

# LAW SOCIETY SUBMISSION

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**Section 120 Legal Services Regulation Act 2015**

**Barrister Issues**

Legal Services Regulatory Authority

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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 respond to the invitation from the Legal Services Regulatory Authority (“the Authority”) for submissions under section 120(1) of the Legal Services Regulation Act 2015 (“the Act”) in relation to the following matters relating to barristers:
- a) the extent, if any, to which the restriction on legal practitioners, other than solicitors, holding the moneys of clients, as provided under section 45, should be retained;
  - b) the retention or removal of restrictions on a barrister receiving instructions in a contentious matter, directly from a person who is not a solicitor, and the reforms, whether administrative, legislative, or to existing professional codes, that are required to be made in the event that the restrictions are retained or, as the case may be, removed; and
  - c) the circumstances and manner in which a barrister may hold clients’ moneys and the mechanisms to be applied for the protection of clients’ moneys which may be so held.
- 1.2 This submission contains the Society’s views on the issues which arise in respect of barrister matters under section 120. It sets out the Society’s opposition to the removal of restrictions on a barrister receiving instructions in a contentious matter directly from a person who is not a solicitor. It also addresses the consequential regulatory requirements that would arise should barristers be permitted to hold client moneys and if direct professional access in contentious matters is introduced.
- 1.3 Responses to some of the queries raised in the public consultation notice have been amalgamated together, for clarity.

## 2. Executive summary

- 2.1 The following submission sets out the Society's views in relation to certain matters relating to barristers including whether the restriction on barristers holding client moneys should be retained, whether barristers should be permitted to accept instructions directly from non-solicitors in contentious matters, and the regulatory framework that would be required if a barrister was permitted to hold clients' moneys, including the mechanisms that would need to be applied for the protection of clients' moneys in such circumstances.
- 3.1 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 Society does not believe that such a move would be in the best interests of consumers and is satisfied that solicitors are best placed to make informed choices about the need for, and the choice of, barristers in contentious matters. In addition, the Society believes that 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. If these reforms took place there would be little to distinguish between the two professions except their form of training and their title.
- 2.2 The Society has identified a series of recommendations in this submission with regard to the regulatory processes and systems that would need to be put in place should the stated restrictions on barristers be removed, in order to ensure protection of the public and client moneys to the same standards as currently exist for solicitors.

### Direct professional access on contentious matters

- 2.3 In chapter 3 of this submission, a number of issues and requirements surrounding the introduction of direct professional access to barristers by non-solicitors on contentious matters are considered. Such matters include anti-money laundering requirements, section 150 obligations, recovery of fees, professional indemnity insurance, run-off insurance, files of barristers who have ceased practising, and impact on professional codes.
- 2.4 The Society also sets out a number of other issues that should be considered when deciding whether or not to lift the restrictions on barristers. In particular, there is a concern that lifting the restrictions would create a *de facto* fusion of the professions in all but title and training, which would pre-empt the consultation and report on unification of the professions mandated under section 34 of the Legal Services Regulation Act.

- 2.5 The ease with which solicitors and barristers can transfer between the professions, and the option of clients to have a solicitor represent them directly before the courts to reduce legal costs is also examined.
- 2.6 Given the substantial cost of introducing a new financial regulatory system for barristers, and the probability of that cost being passed on to clients through legal costs, it seems clear that lifting the foregoing restrictions on barristers would not be of any substantial benefit to the public or to the administration of justice.

## Client moneys

- 2.7 As the issues of barristers holding client moneys, and the circumstances and manner in which a barrister may hold client moneys and the protection mechanisms that should be applied with regard to the holding of client moneys by barristers are all related matters, they have been dealt with together in chapter 4 of this submission.
- 2.8 The Society believes that, if the restrictions on barristers holding client moneys are to be lifted, then barristers must be held to the same regulatory standards as solicitors in the interests of the protection of the public, protection of client moneys, and equity between the professions. If barristers are permitted to hold client moneys and are subject to lighter regulation than that in place on solicitors, this would grant an unfair competitive advantage to barristers, at the expense of public protection. More importantly, it would be to the detriment of clients and the administration of justice if a lesser standard was applied to the monitoring, inspection and system of recompense for the clients of those barristers permitted to handle client moneys.
- 2.9 The purpose of client account regulations for solicitors is the protection of clients' moneys, and by implication the Law Society's Compensation Fund and the public generally. The Society believes that similar accounts regulations would have to be put in place for barristers if they are to be permitted to hold client moneys, in order to ensure the maintenance of proper accounts and accounting procedures.
- 2.10 The Law Society's Compensation Fund is a statutory fund established to compensate clients of solicitors who have suffered pecuniary loss due to the dishonesty in the provision of legal services by a solicitor, and not by any other legal service provider. This Fund is paid for through annual contributions by solicitors as part of their practising certificate fees and has been built up over many years. If barristers are to be permitted to handle client moneys, then a similar Compensation Fund should be established to compensate clients of barristers who have suffered loss due to the dishonesty of their barrister, which fund should be paid for by barristers, and maintained by a competent body. The issue of whether the Authority or the Bar of Ireland would be the appropriate competent body is discussed further in the submission.
- 2.11 The introduction of a financial regulatory system to regulate barristers who hold client moneys is also discussed further in this submission, including recommendations for inspections of barristers who hold client moneys by forensic accountants,

establishment of a regulatory committee to deal with breaches of barristers' accounts regulations and the powers required for such a committee including powers of referral to the Legal Practitioners Disciplinary Tribunal and powers to apply to the High Court for freezing and suspension orders.

2.12 Recommendations have also been made with regard to barristers who hold client moneys who are adjudicated bankrupt, enter into personal insolvency arrangements or have unsatisfied judgments, due to the possible greater risk that such practitioners could pose to client moneys.

2.13 Consideration has also been given to the education requirements that would arise for the barristers' profession on client moneys matters, professional indemnity insurance issues, and the possible consequential impact on legal costs of barristers holding client moneys.

## Recommendations

2.14 The recommendations of the Society in relation to the matters under review by the Authority are summarised below:

### A. Direct Professional Access

#### **Recommendation 1 – Current Restrictions**

No change should be made to the current restrictions on a barrister receiving instructions in a contentious matter directly from a person who is not a solicitor. Solicitors are uniquely well-placed to decide how best to manage litigation, including identifying those cases where the involvement of a barrister is appropriate and, thereafter, deciding which particular individual might be engaged.

#### **Recommendation 2 – Anti-money laundering procedures**

Consideration should be given to the impact of direct professional access in contentious matters on the anti-money laundering due diligence and reporting obligations for barristers, on the additional regulation and education requirements, and the possible consequential increase in costs for the barrister and, by extension, the client.

#### **Recommendation 3 – Section 150 obligations and recovery of fees**

Consideration should be given to the impact of direct professional access in contentious matters to barristers' section 150 obligations and the possible consequential increase in legal costs, in addition to the recovery mechanisms for barristers in relation to unpaid fees for completed work.

