

LAW SOCIETY SUBMISSION



Legal Services Regulation Act 2015

Draft Regulations on Legal Partnerships

Legal Services Regulatory Authority

14 December 2018

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 express the views of the Society to the Legal Services Regulatory Authority (“the Authority”) on the draft regulations on legal partnerships (“the draft regulations”) under section 116 of the Legal Services Regulation Act 2015 (“the Act”).
- 1.2 Legal partnerships are a new form of legal services structure under the Act. They are defined as:
- “..a partnership formed under the law of the State by written agreement, by two or more legal practitioners, at least one of whom is a practising barrister, for the purpose of providing legal services.”*
- 1.3 The new business structure will comprise of partnerships of barristers or solicitors and barristers.
- 1.4 The Society firmly holds the view that the draft regulations in their current format require significant revision and further consideration before commencement. A number of the draft regulations are nebulous and are unlikely to be enforceable by the Authority in any meaningful way. Others may cause difficulties for legal practitioners and clients alike and require further deliberation.
- 1.5 The Authority is introducing for the first time a completely new legal business model and it behoves good regulatory governance that the regulations underpinning this model are:
1. Clear, precise and workable;
 2. Prescriptive;
 3. Balanced;
 4. Proportionate; and,
 5. Enforceable.
- For the purposes of this submission, the Society will refer to these as the “guiding principles”. These guiding principles will ensure the protection of clients of these new entities and also assist those legal practitioners who wish to avail of them.
- 1.6 The Society, in preparing this submission, is offering its views based on its own practical experience in drafting regulatory Statutory Instruments with the aim of reducing potential dangers to the public and the profession.
- 1.7 The Society proposes providing its views on the draft regulations in a sequential manner and would be happy to engage further with the Authority on the matters raised in this submission.

2. Executive Summary

- 2.1 The Society's submission is made with the objective of protecting the public interest and ensuring high standards of legal services in legal partnerships, once introduced.
- 2.2 The Society submits that a number of the draft regulations are not prescriptive enough and will pose difficulties of enforcement for the Authority as currently drafted. The Society also notes that there are matters in the draft regulations that are inappropriate as they have already -and more correctly- been addressed in the Act.
- 2.3 The Society also suggests specifically prohibiting barristers in legal partnerships from performing any act or omission that would interfere with a solicitor's statutory obligations.
- 2.4 The Society notes that the draft regulations require a legal partnership to furnish clients with a significant amount of information which may not be practical to provide and that is unlikely to make legal partnerships attractive to legal practitioners.
- 2.5 The Society is concerned about the conflicts of interest provisions as these could lead to significant difficulties for legal partnerships and clients alike. The draft regulations also seek to prevent a legal practitioner from accepting instructions in a matter where they are likely to be a witness. The Society advises that this is not included as it will hinder the provision of legal services to clients by legal practitioners and do not reflect the reality of the true relationship between client and legal practitioner.
- 2.6 The Society also recommends the draft regulations specifically refer to the continuing obligation for solicitors to comply with the Solicitors Advertising Regulations (S.I. No. 528 of 2002) pending the commencement of the Authority's own advertising regulations.
- 2.7 The Society proposes for reasons of clarity that the draft regulations be divided into three parts which provide for matters exclusive to barrister-solicitor legal partnerships, matters exclusive to barrister-barrister legal partnerships and common provisions to all legal partnerships.

3. Part B – General obligations

Standards, procedures and policies

- 3.1 Draft regulation 4 fails to meet any of the guiding principles as it is fundamentally flawed and unworkable. The draft regulation imposes legal obligations on legal practitioners on vague grounds and any regulatory action taken under this section would very likely be open to legal challenge. It is also outside the Authority's remit to regulate employees of a legal partnership who are not legal practitioners.

Recommendation 1 – Standards, procedures and policies

It is the recommendation of the Society that draft regulation 4 is deleted as it is fundamentally flawed, unworkable and would very likely be open to legal challenge.

