such as solicitors and attorneys. Some would argue that at this point "*a gradual separation of functions began between barristers – advocacy and advisory specialists for whom the higher courts were reserved – and other lawyers, such as 'attorneys' and 'proctors'*"[6] and that this continued over the following centuries. However, others consider that the demarcation between the two was far from clear, and that the strict and historic division between solicitors and barristers, as we know it, only effectively began when the Inns, and later the courts, began broadly adopting a policy of excluding attorneys from the late 19th century.[7]

3.12 This formal division continues but as of the late 20th century (the late 1970s) there has been debate around the issue of fusion of the profession. For example, as part of its review of legal services the "Royal Commission on Legal Services of 1979" (the Benson Commission)[8] largely focussed on whether the structure of the legal profession should be unified. Ultimately, it decided against recommending fusion.[9] In 1986, the Law Society of England and Wales and the Bar Council established the "Marre Committee", to look at a range of issues affecting legal services, including the structure of the legal profession. Its 1988 report did not recommend fusion but it did

4 Judith L. Maute, *Alice's Adventures in Wonderland: Preliminary Reflections on the History of the Split English Legal Profession and the Fusion Debate (1000-1900 A.D.)*, (2003) 71 Fordham L. Rev. 1357, 1358.
<http://ir.lawnet.fordham.edu/flr/vol71/iss4/7>.

5 Ibid at 1359 - 1360.

6 http://www.2hb.co.uk/history.

7 Harry Cohen, *The Divided Legal Profession in England and Wales - Can Barristers and Solicitors Ever Be Fused*, (1987-1988) 12 Journal of the Legal Profession 7, 12.
<http://www.law.ua.edu/pubs/jlp_files/jlp_issues.php?page=issues&vol=12>

8 Benson, Final Report: Volume 1, (1979).

9 See Grania Langdon-Down, *Shifting Values,* Law Society Gazette of England and Wales (17 December 2004).

recommend extending rights of audience to solicitors in the Crown Court, that professions other than solicitors be permitted direct access to the bar, and that solicitors should be eligible for appointment as High Court judges.[10]

3.13 In July 2003, Sir David Clementi was appointed by the Secretary of State for Constitutional Affairs to review the regulatory framework for legal services in England and Wales. The final report of the "Review of the Regulatory Framework for Legal Services in England and Wales" ("the Clementi Review") was published in 2004. The terms of reference for the Clementi Review were as follows:

> *"To consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector; and*
> *To recommend a framework which will be independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified."*11

3.14 In the context of its broad mandate to consider changes in the public interest to the legal services sector, the Clementi Review only very briefly referred to the fusion of the legal profession in the foreword of the final report. It was firmly of the view that the issue was a matter for the professional bodies. Therefore, fusion was clearly not considered an issue fundamentally connected to any "public interest" reform of the legal services sector.

> *"…a number of observers have wondered whether I might recommend that there should be fusion between the Bar Council and the Law Society. 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*

10 Ibid.

11 *Review of the Regulatory Framework for Legal Services in England and Wales*, Final Report, Sir David Clementi, December 2004.
http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/content/report/report-chap.pdf.

themselves and their members. The regulatory framework needs to be able to accommodate either merger or de-merger."

3.15 As a result of many government green and white papers regarding the provision of legal services (government papers spurred on by the OFT "*Competition in the Professions*" Report in 2001[12] and the Clementi Review in 2004), significant legislative reforms were introduced in England and Wales by way of the *Legal Services Act 2007*, which radically changed the provision and regulation of legal services.[13]

3.16 Some changes introduced were along the lines of what had previously been recommended by the Marre Committee and had the effect of diminishing some of the formal differences between solicitors and barristers; i.e. higher rights of audience may now be acquired by solicitors after passing an Advocacy Assessment14 while barristers may now be instructed by members of the public directly under the Public Access Scheme[15]. It is arguable that "*while total fusion of the two professions has not yet taken place, the more accurate way to characterise the current system is one of partial assimilation*."[16]

3.17 The issue of fusion continues to arise as a topic for debate in England and Wales, particularly in the context of the many regulatory changes which its legal system has undergone more recently. Nevertheless, it would appear that, for the moment, it remains solely as an issue for discussion amongst legal practitioners and commentators, rather than featuring on any government legislative agenda.[17]

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12 The *Report on Competition in Professions* was published by the Office of Fair Trading in March 2001, and reviewed the restrictions on competition in the legal, accountancy and architects professions.
http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf

13 See 9 above.
See the website of the Legal Services Board, England and Wales, which briefly outlines the decade of reform leading to the Legal Services Act 2007 and the creation of the of the LSB.
http://www.legalservicesboard.org.uk/about_us/history_reforms/index.htm.

14 <http://www.sra.org.uk/solicitors/accreditation/higher-rights-of-audience.page>.

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

16 The Wilberforce Society, *Reform of the Legal Profession* (February 2012), at p. 17.

17 For example: Paul Rogerson, *Roundtable: Solicitor-Advocates,* The Law Society Gazette (13 December 2013) <http://www.lawgazette.co.uk/people/roundtable-solicitor-advocates/5039130.article>.
Joshua Rozenberg, *Advocacy Time Bomb ticking*, The Law Society Gazette (19 May 2014) <http://www.lawgazette.co.uk/analysis/comment-and-opinion/advocacy-time-bomb-ticking/5041266.article>.

3.18 When considering some of the views expressed by members of the Law Society of England and Wales and the Bar Council of England and Wales, it would seem that many practitioners consider that fusion has already occurred (or at least started to occur) in practical terms, and continues to occur naturally within the profession in England and Wales.

3.19 For example, in 2012 the then President of the Law Society of England and Wales, John Wotton, delivered the "President's Oxford lecture at the Saïd Business School", entitled "*Fission or fusion, independence or constraint?*", observing:

> *"…the barrister/solicitor division, which was originally based on higher court advocacy being reserved to barristers and the conduct of litigation (and some other non-contentious legal services) to solicitors is unknown in the civil law world and increasingly anomalous in today's common law world, surviving in a handful of jurisdictions internationally.*
>
> *With solicitors gaining higher court advocacy rights, one of the key functional planks supporting the division of the profession by two separate titles has already been removed.*
>
> *It is on the other hand particularly at the more experienced and specialised end of the advocacy market that economic and public interest considerations favour the existence of an independent, referral-based Bar, whose services are potentially available to all law firms and their clients.*
>
> *I assume, however, that the two separate professional titles of barrister and solicitor will survive for the foreseeable future, if only because there is no strong current of opinion in favour of fusion. The Bar has a well-established, relatively low-cost model for its traditional work, from which it will not lightly depart (though I harbour doubts about the long term sustainability of the low fees charged by junior barristers in some cases). One might, however, envisage a time at which* ***the distinction between barrister and solicitor is more a matter of tribal culture than function****."*[18] (Emphasis added)

Baroness Deech of Cumnor DBE, *The Legal Profession – Regulating for Independence* (Gresham College, London, 9 May 2012) <www.gresham.ac.uk/lectures-and-events/the-legal-profession-regulating-for-independence>.

18 John Wotton, *Fission or fusion, independence or constraint?* (President's Oxford Lecture, Said Business School, Oxford University, 24 January 2012).

3.20 Thus, Mr Wotton considered that the distinction between the two branches of the profession would probably remain in existence but more so as a matter of form or "*tribal culture*", rather than as a clear and impenetrable divide in function as between the types of work undertaken by solicitors and barristers. The same observation could be made in an Irish context.