#### **Recommendation 4 – Client files of barristers who have ceased practising**

Consideration should be given to the need to enact legislation to deal with files from barristers who cease practice, and to the introduction of a file distribution service for distressed closures, to be

provided by their competent body.

#### **Recommendation 5 – Professional codes**

Consideration should be given to the requirement to change the Bar of Ireland’s code of conduct, including changes to the cab-rank rule, if direct professional access for contentious matters is introduced.

## **B. Client Moneys and Regulatory Framework**

#### **Recommendation 6 – Regulatory standards**

Any legal practitioner who holds client moneys should be held to the same regulatory standards as solicitors to ensure there is no competitive advantage given to a class of legal practitioners who are held to a lower regulatory standard and also to ensure proper monitoring, inspection and recompense for clients.

#### **Recommendation 7 – Barristers’ Compensation Fund**

In the event that barristers are allowed to hold client moneys, a barristers’ Compensation Fund should be set up by way of levy on the barristers’ profession only and to be maintained by the designated competent regulatory body, together with the appropriate financial regulatory system.

#### **Recommendation 8 – Claims handling system**

If a barristers’ Compensation Fund is established, there will be a need for their competent body to establish and maintain a claims handling system.

#### **Recommendation 9 – Demarcation between and guidance on access to compensation funds**

If a barristers’ compensation fund is established, a clear demarcation will need to be established on which clients have access to which Compensation Fund (either the solicitors’ or barristers’ Fund), especially for legal partnerships, and guidance regarding same should be required to be provided to clients of solicitors and barristers.

#### **Recommendation 10 – Regulatory body**

A competent body other than the Law Society would have to be given the statutory obligation under primary legislation to act as regulator in relation to the holding of client moneys by barristers, which would include an obligation to protect client moneys and to establish and maintain the new Compensation Fund for barristers. Regulatory powers including investigative, disciplinary, protective and enforcement powers to oversee those barristers who would be permitted to receive, hold or

control client moneys to ensure the protection of the public and client moneys would have to be granted to the competent body, together with powers to make regulations in relation to the financial regulation of those barristers permitted to handle client moneys.

**Recommendation 11 – Barristers’ accounts regulations**

A rigorous set of accounts regulations would have to be enacted to ensure practising barristers who were permitted to receive, hold or control client moneys were subject to strict oversight.

**Recommendation 12 – Inspection regime for barristers holding client moneys**

Inspections of barristers’ accounts would have to be provided for in primary legislation and accounts regulations, to be conducted on a regular basis and on the basis of an assessment of risk by forensic investigating accountants to ensure compliance with those regulations.

**Recommendation 13 – Annual reporting accountants’ reports**

Barristers who were permitted to hold client moneys should be required to submit an annual reporting accountants’ report to the regulator which report should disclose any breaches of the applicable accounts regulations, in particular any deficits on client accounts.

**Recommendation 14 – Establishment of a regulatory committee**

The competent regulatory body would have to establish a regulatory committee to deal with barristers who breached the accounts regulations and to consider claims on the barristers’ Compensation Fund.

**Recommendation 15 – Powers of regulatory committee**

The competent regulatory body would have to be given all the relevant statutory powers to deal with barristers who breached the accounts regulations as are currently held by the Society, including the right to refer the barrister to the Legal Practitioners Disciplinary Tribunal, which powers could be delegated to a regulatory committee if appropriate.

**Recommendation 16 – Refusal to issue barristers’ practising certificates, or imposition of practising certificate conditions**

Consideration would need to be given to granting the competent regulatory body the power to impose conditions on barristers’ practising certificates, or to refuse to issue a practising certificate, for breaches of the accounts regulations in order to protect client moneys.

**Recommendation 17 – Right to apply to the High Court**

The competent regulatory body would have to be given the statutory power to apply to the High Court to freeze a barrister's accounts and/or assets to protect client funds, and/or suspend the barrister from practice.

**Recommendation 18 – Suspension due to bankruptcy**

Barristers permitted to hold client moneys who are adjudicated bankrupt should be automatically suspended from practice with immediate effect. Provisions allowing the barrister to apply to the competent body to lift the barrister's suspension on such terms as the competent body sees fit should be considered.

**Recommendation 19 – Refusal of practising certificate, or imposition of practising certificate conditions where a solicitor has been adjudicated bankrupt, entered into a personal insolvency arrangement, and/or has unsatisfied judgments**

The competent body would have to be given the power to refuse a practising certificate, or impose such conditions as they deem fit on the practising certificate of a barrister who has at any time or in any jurisdiction been adjudicated bankrupt, entered into a personal insolvency arrangement, and/or has unsatisfied judgments, for the protection of client moneys.

**Recommendation 20 – Education of barristers on client account matters**

Both practising barristers and prospective barristers should be educated to a standard similar to solicitors in relation to administering client moneys.

**Recommendation 21 – Professional indemnity insurance**

Barristers holding client moneys should be subject to the same professional indemnity insurance standards as solicitors to ensure there is no competitive advantage given to a class of legal practitioners who are held to a lower regulatory standard to the detriment of client protection.

**Recommendation 22 – Assigned Risks Pool**

An Assigned Risks Pool should be established as an insurer of last resort for barristers who are unable to obtain professional indemnity insurance in the market in any year.

**Recommendation 23 – Run-off insurance cover**

Run-off insurance cover provisions for barristers, including duration of cover, how cover is paid for, and relevant regulations, should be reviewed in light of a possible consequential increase in run-off premium caused by any lifting of the restriction on barristers holding client moneys and direct professional access in contentious matters.

**Recommendation 24 – Legal costs consequences of barristers holding client moneys**

Consideration should be given to the possible consequential increase in legal costs that may arise due to the costs of the financial regulatory structure required to protect client moneys having to be established and maintained by barristers.

### 3. Direct professional access to barristers in contentious matters

3.2 Section 120(1)(b) of the Act asks respondents to consider the following:

*“The retention or removal of restrictions on a barrister receiving instructions in a contentious matter, directly from a person who is not a solicitor, and the reforms, whether administrative, legislative, or to existing professional codes, that are required to be made in the event that the restrictions are retained or, as the case may be, removed.”*

3.3 At present, all practising barristers who are members of the Law Library are only allowed to accept briefs from either practising solicitors or approved bodies from which the Bar Council of Ireland allows direct professional access. The direct professional access scheme is limited in nature for non-contentious matters and does not extend to contentious matters. If matters become contentious, a client is obliged to engage the services of a solicitor to allow the barrister to continue to act.

3.4 The Law Society believes that the current system is the most efficient system and provides the best value and service for consumers. Solicitors are uniquely well-placed to decide how best to manage litigation, including identifying those cases where the involvement of a barrister is appropriate and, thereafter, deciding which particular individual might be engaged.

3.5 Receiving instructions from a solicitor means that a barrister can be assured that due diligence has been conducted by the solicitor including risk profiling and anti-money laundering compliance. Removing this layer will require practising barristers to conduct their own due diligence on clients instructing them directly.

