

# LAW SOCIETY SUBMISSION

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**Legal Services Regulation Act 2015**

**Draft Code of Practice for Practising Barristers**

Legal Services Regulatory Authority

26 October 2018

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#### 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 support.

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 reply to the invitation from the Legal Services Regulatory Authority (“the Authority”) for submissions on the draft Code of Practice for Practising Barristers (“the Code”). Before the Authority issues a Code of Practice, under section 22(3) of the Legal Services Regulation Act 2015 (“the Act”) the Authority is required to consult in such manner as it considers appropriate with:
- (a) a professional body, the members of which will be subject to the proposed code of practice, and
  - (b) such other interested parties, including legal practitioners who are not members of a body referred to in paragraph (a) who will be subject to the proposed code of practice, as the Authority considers appropriate.
- 1.2 It is observed that the Code has drawn from the current Code of Conduct for the Bar of Ireland adopted by a general meeting of the Bar of Ireland on 23 July 2014.
- 1.3 While the Society has no regulatory powers over practising barristers, the Society takes an interest in the draft Code due to the requirement for interaction between practising solicitors and practising barristers. Further to this, the Society notes the imminent commencement of legal partnerships which will see practising solicitors and practising barristers being permitted to go into partnership together for the first time.
- 1.4 The Society also recognises that a practising solicitor who retains the services of a practising barrister should be in a position to advise their client concerning a possible complaint to the Authority about a practising barrister’s conduct. Circumstances may also arise where a practising solicitor may make a complaint to the Authority about a practising barrister for breaches of the Code. In either of these circumstances, a practising solicitor should have an understanding of the contents of the Code.
- 1.5 The Society proposes to review sections of the Code and make recommendations and observations before the Authority issues a final Code of Practice for Practising Barristers.

## **2. Executive Summary**

- 2.1 The following submission sets out the Society's views in response to the public consultation notice dated 26 September 2018 issued by the Authority in relation to the Code.
- 2.2 The Society's submission is made with the objective of protecting the public interest and ensuring high standards of legal services.
- 2.3 The Society provides suggested amendments to the Code, including widening the forums before which a practising barrister owes a duty of candour, tighter restrictions on barristers receiving instructions in contentious matters and defining the class of persons who may directly instruct a barrister without a solicitor.
- 2.4 The Society also considers the provisions in the Code which relate to advertising and whether those provisions are sufficient pending the commencement of advertising regulations which will be drafted by the Authority. The Society also notes that until the provisions of Part 6 of the Act are commenced there are no enforcement procedures available to the Authority for breaches of the Code.
- 2.5 Finally the Society suggests that the Code provide definitions for terms used in the Code for the purposes of clarity and to prevent ambiguity.

### 3. Sections recommended for review

#### Appearing before a Court or tribunal

- 3.1 Clause 3.1 of the Code states *“Where he or she appears before a Court or tribunal established by the State, a Practising Barrister owes a duty of candour to the Court or Tribunal, which duty prevails over any conflicting duty owed to his or her client, any other legal practitioner associated with the proceedings or any other party to the proceedings”*.
- 3.2 The Society notes that there are many tribunals and disciplinary committees that operate in Ireland which are not established by the State, that is to say they are not commenced by the passing of an Act of the Oireachtas.
- 3.3 The Society recommends removing the phrase *“established by the State”* from clause 3.1 of the Code as in its current format this would exempt a practising barrister from owing a duty of candour to a tribunal or any other forum that was not established by the State. It is suggested that the Code adopt similar wording to section 2(4)(b)(i) of the Act which provides as follows:

*“For the purposes of this Act—*

*(b) a person provides legal services as a barrister where he or she does one or more than one of the following:*

*(i) in relation to proceedings before a court, tribunal or forum for arbitration, whether in the State or in another jurisdiction, or the Personal Injuries Assessment Board”*

#### **Recommendation 1 – Widening of the definition of Tribunal**

It is the recommendation of the Society that clause 3.1 of the Code be broadened to encompass the wide range of forums before which practising barristers may appear by adopting the language from the Act which could be worded as follows:

*“Where he or she appears before a Court, tribunal or forum for arbitration, whether in the State or in another jurisdiction, or the Personal Injuries Assessment Board, a Practising Barrister owes a duty of candour to the Court or Tribunal, which duty prevails over any conflicting duty owed to his or her client, any other legal practitioner associated with the proceedings or any other party to the proceedings”*.

