



THE BAR
OF IRELAND

The Law Library

**SUBMISSION OF THE
COUNCIL OF THE BAR OF IRELAND**

**IN RESPONSE TO LSRA CONSULTATION
ON THE CREATION OF A NEW PROFESSION OF
CONVEYANCER IN IRELAND**

December 2021

Introduction

The Council of the Bar of Ireland 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 2,170 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.

Scope of the Consultation

The Council was invited by the Legal Services Regulatory Authority to make a submission in relation to the creation of a new profession of conveyancer in Ireland. The Authority shall furnish a report to the Minister for Justice in accordance with section 34(1)(c) of the Legal Services Regulation Act 2015.

The Minister has asked the Authority to include consideration of the following matters:

- The background and context including 2006 Report of the Competition Authority on Solicitors and Barristers and stakeholder mapping;
- An analysis of comparable international models and experience;
- An economic analysis of how Ireland compares to other jurisdictions in terms of the cost and the speed of conveyancing, particularly for domestic home purchases, including any particular barriers in Ireland;
- Intervening developments of relevance including in policy, law, regulation and conveyancing technologies;
- A full consideration of how digital technology, which is rapidly evolving, could transform the manner, the cost and the speed of carrying out a conveyance, and how digitalisation should inform a decision to establish a conveyancer profession;
- Profile of the scale of provision and value to the economy of conveyancing services and activities in the State;
- The path through which such services are currently provided and at what transactional cost;
- Analysis of any barriers to new providers and to greater competition in this area;
- Outcome of section 34 public consultations and views of key stakeholders including those who avail of conveyancing services.
- The pros and cons of introducing a new profession of conveyancer and models for its regulation (including entry requirements) with protections for consumers.

- Potential benefits, if any, to private consumers and enterprise and to national competitiveness of a new profession of conveyancer.
- Any other matters that the authority considers appropriate.

In order to assist in the consultation process, the Authority has posed the following specific questions relevant to the discussion:

1. Do you have views on the creation of a new profession of conveyancer?
2. What impact do you consider the establishment of a new profession of conveyancer could have in Ireland in terms of competition in the provision of legal services?
3. Are there specific implications, positive or negative, for the legal services sector and the solicitors' profession that in your view would arise from introducing a new profession of conveyancer?
4. What are the potential benefits and risks to consumers of legal services (including businesses) that can be reasonably expected from enabling them to access the services of a conveyancer, specifically in terms of legal costs, access to legal services and consumer protections?
5. What are the potential benefits and challenges to enterprise and national competitiveness with the introduction of a new profession of conveyancer?
6. Are there specific issues related to digital technology and how digitalisation that should inform a decision to establish a conveyancer profession?
7. Do you consider that there are any particular barriers to the establishment of new providers for conveyancing services?
8. Are there any specific considerations for the training and models for regulation of a new profession of conveyancer in line with the Authority's statutory objectives that should be taken into account?
9. Are there any further considerations that in your view should be taken into account, including in respect to Ireland's domestic economy and the wider legal services sector?

Before turning to address the specific questions posed by the Authority, it is important to set out the conveyancing process and the role barristers play in this process.

The Conveyancing Process

It has long been accepted that the purchase of a dwelling house is for most people the most important, and possibly the most stressful, purchase that they will make during their lifetimes and it is accepted that the buying and selling of houses and other properties is a difficult process. For many years the process has been largely the preserve of solicitors, generally speaking both the vendor and the purchaser will retain their own solicitor to act for them in the transaction and they will rely on the expertise of those solicitors to deal with the technical aspects of the transaction.

The sale of property is in effect a three-stage process, the first being the sale process whereby a property is offered for sale, the second stage is where once a purchase price has been agreed between the parties, contracts are prepared and signed, and a deposit paid, and the final stage is the completion of the transaction. In real terms solicitors are only involved in the second and third stage, albeit that it is often the case that the contract will be prepared by a solicitor prior to sale being concluded.

The expertise of a solicitor is firstly required therefore in taking up the title documentation to a particular property, preparing a contract for sale on the basis of that title documentation, with the purchaser's solicitors engaged to check whether the title documentation is sufficient and to clarify that the purchaser is going to get a good title to the property. In practical terms, it is very difficult, especially in the context of unregistered property, to see how somebody without specialist skills would be able to properly advise in the context of a conveyancing transaction.

The other issue in property transactions is the payment of a deposit and the retention of same by the purchaser's solicitor pending completion. While it is true to say that most auctioneers will retain a small nominal deposit, solicitors will usually hold a 10% deposit less the small sum paid to an auctioneer. The holding of deposits is clearly an important service, and the payment over of same is sometimes a difficult issue.

The other aspect of the normal property transaction, certainly in the context of the dwelling house, is that most people need to obtain a mortgage. Up until relatively recent times, a lending institution which was going to grant a mortgage retained a third solicitor to look at the title documentation and make certain that the purchaser has obtained a good marketable title to the property. This clearly resulted in extra expense on the part of a purchaser, and that process was altered, and the need for the third solicitor is obviated by virtue of the fact that the purchaser's solicitor will normally certify the title for the lending institution which

precludes the need for a third solicitor to examine the title documentation.

