



Irish Institute of Legal Executives Ltd.

**THE LEGAL EXECUTIVE
AS PRACTISING AND
QUALIFIED LAWYERS**

**PUTTING CONSUMERS OF
LEGAL SERVICES FIRST**

PAPER FOR STAKEHOLDERS

Presented by

The Irish Institute of Legal Executives

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Introductory Preface

This paper has been written and prepared by the Irish Institute of Legal Executives.

The purpose of this paper is to inform stakeholders and decision makers in Ireland of the existing role of the Legal Executive in Ireland and, in the context of legal services, to chart reforms which involve the Irish Institute of Legal Executives.

The title of this paper: ‘ The Legal Executive as Practising and Qualified Lawyers Putting Consumers of Legal Services First’ reflects the emphasis the Irish Institute of Legal Executives places on delivering first-class services to consumers of legal services.

Executive Summary

In the interests of the consumer, the Irish Institute of Legal Executives invites the Minister for Justice, Equality and Defence (the Minister responsible for the ultimate regulation of legal services) to introduce legislation:

- i) **Clarifying the evidential status of the attestation of documents by a Legal Executive acting as a Commissioner for Oaths;**
- ii) **Granting a right of audience in the District and Circuit Courts (and subsequently in all courts) to the Legal Executive;**
- iii) **Providing that a Legal Executive with suitable experience be entitled to practice as a licensed conveyancer and provide conveyancing services in his/her own right;**
- iv) **Providing that the Legal Executive be eligible to become a partner in a solicitor law firm and**
- v) **Providing that a Legal Executive with suitable post-admission experience and qualifications be eligible for appointment to certain quasi-judicial and judicial offices.**

PART ONE

The Legal Executive and the Irish Institute of Legal Executives An Introduction

The Irish Institute of Legal Executives is the professional body representing registered Legal Executives in Ireland. The aim of the Institute is to provide a system of training and examination so that Legal Executives possess a recognised legal professional qualification.

The Institute, in conjunction with Griffith College, Dublin, have developed a course specifically for the Legal Executive. The Diploma in Professional Legal Studies and Practice (HETAC Level 7) is a two year course which is designed to give the Legal Executive the necessary academic and practical skills for the legal office.

Legal Executives in Ireland are lawyers, normally employees, but some are self-employed in private practice providing legal services to solicitors and others.

Most Legal Executives specialise in a particular sector of law such as:

- **Criminal Litigation (Defence and Prosecution)**
- **Civil Litigation (such as personal injury, debt recovery and other such actions in the Civil Courts)**
- **Family Law**
- **Conveyancing**
- **Public Law/Constitutional Law (such as legal work proper to a Government Department and a Local Authority)**
- **Corporate Law (Company and Commercial Law)**
- **Private Client (such as banking)**
- **Legal Practice (such as legal practice management, legal costs and court registration matters)**
- **General Advisory**

Legal Executives are employed in the offices of the Attorney General, Director of Public Prosecutions, Chief State Solicitor, Government Departments, semi-state companies, banks, and private law firms.

Status of the Legal Executive

The status of the Legal Executive is becoming more significant as a consequence of the growing legal duties and obligations on each person in our society.

Two recent cases illustrate that status in the common law world. Ireland shares a common law inheritance with the United Kingdom and the United States, among other countries.

There is the Irish case of *Elliot v. Stamp* [2006] IEHC 336. In that particular case, it had been alleged, inter alia, that the testamentary disposition, a Will, the subject of the litigation, had been procured by acts of undue influence brought to bear on the relevant deceased.

Mr. Justice Roderick Murphy of the High Court HELD, inter alia, that the deceased had the benefit of independent advice from a Legal Executive. In the circumstances, the High Court determined that the Will in question was not procured by duress or undue influence.

The second case relates to the Supreme Court of Judicature, England and Wales, a decision of the Court of Appeal comprised of Lord Justices Nourse, Pill and Mummery.