## Taking instructions in contentious matters

- 3.4 Clause 3.11 of the Code states that *“In contentious matters, save where otherwise expressly stated in this Code, a Practising Barrister should not take instructions directly from a client”*. This section mirrors the language used in the current Code of Conduct for the Bar Council of Ireland.
- 3.5 It is submitted that leaving the words *“should not”* may expose the Authority to potential difficulties in the future as practising barristers may attempt to test the boundaries of this phrase.
- 3.6 The Society notes the High Court in [\*Bond and Others v Dunne and Another\*](#)<sup>1</sup> prohibited a barrister from providing direct access counsel to clients in a contentious matter without an instructing solicitor. It is suggested that the Code make this requirement clear and unambiguous for the avoidance of doubt.
- 3.7 The Society suggests that clause 3.11 should read *“In contentious matters, save where otherwise expressly stated in this Code, a Practising Barrister shall not take instructions directly from a client.”*

### **Recommendation 2 – Taking instructions in contentious matters**

It is the recommendation of the Society that the Code expressly prohibit barristers from taking instructions in contentious matters from persons who are not practising solicitors, except in prescribed circumstances, which could be worded as follows:

*“In contentious matters, save where otherwise expressly stated in this Code, a Practising Barrister shall not take instructions directly from a client.”*

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<sup>1</sup> [2017] IEHC 646

## Taking instructions in non-contentious matters

- 3.8 The Code provides for persons who may directly instruct a barrister. It is presumed that this will be limited to non-contentious matters. However, there is no definition within the Code of what class of persons may directly instruct a practising barrister without the requirement of engaging a practising solicitor. It is suggested that the Code be amended to clarify the class of persons who may instruct a barrister directly.

**Recommendation 3 – Direct access to practising barristers in non-contentious matters**

It is the recommendation of the Society that the Code explicitly define persons who may directly instruct a barrister in non-contentious matters without the requirement of engaging a practising solicitor.

## Client moneys

- 3.9 Clause 3.18 states “A Practising Barrister shall not hold moneys of clients. This applies whether the Practising Barrister is a self-employed barrister, an employed barrister, or a barrister in a Legal Partnership”. The Society suggests that this form of wording is loose and would not prevent a practising barrister in a legal partnership from being a cheque signatory on the client account. This language would also not prevent a practising barrister from receiving client moneys.
- 3.10 For the avoidance of doubt and to prevent any ambiguity, the Society suggests that this clause is widened to ensure that practising barristers are prohibited from any dealings with client moneys. An alternative to the current clause in the Code could be worded as follows:

*“A Practising Barrister shall not hold, receive, control or pay moneys of clients nor shall a Practising Barrister be a signatory on a client account.”*

**Recommendation 4 – Client moneys**

It is the recommendation of the Society that clause 3.18 of the Code be widened to ensure that practising barristers are prohibited from any dealings with client moneys. The suggested wording of this clause could be as follows:

*“A Practising Barrister shall not hold, receive, control or pay moneys of clients nor shall a Practising Barrister be a signatory on a client account.”*

- 3.11 Clause 5.6 of the Code states that “A *Practising Barrister in a legal partnership shall ensure that he or she assists the Legal Partnership in complying with all relevant legal and regulatory requirements placed on the entity in respect of data protection and client confidentiality.*”
- 3.12 Similarly, the Society recommends that a further clause be inserted under Part E of the Code specifically prohibiting practising barristers in a legal partnership from performing any act or omission that may interfere with a solicitor partner’s obligations under the Solicitors Accounts Regulations (S.I. No. 516 of 2014), the Solicitors (Money Laundering and Terrorist Financing) Regulations 2016 (S.I. No. 533 of 2016) and the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013 or any Act or regulation amending or extending that Act or those regulations. The Code should clearly provide that a breach of this vicarious duty will be deemed misconduct.

**Recommendation 5 – Prohibition on interfering with solicitor’s obligations**

It is the recommendation of the Society that Part E of the Code specifically prohibits practising barristers in a legal partnership from performing any act or omission that may interfere with a solicitor partner’s obligations under the Solicitors Accounts Regulations (S.I. No. 516 of 2014), the Solicitors (Money Laundering and Terrorist Financing) Regulations 2016 (S.I. No. 533 of 2016) and the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013 or any Act or regulation amending or extending that Act or those regulations. The Code should clearly provide that a breach of this vicarious duty will be deemed misconduct.

### Reporting matters to the Authority

- 3.13 Clause 3.31 of the Code provides as follows:

*“A Practising Barrister should forthwith report to the Authority:*

- (a) a conviction for an arrestable offence;*
- (b) a conviction for a criminal offence outside the State which, if committed within the State, would be an arrestable offence;*
- (c) his or her suspension or disbarment by the Benchers of the Honorable Society of King’s Inns.*
- (d) his or her disbarment, or any restriction or condition placed on his or her provision of legal services, by a legal regulatory authority in any other jurisdiction in which he or she has or continues to practise.”*

- 3.14 In the Society's experience, the use of the word "*forthwith*" often leads to uncertainty and does not impose a defined, immediate obligation under which action should be taken. The Society suggests inserting a specified timeframe of 14 days within which a practising barrister should report any of these matters to the Authority.
- 3.15 The Society suggests, for the purposes of preventing any ambiguity, that the use of the words "...*should forthwith report to the Authority...*" be replaced with "...*shall report to the Authority within 14 days after the occurrence of any of the following matters...*" in order to place an obligation on a practising barrister to report such matters to the Authority within a specified time.