Regard to the Solicitor's Guide

- 3.2 Draft regulation 5 not only fails utterly to meet the guiding principles but is also fundamentally flawed and unworkable in requiring legal partnerships to *"have regard to the Solicitor's Guide (as applicable), any Code of Practice, measure and/or guidelines as issued by the Authority in their standards, procedures and policies"*. The words *"have regard"* are not prescriptive and do not provide legal practitioners with a definitive statement of their obligations.
- 3.3 The Guide to Good Professional Conduct for Solicitors ("the Solicitor's Guide") contains a statement of the accepted principles of good conduct and practice for the profession. It represents the Society's policy and recommendations as at the date of publication. The consequences of non-compliance may only be considered however on a case-by-case basis and as such breaches of the Solicitor's Guide do not *per se* amount to professional misconduct. It should also be noted that legal partnerships were not envisaged when the Solicitor's Guide was published.

Recommendation 2 – Regard to the Solicitor's Guide

It is the recommendation of the Society that draft regulation 5 is deleted as it is not prescriptive and does not provide legal practitioners with a definitive statement of their obligations in circumstances where legal partnerships were not envisaged when the Solicitor's Guide was published.

Responsibilities of legal partnership and partners

- 3.4 The Society's view is that draft regulation 6 is unclear, does not meet the guiding principles and will be difficult for the Authority to enforce. Without prejudice to this position, the Society suggests that the first sentence of draft regulation 6 should read "*It shall be the responsibility...*" as it is noted the definite article is absent from the draft.

Recommendation 3 – Responsibility of legal partnership and partners to comply with obligations

It is the recommendation of the Society that draft regulation 6 be deleted as it is unclear and would be difficult for the Authority to enforce.

Compliance or obligations under the Act

- 3.5 Draft regulation 7 requires each legal practitioner in a legal partnership to ensure that he/she complies with obligations under the Act, the Regulations and such other measures and/or guidelines as may be issued from time to time by the Authority. The anticipatory nature of unmade measures/guidelines creates a very weak basis for good regulation. It usurps secondary legislation and runs contrary to the principles of the Irish legal system. It is suggested that it is ultra vires, unenforceable and open to direct challenge.
- 3.6 The Society notes that section 50(m) of the Act provides that an act or omission of a legal practitioner may be considered as constituting misconduct where that act or omission constitutes a breach of the Act or regulations made under it. Accordingly, the Society fails to see any reason for an express regulation requiring legal practitioners to ensure their compliance with the Act or regulations made under it.
- 3.7 In the Society's opinion, the Authority will not be successful in taking regulatory action against a legal practitioner for breaches of draft regulation 7.

Recommendation 4 – Complying with obligations under the Act or regulations made under the Act

It is the recommendation of the Society that draft regulation 7 be deleted as there are sufficient provisions available under the Act for the Authority to take action against legal practitioners who do not comply with their obligations under the Act or any regulations made under it.

4. Part C – Requirements applicable to Legal Partnerships

Ceasing to provide legal services

- 4.1 The Society notes that there is no defined timeline in draft regulation 10 within which a legal partnership that ceases providing legal services should notify the Authority. The Society suggests that the Authority should require a minimum notice period of 14 days from a legal partnership that intends to cease the provision of legal services. Otherwise, a legal partnership that has ceased providing legal services could provide notice of cessation - and the fees to the Authority - some months after the fact and would not be in breach of draft regulation 10.

Recommendation 5 – Minimum notice period

It is the recommendation of the Society that draft regulation 10 is amended to provide for a minimum notice period of 14 days to the Authority in advance of its cessation.

Client moneys

- 4.2 The Society submits that draft regulation 11 does not effectively prohibit practising barristers in a legal partnership from handling client moneys.
- 4.3 The Society suggests that this wording would not prevent a practising barrister in a legal partnership from being a cheque signatory on the client account. Nor would this wording prevent a practising barrister receiving client moneys.
- 4.4 For the avoidance of doubt and to prevent any ambiguity, the Society suggests that this clause is widened to ensure that practising barristers are prohibited from any dealings with client moneys. An alternative to the current draft regulation could be worded as follows:

“A practising barrister shall not hold, receive, control or pay moneys of clients nor shall a practising barrister be a signatory on a client account. This shall apply whether the practising barrister is either an employee or a partner in a legal partnership.”