In this case, *Barclays Bank Plc v. Coleman* [2001] 1QB 20, Barclays Bank had granted the husband loan facilities to finance the purchase of commercial investment properties. The loan was to be secured by a second legal mortgage over the matrimonial home which was owned jointly by the husband and the wife. The wife was advised by a Legal Executive. It was argued that the legal advice by a Legal Executive was not sufficient.

The Court of Appeal HELD in the case that matters such as the legal advice in question was “frequently and properly delegated to Legal Executives”. What was required, according to the Court of Appeal, was “independent legal advice” – i.e. advice independent of the mortgagee. On this issue, the Court of Appeal held that “advice given by a Legal Executive” was “legal advice” and provided it was independent, then in the circumstances of the case there was “no sound reason for holding [the legal advice by the Legal Executive] to be inadequate”.

PART TWO

General Principles of Reform

- Almost everyone in Ireland requires legal services at some time in their lives. Legal services may be required for the purposes of buying a home, managing an aspect of business, to resolve a dispute, to collect a debt or to prepare a Will prior to one's death. Access to legal services is thus of major significance in society.
- Irish consumers of any legal services should have a choice. Choice, competition and the concept of facilitating the availability of competent providers of legal services should be the cornerstones of Government policy in the legal services sector.
- The demand for legal services has grown considerably in Ireland in recent years.
- Legal services make a significant contribution to the Irish economy. Affordable law is a contributor to a healthy and vibrant economy.
- In the context of this paper and any proposed reform of the code of legislation regulating the provision of legal services, a core principle of the Irish Institute of Legal Executives which is shared with the stakeholders is support for the "rule of law". The "rule of law" has been defined as meaning that the law is above everyone and applies to everyone. The "rule of law" - both an ancient ideal and a modern concept of governance - is stated to apply to the governors and the governed, rulers and the ruled by the adherence to the concepts that no one is above the law, no one is exempted from the law, and no one can grant exemption to the application of the law.
- The "rule of law" lies at the heart of the concept that it is a fundamental tenet of our society and democracy that all members of society have access to justice.
- The concepts of the "rule of law" and the right of all to access to justice are informed by the principle of protecting and promoting the best interest of consumers of legal services.
- The manner in which the foregoing principles are implemented is inspired by a philosophy which favours competition. In effect, the regulation of legal services must ensure the objective that there are no unnecessary or unjustified restrictions on the supply of legal services.

- Irish competition policy, in general, is based on the principle that a competitive market is best for the economic well-being of the nation and its people. A satisfactory well-functioning market modelled on policies promoting competition should provide incentives for increased productivity. This should result in lower prices for consumers and wider choice. This paper and the proposals for reform set out by the Institute are based on pro-competition policies.
- The principles set out above were encapsulated in the Report of Study into Restrictive Practices in the Legal Profession published by the Fair Trade Commission of Ireland in 1990. The Commission repeated its strong view that competition between the suppliers of professional services, as with suppliers of goods and other services, was desirable in the public interest. The Commission considered that there was a fundamental requirement that the public should have an adequate supply of legal services, of sufficient quality, with a wide degree of choice among practitioners, and delivered efficiently at a reasonable price. It was in the public interest that suppliers of legal services should maintain a high degree of competence, conduct, integrity and independence for the protection of consumers. The Commission did not consider that there was any fundamental incompatibility between the maintenance of high standards by lawyers and subjecting the providers of legal services to the ordinary market forces of free competition.
- The Competition Authority in its report (published December 2006) made 29 recommendations to enhance competition in legal services. It found that the legal profession was in need of substantial reform. The profession had many unnecessary and disproportionate restrictions on competition; these need to be removed so that consumers can benefit from greater competition in legal services. The EC ECB and IMF in their Memorandum of Understanding on Specific and Economic Policy 2011 - 2015 recommends the removal of restrictions to competition in sheltered areas including the legal profession.
- The Irish Institute of Legal Executives submits this paper for the purposes of contributing to an informed debate assisting the policy of Government and other stakeholders on the development of a more flexible and dynamic legal sector which fosters competition and choice for consumers of legal services.
- The facilitation of greater competition in the legal services sector as advocated in this paper should lead to new channels for the delivery of legal services ensuring greater choice for consumers, more competition in price and greater access to justice.
- The potential increase in the number of suppliers of legal services should facilitate increased training opportunities and employment for law students and others.