3.21 In an earlier speech, in 2010, the then Chairperson of the Bar Council of England and Wales, Nicholas Green QC, set out his view of fusion and how in practical terms, it was already in existence in England and Wales:

> *"In my view there is a strong public interest in the preservation of a discrete cadre of specialist advocates and advisors. Fusion is to be avoided. The "f" word crops up in numerous conversations I have had with the profession; it is a "hot topic". The old Bar but also the new and Young Bar wish to remain discrete and independent. They do not wish to be regulated by the SRA. It has frequently been put to me that we must at all costs avoid fusion. Yet there is a great deal of misunderstanding about the meaning of the phrase.*
>
> ***In one sense the legal profession is already fused and has been for a considerable period of time. Any barrister who has wished to work with solicitors has long been able to be employed by a firm. That is fusion**: barristers and solicitors working together in the same partnership albeit that until very recently the barrister has been an employee not a partner. Since the decision the BSB took in November 2009 to permit barristers to go into partnership in solicitors' firms the oddity that a barrister could be employed but not a partner has disappeared so even that lingering asymmetry has now gone. **Secondly, if by fusion what is meant is that barristers and solicitors do the same thing – functional fusion – then again that has been more or less true for a considerable period of time.** Solicitors have had higher rights of audience since 1990 and barristers have had (limited) public access since 2004. There has been licensed access to the Bar by professionals for 20 years and licensed access for other organisations and*

See also: John Wotton, *Is the legal profession looking at fission or fusion?* The Law Society Gazette (2 February 2012) <https://www.lawgazette.co.uk/analysis/is-the-legal-profession-looking-at-fission-or-fusion/64099.article>.

individuals for the last 10 years. So although there are some functional differences they are not as great as is first supposed."[19] (Emphasis added)

3.22 Thus, he considered that fusion was already a reality in practical terms in two ways:

(i) barristers and solicitors can form a legal services partnership;

(ii) there is little distinction between the types of work that can be carried out by a solicitor or barrister.

3.23 However, a recent Independent Review of Legal Services Regulation in England and Wales, while not considering the issue of fusion *per se*, did observe in its Interim Report that it did *"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)"*.[20]

B) AUSTRALIA

3.24 The legal profession in Australia retains a mixture of fused and divided models amongst its six states and two territories.

3.25 In summary, the breakdown amongst these states and territories is as follows: [21]

i. Two retain a divided legal profession (New South Wales and Queensland);

ii. Five have a unified or fused legal profession (Western Australia, South Australia, Australian Capital Territory, Northern Territory, and Tasmania);

19 Nicholas Green QC, *The Future of the Bar* (Future of the Bar Symposium, 10 June 2010), at p. 60.
See also: *Bar Council Chairman sets out radical and progressive vision for the future of the bar,* The Bar Council (Press Release, 11 June 2010).

20 Professor Stephen Mayson, (September 2019) *Independent Review of Legal Services Regulation: Findings, Propositions and Consultation, LSR Interim Report*, at p.49, available at https://www.ucl.ac.uk/ethics-law/sites/ethics-law/files/irlsr_interim_report_1909_final_4.pdf.

21 The Competition Authority, *Study of Competition in Legal Services* (Preliminary Report, 24th February 2005), Appendix A, para A.22-A.55.

iii. One has a fused legal profession by virtue of its legislation but in reality it is divided, as lawyers must choose to be registered as a solicitor *or* barrister (Victoria).

3.26 Thus in the majority of the Australian states and territories, the legal profession is fused and has been for many years, often since the late 18th and early 19th centuries.

3.27 As noted in the preceding section, some consider that the model of a divided legal profession in the common law system of England and Wales came about as a result of "*historical accident, driven by class distinctions and economic turf protection*". Similarly, it is arguable that the widespread adoption of a unified model in the younger common law jurisdictions essentially resulted from "*historical accident*" as well, driven by factors stemming from the difficulties encountered in the early colonisation of these new continents. What is certain is that it is evident that a unified legal profession is the norm in most common law jurisdictions which historically were once colonies of the British Empire.

3.28 Alternatively, it could be said that it is the result of more than mere "accident" as the adoption of fusion throughout these jurisdictions probably stemmed from the need to find immediate and practical solutions for the difficulties encountered in early colonial life and the sense of creating a new "social order" for the "new world"; i.e., the practical difficulties faced by the first European settlers in these lands included, for example, sometimes coping with a sparse population, adapting to a more relaxed social hierarchy, and explosive new flourishing economies.

3.29 A very brief historical overview of when fusion originated in some of the Australian states and territories is outlined below.

3.30 In relation to New South Wales and Victoria:

> *"**Throughout Australia, there was in the earliest days of 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 the business.** As soon as high level courts were established (1823 on) and staffed by judges appointed from the English Bar, there was immediate pressure from these gentlemen to establish the divided profession with which*

they were familiar, and this move was supported by English barristers who came to the colony to practise. The colonials who had carried on an amalgam practice were sometimes of convict origin and in any event not gentlemen, and these considerations increased the desire of some judges and English barristers to avoid the necessity for unduly close contact with such practitioners. Thus in New South Wales a divided profession was created in the first place by judicial direction which took effect in 1834, and this division was accepted and supported by subsequent legislation dealing with the legal system of the state, which at the time included the areas subsequently to become Victoria and Queensland. Victoria accordingly took over the same division when it separated from New South Wales in 1851 and Queensland when it separated in 1859.

But the Victorians were acquainted with the fused profession already established in South Australia; also, as in that state, radical political ideas and Chartist and Benthamite proposals for law reform had considerable influence, especially after the gold rushes of 1851-62 brought new settlers with new ideas. *Hence it is not surprising that from the establishment of responsible as well as representative government (1856), proposals were made to amalgamate the profession."*[22] (Emphasis added)

3.31 In the case of South Australia, Tasmania and Western Australia:

"In these three states, ***early enactments provided for the continuation of the type of amalgam practice which had at first become established in fact.*** *In each case, however, as with the Victorian Act of 1891, the terms of these enactments acknowledged the potential separate existence of practice as a barrister and as a solicitor."*[23] (Emphasis added)

3.32 In the case of the Australian Capital Territory, the "*small size of the population and the profession made amalgamation the only feasible system at first. Hence it is not surprising that the Seat of Government (Administration) Ordinance 1930, section 15, explicitly adopted fusion … the section provides: 'Any person entitled to practise as a*

22 Geoffrey Sawer, *Division of a Fused Legal Profession: The Australasian Experience* (1966) The University of Toronto Law Journal, Vol. 16(2), 245, 247.

23 Ibid at 255.

barrister or solicitor in the High Court of Australia shall have the right to practise as a barrister or solicitor, or both, in the Territory.'"[24] Similarly, it was small population size that ultimately made fusion the only viable option for the Northern Territory.[25]

3.33 Despite the prevalence of the fused model in Australia, what really proves remarkable is the fact that in each of the Australian states or territories which have a fused profession, an independent bar has developed.[26] As hinted at above, many jurisdictions which provide for a fused profession by statute also allow for practitioners to choose to practise as either a barrister or solicitor, should they so wish. As a result, legal practitioners can *choose* to operate solely as barristers *or* solicitors, rather than by their fused title of "barrister and solicitor". In these jurisdictions, a practitioner working only as a barrister is termed a "barrister sole".[27]

3.34 Professor Geoffrey Sawer, a leading Australian legal and political science academic, made the following observations in 1966 regarding the advantages to the development of an independent bar in jurisdictions with fused or "amalgam" legal professions:

> *"But as the Australasian experience shows, not every feature of the English division needs to be imitated. There is much to be said for the Victorian situation, likely to develop in the other states where fusion is legally possible, of a strong de facto Bar whose privileges depend on performances and not on legal guarantee. This* ***gives great flexibility to the system;*** *it ensures that as soon as a particular class of litigious work no longer requires specialized advocacy, it can be carried out by the lawyer who takes the client's instructions; it prevents the Bar from developing folie de grandeur, and from making unreasonable financial demands, since the possibility of competition from amalgams is always available. There is much to be said for a single*

24 Ibid at 259.

25 Ibid at 260.

26 The Competition Authority, *Competition in Professional Services, Solicitors and Barristers* (Report, December 2006), Appendix 3, p. 160.

"*The legal profession in Australia consists of both barristers and solicitors. In some States, the profession is integrated, in others it is not. Interestingly, in those States where the profession is formally integrated, an independent Bar has nevertheless emerged in relatively recent times. The legal profession as a whole is represented nationally by the Law Council of Australia, but there are also local representational bodies in the different States. Barristers in Australia have their own professional representational bodies, both nationally and regionally. They may also – and in some cases, must – belong to the Law Society of their particular region*."

27 Ibid at para 4.123 (p. 71).

basic training system for the whole profession, and for the Western Australian principle of an all-embracing professional organisation as well as a special Bar council.

….