3.6 The argument for allowing direct professional access to barristers by clients in contentious matters seems to be predicated on the assumption that there is a duplication of work between the solicitor and barrister, and therefore a higher level of fees than if the work was done solely by either the solicitor or the barrister. This argument is flawed as, in such contentious matters, both the solicitor and the barrister have discrete areas of work. If all matters are to be handled by the barrister, the same level of work will need to be done, albeit by one person, so it is unlikely that the fees will be reduced.

#### **Recommendation 1 – Current Restrictions**

No change should be made to the current restrictions on a barrister receiving instructions in a contentious matter directly from a person who is not a solicitor. Solicitors are uniquely well-placed to decide how best to manage litigation, including identifying those cases where the involvement of a barrister is appropriate and, thereafter, deciding which particular individual might be engaged.

- 3.7 If the restriction on barristers receiving instructions directly from a person who is not a solicitor are removed, some of the following issues will arise.

### **Anti-money laundering measures**

- 3.8 While barristers are already considered to be “designated persons” under the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013, customer due diligence and reporting obligations in relation to anti-money laundering (“AML”) in practice currently rests predominantly with the solicitor on acceptance of instructions from the client.
- 3.9 If direct professional access was introduced, any AML prevention and governance requirements would need to be met by barristers, as the AML customer due diligence and reporting obligation would shift from the solicitor (who would no longer be involved in such cases) wholly to the barrister. The current law applies an AML-compliance equivalence between the two branches of the profession.
- 3.10 Given the complexity and higher risk involved, particularly if the barrister is also permitted to hold client moneys, the reporting and administrative burden on the barrister would now be much higher, increasing the cost for the client.
- 3.11 Further education and guidance would also be required for the barristers’ profession on the complexities of AML due diligence and reporting in contentious matters.
- 3.12 The regulatory requirements on the Bar of Ireland, as a ‘competent authority’ under the legislation, to monitor and take measures against barristers who did not meet their statutory AML obligations, would also increase, which could result in an increase in the annual practising fee for barristers.

#### **Recommendation 2 – Anti-money laundering procedures**

Consideration should be given to the impact of direct professional access in contentious matters on the anti-money laundering due diligence and reporting obligations for barristers, on the additional regulation and education requirements, and the possible consequential increase in costs for the barrister and, by extension, the client.

### **Section 150 obligations and recovery of fees**

- 3.13 A significant portion of the complex requirements under section 150 of the Act in relation to legal costs will be dealt with directly by solicitors in contentious matters if both a solicitor and barrister are instructed. However, if direct professional access in contentious matters is permitted, the legal cost and update notification requirements

under the Act will fall solely on the barrister, increasing the barrister's administrative burden with possible consequential increases in legal fees.

- 3.14 While solicitors can sue clients to recover fees owed on completed work, barristers are currently not permitted to do so. This can lead to barristers having to write off a certain amount of business as bad debts. In contentious matters, particularly in matters where the fees may be high, the ability of the solicitor to sue clients for recovery of fees (including the barrister's fees) is very useful to the barrister in recovery of their fees.
- 3.15 If direct professional access on contentious matters is permitted, but barristers are still not entitled to initiate debt recovery proceedings against clients who have failed to pay fees for completed work, this could lead to a high level of default on payment of legal fees. As such, a mechanism would need to be considered, either by way of barristers being permitted to issue proceedings against clients in respect of unpaid fees in contentious matters, or by an alternative mechanism, for recovery of barristers' fees.

**.Recommendation 3 – Section 150 obligations and recovery of fees**

Consideration should be given to the impact of direct professional access in contentious matters to barristers' section 150 obligations and the possible consequential increase in legal costs, in addition to the recovery mechanisms for barristers in relation to unpaid fees for completed work.

### **Professional indemnity insurance and run-off insurance**

- 3.16 Consideration should be given to the increased exposure for negligence claims against barristers' PII that will result from permitting direct professional access by clients in contentious matters. Currently, the involvement of the solicitor in such cases acts as a buffer, with the risk of claims being largely borne by the solicitor. With direct access, and the potential for higher claims in contentious matters, there may be a consequential increase in PII costs for barristers, which costs may be passed on to the client.
- 3.17 As stated in chapter 4 of this submission, the current requirements for run-off cover for barristers may need to be reviewed if the restrictions on holding client moneys and/or direct access for contentious business are lifted, due to the likely increase in run-off premiums and the impact on whether barristers can afford to retire.
- 3.18 Barristers given direct instructions from a non-solicitor will continue to require a form of run-off insurance cover either by way of individual cover, or a run-off fund similar to the fund that provides run-off cover for closed solicitor firms. Given possible affordability issues, consideration may need to be given to the duration of the run-off cover (currently 6 years) and the manner in which the cover is provided (through the market or through a run-off fund). Recommendations in relation to these issues are contained in Chapter 4.

## Files of barristers who have ceased practising

- 3.19 Self-employed barristers accepting work from non-solicitors in contentious matters would need to be in a position to maintain their own comprehensive client files. There may be the need to consider legislative input to ascertain how client files are dealt with when a barrister retires from practice.
- 3.20 In the event of an orderly wind down of a barrister's practice, the barrister would have to organise to transfer remaining live files to their clients or another practising barrister or practising solicitor nominated by their clients and make arrangements for closed files to be securely stored and made accessible to a practising barrister or practising solicitor for the relevant statutory period.
- 3.21 Consideration should be given to introducing legislation relating to client files in emergency scenarios whereby a barrister ceases practice either through regulatory intervention such as a suspension from practice, or in the case of death.
- 3.22 The Society runs a practice closures system for distressed closures. If a solicitor firm is closed by order of the High Court, or the solicitor has abandoned the practice, or in some cases where the principal of the firm has died in practice, the Society may obtain an order of the High Court permitting the Society to take up the files of the practice. The Society then redistributes the files to the clients, or to their new nominated solicitors. This is a voluntary service provided by the Society for the protection of clients which is only triggered as a last option to protect client files. In such cases the Society may also obtain a High Court order for the Society to take client moneys in order to protect same.
- 3.23 Consideration should be given to the introduction of a similar system for barristers in order to protect client files.

### **Recommendation 4 – Client files of barristers who have ceased practising**

Consideration should be given to the need to enact legislation to deal with files from barristers who cease practice, and to the introduction of a file distribution service for distressed closures, to be provided by their competent body.

## Existing professional codes

- 3.24 The code of conduct for the Bar of Ireland would need to change significantly in its content if the restriction on barristers receiving instructions from non-solicitors is lifted. Currently the code is geared towards barristers receiving instructions only from solicitors and through the Bar of Ireland's direct professional access scheme.
- 3.25 Currently practising barristers are obliged to accept instructions in any area in which they profess to practice subject to the payment of a proper professional fee. Allowing

barristers to receive instructions directly from a client may make this an impractical rule to uphold.

3.26 Barristers given instructions from non-solicitors in contentious matters will have to carry out their own due diligence in a manner similar to that employed by solicitors to determine whether they can accept instructions in a given matter.

