



THE BAR
OF IRELAND

The Law Library

The Council of the Bar of Ireland's
response to the UN Special
Rapporteur on the Independence of
Judges and Lawyers' consultation
for the preparation of its forthcoming
report on protection of lawyer

December 2021

1. Introduction

The Council of The Bar of Ireland (“the Council”) is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,200 practising barristers.

The Bar of Ireland is long established and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

In this representative capacity, the Council is happy to respond to the questionnaire on aspects of the independence of lawyers recently issued by the Special Rapporteur. Given the Council’s role, these replies focus principally on the position of barristers within the Irish legal system. It should be noted that there is a considerable overlap between the topics covered in the replies below and it is necessary to consider all replies to obtain a full understanding of the Council’s position on the topics which are addressed.

Prior to addressing the questions, it is necessary to give a brief outline of the structure of the legal profession in Ireland.

2. The Legal Profession in Ireland

In Ireland, the Legal Profession is divided into two “branches” - solicitors and barristers. The Legal Services Regulation Act 2015 (the “LSR Act”) (which is still in the course of being implemented), established a new statutory authority called the Legal Services Regulatory Authority (the “LSRA”) to regulate all legal practitioners.¹ However, notwithstanding this, the essential structure of the legal profession remains as it was prior to the enactment of the LSR Act.

¹ The Legal Services Regulation Act 2015, <https://www.irishstatutebook.ie/eli/2015/act/65/enacted/en/html>

Solicitors provide clients with legal advice and representation on all matters. A solicitor is the first point of contact for a person who requires legal advice and/or representation. Generally speaking, where the matter is non-contentious (for example transferring property or writing a will) the solicitor will deal with the matter entirely although, on occasion, may require specialist advice from a barrister. Where the matter is contentious (for example civil litigation or criminal charge/investigation) a solicitor will, save in respect of minor matters, generally instruct a barrister to represent the client.

The vast majority of barristers practising in Ireland are members of the Law Library and as such, they are members of an independent referral bar who specialise in advocating before courts, tribunals and other bodies of a quasi-judicial nature on behalf of their clients. They also give legal opinions and advices on areas of particular specialisation. In all contentious matters and in nearly all non-contentious matters, a barrister is instructed by a solicitor on behalf of a client. In such situations, the solicitor remains involved in the matter and instructions from the client to the barrister are communicated by, or in the presence of, the solicitor.

Apart from their basic legal degree, solicitors and barristers undergo different training processes in different institutions and are members of different professional bodies. Solicitors undergo their training (which involves a period of time spent as a trainee in a solicitor's office) with the Law Society of Ireland and, on qualification, are admitted onto the roll of Solicitors. Barristers undergo their training in the Honorable Society of Kings Inns and, on obtaining a degree from that institution, are called to the Bar of Ireland by the Chief Justice of Ireland. Following being called to the Bar and having their name entered on the Roll of Practising Barristers maintained by the LSRA, a barrister has a right of audience before every Court in the Country.

3. Questionnaire

The Questions raised in the Questionnaire will now be addressed separately.

Question 1 (The measures adopted to enable lawyers to exercise their professional activities in a free and independent manner)

The principles set out at paragraphs 16 to 22 of the Basic Principles of the Role of Lawyers adopted by the United Nations are given effect to by a number of measures and basic legal concepts which are addressed in the course of this questionnaire, many of which are features of general application in the Irish legal system. For example, as outlined in the reply to question 6, a lawyer who is subjected to intimidation or harassment can, like every other citizen, make a complaint to the Irish police (An Garda Síochána) and seek the general protection of the law. The Council believes that such complaints are acted upon and treated seriously by the authorities. In carrying out their duties in an independent and safe manner, barristers rely, to a large extent, on the legal and Constitutional protections that are generally available in Ireland by operation of the Rule of Law. As well as the matters addressed in the replies to the other questions, the points below are of particular relevance to barristers in this regard.

- (a) Pursuant to Section 13(1) of the LSR Act, the LSRA is charged with the responsibility for regulating the provision of legal services by “legal practitioners” (i.e., solicitors and practising barristers) and ensuring the maintenance and improvement of standards in the provision of such services. In performing its functions, the LSRA must have regard to, *inter alia*, the objective of encouraging an independent, strong and effective legal profession. Having regard to these objectives, the LSRA may issue a code of practice for legal practitioners which, in effect, prevails over any code issued by another body (such as the Council). Such a code is, however, subject to ultimate review by the High Court in the event that it is challenged by any legal practitioner affected thereby.

