LAW SOCIETY SUBMISSION

LAW SOCIETY OF IRELAND

SUBMISSION ON THE GENERAL SCHEME OF THE COURTS AND CIVIL LAW (MISCELLANEOUS PROVISIONS) BILL 2021

DEPARTMENT OF JUSTICE

JULY 2021

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.

Introduction

Following consultation with various of our Committees, the Law Society makes the below preliminary observations and recommendations in respect of the General Scheme.

Head 3 - Centralised court offices

Head 3 (3) requires that the Courts Service "shall" publish notice of the specification of a centralised court office, but failure to publish shall not affect the validity of the specification.

The Society considers this unsatisfactory and believes that, in addition to requiring that notice be published, the provision should also require that publication must be made a specified number of days prior to the proposed commencement.

Adequate notice of such specification is essential to members of the profession particularly if, as a result of the decision made, a specified business will be transacted exclusively in the centralised court office from the specified date.

The Society also notes that (4) (b) proposes that certain references to County Registrars would be construed as references to a centralised court office. In circumstances where County Registrars carry out independent statutory functions, we would question how a reference to such statutory office could or should be construed as referring to an office specified by the Courts Service.

Head 4 - Variation of functions or dissolution of a centralised court office

The (Head 3) publication requirement is also contained here.

Again, adequate notice needs to be given to the profession before a centralised court office is either specified or dissolved.

Head 5 – Consultations

While the Head proposes to create a consultation mechanism with the Chief Justice/President of each court, there is no provision for consultation with court users.

The loss/combination of court offices impacts on a range of stakeholders, an issue which solicitors have raised in the past.

We would request that the Law Society be included in the consultation process as a representative of key stakeholders in the process.

Head 10 – Immunity from suit

Noting that the provision has been widely drafted (where 'officer of the court' includes judges, solicitors, barristers etc.), the Society queries the rationale for same.

Head 17 – Amendment of the Courts Service Act 1998

The Head represents a significant departure from the 1998 Act and purports to create a situation where the CEO of the Courts Service would manage and control the functions of County Registrars in certain circumstances.

Again, we would query the rationale for the proposed amendment.

Head 19 - Amendment of schedule 8 of the Courts (Supplemental Provisions) Act 1961

Head 20 - Amendment of section 27 of the Court Officers Act 1926

It is difficult to rationalise precisely what is intended by Head 19 insofar as it appears to propose that, in circumstances where a solicitor could have the exceptionally high level of legal knowledge, experience and judgement necessary to be appointed a judge of the Superior Courts, that same solicitor would not be deemed eligible for consideration for appointment to the office of Master of the High Court (unless they had acted as Deputy Master for an as yet unspecified period of time).

This difficulty is amplified when you consider that Head 20 provides that a solicitor can only be appointed Deputy Master if they are a member of staff of the Courts Service at the time of appointment.

The matter is further complicated by the suggestion (also at Head 20) that non-lawyers, who have been members of the staff of the Courts Service for not less than 9 years, or other members of staff of the Courts Service who hold such qualification/s as the Courts Service (with the consent of the President of the High Court) may deem appropriate, would be eligible for appointment as Deputy Master while again, quite incredibly, a qualified solicitor would not be eligible unless they were working for the Courts Service at the time of appointment.

The potential for a non-lawyer (member of staff of the Courts Service) who, having served an as yet unspecified period of time as Deputy Master to become Master and, from there, perhaps be considered for judicial office is, needless to say, a matter of substantial concern.

Regarding calculation of the relevant time period, it is noted that section 27(3) of the Court Officers Act 1926 provides that "*Except in the case of the temporary incapacity of an officer through illness no office shall be executed by a deputy appointed under this section for any period or periods exceeding in all three months in any year*".

In more general terms, the Society is of the view that purporting to confine the role of Master to barristers in the manner suggested (or persons who have served as Deputy Master) is not only unnecessary in the context of the job, it militates against the public interest, does not reflect best practice, rather it reflects an unacceptable bias towards barristers. Further, limiting the position in the manner proposed would be unduly restrictive insofar as it does not reflect what is necessary to perform the duties of the role. Even if one were to take the view that practice as a barrister (for a prescribed period of time) was a desirable criteria, it should not be elevated to the status of a prerequisite for consideration.

To provide, in law, that solicitors would be excluded from competing for the role is, in our view, both directly and indirectly discriminatory, both within the meaning of the *Code of Practice on Appointment to Positions in the Civil Service and Public Service* and the Employment Equality Acts.

That the public is entitled to the finest recruitment process for those who are to act in its service is acknowledged in the Code of Practice which highlights the Public Service Commission's statutory role in ensuring that appointments are "*made on candidates' merit and as the result of fair and transparent appointment processes*".

The Society is concerned that the proposed amendments breach the Code in a number of respects and asks that the Department reconsiders the significant anomalies which arise from these Heads.

Head 21 - Amendment of section 35 of the Court Officers Act 1926

We would query why such an amendment would only apply to County Registrars and not to other courts officers e.g. the Legal Costs Adjudicator and the Master of the High Court.

Head 26 - Amendment of the Juries Act 1976

The Society considers that the intended role for County Registrars as a result of these proposed amendments is unclear and would appreciate a better understanding of same.

Head 27 - Amendment of section 9 of the Courts and Court Officers Act 1995

While an increase in the number of judges is welcome, we believe that the proposed increase (of just five) will not be sufficient to deal with current levels of backlog.

Further, the Society considers that more judges will be needed in the lower courts to deal with the Personal Injury Guidelines and suggests that, at a minimum, there should be scope within the Act to recruit more judges to those courts.