Obviously, the fact that the solicitors are retained, and that solicitors are required to have indemnity insurance is what underwrites this process. If the solicitor acting for either the vendor or more realistically, the purchaser makes an error, the existence of insurance on the part of that solicitor to compensate for such errors means that there can be a relatively straightforward compensation in relation to errors, and insofar as the certificate of title is concerned if the solicitor giving the title does not have insurance then quite clearly same is of minimal value insofar as the mortgagee is concerned.

The Role of Barristers

It is clearly the case that barristers have little involvement in the actual conveyancing transaction, however as in any area of law, conveyancing and title can give rise to significant problems and difficulties and it is in this context that barristers play a very significant role.

The most obvious role for barristers is when the title to a particular property presents problems and issues arise on the part of the vendor or the purchaser as to whether or not a good marketable title exists. In the event of a dispute, the matter is often referred to a barrister who effectively will look at the title and provide an Opinion clarifying as to whether or not the title is a marketable title and if not, what steps would need to be taken in order to resolve any issues. At present, no particular problem exists in the context of either party's solicitor referring the matter to a barrister because quite clearly a solicitor is entitled to instruct barristers to furnish the relevant Opinion and barristers are entitled to accept such instructions.

Barristers are often retained to advise on the title to a property prior to the drafting of a contract, and often to furnish an opinion on title, which would be sufficient to reassure a purchaser that the title to the property is satisfactory. Barristers can also become involved where an issue arises as between the solicitors acting on behalf of the vendor and the purchaser as to whether or not a good marketable title exists, and in that event the dispute is often referred to a barrister who will then furnish his / her opinion as to the title and whether or not same is a marketable title.

Another obvious area where barristers are involved in conveyancing transactions is when the transaction is not proceeding as anticipated, for example, when a purchaser refuses to accept that a marketable title has been furnished or where a purchaser, or indeed sometimes the vendor, simply refuses to complete the transaction. It is at this point in time that the issue of litigation arises, whether it is Vendor and Purchaser proceedings under the Land and Conveyancing Law Reform Act 2009, or Specific Performance proceedings where one or other party to the transaction seeks to enforce same. Again, in that context, this stage of the process

while fortunately rare, remains as a consequence of the transaction not proceeding according to plan. It is not clear in that context what role the conveyancer would play in this context nor is it clear how the role of the conveyancer would or could in fact deal with such complex, time consuming and expensive disputes.

Consultation Paper Questions

The Consultation Paper questions are answered as follows:

1. Do you have views on the creation of a new profession of conveyancer?

The creation of a new profession of conveyancer has been mooted for many years, and is indeed a reality in many jurisdictions. It is not necessarily clear how the creation of the new profession will operate in favour of the consumer save and unless conveyancers were prepared to operate for lesser fees than solicitors currently. It is difficult to see in practical terms how they could do so if they attract the same overheads etc., while not necessarily having the other aspects of the normal solicitor practice to counterbalance those expenses.

2. What impact do you consider the establishment of a new profession of conveyancer could have in Ireland in terms of competition in the provision of legal services?

Clearly, the introduction of a new profession of conveyancer would impact in competition in Ireland because there would be more individuals in a position to carry out a conveyancing transaction rather than if it stayed confined, as it largely is, to practising solicitors. Whether the extra competition is necessary is not entirely clear given the number of practising solicitors and the willingness that the solicitors profession have to carry out conveyancing transactions. It is not entirely certain whether the introduction of more individuals prepared to carry out the same service will result in a lower fee for consumers, given that overheads will have to be discharged by the individuals and certain expenses in transaction would be fixed.

3. Are there specific implications, positive or negative, for the legal services sector and the solicitors' profession that in your view would arise from introducing a new profession of conveyancer?

The specific implications for the solicitors profession are clearly the introduction of individuals who will act in competition to them. Presumably conveyancers will have to satisfy the same standards, i.e. the possession of indemnity insurance etc., as the solicitors currently engaged in the transactions do, and it is not certain that conveyancers will be in a position to undercut the fees currently charged by solicitors. It is possible to envisage situations, specifically where a transaction is not proceeding according to plan, where the fact that a conveyancer being

engaged in the transaction may result in the consumer incurring extra expense than would otherwise be the case, especially if conveyancers are not entitled to instruct barristers in relation to any necessary litigation, presumably it would then be necessary to engage a solicitor as well, thus increasing costs.

4. What are the potential benefits and risks to consumers of legal services (including businesses) that can be reasonably expected from enabling them to access the services of a conveyancer, specifically in terms of legal costs, access to legal services and consumer protections?

The only potential benefit to a consumer is that there would presumably be more individuals qualified and able to act in a conveyancing transaction, but it should be pointed out that there is currently no shortage of individuals able and qualified to do so at the moment, and that may result in lowering fees. The lowering of fees may mean that the conveyancer, or indeed anybody acting in conveyancing transactions, would seek to compete on a price basis and may cut corners and provide a less than perfect service, which would clearly be to the detriment of the consumer.