Recommendation 6 – Handling client moneys

It is the recommendation of the Society that draft regulation 11 be widened to ensure that practising barristers are prohibited from any dealings with client moneys. The suggested wording of this clause could be as follows:

“A practising barrister shall not hold, receive, control or pay moneys of clients nor shall a practising barrister be a signatory on a client account. This shall apply whether the practising barrister is either an employee or a partner in a legal partnership.”

- 4.5 Furthermore, there should be a specific prohibition in the draft regulations on practising barristers in a legal partnership from performing any act or omission that may interfere with a solicitor partner’s obligations under the Solicitors Accounts Regulations (S.I. No. 516 of 2014), the Solicitors (Money Laundering and Terrorist Financing) Regulations 2016 (S.I. No. 533 of 2016) and the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013 or any Act or regulation amending or extending that Act or those regulations.

Recommendation 7 – Prohibition on interfering with solicitor’s obligations

It is the recommendation of the Society that the draft regulations specifically prohibit practising barristers in a legal partnership from performing any act or omission that may interfere with a solicitor partner’s obligations under the Solicitors Accounts Regulations (S.I. No. 516 of 2014), the Solicitors (Money Laundering and Terrorist Financing) Regulations 2016 (S.I. No. 533 of 2016) and the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013 or any Act or regulation amending or extending that Act or those regulations.

Confidentiality / protection of information

- 4.6 The Society considers draft regulation 13 to be excessively brief and lacking in any detail and would advise that there is already a duty on all legal practitioners to keep the affairs of their clients confidential. The obligations of confidentiality posed by draft regulation 13 are no different to the obligations on legal practitioners since time immemorial.
- 4.7 While client confidentiality is a cornerstone of a legal practitioner-client relationship, the Society doubts that this should be in the draft regulations.

- 4.8 The laws to which draft regulation 13 refers are extensive, complex and impossible to summarise and put into regulations. This attempt to import the obligations of legal practitioners into regulations is unworkable and not advisable given the reach of these obligations.

Recommendation 8 – Duty of confidentiality

It is the recommendation of the Society that draft regulation 13 be deleted as there is already an existing duty of confidentiality on legal practitioners.

Information to client

- 4.9 The Society submits that draft regulation 14 is overly prescriptive and requires amendment for the purposes of making legal partnerships an attractive structure to legal practitioners. Draft regulation 14 requires a client be furnished with an inordinate amount of documentation and information that is unlikely to assist the legal practitioner-client relationship.
- 4.10 The amount of information required in particular under draft regulation 14(iii), (iv) and (vii) is vast to the point of making it impossible for legal practitioners to comply with. It is noted that these requirements are unique to legal partnerships and do not apply to individual barristers or solicitor firms.

Information concerning legal practitioner(s) providing services

- 4.11 The obligations under draft regulation 14(a)(i) and (ii) are unnecessary and inflexible. It is considered to be over-regulation. It is suggested that complications will arise when handling client matters that change the types of legal services required and/or the identity of the legal practitioners within the practice providing those services. This will result in inadvertent breaches by legal practitioners of draft regulation 14(a)(i) and/or (ii).

Recommendation 9 – Information concerning legal practitioner(s) providing services

It is the recommendation of the Society that draft regulations 14(a)(i) and (ii) are deleted from the draft regulations as they are unnecessary and inflexible.

Information on client's rights as a client of the legal partnership

- 4.12 Draft regulation 14(a)(iii) will cause an unnecessary amount of bureaucracy for any legal partnership, in particular those legal partnerships comprised of a small number of partners. Providing an exhaustive list of the rights available to clients can only result in increased costs and is unlikely to make legal partnerships appealing to legal practitioners. The rights available to clients of a legal practitioner are many and varied and it would be a laborious task to attempt to enumerate every last one to each and every client. It is noted that the obligations envisaged are more onerous on legal partnerships than on current structures.

