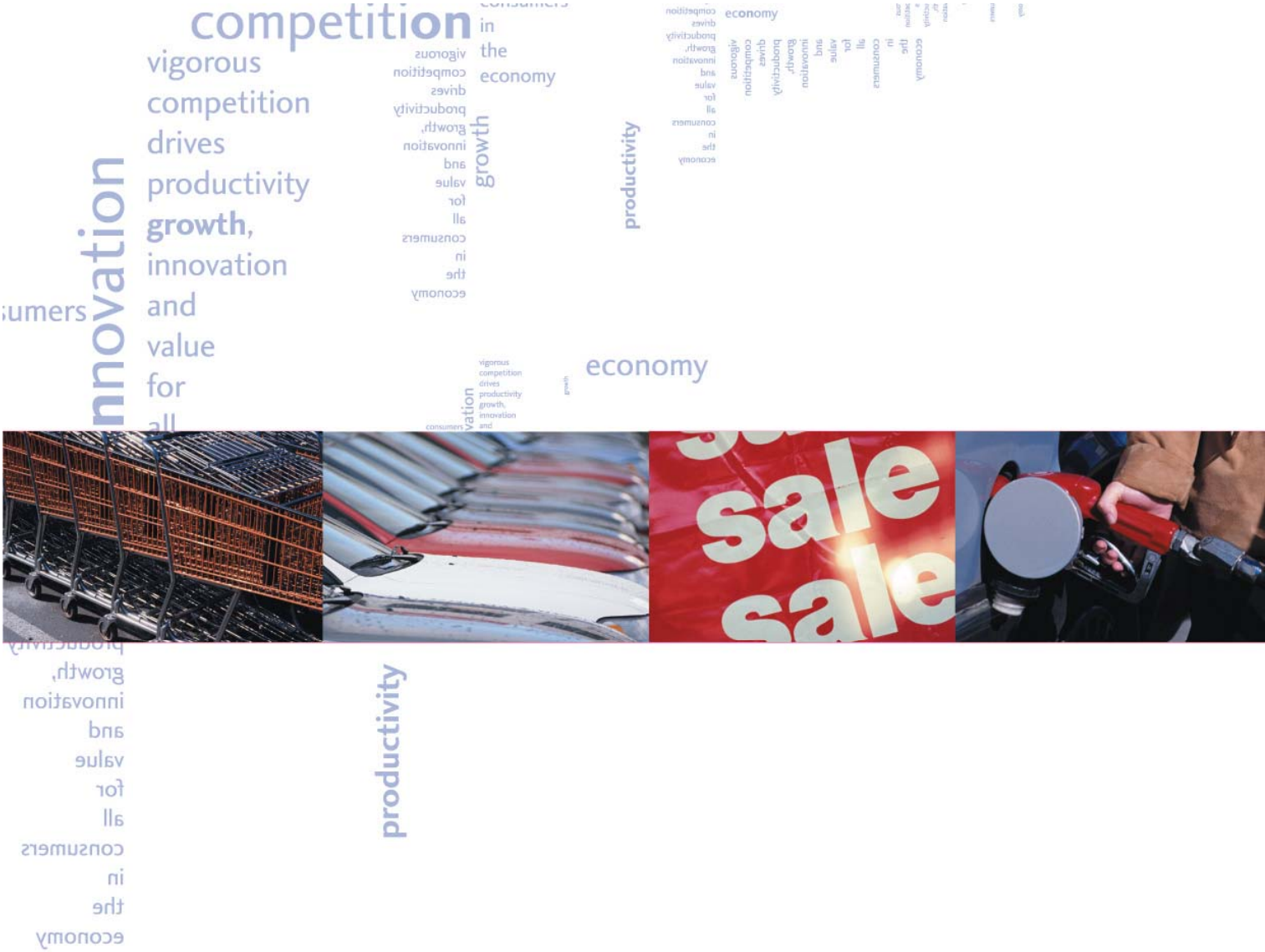


Study of Competition in Legal Services

Preliminary Report

24th February 2005

The Competition Authority
An tÚdarás Iomaíochta

Contents

Executive Summary

Legal services are essential for access to justice, a fundamental value in society and for the operation of the entire economy. Access to justice has broad implications for social and family relationships, perusal of rights and entitlements, and the comfort and security in a democratic society of being able to rely on the rule of law.

Access to justice requires not only that the legal advice given is sound but also that it is provided in a cost effective and client responsive manner. High quality legal services are important to society, but of limited value if available only to the very rich or those paid for by the State.

At the economic level, legal services provide part of the fundamental infrastructure of the economy and the essential backbone for contracts in trade, property and employment. The annual expenditure of over €1.1bn on legal services in Ireland enormously underestimates the impact of the sector on the economy as a whole. Competition and efficiency in the supply of legal services has the potential to make all of the rest of the Irish economy work better, and to be a source of competitive advantage internationally.

The Competition Authority's study finds that the legal profession is permeated with serious and disproportionate restrictions on competition. These restrictions emanate primarily from the regulatory rules and practices of the Law Society, the Bar Council and King's Inns but also from the relevant legislation. This report analyses each of these restrictions and examines whether they are necessary, consistent and proportionate with the public interest objectives claimed. The transparency and accountability of the regulation system that applies to the legal profession is also examined.

Although many of the restrictions which apply to the legal profession pursue a valid objective, the objective can in some cases be achieved without the restriction, while in other cases it can be achieved by less restrictive means. Wherever a valid objective can be achieved in the absence of a restriction, the Authority recommends the removal of that restriction, and wherever the objective can be achieved by less restrictive means, the Authority recommends an amendment or relaxation of the restriction. In all cases where the Authority proposes change, it specifies the body or institution that should be responsible for implementing that change.

The Competition Authority makes over 40 proposals for reform of the legal profession in order to make it easier to become a lawyer, easier to hire a lawyer and easier for lawyers to organise themselves. The Authority's proposals on the most significant restrictions include:

- Abolition of the educational monopolies enjoyed by Kings Inns and the Law Society in respect of professional legal education;

- Removal or amendment of the rule requiring barristers to be sole traders;

- Either the broadening of the Bar Council's Direct Professional Access Scheme, or the abolition of the prohibition on direct access of the public to barristers' services;

- Amendment of the restriction on the provision of conveyancing services by persons other than solicitors firms and practising solicitors;

- Removal of the restriction on partnerships between barristers and solicitors;

- Removal of the restriction on lawyers holding the titles of barrister and solicitor simultaneously;

- Abolition of the rule which prevents barristers engaging in occupations inconsistent with full-time practice at the Bar;

- Abolition of the rule which confines membership of the Law Library to full-time practising barristers;

- Removal of all restrictions on barrister and solicitor advertising, or of all except specified minimum restrictions;

- New criteria for allowing entry of lawyers qualified outside the EU;

- The establishment of a transparent scheme for the awarding of the title of Senior Counsel, together with the opening up of the title to solicitors;

- The provision by barristers of fee information to clients in advance;

- Persons other than solicitors to be allowed to become Taxing Masters, together with changes in the methods of taxation of costs;

- Abolition of the requirement on certain applicants to acquire the Diploma in Legal Education before sitting the King's Inns entrance examination;

Other restrictions which the Authority recommends should be relaxed or amended are: the statutory requirements that persons intending to be barristers and solicitors pass an examination in Irish; the rule which provides that only solicitors and lay litigants can sign originating summons and the rules in relation to a solicitor's lien on his client's file.

Independent Legal Services Commission

The layers of restrictions which apply to the legal profession have arisen over decades, or in some cases, centuries of self-regulation by professional bodies that also represent the interests of their members. The removal or amendment of all disproportionate

restrictions on competition will not, in the Authority's view, be sufficient to safeguard competition on an ongoing basis. None of these measures is capable of addressing the conflict of interest faced by the existing self-regulatory bodies that also represent the interests of their members.

The fact that regulation is carried out by more than one organisation adds further problems by perpetuating divisions between solicitors and barristers. This has resulted in limited mobility between the two branches of the legal profession, has prevented the emergence of partnerships between solicitors and barristers, and may have prevented new and more innovative types of legal professional from emerging. It has also duplicated certain regulatory costs.

For these reasons, the Authority proposes an independent, transparent and accountable Legal Services Commission (LSC) with a majority of non-lawyer members be created. This body would take responsibility for regulating the legal profession as a whole. It would have as its objectives the facilitation of the administration of justice, the promotion of competition and the safeguarding of the public interest.

The creation of this body would not involve any net new regulation, but would replace the current complex and opaque maze of regulation with a simpler, more transparent model that is accountable to buyers of legal services.

The Competition Authority proposes two options for the functioning of the Legal Services Commission.

Legal Services Commission *Model A*	The Legal Services Commission would have full responsibility for regulation of legal services, including all the regulatory powers and responsibilities currently undertaken by the Law Society, the Bar Council and King's Inns. The Law Society and the Bar Council would retain representative functions.
Legal Services Commission *Model B*	The Legal Services Commission would have responsibility for the regulation of legal services, but would delegate many regulatory functions to existing and possibly new self-regulatory bodies. The Legal Services Commission would be given explicit authority to make new regulations and would have power to veto the rules of the self-regulatory bodies. These self-regulatory bodies would not be permitted to exercise representative functions.

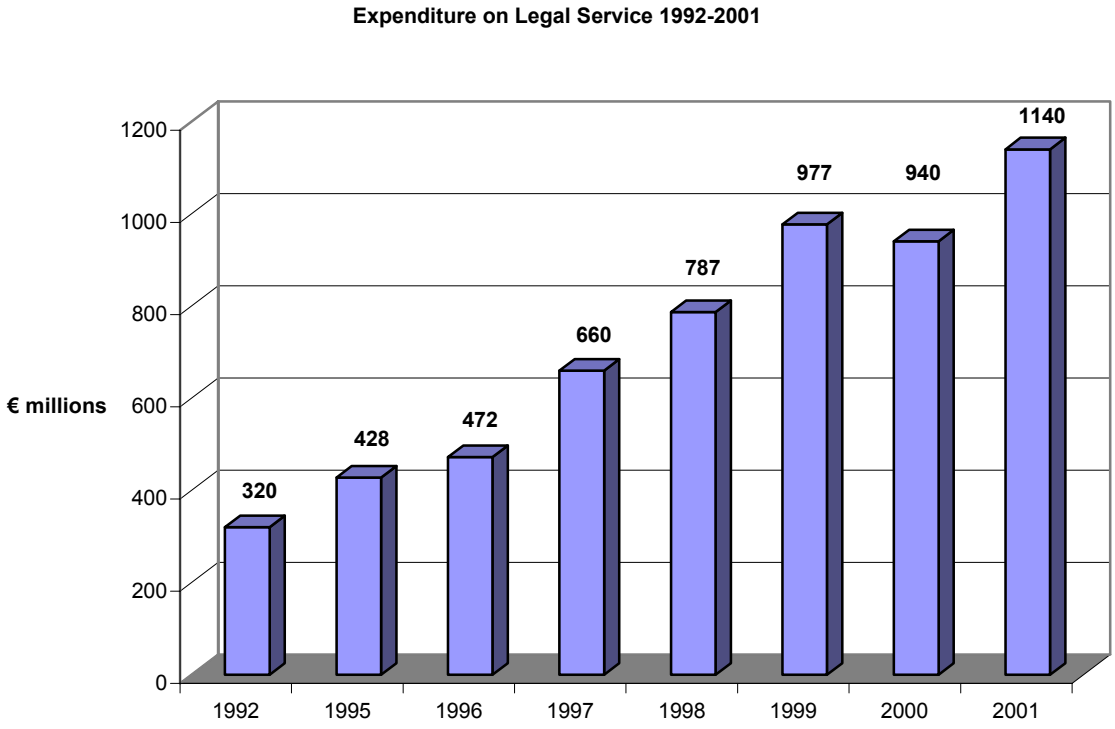
In Model A, the Legal Services Commission would exercise all the regulatory powers and responsibilities currently exercised by the Law Society, the Bar Council and King's Inns. Model B is based on the premise that self-regulation has certain advantages in terms of knowledge of the market. In this model, while the Legal Services Commission would have overall responsibility for the regulation of legal services, it would delegate many regulatory functions to existing and possibly new self-regulatory bodies. These self-regulatory bodies would not, however, be permitted to exercise representative functions.

The establishment of a Legal Services Commission would bring the regulation of the legal profession into line with other professions such as the medical and dental professions and with other sectors of the economy such as financial services. Similar

measures are already under consideration in the UK, and have existed for some time in certain states in Australia.

The growth of the market for Legal Services in Ireland

Demand for legal services has grown substantially since the early 1990s and in economic terms the legal profession makes a significant direct contribution to the Irish economy. The period 1992-2001 saw rapid economic expansion and the relative share of legal services as a portion of Gross Domestic Product (GDP) rose slightly during this period. According to data from the Central Statistics Office, analysed by The Competition Authority, expenditure on legal services in 1992 was estimated at just over €300 million while by 2001 it had reached €1,140 million, or nearly 1% of total GDP.



Source: Central Statistics Office (Notes: Data not available for 1993 & 1994. The method of calculation changed in 2000 so that figures up to 1999 are not fully comparable with 2000 & 2001)

Compared with some other professions, such as architects, engineers and accountants, lawyers earn relatively high incomes. The average income for lawyers in 2001 was over €120,000. Relatively high incomes among lawyers are consistent with the increase in demand for legal services not being met by an equal increase in supply. This suggests that the economic impact of the restrictions on competition may be large.

Incomes by Category of Lawyers (2001) [1]

Category	Average Income (Mean Income)	Mid Point Income (Median Income)
Overall	€123,339	€70,228
Solicitors: Owners & Partners	€164,512	€124,170
Solicitors: Associates	€47,532	€40,064
Employed Solicitors	€49,755	€31,759
Barrister: Junior Counsel	€93,720	€46,550
Barrister: Senior Counsel	€270,618	€225,076

Source: Revenue Commissioners

Opportunity for reform

In the preparation of this Report, The Competition Authority has consulted and listened to the views of various parties on several occasions, researched competition in legal services in other jurisdictions and competition in other professions in Ireland, commissioned external research, and thought carefully about the issues involved before coming to conclusions. The Authority has also referred to previous reports on the legal profession including those conducted by its predecessor the Fair Trade Commission.

This Preliminary Report presents the conclusions of the Authority on competition in legal services, and moves on to discuss how to remedy the problems that have been identified.

What is being proposed is a fundamental reform of the regulation of legal services to make it easier to become a lawyer, easier to hire a lawyer and easier for lawyers to organise themselves. This will require replacing the current antiquated, complex and opaque set of rules with an independent, transparent and accountable regulator.

This is an opportunity for the legal profession to reform itself and bring legal services into the 21st century. The Authority is also calling on the government to introduce legislation, particularly to establish an independent, accountable and transparent regulatory system. Obviously a positive response from the legal profession would reduce the need for extensive new legislation.

[1] Source: Revenue Commissioners. Income figures used in this Report were derived from survey data obtained from the Revenue Commissioners. A random sample of nearly 40 percent of all lawyers was used. These figures do not include employed barristers who are not members of the Law Library. Also, the top ten earners from the sample were removed to preserve confidentiality. This means that the figures in Table 2 will slightly underestimate actual figures.

Summary of Proposals and Questions

Chapter 2: The market for legal services
Q1: What additional facts or issues, if any, are relevant to the description, in paragraphs 2.3 – 2.18, of the demand for legal services?
Q2a: What additional facts or issues, if any, are relevant to the description, in paragraphs 2.19 – 2.43, of the supply of legal services? For example:
Q2b: How frequently do barristers act jointly with solicitors in court proceedings?
Q2c: How frequently do senior counsel act without junior counsel in court?
Chapter 3: Regulatory Reform
Proposal 1: The Department of Justice, Equality and Law Reform should bring forward legislation to establish a Legal Services Commission. The Commission would regulate both branches of the legal profession. The majority persons appointed to the Legal Services Commission should be non-lawyers. There are two possible models for the Legal Services Commission: **Option A:** The Legal Services Commission would have responsibility for, and would undertake, all of the regulatory powers and responsibilities currently undertaken by the Law Society, the Bar Council and King's Inns. The Bar Council and the Law Society would retain representative functions. **Option B:** The Legal Services Commission would have responsibility for the regulation of legal services, but would delegate many regulatory functions to existing and possibly new self-regulatory bodies. The Legal Services Commission would be given explicit authority to make new regulations and would have power to veto the rules of self-regulatory bodies. These self-regulatory bodies would not be permitted to exercise representative functions.
Q3a: What practical problems might arise in establishing a Legal Services Commission, as envisaged in either Option A or B of Proposal 1?
Q3b: What timeframe would be necessary to establish the Legal Services Commission and to transfer regulatory responsibilities and/or functions from the Bar Council and Law Society?
Q3c: Who should be the non-lawyers on the Legal Services Commission? For example, would representatives from the Office of the Director of Consumer Affairs or IFSRA be suitable representatives?
Q3d: Are there other possible models (in addition to Option A and B of Proposal 1) that would achieve the objective of transparently distinguishing representative and regulatory functions and which would also ensure that the regulatory system promotes competition in the interests of buyers of legal services?
Chapter 4: Monopoly Supply of Legal Education
Proposal 2: The Legal Services Commission should set standards for the provision of professional education for solicitors. The Law Society should, in common with other providers, be required to apply and meet these requirements. **Final Recommendation 1:** As an interim and immediate measure, the Law Society should, by 30 September 2005, issue detailed criteria pursuant to which it will licence institutions to provide courses.

Proposal 3: The Legal Services Commission should set standards for the provision of barrister education. Kings Inns should, in common with other providers, be required to apply and meet these requirements.

Final Recommendation 2: As an interim and immediate measure, King's Inns should, by 30 September 2005:

a) Issue criteria pursuant to which King's Inns will recognise Barrister-at-law Degrees awarded by other educational providers so that other providers can provide Barrister-at- law Degree courses; and,

b) Allow persons awarded such Degrees entry to the barristers' profession.

Proposal 4: King's Inns should abolish the requirement for persons who hold a recognised law degree to obtain its Diploma in Legal Studies before being permitted to sit its Entrance Examination.

Q4a: What, if any, aspects of the current structure of the profession education of solicitors could be modified? For example:

Q4b: Could the current curriculum be broadened or narrowed in scope?

Q4c: Could the two-year period of training be shortened?

Q4d: Should trainees be allowed commence professional practice course I before having obtained a training contract?

Q4e: If the system of regulation focused primarily on legal firms rather than individual lawyers, what impact might this have on the professional training curriculum and/or training costs?

Chapter 5: Restrictions on Business Structures

Proposal 5: The proposed Legal Services Commission should have responsibility for the regulation of business structures for barristers.

Proposal 6: As an interim measure the Bar should amend its Code of Conduct to remove the sole trader requirement on barristers. The following options to replace this prohibition are put forward:-

Option A: The Bar Council permits barristers to choose their own business structures.

Option B: The Bar Council permits practising barristers to employ other practising barristers and one or more of the following are also permitted: -

- Partnerships amongst barristers.
- A chambers system similar to that in England and Wales.
- Partnerships and/or a chambers system subject to a maximum number of barristers being part of that partnership or chambers.

Proposal 7: The Department of Justice Equality and Law Reform should introduce regulations, as permitted by Section 71(1) of the Solicitors (Amendment) Act, 1994 to permit solicitors to share fee income with barristers. In anticipation of this the Bar Council and Law Society should amend their respective Codes of Conduct to permit barrister and solicitor partnerships.

Q5a: What practical problem could arise in the implementation of Options A and/or B of Proposal 6?

Q5b: What reasons, if any, might warrant regulating barrister partnerships or chambers with measures of restrictions in addition to existing competition law?

Q5c: What form, if any, might those restrictions or measures take? For example, what might be a suitable maximum number for partnerships or chambers amongst barristers? Why?