However, while the general issues of probity and of the choice of the judiciary are, in my view, the principal objective reasons for advocating a divided profession, I doubt whether they have been the main factors in preserving or creating a divided profession in Australasia where provision for an amalgamated profession existed or exists. ***The main issue has been that of advocate efficiency. Only a very large firm of attorneys can afford to have a specialist in advocacy who spends most of his time in court.*** *The judges like and encourage this sort of specialization, since it makes their task so much easier. Once a practitioner gets to the stage where he spends most of his time in court, he begins to wonder whether he might not do better for himself and the profession if he does this as an independent contractor - that is, as a barrister, English style."*[28] (Emphasis added)

3.35 In short, some division within what is otherwise a unified profession is inevitable given that the majority of lawyers will naturally wish to specialise for reasons of greater efficiency and competitiveness. Interestingly, in Western Australia which features a unified legal profession, the Legal Practice Board (state regulator), is currently dealing with the issue of legal practitioners using the title of "Senior Legal Counsel" in a misleading manner. Following objections to the Board's request for those practitioners to amend their titles, the Board is allowing further submissions and responses to allow them to consider the matter further. [29]

C) NEW ZEALAND

3.36 Similar issues faced New Zealand, as those encountered by Australia, when its fledgling legal profession was first being established:

28 Geoffrey Sawer, *Division of a Fused Legal Profession: The Australasian Experience* (1966) University of Toronto Law Journal, Vol. 16(2), 245, 265 – 266.

29 *Use of the title Senior Legal Counsel*, Legal Practice Board of Western Australia, 18 March 2020, https://www.lpbwa.org.au/Legal-Profession/News/Use-of-the-term-%E2%80%98Senior-Legal-Counsel%E2%80%99.

"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[30] *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."*[31]

In New Zealand, the legal profession is fused. All practitioners have similar legal training and are admitted to the High Court of New Zealand as "barristers and solicitors" and hold practising certificates with this title. After admission, the vast majority of legal practitioners continue to be styled as "barrister and solicitor" but a small minority elect to become barristers sole, generally specialising in advocacy, similar to the situation noted in other jurisdictions. Often individuals only become barristers sole after they have practised in a law firm for a number of years. Indeed, they require three years' experience in a law firm or similar environment before becoming a barrister sole.[32] Barristers sole are subject to the same regulatory body as solicitors.

3.37 The role of the vast majority of individuals who remain styled as barristers and solicitors depends on whether they are engaged in purely transactional work or also act in disputes. The role of transactional lawyers would be similar to solicitors in an Irish law firm. The fused profession is more relevant to litigation lawyers in law firms. Being both barristers and solicitors, such individuals would generally exercise their rights of audience in New Zealand courts more frequently than solicitors would exercise such rights of audience in Ireland. The default position in most New Zealand litigation would be for law firms to perform the roles associated with both barristers and solicitors and this is seen as reducing costs for the client. However, the "independent bar" is also available to clients when required. Accordingly, in practice, litigation specialists in New Zealand law firms are likely to discharge both functions in many circumstances, with independent counsel often engaged for more

30 Of course it was *"men"* in those days. Fortunately, the profile of the New Zealand profession, like the Irish, has developed since then - a majority of law graduates are female as in Ireland, although Ireland was of course the first jurisdiction to have a majority of the profession female.

31 Ibid at 261.

32 32 The Competition Authority, *Study of Competition in Legal Services* (Preliminary Report, 24th February 2005), Appendix A, para A.56.

complex matters, or for cases in the appellate courts or where particular expertise is required or where it is more cost effective to employ such a barrister sole.

D) CANADA

3.38 In Canada, the legal profession is unified in nine of the ten provinces, the exception being Québec which in any event has a different legal system with its civil law tradition.[33]

3.39 In each Canadian Province or Territory, a single "Law Society" functions as the regulator of the legal profession in that Province or Territory. For example; the Law Society of British Columbia, the Law Society of Alberta, Law Society of Yukon, etc. Each lawyer is required by law to be a member of a Law Society.[34]

3.40 This system applies to Canada's 10 provinces and 3 territories. The one exception is Quebec as there the profession is divided between attorneys and notaries, and therefore there are two distinct law societies in Quebec – the "*Barreau du Québec*" and the "*Chambre des Notaires"*.

3.41 In effect, the Law Societies "*set the standards for admission to the profession and the conduct of members in their province or territory. They audit and monitor the use of trust funds held by members of the profession. They also investigate complaints and discipline members of the profession who violate the required standards of conduct.*"[35]

3.42 Canada provides an excellent example of a jurisdiction with a well-established fused or unified legal profession which has been in place, there or thereabouts, since the early 19th century.[36]

33 The Competition Authority, *Competition in Professional Services, Solicitors and Barristers* (Report, December 2006), Appendix 3, p. 159.

34 Federation of Law Societies of Canada < https://flsc.ca/ >.

35 Ibid.

36 For example, see the website of The Law Society of Ontario <http://www.lsuc.on.ca/with.aspx?id=427>.

3.43 Unlike the experience in other common-law jurisdictions with fused legal professions (such as New Zealand and Australia), there does not appear to be an independent bar in Canada.

3.44 In considering the application of fusion to England and Wales, one commentator of the Law Society Gazette (of England and Wales) has described the fused profession in Canada as follows: "*Perhaps Canadian lawyers have the most seamlessly fused profession in the Commonwealth*."[37]

3.45 While there is no sign of an emergent independent bar in Canada, it can be assumed that a comparable type of division amongst the legal profession might nonetheless be identifiable, and that to a certain extent, this division could have a somewhat similar effect in practice to that of a fully independent bar being in existence. In the simplest terms, it is probable that some Canadian lawyers are likely to choose to specialise either as "litigators" (i.e. barristers as we know them, or "sole barristers" as in Australia and New Zealand) or as office-based lawyers (i.e. solicitors as in this jurisdiction), rather than practising as both.

3.46 The most obvious reasons for a pronounced separation in legal specialisation, a separation which is essentially based along the lines of the traditional common law solicitor/barrister divide, stem from considerations such as practicality and economic feasibility. For some legal practitioners, it would arguably be a more economically viable solution for them to choose to focus their labours in one particular area of practice. Additionally, it is clear that in all types of professions there are categories and degrees of specialisation, and, the legal profession is the same.

3.47 Nevertheless, the likelihood that Canadian lawyers retain the option of choosing a specialisation to focus on either court or office-based work, if they so wish, cannot be viewed as equating with either; (a) retaining a formally divided legal profession or (b) having a genuinely independent bar in addition and parallel to an otherwise unified profession.

37 *Competitive edge -- last year, Law Society President Robert Sayer reignited the debate over fusion of the profession -- a look at the issue both here and abroad, where it has already happened,* The Law Society Gazette (10 February 2000) <https://www.lawgazette.co.uk/news/competitive-edge-last-year-law-society-president-robert-sayer-reignited-the-debate-over-fusion-of-the-profession-a-look-at-the-issue-both-here-and-abroad-where-it-has-already-happened-/21140.article.

4. EUROPEAN CIVIL LAW JURISDICTIONS

4.1 Civil law has its roots in ancient Roman law. More particularly, it can be traced back to the compilation of Roman laws (legislation, etc.) and jurists' legal writing at the direction of emperor Justinian[38] in the 6th century and known as "Justinian's Code".

4.2 The civil law tradition is the legal system followed in continental Europe. The most significant codifications of modern civil law were the French Civil Code (the Napoleonic Code, 1804) and the German Civil Code (1900). Each of these influenced most other European states. For example, Spain and Belgium followed the French tradition, while Austria and Switzerland followed the German code.

4.3 In very general terms, civil law can be described as primarily based on "*legal codes*" and legislation (i.e., the law is codified) *rather* than case law or precedents. In contrast, the common law system has its origins in Middle Ages England, and is largely based on case law precedents, with no definitive collection or codification of legislation or rules (i.e. a decision is legally binding on all subsequent similar cases unless a higher court reverses it).

4.4 In more recent times, it is clear that the increasing interrelation and connection between legal statute and case law for both civil and common law traditions is often overlooked, with the focus instead remaining on the existing differences between the two legal systems. Nonetheless, although the sources of law for both systems are becoming more alike, the structure of the common law and civil law professions continue to reflect their contrasting origins.

4.5 Generally speaking, the common law division in the legal profession does not have an exact equivalent in the civil law jurisdictions in Europe. As far as we would recognise a divided profession along the lines of solicitor and barrister, the equivalent profession of legal practitioners in Europe is a fused one. Notwithstanding this, it has to be acknowledged that there are variations amongst the broader legal profession in many continental jurisdictions, depending on the type of legal specialisation chosen.