Recommendation 10 – Clients rights as a client of a legal partnership

It is the recommendation of the Society that draft regulation 14(a)(iii) be deleted as it will cause an unnecessary amount of bureaucracy for legal partnerships.

Duties owed to the client by the legal partnership

- 4.13 Draft regulation 14(a)(iv) is similar and it would be unduly onerous to require a legal partnership to provide each and every client with all the duties owed in a legal practitioner-client relationship.

Recommendation 11 – Duties owed by legal partnership to clients

It is the recommendation of the Society that draft regulation 14(a)(iv) is deleted from the draft regulations as it would cause an unnecessary amount of bureaucracy for legal partnerships.

Internal complaints procedure

- 4.14 Draft regulation 14(a)(vi) places an obligation on legal partnerships to ensure there is a functioning complaints procedure available to clients. It is suggested that in order for this to be feasible, further guidance will be required from the Authority to provide a framework for legal partnerships to address complaints.

Recommendation 12 – Complaints procedures

It is the recommendation of the Society that the Authority provide further guidance on the complaints procedure proposed in draft regulation 14(a)(vi) for legal partnerships.

Provision of regulations to client

- 4.15 Draft regulation 14(a)(vii) is a very onerous obligation to impose on a legal practitioner. It would require a solicitor to provide information concerning the Solicitors Accounts Regulations 2014 (S.I. No. 516 of 2014), the Solicitors Professional Indemnity Insurance Regulations 2018 (S.I. No. 351 of 2018) and the Solicitors (Continuing Professional Development) Regulations 2017 (S.I. No. 529 of 2017) amongst many others.
- 4.16 It is unlikely the provision of such a large volume of information will provide any practical benefit to clients and may increase the costs of providing the legal services. This will also make legal partnerships less desirable structures to legal practitioners.

Recommendation 13 – Provision of regulations to clients

It is the recommendation of the Society that draft regulation 14(a)(vii) be deleted as being very onerous on the legal partnership and of little practical benefit for clients.

Provision of information required by section 150 of the Act

- 4.17 Draft regulation 14(a)(viii) is completely unnecessary as legal practitioners will be under an obligation to comply with the provisions of section 150 of the Act, once commenced.

Recommendation 14 – Provision of information as required under section 150

It is the recommendation of the Society that draft regulation 14(a)(viii) be deleted as this is provided for under section 150 of the Act.

Clients to be informed of material events

- 4.18 The provisions of draft regulation 14(b) are ambiguous and aspirational. The phrase “material events” is so inherently subjective and open to interpretation as to be unworkable. Nor does it comply with the guiding principles. It will be impossible for the Authority to enforce its provisions against a legal practitioner whether as a result of a complaint by a dissatisfied client or by the Authority.

Recommendation 15 – Duty to inform clients of material events

It is the recommendation of the Society that draft regulation 14(b) be deleted as it is so inherently subjective and open to interpretation that it will be impossible to enforce.

Issuing a bill of costs to client

- 4.19 Draft regulation 14(c) mirrors the concerns raised in paragraph 4.17 above. These matters are provided for in the Act and do not require restatement.

Recommendation 16 – Provision of information as required under section 152

It is the recommendation of the Society that draft regulation 14(c) is deleted from the draft regulations as this is provided for under section 152 of the Act.

Conflicts of interest

- 4.20 The Society has grave concerns about draft regulation 15. Laws and generally accepted practice relating to conflicts of interest are too vast to encapsulate in a single regulation. Commencing a regulation in this fashion is inherently unsound and will stifle the legal profession. The introduction of this regulation is likely to make legal partnerships a wholly undesirable business model for legal practitioners. It is also observed that these obligations are unique to legal partnerships and do not exist for sole practitioner barristers or solicitors.
- 4.21 Draft regulation 15(a) states *“A legal partnership, a partner or employee of a legal partnership, shall not accept instructions to act in any matter in which the legal partnership, or a partner or employee of the legal partnership, is acting for, or has previously acted for, the opposing or counter party, unless:—*
- (i) both parties are given full information about the proposed acceptance of instructions;*
 - (ii) both parties consent to the acceptance of such instructions; and,*
 - (iii) information and communications of and related to the two parties are fully segregated and protected against disclosure (subject to disclosure with the consent of both parties).”*