Q6a: What implications, if any, might arise from Proposal 7 for the supply of legal services?

Q6b: What factors, if any, might warrant the use of measures in addition to existing competition law to regulate barrister and solicitor relationships?

Q6c: If restrictions additional to existing competition law, and specific to barrister and solicitor relationships, were to be established, what might be the form of those restrictions?

Q7a: What practical problems or issues, in addition to those identified in paragraphs 5.59 – 5.77, could hinder the establishment of the Multi Disciplinary Partnerships?

Q7b: What practices or regulations would be necessary and/or sufficient for Multi-Disciplinary Partnerships to operate without affecting legal professional privilege?

Q7c: How might regulation of Multi-Disciplinary Partnerships be more effective if the system of regulation focused primarily on firms rather than on individual lawyers (and other professionals) within firms?

Q8a: What practical problems, if any, might arise if barristers and/or solicitors were permitted form limited liability companies?

Q8b: What practical problems, if any, might arise if non-lawyers were able to own law firms, either as a partial or full owner, and either in a partnership or a limited liability company? Would there be an impact on the quality or cost of legal services?

Q8c: If non-lawyers were allowed to have an ownership stake in law firms, what controls, if any, would be required in addition to existing competition law?

Q8d: Should regulation be different for lawyer owned and non-lawyer owed firms? If yes, why?

Q8d: Would the proposed Legal Services Commission together with the Companies Acts be sufficient to ensure appropriate regulation of firms?

Chapter 6: Restriction on Holding Dual Titles

Proposal 8: King's Inns should abolish Rule 24(b) (2) of its Education Rules, thereby removing the requirement for a solicitor to remove his name from the Roll of Solicitors before being admitted to study at King's Inns.

Proposal 9: The Bar Council should abolish rule 8.11(a) of its Code of Conduct, thereby allowing barristers to simultaneously hold the titles of barrister and solicitor.

Proposal 10: The Department of Justice Equality and Law Reform should introduce legislation to amend section 51 of the Solicitors (Amendment) Act, 1994, so that barristers, who have not disbarred themselves, can still avail of the abridged transfer provisions, to the solicitor profession.

Chapter 7: Direct Access and Restrictions on Barrister Practice

Proposal 11: The Bar should either:

Option A: Abolish completely Rules 4.1 and 4.22 so that unlimited Direct Access is permitted; or

Option B: Broaden the existing Direct Access Scheme, in a manner similar to the new UK scheme, to include the following features:

- Barristers will only be permitted to undertake direct access work if:
    - they have been in practice for three years following the completion of their period of "devilling" or pupillage:
    - they have complied with training requirements imposed by the Bar Council; and they have notified the Bar Council that they intend to do public access work.
- A barrister must refuse instructions if he or she considers that it is in the interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client.
- A barrister is not obliged to accept instructions from a direct access client.
- Barristers may not undertake work in certain sensitive areas or where there are likely to be profound ramifications for clients and others; i.e.:
    - Immigration or asylum work;
    - Family or criminal proceedings other than for advice where proceedings have not been commenced (but not to attend interviews conducted by prosecuting or investigating authorities) or some appeals; and
    - Where the instructions come from intermediaries and are in connection with any family or criminal proceedings.

Proposal 12: The Bar should abolish rule 2.6 so that barristers are permitted to be in part time practice at the Bar or to be in employment.

Proposal 13: The Bar should abolish rule 8.3 so that membership of the Law Library is not limited to barristers in full time practice.

Q9a: What practical problems, if any, might arise in relation to options A and/or B of Proposal 11?

Q9b: Are there alternatives to Options A and B of Proposal 11 that might also increase direct access to barristers?

Q10: Would extra regulation be required if barristers handle client funds? Would this create an unnecessary burden on the Bar, and/or additional costs to clients?

Chapter 8: Restrictions on the Supply of Conveyancing Services

Proposal 14: The Department of Justice, Equality and Law Reform should introduce legislation permitting financial institutions to provide conveyancing services to the public by way of employed solicitors or other qualified persons. Where such legislation already exists, namely Section 31 of the Building Societies Act, 1989, the Department of Justice Equality and Law Reform should bring forward secondary legislation to effect its implementation (except section 31 (2)) so that Building Societies can provide conveyancing services.

Proposal 15: The Law Society should amend its Code of Conduct so that solicitors employed by financial institutions can provide conveyancing services for persons other than their employer.

Proposal 16: The Department of Justice, Equality and Law Reform should bring forward legislation to permit licensed conveyancers to provide conveyancing services.

Proposal 17: The Legal Services Commission should have responsibility for regulating the training, qualification and operation of licensed conveyancers to promote competition in the interests of buyers of conveyancing services.

Q11a: What practical problems could arise to hinder the expansion of the range of suppliers of conveyancing services?

Q11b: Should regulation of conveyancing be different for solicitors and non-solicitors? If yes, why?

Q11c: What other potential suppliers of conveyancing services exist? What regulatory issues would need to be addressed if the range of suppliers of conveyancing services was extended beyond that in Proposals 14 – 17?

Chapter 9: Restrictions on Advertising

Proposal 18: The Department of Justice, Equality and Law Reform should introduce legislation to transfer the regulation of advertising by barristers to the proposed Legal Services Commission.

Proposal 19: As an interim measure the Bar Council should permit advertising by barristers by either:

Option A: The abolition of Rule 6.1. The sole regulation of advertising by barristers would then be the restrictions on misleading advertising contained in the European Communities (Misleading Advertising) Regulations, 1988.

Option B: The substitution of Rule 6.1. with an alternative rule permitting advertising so long as it does not:

- Give false or misleading information;
- Refer to the outcome of previous, or future, legal action;
- Bring the administration of justice into disrepute, or otherwise be considered in bad taste; or
- Appear in inappropriate locations.

Proposal 20: The Department of Justice, Equality and Law Reform should introduce legislation to transfer the regulation of advertising by solicitors to the proposed Legal Services Commission.

Proposal 21: As an interim measure the Department of Justice, Equality and Law Reform should introduce amending or secondary legislation to remove restrictions on advertising content and forms that are not inherently misleading, harmful or offensive, either by:

Option A: Removing all specific legislation relating to solicitors' advertising in favour of reliance on the restrictions on misleading advertising contained in the European Communities (Misleading Advertising) Regulations, 1988; or

Option B: Amending current restrictions by limiting restrictions to:

- False or misleading advertising;
- References to the outcome of previous, or future, legal action;
- Advertising in bad taste or which brings the administration of justice into disrepute; or,
- Advertising in inappropriate locations.

Q12: What practical problems, with adverse consequences for competition and for buyers of legal services, could arise in liberalisation of advertising as proposed in Proposals 18 and 19?

Q13: What practical problems, with adverse consequences for competition and for buyers of legal services, might arise from implementing the liberalisation of advertising as proposed in Proposals 20 and 21?

Chapter 10: Restrictions on recognition of foreign legal qualifications

Proposal 22: The Department of Justice, Equality and Law Reform, the Law Society and King's Inns should replace the current system of reciprocity with a system that recognises foreign-qualified lawyers on the basis of their suitability to practice. The Legal Services Commission should be responsible for regulating the recognition of foreign qualified lawyers.

Proposal 23: As an interim measure, the Department of Justice, Equality and Law Reform should establish criteria for foreign lawyers, to be assessed on a case-by-case basis by the Law Society.

Proposal 24: The Kings Inns should amend its rules to permit foreign lawyers to practice in Ireland as barristers without reciprocity or recognition requirements or further examinations, but being subject to the Irish Bar Council's Code of Conduct and disciplinary sanctions.

Q 14: What practical problems could arise from changes in the system of recognising foreign lawyers arising from Proposals 22-24?

Q 15: To what extent, if any, would Proposal 22-24 need to be amended, if greater direct access to barristers was permitted (as proposed in proposal 11)?

Chapter 11: Senior Council

Proposal 25: The Government should establish objective criteria for awarding the title of Senior Counsel together with a procedure for monitoring and removing it. Solicitors should be eligible for the title.

Proposal 26: The Bar Council should advise all junior counsel to mark a fee based on work done when acting in a case. This fee should not depend in any way on that marked by senior counsel.

Q16: Does a quality mark for purchasers of advocacy serve any other useful purpose not identified in Chapter 11?

Q17: If the title of Senior Counsel is retained, should the Government be responsible for awarding the title? Should it be the Legal Services Commission or some other organisation?

Q18: Would proposals 25 and 26 be sufficient to ensure competition and consumer interests or would abolition of the title of Senior Counsel best serve competition and consumer interests?

Chapter 12: Legal Fees and the Taxation of Costs

Proposal 27: The Legal Services Commission should be responsible for directing the amount and type of information to be contained in Section 68 letters (i.e. letters setting out estimates of fees) issued by lawyers.

Proposal 28: The Law Society should review its precedent Section 68 letters and issue a practice direction to ensure that solicitors give clients more information regarding likely fees.

Proposal 29: The Department of Justice, Equality and Law Reform should introduce legislation requiring barristers to issue letters providing fee information similar to solicitors' Section 68 letters, both to clients and to solicitors, when first briefed.

Proposal 30: Taxing Masters should not consider the size of any award when assessing legal costs. Legal costs should be assessed on the basis of the work undertaken by individual lawyers.

Proposal 31: Taxing Masters should cease the general practice of allowing junior counsel's fees at two-thirds that of senior counsel. Instead fees should be set on the basis of the work undertaken by each of senior and junior counsel.

Proposal 32: The Department of Justice, Equality and Law Reform should introduce legislation to permit persons other than solicitors being appointed to the position of Taxing Master.

Chapter 13: Miscellaneous Restrictions on Competition

Proposal 33: Pending the introduction of Proposal 3, King's Inns, as an interim measure, should abolish the requirement for graduates in law from recognised universities to sit the King's Inns Entrance Examination.

Proposal 34: The Department of Justice, Equality and Law Reform should introduce amending legislation to abolish the requirement for non-graduates to pass the Preliminary Examination before sitting the Law Society Entrance Examination.

Proposal 35: Pending the introduction of Proposal 2, the Law Society, as an interim measure should abolish the requirement for law graduates to pass the Entrance Examination.

Proposal 36: The Department of Justice, Equality and Law Reform should introduce amending legislation to repeal sections 3 and 4 of the Legal Practitioners Qualification Act, 1929.

Proposal 37: The Law Society and Kings Inns should publicise criteria for a voluntary system whereby solicitors and barristers who wish to represent clients in Irish, or have a particular interest in Irish, could be trained and examined to a high and consistent standard. Institutions other than the Law Society and Kings Inns should be permitted to provide such courses and examinations.

Proposal 38: The Bar should abolish Rule 2.15, and, if necessary, introduce a new rule requiring barristers to make a declaration of any interests that might give rise to a conflict or to undue influence.

Proposal 39: The Bar should abolish Rule 7.5. If necessary, legislative measures should be introduced to establish the existence of contractual arrangements between barristers and solicitors, and in the case of direct access, between barristers and their clients.

Proposal 40: The Law Society should amend its professional Code of Conduct to require solicitors to waive their lien (the common law right of a solicitor to retain a client's file pending payment from the client) in instances where unpaid fees are the sole issue between the solicitor and his former client.

Proposal 41: The Rules Committee should amend Order 5, rule 11 and Order 12, rule 1 of the Rules of the Superior Courts so as to permit barristers to sign the originating summons and to allow their names to be placed on appearances.

Q19: Is this proposal sufficient to overcome the common law right of a solicitor to exercise the solicitor's lien?

Q.20: Should the right of audience be extended to cover certain categories of third parties in appropriate circumstances?

Q.21: If so, what categories of person should be accorded such right of audience?

Chapter 1: Introduction

The Legal Profession in Ireland

1.1 The Irish legal profession is, like that in the United Kingdom and in certain parts of Australia, a split profession. Lawyers in Ireland are of two kinds: solicitors and barristers, each having different but often overlapping functions. Solicitors, who operate mainly in partnerships, deal directly with clients at first instance, advising them, engaging a barrister on their behalf if necessary and making practical preparations for litigation, such as arranging for medical examinations, engaging professional witnesses, and so on. Barristers, whose rules prohibit partnerships, are sole traders and act primarily as advocates before the courts, where they represent litigating parties and plead their cases. With limited exceptions[2], a member of the public cannot engage a barrister directly, but must go through the intermediary of a solicitor who will instruct a barrister on the client's behalf. Of course, this does not mean that a barrister never meets the client he is representing; consultations between barrister and client are a matter of routine, especially prior to litigation, but the client's solicitor is always present.

1.2 Each branch of the legal profession has its own self-regulatory body, the Law Society of Ireland regulating solicitors and the Bar Council regulating barristers. Both regulatory bodies fulfil a dual role, as each of them also acts as the representative body for its particular members. Lawyers may acquire law degrees at a number of third level institutions, but if a lawyer wishes to go on to qualify as a solicitor or a barrister he must undergo a course of professional education. In Ireland, the professional education of solicitors is provided solely by the Law Society, while that of barristers is provided solely by the Honourable Society of Kings Inns.

1.3 Only persons who have undergone professional training and passed examinations can be admitted to the Roll of Solicitors and use the title "Solicitor".[3] Similarly, only persons who have passed the examinations for the Barrister-at-Law degree can be called to the Bar and use the title "Barrister". [4] While anyone can provide legal advice, the law confines some services to lawyers. Only solicitors are permitted to provide conveyancing and probate services to the public for payment.[5] The right of audience before a court is a right granted by law to

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[2] Since May of 1990 the Bar Council has authorised a number of approved organisations and institutions and their members to have direct professional access (DPA) to members of the Bar of Ireland in non-contentious matters. The scheme does not extend to contentious matters (e.g. court appearances).

[3] European Union law ("EU law") permits lawyers, who are citizens of, and further qualified within, the European Union ("the EU"), to establish in Ireland as solicitors (or barristers) without having to undergo full professional training and examinations. See the European Communities (Lawyers' Establishment) Regulations 2003. Likewise, barristers qualified for more than 3 years, can transfer to the solicitors' profession without being required to undergo full professional training and examinations.

[4] Solicitors are also permitted to transfer to the barristers' profession without being required to undergo full professional training and examinations provided certain criteria are fulfilled.

[5] The reservation of these functions to solicitors is set out in Section 58 of the Solicitors Act, 1954. People can, of course, carry out their own conveyancing, conduct their own litigation and extract letters of administration on their own account. Section 58 also contains some minor exemptions from this prohibition, for instance for notaries public (who are usually solicitors), diplomats and people working for barristers or solicitors and under their supervision. The Building Society Act, 1989 also went some way towards relaxing this prohibition for conveyancing services but this has not been implemented. Likewise Section 78 of the Solicitors (Amendment) Act, 1994 relaxed the prohibition on probate services.

solicitors. Likewise, barristers are permitted[6] to prepare papers necessary to carry out conveyancing and probate work and, of course, have a right of audience before the courts. It is a criminal offence for non-lawyers to provide services that are reserved by law to lawyers for payment.[7]

1.4 Because of the close similarities between the professions of solicitor and barrister, the Authority has decided to report on both professions together.

Restraints on competition in the market for legal services

1.5 Lawyers play an important role in any society. By their legal expertise they facilitate citizens' access to justice and to the courts, both of which are vital elements of any democracy. Lawyers play a major role in the Irish economy. In 2001, the total expenditure on legal services was over €1.1 billion, or approximately one percent of total Gross Domestic Product (GDP). The amount spent on legal services in Ireland has grown rapidly over the last ten years, and data suggests that profit margins in the sector have also grown over that period. It is important that competition should work well in the sector. Scarce or overly costly legal services limit access to justice and impose unnecessary costs on businesses and individual clients.

1.6 A minimum quality of service is required to ensure access to justice. Forcing a higher quality standard than necessary for all customers ("gilt-edging") perversely reduces access to justice because legal services become unaffordable to many. The measures proposed in this Report to increase competition have been designed to ensure that the standard of quality needed to provide access to justice, independent legal advice and the protection and promotion of consumer interests would be met, while allowing enhanced services to be provided at an additional cost.

1.7 The legal profession in Ireland is subject to many restraints which distort competition and which sometimes prevent it entirely. The Authority undertook its study in order to identify those restraints which have such an effect, to analyse them and to see whether they were justified. The Authority sets out its findings in this Report and makes recommendations wherever it believes that an anti-competitive restriction cannot be justified. High-quality legal services are important, but they are of limited benefit if they can only be afforded by the wealthy, or when paid for by the State. Removing the disproportionate restrictions identified in this Report, and thereby facilitating competition, should not lower the quality of legal services. On the contrary, competition should help raise quality and innovation, and, by lowering costs, actually facilitate access to justice.

[6] Section 58(3) of the Solicitors Act, 1954 as substituted by Section 77(c) of the Solicitors Act, 1994
[7] Section 58 (2) of the Solicitors Act, 1954 as substituted by Section 77(a) of the Solicitors Act, 1994

1.8 The Authority finds that competition in the market for legal services in Ireland is either prevented, restricted or distorted by:

- The current self-regulatory regime and the fact that the bodies responsible for regulation also represent the professions (Chapter 3);

- The monopoly on the professional education of solicitors enjoyed by the Law Society, and the monopoly on the professional education of barristers enjoyed by the Honourable Society of King's Inns (Chapter 4);

- The admission rules of the Honourable Society of King's Inns which require all applicants for its degree course of Barrister-at-Law, except those holding law degrees from certain approved institutions, to acquire the Diploma in Legal Studies of which it is the monopoly provider (Chapter 4);

- Rules requiring barristers to be sole practitioners, rules preventing barristers and solicitors from forming partnerships, rules preventing both solicitors and barristers from forming partnerships with non-lawyers and rules preventing non lawyers from owning a legal practice (Chapter 5);

- Rules preventing lawyers from holding the titles of solicitor and barrister simultaneously (Chapter 6);

- Rules preventing members of the public from directly accessing the services of a barrister (Chapter 7);

- The rule prohibiting barristers from engaging in occupations inconsistent with full-time practice at the Bar, one effect of which is that employed barristers are precluded from appearing in court on behalf of their employer (Chapter 7);

- The rule restricting membership of the Law Library to full-time practising barristers which also precludes employed barristers(Chapter 7);

- Restrictions on the supply of conveyancing services (Chapter 8);

- Restrictions on advertising (Chapter 9);

- Restrictions on the entry of lawyers qualified abroad (Chapter 10);

- The manner in which the title of Senior Counsel is awarded (Chapter 11);

- The setting of legal fees and the taxation of costs (Chapter 12); and,

- Further miscellaneous restrictions relating to King's Inns examinations; Law Society examinations and training contracts; barristers who were in employment prior to commencing practice; one barrister taking over a case from another; the initiation of legal proceedings and a solicitor's lien on his client's file (Chapter 13).