3.27 Barristers may wish be in a position to decline to act for a client giving direct instructions in contentious matters. Reasons a barrister may wish to decline to act for a client could include the following:

- a) accepting instructions in the furtherance of a crime or unprofessional conduct;
- b) where the matter may raise a conflict of interest; or
- c) if the barrister is unable to carry out the instructions sufficiently.

3.28 In England and Wales the 'cab rank' rule does not apply to direct access. A number of restrictions on direct access in England and Wales still remain including:

- a) barristers may not instruct expert witnesses;
- b) barristers may not take responsibility for the handling of clients' affairs, or the handling of clients' money; and
- c) a barrister remains under a continuing obligation to consider whether given work would be better served by the instruction of a solicitor.

#### **Recommendation 5 – Professional codes**

Consideration should be given to the requirement to change the Bar of Ireland's code of conduct, including changes to the cab-rank rule, if direct professional access for contentious matters is introduced.

### **Fusion of the professions**

3.29 Both barristers and solicitors have many similarities in their respective professions. Both professions are entitled to draw up restricted documents and they have full rights of audience in all courts.

3.30 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. If these reforms took place there would

be little to distinguish between the two professions except their form of training and their title.

- 3.31 In addition, unification of the solicitors' profession and the barristers' profession is meant to be the subject of a report by the Authority to the Minister following public consultation in accordance with section 34(1)(b) of the Act. In effect unifying the professions in all but title and training in advance of such consultation and report could render this separate and complex statutory study effectively meaningless.
- 3.32 Fusion of the two professions by the back door would result in two separate regulatory systems for two professions that would now only be differentiated by title and training, rather than by their respective areas of legal work. This duplication of regulatory function, with its consequential costs, would result in an increase in the overall costs of regulating legal practitioners, costs that would ultimately be passed on to the consumers of legal services.

### **Transfer between professions**

- 3.33 For barristers of at least 3 years' professional practice (or alternative legal employment) who wish to transfer from being a barrister to a solicitor, there is a relatively simple application procedure available to them via the Society. A similar application may be made by a solicitor wishing to transfer to the Bar of Ireland. This too requires 3 years' professional practice (or alternative legal employment) and an application may be made by a solicitor to the Honorable Society of King's Inns.
- 3.34 The ease of transfer between the professions means that any barrister who genuinely wishes to hold client moneys and accept instructions directly from clients has a method available to them to do so by transfer to the solicitors' profession. In addition, the costs of transferring between the professions are borne by the applicants and not by the profession as a whole.

### **Solicitor representation before the courts**

- 3.35 If the purpose of permitting barristers to hold client moneys and granting direct professional access in contentious matters is to reduce legal costs for clients, it should be noted that solicitors are already entitled to hold client moneys, and to represent clients before any court in the State from the District Court to the Supreme Court.
- 3.36 As such, if clients wish to reduce their legal costs in relation to instructing both a barrister and solicitor in contentious matters, they are free to instruct their solicitor to advocate on their behalf directly before the courts, rather than instructing a barrister.

### **Work required to implement changes proposed, and cost of same**

- 3.37 If the proposed changes in relation to the lifting of the restriction on barristers holding client moneys and direct professional access in contentious matters were to be

introduced, there would be the requirement for a substantial number of legislative changes in order to implement same. It would also require the establishment of a regulatory system for financial matters at a significant cost to the barristers' profession.

- 3.38 This would also require the establishment and maintenance of a barristers' Compensation Fund which is likely to be funded by way of a levy on the barristers' profession. This could take a number of years to properly fund, establish minimum reserves, insure and maintain.
- 3.39 The new regulatory system would have to be as rigorous and as strictly enforced as the current regime for solicitors. To introduce a regulatory system with a lower standard would put one profession at a competitive advantage over the other and, more importantly, would put clients at risk. This could lead to a scenario where many practitioners and aspiring practitioners would choose the profession with the lower (and less costly) standards of regulation.
- 3.40 The enhancements required to the education system for barristers would require a great deal of planning. While the Society has not gone into any great detail on the Bar of Ireland's code of conduct, it would most likely have to be substantially overhauled to permit such changes.
- 3.41 It is uncertain at this time what proportion of the barristers' profession would be willing to work with and be comfortable with the above reforms. Those in the profession that would resist such changes might have to subsidise the costs of setting up and maintaining a new regulatory system for those colleagues choosing to handle clients' monies and accept direct professional access in contentious matters. This would place the costs of regulating the profession on an upwards trajectory. The ramifications of these changes could lead to a situation whereby the increase in costs would become a barrier to entry to the barristers' profession. The likely increase in costs of regulation could also impact on the costs of legal services to consumers.
- 3.42 Given that solicitors are already permitted to hold client moneys, have the appropriate regulatory system in place, and are fully capable of representing their clients directly before any court, the question remains as to what benefits, if any, the proposed changes to the barristers' profession under section 120 of the Act would afford to clients.

## 4. Holding client moneys and protection mechanisms for clients

4.1 Section 120(1)(a) of the Act asks respondents to consider the following:

*“The extent, if any, to which the restriction on legal practitioners, other than solicitors, holding the moneys of clients, as provided under section 45, should be retained”*

4.2 Section 45 of the Act provides as follows:

*“(1) Subject to subsection (2), a legal practitioner shall not hold moneys of clients unless that legal practitioner is a solicitor.*

*(2) Notwithstanding subsection (1) the Minister may by regulations prescribe a class or classes of solicitors who may not hold the moneys of clients, or who may hold such moneys subject to such conditions as may be provided for in such regulations.*

*(3) Subsection (1) shall not be construed as permitting a solicitor to hold the moneys of clients where a condition or restriction is placed on a solicitor’s practising certificate pursuant to the Solicitors Acts 1954 to 2015 or this Act.”*

4.3 Section 120(1)(c) of the Act asks respondents to consider the following:

*“The circumstances and manner in which a barrister may hold clients’ moneys and the mechanisms to be applied for the protection of client moneys which may be so held.”*

4.4 As the two matters set out in sections 120(1)(a) and (c) are closely related, the Society has amalgamated its responses to these matters together.

### Regulatory standards

4.5 The holding of client moneys is a responsibility that should only be entrusted to those of the highest integrity and requires strict regulation in order to protect the interests of the public. In Ireland, there are a very limited number of professions legally entitled to hold and control client moneys in prescribed circumstances.

4.6 It is the view of the Society that, if the proposed changes with regard to barristers holding client moneys under section 120 are introduced, any legal practitioner who holds client moneys should be held to the same regulatory standards as solicitors, including a requirement to establish a separate Compensation Fund, in the interests of public protection and equity between the professions. To do otherwise would bestow a competitive advantage on the class of legal practitioners who are held to lower regulatory standards. More importantly, clients of barristers deserve the same level of monitoring, inspection and recompense as clients of solicitors.

### **Recommendation 6 – Regulatory standards**

Any legal practitioner who holds client moneys should be held to the same regulatory standards as solicitors to ensure there is no competitive advantage given to a class of legal practitioners who are held to a lower regulatory standard and to ensure proper monitoring, inspection and recompense for clients.