- 4.22 For example the wording could mean that a legal partnership or an employee or partner of a legal partnership, who had ever acted for a bank, would be prohibited from acting in any matter opposing that bank into the future. This would apply even where the subject matters are widely different and are wholly unrelated.
- 4.23 Further, it could have the wholly unintended consequence that legal partnerships would be allowed to accept instructions from a client on only one occasion thereby impeding the business prospects of the legal partnership.
- 4.24 The application of the proviso will be burdensome on legal practitioners and legal partnerships as a whole. The legal partnership, when seeking to accept instructions, would have to conduct investigations as to whether any legal practitioner in the partnership had ever acted for the opposing side.
- 4.25 Draft regulation 15(a) also suggests that there are only two parties in relation to any particular matter. In commercial litigation, there may be multiple parties to an action, where conflicts of interest are important matters to consider. Accordingly, the use of the words “two” and/or “both” in this section does not take into account matters that involve several parties.
- 4.26 Draft regulation 15(a) would appear to be completely at variance with the provisions of section 13(4) of the Act which, *inter alia*, requires the Authority to protect and promote the interests of consumers relating to the provision of legal services and to promote competition in the provision of legal services in the State.

Recommendation 17 – Conflicts of interest where legal practitioner has previously acted for a party on opposing side

It is the recommendation of the Society that draft regulation 15(a) be deleted as it will cause serious difficulties for legal practitioners by restricting the range of clients that may instruct them.

- 4.27 The term “*significant pecuniary interest*” in draft regulation 15(b) is ambiguous and open to interpretation. It will require the legal partnership to conduct exhaustive investigations into the pecuniary interests of all its partners and other employees.

Recommendation 18 – Instructions where a partner or employee has a significant pecuniary interest

It is the recommendation of the Society that draft regulation 15(b) is deleted as it is ambiguous, open to interpretation and requires a legal partnership to conduct exhaustive investigations into the pecuniary interests of all its partners and employees.

- 4.28 The Society notes draft regulation 15(c) requires a partner or employee of a legal partnership not to accept instructions in a matter where it is likely they will be witnesses. It is submitted that this will lead to significant problems as it is entirely possible and appropriate for legal practitioners to find themselves giving evidence in the course of providing legal services.
- 4.29 This draft regulation bears no reality to the proper conduct of legal practice as overseen by the judiciary. A legal practitioner must be able to give evidence in their client's cause if and when the need arises and subject to the well-recognised rules of conducting litigation before the Courts.

Recommendation 19 – Legal practitioners not to accept instructions where they are likely to be a witness

It is the recommendation of the Society that draft regulation 15(c) be deleted as it will further impede the provision of legal services by legal practitioners in legal partnerships.

- 4.30 The Society would advise that conflicts of interest must take into account a wide number of varied matters and could be the subject of a standalone project to be undertaken by the Authority in the fullness of time.

Recommendation 20 – Conflicts of interest

It is the recommendation of the Society that the Authority consider addressing conflicts of interest as a standalone project instead of including them in the draft regulations.

Names of legal partnerships

- 4.31 It is noted that draft regulation 16 is very restrictive and only allows the name of the legal partnership to consist of the names of some or all of the partners or former partners of the legal partnership.
- 4.32 The Solicitors (Practice, Conduct and Discipline) Regulations 1996 (S.I. No. 178 of 1996) require solicitor firms to carry on business under the name or names of the solicitors or one or more of the present or former principals of the firm. These regulations allow solicitor firms to seek the written approval of the Society for a name other than the name or names of the solicitors or one or more of the present or former principals of the firm.

- 4.33 The Society submits that the Authority consider allowing legal partnerships to make an application for a name other than the name or names of the current or former partners.