Proposals for reform

1.9 In respect of these restrictions, the Authority makes a number of proposals which are set out in detail in the appropriate parts of the text, but which are summarised here:

- The establishment of a Legal Services Commission to regulate both branches of the legal profession;

- Abolition of the educational monopolies enjoyed by Kings Inns and the Law Society in respect of professional legal education;

- Abolition of the requirement on certain applicants to acquire the Diploma in Legal Education before sitting the King's Inns entrance examination;

- Removal or amendment of the rule requiring barristers to be sole traders;

- Removal of the restriction on partnerships between barristers and solicitors;

- Removal of the restriction on lawyers holding the titles of barrister and solicitor simultaneously;

- Either the broadening of the Bar Council's Direct Professional Access Scheme, or the abolition of the prohibition on direct access of the public to barristers' services;

- Abolition of the rule which prevents barristers engaging in occupations inconsistent with full-time practice at the Bar;

- Abolition of the rule which confines membership of the Law Library to full-time practising barristers;

- Amendment of the restriction on the provision of conveyancing services by persons other than solicitors firms and practising solicitors;

- Removal of all restrictions on barrister and solicitor advertising, or of all except specified minimum restrictions;

- New criteria for allowing entry of lawyers qualified outside the EU;

- The establishment of a transparent scheme for the awarding of the title of Senior Counsel, together with the opening up of the title to solicitors;

- The provision by barristers of fee information to clients in advance;

- Persons other than solicitors to be allowed to become Taxing Masters, together with changes in the methods of taxation of costs;

- Law graduates to be exempted from the requirement to sit the King's Inns and Law Society's Entrance Examinations, and the abolition of the requirement that non-law graduates pass the Law Society's Preliminary Examination;

- Repeal of the statutory requirements that persons intending to be barristers and solicitors pass an examination in Irish, and the replacement of the examinations by a voluntary course;

- Abolition of the rule preventing barristers who have previously been employed from accepting work from their former employer for a specified period;

- Abolition of the rule preventing one barrister taking over a case from another until the first barrister has been paid;

- Amendment of the rule which provides that only solicitors and lay litigants can sign originating summons, so as to allow them to be signed by barristers;

- Modification of the Law Society's rules in relation to a solicitor's lien on his client's file, so as to permit timely transfer of files to another solicitor.

1.10 Proposals identify specific functions and/or responsibilities to be undertaken by the proposed Legal Services Commission. Establishing a Legal Services Commission (LSC) is a significant initiative and will take time. Accordingly, in proposals referring to the proposed LSC, the Authority has included various interim measures; i.e., until the establishment of a LSC.

1.11 It is important to note that the removal of the specified restrictions will not force any change upon either barristers or solicitors; it will simply allow them greater flexibility in the way in which they provide their services. If the disproportionate restrictions identified above are removed, any features of the current system that are efficient will still be retained. For instance, allowing barristers to form partnerships does not mean they will be obliged to do so; if the sole practitioner model is an efficient one, barristers will be free to retain it. Similarly, if direct

access to barristers is allowed, barristers may still choose not to take part in such a scheme, but to operate as part of an independent referral Bar.

Submissions

1.12 The Authority seeks submissions on the various proposals in the report. In particular the Authority welcomes comment on practical and implementation issues. Submissions should identify obstacles to the implementation of proposals and also identify potential side effects, either positive or negative, that might arise. Where the proposals include options the Authority would welcome comment on the practical implications of each option.

1.13 The Authority also requests submissions on questions in the report. Some of the questions focus on practical and implementation issues, while others seek further information to confirm or enhance the Authority's knowledge of the market for legal services.

1.14 Submissions should address the specific proposals or questions in the report and be addressed to the Secretary, The Competition Authority, 14 Parnell Square, Dublin 1. Submissions should be made no later than close of business on Thursday 28th April, 2005 and can be made either by post or via the Authority's website address: markets@tca.ie

Method of Analysis

1.15 Restrictions on competition limit the commercial freedoms and choices of buyers and sellers in a market economy. They generally impose significant, and often hidden, costs on the economy. Restrictions should only be imposed if there are clear benefits from restricting competition that outweigh the costs. The burden to show that the benefits outweigh the costs should rest with those seeking and benefiting from the restrictions, which is normally the suppliers in a sector.

1.16 In evaluating the impact on competition of regulatory restrictions, the Authority has first of all had regard in each case to the objectives that the restriction seeks to attain. Where in any particular case the objectives appear to be without validity, the Authority recommends that the restriction in question be abolished. Where, on the other hand, the objectives are valid, as is mostly the case, the restrictions are assessed to test whether they are proportional. If the objectives can still be attained in the absence of the restriction, or can be attained by less restrictive means, the Authority makes recommendations for change accordingly.

1.17 In contrast to other sectors, where insufficient competition frequently arises from high levels of concentration, or from the market power exercised by a single firm, distortion or restriction of competition in professional services tends to arise from

excessive and disproportionate regulation.[8] That is the case with the restrictions identified in this Report.

1.18 Chapter 2 explains the regulatory structure within the State, identifies the market for legal services and describes how competition works in this market. The remainder of the chapters deal with individual restrictions. Appendix 1 contains an outline of the regulatory structure of the legal profession in other common-law countries.

1.19 In dealing with the issue of regulatory framework the Authority has had regard to developments in the United Kingdom, and in particular to the recent report of Sir David Clementi. [9] The Authority has consulted with the Clementi team and refers readers to his report.[10]

Background to the report

1.20 Section 30 of the Competition Act, 2002, confers on the Competition Authority the function to "study and analyse any practice or method of competition affecting the supply and distribution of goods or the provision of services or any other matter relating to competition".

1.21 Following an OECD Report in 2001,[11] which suggested that competition in the professional services sector in Ireland could be stronger, the Authority commenced a study of selected professions. The professions chosen were: engineers, architects, dentists, optometrists, veterinary surgeons, medical practitioners, solicitors, and barristers.

1.22 The purpose of the study is to identify any regulations or practices that may restrict competition within these professions, to evaluate any consumer benefits claimed, and to consider whether the restrictions are proportionate to such benefits.

1.23 The initial process of the study involved the selection of Indecon International Economic Consultants to conduct research. Indecon subsequently published a report, in March 2003, "Indecon's Assessment of Restrictions in the Supply of Professional Services".[12]

1.24 The Authority's approach to completing the professions study involves producing an initial report for each profession setting out its analysis of existing restrictions

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[8] A market has high levels of concentration when it has either a small number of players, or when a small number of a larger group of players each holds a large percentage of market share. For example, the banking industry in Ireland is highly concentrated. In contrast, the market for legal services, whether provided by solicitors or by barristers, has a large number of players, with market share generally well divided between them.

[9] *Report of the Review of the Regulatory Framework for Legal Services in England and Wales* (December 2004).

[10] See www.legal-services-review.org.uk/content/report:

[11] OECD, "Regulatory Reform in Ireland" Review of Regulatory reform, 2001.

[12] See www.tca.ie/professions

and its proposals for reform. Each initial report seeks submissions from interested parties. The Authority considers submissions in formulating its recommendations in respect of each profession.

1.25 The Authority would like to thank all of those who made submissions and spoke to it during the preparation of this report. The Law Society, Bar Council and King's Inns all had several meetings with the report team. The team also met and discussed the issues with numerous other parties.

1.26 The Authority would particularly like to thank Dr Vincent Hogan, who provided assistance with much of the technical and data issues associated with the report, and Indecon International Economic Consultants who provided analysis of some of the data gathered by them in the compilation of their own report.

1.27 This report has used the word "he" throughout when referring the to the first person singular. The Authority would like to make clear that this is for notational convenience only.

Chapter 2: The market for legal services

2.1 This chapter describes the market for legal services and outlines the nature of demand and supply within the profession. The different characteristics of both demand and supply mean that legal services are not a single relevant market, but rather segmented into a variety of sub-markets. Across the profession, and within various sub-markets, there is relatively low concentration of suppliers. This suggests that competition issues within the profession are more likely to arise from regulatory structures and intervention.

2.2 Demand for legal services has grown substantially over the past decade, both in total expenditure and in terms of expenditure per lawyer, despite the increase in the number of lawyers. An analysis of income data also shows that many within the profession earn relatively high incomes.

The demand for legal services

How buyers choose solicitors

2.3 Most people only use a solicitor when they buy or sell property, suffer or cause personal injury, or require advice on probate or family matters.[13] This relatively rare use of solicitors, allied to the sometimes complexity of legal services, means that many buyers are not well informed as to what legal services they need, how much these services cost, and the relative merits of different providers.[14]

2.4 Infrequent buyers choose solicitors in a variety of ways. They may use the solicitor who has acted for their family, follow recommendations from friends, estate agents or their bank, or select a solicitor from advertisements, for instance in the Golden Pages.

2.5 More frequent buyers, including many business clients, are usually better informed about the services they purchase. Business clients tend to have clearer ideas of what services they want and from whom. Businesses with in-house lawyers are particularly knowledgeable buyers. Increasingly, business clients have less loyalty to specific law firms. Rather, they divide their custom between law firms, actively playing one firm off against another. Large clients are extremely important to solicitors' firms, and consequently such clients can, and do, use their buyer power to obtain service on good terms.

2.6 Both individual and business clients can easily switch from solicitor to solicitor between different transactions. By contrast, it is more difficult for the client to switch during the course of their solicitor's engagement, for instance, during a conveyance or mid-way through litigation.

[13] Indecon's survey of consumers indicated that 51 percent of those surveyed had not used a solicitor in the last five years.

[14] This is referred to as the problem of asymmetric information whereby clients may have difficulty in assessing the quality of a service or service provider. This can lead to market failure, and can provide a basis for regulatory intervention in the market. See Chapter 2 of the Indecon report for a further discussion.

The choice of barristers

2.7 Barristers cannot be engaged directly by clients, except in limited instances. Instead, solicitors, who are informed buyers of legal services, engage barristers on the client's behalf.

2.8 Barristers are usually engaged in contentious matters. In these matters, barristers provide general advice and draft the necessary paperwork, called pleadings.[15] Advocacy, involving representing a client in court, is required less frequently as most cases settle before a court hearing. Commercial clients may engage barristers to provide opinions on specialised legal matters.

2.9 Reputation plays a large part in distinguishing between barristers and, consequently, the selection of a barrister. Some barristers, especially some senior counsel, are considered to be of exceptional quality, which is important because the perception is that having a superior advocate, even if only marginally better, is crucial to success in litigation. A strong reputation enables a barrister to charge high fees.

Fees

2.10 Private buyers have become more price conscious, and, particularly for conveyancing, it is now common for clients to ring a number of solicitors to seek fee quotes. Solicitors are legally required to provide clients with either fee estimates or indications of the basis upon which the charges will be made, known as Section 68 letters.[16] Barristers are not required to provide similar information. Chapter 12 discusses how fees are set in greater detail and recommends that Section 68 letters should include more useful information and that similar requirements should be introduced for barristers.[17]

2.11 Some lawyers take litigation cases on a "no-foal-no-fee" basis. This means the client does not pay his lawyer's fees if his case is unsuccessful.[18] This issue is discussed further in chapters 9 and 12.[19]

Public-sector demand for legal services and the criminal aid system

2.12 This Report focuses on the market for legal services in relation to private civil matters, but not criminal matters. For most criminal matters, the State effectively purchases legal services and sets prosecution and defence fees. This

[15] Indecon's survey of consumers indicated that 90 percent of those surveyed had not used a barrister in the last five years.
[16] Section 68 of the Solicitors (Amendment) Act, 1994.
[17] The Indecon survey of consumers found that 71 percent of those surveyed wanted more information on the legal fees they were likely to face.
[18] No-foal-no-fee charges facilitate access to justice for those who may otherwise not be able to afford legal representation, but are considered by some to encourage vexatious litigation.
[19] Contingency fees, where the legal fees charged depend upon the size of the award won, are illegal in the State. In any case, because of the system of awarding costs and taxation of costs, contingency fees would be difficult, if not impossible, to operate formally. Despite this, empirical evidence outlined in Chapter 12 suggests that, in practice, the system of taxation effectively determines fees on a contingency fee basis.

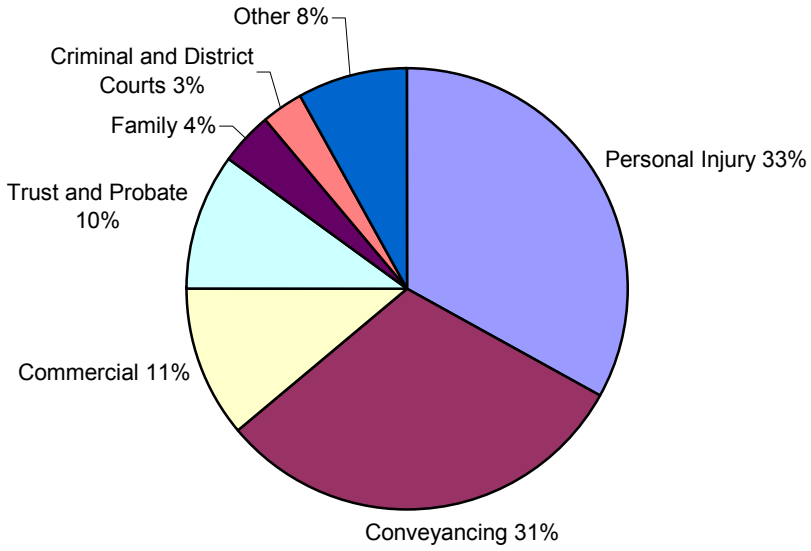
arises from the State's role as the prosecutorial body and from accused citizens' constitutional right to legal representation. A description of the criminal aid scheme is contained in Appendix 3.[20]

2.13 The State also purchases legal services through the many Tribunals of Inquiry set up over the last fifteen years. Large numbers of barristers have represented the State and witnesses before the Tribunals.[21] The State initially negotiated daily fees commensurate with a barrister's usual "brief fee".[22] As the Tribunals have exceeded the length of the typical court case, the result has been that some barristers have received unusually large fees. Recently, the State has attempted to use its buying power as a large purchaser more effectively that it previously has and has announced that it is now paying lower rates in an effort to obtain better value for money.

Demand by area of law

2.14 Demand for legal services varies depending upon the area of law involved. Figure 1 below shows an approximate breakdown of fee income of solicitors by area of law in 1999.[23]

Figure 1. Share of fee income by area of law



[20] The civil legal aid scheme is limited in Ireland and is mostly awarded in family law cases, and, increasingly, in refugee/asylum cases.

[21] Demand comes not only from the State but also from individuals involved in the Tribunals. It is likely that the State will pay the legal costs of the majority of individuals involved, but it is not certain that all individuals will have their costs covered.

[22] The brief fee is the fee paid to the barrister for being engaged on a case. It will usually constitute almost all of the total fee paid to the barrister.

[23] Source: A survey conducted by the Law Society. Because the survey was limited in scope, figures should be used as a rough guide rather than exact numbers. There have also been changes since 1999 that may have changed the relative proportions, including the formation of the Personal Injuries Assessment Board.

2.15 There are no equivalent figures for barristers, but it is likely that criminal law constitutes a higher share of fee income for barristers than for solicitors[24] and conveyancing a lower share. Survey data from the Indecon report suggests that half of the demand for barristers' services stems from corporate clients, the other half from private individuals and the State.

2.16 The volume of personal injury litigation has grown considerably over the last twenty years and is now the main source of private litigation. As a result, insurance companies and other companies frequently involved in personal injury claims have developed internal litigation departments to deal with these claims.

2.17 The increase in insurance premiums, in part due to the volume of personal injuries claims, and the finding that litigation costs add, on average, in excess of 40 percent to the cost of compensation,[25] contributed to the formation of the Personal Injuries Assessment Board (PIAB) in 2004. The PIAB aims to reduce the expenditure on lawyers in personal injury cases. The High Court judgment of January 2005, which suggests applicants to the PIAB may not be prevented from being represented by lawyers, may limit any such reduction in demand.[26]

2.18 Despite the possibility that demand for legal services in the area of personal injuries may fall, the general belief amongst the legal profession is that the demand for legal services will remain strong. New laws and regulations are constantly enacted, and demand in certain areas, such as corporate compliance and e-commerce, is expected to grow in the future.

Question

Q1: What additional facts or issues, if any, are relevant to the above description of the demand for legal services?

The supply of legal services

2.19 Generally there is a clear delineation between the legal services provided by lawyers and non-lawyers. The titles "solicitor" and "barrister", along with legal prohibitions on non-lawyers providing some legal services, distinguishes lawyers from other professionals. Although other professionals may provide legal advice, for example, accountants may provide advice on taxation issues, this report focuses on the supply of legal services by the legal profession.

2.20 Within the branches of the legal profession there is a high degree of supply substitutability. Lawyers practising in one area of law can, and frequently do, change to another. Indeed, many lawyers practise in a number of areas of law. Other lawyers, usually solicitors in larger firms, specialise in very narrow areas of law. It is usually possible for other lawyers to develop skills in that area and erode market power built up by those who have specialised.

[24] There are some solicitors whose practices will consist of almost entirely criminal law.
[25] See the Motor Insurance Advisory Board Report.
[26] At the time of writing, it is not known whether this judgment may be appealed.

Solicitors

2.21 Solicitors can be divided into those in private practice, that is those who offer their services to the public for a fee,[27] and those who are employed as "in-house" solicitors. In-house solicitors are usually employed by companies or the State, in particular the Office of the Director of Public Prosecutions and the Chief State Solicitors Office. Employed solicitors only provide legal services to their employer.

2.22 Solicitors in private practice operate as either sole practitioners or with other solicitors in partnerships, or as associate solicitors. Partnerships range in size from two solicitors to over 50 or more. Solicitors firms usually employ assistant or associate solicitors, legal executives and administrative staff. Regardless of size, unlimited liability is the only permitted organisation form in Ireland. This means sole practitioners or partners are personally liable for the firm's liabilities.

2.23 While the high street solicitors firm, found in most towns and providing mainly conveyancing, probate and litigation services, is an accurate picture of many legal practices, this model has little in common with the larger solicitors firms usually based in Dublin. These large firms offer services tailored to the demands of commercial clients, which will range from construction law, to mergers and acquisitions work, to advice on financial services or taxation.

2.24 Approximately 70 percent of practices in Ireland are small, that is with one or two solicitors. There is a wide geographic spread of small solicitors firms, who tend to situate themselves in "high street" environments in cities, towns and small villages across the country. Small firms typically compete with similar sized firms for business from private clients. Most business for these firms relates to conveyancing, probate or some criminal work, though advice on any legal matter is usually supplied if requested. Services may be outsourced to a barrister, who will provide a legal opinion on a specialised area of law.

2.25 Another category can be loosely termed medium-sized firms. The larger of these will usually be located in cities and may have specific divisions focusing on the needs of commercial clients. These commercial clients are typically smaller local businesses rather than very large private or public limited companies. Some firms in this group are "niche" firms specialising in specific aspects of law, such as criminal law, family law or areas of commercial law. These firms, while typically small, have substantive reputations in their area and compete with larger firms for clients.

2.26 Large law firms, typically with more than thirty solicitors, predominately provide legal services to commercial clients. Most are located in Dublin. These firms tend to compete with other similar sized firms and do not often compete with smaller firms for individual private clients.

2.27 Solicitor firms often grow and develop, sometimes merging or alternatively, new firms may start when solicitors leave existing firms. Occasionally newly qualified solicitors start practices. The main barrier to starting a practice is attracting a

[27] The Indecon report estimated that circa 90 percent of practising solicitors were engaged in private practice.

sufficient client base to make operations initially viable. Building a client base takes time. As a result, some associate solicitors stay in their current firms and attempt to become partners.

2.28 Over the last 10 years, on average 70 new law firms were created per year.[28] 20 firms closed every year, meaning the total number of firms has been increasing by around 50 per year. In August 2004 there were 2,044 law firms.

Barristers

2.29 Barristers can be divided into those in independent private practice and employed barristers. Employed barristers are employed by solicitors firms, companies or the State, in particular the Attorney General's office. Barristers in private practice are only permitted to work as sole practitioners. Consequently, employed barristers, unlike employed solicitors, lose their right of audience before the courts.

2.30 Barristers in independent private practice can be further divided into Barristers-at-Law, otherwise called junior counsel or the Outer Bar, and senior counsel, who are officially described as Members of the Inner Bar, but are more commonly known as "SCs". Senior counsel typically have a higher standing in the profession, and command higher fees.

2.31 As most barristers specialise in contentious issues, they locate near the courts. The Law Library, which provides desk space and library facilities for barristers, is based in locations in and around the Four Courts building in Dublin. This is convenient for many barristers as the High Court and Supreme Court are housed in the Four Courts. Some barristers use private offices near the Four Courts and there has been a tendency recently for barristers to share office space.