- (b) The Code of Conduct of the Bar of Ireland (the “Code”) (which has been approved by the LSRA) sets out the code of practice with which all barrister who are members of the Law Library must comply. The Code provides, *inter alia*, that barristers must promote and protect fearlessly and by all proper and lawful means their client’s best interests and do so without regard to their own interest or to any consequences for themselves or to any other person. It further provides that one of the duties to which barristers are subject requires their absolute independence, free from all other influence, especially such as may arise from their personal interests or external pressure. To promote and protect such independence, barristers who are members of the Law Library are prohibited from carrying on, or appearing to carry on, their practices as partners. Accordingly, each member of the Law Library carries out his/her

practice as a “sole trader” and is responsible for his/her own professional conduct. The Code sets out other obligations necessary for the proper discharge of a barrister’s professional responsibilities such as a duty of confidentiality to the client and a prohibition on permitting any other person (including in particular certain designated officials such as a member of the police force) to read instructions confided in them as a barrister. In essence, the Code provides a framework within which each barrister is, in accordance with the terms of the Code, free to take instructions from, advise and represent any client.

- (c) The effect of Sections 136 and 137 of the LSR Act is that a person must be a qualified barrister to practice as a barrister. In addition, a practising barrister must have his or her name entered on the Roll of Practising Barristers maintained by the LSRA. Similar provisions apply in respect of solicitors under the Solicitors Act 1954 as amended (sections 55 and 56).
- (d) In Irish law, legal professional privilege attaches to communications for the purposes of legal advice between a lawyer and his/her client. The effect of this is that, in general terms, the contents of such communications cannot be disclosed to any other party, including a State party².
- (e) In 1976, the Irish Supreme Court held that a person accused of a criminal offence has a right to be legally represented and that those who were of inadequate means to afford legal representation were entitled to legal aid and that they must be informed of this right.³
- (f) In Ireland, the right to legal advice before interrogation relating to a criminal offence is statutorily and constitutionally protected. The legislative mechanism enshrining this right is Section 5(1) of the Criminal Justice Act 1984 which provides as follows:

“Where a person not below the age of eighteen years is detained in a Garda Síochána station pursuant to section 4 the member of the Garda Síochána in charge of the station shall inform him or cause him to be informed without delay that he is entitled to consult a solicitor and to have notification of his detention and

² Legal Professional Privilege, Heffernan (Bloomsbury Professional) (1st Edition) Paragraphs 2.01 and 2.02).

³ State (Healy) v Donoghue [1976] 1 IR 325 page 352

of the station where he is being detained sent to one other person reasonably named by him and shall, on request, cause the solicitor and the named person to be notified accordingly as soon as practicable.”

(g) The Supreme Court has held, in referring to the above provision that *“the right to legal advice before interrogation is an important constitutional entitlement of high legal value.”*⁴ While it has been held that that this right does not extend to solicitors being present *during* police interviews⁵, it should be noted that a Directive as issued by the Director of Public Prosecutions in 2014 states that where a request is made by a suspect who is detained by the police to have their solicitor present during interview, the request should be granted. This Directive remains in force.

Question 2 (Entities and/or mechanisms in place to prevent and/or punish interferences with the free and independent exercise of the legal profession.)

There are no entities which are specifically designed to punish interferences with the free and independent exercise of barristers’ obligations. There is no specific offence of interfering with the free and independent exercise of the legal profession.

In terms of entities which exist to prevent interferences with the free and independent exercise of barristers’ duties, the Council, as the representative body of the vast majority of barristers practising in Ireland, is the principal body relied on by barristers in the event of any actual or potential interference with the proper performance of their professional duties. Details of the Council’s work are given in the reply to questions 4 and 7 below.

Further, as noted elsewhere in these replies, a Barrister who believes that he or she is being harassed or interfered with in the proper exercise of his/her professional duties may make a complaint to An Garda Síochána (the Irish police) and request them to take such steps as may be appropriate in the circumstances.

⁴ *DPP v Gormley and White [2014] IESC 17*, paragraph 9.14

⁵ *People (DPP) v. Doyle [2018] 1 IR 1. 2 IR 286*

Question 3 (Legislative, administrative, or institutional barriers that have hindered the work of lawyers and the exercise of the legal profession)

The Council is not aware of any legislative, administrative or institutional barriers that have hindered the work of barristers in the free and safe exercise of their professional duties.

Question 4 (Activities of representative bodies to protect lawyers).

The Council is *de jure* and *de facto* independent from the State, receives no funding from it and is not subject to any obligations to the State which might undermine that independence. Its work is funded entirely from subscriptions paid by its members. The Law Library, its members (all of whom are practising barristers) and its properties are overseen and managed by the Council which consists of 20 elected members of the Law Library and up to four other Law Library members who are co-opted by the elected members. The Council is assisted by an Executive staff appointed solely by the Council.