PART THREE

Proposals for Reform

Evidential Status of Legal Executives

Commissioners for Oaths

Many Legal Executives are Commissioners for Oaths. A Commissioner for Oaths is appointed by the Chief Justice and President of the Supreme Court in open Court pursuant to a Motion on Notice. A Commissioner for Oaths is empowered to administer any oath or take any affidavit for the purpose of any matter, or in relation to any court proceeding.

Many Legal Executives who are Commissioners for Oaths are recognised under The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents adopted at the 9th Session of The Hague Conference on Private International Law on 5 October 1961 (“the Convention”). This Convention simplified legal formalities which had complicated the utilisation of public documents outside the country from which they emanated.

Pursuant to section 72 of the Solicitors (Amendment) Act 1994 every solicitor who holds a practising certificate which is in force shall have all the powers conferred on a Commissioner for Oaths. He or she may take any oath or affidavit.

Section 72 (4) of the Solicitors (Amendment) Act 1994 provides that a document purporting to be signed or sealed by a solicitor pursuant to his or her powers as a Commissioner for Oaths shall be admitted in evidence without proof of the said seal or signature, and without proof that he or she is a validly qualified solicitor with power to act as a Commissioner for Oaths or that such document has not been so sealed or signed in contravention of a relevant condition.

The same status and evidential privileges attaching to a solicitor acting as a Commissioner for Oaths should apply to any Commissioner for Oaths and any Legal Executive acting as a Commissioner for Oaths.

Right of Audience in Courts

It is proposed that a Legal Executive with suitable practical experience and legal qualification and training should have a right of audience in the District and Circuit Courts, before tribunals and, subject to review, subsequently in all courts.

Prior to 1971 barristers enjoyed a right of audience in all courts but solicitors had a right of audience in the District and Circuit Courts. With minor exceptions, a solicitor had no right of audience in the High and Supreme Courts.

The thirteenth interim report of the Committee on Court Practice and Procedure entitled 'The Solicitor's Right of Audience' was published in 1971. The Committee was of the opinion, by a majority, that solicitors should be granted a right of audience in all courts at least until it appeared that the disadvantages to the public interest of such extension outweighed the advantages. The majority view of the Committee was accepted by the Government and Section 17 of the Courts Act 1971 conferred the right of audience upon solicitors, by providing that a solicitor who was acting for a party in an action, suit, matter or criminal proceedings in any court and a solicitor qualified to practice (within the meaning of the Solicitors Act 1954) who was acting as his/her assistant should have a right of audience in that court.

It is submitted that the rules allowing only solicitors and barristers act as advocates in courts are unduly restrictive. The UK provided in 1990 pursuant to section 27 of the Courts and Legal Services Act 1990 that "appropriate authorised bodies" whose "qualification regulations and rules of conduct have been approved" have the power to grant a "right of audience in relation to any proceedings".

The Secretary of State for Constitutional Affairs (of the time) was empowered to approve each authorised body's qualifications and rules of conduct under the procedure set out in the legislation before such a body may grant a right of audience in court. The Secretary of State initially designated the General Council of the Bar and the Law Society of England and Wales and subsequently the Institute of Legal Executives (UK), now known as the Chartered Institute of Legal Executives, as authorised bodies for the purpose of granting the right of audience in courts and tribunals.

An argument in favour of Legal Executive advocates in courts and tribunals is that the exercise of the proposed Legal Executive's right of audience would eliminate some duplication of work and result in a reduction in costs to litigants. It would also serve to increase competition. There are many motions and applications which could be competently dealt with by a Legal Executive.

Licensed Conveyancers

It is proposed that a Legal Executive with suitable post-admission training and experience would be entitled to become a licensed conveyancer.