2.32 Some barristers practise outside of Dublin "on circuit" and represent clients in the Circuit Court and in the High Court when it is on circuit.[29] Some barristers, who decide to practise mainly in the south of Ireland, locate in offices in Cork in response to demand for their services.

2.33 Junior counsel prepare pleadings and usually advocate cases before the Circuit Court and other lower courts. For High Court and Supreme Court cases, it is common for solicitors to engage a junior counsel to act with one or more senior counsel. In these instances, junior counsel draft the pleadings and senior counsel conduct the case before the court. This may reflect the extra work involved in litigation before the High Court and Supreme Court and a natural division of labour between senior and junior counsel.

2.34 Practising barristers are subject to the "cab-rank" rule. If requested to work on a case they must take it if they are available, subject to their usual brief fees.

[28] Chapter 4 of the Indecon Report.
[29] Twice yearly the High Court sits in various venues around Ireland.

Submissions to the Authority suggested that this rule was not always adhered to. The "cab-rank" rule is discussed further in chapter 5.

2.35 It can be difficult for new barristers to establish themselves. The drop-out rate among newly qualified barristers from the Bar is relatively high. The Bar Council estimates that roughly 15 percent of new barristers leave the Bar within 5 years. This is consistent with figures that show that a significant proportion of junior barristers have low earnings from providing legal services.[30] Some of the specific restrictions that may contribute to these features are discussed further in chapters 5 and 7.

2.36 The process by which barristers enter the profession may also make it difficult to become established. After completing professional training, a new barrister must undertake a one or two year apprenticeship with an established barrister. This is known as "devilling" for a "Master", during which period the "devil" is not paid, but follows the Master to obtain practical training.

2.37 A barrister may accept paid work of his own during this period, but obtaining work can depend greatly on the assistance a devil gets from his Master. According to barristers, the level of assistance and training provided by different Masters varies greatly. Helpful Masters enable new barristers to build up their own practices, in part by helping to obtain useful contacts within the profession. Other Masters may be unhelpful and do not assist a new barrister's progression. Barristers have stated that this is because the ability to obtain work may be more dependent upon contacts within the Bar and the solicitors' profession than on a barrister's ability.

Geographic area

2.38 The relevant geographic area for legal services varies by demand type. Individuals and small businesses seeking a solicitor tend to search close to where they are located, although the loyalty of some clients toward specific solicitors may mean some will clients will travel to use certain solicitors. The market may be regional for such clients.

2.39 It is only for large business clients that the market is national in size. Such firms will require one of the larger solicitors' firms specialising in commercial law.

2.40 Some business clients use solicitors firms from the UK. This indicates that for commercial law the geographic spread of the market may be international. One issue that potentially limits expansion by foreign firms into the State is restrictions on recognition of non-EU trained lawyers. This is analysed further in Chapter 10.

2.41 The relevant geographic market for barristers' services is generally the State. While most barristers are usually based near the higher courts, and are hence located in Dublin and Cork, they may be briefed by a solicitor from anywhere in

[30] See Table 1 later this chapter.

the State. Barristers working "on circuit" perform mostly regionally based work, however, they can and do accept briefs from solicitors located anywhere in the State and appear in courts other than their regional court.

Market concentration

2.42 The concentration of legal service suppliers within the profession is relatively low. Barristers must operate as sole practitioners and even amongst solicitor practices, concentration of suppliers is not high.[31] The largest 100 solicitor firms employ less than one third of solicitors.

2.43 Although concentration across the entire profession is low, concentration within the various different sub-markets based upon specific legal services and location may be higher. Despite this, there is little indication of levels of concentration within different sub-markets that raise competition concerns.

Questions

Q2a: What additional facts or issues, if any, are relevant to the above description of the supply of legal services? For example:

Q2b: How frequently do barristers act jointly with solicitors in court proceedings?

Q2c: How frequently do senior counsel act without junior counsel in court?

Market segments

2.44 As with many professional services, the market for legal services can be divided into segments, or sub-markets. These sub-markets can be based on characteristics such as geographical area, area of law, nature of demand, type of supplier and the legal service required.

2.45 Within different sub-markets, as with the profession overall, concentration tends to be low. For instance, in the top tier of large corporate law firms based in Dublin there are at least five firms competing with each other. This suggests that competition issues within the profession are more likely to arise from regulatory structures and intervention.

[30] If the entire country is taken as the market, the Herfindahl-Hirschmann index in relation to solicitor practices is less than 100. A Herfindahl-Hirschmann index value greater than 1800 is usually considered to indicate a concentrated market.

Background information

2.46 The amount spent on legal services has risen significantly over the last ten years and amounted to approximately €1.1 billion in 2001, up from approximately €320 million in 1992.[32]

2.47 As a proportion of total expenditure in the economy, expenditure on legal services has remained relatively constant or just under one percent of Gross Domestic Product (GDP), as shown in Figure 2 below.[33] During this time, expenditure on legal services has kept pace with the growth in GDP, which has increased by an average of nearly seven percent per year.

2.48 This increase is surprising given that a service sector would not typically expand at the same rate as an economy experiencing very rapid growth fuelled predominantly by growth in high-tech sectors.

2.49 The numbers of lawyers has also increased in recent years. In 2003 there were 8005 lawyers, consisting of 1,412 barristers, and 6,593 solicitors.[34] In 1992, there was 4,617 lawyers, consisting of 809 barristers and 3,808 solicitors. Since 1992, the rate of increase in lawyers per year has typically been less than the annual increase in GDP.[35]

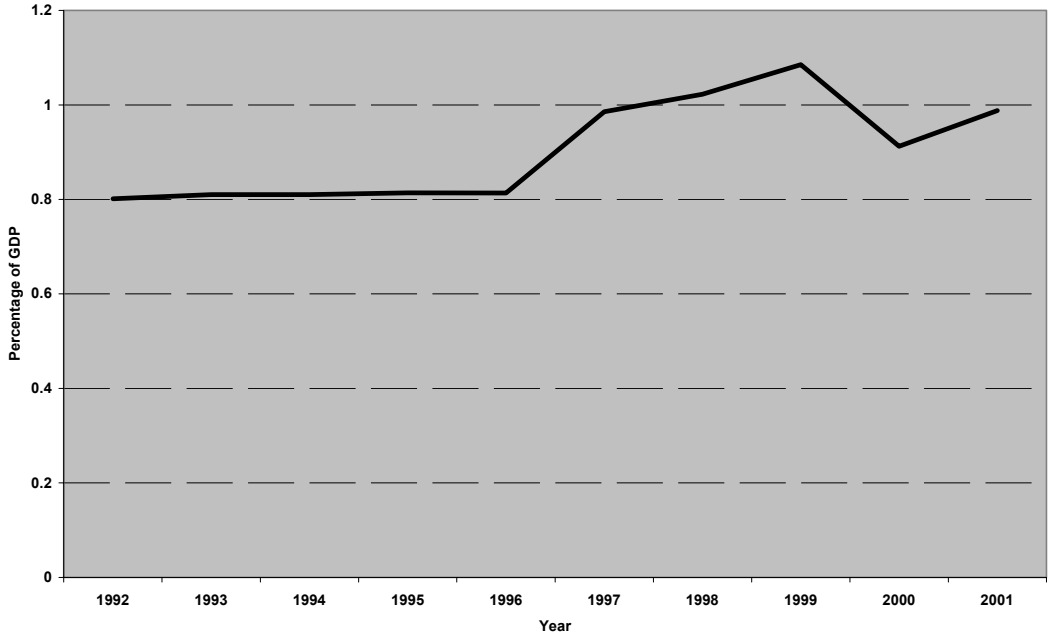
[32] Source: Data from the Central Statistics Office, derived from the Annual Services Inquiry (ASI). This is a large-scale survey of the contribution of the service sector to Irish GDP. The ASI was initially based on a 1988 Census on Services. It was first carried out in 1992, and then in an incomplete manner in 1995. It has been carried out annually since 1996, though the last year where results are available is 2001. The sample size is approximately 30 percent of the entire sector.

[33] Note that, after a large rise in expenditure in 1999, the CSO changed its methodology of calculation. This resulted in the level of total expenditure being revised downwards in 2000. This means that the figures from 2000 are not strictly comparable to the figures up to 1999 in absolute terms. However, the trend of increased expenditure on legal services in absolute terms is common for both periods before and after 1999.

[34] This includes only practising barristers, as the Bar Council does not keep figures on the number of non-practising barristers who are not members of the Law Library.

[35] See the Indecon Report.

Figure 2: Legal Services Turnover as Percentage of GDP



2.50 Despite this increase in lawyers, Table 1 below indicates that the proportion of lawyers per population is lower in Ireland than in several other common law jurisdictions.[36] For Ireland to have a similar ratio of lawyers as, say, New Zealand, which has a comparable population of approximately 4 million, Ireland would need to have an additional 1,000 lawyers.[37]

Table 1: Lawyers per population

Jurisdiction	Lawyers per 1,000 pop.
Ireland	**1.9**
New Zealand	**2.3**
Victoria (Aus)	**2.8**
England & Wales	**2.5**
NSW (Aus)	**3.2**

[35] Source: Law Society and Bar Council figures, plus information on numbers of lawyers with practising certificates from the relevant regulatory bodies in various jurisdictions. Ireland's level of 1.9 per 1,000 people consists of approximately 1.54 solicitors and 0.36 barristers for every 1000 people.

[37] In contrast to Ireland, the demand for lawyers in New Zealand does not generally include the right to sue for personal injury because of statutory limitation on such legal action.

2.51 Compared with some other professions, such as architects, engineers and accountants,[38] lawyers earn relatively high incomes. The average income for lawyers in 2001 was approximately €120,000.[39] There is a wide variation within the profession around this average. This variation within the profession is indicated by the median income for lawyers, or the income level that half of those in the profession earn more than and half earn less than, which is approximately €70,000. The fact that the median income is much lower than the average income indicates that a small number of individuals earn higher incomes and a larger group earns lower incomes.[40] This effect is particularly strong for barristers.

2.52 Table 2 provides more detail regarding the incomes of lawyers within different groups, including the proportion of lawyers that earn over €100,000 and over €54,000, which is twice the average industrial wage. Solicitors who are owners or partners of law firms tend to have relatively high income levels, with the majority earning over €100,000. This is evidence that partners or owners are able to obtain "leverage" from the work of their associates by charging for associates' work at higher rates than associates are paid so as to accumulate earnings. Roughly ten percent of owners and partners earn more than €350,000. A small number, most likely part-time practitioners, earn very little.

Table 2: Incomes by Category of Lawyers, 2001

Category	Average income	Median income	% with income over:	
			€54,000	€100,000
All lawyers	**123,339**	**70,228**	**60**	**40**
Solicitors: Owners & Partners	**164,512**	**124,170**	**78**	**58**
Solicitors: Associates	**47,532**	**40,064**	**26**	**6**
Employed Solicitors	**49,755**	**31,759**	**25**	**14**
Junior Counsel	**93,720**	**46,550**	**49**	**32**
Senior Counsel	**270,618**	**225,076**	**82**	**70**

2.53 Associate solicitors tend to earn less than half that of owners or partners. The variation in incomes for associates is high, as associates include newly qualified solicitors as well as experienced solicitors who may be close to being offered partnerships in firms. Employed solicitors tend to earn slightly less than

[38] Average income for engineers and architects are likely to be in the vicinity of €30,000 to €60,000, see Competition Authority professions reports on www.tca.ie. The gross value added per worker in the accounting sector is approximately €20,000 less than the legal sector (€62,000 versus €82,000). This suggests that accountants' incomes are on average lower than those for lawyers.

[39] Source: Revenue Commissioners. Income figures used in this Report were derived from survey data obtained from the Revenue Commissioners. A random sample of nearly 40 percent of all lawyers was used. These figures do not include employed barristers who are not members of the Law Library. Also, the top ten earners from the sample were removed to preserve confidentiality. This means that the figures in Table 2 will slightly underestimate actual figures.

associates, with the exception of a minority who are relatively senior and earn high incomes.[41]

2.54 Junior counsels' average earnings were nearly €94,000 in 2001, although there is a very large degree of variation amongst incomes. One third of junior counsel earn more than €100,000, while the top ten percent earn more than €240,000 per year. In contrast, the median income, or that income level under which half of all junior counsel earn is €46,500 (less than 50 percent of the overall average income). Nearly 40 percent of junior counsel earn less than €30,000 per year, and ten percent earn less than €9,000. This illustrates that, while some barristers do extremely well, others do not earn large amounts.

2.55 This variation in incomes may reflect the inability of barristers to work fulltime as associates for other, more senior, barristers. Table 3 indicates that the incomes of junior barristers are significantly lower in the their early years of practice. In fact half of barristers with less than four years experience earn less than €13,000 per year.[42]

Table 3: Income for junior counsel by years of experience

Experience (years)	Average income	Median income	% with income over:	
			€54,000	€100,000
0 - 3	19,013	12,959	7	2
4 – 6	52,135	25,162	30	13
7 - 9	64,151	43,189	45	19
10 –12	160,256	123,813	73	60
13+	148,631	111,388	74	57

2.56 There is less variation amongst the incomes of senior counsel than other types of lawyers, with the average income of this group being €270,000.[43] Fewer than 30 percent of senior counsel earn under €100,000, with the top ten percent earning more than €600,000 per year.

2.57 Relatively high incomes are consistent with the increase in demand for legal services not being met by an equal increase in supply. This does not prove that competition is restricted, but it is consistent with the existence of restrictions.

[41] The sample size for this category was relatively small. This may make the results for this group less reliable.
[42] Source: Revenue Commissioners
[43] The coefficient of variation for the incomes of senior counsel is 0.85, compared with 1.24 for junior counsel.

Chapter 3: Regulatory Reform

3.1 Chapters 4 to 13 of this Report analyse various restrictions on competition imposed either by statute or by the professional bodies. This chapter examines how the institutional framework itself affects competition within the profession. It concludes that reforming or removing all the individual restrictions on competition identified in this Report will not of itself ensure that future regulation will be effective, pro-competitive and in the interest of clients or the general public. Leaving the existing self-regulatory framework unreformed would allow the future development of other rules and practices that would limit competition, hinder the efficient and innovative supply of services and harm buyers.

3.2 The Authority proposes the establishment of a Legal Services Commission (LSC) with overall authority for regulating the market for legal services, in order to meet the principles of good regulation established by the Government and to address adequately the risk associated with self-regulation.[44] The Authority also proposes the separation of representative and regulatory functions within the profession and the greater involvement of non-lawyers in the regulatory framework. The Authority proposes and seeks comments on two models for reform:

> **Option A:** The Legal Services Commission would have full responsibility for regulation of legal services, including all the regulatory powers and responsibilities currently undertaken by the Law Society, the Bar Council and King's Inns. The Law Society and the Bar Council would retain representative functions.
>
> **Option B:** The Legal Services Commission would have responsibility for the regulation of legal services, but would delegate many regulatory functions to existing and possibly new self-regulatory bodies. The Legal Services Commission would be given explicit authority to make new regulations and would have power to veto the rules of the self-regulatory bodies. These self-regulatory bodies would not be permitted to exercise representative functions.

3.3 In arriving at these proposals the Authority has analysed the legal profession in Ireland and reviewed analysis undertaken in other jurisdictions. The most recent analysis in the UK is to be found in the Clementi Report referred to in Chapter 1.[45] The Clementi Report, having considered two models for reform similar to those proposed here, recommends the setting up of an oversight regulator and the separation of regulatory from representative functions within the self-regulatory bodies. This is the same model as Option B above.

[44] Self-regulation is regulation carried out by members of the profession that is being regulated, whether this is done pursuant to a statutory power or not.

[45] "Final Report of the Review of the Regulatory Framework for Legal Services in England and Wales", Sir David Clementi, December 2004.

The need for regulation

3.4 There are three reasons why it is appropriate to regulate the legal profession:

a) To ensure the administration of justice and the rule of law;[46]

b) To protect uninformed buyers from poor quality legal services;[47] and,

c) To prevent the abuse of market power and other impediments to competition.

3.5 Regulation can serve multiple objectives. For example, rules that seek to ensure that only qualified and expert individuals can supply legal services serve the twin objectives of protecting prospective clients and assisting the administration of justice. Similarly, measures that promote competition, such as advertising, may simultaneously prevent abuse of market power and provide more information to buyers.

3.6 Other regulations serve only one objective. For example, rules that prevent lawyers from misleading judges are necessary to facilitate the administration of justice, but do not relate to the issues of market power or the protection of clients.

3.7 There are a number of specific principles of good regulation that, if met, best ensure the achievement of the above objectives. These principles form a basis for the Government's regulatory policy and are set out in "Regulating Better", a White Paper published by the Department of the Taoiseach.[48] The principles are:

a) Necessity – regulation should only be imposed where it is necessary.

b) Effectiveness – existing regulations should be valid and should be targeted effectively.

c) Proportionality – regulation should be as light as possible given the circumstances.

[46] The provision of a justice system to maintain the rule of law can be considered a public good. The administration of justice and maintenance of the rule of law benefits society as a whole. Because of this wide, external benefit, intervention in the form of public funding and regulation may be regarded as necessary.

[47] For a discussion on the need to protect uninformed buyers of professional services in the presence of asymmetric information see "Indecon's Assessment of Restrictions in the Supply of Professional Services", Indecon International Economic Consultants, March 2003; "Competition in Professional Services", OECD, 2000; "Regulatory Reform in Ireland", OECD, 2001.

[48] "Regulating Better", Department of the Taoiseach, January 2004. This White Paper sets out the core principles that the Government considers should be adhered to in regulatory policy.

d) Transparency – adequate consultation should be carried out with all relevant parties before regulation is imposed.

e) Accountability – regulators should be accountable to those on whose behalf they are regulating.

f) Consistency – regulation should be consistent across regulatory bodies and within particular sectors.

The current regulatory structure

The regulation of solicitors

3.8 The Solicitors Acts 1954-2002 set out the framework for the regulation and education of solicitors in Ireland. Under this legislation, significant powers are delegated to the Law Society, which is permitted to pass regulations governing the conduct and discipline of solicitors, set educational standards and provide professional education.[49] The Solicitors' Disciplinary Tribunal and the President of the High Court also have a role in the regulatory framework. The regulatory role of the Law Society is combined with its non-statutory role of representing the interests of the solicitors' profession. It is also the monopoly provider of solicitors' professional education. Its governing Council is composed entirely of solicitors elected from among its membership. A number of the Law Society's sub-committees, known as Standing Committees, have minority lay person appointees.

3.9 The Law Society is subject to some executive oversight when making regulations. The concurrence of the Minister for Justice, Equality and Law Reform is required for the Law Society to pass regulations governing advertising by solicitors. Other regulations[50] must be laid before both houses of the Oireachtas. The Law Society's regulatory powers are also subject to some judicial control. For example, regulations made by the Law Society to govern how solicitors maintain their financial accounts, must have the consent of the President of the High Court.[51] The Law Society also monitors and controls the behaviour of solicitors through its Professional Code of Conduct, to which solicitors are obliged to adhere.

3.10 Complaints about solicitors may be made either to the Law Society or the Solicitors' Disciplinary Tribunal, or to both. The Solicitors Disciplinary Tribunal has the power to investigate allegations of misconduct against a solicitor either made directly by members of the public or on referral by the Registrar's Committee of the Law Society. The Tribunal can itself impose sanctions or can make a recommendation to the President of the High Court that a solicitor be suspended or struck off. Members of the Tribunal are appointed by the President of the High Court and include a minority of non-solicitors.

[49] Section 71 of the Solicitors Act, 1954 permits the Law Society to make regulations in respect of the professional practice, conduct and discipline of solicitors.
[50] For instance all regulations made by the Law Society pursuant to the Solicitors (Amendment) Act, 1994.
[51] Section 66 of the Solicitors Act, 1954 as amended by Section 76 of the Solicitors (Amendment) Act, 1994.