The Council works to safeguard the independent nature of the profession through a close and continuous analysis of issues affecting the profession as they emerge. The Council has a full-time communications team which issues, on an ongoing basis, public statements and communications seeking to promote and support the public standing of the profession and to defend it against any unwarranted criticisms or attacks. The Council is particularly vigilant in respect of any interference with the free exercise of an individual barrister's professional duties and will seek to prevent or stop such interference by public comment and/or personal and professional support to the barrister in question.

Further information on the activities of the Council is contained in the reply to question 7 below.

Question 5 (Information on Proceedings for Alleged Violations of Standards of Professional Conduct)

The reply to this question addresses the position of Barristers only. Information in respect of Solicitors is should be sought from the Law Society of Ireland. The LSRA may also have further information in respect of the overall regulatory position.

- Prior to 7th October 2019, the Barristers’ Professional Conduct Tribunal (“BPCT”) was responsible for receiving and investigating complaints of alleged violations of standards of professional conduct by barristers. The BPCT is an independent body established by the Council which consists of nine members comprised of a lay (i.e., non lawyer) majority of five members and a minority of four barristers. The lay members are nominated by business and employee representative groups and by the Bar Council. The BPCT was established in 1991. By reason of changes introduced by the LSR Act, the complaints and disciplinary function of the BPCT has been transferred to the LSRA which, since 7th October 2019 has been responsible for receiving and addressing allegations of violations of professional standards by barristers.

The BPCT Annual Reports for each of 2017, 2018 and 2019 which are attached disclosed the following number of complaints made to the BPCT against barristers: -

2017 - 36 new complaints

2018 32 new complaints

2019 35 new complaints

The LSRA reports for the following periods disclose the following number of complaints relating to barristers:

7 October 2019 to 6 March 2020 – 3 Complaints

7 March 2020 to 6 September 2020 – 18 Complaints

7 September 2020 to 26 March 2021 – 22 Complaints

27 March 2021 to 3 September 2021 – 19 Complaints

It appears from the reports that a number of complaints related to the same barrister so the number of complaints does not equate to the number of barristers subject to a complaint.

As is apparent from the BPCT reports, the complaints against barristers referred to in that report related to matters such as (i) complaints about opposition counsel (possibly misunderstanding the role of counsel on the other side of a case); (ii) conflict of interest; (iii) competence; (iv) undue pressure to settle cases; (v) rudeness; (vi) misleading the Court; (vii) acting without proper instructions; and (viii) breach of confidentiality. The LSRA reports do not detail the nature of the complaints against barristers referred to in that report but there is no reason to believe that the complaints to it are of a substantially different nature to the complaints to the BPCT.

No figures are available to the Council in respect of the total number of complaints upheld against barristers nor of the specific sanctions imposed in respect of any finding of professional misconduct. The BPCT reports give examples of complaints which have been heard and determined.

On 8 February 2017, the Benchers of the Honorable Society of Kings Inns suspended a barrister from practice as a Barrister at Law for a period of approximately ten years (until 11 December 2028). The barrister in question had been convicted of a criminal offence relating to the harassment of a colleague for a period of approximately four years.

Question 6 – (Intimidation and harassment of lawyers)

The Council acknowledges that improper interference with barristers by State Authorities or non-State actors is not considered a significant issue for practising barristers in Ireland. There are instances of harassment or violence against barristers, examples of which are given below. However, these are isolated instances which often involve aggrieved litigants, frequently in the criminal or family law arenas. Further, as is apparent from the examples given below, the evidence suggests that State authorities do tend to take appropriate remedial action where this is warranted.

- (a) Most recently, on the 29th July 2021, a convicted rapist was sentenced to 16 years in jail for making threats to kill the barrister who appeared for the prosecution in his trial him. The Judge described the man’s actions as “a fundamental attack on our system of justice”⁶.

⁶ <https://www.rte.ie/news/2021/0729/1238050-michael-murray-case/>

(b) On the 20th December 2018, a man held a Judge and lawyer hostage in a family law court, whilst wielding an imitation firearm and claiming to have an explosive device⁷. The man was convicted and sentenced to eight years imprisonment, with the final two years suspended⁸.

(c) On the 17th May 2018 a convicted murderer who held a “shiv” of jagged Perspex to his barrister’s throat and threatened to kill her in an attempt to escape custody was given an eight year sentence⁹.

In 2019 the Council undertook research amongst its members entitled ‘Balance at the Bar’ which found that almost two out of three barristers are concerned about their personal safety. Further, 31% of respondents submitted that they had actually experienced threats to their personal safety and security in courts.

