

**Opening Statement by Dr. Brian Doherty, Chief Executive Officer,
Legal Services Regulatory Authority to the
Joint Oireachtas Committee on Justice and Equality
18 December 2019**

Good morning Chairperson and Committee members. Thank you for inviting us here today to discuss the issue of legal costs.

I would like to introduce my colleague Mr. Ultan Ryan, Secretary to the Authority.

Your invitation letter suggested that witnesses may wish to focus on issues which they believe are most relevant to their own areas of expertise. Of the areas of examination listed by the Committee, those which are most relevant to the role of the Legal Services Regulatory Authority relate to greater transparency in relation to legal costs in Ireland and increased competition within the legal sector which may thereby reduce costs.

It might be helpful to outline the relevant statutory objectives and functions of the LSRA that frame its mandate, highlighting those that are directly relevant to the matter at hand and to the concerns of the Committee. I'll then provide an update as to where the LSRA currently is in fulfilling its broad statutory remit with emphasis on the areas of activity that might have the most impact in the areas of cost and competition. Finally, I'll look ahead to the New Year and some elements of the future work programme of the LSRA relevant to the costs of legal services in the State.

The Legal Services Regulatory Authority

The LSRA is the new independent regulator for the provision of legal services by legal practitioners. The Legal Services Regulation Act, 2015 sets out at section 13 (4), the six statutory objectives of the LSRA – our operating principles.

These are to:-

- protect and promote the public interest,
- support the proper and effective administration of justice,
- protect and promote the interests of consumers relating to the provision of legal services,
- promote competition in the provision of legal services in the State,
- encourage an independent, strong and effective legal profession and
- promote and maintain adherence to the professional principles of legal practitioners as specified in the Act.

You will note that whilst reduction in legal costs is not explicitly mentioned, we are tasked with protecting the public interest, the interests of consumers of legal services and with promoting competition. The Act intends that these principles guide the Authority in the work that it undertakes.

The Authority's eleven functions are set out under Section 13 of the Act, and in the context of today two of those functions are particularly relevant. These relate to receiving and investigating complaints and to promoting public awareness and disseminating information to the public in respect of legal services, including the cost of such services:

13. (1) Subject to this Act, the Authority shall regulate the provision of legal services by legal practitioners and shall ensure the maintenance and improvement of standards in the provision of such services in the State.

(2) Without prejudice to the generality of *subsection (1)*, the Authority may, and where required by this Act, shall—

(a) keep under review, and make recommendations to the Minister in respect of, the following:

- (i) the admission requirements of the Law Society relating to the solicitors' profession and of the Bar Council and the Honorable Society of King's Inns relating to the barristers' profession;
- (ii) the availability and quality of the education and training (including on-going training) for the solicitors' and barristers' professions, including—
 - (I) the curriculum arrangements for the provision of clinical legal education and the teaching of legal ethics, negotiation skills, alternative dispute resolution and advocacy, and
 - (II) the methods by which, and the persons by whom, such education and training is provided;
- (iii) the policies of the Law Society in relation to the admission of persons as solicitors in the State, and of the Bar Council and the Honorable Society of King's Inns in relation to persons becoming entitled to practise as barristers in the State, including the arrangements for—
 - (I) accreditation of foreign legal practitioners, and
 - (II) movement by legal practitioners between the professions of solicitor and barrister;
- (iv) professional codes;
- (v) the organisation of the provision of legal services in the State,
- (b) disseminate information in respect of the education and accreditation requirements and other matters referred to in *paragraph (a)* to such extent and in such manner as it thinks fit,
- (c) specify the nature and minimum levels of professional indemnity insurance in accordance with *sections 46 and 47*,
- (d) establish and administer a system of inspection of legal practitioners for such purposes as are provided for in this Act,
- (e) receive and investigate complaints under *Part 6*,**
- (f) maintain the roll of practising barristers in accordance with *Part 9*,
- (g) promote public awareness and disseminate information to the public in respect of legal services, including the cost of such services,**

- (h) keep the Minister informed of developments in respect of the provision of legal services by legal practitioners and make recommendations to assist the Minister in co-ordinating and developing policy in that regard,
- (i) undertake, commission or assist in research projects and other activities in respect of the provision of legal services, which in the opinion of the Authority may promote an improvement in standards for the provision of those services and public awareness of them, and make recommendations to the Minister arising from those projects or activities, and
- (j) perform any other functions conferred on it by this Act or by regulations made under it.