38 Justinian I ruled from 527-565 AD. At that stage, the vast Roman Empire had been politically and culturally divided for centuries into the Western and Eastern (or Byzantine) empires. The Western Empire collapsed in 476 due to Germanic invasions. So the Roman empire of Justinian was the Eastern Empire.

For example, there would be a much richer tradition and variety of other legal qualifications such as notaries, state prosecutors provided for by legislation, different types of lawyers for different higher courts of appeal or specialty, qualified court clerks, and property and/or commercial registrars.[39]

4.6 For example, in France, there is no split along the lines of the common law solicitor/barrister divide amongst what we would view as its "liberal" ("free and independent") legal profession of "*avocats*". Some "*avocats*" specialise in legal advisory work only and therefore do not go to court but all "*avocats*" have the same status.[40] However, there are a variety of other legal professionals and specialisations such as "*avoués",* state appointed lawyers who can appear before the Court of Appeal, and "*avocats au Conseil d'Etat et à la Cour de cassation*", state appointed lawyers who can appear before the two superior courts in France. There are also "*notaires*", who can advise in relation to property and certain commercial matters.[41]

4.7 Similarly, in Germany there is no corresponding division in legal qualifications and roles as exists in Ireland in relation to solicitors and barristers. In order to become a fully qualified lawyer, an individual must first have a law degree and then pass two sets of state exams. After the first set of state exams, an individual can work as a "legal advisor" in a law firm but cannot act as "counsel" for a client (i.e., appear and argue in court on behalf of the client) or become a judge. To become a fully practising lawyer – "*volljurist*" – the person must then pass a second set of exams, which entitles them to appear in court, be a lawyer in a law firm, and become a judge.[42]

4.8 Given the fundamental differences between the structure of the common law and civil law legal professions, there is little to be gained in extensively comparing and contrasting each and every civil legal profession with our own. Differences abound in the variety of the many different types of legal practitioner in each jurisdiction. It is the

39 The website of the *European Judicial Network in civil and commercial matters* (European Commission) provides a detailed overview of the legal professions in the EU. <http://ec.europa.eu/civiljustice/legal_prof/legal_prof_gen_en.htm>.

40 See the IBA website for further information on how one becomes a lawyer in France. <https://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/ITILS_France.aspx>.

41 See 39. <http://ec.europa.eu/civiljustice/legal_prof/legal_prof_fra_fr.htm>.

42 See the IBA website for further information on how one becomes a lawyer in Germany. <http://www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_Germany.aspx>.

Society's view that there is more to learn in examining the situation of legal practitioners in comparable common law jurisdictions.

5. OTHER JURISDICTIONS OF INTEREST

5.1 Although the civil law jurisdictions can provide little insight for analysing the structure of our legal profession, and the prominent common law jurisdictions of England and Wales, Australia, New Zealand and Canada have already been considered in this paper, there are a few other jurisdictions which are of interest, namely Scotland, South Africa and the United States.

A) SCOTLAND

5.2 In Scotland, the legal profession is broadly similar in structure to that of England and Wales and comprises solicitors, "advocates" (barristers), solicitor-advocates (as in England and Wales, since 1990 solicitors who have undergone specialist training may apply for rights of audience in the higher courts) as well as conveyancing and executry practitioners.

5.3 One interesting divergence amongst the legal profession in Scotland as opposed to Ireland or England and Wales is that of the education model used for solicitors and barristers. Although there is a divided legal profession in Scotland, the legal education model for qualifying is not correspondingly divided as in Ireland or England and Wales. It is a "progressive qualifying system".[43] All aspiring lawyers take the same 26-week vocational course, the Scottish "Diploma in Legal Practice", after which an in-office two-year traineeship must be completed. On completing the traineeship, the student becomes a qualified solicitor and is only at this point that the legal training for advocates splits. Those wishing to qualify and work as advocates must then apply to the "Faculty of Advocates" (the equivalent of the Bar Council), pass the required exams, and complete a period of devilling (8-9 months) before being a qualified advocate and admitted as a member of the Faculty of Advocates.[44]

5.4 There was recent reform in Scotland in the provision of legal services with the enactment of the *Legal Services (Scotland) Act 2010*; however, no aspect of the reform related to the fusion of the legal profession.

43 The Wilberforce Society, *Reform of the Legal Profession* (February 2012), at p. 12.

44 See the website of the Scottish Faculty of Advocates - *Becoming an Advocate* - http://www.advocates.org.uk/about-advocates/becoming-an-advocate.

5.5 The Scottish government website states that the *Legal Services (Scotland) Act 2010*[45] was intended to deliver benefits to both the profession and consumers, and would "*reduce the restrictions on solicitors entering into business relationships with non-solicitors, allowing investment by non-solicitors and external ownership, within a robust regulatory framework*."[46] Amongst other reforms, the Act was to "*set out regulatory objectives and professional principles which will apply to all legal professionals*" and "*codify the framework for regulation of the Faculty of Advocates*".[47]

5.6 In somewhat greater detail, the primary aim of the Act was described on the Scottish government website as follows:

> *"The primary aim of the Legal Services (Act) 2010 ("the Act") is to remove the current restrictions in the Solicitors (Scotland) Act 1980 on how solicitors can organise their businesses. It will allow solicitors to form partnerships with non-solicitors and to seek investment from outside the profession (although a majority share in any such business must remain with solicitors or other regulated professionals). The Act is enabling rather than prescriptive, so solicitor firms that do not want to operate under the new business arrangements will be under no obligation to do so.*
>
> *The Act will create a tiered regulatory framework in which the Scottish Government will be responsible for approving and licensing regulators ("approved regulators"), who in turn will regulate licensed legal services providers ("licensed providers")…"*[48]

5.7 It would appear that the focus of recent legal services reform was firmly upon the creation and regulation of multi-disciplinary partnerships, etc. Fusion of the profession does not appear to be a particular issue of concern in Scotland.

45 Legal Services (Scotland) Act 2010 <http://www.legislation.gov.uk/asp/2010/16/contents>.

46 See the Scottish Government website <http://www.scotland.gov.uk/Home>. Particularly, see the webpage <http://www.scotland.gov.uk/Topics/archive/law-order/17822/10190/profession-reform-1>.

47 See the Scottish Government website at - <http://www.scotland.gov.uk/Topics/archive/law-order/17822/10190/profession-reform-1/Bill>.

48 Ibid.

5.8 Part of the reason for this lack of interest in fusion may lie with the Scottish model of legal education, which is essentially uniform in structure, providing a broad and common shared legal training for both solicitors and advocates.

5.9 Another contributory factor may be that, aside from the shared legal training, those who choose to practice as solicitors may also acquire rights of audience in the higher courts by becoming solicitor-advocates, as in England and Wales. Thus, they can choose to remain a solicitor but also acquire the right to represent clients in the higher courts without having to formally choose to practice as an advocate and undergo such training to become a qualified advocate (a Scottish barrister).

B) SOUTH AFRICA

5.10 In South Africa, the legal profession is primarily split between advocates (barristers) and attorneys (solicitors). Attorneys can also be registered to practice as notaries and/or conveyancers. The system is currently broadly similar to Ireland in that it is a referral legal system – meaning that there is no direct public access to advocates, they are instructed by attorneys who in turn are instructed by the client. Attorneys also have limited rights of higher audience since 1995.[49] The structure and organisation of the legal profession in South Africa has been the subject of intense debate for a number of years, and significant changes were introduced with the implementation of the Legal Practice Act 28 of 2014[50] ("Legal Practice Act").