## **Regulation of solicitors holding client moneys**

- 4.7 Practising solicitors with unrestricted practising certificates are the only legal practitioners in Ireland who can currently receive, hold or control client moneys. These solicitors are subject to the stringent provisions of the Solicitors Accounts Regulations 2014 (S.I. No. 516 of 2014) regarding the holding of client moneys and must keep a designated client account for these moneys.
- 4.8 Solicitors must only pay moneys from the client account in prescribed circumstances for the purposes of conducting business on behalf of their client, in line with their client's instructions.
- 4.9 Solicitors must keep strict accounting records for the purposes of holding client moneys and are subject to regular inspection from the Society's investigating accountants to ensure compliance with the regulations. The regulations require a solicitor to maintain proper books of account at all times and to preserve all necessary supporting documentation.
- 4.10 Solicitors' practices are also required to submit an annual reporting accountant's report to the Society confirming whether the practice has complied with accounts regulations for the financial year covered by the report. Such report must be filed with the Society within 6 months of the stated financial year end of the firm, and failure by the firm to submit the report is considered to be misconduct.

## **Purpose of solicitors accounts regulations**

- 4.11 In *Giles J. Kennedy & Co v. Law Society of Ireland* High Court, October 5, 1999<sup>1</sup>, Kearns J. held that the whole purpose of the regulations was the protection of client moneys and by implication the Law Society's Compensation Fund and the public generally. The regulations set out to achieve this by requiring the maintenance of proper accounts and accounting procedures.

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<sup>1</sup> *Giles J. Kennedy carrying on practice under the style and title of Giles J. Kennedy & Company, Applicant –v- The Law Society of Ireland, Patrick Joseph Connelly and Aisling Foley, Respondents* [2000] 2 IR 104

4.12 The Society has refined the current system of protecting client funds over many years. The many challenges presented to the Society in regulating client moneys over the last 60 years has resulted in the Solicitors Accounts Regulations 2014 which are under constant review to ensure maximum protection of the public.

### **Law Society's Compensation Fund**

4.13 The Law Society's Compensation Fund is a statutory fund established under the Solicitors Act 1954 to compensate clients of solicitors who have suffered pecuniary loss due to the dishonesty in the provision of legal services by a solicitor.

4.14 The Society has statutory responsibility to maintain and protect the Fund, and protect client moneys.

4.15 The Fund is an additional layer of protection for consumers of legal services provided by solicitors, in conjunction with professional indemnity insurance which deals with losses suffered due to negligence. The Fund was originally established as clients of solicitors had no adequate form of redress against a solicitor where moneys were lost due to the dishonesty, rather than the negligence, of the solicitor.

4.16 The Law Society's Compensation Fund is only open to clients of solicitors who suffer financial loss through dishonesty by the solicitor in the provision of legal services. For any other type of loss suffered by a client of a solicitor they must pursue their claim against the solicitor's professional indemnity insurance.

4.17 The Society requires all practising solicitors to contribute annually towards the maintenance of the Law Society's Compensation Fund through their practising certificate fees, whether or not the solicitor holds client moneys.

4.18 Monetary fines imposed by way of penalty on solicitors may also be directed to be paid into the Fund.

### **Regulation of barristers holding client moneys**

4.19 Altering the legal system so that all legal practitioners may hold client funds would require a dual system of regulation and enforcement for solicitors and barristers run by separate competent bodies. A regulator for barristers, either the Authority or the Bar of Ireland, which specifically regulates practising barristers holding client moneys in the interest of public protection would need to be designated.

4.20 This would require a number of legislative changes including, as mentioned previously, the introduction of a barristers' Compensation Fund and a claims-handling and financial regulation system to deal with claims on the new Fund and protection of the fund and clients' moneys.

4.21 As stated previously, if so permitted, barristers holding client moneys should be held to the same regulatory standards as those imposed on solicitors, which would require a regulatory system of a similar standard to that in place for the regulation of solicitor firms that hold client moneys. As such, the following recommendations are based on the regulatory standards and regulatory system in place for solicitors who hold client moneys.

#### New Compensation Fund for barristers

4.22 In the event that barristers are given the right to hold client moneys, consideration will need to be given to the introduction of a form of redress open to clients whose moneys are misappropriated through dishonest acts by barristers in the course of the delivery of legal services.

4.23 Consideration would be required to establishing a form of barristers' Compensation Fund to compensate clients of practising barristers who suffer financial loss due to the dishonesty of a barrister in the provision of legal services. This would offer an additional layer of protection to clients alongside professional indemnity insurance (which provides cover for acts of negligence by the barrister).

4.24 The model scheme for redress in this regard is the Law Society's statutory Compensation Fund as outlined previously in this submission.

4.25 The barristers' Compensation Fund would probably require to be established by way of levy on the barristers' profession over a number of years in order to establish a minimum funding level. Once the minimum funding level was reached, the competent body would have to go about insuring the Fund.

4.26 In order for the Fund to be insured, the competent body would have to demonstrate to insurers that their financial regulation functions were rigorous and that the insurers' exposure was kept to a minimum. Access to grants from the Fund should only be made in defined and limited circumstances.

4.27 In order to maintain the barristers' Compensation Fund, including minimum reserve levels, the competent body would have to establish a resilient system of control and risk management in order to protect the Fund. This could include matters such as regulations, education and powers of inspection.

4.28 Giving another competent body the power to control a new Compensation Fund may raise regulatory issues. The competent body would have to have clear lines of communication open between itself and the Authority. Clients of barristers would have to be made aware that there was no possibility for them to claim on the Law Society's Compensation Fund.

4.29 A claims management system would need to be put in place to manage claims on the barristers' Compensation Fund to compensate clients for loss in the event of dishonesty by the barrister and a financial regulatory system would need to be put in place to protect client moneys and the new barristers' Compensation Fund.

4.30 In the context of legal partnerships between barristers and solicitors, a situation could arise whereby a client who suffered financial loss could be uncertain of which Compensation Fund applied. This could be confused further if the loss suffered was a result of receiving legal services from both a barrister and a solicitor within that legal partnership.

**Recommendation 7 – Barristers’ Compensation Fund**

In the event that barristers are allowed to hold client moneys, a barristers’ Compensation Fund should be set up by way of levy on the barristers’ profession only and to be maintained by the designated competent regulatory body, together with the appropriate financial regulatory system.

**Recommendation 8 – Claims handling system**

If a barristers’ Compensation Fund is established, there will be a need for their competent body to establish and maintain a claims handling system.

**Recommendation 9 – Demarcation between and guidance on access to compensation funds**

If a barristers’ compensation fund is established, a clear demarcation will need to be established on which clients have access to which Compensation Fund (either the solicitors’ or barristers’ Fund), especially for legal partnerships, and guidance regarding same should be required to be provided to clients of solicitors and barristers.