Membership of the Authority

The Authority is comprised of eleven members who are appointed by the Government following nomination by a number of bodies. The Government appointments to the Authority are approved by resolutions of both Houses of the Oireachtas.

Of the Authority's eleven members – six are lay members (including a lay chairperson) and 5 are non-lay persons. The six lay members are nominated by the following bodies: the Citizens Information Board; the Higher Education Authority; the Competition and Consumer Protection Commission; the Irish Human Rights and Equality Commission; the Institute of Legal Costs Accountants; and the Consumers' Association of Ireland. Of the five non-lay members one is nominated by the Bar Council/Bar of Ireland, one is a solicitor nominated by the Legal Aid Board, one member is nominated by the Honorable Society of King's Inns and two are nominated by the Law Society.

Each member of the Authority is statutorily required to act on a part-time basis. The Authority is required by law to be independent in the performance of its functions. Authority members are required to protect and promote the public interest. They are nominees and not representatives of the nominating bodies. The Authority has met on 19 occasions to date.

The Executive function of the Authority is provided by the CEO and staff of the Legal Services Regulatory Authority.

LSRA Work to Date – Legal Costs

As I mentioned earlier, the statutory remit of the LSRA is broad. In terms of areas of our work that relates to legal costs, there are three key areas that I will focus on today:

1. Legal Costs Transparency
2. Promoting Competition
3. Complaints About Costs

1. Legal Costs Transparency

From 7 October 2019, under section 150 and 152 of the 2015 Act, legal practitioners are required to provide specific and detailed notices on costs to their clients.

Under the new provisions, when solicitors and barristers first receive instructions from a client they must provide the client with a notice written in clear and understandable language setting out:

- the legal costs that will be incurred in relation to the matter concerned or, if this is not reasonably practicable,
- the basis on which the legal costs are to be calculated.

Section 150 sets out in detail the information that must be included in the notice. This includes:

- the costs incurred up to the date of the notice,
- the costs that are certain to be incurred and the costs that are likely to be incurred,
- the amount of VAT to be charged,
- information as to the likely legal and financial consequences of the client's withdrawal from the litigation and its discontinuance and
- information as to the circumstances in which the client would be likely to be required to pay the costs of one or more other parties to the litigation and information as to the circumstances in which it would be likely that the costs of the legal practitioner would not be fully recoverable from other parties to the litigation.

There is also an obligation under the Act for the legal practitioner to provide a further notice to the client where they become aware of any factor that would make the legal costs likely to be incurred significantly greater than those disclosed or indicated in the notice. This means that the process of notification of costs is an ongoing one and not just an initial once-off notification.

Legal practitioners are also now required to provide, as soon as practicable after the conclusion of legal services, a signed bill of costs that meets the requirements of the Act including an itemised statement of the amounts charged in respect of the legal services.

The provisions of sections 150 and 152 are an important step in the promotion of transparency and consistency in how legal services are costed and billed. These new requirements on legal practitioners will allow consumers of legal services to make more informed decisions in respect of the legal services which they have sought. With updated notices being provided to them, they will have the opportunity to review their own choices, priorities and decisions as to how they wish to proceed.

The LSRA expects that it will be required in due course to consider complaints where it is alleged that section 150 notices were either not provided, were not clear or were inadequate. However, these notices should greatly improve communication and transparency on cost between practitioner and client, which should in turn have a positive impact in respect of volumes of such complaints.

Section 150 and the requirements of this part of the Act go a long way towards providing a statutory framework for communication of legal costs. There is now a clear obligation on legal practitioners to be transparent, consistent and thorough in communicating with their clients.

The LSRA will consider the failure to provide a section 150 notice or an accurate notice when considering complaints of excessive costs and the new Legal Costs Adjudicator will also consider the notices when adjudicating on bills of costs, in fact failure to properly

comply with the requirement to provide a notice of costs can be taken into account to disallow costs in an adjudication.

The new Office of the Legal Costs Adjudicator is established under part 10 of the 2015 Act. The Legal Costs Adjudicator replaces the Taxing Masters' Office and is wholly independent and separate from the LSRA. The new Office will also maintain a register of determinations in relation to applications for the adjudication of legal costs adding a new layer of transparency to legal costs.