5.11 In 2014, the legal profession began the process of undergoing major reform with legislation passed to establish a new regulatory organisation for the legal profession in South Africa. One of the principal aims of the Legal Practice Act was "*to create a single unified statutory body, the Council, in order to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of an*

49 Right of Appearance in Courts Act, no. 62 of 1995 (South Africa). < http://www.saflii.org/za/legis/num_act/roaica1995278/ > Section 3(1) *"Any attorney shall have the right to appear on behalf of any person in any court in the Republic, except the Supreme Court and the Constitutional Court."*
Section 3(2) "*Any attorney who wishes to acquire the right to appear on behalf of any person in the Supreme Court may apply to the registrar of a provincial division of the Supreme Court in the manner provided for in section 4(1)."*

50 Legal Practice Act 28 of 2014. Published in the Government Gazette, Vol 591, Cape Town, 22 September 2014, No. 38022. Accessible at - <https://www.gov.za/documents/legal-practice-act>.

accountable, efficient and independent legal profession".[51] There are 12 "Objects of Council" listed in the Legal Practice Act.[52]

5.12 This new body is called the "South African Legal Practice Council" and deals with all regulatory aspects of the legal profession encompassing all advocates and attorneys (i.e., "all legal practitioners") - from education, to admission and regulation (including disciplinary proceedings). In addition, a new "*Office of Legal Services Ombud*" will also be established by the Legal Practice Act.[53] Part of its statutory role will be to "*ensure the fair, efficient and effective investigation of complaints of alleged misconduct against legal practitioners*".[54]

5.13 The Legal Practice Act is interesting as it adopted an incremental approach to the reform of the legal profession whereby a "National Forum" was first established to make recommendations to the Justice Minister and act as a transitional body before the "South African Legal Practice Council" was established. These recommendations covered a number of issues such as the election procedure for the "Legal Practice Council", educational requirements of "candidate attorneys" (those undergoing vocational training to become attorneys or "pupils" to become advocates), and the right of appearance of "candidate legal practitioners" (those undergoing vocational training to become either an advocate or an attorney).[55] The explanatory memorandum to the Legal Practice Bill outlines the approach:

> *"A National Forum on the Legal Profession (the National Forum) will fulfil a key role in the first phase of implementation, paving the way for the establishment of the permanent South African Legal Practice Council (the Council) and putting systems and procedures in place for the second and subsequent phases of the implementation process. The powers and functions of the National Forum relate largely to aspects in respect of which there are still differing views between the various categories of legal practitioners*

51 See the *Revised Memorandum on The Objects of the Legal Practice Bill, 2012* at S.2(c), see <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/131105memorandum.pdf>.

52 Legal Practice Act 28 of 2014, section 5.

53 Ibid at Chapter 5.

54 Ibid at section 46.

55 Ibid at section 97.

among themselves, on the one hand, and between the Government and the legal profession, on the other."[56]

5.14 The Legal Practice Act 2014 was enacted on 22 September 2014, signalling the formal start to the transfer of regulation of the legal profession to the Legal Practice Council. The Legal Practice Act was amended by the Legal Practice Amendment Bill 2017[57] which was enacted in December 2017 and addressed practical and technical issues of a non-contentious nature. From 2015 to 2017, the National Forum held ten meetings culminating with the submission of their recommendations to the Minister on 26 October 2017, with the Amendment Bill passed the following month.

5.15 It seems that a key motivation behind the introduction of the Legal Practice Act was to radically restructure the organisation and regulation of the legal profession. The explanatory memorandum states that one of the main goals of the Legal Practice Act was to "*provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld*".[58]

5.16 The Legal Practice Act allows the public to directly instruct advocates (i.e., direct public access to barristers).[59] It will also simplify the process (somewhat) for attorneys applying for rights of audience before the Constitutional and Supreme Courts.[60]

5.17 It is interesting to note that longstanding plans to introduce fusion of the two branches of the legal profession were ultimately omitted from the final legislation.[61] This is despite the fact that legal fusion was often a source of fierce political and legal debate from the late 1990s onwards in South Africa. Some of the intensity of the arguments in favour of fusion appeared to stem, at least in part, from South Africa's traumatic past, and the belief that a divided profession was a colonial and apartheid

56 See the *Revised Memorandum on the Objects of the Legal Practice Bill, 2012* at < http://pmg-assets.s3-website-eu-west-1.amazonaws.com/131105memorandum.pdf >.

57 Legal Practice Amendment Bill 2017, see <https://www.justice.gov.za/legislation/bills/2017-LegalPracticeAmendmentBill.pdf>.

58 Ibid at p. 63 (section 2 of the Revised Explanatory Memorandum).

59 Section 34(2)(a)(ii) of the Legal Practice Act 28 of 2014.

60 Section 25(3) of the Legal Practice Act 28 of 2014.

61 Seth Nthai, *Bill both bolsters and threatens legal profession's independence,* Business Day (South Africa, 19 December 2013) <https://www.businesslive.co.za/archive/2013-12-19-bill-both-bolsters-and-threatens-legal-professions-independence/>.

relic of antiquated institutions, and one which resisted the reality of a newly diverse and egalitarian South African society. It was felt that by retaining a split legal profession, South Africa "*would effectively be retaining old colonial distinctions and would not contribute to the constitutional imperative for the transformation of the legal profession*."[62]

5.18 Nonetheless, some commentators considered that the approach of having a single regulating body for both branches of the profession was an attempt to introduce some element of fusion; "*(T)he idea of fusing the professions of advocates and attorneys was abandoned, but the Legal Practice Bill survived through five justice ministries. It is fusion in disguise. The thinking behind the Bill has been perfectly honestly stated by ANC members of the justice committee: it is still what it was five ministers ago, namely fusion – but now by other means.*"[63]

C) UNITED STATES OF AMERICA

5.19 The legal profession in the United States is fused. Practising lawyers are also known as "attorneys" or "counselors".

5.20 In a similar manner to other countries with a history of English colonisation, there were numerous practical constraints in the early days of colonisation which constrained the development of the legal profession along the lines of the traditional structure which existed in England. These constraints resulted in what was an

62 Wyndham Hartley, *Legal Practice Bill forced through despite opposition,* Business Day (South Africa, 13 November 2013) <http://www.bdlive.co.za/national/law/2013/11/13/legal-practice-bill-forced-through-despite-opposition>.
See also John Jeffery, Dene Smuts, *Legal Practice Bill: Fusion in disguise Mail and Guardian* (South Africa, 29 November 2013) <http://mg.co.za/article/2013-11-28-legal-practice-bill-fusion-in-disguise>.
In relation to the arguments in favour of fusion as a means of doing away with "colonial influences", it was stated: "*Dr Mathole Motshekga cited the case of Zimbabwe, where he was present when fusion was effected at transition. But he does not say, or remember, that 99% of advocates in Zimbabwe were white and had sole right of appearance in the higher courts. To fellow MP Jonas Ben Sibanyoni, the divided legal profession is the inherited 'old order'. The logic and applicability of his argument are not clear, unless advocates are assumed to be the embodiment of the inherited old order.*"

63 Ibid. John Jeffery, Dene Smuts, *Legal Practice Bill: Fusion in Disguise,* Mail and Guardian (South Africa, 29 November 2013).
See also, Wyndham Hartley, *Legal Practice Bill forced through Despite Opposition,* Business Day (South Africa, 13 November 2013) – "*The bill, which, when it becomes law, will create a single legal practice council, has been criticised as being the death knell of the advocates profession and a move by the ANC to take control of the legal profession. While Justice Minister Jeff Radebe argued that the differences between attorneys and advocates remained, and the original intention of "fusing" the two branches of the profession had been abandoned, opposition parties claimed that the bill provided for fusion by stealth.*"

essentially unified legal profession developing from the outset of colonial American society; practical difficulties such as sparse colonial populations (at first), developing infrastructural resources, and the establishment of a "New World" society modelled initially on that of Western Europe and in particular, England.

5.21 The American Revolution also had a significant impact upon the burgeoning legal profession both directly and indirectly. Firstly, many prominent (English) lawyers were lost (some were killed in the Revolution, and some had remained loyal to the British crown and left the colonies), and secondly, a "*particularly bitter antipathy*" grew towards all things English, including "*the English way of administering justice*".[64] The widespread economic recession that followed the Revolution also had an impact.[65] In summary, the early days of the "American" (post-revolution) legal profession were fraught and filled with great difficulties.

> *"Although America's legal system is derived from the English common law, its formation was not complicated by centuries of history, in which modern forms of practice evolved from historical accident and struggles over social status and turf protection by the predecessors of the two branches of legal practitioners.*
>
> *…*
>
> *As a new country, settled by refugees, melting-pot America enabled the development of a legal profession that was considerably more democratic and less hidebound than its predecessor. Over the last 170 years, American legal ethics improvised solutions to situations as they became problematic. By contrast, the English legal system and practice of law evolved over more than a thousand years, in a long course of specific, piecemeal adjustments."*[66]

64 Anton-Hermann Chroust, *The Rise of the Legal Profession in America, Volume 2, The Revolution and the Post-Revolution Era* (1st Edition, University of Oklahoma Press, 1965) at p. 5.