Heads 29 to 33 – Amendment of the Legal Services Regulation Act 2015

While accepting that the LSRA requires amendments to the levy model, the Society is disappointed in the limited scope of these proposed amendments which, in our view, represent a missed opportunity which we would wish to see rectified in the upcoming Bill.

In July 2018, the Society provided the LSRA with 106 recommendations for amendments to the Solicitors Acts. A number of priority recommendations concerned data sharing between the Society and the LSRA to enable both entities to fulfil their statutory duties. We also highlighted the need for data sharing between the Society, the Solicitors Disciplinary Tribunal and the Legal Practitioners Disciplinary Tribunal to ensure the proper functioning of the disciplinary provisions of the 2015 Act.

The Society's July 2018 submission to the LSRA can be viewed here and we would draw the Department's attention to the following specific recommendations:

i. Data sharing between the Society and the LSRA

Recommendations 46, 47, 53, 54, 64, 66, 75, 86, 91-93 and 98

ii. Data sharing between the Society, the Solicitors Disciplinary Tribunal and the Legal Practitioners Disciplinary Tribunal

Recommendations 14,15,17–19, 23, 25, 26, 58, 59, 61, 62, 65, 68, 69, 87 and 89

We would ask that consideration be given to these recommendations in the context of this General Scheme.

Head 44 Amendment of section 15 of the Irish Nationality and Citizenship Act 1956: Children born in the State

Head 44 introduces measures to reduce the 'reckonable residence' required for minors seeking to be naturalised from three to five years by amending section 15 of the Irish Nationality and Citizenship Act 1956 through the substitution of text in subsection 15(1)(c) of the 1956 Act.

While this is a welcome change for some families, the proposed change does not go far enough and a critical opportunity to expand rules around naturalisation has been overlooked.

Head 44 will not broaden the categories of children who are entitled to citizenship and this amendment will only apply to the children of those parents who are legally resident in the State. This means that children whose parents are undocumented or did not have sufficient reckonable residency prior to their birth (including, in certain instances, those who might have been international protection applicants or those who are resident on 'non-reckonable' permission) are not eligible. In effect, this means that vast numbers of children who have only known Ireland as their home may continue to be excluded from the prospect of obtaining naturalisation and will remain vulnerable to deportation from the jurisdiction. In addition, siblings will continue to have entirely different entitlements under the Act depending on the residency status and period of residency of their parent(s) at birth or indeed, who is the applicant on their behalf.

The Society submits that the new sections 15(3)(a) and 15(3)(b) are overly restrictive in imposing a reckonable residence requirement on an eligible sponsor which potentially excludes otherwise eligible children from obtaining a certificate of naturalisation.

Inclusion of the fact that a person *in loco parentis* can make an application on their behalf is a helpful step. However, the question of who has the authority to make an application on behalf of a child who is subject to an interim care order, or in wardship, should also be expressly addressed.

Head 45 Amendment of the Irish Nationality and Citizenship Act 1956: Continuous residence condition for naturalisation

Head 45 seeks to insert a Section 15B in respect of the calculation of the 'continuous residence' which is required in the year prior to an application for naturalisation.

'Continuous residence' is now to be defined as requiring physical residence for the entire year prior to an application for naturalisation, save for 70 days in ordinary circumstances and an additional 30 days in the exceptional circumstances defined in the section. Again, the Society has some reservations as to whether this goes far enough and is concerned that it may allow for an arbitrary approach to be adopted towards the calculation of reckonable residency, particularly having regard to the unpredictable nature of the circumstances set out in the section.

The Society recommends that there be no upper limit to the additional period of 30 days, rather that provision be made for the additional period to be justified by reference to one or more of the circumstances set out in the section.

Head 47 - Amendment of section 4 of Act of 2004

Head 47 seeks to make certain additions to Section 4(3) of the Immigration Act 2004 which refers to the so-called 'permission to land' power by providing additional grounds on which someone can be refused entry to the State. The Head also makes certain amendments to the language of section 4(7) in respect of who can make a 'change in status' application.

The Society is concerned with rule of law and procedural fairness considerations in respect of the 'permission to land' powers and how same operates in practice, specifically in relation to how the section operates in terms of the rights of those who are refused such permission to appeal to an independent body and to access legal advice and translation services.

Non-visa required nationals have the additional burden, due to the lack of a pre-clearance facility, of not having any certainty on arrival in Dublin. Also, where someone is refused permission to land on grounds of public policy, or national security, additional concerns exist around accessing the reasons for the refusal based on how cases involving national security considerations are dealt with by the State (see Damache vs MOJ [2021] IESC 6 and AP v. MJE [2019] IESC 47).

These concerns could be addressed by providing that a person, in respect of whom it is proposed to refuse leave to land, must be granted access to immediate legal advice and the opportunity to make representations in respect of why such leave should be granted and thereafter, to allow the person access to an independent appeals mechanism.

While the time frames involved will, by their nature, require to be short, the Society is confident that the solicitors' profession will fulfil this need if an appropriately resourced system is put in place.

Head 50 - Amendment of section 48 of Act of 2015

The impact of the proposed amendment would be that International Protection Applicants would have 30 days (instead of 5 days) to make further submissions to the Minister to review a decision not to grant permission to remain.

The Society welcomes this proposed extension to the window during which an applicant can seek a review as previous arrangements proved extremely difficult and allowed practically no opportunity for an applicant to obtain an appointment with a solicitor, gather updated documentation and submit a proper review.

Conclusion

The Society hopes that the Department will find our observations and recommendations to be useful in its consideration of the General Scheme.

We look forward to your responses on the matters raised and will be glad to engage further if that would be helpful.

For further information please contact:

Fiona Cullen
Public and Government Affairs Manager
Law Society of Ireland
Blackhall Place
Dublin 7

Tel: 353 1 6724800
Email: f.cullen@lawsociety.ie