2. Promoting Competition

The LSRA has conducted public consultations, research and reports on a series of key subjects as required under the Legal Services Regulation Act. Three of the reports submitted to the Minister for Justice and Equality were undertaken in line with the statutory objective of promoting competition in the provision of legal services in the State.

These reports examine or relate to the introduction of legal partnerships, multi-disciplinary practices and the consideration of whether Barristers should be permitted to hold clients' money or to receive direct instructions in contentious matters.

Limited Liability Partnerships (LLPs), Legal Partnerships and Multi-Disciplinary Practices

In November 2019 the LSRA introduced the framework that will allow existing solicitor partnerships to apply to the LSRA for authorisation to operate as limited liability partnerships.

This is intended to put Ireland on a par with other jurisdictions that have operated LLPs for a number of years but also to have the potential to increase competition in the legal services market, reduce professional indemnity insurance costs for LLPs and to consequently lower legal costs.

Following on from the introduction of LLPs, the Minister for Justice & Equality will be introducing the necessary legislation to allow the LSRA to introduce the framework for legal partnerships as a new business model for legal service delivery in 2020.

Once Legal Partnerships have been introduced, the LSRA will consider whether Multi-Disciplinary Practices would be a viable and positive model for legal services delivery.

3. Complaints About Costs

On the 7 October 2019, the LSRA began receiving and investigating complaints relating to solicitors and barristers.

Since that date, the LSRA has received 522 complaints or queries and over 847 phone calls and e-mails requesting information or complaint forms.

We have been busy. It was anticipated that there would be a spike in complaints at the beginning of operations under this function as a result of persons waiting for the LSRA to open its service who might otherwise have made their complaints through the previous framework at the representative bodies.

It should be noted that the LSRA, in determining admissibility of complaints cannot admit a complaint to the process where the same or substantially the same complaint has been previously determined by the High Court or by the Law Society or any of its Committees or Tribunals. Similar restrictions on admissibility apply in relation to matters which have been the subject of civil or criminal proceedings. The impact of this is of particular significance at this early stage of the operation of our complaints function as part of the transition to the new regime.

The issue of the cost of legal services is directly relevant to complaints in a number of key ways.

Firstly, there are three grounds for complaint, namely:

- that the legal services provided were of an inadequate standard ;
- that the amount of costs sought by the solicitor or barrister were excessive; and
- that the legal practitioner performed an act or omission which amounts to misconduct under the Act.

There is a degree of overlap between the three grounds for complaints when it comes to costs. This is because a complaint about excessive costs can actually become a complaint about misconduct where the amount of costs sought is grossly excessive.

Under the definition of misconduct for legal practitioners in the 2015 Act it is misconduct to seek an amount of costs in respect of the provision of legal services that is grossly excessive. It is also misconduct for a legal practitioner to be involved in an act or omission which involves fraud or dishonesty, is connected with the provision of legal services which are inadequate to a substantial degree or which is likely to bring the profession into disrepute.

Focusing on non-misconduct cases for a moment, in non-misconduct complaints where it is alleged that the amount of costs sought by the legal practitioner in respect of legal services provided to the client was or is excessive, the complainant has three years either from the issuing of the bill of costs or from when the complainant knew or ought reasonably to have known that the amount of costs sought was excessive to bring the complaint to the LSRA.

If a complaint of excessive costs is made to the LSRA and meets the admissibility criteria under the Act that would allow the LSRA to deal with the complaint, the LSRA must first attempt to informally resolve or mediate the complaint between the legal practitioner and the complainant.

We are hopeful, based on our experience so far, that both legal practitioners and complainants will engage in this process and allow for an early resolution of issues of cost and inadequate service.

However, where the client or the legal practitioner do not accept the invitation to informally resolve the complaint of excessive costs, where attempts to resolve are not successful or where the LSRA forms the view that a resolution or agreement is unlikely, the LSRA has the power, having first sought the views of the parties, to determine the complaint.

This means that the LSRA can direct that the costs were, in fact, not excessive or where it concludes that the costs sought were excessive can direct the legal practitioner to refund without delay, either wholly or in part as directed, any amount already paid by or on behalf of the client in respect of the practitioner's costs in connection with the bill of costs or to waive, whether wholly or in part, the right to recover those costs.