65 Ibid at p. 11.

See also pp. 11 – 19. The vast majority of legal proceedings related to debt collection, rent collection, tax collection, and insolvency. This coupled with lengthy and slow court proceedings led to the public viewing the legal system and the profession with great suspicion and hostility. This open public antagonism towards the profession caused difficulties in the development of common legal education and training as well as regulation of the profession and even judicial appointments.

66 Judith L. Maute, *Alice's Adventures in Wonderland: Preliminary Reflections on the History of the Split English Legal Profession and the Fusion Debate (1000-1900 A.D.),* (2003) 71 Fordham L. Rev. 1357, 1370. <http://ir.lawnet.fordham.edu/flr/vol71/iss4/7>.

5.22 However, in a similar fashion to the Canadian legal profession, there is a pronounced and extensive variety of legal specialisation, albeit with no "independent referral bar" as such in existence. Once more, it is evident that a pronounced divide in legal specialisation is inevitable, particularly given the breadth and range of areas of law. Divisions in the legal profession will naturally occur in some form or other; either by way of the "stratification" of the legal profession amongst various types of legal practice, or perhaps primarily by way of a functional divide. As one commentator observed on considering the divided legal profession in England and Wales; "*Just as the American legal profession is stratified into subcategories of practitioners with distinct skills and practice areas, those functional separations are likely to remain in the British profession*."[67]

5.23 An American legal article from 1998 illustrates this type of separation in legal practice with the example of Chicago, by comparing the findings of two surveys of Chicago lawyers, the first conducted in 1975 and the second in 1995.[68] In summary, an outline of its findings are as follows:

> *"This article compares findings from two surveys of Chicago lawyers, the first conducted in 1975 and the second in 1995. The earlier study indicated that the Chicago bar was then divided into two broad sectors or 'hemispheres,' one serving large corporations and similar organizations and the other serving individuals and small businesses. Analyses of the structure of co-practice of the fields of law indicate that the hemispheres are now less distinct. The fields are less tightly connected and less clearly organized - they became more highly specialized during the intervening 20 years and are now organized in smaller clusters. Clear indications of continuing separation of work by client type remain, however. Estimates of the amount of lawyers' time devoted to each field in 1975 and 1995 indicate that corporate practice fields now consume a larger share of Chicago lawyers' attention, while fields such as probate receive a declining percentage. Growth is most pronounced in the litigation fields, especially in business litigation. The organizational contexts within which law is practiced both reflect and contribute to these changes. The scale of those organizations has increased greatly, and the allocation of*

67 Ibid at 1371.

68 John P. Heinz, Edward O. Laumann, Robert L. Nelson, *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, (1998) 32(4) Law & Society Review, 751-776.

work within them has been divided along substantive, doctrinal lines. As a result, there is a greater disaggregation of work and workgroups within the profession today."[69]

5.24 Many would consider that although there is clearly a great deal of variety of specialisation in the American legal profession, this diversity of legal practice takes place within the context of a fundamentally unified legal profession.

5.25 Nonetheless, it would be accepted as common knowledge that American "trial attorneys" would rarely specialise in any other field of legal practice other than that of litigating cases and engaging in advocacy in court. Therefore, it is at least arguable that depending on the type and the degree of specialisation, it is possible that there is a similar divide amongst the American legal profession between court, or office, based lawyers which mirrors - to a certain extent at least - the divide between solicitors and barristers in this jurisdiction.

69 Ibid at 751.

6. ARGUMENTS IN FAVOUR OF FUSION

6.1 The general assumption underlying some of the arguments in favour of retaining a divided legal profession is that a barrister will always be a specialist lawyer while a solicitor will always be a general practice lawyer. Although this is often true, it is not always the case and in practice the leading experts in many areas of Irish law may be either barristers or solicitors. Facilitating a fused profession would do away with this presumption and present a more pragmatic and streamlined structuring of the legal profession.

6.2 Unifying the profession would thus eradicate arguably archaic and largely redundant distinctions of professional functionality which have their origins in historical accident and tradition rather than modern practice. Such distinctions may be preserved in the current configuration of the legal profession because that is how the profession has been arranged for centuries rather than considering whether such differences continue to serve any real or practical purpose in the public interest (and particularly in the interest of clients).

6.3 In reality, what can be said to be the actual necessity for maintaining a professional split between solicitors and barristers? If there is such a similarity or blurring of functions as between what a solicitor and barrister can do and what they can provide by way of legal services, it is difficult to rationally argue against what must logically be the next stage of simplifying the overall legal professional structure – i.e., the fusion of the profession.

6.4 In terms of both the public benefit and the benefit to lawyers, a fused legal profession would have the result of combining the collective resources and strengths of the branches of the profession. This unified front would assist the legal profession in maximising its public influence to the benefit of its members and the greater public interest. It would provide a more cohesive response from the legal profession to the challenges encountered by lawyers, and also bolster the profession's role in robustly safeguarding the public interest.

6.5 Having one legal profession, united by a common set of practice regulations, disciplinary measures, professional and ethical standards, etc. would best serve the public interest. It would provide greater clarity as to the legal profession's obligations

to the public as the profession would speak with one voice in informing the public as to its responsibilities and duties in providing legal services. The public interest would be better protected by the maintenance of one set of uniform or universal legal practice standards in this manner.

6.6 It is often argued that fusing the two main branches would offer a broader and potentially cheaper choice of legal services to individuals, and generally facilitate greater access to justice A client would no longer have to instruct both a solicitor and a barrister for significant litigation – the same lawyer could undertake both roles, leading to assumed efficiencies and cost savings.

6.7 Fusion would lessen confusion in the public eye about the two main branches of legal profession and simplify matters for individuals seeking to hire the services of a legal professional. The best lawyer for the particular situation would be retained, irrespective of label.

6.8 In theory, legal costs should decrease to some extent, as individuals would not have to pay for two different sets of legal fees due to having to engage both a solicitor and barrister - rather there would only be one set of legal fees.

6.9 There is a perception that unification of the two branches of the legal profession would lead to a reduction in legal costs for consumers of legal services. It should be noted that it is beyond the scope of this submission to confirm whether this perception is correct or not. The Society suggests that a full economic analysis could be undertaken by a more appropriate body to assess the potential for cost benefits for consumers of legal services if the two branches of the legal profession were unified.

6.10 Furthermore, fusion would allow for greater flexibility within the profession as there would be no need to “transfer” between the two branches and only one “pathway” to legal qualification would be required.

IN SUMMARY

6.11 It could be argued that a unified legal profession, united by a common set of practice regulations, disciplinary measures, professional and ethical standards, would best serve the public interest in the provision of legal services.

6.12 A fused profession would combine the collective resources and strengths of both branches of the profession. This will assist the legal profession in maximising its public influence to the benefit of its members and the greater public interest.

6.13 Fusing the profession could theoretically lower legal costs for the consumer and theoretically allow for greater direct access to lawyers. 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. This point is dealt with in greater detail in paragraph 7.37 below.

6.14 A fused profession would require only one form of legal qualification thus simplifying the qualification process for students intending to become lawyers.

7. ARGUMENTS AGAINST FUSION

7.1 The Society has previously expressed concern over any possible legislative move to create a fused legal profession in Ireland, such as changes initially suggested by 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".[70]

7.2 The Society publicly responded to the Competition Authority's Preliminary Report in July 2005 by way of a submission entitled: "*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*" ("the submission").[71]

7.3 The Society's 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.[72] Therefore, in reality, either the retention of dual titles leading to a *de facto* fusion of the profession, or an 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 is desirable*"[73] as an alternative to this proposal of the Competition Authority.