3.11 Complainants who are dissatisfied with the manner in which the Law Society has handled a complaint may refer the matter to the Independent Adjudicator, who is an appointee unconnected with the legal profession.

3.12 Apart from its regulatory functions, the Law Society is the only provider of professional education for trainee solicitors. The Society's law school is located at the Law Society's headquarters in Blackhall Place in Dublin. The Law Society is permitted by law to grant other providers the right to train solicitors. To date, it has not done so.

The regulation of barristers

3.13 Barristers are wholly self-regulated. There are no statutes or government imposed controls governing their conduct, discipline or education. The Bar Council regulates practising barristers, while the Honourable Society of King's Inns controls entry into the profession and is the monopoly provider of the professional course leading to the degree of Barrister-at-Law ("the B.L. degree"). Only holders of the B.L. degree can be called to the Bar of Ireland and admitted to practise in the Courts of Ireland as members of the Bar of Ireland.[52]

3.14 The Bar Council is comprised entirely of barristers, elected annually from among the members of the Bar. Like the Law Society, it combines its regulatory role with that of representing the interests of its members.[53] The Code of Conduct of the Bar, proposed by the Bar Council and adopted by the Bar in general meeting, governs the conduct of all practising barristers.[54]

3.15 Barristers who wish to engage in practice must, at the time of their call to the Bar, give an undertaking to the Chief Justice[55] to become members of the Law Library. The Law Library, which comprises accommodation in and near the Four Courts in Dublin, provides desk, office and library facilities to barristers in full-time practice, administered by the Bar Council, on payment of an annual subscription fee.

3.16 The Bar Council's Professional Practices Committee considers complaints of misconduct made by one barrister against another. Complaints of misconduct from members of the public and from solicitors about barristers are considered by the Barristers' Professional Conduct Tribunal, which comprises five practising barristers, including a chairman, and two lay representatives; one nominated by the Irish Business and Employers' Confederation (IBEC), and one nominated by the Irish Congress of Trade Unions (ICTU). The Tribunal can impose penalties, including recommending the disbarring of a barrister.

[52] Information taken from the Society's website: www.kingsinns.ie. "The Bar" is a collective expression used to describe all barristers. A person becomes a barrister when he has acquired the B.L. degree and gone through the ceremony known as his "call to the Bar", at which the Chief Justice presides.
[53] Cf. www.lawlibrary.ie
[54] The term "practising barrister" is defined in the Bar's Code of Conduct in a manner that excludes barristers in employment.
[55] The Chief Justice is the presiding judge in the Supreme Court in Ireland

Rationale offered for the status quo

3.17 The Law Society, King's Inns and the Bar Council put forward various reasons why the status quo should be retained. These are summarised here and discussed in more detail below. In essence, the three bodies submit that the current system of self-regulation:

a) Utilises the knowledge and expertise of lawyers who are best placed to understand the workings of the profession;

b) Has the respect of those it regulates;

c) Incorporates sufficient external, independent involvement;

d) Ensures regulatory independence from the State, which is one of the largest buyers of legal services; and,

e) Delivers effective regulation, obviating the need for possibly costly reform.

3.18 The Law Society, Kings Inns and the Bar Council argue that lawyers have a greater knowledge of the profession than non-lawyers and are better qualified to provide superior quality regulation. Specifically, the Law Society argues that information problems can make it difficult for an external organisation to be up-to-date with changes in practices within a profession. The Bar Council has claimed it has the necessary expertise amongst its members to ensure that all of its rules and restrictions take adequate account of potential competition issues.

3.19 All three bodies consider that the present regulatory structure has the respect of legal professionals. This, they say, is valuable because it facilitates acceptance of regulation by those within the profession and may lead to fewer challenges against regulators and their decisions – a not insignificant consideration, given the ability of lawyers to use legal action to dispute and delay regulatory processes. The Independent Adjudicator of the Law Society indicated his support to the Authority of this point.

3.20 The three regulatory bodies agree that there is a need for external, independent involvement in regulation, but say that the existing levels of external involvement are adequate. They argue that in part the current system, particularly in respect of solicitors, is a system of co-regulation rather than self-regulation. The Law Society suggests that its establishment of a non-lawyer Independent Adjudicator to hear complaints regarding solicitors is an example of co-regulation. It points to the regulatory role of the President of the High Court as well as the fact that much of the regulation of solicitors is governed by statute. The complaints and disciplinary processes of the Law Society and the Bar Council incorporate a significant proportion of independent lay people, typically one third.

3.21 King's Inns considers that the members of the judiciary are entitled to have some say in the qualification of barristers, who will ultimately appear before them in their courts. The current system whereby the Benchers of King's Inns, who control entry into the profession, are largely drawn from the judiciary ensures this.[56] The Law Society suggests that other organisations and institutions, such as the Competition Authority, the EU and the media, are also external influences that can reduce the possibility of anti-competitive regulation.

3.22 The Law Society considers that, because the State is one of the largest buyers of legal services, the regulator needs to be independent of the State. If the State had control over the regulation of the profession it could face a conflict in attempting to combine its role of ensuring the administration of justice with that of a buyer of legal services.

3.23 The self-regulatory bodies also maintain that the present structure works well and delivers effective regulation. Reform is unnecessary and would constitute a misuse of effort and resources.

3.24 The Law Society acknowledges that a body that combines representative and regulatory roles has an incentive to act anti-competitively. However, the Society considers that it adequately manages any conflict of interest that arises. As an example of this, it points to the fact it has lobbied for the reform of conveyancing law and for greater sanctions against solicitors who provide poor quality services. It also points to a report commissioned by the Competition Authority, which stated that no evidence could be found that the Law Society's complaints, discipline and enforcement procedures were used in an anti-competitive manner.[57] The recently released Law Society Report on the regulation of the solicitors' profession suggests that its procedures work well generally, though it acknowledges that they could be further improved.[58]

3.25 The Bar Council acknowledges a potential for a conflict of interest in its regulatory role, given that its members are exclusively barristers, but insists that this is not a problem in practice. The Bar Council suggests that the existing regulatory system works well and maintains high standards, and says that this is evidenced by the low number of complaints about barristers. The Council says that under the present system barristers meet all of their obligations to the courts. As a result, providing a statutory basis for the regulation of barristers would not provide any advantages. On the contrary, making the system more formal could introduce delays in regulatory procedures.

3.26 The Law Society points out that external regulation too is subject to shortcomings, including "regulatory creep", i.e. where a regulator seeks to expand its influence and power in excess of what is required for effective regulation. Similarly, there may be less of an incentive on a State regulator to reduce bureaucracy and become more efficient because such a regulator would not be directly answerable to those within the profession in the same way as a representative body.

[56] The Benchers are the governing body of Kings Inns.
[57] See "*Indecon's Assessment of Restrictions in the Supply of Professional Services*", Indecon International Economic Consultants, March 2003, p. 118.
[58] See The Law Society's Regulatory Review Task Force Report, January 2005.

Potential problems with self-regulation

3.27 Self-regulation carries with it the potential for the prevention, restriction and distortion of competition. It facilitates the creation of rules and practices that, while in the interest of the regulated profession itself, may unnecessarily restrict competition and thus not be in the public interest.

3.28 Sometimes a restriction on competition can make both buyers and sellers better off, but it is more usual that restricting competition benefits sellers, harms buyers, and imposes a net cost on society as a whole. For this reason, self-regulation involves an inherent conflict of interest, because if the regulatory body is carrying out its regulatory functions correctly, it would often put the interests of buyers ahead of the interests of its members.

3.29 Under the current system of self-regulation, lawyers have control over how large sections of the market for legal services operate by virtue of their ability to set the rules by which fellow professionals may enter the market and must operate after entry. This is particularly so in the case of the Bar, which has an unfettered power to set rules for itself, in contrast to the Law Society which is to an extent constrained by legislation and by the requirement in certain cases to obtain ministerial approval. But even the Law Society enjoys considerable latitude in regulating, as it has discretion in regard to the enforcement of much of the legislation relating to solicitors. This discretion creates an opportunity for regulation to be enforced in an anti-competitive manner, or at least for delay in undertaking actions that would be pro-competitive.

3.30 A profession-based, self-regulatory approach can also hinder innovation. There is, for example, a strong incentive for those who have succeeded within the existing structure to maintain that structure. A reluctance to promote innovation and accept change may not necessarily be a result of an explicit anti-competitive approach, but may arise as a result of a belief by those in regulatory positions that their own success within the present system of rules and regulations is proof that the system is not in need of reform.

3.31 The combining of regulatory and representative functions together can also hinder competition in the provision for representative services themselves. Representative bodies that also hold a regulatory role have an advantage over new representative bodies attempting to enter the market for representative services precisely because of the higher standing they enjoy on account of their regulatory role.

3.32 Complaints procedures in a self-regulated profession may be perceived by clients and members of the public as being biased in favour of the profession. Any perceived lack of effective discipline on legal professionals is detrimental to the working of the profession, and can adversely affect competition on merits. Effective complaints procedures are needed in order to sanction professionals who provide poor quality services or who charge excessive fees. This is particularly so in the case of lawyers because information asymmetry between clients and lawyers, together with the customised nature of legal services, could enable unscrupulous lawyers to overcharge or to provide substandard quality

services on an ongoing basis.[59] Accordingly, complaints procedures for both barristers and solicitors must be transparent and effective, and to be effective, they must be seen to be independent of the profession.

Evaluation of regulatory structure

3.33 This section evaluates the current regulatory structure in light of the general principles of good regulation and the rationales put forward for the existing structure. In the course of this evaluation, problems that have arisen from the self-regulatory aspects of the current structure are also considered.

3.34 Many of the specific regulatory rules and practices of the Law Society, King's Inns and the Bar Council are necessary and proportionate. These organisations also provide services both to their members and to the public that facilitate the operation of the legal profession and the administration of justice to the benefit of all. For instance, the Law Society is actively seeking to have certain areas of the law reformed where this would reduce unnecessary complexity. It is also proactive in improving its complaints procedures and takes steps to increase public awareness of its complaint process. Both Kings Inns and Law Society occasionally waive educational fees or provide grants for persons unable to afford the full fees.

3.35 Notwithstanding the above, there is a clear need to reform many aspects of the regulation of the legal profession. In many cases the present structure does not conform to the principles of good regulation. The Law Society and the Bar Council have, as has been said earlier, pointed out that the existing system ensures the valuable input of experienced, knowledgeable lawyers into regulation of the profession, and indeed it is vital for the effectiveness of the regulatory structure that the expertise of the legal profession is extensively utilised within it. However, it is neither necessary nor desirable that the profession should *control* the regulatory process, or important facets of it, as is currently the case. Regulation that is both effective and informed can be achieved by the inclusion of a large minority of lawyers within a regulatory body. Such a regulatory body, provided that its reforms are based on the principles of good regulation, would retain the strengths of the current structure while avoiding its weaknesses.[60]

3.36 Self-regulation is profession-focussed, rather than focussed on the services provided, or on the buyers of those services. In the case of a divided profession like the legal profession in Ireland, self-regulation means that each branch of the profession has its own regulator. This causes additional problems, such as unnecessary duplication of regulatory action, complexity with regard to complaint procedures and the lack of a specific public benefit and client assistance focus. Dissatisfied clients may be confused as to which body it is appropriate to complain to, particularly where their complaint arises from the conduct of litigation, in which both solicitor and barrister have a role.

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[59] "Information asymmetry" is a condition in which at least some relevant information is not equally available to all parties involved. In the case of the market for legal services, clients are at a disadvantage because they lack the information necessary to judge whether the service being provided is a good one.

[60] The Legal Professional Advisory Council in the Australian state of New South Wales is a good example of such a body. It consists of a number of representatives of the legal profession and a majority of independent, lay members, including the chairperson. See the Appendix to this Report for more information.

3.37 Independent regulation would engender greater confidence and would attract the respect of clients and of the general public. A regulatory body that is focused more on the buyers of legal services than on the professionals supplying those services would be just as capable as a self-regulatory body of adjusting to changes in the legal sector. Such a body would also be just as able to obtain the respect of the profession.

3.38 The claim that there is sufficient independent, external involvement in the existing regulatory structure is not supported by the facts. While there is certainly external, independent involvement in some regulatory functions, notably in relation to complaints, most regulatory decisions are instituted by the regulatory bodies themselves in the form of codes of conduct and other similar rules.

3.39 An independent regulatory body would not face a conflict of interest with the State in its role as a buyer of legal services. In many other sectors, state-established regulators are able to function independently without interference from those branches of Government that are direct buyers of regulated goods or services. Ensuring that a regulatory body did not contain a majority of representatives from Government purchasers of legal services would prevent any such conflict of interest. Indeed a single regulatory body, set up with clear regulatory objectives and separate from Government departments, should imply a high degree of independence from any Government interference. It would also represent public and client interests in a way that is unlikely to be done by a self-regulatory body.

3.40 Contrary to the claims of the Law Society, Kings Inns and the Bar Council, the current system has not worked well across a range of areas. This is supported by the fact that many of the potential negative effects of self-regulation previously outlined in this chapter have, in fact, arisen. Some examples are:

- The monopoly enjoyed by the professions in the provision of professional legal training;
- Restrictions on advertising;
- Restrictions on direct access to barristers;
- Restrictions on business structures.

3.41 Many important aspects of the current regulatory structure do not adequately meet the principles of good regulation, particularly transparency and accountability.[61] While the objectives of many of the regulatory rules are valid, the restrictions imposed are disproportionate. These disproportionate restrictions are described in detail in Chapters 4 to 13.

[61] Another explanation for this is that, where regulation has been imposed by statute, previous Governments have not had the benefit of applying Regulatory Impact Analysis and the principles of good regulation. These are outlined in "Regulating Better", Department of the Taoiseach, January 2004.

3.42 Where statute has provided the Law Society with discretion to act in certain areas, it has failed to undertake certain pro-competitive actions. For example, the Law Society has the power to license alternative education providers. To date, as further explained in the following chapter, it has not done so nor has it provided the guidelines necessary for prospective education providers to make license applications. The Law Society also has the authority to produce guidelines on advertising for solicitors but has not done so. More detail on this and on advertising restrictions generally are set out in Chapter 9. Similarly, Kings Inns has preferred to retain its monopoly over legal education, rather than extend it to competing suppliers.

3.43 Self-regulation has, in a large part, contributed to the traditional nature of the profession, and of the Bar in particular. The traditions of the Bar have helped facilitate a perception amongst members of the public that the Bar and King's Inns are elitist institutions intimately connected with family background, wealth, privilege and connections. This perception of elitism may no longer be fair or accurate, but it persists among law students as well as the public. Some student representatives have indicated that this has acted as a barrier to some students wishing to become barristers.

3.44 The manner in which regulatory and representative functions are bundled together has also led to dissatisfaction amongst some in the profession. Some solicitors are unhappy with the manner in which the Law Society fulfils its representative role.[62]

3.45 While lawyers are free to form their own representative bodies and some have done so,[63] new representative bodies could find themselves disadvantaged vis-à-vis the Law Society and the Bar Council, whose standing in the profession is higher because of their regulatory roles. The regulatory functions held by the Law Society and Bar Council also provide these bodies with a mechanism of disciplining members of any competing representative bodies. In this way the bundling of regulatory and representative functions may distort competition in the market for representative services.[64]

3.46 The lack of an explicit client-based approach means that the existing regulatory bodies do not have a formal responsibility for, or focus on, providing information and assistance to clients that would facilitate competition. The Irish Financial Services Regulatory Authority is an example of an independent body that along with its regulatory role has a specific consumer protection focus and an explicit responsibility for providing information and assistance to individuals undertaking financial transactions, such as obtaining mortgages, acquiring insurance and making investments. Neither the Law Society nor the Bar Council provides the same degree of information and assistance in connection with the purchase of legal services. People tend to purchase legal services at moments of crisis or great importance in their lives. This, coupled with the fact that involvement in

[62] This dissatisfaction is documented in the Law Society's own Regulatory Review Task Force Report, January 2005. It states that there is a wealth of anecdotal evidence suggesting some solicitors contacted regarding regulatory issues believe the Law Society should focus more on representing its members' interests and not on "making life difficult for them." The report also states that there are a small number of solicitors who are very uncooperative with the Law Society's regulatory procedures.

[63] Other representative bodies include the Dublin Solicitors Bar Association and Southern Law Association.

[64] For a discussion on markets for representative services see The Competition Authority –v– O'Regan and Others, Decision of the High Court (Mr. Justice Kearns) 22nd October, 2004 (subject to appeal).

litigation can be a confusing and stressful experience for many people makes the availability of consumer information in this market all the more important.

3.47 The lack of assistance and information for prospective clients should not be considered as a shortcoming on the part of either the Law Society or the Bar Council. Rather, it is a shortcoming in the overall regulatory structure that does not serve competition and buyers specifically, as well as it should.

3.48 The present regulatory structure, based as it is upon a split profession and having a primarily profession-based approach, also hinders pro-competitive innovation. Some examples of barriers to innovation, discussed in more detail in Chapters 5, 6, 8 and 10, include:

a) Restrictions on business structures, such as the forced separation of barristers and solicitors despite the fact that they are able to perform many of the same tasks;

b) The prohibition on individuals from holding the titles of solicitor and barrister simultaneously;

c) The failure to emerge of any new titles or new forms of legal professional, such as licensed conveyancers; and,

d) Continued barriers to entry for foreign-qualified (non-EU) lawyers.

3.49 The Law Society, which receives approximately 1100 complaints a year concerning solicitors, provides extensive information to clients wishing to make complaints. It has also undertaken reviews of its complaints process that consider how the process can be improved and how public awareness of the process can be increased. A report commissioned for the Competition Authority found no evidence that the Law Society's complaints, discipline and enforcement procedures were used in an anti-competitive manner.[65] Despite this, the complaints systems is perceived by some clients and members of the public as being biased in favour of lawyers and lacking in an adequate degree of public accountability.[66]

3.50 The Bar Council receives fewer complaints. This is possibly due in part to the fact that members of the public do not deal directly with barristers. The Bar Council's complaint process is less transparent than the Law Society's, which may further increase the difficulty of making a complaint.[67] It should not be more difficult for a client to complain about one type of legal service supplier than another. Bringing complaints together into one common framework under the LSC would

[65] See page 118, "Indecon's Assessment of Restrictions in the Supply of Professional Services", Indecon International Economic Consultants, March 2003.

[66] The Competition Authority has received submissions from individuals and organisations expressing dissatisfaction and scepticism regarding complaints processes. This scepticism has resulted in some clients being discouraged from making formal complaints, especially where initial complaints have been met with an unsatisfactory response.

[67] The Bar Council's Code of Conduct has recently being removed from its website, which does not inspire confidence in there being a transparent, clear route for a complainant.

provide a consistent approach as well as simplifying the system and providing a greater perception of independence.

Conclusion

3.51 The structure of self-regulation that governs the supply of legal services has few, if any, of the safeguards needed to protect customers from the inherent conflict of interest that arises with self-regulation. As a result, the regulatory system has failed to promote competition in the interests of customers. As the remainder of this report shows, the current system has resulted in many restrictions on competition that either lack a clear and valid objective or are disproportionate in the sense that the objective could be met by less restrictive means. In many cases, the existing self-regulatory bodies could have taken actions that would have increased competition without any harm to customers but they have declined to do so.

3.52 Minor amendments to the existing self-regulatory structures, and removing all of the current disproportionate restrictions on competition would not be sufficient to guarantee effective competition into the future. As long as self-regulatory bodies retain such extensive discretion over the creation and enforcement of rules and regulations governing the supply of the service, there will continue to be a conflict between the interests of buyers and sellers of legal services, in which the suppliers will be inclined to restrict competition as they have done in the past. For this reason, the Authority considers that external independent regulation of the legal profession is indispensable for ensuring competition in the provision of legal services. The Authority proposes a Legal Services Commission that would undertake this regulation.