**Regulator**

4.31 Giving practising barristers access to client funds would require strict financial regulation by a competent body similar to that carried out by the Society in relation to solicitor firms that hold client moneys.

4.32 As mentioned previously, this competent body could be the Bar of Ireland or the Authority. The competent regulatory body would require powers similar to those in place for solicitors to ensure that client moneys are protected from the possibility of misappropriation and/or misuse by a practising barrister, and to protect the new barristers’ Compensation Fund.

4.33 The competent body should have the power to appoint investigating accountants, who are forensic accountants who have a detailed understanding of the regulations as authorised persons for inspection. The investigating accountants would require powers to investigate self-employed practising barristers as well as those engaged in legal partnerships and multi-disciplinary practices.

- 4.34 The competent body should be in close communication with the other regulatory bodies as there would be a need to share information particularly in the context of legal partnerships and multi-disciplinary practices that might include both barristers and solicitors.

**Recommendation 10 – Regulatory body**

A competent body other than the Law Society would have to be given the statutory obligation under primary legislation to act as regulator in relation to the holding of client moneys by barristers, which would include an obligation to protect client moneys and to establish and maintain the new Compensation Fund for barristers. Regulatory powers including investigative, disciplinary, protective and enforcement powers to oversee those barristers who would be permitted to receive, hold or control client moneys to ensure the protection of the public and client moneys would have to be granted to the competent body, together with powers to make regulations in relation to the financial regulation of those barristers permitted to handle client moneys.

**Client accounts and accounts regulations**

- 4.35 As stated previously, in order for practising barristers to be able to hold client moneys, strict regulations would be required to ensure that the public was adequately protected, including the introduction of barristers accounts regulations to deal with the handling of client moneys by barristers.
- 4.36 The model for regulating client moneys by legal professionals in this regard is the Solicitors Accounts Regulations 2014. These regulations are the product of years of experience by the Society from scrutinising the accounts of solicitors in order to ensure the safeguard of client funds and, by extension, the Law Society's Compensation Fund. The regulations are appended to this submission.
- 4.37 If a new regime is introduced permitting access to client moneys by barristers, a raft of rules would be required. A barrister wishing to hold client moneys should be required to set up a client account or client accounts, as necessary. These bank accounts should be clearly designated for the purposes of client funds only. Any barrister who receives, holds or controls client moneys should pay such moneys into the client account without delay. The barrister should be only allowed pay moneys from the client account in specific circumstances in accordance with their client's instructions.
- 4.38 The barrister should maintain a client ledger account in respect of each separate client matter, including different client matters for the same client. There should be very limited circumstances whereby moneys could be transferred between separate client ledger accounts to prevent the possibility of misappropriation.
- 4.39 The barrister would also require an office account or office accounts for the purposes of paying in any moneys which they were beneficially entitled to receive. This account should receive all professional fees.

### **Recommendation 11 – Barristers’ accounts regulations**

A rigorous set of accounts regulations would have to be enacted to ensure practising barristers who were permitted to receive, hold or control client moneys were subject to strict oversight.

#### Inspections of barristers holding client moneys

- 4.40 As stated above, the barristers’ accounts regulations would need to be drafted so that they contained clearly defined rules as to how client funds were to be received, handled and controlled. A practising barrister would also have to keep clear books of account with vouching documentation so that all client moneys were readily identifiable and available for inspection.
- 4.41 The competent body would have to oversee the enforcement of these accounts regulations to ensure that the highest standards were maintained. In order to allow barristers to receive, hold or control client moneys the competent body would need a financial regulation department with forensic investigating accountants with particular expertise in ensuring compliance with the regulations.
- 4.42 Currently, the Society investigates all solicitors’ practices through a number of designated investigating accountants who are appointed as an *‘authorised person’* by the Registrar of Solicitors. The method for selecting solicitors’ practices for inspection is done through both a rotational basis and on the basis of risk management procedures. An inspection of a practice may also be triggered through a complaint made to the Society by a client.
- 4.43 Practising barristers given access to client funds would have to be subject to similar inspections of their accounts on a regular basis by a forensic investigating accountant on behalf of the regulatory body. It would also be prudent to consider inspecting such barristers on the basis of risk profiling depending on the nature of their practice.
- 4.44 A requirement to submit an annual reporting accountant’s report to the competent body, similar to the annual reporting accountants’ reports submitted by solicitor firms who hold client moneys, would need to be introduced to assist with identifying and assessing high risk barristers.
- 4.45 It would need to be made clear that a breach of the regulations would be treated as a matter of professional conduct. Any breaches of professional conduct in relation to accounts matters could result in regulatory intervention, referral to the Legal Practitioners Disciplinary Tribunal for an inquiry into the legal practitioner’s conduct and/or a referral to the High Court.
- 4.46 Protective powers would need to be put in place to allow the relevant regulator to make applications to the High Court to obtain suspension and freezing orders in the event that misappropriation or deficits on the client account were identified. This is considered further below.

#### **Recommendation 12 – Inspection regime for barristers holding client moneys**

Inspections of barristers' accounts would have to be provided for in primary legislation and accounts regulations, to be conducted on a regular basis and on the basis of an assessment of risk by forensic investigating accountants to ensure compliance with those regulations.

#### **Recommendation 13 – Annual reporting accountants' reports**

Barristers who were permitted to hold client moneys should be required to submit an annual reporting accountants' report to the regulator which report should disclose any breaches of the applicable accounts regulations, in particular any deficits on client accounts.

### **Regulatory committee and disciplinary powers**

4.47 The competent body should be required to establish a regulatory committee to deal with barristers' accounts regulations matters, and claims on the barristers' compensation fund, similar to the Society's Regulation of Practice Committee.

4.48 In the event that there are breaches of regulations, the regulatory committee should have a range of powers open to them to deal with such breaches. Such powers would include:

- (a) power to call barristers to a meeting of the committee;
- (b) power to compel barristers to comply with directions of the committee, including production of relevant documentation and books of account;
- (c) imposition of reprimands;
- (d) levying of contributions towards the costs of the inspection;
- (e) imposition of practising certificate conditions;
- (f) refusal to issue a practising certificate;
- (g) referral of serious breaches to the Legal Practitioners Disciplinary Tribunal;
- (h) direction that an application be made to the High Court for a suspension order or a freezing order.

4.49 For minor breaches of the barristers' accounts regulations, the imposition of reprimands or a contribution towards the cost of the inspection that identified the breaches, or the imposition of minor practising certificate conditions (such as requirement for further education in specific areas) might be appropriate.

4.50 For more serious breaches of the barristers' accounts regulations (which do not reach the threshold of seriousness that would warrant referral to the Legal Practitioners

Disciplinary Tribunal), stiffer practising certificate conditions might be considered, such as a requirement for a barrister to have an approved supervisor in place, or a requirement to have a second signatory in place for all client account cheques (or electronic equivalent).