7.4 The Society reiterated its views in its recent submission to the 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.[74]

7.5 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[75]; however,

70 The Competition Authority, *Study of Competition in Legal Services (Preliminary Report, 24th February 2005)*, Chapter 6.
71 The Law Society of Ireland, *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. <https://www.ibanet.org/Document/Default.aspx?DocumentUid=BDABEC0B-FCDB-4E20-808E-DB99D1CC66D2>
72 Ibid at para 6.4. - *"…a solicitor can already do everything that a barrister can do."*
73 Ibid at para 6.5.
74 Law Society of Ireland, *Submission on section 120 Legal Services Regulation Act 2015: Barrister Issues*, para. 3.30-3.32.
75 http://www.irishstatutebook.ie/1994/en/act/pub/0027/sec0051.html#sec51.

approximately seven years ago the Society simplified both the application process and its transfer course requirements for barristers wishing to transfer to the solicitors' rolls. The process is outlined on the Society's website.[76]

7.6 Section 51 the Solicitors (Amendment) Act, 1994 states as follows:

51. The Principal Act[77] is hereby amended by the substitution of the following section for section 43:

"Exemptions for practising barristers

43 – (1) This section applies to a person

(a) Who seeks to be admitted as a solicitor,

(b) Who has been called to the bar of Ireland and has practised as a barrister in the State for such period (not exceeding three years) and at such time or times as may be prescribed,

(c) Who has procured himself to be disbarred with a view to being admitted as a solicitor,

(d) Who has obtained from two of the Benchers of the Honourable Society of King's Inns, Dublin, a certificate of his being in good standing while he was practising as a barrister in the State, and

(e) Who has satisfied the Society that he is a fit and proper person to be admitted as a solicitor.

(2) Subject to subsection (8) of this section, the following provisions shall have effect in relation to a person to whom this section applies:

(a) He shall not be required to obtain a certificate of his having passed any examination of the Society other than the final examination (being the examination or an examination in like form referred to in section 40 of this Act before the coming into operation of section 49 of the Solicitors (Amendment) Act, 1994, as 'a final examination' and in this section referred to as the final examination) and (if obligatory on him) the second examination in the Irish language which is referred to in the said section 40, but he shall not be re-examined in any subject of substantive law

76 http://www.lawsociety.ie/Public/Become-a-Solicitor/Barristers/.
77 The Principal Act as referred to in section 43 is the *Solicitors Act, 1954.* http://www.irishstatutebook.ie/eli/isbc/1954_36.html.

which he has passed or is deemed to have passed as part of a qualifying examination for the degree of barrister-at-law,

(b) He shall be entitled, without being bound under indentures of apprenticeship to a practising solicitor, to apply to present himself for the final examination,

(c) On passing the final examination (except so much of that examination as relates to indentures of apprenticeship and service thereunder) and (if obligatory on him) the second examination in the Irish language, he shall be entitled to apply to be admitted and enrolled as a solicitor.

(3) A person to whom this section applies shall not be required to become bound under indentures of apprenticeship to a practising solicitor but shall attend such courses (if any) and complete such training (if any) and pass such examination (if any) as may be prescribed but he shall not be re-examined in any subject of substantive law which he has passed or is deemed to have passed as part of a qualifying examination for the degree of barrister-at-law.

(4) A person to whom this section applies shall not be required to pass any examination in the Irish language held by the Society under section 40 (3) of this Act if he has passed or was exempted from an examination in the Irish language prescribed by the Chief Justice under section 3 of the Legal Practitioners (Qualification) Act, 1929.

(5) Subject to the provisions of subsection (1) of this section, a person who has attended such courses (if any) completed such training (if any) and passed such examinations (if any) as he shall have been required to undertake pursuant to regulations (if any) made under this section, shall be entitled to apply to be admitted and enrolled as a solicitor.

(6) For the purposes of this section, service by a person as a member of the judiciary in the State, or as a barrister in the full-time service of the State or as a barrister in employment shall be deemed to be practice as a barrister.

(7) In this section-

'barrister in employment' means a barrister who satisfies the Society in the prescribed manner that he has been engaged, under a contract of employment with an employer, full-time in the provision of services of a legal

nature for a prescribed period (not exceeding three years) at such time of times as may be prescribed;

'barrister in full-time service of the State' means a barrister who is required to devote the whole of his time to the service of the State in the provision of services of a legal nature and is remunerated for such service wholly out of moneys provided by the Oireachtas.

(8) Subsection (2) of this section shall stand repealed on the coming into operation of regulations made under subsection (3) of this section."

7.7 To begin with, section 51 provides for a subjective analysis of barristers with more than three years post qualification experience and a decision on what courses and examinations they should take. None of these requirements should repeat any course or examination they took while being admitted as a barrister.

7.8 Before 2008, the transfer process was more complicated and drawn out. In 2007, the Bar Council and the Society agreed on a reciprocal course model. Solicitors and barristers with three years post qualification experience can now apply to take a month long course with the Kings Inns or the Society. On completion of this course (and six months in office training for barristers transferring to become solicitors), they can then transfer over to the other branch of the profession. There are no examinations in either transfer course but they are subject to attendance requirements. The rationale of the transfer courses is to cover areas of education unique to the branch of the profession the transferee is moving to. The Society's course covers Conveyancing, Probate & Administration of Estates, Solicitors Accounts, Ethics and issues relating to running an office. The bar course is focused on civil and criminal litigation procedure and advocacy.

7.9 The below tables show the numbers of barristers who have requalified as solicitors:

2004	2005	2006	2007	2008	2009	2010	2011
2	4	4	3	11	9	6	9

2012	2013	2014	2015	2016	2017	2018	2019
3	10	15	15	34	34	30	28

7.10 The equivalent number of solicitors requalifying as barristers is set out below:

2004	2005	2006	2007	2008	2009	2010	2011
2	1	3	6	3	4	6	10

2012	2013	2014	2015	2016	2017	2018	2019
10	3	0	1	1	3	6	3

7.11 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.

7.12 Thus, the Society has taken action in respect of facilitating "*easier transfer between the two branches*" of the profession.

7.13 The Society 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*".[78] A fused profession would act to negate the existence of an independent referral bar, and it is evident from other jurisdictions where fusion has taken place that an independent bar is an essential feature of common law legal systems. This is particularly apparent in Australia, as in all of the Australian states or territories where the legal profession is or was unified; an independent bar has nonetheless subsequently come into existence.

7.14 On considering the experiences of common law jurisdictions with fused legal professions, such as Australia and New Zealand, there is a clear trend of a distinct group of practitioners inevitably breaking away to practice solely as barristers or advocates. An otherwise unified legal profession is thus voluntarily divided through the creation of an independent bar in effect, through the decision of practitioners, presumably in response to client demand, to specialise in this way. This indicates that, in common law jurisdictions similar to our own, the existence of an independent

78 The Law Society of Ireland, *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.

referral bar is a necessary feature of such legal systems, welcomed by clients wishing to avail of the services of such specialist advocates.

7.15 In its Preliminary Report on "*Study of Competition in the Legal Services* of 2005", the Competition Authority observed that in Australian states and territories where there was a fused profession, there remained a consistent tendency amongst the unified profession to split into two distinct branches:

> "*Evidence from abroad indicates that when barristers and solicitors are allowed form partnerships, many choose not to do so. In the majority of Australian states, barristers may join solicitors' firms. But a voluntary independent Bar has been maintained in most states, and, if it is an efficient model, it is likely to be maintained in a similar form here*."[79]

7.16 Similar problems faced New Zealand, as those encountered by Australia, when its fledgling legal profession was first being established.

7.17 Similarly, in jurisdictions such as Canada and the United States where there is a well-entrenched unified legal profession, there is often a distinct path of specialisation for those who wish to practice solely in litigation and advocacy, which to a certain albeit very limited degree, reflects this somewhat natural split or divergence in the legal profession. One practical reason for this is that it is often more economically feasible for a lawyer to choose to focus on one particular type of legal practice (i.e., court work or more office-based work) and to develop their expertise in that particular area of work. It may be impractical, or not cost effective, for to combine the office based demands of a busy solicitor's role (including the need to meet and advise clients) with the need to attend court for significant periods.

7.18 Currently in Ireland, if a solicitor chooses to exercise his advocacy skills and rights of audience, s/he is fully entitled to do so in a manner similar to that of any fused "barrister and solicitor" in Australia or elsewhere. In addition, Ireland already has a well-established and independent referral bar in existence.

79 The Competition Authority, *Study of Competition in Legal Services* (Preliminary Report, 24th February 2005) at para 5.56.

7.19 The advantage of the independent referral bar in Ireland currently allows an equal level of access to specialist barristers for both small and large firms of solicitors. This is an essential feature of the Irish legal system as it allows small firms to provide a comprehensive range of legal services to consumers as well as small and medium enterprises by engaging specialist services for clients when required. If the independent referral bar was no longer in place, specialist barristers would be the preserve of the larger firms which would reduce the types of legal services offered by smaller firms.