3.53 A Legal Services Commission would not necessarily be more costly than the present system. Having a single regulator would eliminate the duplication of the current structure. Funding currently channelled into self-regulatory bodies from solicitors and barristers could be re-directed to the new regulator. Even if there were higher costs, they would likely be associated with a higher degree of transparency and accountability, with attendant benefits. The Clementi Report indicated that the move to an independent regulator responsible for all regulatory functions in the UK would cost approximately the same as the status quo. The Clementi Report also suggests that allowing self-regulatory bodies to retain some regulatory functions subject to the oversight of an independent regulator would be slightly more costly.[68]

[68] These findings may underestimate the true cost of self-regulatory structures. The Clementi Report uses historical cost data which does not measure opportunity costs, such as the voluntary time and effort of lawyers administering regulations. See Appendix 3 of the Clementi Report.

Proposal 1: The Department of Justice, Equality and Law Reform should bring forward legislation to establish a Legal Services Commission. The Commission would regulate both branches of the legal profession. The majority of persons appointed to the Legal Services Commission should be non-lawyers. There are two possible models for the Legal Services Commission:

Option A: The Legal Services Commission would have responsibility for, and would undertake, all of the regulatory powers and responsibilities currently undertaken by the Law Society, the Bar Council and King's Inns. The Bar Council and the Law Society would retain representative functions.

Option B: The Legal Services Commission would have responsibility for the regulation of legal services, but would delegate many regulatory functions to existing and possibly new self-regulatory bodies. The Legal Services Commission would be given explicit authority to make new regulations and would have power to veto the rules of the self-regulatory bodies. These self-regulatory bodies would not be permitted to exercise representative functions.

Questions

Q3a: What practical problems might arise in establishing a Legal Services Commission, as envisaged in either Option A or B?

Q3b: What timeframe would be necessary to establish the Legal Services Commission and to transfer regulatory responsibilities and/or functions from Bar Council and Law Society?

Q3c: Who should be the non-lawyers on the Legal Services Commission? For example, would representatives from the Office of the Director of Consumer Affairs or IFSRA be suitable representatives?

Q3d: Are there other possible models (in addition to Option A and B above) that would achieve the objective of transparently distinguishing representative and regulatory functions and which would also ensure that the regulatory system promotes competition in the interests of buyers of legal services?

Chapter 4: Monopoly Supply of Legal Education

4.1 This chapter describes the entry requirements to the legal professions that restrain competition in the provision of legal professional education and the provision of services by lawyers.

4.2 The Authority finds that the reservation of professional legal education to the Law Society and King's Inns restricts competition. The restriction has the potential to reduce the numbers qualifying as lawyers, increase fees, and diminish the possibility of innovation in teaching methods. The Authority recommends that the proposed Legal Services Commission should regulate the education of solicitors and barristers by setting standards that all educational providers would meet. Until the establishment of a Legal Services Commission, both the Law Society and King's Inns should issue detailed criteria for professional educational standards so as to allow other providers to enter the market.

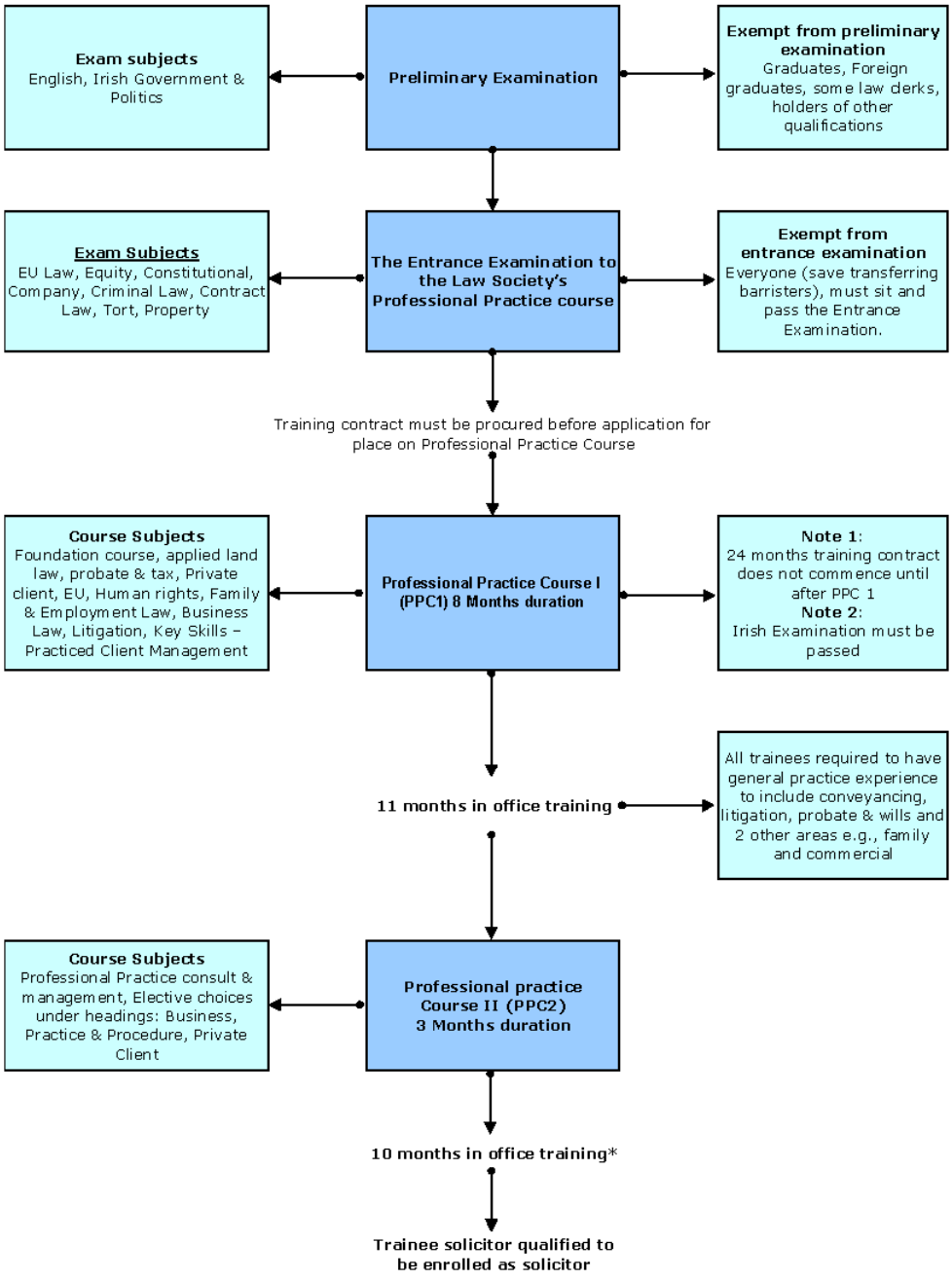
Solicitors

Structure of Professional Training for Trainee Solicitors

4.3 To become a solicitor, a trainee must first pass the Law Society's entrance examination to its professional practice courses.[69] In addition, if the trainee is not a university graduate or does not hold some equivalent qualification, he must pass a preliminary examination before being permitted to sit the entrance examination. Before commencing the professional practice courses, the trainee solicitor must also obtain a two-year in-office training contract with a qualified solicitor. He may then take the 8-month Professional Practice Course I (PPC1) in the Law Society's law school in Blackhall Place in Dublin, before commencing 11 months of in-office training. He returns to Blackhall Place for the 3-month Professional Practice Course II (PPC2), after which there is a further 10 months of in-office training. At the end of this, he is qualified to be enrolled as a solicitor. This is set out in Diagram 1 below.

[69] The majority of trainees will have completed a law degree first, but many will not. Most trainees without law degrees will first take some form of preparatory course to equip them with the required legal background. The entrance examination can be taken by any graduate.

Diagram 1: Solicitor Professional Training



* It is possible to do 4 months in-office before PPC1 in which case 6 months in-office is permitted afterwards

Primary Restraint: The Law Society's Monopoly

Nature of Restraint

4.4 Professional training and education for trainee solicitors, by law, can only be provided by the Law Society and bodies licensed by the Law Society.[70] The Law Society has issued no licences[71] and is the sole provider of professional education leading to the title of solicitor.

4.5 Two distinct markets are affected by this restraint: the education of solicitors and the provision of legal services.

Effects

4.6 A monopoly is the most extreme example of the absence of competition. The Law Society's monopoly in the provision of solicitors' education is thus a serious restriction on competition in the market for the education of solicitors. A monopoly of this kind can have several effects. First, the monopolist may raise prices in order to obtain greater profit from the market. The monopolist may reduce the number of places, to produce a similar effect. Second, the absence of competition removes an important incentive to keep costs to a minimum. For this reason, monopolists tend to be less efficient than competitive firms. In many cases, a monopolist's high prices may be barely sufficient to cover its inflated costs. Third, monopolists tend to be less innovative. A competitive firm that innovates successfully will win business from competitors, a prize that is not available for an innovative monopolist who takes from its own business. Such innovation could include courses tailored to specific areas of law, or offering course outside of Dublin, that could reduce training costs for some trainee solicitors.

4.7 If the education of solicitors were carried out by a monopoly unconnected with the solicitor profession, then all the effects in the previous paragraph would be present. The fact that the educational monopoly is held by the solicitor's own professional body adds an extra dimension and gives an additional incentive to limit competition in the market for education. In other words, restricting competition in the market for education is capable of generating two negative effects: a monopoly in education and reduced competition in the separate market for solicitors' services.

Rationale offered for Restraint

4.8 The Law Society says its objective is to ensure consistency in the standard of education for trainee solicitors. It says that it would have no objection in principle to other institutions providing training courses, so long as arrangements were in

[70] Section 40 of the Solicitors Act, 1954, as substituted by section 49(a) of the Solicitors (Amendment) Act, 1994

[71] The Law Society says, that since it commenced its operations in 1978, it has never received an application from another institution for a licence to provide education and training.

place to ensure commensurate standards.

4.9 The Law Society claims that a central system of examinations would not ensure consistency as the solicitors' training is practice rather than exam focused. The Law Society would be "perfectly happy" to license other providers to provide courses only if such providers could replicate the standards and systems of education and training of trainee solicitors provided by the Law Society.

4.10 The Law Society put forward two other arguments to justify its monopoly. First, it says its system of education is highly cost effective. The Law Society "cannot imagine" that the competition produced by another institution would lower the costs of a trainee solicitor or be "welfare improving". The Law Society is non-profit making and entirely self-financing. It claims that fees that another institution would charge would be higher as such institutions would seek to make a profit. The Law Society also says that any increase in its course fees must be approved by the President of the High Court, which prevents it from increasing fees unreasonably.

4.11 Second, the Law Society says its Law School achieves economies of scale in education and training. The Law Society has access to the 570 or so practitioners who provide their experience to the Law School as a teaching resource.

Analysis of the Competition Authority

4.12 While the Law Society's stated objective of consistency in education standards is valid, achieving this through a statutory monopoly is a disproportionate restriction. In most other common law jurisdictions, there are multiple providers of professional training. For instance, in England and Wales, the Law Society of England and Wales stipulates the standards for training courses for solicitors, which are provided by a wide range of third level institutions. The Central Applications Board administers applications for full-time places on these courses. Individual universities design legal practice courses. While all the courses have to meet the written standards stipulated by the Law Society, they are all unique. This means that there may be some variations in how the subjects are taught and assessed.

4.13 Consistency can be achieved despite a course having a vocational element. Consistent standards are maintained in medicine where there are multiple educational providers and where student and junior doctors are trained in various education institutions and hospitals. There are five medical schools in Ireland: University College Cork, University of Galway, University College Dublin, Trinity College Dublin and Royal College of Surgeons in Ireland. On graduation new doctors works as interns in Irish hospitals or recognised hospitals elsewhere, during which time they receive internship registration with the Medical Council. On successful completion of the internship they are entitled to proceed to full registration with the Medical Council. If this system can work for doctors, and for solicitors in other jurisdictions as shown in Appendix A, it can work for solicitors in Ireland.[72]

[72] See Appendix A: Regulatory regimes in other jurisdictions.

4.14 The two justifications put forward by the Law Society for the monopoly are not supported by any clear evidence and are not accepted by the Authority. First, whether other potential suppliers could provide the course as efficiently is a decision for them, not for the monopoly supplier. Any monopolist has an incentive to claim other suppliers would not be as efficient and no credible evidence has being offered to support this claim.

4.15 Second, a monopoly is not necessary for the Law Society to achieve economies of scale. If it faces competing suppliers there are no barriers to it attempting to exploit any possible economies. If it does so, it should be able to offer a lower cost service than its competitors. There is no credible evidence that allowing other suppliers would prevent the Law Society from exploiting any economies of scale.

4.16 The Law Society's not-for-profit status is not a reason to block other suppliers from entering the market. This status should be a source of competitive advantage in the education of solicitors. There is no reason why its not-for-profit status prevents the costs of monopoly outlined in paragraphs 4.6 and 4.7. Moreover, while the Law Society must have increases in the course fees approved by the President of the High Court, the President of the High Court cannot reasonably be expected to have in his possession all relevant information regarding the costs of providing education. This is a complex process best undertaken by a prospective educator. The President of the High Court's oversight of the Law Society's fees is not an adequate alternative to competition from other providers imposing market constraints.

4.17 The fees charged by the Law Society in recent years are as follows:

Table 4: Law Society Fees

	2001	2002	2003
PPC I	**€4,500**	**€6,100**	**€6,200**
PPC II	**€2,000**	**€3,200**	**€3,410**

4.18 Opening up the market for education could lead to costs incurred by trainees apart from the actual fees falling. For instance, the location of providers outside Dublin may facilitate trainee solicitors deterred by travel and living expenses in Dublin. The location of training courses outside Dublin may also assist firms that want to provide training contracts but require trainees to work part time while on the course.[73]

[9] Firms have to pay trainees the National Minimum Wage while on the second professional course notwithstanding that the trainee is based in Dublin for the duration of the course and hence cannot travel to work part time in the solicitor's office. This is a burden for smaller rural solicitors practices.

4.19 Recent numbers of solicitors qualifying are as follows:

Table 5: Newly qualified solicitors by year

Year	Newly qualified solicitors[74]
1999	322
2000	281
2001	406
2002	321
2003	352

4.20 From submissions made to the Authority, certain third level institutions are willing to provide training services for solicitors and believe these courses would complement their existing legal degrees. They say that their law courses are well supported by the local legal community. They believe that this support would ensure that the tutorial system, which is a feature of solicitors' education, and is reliant on practitioners giving their services, could be replicated in educational centres outside Dublin. Third level institutions have facilities of similar quality to those provided by the Law Society's Law School. Third level institutions indicated that they do not believe that an application for a licence would be favourably received by the Law Society, due to its dual role as regulator and educational provider, and hence had not submitted applications. To submit an application would involve significant preparation on their part, as they would first have to obtain approval for additional funding and facilities. They would not invest time in drawing up proposals without knowing the applicable criteria in advance (which the Law Society has not set out) and without some indication that their proposals would be met favourably.

4.21 Competitive individual institutions could emerge to provide courses concentrating on particular areas of law.[75] This could assist Irish solicitors to compete in the global market for certain legal services. Without competition the Law Society has less incentive to engage in innovative methods of providing education in niche areas or attracting trainees from abroad.

4.22 Another effect of the monopoly is that as the Law Society is the only provider, trainee solicitors must undergo the Law Society's course. This may cover more subjects and areas than necessary. This can increase training costs in the market for education. It is open to question if there is a need for all trainee solicitors to be trained in all areas of law. For instance, trainee solicitors who know that they will be specialising in commercial law will have little use for family law. In addition, the course may include non-legal topics that are not relevant for all trainees.

[74] Numbers do not include foreign solicitors or transferring barristers.
[84] For instance, in England it is possible for trainee solicitors to undergo a particular version of the professional course which has been specifically tailored to the requirements of the top City law firms in the UK.

4.23 An argument against this is that wide training permits solicitors to switch easily from one area of practice to another without additional training. This has a beneficial effect on competition in the market for legal services, as it allows a wide variety of practitioners to provide services in any area, thus limiting any market power of practitioners in any specific area. A second argument is that the trainee solicitor who intends to specialise in one area may be a better lawyer if he has some knowledge of other areas of law, even if these are not directly related.

4.24 It is noted that if the Law Society was to licence other institutions on the basis that these institutions were to provide identical courses to the Law Society, the issue of whether the professional course can be streamlined or tailored to meet specific student demands would not be addressed.

4.25 A related issue is the statutory requirement for a trainee to secure a training contract before the professional practice courses are commenced.. If there are few training contracts, then this can limit the number of solicitors entering the market. In the early 1990s there were difficulties encountered by trainees in obtaining training contracts. From recent views made known to the Authority this appears to be the situation again.

4.26 It is accepted that a training contract is a valuable way for a trainee to gain practical experience. But while a training period is laid down in statute, the Law Society has autonomy to decide the length of time involved, subject to a maximum of two years, which is the length chosen. Common-law countries such as New Zealand, and most Australian states, have much shorter professional training times, and the Authority seeks submissions from interested parties on whether the minimum training period, which would apply to all providers, could be made shorter.

4.27 The number of training contracts appears to be cyclical. In periods of low economic activity the number tends to fall, which can act as a barrier to entry to the profession. One possible solution is to allow trainees to commence the professional practice courses before having obtained a training contract. This could reduce the cost to the employing solicitors of engaging a trainee solicitor, which could increase the number of training contracts available. It could introduce further uncertainty for the trainee, who might expend resources and time on the courses and still not be able to qualify as a solicitor. But this would be a decision of the trainee, who would be free to take on any risk if they wished to do so.

Questions

Q4a: What, if any, aspects of the current structure of the professional education of solicitors could be modified? For example:

Q4b: Could the current curriculum be broadened or narrowed in scope?

Q4c: Could the two-year period of training be shortened?

Q4d: Should trainees be allowed to commence professional practice course I before having obtained a training contract?

Q4e: If the system of regulation focused primarily on legal firms rather than individual lawyers, what impact might this have on the professional education curriculum and on training costs?

Proposal 2: The proposed Legal Services Commission should set standards for the provision of solicitor education. The Law Society should, in common with other providers, be required to apply and meet the specified standards.

4.28 This measure would facilitate entry into the market for solicitors' education and could benefit trainee solicitors who could choose from multiple providers in some instances based outside of Dublin. This would lead to increased places being available and facilitate both trainees and law practices who wish to provide training contracts situate outside of Dublin. While these providers would provide training in certain core topics set by the proposed Legal Services Commission, they could, in response to demand, tailor their courses. For instance, trainees could be taught at weekends or in evenings or could be given additional training in certain legal areas. Increasing the number of providers will lead to increased choice.