Therefore, whilst there may not be interference in the exercise by barristers of their professional duties from State authorities, there have been some instances of serious interference with a barrister’s ability to conduct his/her work in safety – some of which have ultimately led to successful prosecutions of the perpetrators.

Question 7 – (Council activity to promote independence of Lawyers)

Activities that the Council undertakes to promote the independence of the legal profession include:

- **Training:** A comprehensive continuous professional development programme that requires members of the Law Library to engage across a number of competencies that reflect their practice. A key element of the Scheme is the obligation to engage in ongoing training in the area of Ethics, which has at its core, the value of independence.

⁷ <https://www.independent.ie/regionals/goreyguardian/news/bomb-scare-threat-leads-to-evacuation-of-courthouse-39030345.html>

⁸ <https://www.irishexaminer.com/news/courtandcrime/arid-40214411.html>

⁹ <https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/murderer-given-eight-years-for-threatening-to-kill-barrister-with-shiv-1.3499480?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fcrime-and-law%2Fcourts%2Fcourt%2Fmurderer-given-eight-years-for-threatening-to-kill-barrister-with-shiv-1.3499480>

- **Public and Policy Engagement:** The Bar of Ireland engages regularly with Parliament (Oireachtas) on a wide range of law reform priorities, to which the expertise and legal knowledge of barristers can assist. The Council's submissions and appearances before parliament are intended to ensure that a legal and social environment exists which ensures that barristers are free to take instructions and deliver legal services to any client on an independent and non-partisan basis and to ensure that the Rule of Law, both at home and abroad is upheld.

Examples of other public engagement include:

- The work of the Council's Human Rights Committee, who places a focus on endangered lawyers throughout the world and monitors some key legislative agendas.
 - The Bar of Ireland Annual Human Rights Award, which seeks to acknowledge and support the work of rights based organisations and individuals on issues of human rights, dignity and the rule of law.
 - Annual Conference - which brings together legal, political and academic experts on matters relating to law reform, judicial developments and the rule of law.
- **Partnerships:** The Bar of Ireland has forged important relationships with a number of civil society groups and others that underpin and maintain a close alignment to our values of an independent bar, and the rule of law. Examples include sponsorship of a number of fellowships in the Civil Liberties area and participation in a high level Access to Justice working group consisting of members of the Judiciary and representatives of other public legal bodies.

As regards co-operation with other organisations:

- The Bar of Ireland is an active member of the Council of Bars and Law Societies of Europe, and delegation partner with the Law Society of Ireland.
- The Bar of Ireland is also a member of the International Bar Association.

- The Bar of Ireland has forged deep relationships with The Bar of Northern Ireland, The Bar Council of England and Wales and The Faculty of Advocates, Scotland.

Full details of The Bar of Ireland’s activities and work can be viewed in our most recent [Annual Report 2020/2021](#) and at www.lawlibrary.ie

Question 8 – Effect of Covid 19 Measures on Independence of Lawyers

The Council does not believe that the measures introduced to combat the Covid 19 pandemic had a significant adverse impact on the exercise of the independence of the Barristers’ profession. Pursuant to the statutory measures enacted to introduce restrictions, legal services provided by practising Barristers or practising Solicitors were designated as “essential services”¹⁰ and, therefore, such regulations did not, of themselves, prevent practising Barristers from carrying out their professional responsibilities. The restrictions did, however, impose a significant impact on the operation of the Courts system in that many court hearings were moved to “virtual” hearings or were postponed. However, the Council does not believe that, to date, these measures have had an impact on the independence of barristers in the exercise of their professional duties.

Question 9 – Proposal for Reforms

Whilst the Council believes that the legal and political environment in Ireland does, in general terms, allow barristers to carry out their professional freely and safely, it does believe that a strong focus should be placed on ensuring that places where barristers carry out their work (such as courtrooms, courthouses and prisons) are provided on an ongoing basis with proper and effective security so that barristers can carry out their work free from any threat or potential threat to their personal safety.

In order to support the independent nature of the profession, the Council believes that, as part of its statutory function under Section 13(2)(g) of the LSR Act to promote public awareness in respect of legal services, the LSRA should be requested to prioritise a public

¹⁰Paragraph 10 (c) of the Second Schedule of S.I. 121/2020 – Health Act 1947 (section 31A – Temporary Restrictions) (Covid-19) Regulations 2020

information campaign to promote amongst the general public an enhanced understanding of the legal system and an appreciation of the importance of an independent legal profession and an independent judiciary as necessary components of a free and democratic society.



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