There is a risk that there may be an absence of adequate insurance and/or oversight, that would clearly be a matter of significant detriment to a consumer. Clearly, there would have to be the oversight as to the expertise and qualifications of conveyancers, and indeed a professional body to oversee and regulate their conduct such as is the case with solicitors and the Incorporated Law Society, which is necessary, not least if conveyancers will be holding deposits.

In addition, there may be issues in relation to the access to legal services, where those legal services involve litigation and legal costs associated with same. If conveyancers are not in a position to brief barristers to deal with issues arising from a conveyancing transaction that would involve a further expense should the need arise as the conveyancer would likely have to engage a solicitor to then brief a barrister.

5. What are the potential benefits and challenges to enterprise and national competitiveness with the introduction of a new profession of conveyancer?

In establishing a new profession of conveyancer, it would be obviously necessary to set a professional standard. It is not yet clear how individuals could show that they have met the standard, it would presumably also be necessary to ensure that the conveyancer carried indemnity insurance and was subject to oversight from a professional body and subject to the rules of same so as to ensure that they act appropriately and properly. The entitlement to act as a conveyancer would also be overseen by the professional body.

In the absence of such protection, the likelihood is that individuals would hold themselves out as conveyancers who were not competent to act, who lacked the appropriate indemnity insurance, and would thus deal with the transactions inappropriately or improperly, and leave the consumer in a difficult position, possibly with a defective title to their property. In reality, it seems that the only benefit that the introduction of a conveyancer profession would be increased competitiveness and the possible reduction in costs, which is not guaranteed and which has not necessarily been seen in other jurisdictions, but also there is no evidence at present that there is a shortage of conveyancing solicitors in the State resulting in artificially high costs to the consumer.

6. Are there specific issues related to digital technology and how digitalisation that should inform a decision to establish a conveyancer profession?

E-conveyancing and allied technology have for some time been hailed as the way forward in order to simplify conveyancing transactions. It is accepted once registration of title becomes more universal that this may in fact be the way forward, but given that the vast majority of urban properties in Ireland still remain unregistered, it is likely that this is sometime away. Digital technology and digitalisation are unlikely to be of any great significance to conveyancers any more than they would be of benefit to solicitors currently engaging in a transaction and it does seem that it per se would have much impact one way or the other.

7. Do you consider that there are any particular barriers to the establishment of new providers for conveyancing services?

The most obvious issue in relation to the introduction of a conveyancer has to be the training, holding of indemnity insurance and overall supervision of them as a professional body. It is not clear how that is to be done but it is submitted that it would be a necessary requirement and this should be clarified.

Clearly land law and conveyancing are complex subjects, but ones which can readily be taught or learnt. Obviously, the greatest barrier to the establishment and perfection of conveyancers is having good people who are not qualified lawyers but who are possessed of the necessary technical knowledge and understanding so as to enable them to provide conveyancing services.

8. Are there any specific considerations for the training and models for regulation of a new profession of conveyancer in line with the authority's statutory objectives that should be taken into account?

It is to be presumed that there has to be a minimum standard obtained by conveyancers, which must be supervised by an appropriate body, and potential conveyancers must

therefore be appropriately taught and qualified. Once qualified they must presumably be registered, and there must be a set of rules or ethics by which they must abide, and there has to be a supervision by a third party with disciplinary powers, as to compliance with same. In that context it is difficult to see how the new profession of conveyancer would differ significantly from a solicitor in the context of conveyancing services as currently provided. It is presumably anticipated that conveyancers will have to adhere to the same standard and that they will not have a lower duty of care or a lower professional standard.

9. Are there any further considerations that in your view should be taken into account, including in respect to Ireland's domestic economy and the wider legal services sector?

There is always a tendency simply to look at conveyancing transactions as being relatively straightforward and easy which is not always the case. All conveyancing transactions carry various risks, those risks will be identified and avoided by a competent practitioner, but even where competent practitioners are involved issues may arise in relation to the title to property, planning issues, family law issues, taxation issues, probate and other issues which will require very significant specialist advice, or indeed litigation, to resolve. It is difficult to see how these transactions, which in fairness are the ones most likely to operate to significant detriment of consumers, can be accommodated in a profession of conveyancers to any greater or more effective levels than they are currently covered by solicitors.

Conclusion

The Council of the Bar of Ireland welcomes the opportunity to respond to this consultation on the creation of a new profession of conveyancer in accordance with section 34(1)(c) of the Legal Services Regulation Act 2015.

The introduction of a new profession of conveyancer does not, on examination, seem to have any significant benefit for the consumer, save that there will be more people qualified and able to act in conveyancing transactions. It is not clear that this will lead to lower prices for consumers and there does not seem to be a shortage of people capable of dealing with conveyancing transactions in the ordinary way. Further there is nothing to stop the legislature from prohibiting the calculation of fees for such a service based on the price of the property, in the same way that the calculation of legal fees cannot be based on the quantum of an award in personal injuries.

While there is no clarity as to the level of training that conveyancers will require, nor is it clear what professional standards they will have to obtain, the establishment and need for a supervisory body to ensure the appropriate standards for conveyancers is likely to prove problematic.