The Restrictive Practices Commission published in 1982 its Report of Enquiry into the effects on Competition of the Restrictions on Conveyancing and the restrictions on Advertising by Solicitors. The Commission recommended a liberalisation of the monopoly on conveyancing enjoyed by solicitors. The Fair Trade Commission in its Report of Study into the Restrictive Practices in the Legal Profession published in 1990 argued in part, inter alia, for the creation of a class of licensed conveyancer.

A Legal Executive with sufficient post-admission training and experience should be entitled to conduct conveyancing as a self-employed person subject to such regulation as applies to other providers of conveyancing services.

Legal Executives as Partners in Solicitors Firms

Legal Executives should be entitled to become partners in Solicitor law firms.

In England and Wales pursuant to the UK Legal Services Act 2007, Fellows of the now Chartered Institute of Legal Executives (CILEx) are “authorised persons” and so are eligible to become partners in a law firm. Already, well over 200 Chartered Legal Executives in England and Wales have become partners in law firms.

The Irish Institute of Legal Executives considers that different types of lawyers such as Solicitors and Legal Executives should be able to work together on an equal footing and thus legal executives should be eligible to become partners in a solicitor law firm. This would enhance competition, benefit consumers, allow the legal services sector to work better and provide an incentive for innovation in the practice of the law.

Appointment as Judges

It is proposed that a Legal Executive with a sufficient legal qualification including CPD certification post-admission training and experience would be eligible to be appointed to certain quasi-judicial and certain judicial offices.

In the United Kingdom, pursuant to the Judicial Appointments (Relevant Qualification) Order 2008 (which came into force on 1 July 2010) a person holding the qualification of, inter alia, a Fellow of the now Chartered Institute of Legal Executives (CILEx) (with relevant post-qualification experience) is eligible for appointment to certain judicial and quasi-judicial offices. These judicial offices include the following:

- **District Judge**
- **Deputy District Judge**
- **Member of panel of Chairmen of Competition Appeal Tribunal**
- **Legally qualified member of the Asylum and Immigration Tribunal**
- **Member of panel of the Employment Tribunals referred to as an “Employment Judge”**
- **Judge of a “First-Tier” Tribunal and a**
- **Member of an Appeal Tribunal under the Social Security Act 1998 (UK)**

The rationale for making a Fellow of CILEx (with relevant post-qualification experience) eligible for judicial appointment was set out in the paper entitled Tribunal Costs and Enforcement Act 2007 Eligibility for Judicial Appointments: Consultation Paper published by the Ministry of Justice (United Kingdom). In the Consultation Paper, cited above, the Ministry of Justice stated:

“A key purpose of the legislation is to support diversity by widening the range of those who are eligible for judicial appointment. The changes in the [legislative] Order will ensure that all those with the relevant skills, experience and expertise can apply for judicial office, instead of just solicitors and barristers at present which is a significant leap forward.”

The same principles written above apply to the Legal Executive in the Republic of Ireland.

The first judicial appointment by a Chartered Legal Executive was announced

in the UK in August 2010 and he took up his position in December 2010.

At the time, Chairman of the Judicial Appointments Commission, Baroness Usha Prashar commented on the occasion of the first Legal Executive Fellow Judge Appointment:

“The JAC is delighted that the first ILEX Fellow Judge has been appointed. The JAC works closely with ILEX, as it does the Bar and Law Society, to ensure everyone is aware of the judicial opportunities open to them. We welcome applications from good candidates whatever their legal background. We have a statutory duty to encourage diversity in the range of candidates available for selection and to select candidates solely on merit.”

Please note that ILEX is now CILEx.

The, then UK Justice Minister Jonathan Djanogly said when ILEX was granted its Royal Charter in January 2012. “Legal Executives make a valuable contribution to the legal industry and their commitment to providing the British public with legal services should be recognised.”

Signed by the President of the Irish Institute of Legal Executives on behalf of the Council of the Irish Institute of Legal Executives



President of Irish Institute of Legal Executives

Dated this 19th day of October 2012