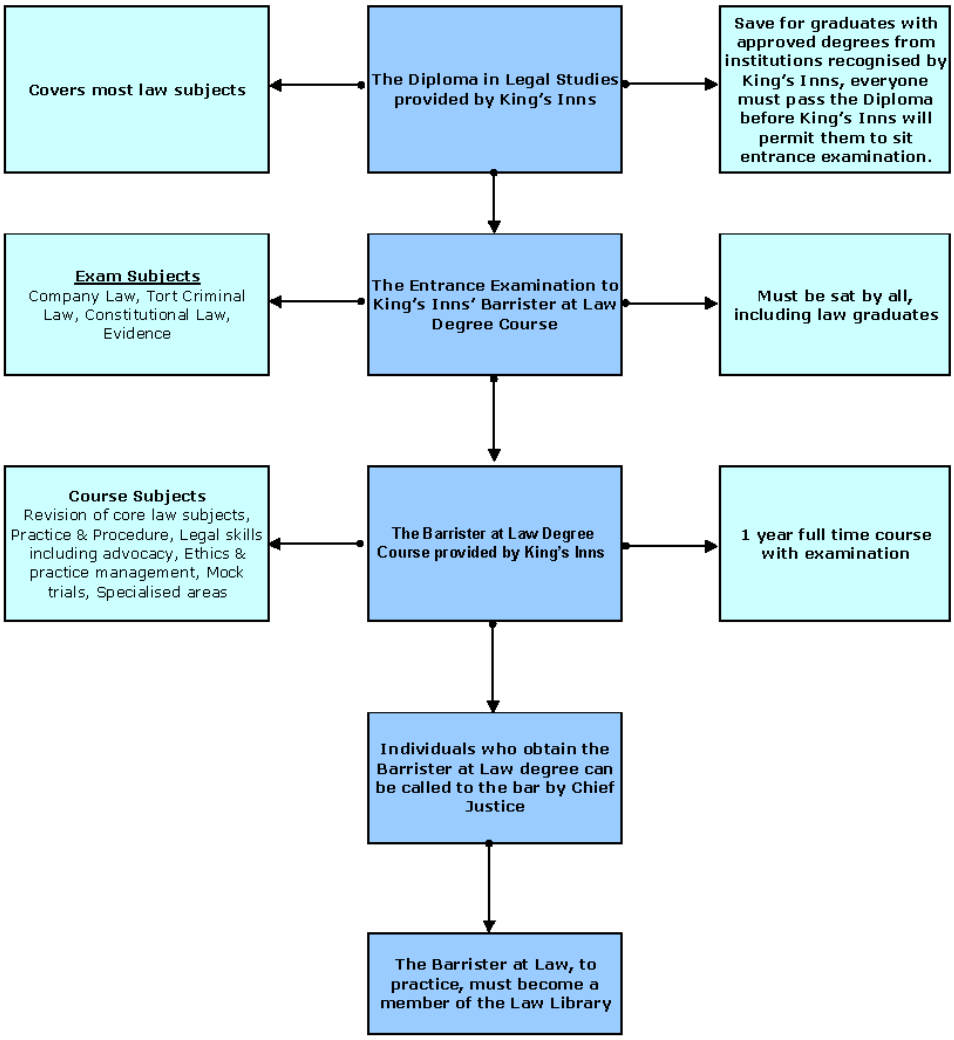
Final recommendation 1

As an interim and immediate measure, the Law Society should, by 30 September 2005, issue detailed criteria pursuant to which it will licence institutions to provide courses.

Barristers

4.29 To become a barrister, holders of approved law degrees must pass the entrance examination to be admitted to the Barrister-at-Law degree course provided by King's Inns. The Barrister-at-Law degree is a pre-requisite to being called to the Bar, and was recently changed from a two-year part-time to a one-year full-time course. If individuals do not hold an approved law degree they must obtain the Diploma in Legal Studies, which is only provided by King's Inns, before they can sit the entrance examination for a place on the degree course. The diploma is taught over two years on a part-time basis.

Diagram 2: Barrister Professional Training



Primary Restraint: The Kings Inns Monopoly

Nature of restraint

4.30 The Honourable Society of Kings Inns ("King's Inns) is the sole provider of the barrister-at-law degree ("the degree"). Only persons who have obtained the degree provided by King's Inns can be "called to the Bar" by the Chief Justice, and formally admitted to practise as a barrister. As the sole provider of the only degree recognised for admission to the Bar, King's Inns controls entry to the barristers' profession. King's Inns' monopoly in the provision of the degree has no statutory basis.

4.31 Two distinct markets are affected by this restraint: the education of barristers and the provision of legal services and in particular advocacy services and the provision of legal advice.[76]

Effects

4.32 A monopoly is the most extreme example of the absence of competition. The Kings Inn's monopoly in the provision of barristers' education is thus a serious restriction on competition in the market for the education of barristers. A monopoly of this kind can have several effects. First, the monopolist may raise prices in order to obtain greater profit from the market. The monopolist may reduce the number of places, to produce a similar effect. Second, the absence of competition removes an important incentive to keep costs to a minimum. For this reason, monopolists tend to be less efficient than competitive firms. In many cases, a monopolist's high prices may be barely sufficient to cover its inflated costs. Third, monopolists tend to be less innovative. A competitive firm that innovates successfully will win business from competitors, a prize that is not available for an innovative monopolist who takes from its own business. Such innovation could include courses tailored to specific areas of law, or offering course outside of Dublin, which could reduce training costs for some barristers.

4.33 If the education of barristers were carried by a monopoly unconnected with the barrister profession, then all the effects in the previous paragraph would be present. The fact that the educational monopoly is held by a body closely connected with the barristers' professional body adds an extra dimension and gives an additional incentive to limit competition in the market for education. In other words, restricting competition in the market for education is capable of generating two negative effects: a monopoly in education and reduced competition in the separate market for barristers' services.

Rationale for the Restraint

4.34 King's Inns did not argue its monopoly was necessary to achieve any specific objective. It did, however, put forward four justifications for the monopoly's existence.

[76] Barristers compete with solicitors in both of these areas, but as Chapter 2 discusses, the vast majority of advocacy work in the Circuit Court and higher courts is conducted by barristers.

4.35 First, King's Inns submits that it performs a quality assurance role in relation to barristers on behalf of the judiciary. This quality assurance function would not work as well if other institutions were permitted to offer the degree.

4.36 Second, King's Inns says that it operates on a break-even basis; funded by student fees and a subsidy from the Bar Council. It claims another educational provider could not provide a similar course for the same level of fees. It further claims that the existence of a second institution might give rise to fee increases, as King's Inns would have to increase the amounts paid to tutors in order to attract them to teach on the King's Inns course. King's Inns suggests that another entrant could lead to both schools driving each other out of business, resulting in there being no provider of the degree.

4.37 Third, King's Inns says that, given the Superior Courts' location in Dublin, a provider of barristers' training would have to source practitioners and teachers from the pool of barristers based in Dublin. It claims that an institution outside Dublin would be unable to provide appropriate training, as it would not have enough barristers available to teach on the course. King's Inns also claims that there is insufficient demand for barrister training to justify a second provider in Dublin or elsewhere.

4.38 Fourth, King's Inns suggests that there would be an increase in regulatory costs if, instead of its monopoly provision of barristers' education, licences were awarded and course standards had to be evaluated across different educational providers.

Analysis of the Competition Authority

4.39 The arguments put forward by King's Inns do not justify the restrictive effects of its monopoly.

4.40 First, King's Inns educational monopoly is disproportionate to the objective it seeks to achieve. It is not accepted that the only way to satisfy the judiciary as to the quality of barrister that appears before them is via monopoly education by the King's Inns. Quality could be assured if the education of barristers was also provided by other institutions. Quality can be controlled by means other than a monopoly; for example, King's Inns or some independent body could establish criteria for courses and examinations as happens in other jurisdictions and in other professions. In England and Wales, for example, four different institutions train barristers.

4.41 Second, whether a competing school could supply at lower cost is not a valid concern for Kings Inns, and is not a justification for blocking entry. As a justification, it is either unnecessary or inherently anti-competitive. If an entrant had higher costs, the restriction would be unnecessary. If the entrant had lower costs, the restriction would reduce competition. Monopoly status is not necessary for King's Inns to provide courses at the lowest possible prices and indeed it reduces the incentive on King's Inns to constrain its costs. There is no evidence that the existence of a second provider of barristers' education would raise costs to students.

4.42 The justification that the amount paid to tutors would increase with competition relies implicitly on the market currently being uncompetitive. Assuming that tutors are currently paid competitive market rates, the demand and rates for tutors could only increase if the overall number of student places increased. Higher output in the education market (i.e., more students) combined with higher input prices (i.e., higher tutor rates) could only occur if either current margins are higher than the competitive level or there is a pent up demand for student places that Kings Inns cannot currently meet. In other words, a new supplier of barrister education would have to generate new student business, rather than simply steal students from King's Inns if it was to generate additional demand for tutors. This would imply a lack of competition in the market at present. There is a second uncompetitive aspect to the justification, and this is that it relies on a shortage of tutors at present. This is, if anything, an argument for greater competition in the education market which would, over time, increase the pool of potential tutors.

4.43 Third, whether there is sufficient demand and sufficient available resources for a course is for a prospective provider to decide. King's Inns' assertions that there is a lack of potential demand and resources[77] do not justify the maintenance of a monopoly. No monopoly should be maintained by the mere assertion that it supplies the market fully, or that competitors could not match its costs. Entry difficulties for other institutions should not prevent them from having the opportunity to design new programmes, provided they meet the appropriate standards.

4.44 Fourth, the regulatory costs associated with King's Inns, or a body like the Legal Services Commission, setting standards for alternative providers are not likely to be high. As long as there are clear guidelines, it should be open to any potential providers to meet them.

4.45 Various problems with the provision of barristers' education illustrate the market failure brought about by the monopoly held by the King's Inns. The number of persons able to train as barristers has been restricted. The Authority received submissions that sub-standard training has in the past been provided, and education costs are high. Low levels of satisfaction among barristers with the standard of training provided by King's Inns have been expressed. King's Inns has itself recognised the lack of quality in its existing course and has substantially changed its degree programme.[78] These restrictions have hindered competition in the market for barristers' services, particularly advocacy services. This is to the detriment of the buyers of legal services and the barristers' profession itself.

[77] Responding to King's Inns point on the difficulty that another provider would have in supplying a second course: there are sufficient numbers of barristers available in Dublin to tutor if a second provider was based in Dublin. There are also barristers around the country, notably in Cork, with numbers increasing. This could provide a solid base of practitioners to act as tutors in any new programme supplied.

[78] The emphasis of the new course will be on teaching practical skills including of course advocacy. While some teaching will be by way of lectures most teaching will take place in small groups of students being taught by barristers who have been trained to provide this tuition.

4.46 Fees charged by King's Inns for its degree course and its diploma course (see next section) are as follows:

Table 6: Fees charged by King's Inns

	2001	2002	2004
Degree Course (total fee)	**€7,000**	**€9,400**	**€10,750**
Diploma (fees per year)	**€3,000**	**€4,000**	**€4,500**

4.47 King's Inns is more limited in space than the Law Society, and its limit on physical space could be reached relatively soon. Although there are no quantitative limits on the number of places, the Education Rules of King's Inns in the past limited the number of entrants on the Barrister-at-Law degree course to 120. King's Inns rules have now been amended so that all persons who pass the Entrance Examination will be offered a place that year subject to teaching capacity. King's Inns say they will be able to accommodate up to 160 students in any one-year and if demand requires accommodate up to 192 students. Rule 36 still permits the numbers to be admitted to the Society's Diploma and Degree courses to be determined from time to time by the Council of King's Inns. A situation where appropriately qualified candidates were prevented from taking the degree would create a significant barrier to entry to the profession.

4.48 Some of those obtaining the Barrister-at-Law degree will not take the call to the Bar. The number of Kings Inns graduates called to the Bar in recent years is:

Table 7: King's Inns graduates called to the Bar

Year	King's Inns graduates called to the Bar
1999	**101**
2000	**105**
2001	**107**
2002	**110**
2003	**126**

4.49 King's Inns new course began in Autumn 2004. The course now runs for one year full-time, rather than the previous two years part-time. This change has led to complaints from those currently studying the preparatory diploma, and from others wishing to do so, that they will be unable to work full-time and do the degree, thus preventing them from qualifying.

4.50 While this change will prevent those working full-time from studying to be a barrister, some will prefer the one-year course. The problem is again that, with only one provider there is no pressure on that provider to offer a variety of course choices to attract students. Another institution might be able to offer modular courses that allow part-time study. This would assist a wider range of individuals wishing to become barristers by increasing flexibility.

Proposal 3: The proposed Legal Services Commission should set standards for the provision of barrister education. Kings Inns should, in common with other providers, be required to apply and meet these requirements.

4.51 This measure may lead to multiple providers of professional training for barristers, which may lead to increased standards and increased numbers of applicants to the Bar. While these providers would provide training in certain core topics set by the proposed Legal Services Commission, they could, in response to demand, tailor their courses. For instance, courses could be held at weekends or in evenings; certain providers provide training in "core" advocacy areas, others in addition to basic training, could provide specialist courses in say, commercial law. Increasing the numbers of providers will lead to increased choice.

Final Recommendation 2

As an interim measure, King's Inns should, by 30 September 2005: -

c) Issue criteria pursuant to which King's Inns will recognise Barrister-at-law Degrees awarded by other educational providers so that other providers can provide Barrister-at- law Degree courses; and,

d) Allow persons awarded such Degrees entry to the barrister profession.

4.52 This recommendation should lead to multiple providers of professional training for barristers, which may lead to increased standards of training and increased numbers of applicants to the Bar. The costs of education for barristers may decrease.

Secondary Restraints: King's Inns' admissions rules

4.53 King's Inns has total discretion in setting its educational requirements. If there were multiple providers of professional education for barristers the Authority would be less concerned with these requirements. Trainees could choose other educational institutions. It is only when market power arises, as it does here, that it is necessary to examine restraints imposed by the provider.

Nature of Restraint

4.54 Save for graduates holding certain law degrees, King's Inns requires all applicants for the Degree course to obtain the Diploma in Legal Studies ("the Diploma") before being permitted to sit the King's Inn's Entrance Examination and gain a place on the King's Inns Barrister-at-Law degree course. King's Inns is the sole provider of the diploma.

Effects

4.55 As the monopoly provider of the diploma, King's Inns can set high fees and potentially restrict the supply of barristers by limiting intake to the Diploma course.

4.56 Due to a lack of market pressure from other competitors, King's Inns has no incentive to minimise its costs in providing the diploma or to develop innovative methods of preparing those with non-legal backgrounds for the degree course.[79]

Rationale offered for the Restraint

4.57 The objective put forward by King's Inns' for its monopoly provision of the Diploma is to assure itself that applicants have an in-depth knowledge of law, beyond the ability to "cram" for examinations. King's Inns submits that it does not want persons to pass the Entrance Examination who cannot then pass the Barrister-at-Law Degree examinations. It submits that this had occurred in the United Kingdom with the result that there were higher failure rates among trainee barristers.

Analysis of the Competition Authority

4.58 The Authority accepts that ensuring adequate knowledge of the law is a valid objective. However, a monopoly in the provision of the Diploma is not necessary to achieve this objective. The Entrance Examination can achieve the objective of ensuring that students have adequate knowledge of the law and the capacity to obtain the Degree.

[79] Submissions made to us suggest it is difficult to get a place on the diploma course and the fees are viewed as excessive.

4.59 Ideally, any person should be able to take the Entrance Examination. It is probable that many would still choose to prepare by taking the Diploma. It is also probable that other educational providers would offer competing courses akin to the Diplomas to students, which would further increase choice for prospective barristers.

Proposal 4: King's Inns should abolish the requirement for persons who do not hold a recognised law degree to obtain its Diploma in Legal Studies before being permitted to sit its Entrance Examination.

This proposal will result in all individuals being permitted to sit the King's Inns entrance examination. It will not prevent King's Inns from continuing to provide the Diploma in Legal Studies. Other providers will also be free to provide legal courses akin to the Diploma.

Chapter 5: Restrictions on Business Structures

5.1 Lawyers in Ireland are subject to restrictions in the way they organise the delivery of their services. This chapter examines issues surrounding four main restrictions. First, the issue of practising barristers as sole practitioners. Second, the prohibition on lawyers using companies as business structures. Third, the rules prohibiting solicitors and barristers from forming partnerships together. Fourth, the restrictions prohibiting lawyers from sharing fees with non-lawyers, which include non-solicitors being precluded from owing law firms.

5.2 The Authority proposes allowing barristers to form partnerships. This will facilitate competition by allowing barristers to choose the corporate form that they find is the most efficient to meet the demands of buyers. It may also make sustainable entry easier. Concerns about compromising the independence of barristers or creating market power are either not justified or can be achieved with lesser restrictions. It is also proposed to allow solicitors and barristers to form partnerships together, which would allow related services to be combined and economies of scope to be realised. There are concerns about limiting smaller clients ability to access the top barristers, but the concerns do not seem sufficiently well-founded to justify the restriction.

5.3 The Authority sees benefits from permitting lawyers to incorporate and multi-disciplinary practices ("MDPs"). MDPs are practices in which lawyers (whether solicitors, barristers, or both) form partnerships with other service providers to provide legal and other services. A total ban on MDPs restricts competition, but problems relating to regulation may result from its removal. For that reason, there is no specific proposal, but instead questions for consultation on whether the ban should be removed and how to address the principal problems that might then arise. There are also regulatory issues arising from legal practices being permitted to incorporate. Submissions are sought on this issue. Finally, benefits from non-lawyers being permitted to own firms that offer only legal services are also identified, and questions for consultation specified.

5.4 The Authority is not suggesting that partnerships of barristers or partnerships of barristers and solicitors, or indeed MDPs, are the best models of business structure for the supply of legal services. There are advantages and disadvantages to each different model. This suggests that no one model is clearly the best and that, subject to sufficient safeguards, all should be allowed to co-exist, giving lawyers and clients the ability to find the most appropriate one for them.

Barristers as Sole Practitioners

Nature of Restraint

5.5 Barristers cannot form partnerships with other barristers.[80] All barristers who are Members of the Law Library (which is necessary for any barrister who wishes to have a right of audience in the Courts) must operate as sole practitioners. Hence, all barristers, who constitute the majority of advocates in the Circuit Court and higher courts, function as single business entities. Barristers are allowed to, and do, share office costs.

5.6 Alternate models of organisation are: (a) Allowing one practising barrister to be an employee of another; (b) A system of chambers such as exists in the Bar of England and Wales, where barristers form groups that share costs (including salary costs paid to new barristers), but do not formally share fee income with each other; (c) Full partnerships, where partners work and share income together, possibly employing other barristers; and (d) Limited liability companies, owned by barrister shareholders.

5.7 The market affected by this restraint is the market for legal services in the State, and, in particular, the market for advocacy services and the provision of legal advice.

Effects

5.8 First, the rule prevents barristers from organising the supply of their services in the most efficient way possible. It prevents potential efficiencies being realised from being able to build shared reputation among professionals and from economies of scale, e.g., in advertising.[81] It can also hinder the efficient allocation of work among barristers with differing skills and expertise. This may mean that the fees charged for services do not relate to the level of service provided. Being able to choose from among a broader range of organisational forms would permit greater efficiency, without impairing the cost effectiveness of the sole trader model that currently exists. Allowing alternative organisational forms would provide barristers themselves with the choice of how to organise the provision of the entire advocacy service for cases; currently only solicitors can put together a team of barristers to argue a case.

5.9 Second, it may act as a barrier to sustainable entry. As detailed in chapter 2, successful entry to the Bar is difficult. Most new barristers have few cases and limited income in their first years; this directly raises the costs of entry for them. The rule prevents barristers being employed by other, possibly more experienced, barristers. Employment would provide these barristers with more certainty of income and might assist them in making contacts in the early years of their

[80] Rule 8.6 of the Bar Council's Code of Conduct states that "A practising barrister cannot form a partnership, group or professional association with any other practising barrister, or give the impression that they are in partnership, group or professional organisation with any other practising barrister". This restriction derives from the Bar's Code of Conduct, most of which is analysed in Chapter 7.

[81] The question of allowing barristers to advertise is dealt with in Chapter 9.

careers. While entry is theoretically possible to all, potential new entrants may be deterred by the difficulties in supporting themselves. The rule thus limits the numbers of barristers who can operate in the market over time.

Rationale offered for restraint

5.10 The Bar Council submits the following rationale for this rule. First, it states that the rule preserves the independence of the Bar, enabling barristers to act freely and without undue influence in the conduct of their business. It states that the requirement to be free from commercial arrangements with any other barrister facilitates this independence. Barristers operate on their own, taking cases on behalf of all potential parties. For example, in one case a barrister may act for the State and in the next against it. The independence of the Bar is considered by the Bar Council to be intrinsic to the administration of justice.