- 4.51 Under the Solicitors Acts 1954 to 2011, practising certificate conditions can be put in place either when a solicitor applies for a practising certificate<sup>2</sup>, or on a practising certificate already in force<sup>3</sup>. Similar powers might be considered in relation to barristers.
- 4.52 The Solicitors Acts also permit the Society to refuse to issue a solicitor with a practising certificate under specified circumstances<sup>4</sup>. Similar powers might be considered in relation to barristers.
- 4.53 As any practising certificate conditions could materially impact on a barrister's right to earn a livelihood, a right of appeal would need to be built into the system. For solicitors, a right of appeal exists against the imposition of practising certificate conditions, or refusal of a practising certificate, with the appeal being made to the President of the High Court.
- 4.54 The committee would need to have jurisdiction to refer barristers who have breached the accounts regulations to the Legal Practitioners Disciplinary Tribunal for further inquiry into whether the matter constitutes misconduct. The Legal Practitioners Disciplinary Tribunal would need the power to make findings of professional misconduct against barristers for breaches of the barristers' accounts regulations.
- 4.55 The issue of referral to the Legal Practitioners Disciplinary Tribunal will require careful consideration and possible amendment to primary legislation as currently, under section 77 of the Act, the Authority and the Society are the only two bodies eligible to make applications to the Tribunal. If a competent body other than the Authority is designated to regulate barristers holding client moneys (such as the Bar of Ireland), such powers would need to be extended to that competent body.
- 4.56 Circumstances could arise where a barrister dishonestly misappropriated client funds. This might be discovered by the competent body by way of inspection (either risk or rotation based), through the annual accountant's report, or through the complaint of a client. In such circumstances statutory powers would be needed by the competent body to apply to the High Court to freeze the accounts and/or assets of the barrister and suspend the barrister from practice in order to protect client funds.
- 4.57 The Society currently has the power under section 20 of the Solicitors (Amendment) Act 1960 (as amended) to apply to the High Court for certain orders in respect of a solicitor's bank accounts and assets. Such applications may be made, on the direction of the Society's Regulation of Practice Committee, in circumstances where the Society

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<sup>2</sup> Section 49 of the Solicitors Act 1954, as substituted by section 61 of the Solicitors (Amendment) Act 1994, as amended by section 2 of the Solicitors (Amendment) Act 2002

<sup>3</sup> Section 59 of the Solicitors (Amendment) Act 1994

<sup>4</sup> Section 49 of the Solicitors Act 1954, as substituted by section 61 of the Solicitors (Amendment) Act 1994, as amended by section 2 of the Solicitors (Amendment) Act 2002

has formed the opinion that there has been dishonesty in the solicitor's practice. A similar application may also be made where the Society is of the opinion that a sole principal has abandoned their practice. The Society may also apply for the suspension of the solicitor in such cases. Broadly similar powers for the competent regulator would need to be considered if practising barristers are permitted to hold client moneys.

**Recommendation 14 – Establishment of a regulatory committee**

The competent regulatory body would have to establish a regulatory committee to deal with barristers who breached the accounts regulations and to consider claims on the barristers' Compensation Fund.

**Recommendation 15 – Powers of regulatory committee**

The competent regulatory body would have to be given all the relevant statutory powers to deal with barristers who breached the accounts regulations as are currently held by the Society, including the right to refer the barrister to the Legal Practitioners Disciplinary Tribunal, which powers could be delegated to a regulatory committee if appropriate.

**Recommendation 16 – Refusal to issue barristers' practising certificates, or imposition of practising certificate conditions**

Consideration would need to be given to granting the competent regulatory body the power to impose conditions on barristers' practising certificates, or to refuse to issue a practising certificate, for breaches of the accounts regulations in order to protect client moneys.

**Recommendation 17 – Right to apply to the High Court**

The competent regulatory body would have to be given the statutory power to apply to the High Court to freeze a barrister's accounts and/or assets to protect client funds, and/or suspend the barrister from practice.

**[Bankruptcy, personal insolvency arrangements and unsatisfied judgments](#)**

4.58 If barristers are given the right to hold client moneys, they should also be required to be subject to the same rules regarding bankruptcy, personal insolvency arrangements and unsatisfied judgments as apply to solicitors in order to protect client moneys.

4.59 The protective measures that are put in place for solicitors who are adjudicated bankrupt, enter into a personal insolvency arrangement and/or have unsatisfied judgments are not put in place because of any moral failing attributed to the solicitor's actions, but rather because such solicitors may be under significant financial pressure and, therefore, constitute a much higher risk to client moneys.

- 4.60 Under section 50 of the Solicitors Act 1954 a solicitor is immediately and automatically suspended from practice when adjudicated bankrupt. The suspension remains in place until the bankruptcy is annulled or the Society lifts the suspension in accordance with such conditions as the Society deems fit under section 51 of the Solicitors Act 1954.
- 4.61 Practising barristers who handle client moneys and are adjudicated bankrupt should also be suspended from practice with automatic and immediate effect to ensure protection of client moneys.
- 4.62 An effective right of appeal against this suspension for solicitors exists under section 51 of the Solicitors Act 1954 whereby the Society can, upon application by the solicitor, lift the suspension imposed under section 50 under such terms as the Society deems fit. Such terms may include imposition of practising certificate conditions that such solicitors cannot have access to client moneys and can only act as an assistant solicitor under supervision. Such provisions should also be considered for barristers.
- 4.63 With regard to solicitors being involved in personal insolvency arrangements and having unsatisfied judgments, the Society has the power under section 49 of the Solicitors Act 1954, as substituted by section 61 of the Solicitors (Amendment) Act 1994, and under section 59 of the Solicitors (Amendment) Act 1994, to refuse a practising certificate, or impose practising certificate conditions where a solicitor has entered into an arrangement with their creditors (such as a personal insolvency arrangement) or has unsatisfied judgments. The power to refuse a practising certificate or impose conditions if a solicitor has been made bankrupt in any jurisdiction also exists under these sections.
- 4.64 The practising certificate conditions imposed on solicitors in situations where the solicitor has entered into a personal insolvency arrangement or has unsatisfied judgments range from prohibiting solicitors from acting as a principal in a practice and requiring the solicitor to act only as an assistant solicitor under the direct control and supervision of a solicitor of at least 10 years' standing to be approved in advance by the Society, to requiring the solicitor to have a second signatory on all client account cheques or the electronic equivalent.
- 4.65 Similar powers would need to be granted to the competent body with regard to the regulation of barristers who are permitted to hold client moneys who have, at any point or in any jurisdiction, been adjudicated bankrupt, entered into personal insolvency arrangements or who have unsatisfied judgments, in order to safeguard client moneys and, by extension, the barristers' Compensation Fund.

**Recommendation 18 – Suspension due to bankruptcy**

Barristers permitted to hold client moneys who are adjudicated bankrupt should be automatically suspended from practice with immediate effect. Provisions allowing the barrister to apply to the competent body to lift the barrister's suspension on such terms as the competent body sees fit should be considered.

