

FROM THE OFFICE OF THE JUSTICE MINISTER



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Our ref: SUB/991/2014

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8 August 2014

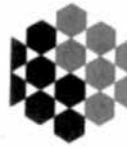
Dear Christine,

PRELIMINARY DISCUSSION PAPER INVITING VIEWS ON ANY WIDER IMPLICATIONS OF MAKING LEGISLATIVE PROVISION IN RELATION TO RIGHTS OF AUDIENCE FOR LAWYERS WORKING IN THE ATTORNEY GENERAL'S OFFICE

The Attorney General has invited the Minister of Justice to consider making legislative provision to confer rights of audience equivalent to those of barristers in private practice on any barrister or solicitor working in his office and designated by him. Such provision would sit outside the existing provision on solicitors' and barristers' rights of audience prescribed in legislation and the Bar Code of Conduct respectively.

The Department's provisional soundings with key stakeholders indicated that extending rights of audience for lawyers in the Attorney General's Office may have implications for the wider legal services landscape and its regulation, which would need to be identified and evaluated. Therefore, whilst acknowledging the potential benefits of making such legislative provision, the Minister of Justice advised the

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Attorney General that he considered it appropriate to allow key stakeholders the opportunity to formally comment on the proposal.

The Department is issuing a short preliminary discussion paper to a number of key stakeholders (copy enclosed for the Committee's information) inviting views on any implications for the legal profession of the Attorney General's proposal and whether there is a case for treating lawyers working in his office differently to other employed lawyers. The responses to the discussion paper will be used to inform further consideration of the proposal and the need for a wider consultation exercise. The Committee will of course be kept informed.

A handwritten signature in black ink that reads "Tim Logan". The signature is written in a cursive style with a long horizontal line above the first name.

TIM LOGAN
DALO

Enc: Preliminary Discussion Paper



Preliminary Discussion Paper

Proposal by the Attorney General for Northern Ireland for legislative provision in relation to rights of audience for lawyers working in his office

Introduction

1. The Attorney General for Northern Ireland has invited the Minister of Justice to consider legislating to confer the same rights of audience as barristers in private practice on lawyers working in his office and designated by him.
2. Such statutory provision would sit outside the provision on solicitors' and barristers' rights of audience prescribed in legislation and in the Bar Code of Conduct respectively.
3. The purpose of this paper is to formally seek views from the key stakeholders listed at **Annex A** on any wider implications for the legal profession and how it is regulated, or for the provision of legal services, of making discrete provision in relation to rights of audience for lawyers working in the Office of the Attorney General. The responses to the paper will inform further consideration, advice to Ministers and the need for a wider consultation exercise. Responses are requested by **10 October 2014**. There is information about how to respond at the end of this paper.

Attorney General's Proposal

4. There are presently eight lawyers (three barristers and five solicitors) working in the Attorney General's office. The Attorney General's legal staff are appointed by him and work under his personal supervision but are members of the Northern Ireland Civil Service. Their role is to assist the Attorney General in carrying out his statutory and other functions.

5. The Attorney General has highlighted that the lawyers working in his office cannot avail of their very considerable advocacy skills because they do not have rights of audience in all courts. He has also noted that the position of the employed barristers is particularly odd because their rights of audience are tied to those of solicitors.

6. The Attorney General has advised that it would be of considerable assistance to him if legislative provision were to be made conferring the rights of audience of barristers in private practice on any lawyer working in his office and designated by him.

7. The Attorney General has suggested that the number of lawyers employed in his office is so small that this would not deprive the independent Bar of significant amounts of work but would on the other hand enable his office to make full use of the talent in it and result in substantial savings.

8. The Attorney General's main responsibilities include acting as the Executive's most senior representative in the courts (representing Ministers or Departments in court), protecting the public interest in the courts (which can include both bringing proceedings and participating in extant proceedings) and defending the interests of charities in proceedings before the High Court. The Attorney's proposal, if taken forward, would enable his staff to act as junior counsel in the High Court in such proceedings.

9. Under section 22 of the Justice (Northern Ireland) Act 2002 the Attorney General's functions are exercised independently of any other person.

Existing Provision on Rights of Audience of Solicitors and Barristers

Solicitors

10. At present, solicitors have rights of audience in all courts except the High Court and Court of Appeal, where they may only appear in limited circumstances, mainly insolvency related proceedings or where Counsel is instructed but unable to appear (section 106, Judicature (Northern Ireland) Act 1978).

11. However, the Justice Act (Northern Ireland) 2011 makes provision extending solicitors' rights of audience in the higher courts. It creates a system of authorisation for solicitors wishing to exercise rights of audience in the High Court and Court of Appeal. Regulations made by the Law Society will prescribe the authorisation process and the education, training and experience which a solicitor must possess before authorisation can be granted.

12. The 2011 Act also creates certain duties which will apply where a solicitor is minded to engage an authorised solicitor to represent a client or, where he or she is an authorised solicitor, to provide that representation. A solicitor will be required to advise their client in writing of the advantages and disadvantages of representation by an authorised solicitor and by counsel respectively and that the decision as to representation is entirely that of the client. The detail of the matters to be covered by this advice is to be prescribed in regulations made by the Law Society.