**Recommendation 6 – An obligation to report within 14 days**

It is the recommendation of the Society that clause 3.31 of the Code is amended to place an obligation on practising barristers to report the matters set out in that clause to the Authority within 14 days. Suggested wording is as follows:

*"A Practising Barrister shall report to the Authority within 14 days after the occurrence of any of the following matters:*

- (a) a conviction for an arrestable offence;*
- (b) a conviction for a criminal offence outside the State which, if committed within the State, would be an arrestable offence;*
- (c) his or her suspension or disbarment by the Benchers of the Honorable Society of King's Inns.*
- (d) his or her disbarment, or any restriction or condition placed on his or her provision of legal services, by a legal regulatory authority in any other jurisdiction in which he or she has or continues to practise."*

**Definitions**

- 3.16 The Society recommends that the Code provide definitions to ensure there is no ambiguity in relation to the language used. The Code gives a comprehensive definition of a Practising Barrister but does not provide for any other definitions which would be beneficial to the reader.
- 3.17 For example, the Society suggests that a definition of "*practising solicitor*" is provided for in the Code. This is to definitively prevent practising barristers from instructing solicitors who are not entitled to practice by reason of suspension from practice, solicitors who have been struck off the Roll of Solicitors or solicitors who have given an undertaking to the High Court not to practice. It would also exclude solicitors who are not enrolled on the Irish Roll of Solicitors.

3.18 The Society recommends that a definition of “*practising solicitor*” be inserted to provide as follows:

*“A practising solicitor is a solicitor:*

- (a) whose name is on the Roll of Solicitors in Ireland;*
- (b) who is not suspended from practice;*
- (c) who is either a solicitor in the full-time service of the State or a solicitor with a practising certificate in force; and*
- (d) who does not have an undischarged undertaking to the High Court that he or she will not act as a solicitor.”*

3.19 The Society also considers a “*client*” could be defined under the Code as follows:

*“A person on whose behalf a practising barrister has been instructed by a practising solicitor or a person authorised to avail of direct access services as set out in this Code as amended from time to time”.*

3.20 There may be other examples of language used throughout the Code that require definition on which the Society would be happy to engage with the Authority prior to the finalised Code of Practice being issued.

**Recommendation 7 – Definitions under the Code**

It is the recommendation of the Society that the Code contain readily identifiable definitions of words used in the Code for the benefit of readers.

## 4. Further observations

### Enforcement mechanisms

- 4.1 The Society observes that, when the Authority issues a final Code of Practice for Practising Barristers, there will be no mechanisms in place for the Authority to enforce breaches of the Code. As the Code will neither be a provision of the Act nor a regulation made under the Act, the Authority will have no means to seek an order from the High Court under section 35 of the Act.
- 4.2 The Society notes that Part 6 of the Act will commence in the second quarter of 2019 but until that time, there will be no method for the Authority to address breaches of the Code by practising barristers.

### Advertising

- 4.3 Clause 3.27 of the Code allows a practising barrister to advertise only in a manner that is permitted by regulations made pursuant to section 218(2) of the Act. Clause 3.28 of the Code advises that, pending the making of such regulations, a practising barrister should not advertise in a manner which would come, or be likely to come, within the scope of section 218(5)(d) of the Act.
- 4.4 The Society notes that both of these clauses refer to sections of the Act that have not yet been commenced. The provisions of section 218(5)(d) are dependent on regulations drafted under section 218(2) of the Act and therefore cannot be commenced on a standalone basis without those regulations first being drafted.
- 4.5 Accordingly, the Authority will have no power to prevent practising barristers from advertising in a manner contrary to the provisions of section 218(5)(d) until such time as the commencement of the relevant provisions and regulations under section 218(2).
- 4.6 The Society would advise that this will provide practising barristers who are not members of the Law Library with a distinct advantage over practising solicitors pending the commencement of such regulations, as solicitors will continue to be bound by the provisions of the Solicitors (Advertising) Regulations 2002 until the relevant sections of the Act are commenced.
- 4.7 The Society would note its concern about unregulated advertising by practising barristers who are not members of the Law Library. This is particularly the case as the Authority's First Strategic Plan 2018-2020 does not provide a timeline within which advertising regulations are likely to be made.

## **Further consultation**

- 4.8 The Society has provided a number of recommendations and observations within this submission to assist the Authority in the publication of a final Code of Practice for Practising Barristers. Should the Authority have any queries or require any elaboration on any of the matters raised in this submission the Society would be happy to provide further assistance upon request.