**Recommendation 19 – Refusal of practising certificate, or imposition of practising certificate conditions where a solicitor has been adjudicated bankrupt, entered into a personal insolvency arrangement, and/or has unsatisfied judgments**

The competent body would have to be given the power to refuse a practising certificate, or impose such conditions as they deem fit on the practising certificate of a barrister who has at any time or in any jurisdiction been adjudicated bankrupt, entered into a personal insolvency arrangement, and/or has unsatisfied judgments, for the protection of client moneys.

## Education

4.66 The current system for educating prospective barristers in the Honorable Society of King’s Inns does not address the holding of client funds, as barristers are currently prohibited from holding same. The system for educating barristers would have to be substantially amended to provide for education on this matter, should barristers be permitted to handle client moneys.

4.67 Barristers currently in practice would also require education on how to treat client funds and how to administer a client account for their practice. They would have to be educated to a standard that would ensure the protection of the public and would require ongoing continuing professional development on this matter. Such education would also assist in satisfying the barristers’ professional indemnity insurers that exposure to risk is minimised.

4.68 Educational courses would require a detailed understanding of how to maintain accounts, the regulations that would apply and an understanding of how the inspection process would work. Barristers would need to understand the ramifications of potential breaches of the accounts regulations and how this might impact on their right to practice.

**Recommendation 20 – Education of barristers on client account matters**

Both practising barristers and prospective barristers should be educated to a standard similar to solicitors in relation to administering client moneys.

## Professional indemnity insurance

4.69 Practising barristers who are members of the Law Library are currently subject to the Bar of Ireland’s code of conduct which requires barristers to hold minimum levels of professional indemnity insurance.

4.70 Under section 47 of the Act, the Authority is required to make regulations for the professional indemnity insurance requirements of practising barristers. This section

has not yet been commenced and until such time as it is, the Bar's code of conduct will prevail.

- 4.71 Giving barristers the entitlement to hold client moneys would inevitably impact on the premium rate for professional indemnity insurance they would have to pay on an annual basis. The range of insurers who would be willing to enter into insurance contracts with barristers who were permitted to hold client moneys should also be considered.
- 4.72 Currently under the Solicitors Acts 1954 to 2011 (Professional Indemnity Insurance) Regulations 2016 (S.I. No. 534 of 2016) solicitor firms are required to have insurance with a minimum level of cover of €1.5m for each and every claim. Barristers who hold client funds would have to be required to maintain a similar minimum level of cover in their practice for each and every claim to ensure public protection at the same level as that afforded to clients of solicitors.
- 4.73 If an entitlement for barristers to hold client moneys is introduced, in order to keep their insurance overheads at a minimum, barristers may have to consider limiting their practice to certain fields of expertise rather than general practice, and not holding client moneys despite being permitted to do so.
- 4.74 Consideration would have to be given to the establishment of an assigned risks pool for barristers, similar to that which exists for solicitors, as an insurer of last resort in order to maintain insurance for barristers who were unable to obtain cover in the open market in any given year. The ARP would prevent the insurance market from inadvertently being given the power to dictate the type of work barristers might or might not engage in if the barrister wished to obtain insurance. The parameters for access to this fund would require careful deliberation and would require regulations to be effective.
- 4.75 Run-off insurance is provided to eligible ceased solicitor firms through the Run-off Fund. This fund was established as it was found that the cost of run-off insurance through the market for solicitors who were ceasing practice was too high for retiring solicitors to afford. As such, the Run-off Fund provides run-off cover to each eligible ceased firm at no cost at point of entry to the firm, and cover is in place for so long as the fund exists. The fund is paid for by participating insurers in the solicitors' professional indemnity insurance market in accordance with the insurer's market share by premium, and the cost of the fund are recovered by the insurers from live solicitor firms through their annual premium.
- 4.76 While barristers are currently required to hold run-off cover for 6 years after ceasing to practise, further consideration would need to be given to run-off insurance requirements for barristers, should barristers be permitted to hold client moneys in future, in light of possible consequential increases in the run-off premium which might make run-off cover unaffordable. Matters such as the duration of such cover, and how the cover would be paid for, and creation of regulations in relation to same would need to be reviewed in light of any potential increase in run-off premium. Further

consideration of the requirements to hold run-off cover for barristers in relation to direct professional access is dealt with later in this submission.

**Recommendation 21 – Professional indemnity insurance**

Barristers holding client moneys should be subject to the same professional indemnity insurance standards as solicitors to ensure there is no competitive advantage given to a class of legal practitioners who are held to a lower regulatory standard to the detriment of client protection.

**Recommendation 22 – Assigned risks pool**

An Assigned Risks Pool should be established as an insurer of last resort for barristers who are unable to obtain professional indemnity insurance in the market in any year.

**Recommendation 23 – Run-off cover**

Run-off insurance cover provisions for barristers, including duration of cover, how cover is paid for, and relevant regulations, should be reviewed in light of a possible consequential increase in run-off premium caused by any lifting of the restriction on barristers holding client moneys and direct professional access in contentious matters.

## Consequential impact of barristers holding client moneys on legal costs

- 4.77 When consideration is given to whether to allow barristers to hold client moneys, the additional costs of the regulatory regime that needs to be put in place to protect client moneys, and the consequential possible increase in legal costs, need to be kept in mind.
- 4.78 As set out in this chapter, the legislative changes and regulatory requirements to ensure protection of client moneys, and to ensure that a comparable regulatory system between solicitors and barristers exists, are substantial. The cost of same for barristers is likely to be a considerable and unwelcome additional financial burden which may be passed on to clients through legal costs.
- 4.79 As a matter of comparison, the financial regulatory system for solicitors cost the Society €6.5m in 2016. This would be on a recurring annual basis. It should be noted that this financial regulatory regime covers approximately 2,298 solicitor firms who hold client moneys.

- 4.80 It should also be noted that the cost of the new financial regulatory system would need to be entirely borne by barristers, as solicitors already pay for their own financial regulation. It would be unreasonable to expect solicitors to pay for both their own financial regulation and that of barristers.
- 4.81 The additional cost of a barristers' Compensation Fund contribution on an annual basis by barristers on top of the fees that they currently pay the Bar of Ireland for their annual practising certificate will need to be recovered by barristers, which could result in increasing legal costs. The annual Compensation Fund contribution for solicitors for 2017 was €760 per solicitor, regardless of whether or not the solicitor held client moneys.
- 4.82 It must also be understood that holding client moneys would raise the risk profile for any practising barrister. This would have ramifications in terms of professional indemnity insurance costs potentially acting as a barrier to entry to the profession and requiring professional indemnity insurance regulatory requirements for practising barristers to become more rigorous and complex to deal with the additional risk of holding client moneys.
- 4.83 Adding the inevitable increase in costs of contributing to a Compensation Fund, paying for a financial regulatory regime, and increased professional indemnity insurance would likely impact the costs of the provision of legal services. These costs are likely to be borne by consumers leading to higher prices for legal services.

**Recommendation 24 – Legal costs consequences of barristers holding client moneys**

Consideration should be given to the possible consequential increase in legal costs that may arise due to the costs of the financial regulatory structure required to protect client moneys having to be established and maintained by barristers.