Any direction of the LSRA can be appealed by the client or the legal practitioner to an independent Review Committee. The decisions of the Review Committee can ultimately be appealed to the High Court.

Dealing with misconduct complaints under the Act which relate to costs where it is alleged that the amount of costs sought by a legal practitioner was grossly excessive, these will be considered and assessed for admissibility and the legal practitioner will be given the opportunity to address the allegations. If the complaint is found to be an admissible complaint it will be forwarded by the Authority to an independent Complaints Committee.

The Complaints Committee is tasked with considering and investigating misconduct complaints. The Complaints Committee has a range of sanctions at its disposal including directing that a legal practitioner participate in a professional competence scheme, that they refund to the client some or all of the fees paid or to pay compensation to the client of a sum set in the Act as not exceeding €5,000.

Should the Complaints Committee be of the view that the matter is so serious as to warrant it, they can refer the matter for the consideration of the Legal Practitioners Disciplinary Tribunal. The Tribunal is independent of the LSRA and is in the process of being established through the Department of Justice & Equality.

The Tribunal will consider more serious matters of misconduct and has a wider range of sanctions from advice, admonishment and censure, a direction that the legal practitioner pay up to €15,000 restitution to the client to a direction that a specified condition or restriction can be placed on the legal practitioner's practice. The Tribunal can also apply to the High Court for further measures including that a legal practitioner be prohibited from practice.

Section 73 Report (Complaints Statistics)

Under section 73 of the 2015 Act the LSRA is required to report in the operation of its complaint function every six months, the first report is due before 7 April 2020. The Act requires that figures in relation to the nature and type of complaints received are included in the report and the LSRA also intends to identify and outline where trends in complaints have emerged.

Even in the relatively short time that has passed since the 7 October 2019, complaint themes are emerging. The one feature that cuts across almost all of them is, perhaps unsurprisingly, communication. Where a legal practitioner fails to adequately explain to a client, the costs of legal proceedings or services, the timeline that it may take to deliver legal services or the risk involved in pursuing certain costs of legal action then complaints will naturally follow.

The Roll of Practising Barristers

In 2018, the LSRA established the Roll of Practising Barristers. The Roll is a tool by which members of the public can be assured that the barrister to whom they may turn for legal advice is lawfully entitled to provide legal services. The Roll of Practising Barristers is published on the LSRA's website.

In 2019 the LSRA issued Professional Indemnity Insurance Regulations for barristers. This means that for the first time practising barristers outside of the Bar of Ireland are required to have minimum levels of professional indemnity insurance which provides an important protection for consumers.

The Future

I will close by drawing the Committees attention to a number of other initiatives under the Act that the LSRA will be undertaking in 2020.

We will be issuing advertising regulations in the New Year that will govern the advertising of legal services. We will also issue regulations that will allow us to enhance the Roll of Practising Barristers to include information on barristers' areas of practice and specialism. We were disappointed not to be able to introduce legal partnerships alongside limited liability partnerships as a new model of legal service delivery in 2019 but there is a need for a legislative amendment before this can be done. We have been assured of the Minister for Justice and Equality's support for the amendment. This will allow barrister/barrister partnerships and solicitor/barrister partnerships to be formed for the first time and, although take up may be modest to begin with, the new model has the potential to reduce costs for consumers. Once we have delivered legal partnerships, we have committed to revisiting the issue of multi-disciplinary practices under the Act.

Before 30 April 2020 the Authority is required to report for the first time and thereafter on an annual basis, on the admissions policies of the legal profession and assess whether the number of persons admitted to practise as barristers and solicitors in 2019 was consistent with the public interest in ensuring the availability of legal services at a reasonable cost. The LSRA is required to publicly consult and to report to the Minister before 1 October 2020 as to whether the profession of solicitor and barrister should be unified.

Finally, and this is not an exhaustive list, the LSRA in 2020 will submit a further report to the Minister, following on from our initial report of September 2018, on the education and training of legal practitioners with recommendations as to potential reforms.

All of these reports have, at the very least, the potential to lead to reforms that could increase competition in the delivery of legal service and could have a positive impact on the costs of legal services.

Thank you, Chairperson. My colleague and I look forward to engaging with you and the Members of this Committee and to responding to the issues and questions that you raise.