Recommendation 21 – Names of legal partnerships

It is the recommendation of the Society that consideration is given by the Authority to allow for applications by legal partnerships to be made in a name other than the name or names of the current or former partners.

- 4.34 In order to be more precise, it is suggested that draft regulation 16 read as follows *“Where the Legal Partnership is also a Limited Liability Partnership, the name shall also comply with section 125(8) of the Act”*.

Recommendation 22 – Legal partnership also a limited liability partnership

It is the recommendation of the Society for the purposes of clarity that draft regulation 16 be amended to read as follows:

“Where the Legal Partnership is also a Limited Liability Partnership, the name shall also comply with section 125(8) of the Act”.

Advertising

- 4.35 The Society notes that the Authority intends to make regulations in relation to advertising as required under section 218 of the Act. The Society nevertheless recommends that draft regulation 18 make explicit reference to the continuing existence and enforcement against solicitors of the Solicitors Advertising Regulations 2002 (S.I. No. 518 of 2002) by the Society until such time as section 218 of the Act is commenced.

Recommendation 23 – Advertising

It is the recommendation of the Society that draft regulation 18 make explicit reference to the continuing existence and enforcement against solicitors of the Solicitors Advertising Regulations 2002 (S.I. No. 518 of 2002) by the Society until such time as section 218 of the Act is commenced.

5. Part E - Supervision

Draft regulation 20

- 5.1 Draft regulation 20 fails to meet the guiding principles and will be unenforceable for vagueness. It fails to provide the obligations and responsibilities for a compliance partner, the partner responsible for financial affairs or the partner responsible for assessing and monitoring risks.
- 5.2 In the Society's view, draft regulation 20(b) which requires a legal partnership to have a partner responsible for the financial affairs will be problematic for the Authority to enforce. The word "responsible" is lacking in sufficient clarity and detail. In legal partnerships where there is a solicitor partner, they will have to bear this (as yet undefined) responsibility.
- 5.3 Given the prohibition on barristers handling client moneys as set out under section 45 of the Act, the Society strenuously objects to a barrister in a legal partnership being in a position of responsibility for its financial affairs. There is a real danger that the barrister responsible for financial affairs could access client moneys. This represents a potential risk to clients and the Society's Compensation Fund which should only be accessible by clients of solicitors.

Recommendation 24 – Supervision

It is the recommendation of the Society that draft regulation 20 is deleted as it fails to meet the guiding principles and will be unenforceable for vagueness. Draft regulation 20(b) also represents a serious risk to clients and the Society's Compensation Fund.

6. Further matters

Measures and / or guidelines

- 6.1 Draft regulations 5, 6 and 7 indicate that legal practitioners will be required to comply with, *inter alia*, measures and/or guidelines as may be issued by the Authority. The Society objects to as yet undefined measures or guidelines which seek to use a Statutory Instrument for enforcement.

Separate sections for the draft regulations

- 6.2 The Society suggests that the draft regulations should be structured in three separate parts which would assist in clarifying the parameters of matters relating to solicitor-barrister and barrister-barrister legal partnerships. The Society therefore suggests dividing the draft regulations into common provisions, provisions relating to barrister-barrister legal partnerships only and provisions relating to solicitor-barrister partnerships only.

Recommendation 25 – Separate sections for the draft regulations

It is the recommendation of the Society that the Authority consider dividing the draft regulations into common provisions, provisions relating to barrister-barrister legal partnerships only and provisions relating to solicitor-barrister partnerships only.

Further engagement

- 6.3 The Society has provided a non-exhaustive review of the draft regulations for the Authority's consideration. As matters stand, it is the considered view of the Society that legal partnerships will require more detailed regulations before there will be adequate protections in place for both clients and legal practitioners. The Society is happy to engage further with the Authority in due course.

Recommendation 26 – Further engagement

It is the recommendation of the Society that the Authority engage further with the professional bodies before commencing the draft regulations to ensure there are adequate protections in place for both legal practitioners and the public.