13. Regulations made by the Law Society are subject to the concurrence of the Lord Chief Justice and the Department of Justice, which must consult the Attorney General.

14. Commencement of the provision in the 2011 Act is dependent on the Law Society making the above regulations and the making of consequential legislation, for example, amendments to court rules.

15. The Law Society has consulted on draft regulations and is presently carrying out an impact assessment of them. Taking account of the impact assessment process and the need for consequential legislation, including a draft affirmative order, it is anticipated that it will be next year at the earliest before the provision in the 2011 Act can be commenced.

Barristers in Private Practice

16. The Bar Council's Code of Conduct sets out the professional rules of the Bar. The rights of audience a barrister has, as set out in the Code, depend on their employment status. The Code defines a barrister in independent practice as "a

barrister who represents to the public generally that he is willing, in return for payment of fees, to render legal services to a client.” Barristers in independent practice have rights of audience in all courts.

Employed Barristers

17. An employed barrister is defined in the Bar Code as “a barrister who, in return for the payment of a salary, is employed wholly or primarily for the purpose of providing legal services to an employer either under a contract or employment, or by virtue of an office under the Crown or in the institutions of the European Communities”. Under the Code an employed barrister may appear on behalf of their employer in any court, in any circumstances where barristers in independent practice do not have an exclusive right of audience in such court (paragraph 28.02). The rights of audience of employed barristers are therefore linked to the rights of audience of solicitors. This means that employed barristers presently do not have rights of audience in the High Court and Court of Appeal but (subject to any amendment of the Bar Code) this would change once the provision in the Justice Act extending solicitors’ rights of audience comes into operation.

18. However, it is to be noted that the rights of audience of employed barristers would (again subject to any amendment of the Code) remain subject to the other restrictions in the Bar Code, in particular that, in general, they may only provide legal services (defined to include representation in court) to their employer (paragraph 28.04). There are a few exceptions to this rule including:

- a barrister in the government legal service (defined as meaning being employed or holding office as a lawyer in any Government Department or the Public Prosecution Service) can act on behalf of Ministers / Officers of the Crown / organisations or public officers or servants for whom GLS customarily acts;
- a barrister employed by trade associations may act for the association in matters affecting all or a class of members; and
- a barrister employed in a Law Centre or Citizens’ Advice Bureau.

Wider Implications

19. Making discrete legislative provision in relation to rights of audience for lawyers employed in the Attorney General's Office may have wider implications.

20. There is a question as to how such provision would sit with the current and future arrangements. For example, the measures contained in the 2011 Act in relation to the exercise by solicitors of rights of audience in the higher courts are designed to protect the public by ensuring high standards of advocacy and competition for advocacy services are maintained and conflicts of interest are prevented.

21. There is also a question as to whether there is a case for treating lawyers working in the Attorney General's Office differently to other lawyers working in an employed capacity. Apart from solicitors and barristers employed in the Attorney General's Office, there are solicitors and barristers employed in other parts of the public sector (for example, Public Prosecution Service, Departmental Solicitor's Office, Crown Solicitor's Office) and by voluntary and private sector organisations. Arguably some, or all, of these groups of lawyers would also benefit from having the same rights of audience as barristers in private practice.

22. The Attorney General has suggested that his close personal reputational engagement and his statutory independence would be the highest possible guarantee of the conscientious professional judgment and quality of the advocacy skills of his staff. He has also emphasised that in any litigation involving his office, there is a degree of personal supervision by the Attorney of his staff which, in his view, cannot be replicated in other government legal offices.

23. Whilst legislating on the rights of audience of lawyers employed in the Attorney General's office (given the small numbers involved) is unlikely to have a significant impact on the independent Bar, the impact of any provision on rights of audience of employed lawyers having wider application would need to be fully assessed.

Questions

24. We welcome comments on the following issues and any other issues which you think may be relevant:

- What would be the wider implications for the legal profession and the provision of legal services, of making discrete provision on rights of audience for lawyers working in the Attorney General's office? Please give reasons for your answer.
- Is there a case for treating lawyers working in the Attorney General's Office differently to other employed lawyers? Please give reasons for your answer.

Responses

25. Responses should be submitted **no later than 5.00pm on 10 October 2014**. If you have any queries please contact Civil Justice Policy Division on 028 9016 9539.

26. When responding please state whether you are making your comments as an individual or representing the views of your organisation.

27. Unless respondents specifically indicate that they wish their response or part of it to be treated in confidence, their name and the nature of their response may be included in any summary of responses made publicly available. Respondents should also be aware that the Department's obligations under the Freedom of Information Act 2000 may require that any responses not subject to specific exemptions under the Act be disclosed to third parties on request. Any personal data which you provide will be handled in accordance with the Data Protection Act 1998.

28. Please forward your responses to:

Post: Civil Justice Policy Division
Department of Justice
Massey House
Stormont Estate
Belfast
BT4 3SX

E-mail: [To be inserted]

Copies of this paper are being sent to:

Departmental Solicitor's Office

Public Prosecution Service

Directorate of Legal Services

Crown Solicitor's Office

The Bar Council of Northern Ireland

The Law Society of Northern Ireland

Law Centre (Northern Ireland)