7.20 In the final report of the Competition Authority on Solicitors and Barristers in December 2006[80], the Competition Authority ultimately changed its view in respect of the initial suggestion in its Preliminary Report that legal practitioners should hold dual titles. It ultimately stated that it would not be considering, nor would it make any recommendations in respect of, the distinction between solicitors and barristers.[81] It went on to conclude that transferring between the solicitor and barrister professions should be made as easy as possible.[82] It appears 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.

7.21 Furthermore, it seems that the proposal of facilitating "*easier transfer between the two branches of the legal profession is desirable*" was considered by the Competition Authority as a more viable option than fusion.[83]

7.22 An extremely important point to note is section 101 of the 2015 Act extends the provision of direct access to barristers for non-contentious work to all members of the public, thus strengthening the independence of the bar.[84] It should be noted that this section of the 2015 Act has not yet been commenced.

7.23 Since 1990, "Direct Professional Access" to barristers has been existence such that members of professional bodies can directly instruct barristers without a need for

80 The Competition Authority, *Competition in Professional Services, Solicitors and Barristers,* (Report, December 2006), <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/03/Solicitors-and-barristers-full-report.pdf >.
81 Ibid at para 4.122.
82 Ibid at paras 4.125 to 4.129.
83 Ibid at para 6.5.
84 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 where received directly from a person who is not a solicitor."*

solicitors in non-contentious matters.[85] Section 101 now extends this type of direct access for non-contentious work to non-professionals, i.e., to all members of the public.

7.24 The effect of section 101 means that the bar remains an independent referral bar for contentious work but will also become a *fully* independent bar for non-contentious work, in the sense that any individual can contact and engage a barrister directly in non-contentious legal matters.

7.25 The Society has already set out its views in relation to extending direct professional access to contentious matters in its response to the Authority's consultation on barrister issues. As previously stated in that submission, the Society *"…does not support any proposal to remove restrictions on a barrister receiving instructions in a contentious matter directly from a person who is not a solicitor."* The submission continues by stating *"…giving barristers the right to hold client moneys and granting the right of direct professional access by non-solicitors in contentious matters would, in effect, amount to a fusion of the professions by the back door."*[86] .

7.26 A second structural change introduced by the 2015 Act is the creation of legal partnerships provided for under section 100 of the Act. This will permit two or more legal practitioners (solicitors and barristers), of whom one must be a barrister, to establish partnerships for the purposes of providing legal services. The provisions of the 2015 Act permitting legal partnerships have not yet been commenced.

7.27 The creation of legal partnerships, in addition to the facilitation of greater direct access to barristers, will act to lessen any perceived "need" for fusion as the public will have increased access to barristers as a result. Equally, legal partnerships will also enable greater and more open competition in the provision of legal services, allowing for a "one-stop shop" for consumers seeking legal services.

7.28 A practical observation regarding the proposed introduction of greater direct access to barristers is the fact that solicitors, as stated above, already have advocacy rights should they choose or wish to exercise them. Increasing the public's direct access to barristers will reduce some of the remaining differences between solicitors and barristers. This again supports the central argument against fusion - that it is a

85 < https://www.lawlibrary.ie/Legal-Services/Direct-Professional-Access.aspx>.
86 Law Society of Ireland, *Submission on section 120 Legal Services Regulation Act 2015: Barrister Issues*, para.3.1.

redundant and unnecessary exercise given the reality that there remains little practical difference between the branches of the legal profession, and therefore there is no need for fusion.

7.29 In any event, it is clear from the broad summary outlined above, that the current circumstance of the Irish legal profession is very similar to that of the fused legal profession in Australia.[87] This is on the basis of there being no real distinction between the advocacy capabilities of a solicitor and barrister. Therefore, what actual purpose would it serve to fuse the professions in Ireland?

7.30 It seems clear that attempts to fuse the solicitors' and barristers' professions would have little effect other than to create great expense in the short-term by necessitating substantial changes in the regulatory and education systems, with the inevitable long-term result being that the legal branches would naturally divide again anyway.

7.31 At the same time, existing or proposed measures which fall short of allowing or facilitating fusion of the branches of the profession, such as allowing greater direct access to barristers and the introduction of legal partnerships, and perhaps even allowing for even easier transfer between the branches of the profession, are already bringing the position of the Irish legal profession even closer to that of the "fused" Australian states.

IN SUMMARY

7.32 The first and foremost practical argument against fusion is that, even if fusion was ultimately introduced, the (re)emergence of a specialist independent bar, would almost certainly be a likely outcome. This has already been demonstrated in the common law jurisdictions of Australia and New Zealand and presumably reflects the conclusion, across various common law jurisdictions, that clients wish to avail of the services of independent barristers on occasion.

7.33 The advantages of pressing for the fusing of the legal profession in Ireland are unclear in circumstances where it is extremely likely that an independent referral bar would still be likely to evolve in practice in response to client demand.

87 The Competition Authority, *Competition in Professional Services, Solicitors and Barristers,* (Report, December 2006). The Competition Authority states at para 4.123; "*Solicitors in Ireland are equivalent to those legal practitioners in certain Australian States who practice as "solicitors and barristers". However, to be a member of the independent Bar in those States one must practise only as a barrister. Thus, the term "barrister sole" has emerged to describe members of the independent bar in those jurisdictions.*"

7.34 It is important that barristers and solicitors should be recognised as enjoying the same status as professional legal advisors and subject to the same ethical constraints where applicable. Any differences are for good reason - barristers do not handle client money and are therefore not subject to associated accounting regulations and obligations. However, on core issues such as integrity and honesty and their duties to the court, solicitors and barristers are subject to the same professional obligations.

7.35 Many of the perceived benefits of fusion have already arguably been achieved in Ireland, in that Irish solicitors enjoy full rights of audience, can be appointed as judges to all courts, the 2015 Act will allow barristers to become partners in law firms once those provisions have commenced and it is now relatively easy for solicitors to become barristers and vice-versa.

7.36 The current independent bar clearly has benefits in that it enables clients to have access to specialist advocates of their choosing. It also enables smaller or regional law firms to have such access. It allows solicitors who wish to do so to concentrate on their office work and direct client engagement, leaving the barrister to deal with court work, which is frequently the most efficient way to manage such work. It is not mandatory for clients or solicitors to avail of the services of a barrister in Ireland - solicitors can undertake the court work themselves, and the new provisions of the 2015 Act for legal partnerships will allow solicitors and barristers to work together in partnership. Accordingly, the existing Irish model gives clients the option of access to the independent bar or of recourse to a firm which might tend to more of its own court work. The current model gives solicitors a significant degree of flexibility in that they are not obliged to retain barristers and have full rights of audience while retaining access to the expertise offered by the independent bar. The independent bar also allows solicitors the means to offer a more cost effective service – the ability to have recourse to a barrister who practises on a particular circuit or in a particular area means that a solicitor is better placed to deal with cases in other parts of Ireland and in other areas of expertise. To this extent the current arrangements arguably offer solicitors and clients greater flexibility and choice.

7.37 The main argument for fusion appears to be the perceived cost saving, avoiding the need for both barrister and solicitor to be briefed. However, this may be illusory. For example, even as matters stand, work in the lower courts is frequently undertaken by solicitors rather than by barristers and by much smaller legal teams than in the higher

courts, so it is unlikely that there would be significant savings in these courts if the profession was fused. By contrast, cases in the higher courts will frequently require a team of lawyers (barristers and solicitors) to attend court on behalf of each party. However, experience suggests that this deemed equally necessary in significant litigation in other common law jurisdictions where the profession is fused. The experience of litigation in other common law jurisdictions does not demonstrate that there would be significant cost savings by introducing a greater degree of fusion.

7.38 Ireland has traditionally produced lawyers – both barristers and solicitors – of a high calibre. It is clear that the distinctions between the two branches of the profession are eroding, and the relative importance of the solicitors' branch of the profession is increasing as regulation increases and clients require more frequent access to legal advice to assist them in the day to day conduct of their business and to ensure they comply with the ever increasing regulation to which they are subject. It is also clear that solicitors are increasingly well positioned to undertake work (such as drafting pleadings or court room advocacy) which would traditionally have been referred to the bar in its entirety. However, it is equally true that Ireland has a strong independent bar and that the continued existence of that bar is in the interests of solicitors and clients (as well as the barristers themselves) because it provides access to greater expertise than might otherwise be available within a law firm and because, while this may appear counterintuitive, it may be more cost effective to employ both a barrister and a solicitor than to seek to combine both roles. 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.

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