5.11 Second, the rule ensures competition in the provision of advocacy services. The Council argues the rule prevents concentration in the market. Otherwise, barristers would form partnerships and could use any resulting market power to increase fees to clients. For example, if a number of barristers specialising in one area formed a partnership they might "corner the market".

5.12 Third, the rule facilitates the operation of the "cab-rank" rule, which obliges barristers to take any case offered to them, subject to their availability. It was submitted that the cab-rank rule helps the administration of justice by ensuring equal access for all clients to the services of the best barristers.

5.13 Fourth, the rule facilitates barristers providing *pro bono* work, i.e., work undertaken for no fee. The Bar Council says that this practice is facilitated by the sole practitioner rule, as it is solely the decision of the individual barrister whether to engage in *pro bono* cases. Barristers in partnership would be less likely to take on *pro bono* work, as any forfeiture of fees by the barrister would have implications for other partners.

Analysis of the Competition Authority

5.14 The objective of a barrister being free from undue influence is a valid one. It is in the interests of justice that a barrister operate in an independent manner. But the restriction requiring barristers to be sole practitioners is (a) disproportionate to the objective, and (b) does not necessarily guarantee its achievement.

5.15 The independence of the Bar can be ensured in the absence of a prohibition on partnerships and chambers so long as there is a clear and enforceable system of ethical guidelines. Barristers who are part of partnerships or chambers will still be subject to the present Code of Conduct and ethical constraints. The English Bar has a Chambers system, but has at least the level of independence and ethical standards as the Irish Bar.

5.16 There are currently over 1,400 practising barristers in Ireland. Barristers are the main suppliers of advocacy services in the Higher Courts, although that situation may change over time as more solicitors become active in advocacy. The market for advocacy services is not concentrated. If partnerships were allowed, there would be enormous scope for consolidation before approaching levels anywhere near the usual levels of concentration that might harm competition.

5.17 The rationale of preventing concentration has more force if one divides barristers into different sub-markets based on quality and competence. If all the most successful barristers, or a number of barristers who specialise in a specific area, formed a partnership they might be able to raise fees.

5.18 It is unlikely this would happen in practice. The two-sided nature of litigation ensures that one partnership could not take all the high-profile cases, as the plaintiff and defendant could not be represented by the same partnership. There would always be strong incentives for talented partners to break away from a partnership that had market power to take up work that the "dominant" partnership could not take up due to conflict. This potential anti-competitive effect might be more serious in a chambers system, as barristers from the same chambers can act on separate sides of the same case. This is an advantage of the partnership system over chambers.

5.19 Additionally, other barristers could become experts in new areas over time. The Bar Council argues that legal training is broad and prepares barristers in most areas of law. Given this, if current specialists in one legal area form a partnership, other barristers will switch into the area and win business.

5.20 There is no evidence from other common law jurisdictions where partnerships or chambers are allowed that excessive market power has resulted. There is no evidence that the chambers system in the United Kingdom has led to concentration in the market. The Bar of England and Wales is much larger than the Bar of Ireland, but the chambers system operated successfully during periods when the Bar of England and Wales was the same size as the current Irish Bar. Nor has concentration leading to market power being a problem for solicitors, where partnerships are allowed.

5.21 The restriction to sole traders amounts to a ban on all mergers in the supply of barrister services. Mergers can lessen competition but the vast majority do not. Banning all mergers, including the vast majority that create efficiencies, to block the minority that lessen competition is disproportionate, and is not applied in any other sector of the economy. No evidence or reasoning has been presented that shows that a blanket ban on mergers among barristers is a proportionate restriction.

5.22 Overall, although the issue of harmful concentration is important, it is unlikely to happen in practice. Competition law, including merger regulation, counter-acts the harmful exercise of market power by undertakings, including barristers and solicitors. To the extent that a higher level of protection than that offered by competition law is required, sector specific limits on concentration could be used.

5.23 The cab-rank rule does not operate well in practice, as was noted in Chapter 2. Even if it worked well, it could still apply equally strongly to barristers in Chambers. When a barrister is approached, he would still have the same obligation to take a case as he currently has**.** A barrister in a partnership could still follow the cab-rank principle, subject, of course, to the proviso that they could not act for a party in any case in which a barrister in the same partnership acted on the other side. The chambers system would probably be more effective than the partnership model in facilitating the cab rank rule.

5.24 The Bar Council points out a number of important cases where litigants without recourse to funding have been represented by leading barristers on either a *pro bono* or on a no-win-no-fee basis. It is recognised that this occurs, and that it can assist in access to justice. No evidence has been presented to indicate that the level of such work is dependent on the sole practitioner rule, or that such work is particularly common in the State.[82] Indeed, a partnership structure may make it easier to share the costs of doing *pro bono* work.

5.25 There is a difference between work done on a no-win-no-fee basis and *pro bono* work. Many cases are taken by leading barristers on a no-win-no-fee basis. Barristers get paid if they win the case, and no-win-no-fee cases are relatively common and not necessarily indicative of *pro bono* work. Solicitors, who can form partnerships, also engage in such no-win-no-fee cases, so the taking of such cases does not appear to depend upon the sole practitioner rule.

5.26 *Pro bono* work, which is free regardless of the outcome of any litigation, is undertaken by barristers, mainly for Law Centres. Evidence presented by the Bar Council suggests that it is far less common than no-foal-no-fee work. While *pro bono* work is in the public interest, the restriction imposed by the sole practitioner rule is disproportionate, because the stated objectives can be achieved by other, less restrictive means: by giving barristers and solicitors specific incentives or obligations to perform such work, or by broadening the civil legal aid system.

5.27 *Pro bono* work is extremely valuable, but increasing access to justice for those less well-off should be done directly and transparently, not indirectly by allowing restraints on competition to operate to the detriment of other clients. Such restraints raise costs to clients, thus making it more expensive to access legal services and ultimately limiting access to justice.

5.28 In summary, independence can be achieved by an ethical code; excessive concentration seems unlikely to happen and has not proved a problem in other jurisdictions, and if it did, less restrictive measures could be used to prevent it; the cab-rank rule can be retained equally in a chambers system and nearly as well in a partnership system; and *pro bono* work, even if facilitated by the rule, could be encouraged in other ways.

5.29 Allowing barristers to form partnerships and chambers and manage their costs in a collective manner, while accessing the benefits of a collective reputation, could benefit clients. The Bar Council argues that barristers currently have a very low

[82] Other jurisdictions collect evidence on pro bono work in a more systematic fashion. The majority of US State Bar associations collect and publish data on the amount of *pro bono* work done by lawyers.

cost base but, if that is indeed the case, then the sole practitioner model would be more efficient and would not be abandoned. The key point is to allow barristers themselves to choose how best to organise their supply in the market.

5.30 A more flexible organisational system, where new entrants could either work in partnership with established barristers, or work as an employee of more senior barristers, would enable new barristers to have some form of guaranteed income for their first few years. It would also fit naturally into the kind of work junior barristers sometimes do in supporting senior barristers, by drafting pleadings, etc., while allowing experienced barristers to do most of the advocacy in the Courts.

5.31 If a new barrister did not obtain work in a partnership when starting off, this might make it difficult for him to enter the market. However, he would still have the right to operate on his own if he wished. The career path in many occupations, including many other professions such as architecture, engineering and accountancy, is for new entrants to work with senior practitioners at the start to build experience before striking out on their own. Denying this career path to barristers seems incorrect unless there are very compelling reasons.

Proposal 5: The proposed Legal Services Commission should have responsibility for the regulation of business structures for barristers.

Proposal 6: As an interim measure, the Bar should amend its Code of Conduct to remove the sole trader requirement on barristers. The following options to replace this prohibition are put forward:

Option A: The Bar permits barristers to choose their own business structures.

Option B: The Bar permits practising barristers to employ other practising barristers and one or more of the following are also permitted:

- Partnerships amongst barristers.
- A chambers system similar to that in England and Wales.
- Partnerships and/or a chambers system subject to a maximum number of barristers being part of that partnership or chambers.

5.32 These proposals would benefit clients by permitting more barristers to enter the professions successfully, thus offering them more choice. They would also allow potential cost savings to be realised by barristers. An advantage of a chambers system over a partnership is that it would have less impact on the cab-rank rule**.**

As against that, a full partnership would permit greater flexibility in arranging supply[83], and would currently be the Authority's preferred option.

Questions

Q5a: What practical problems could arise in the implementation of Options A and/or B?

Q5b: What reasons, if any, might warrant regulating barrister partnerships or chambers with measures or restrictions in addition to existing competition law?

Q5c: What form, if any, might those restrictions or measures take? For example, what might be a suitable maximum number for partnerships or chambers amongst barristers? Why?

Prohibition on Limited Liability

Nature of Restraint

5.33 A shareholder in a limited liability company, or a partner in a limited liability partnership, has limited exposure to the debts of his company or partnership. His exposure is limited to the amount of his equity interest or shareholding. Lawyers are not permitted to organise legal practices as limited liability companies or limited partnerships,[84] and consequently are subject to unlimited liability for any debts incurred by their legal practice.

Effects

5.35 The restriction precludes lawyers from availing of the advantages of limited liability, such as facilitating the raising of capital, the potential expansion and longevity of the legal practice, and the transfer of ownership interests.

5.36 The restriction also limits the range of potential suppliers, possibly at the expense of innovation and efficiencies. This reduces choice for buyers of legal services.

[83] A partnership system would allow for more logical links with solicitors should the restriction preventing solicitors and barristers working together be lifted.
[84] Solicitors can form partnerships together.

5.37 With specific reference to partnerships, the restriction means that each individual partner is liable not only for obligations arising from their own work, but also for any obligations arising from work undertaken by other partners in the firm. The Law Society submits that the current restriction is unfair as partners are liable for the negligent or fraudulent actions of their partners. Accordingly the Law Society favours amending the restriction to allow limited liability partnerships.

Rationale offered for restraint

5.38 A rationale for requiring unlimited liability is that limits on liability are not consistent with lawyers' professional obligations to clients. Unlimited liability provides a signal of professional integrity and buyers of legal services may place a value on, and expect, their lawyer to be personally liable in case of loss.

5.39 The restriction also precludes lawyers from using a corporate entity to evade personal professional obligations. This would not be consistent with requirements for lawyers to be subject to individual sanction and discipline.

5.40 Incorporation may not preclude individual lawyers from being subject to sanction. First, it is already possible to lift the corporate veil in cases of misconduct.[85] Second, notwithstanding incorporation, individual lawyers could remain subject to individual professional regulation and sanction. Third, the Companies Act provides sanctions against directors who do not comply with the Companies Acts.

Analysis of the Competition Authority

5.41 The Authority has not received submissions from legal practitioners that the prohibition on incorporation prevents or limits their expansion or restricts or increases the costs of access to capital. For this reason the Authority has not reached a view on whether the prohibition on limited liability is a proportionate restriction. Submissions are sought on the questions set out in the section on non-lawyers owning law firms.

5.42 Limited liability could assume greater significance if MDPs or legal practices owned by non-lawyers were permitted. Whether the regulation of firms, rather than individuals, would be appropriate for MDPs is examined further in this chapter.

[85] For instance, directors can be made personally liable in the case of fraudulent or reckless trading.

Solicitor and Barrister Partnerships

Nature of Restraint

5.43 Barristers and solicitors cannot form partnerships together. This restraint arises from Sections 59 and 64 of the Solicitors Act, 1954, which state that a solicitor cannot share fee income with a non-solicitor. While a solicitors' practice may employ a barrister, he cannot become a partner in the firm. The Bar Council's Code of Conduct also prevents a practising barrister from working in a solicitor's office.

Effects

5.44 The restriction limits the ability of lawyers to supply services through potentially more efficient forms of organisation. First, it prevents economies of scope, where the cost of producing two services together is less than the cost of producing them separately. Having a "one stop shop" for legal services could lower the transaction costs incurred in having advocacy services sub-contracted to external barristers, thus allowing the integrated firm to offer joint services to the client at a lower rate.

5.45 Second, having the majority of advocates in a separate organisational form from other providers of legal services, may limit the capacity of providers to find new and innovative methods of offering legal services to clients. It seems unreasonable that a barrister, who is a specialist in advocacy, should not be permitted to work with a solicitor, who is an expert in conducting litigation. Allowing them to work together should provide a more efficient, innovative way of delivering services to clients.

Rationale offered for restraint

5.46 First, both the Bar Council and the Law Society argue that barristers are more likely to give independent advice if they are separate from solicitors. It was submitted that if a barrister were in partnership with a solicitor, he might not give disinterested advice in the client's best interest when asked to comment, as he would be influenced by the desire to keep the case within the firm. Someone at one step removed from the client might be better placed to give advice which the client might view as "bad news" and be heeded.

5.47 Second, the rules facilitate competition in the market for solicitors' services and help access to justice. Small firms of solicitors based outside Dublin can, and do, obtain access to high-quality advocates. This ability to access top advocates facilitates competition among solicitor's firms and is particularly beneficial for clients based outside Dublin. Such clients can go to their local solicitors, who may charge lower fees than the larger firms, and be more suited to their needs. A small local solicitor will have the same access to top barristers as a large firm, allowing small solicitors to compete with larger solicitors' practices. If solicitors and barristers could form partnerships the larger solicitors firms would start

forming partnerships with or employing more barristers, leading to fewer barristers being available to provide services to smaller firms.

5.48 Third, the rules reflect a natural distinction between the functions of barristers and solicitors. Barristers predominantly advocate in court, while solicitors need to be available to clients in their practice. Barristers' low overheads would be removed if they went into partnership with solicitors, to the detriment of clients.

Analysis of the Competition Authority

5.49 The objective that advice given by a barrister be independent is valid, but the restriction on partnership with solicitors is disproportionate. The requirement to give independent and impartial advice is best ensured by a strict ethical standard for both barristers and solicitors. The restriction is thus not necessary to achieve the objective nor is there any evidence that it is necessary. Indeed, it may not even achieve the objective as a barrister asked for advice would have as great a commercial incentive to give advice to promote his own economic interest as would a barrister working for a firm.

5.50 Given that both barristers and solicitors have full rights of audience in court[86] there is no reason for distinguishing between them. All lawyers have a duty to the court and to their clients. Barristers already work in solicitors' firms where they can advise clients, but cannot become partners in the firm. If an opinion from outside the solicitor's office is wanted, it can be sought, and if there is a particular value in external opinions, there will be a demand for barristers to remain independent to provide such opinions.

5.51 The objectives of ensuring access to justice and competition in the market for solicitors' services are valid ones. Client access to small firms of solicitors based round the country facilitates local competition for legal services, and that local competition is further strengthened by the knowledge that a top advocate can be sourced if the case goes to court. If all the most capable advocates worked for large, city-based firms, rural clients would have to approach such firms, which would be more costly for them, and which would potentially limit competition in the initial market for legal services.

5.52 It is unlikely that top advocates would base themselves in small rural firms. While the Authority does not see any reason for protecting small firms from competition, it accepts that a wide spread of firms facilitates access to justice and local competition. The question is whether allowing barrister/solicitor partnerships would lead to a significant number of top advocates joining large firms of solicitors leading to a reduction in the supply and quality of advocacy services for other buyers.

5.53 While some top advocates might join firms of solicitors, there is no evidence that a large number would, as the incentives to join would be limited. If a significant number of small solicitor's firms could not find top advocates, it would make

[86] Barristers currently cannot initiate proceedings on behalf of a third party, but Chapter 13 recommends that this restriction be repealed.

commercial sense for advocates to remain in a situation where they could supply such services. If demand for independent advocates services is strong it will be satisfied.

5.54 Large law firms would be unlikely to employ a large number of the top advocates. Such firms do engage in litigation, but the majority of their work is not litigated. They currently source advocates when they need them, yet their total demand for advocacy services is only a fraction of the total demand for such services. That demand is unlikely to grow; consequently, if they decide to employ advocates directly they would only employ a sufficient number to satisfy their current demand. They may also prefer the variety of choice of advocate that the current system offers.

5.55 Data supplied by the Revenue Commissioners on legal incomes shows that the average income for top advocates is commensurate to, indeed generally higher than, partners in large solicitors' firms. Although it appears unlikely that advocates would join a commercial arrangement that involved a reduction in their income, there are other considerations apart from income, such as job security and pensions.

5.56 Evidence from abroad indicates that when barristers and solicitors are allowed form partnerships, many choose not to do so. In the majority of Australian states, barristers may join solicitors' firms. But a voluntary independent Bar has been maintained in most states, and, if it is an efficient model, it is likely to be maintained in a similar form here.

5.57 The justification of the rule in terms of reflecting natural distinctions between barristers and solicitors is not valid. Barristers do indeed function in different ways from solicitors and their overhead costs are lower than those of solicitors. If such arrangements are natural and efficient, they will remain so even if the restriction is removed. If barristers' modes of practice are such that their costs are lower, they will retain their current modes of operation, and these lower costs will ensure that this efficient model survives. If the objective is to ensure an efficient cost base for legal services, then this objective will be realised naturally without any rules being required.

5.58 Overall, the restriction is not necessary to achieve independent advice, nor to ensure an efficient cost base. The restriction may help to ensure a ready supply of top advocates to smaller firms of solicitors. But there are strong reasons for believing that a sufficient supply of advocates would still be available. There is also evidence from abroad, along with domestic income data, which indicates that it is likely that most specialist advocates will not join large firms of solicitors. The current rules are not proportionate to achieving the objective of access to justice and strong local competition, and we suggest they could be modified or removed.

Proposal 7: The Department of Justice, Equality and Law Reform should introduce regulations, as permitted by Section 71(1) of the Solicitors (Amendment) Act, 1994 to permit solicitors to share fee income with barristers. In anticipation of this the Bar and Law Society should amend their respective Codes of Conduct to permit barrister and solicitor partnerships.

Questions

Q6a: What implications, if any, might arise for the supply of legal services.

Q6b: What factors, if any, might warrant the use of measures in addition to existing competition law to regulate barrister and solicitor relationships?

Q6c: If restrictions additional to existing competition law, and specific to barrister and solicitor relationships, were to be established, what might be the form of those restrictions?

Multi-Disciplinary Practices

Nature of restraint

5.59 Neither solicitors nor barristers can form partnerships with non-lawyers. Rule 7.14 of the Code of Conduct for the Bar of Ireland prohibits such partnerships, as do Sections 59 and 64 of the Solicitors Act, 1954.

5.60 Section 71 of the Solicitors (Amendment) Act, 1994, permits the Law Society to allow fee-sharing between solicitors and other professions provided that the Minister for Justice and, in the event of regulations being proposed, the Minister for Enterprise, Trade and Employment, have consented. No such regulations have been made.

Effects

5.61 The prohibition on the formation of multi-disciplinary practices (MDPs) prevents economies of scope. It prevents small to medium-sized professional service providers from catering for clients who have a set of inter-related needs, and from integrating their supply with providers of complimentary services. Such economies of scope should result in lower costs to clients.

5.62 The prohibition also limits the ability of clients to benefit from a "one stop shop". One provider could supply a variety of services to a client, saving the client extra search and transaction costs.[87]

[87] This is known as there being complementarities in demand.

5.63 The prohibition also hinders innovations which might otherwise result from the combination of different services, which could allow for new products or services to be offered to clients.

Rationale offered for restraint

5.64 First, both the Bar Council and the Law Society say that the objective of the prohibition is to ensure the proper, independent practice of the profession, free from undue influence.

5.65 The Law Society stresses that it does not object to MDPs, where members of another discipline, such as economists, might be employed in a solicitor's firm. This happens already. Their objection is rather to partnerships between lawyers and other professionals, where members of another discipline share the profits with lawyers.

5.66 Second, both bodies point out the difficulties involved in regulating MDPs. A legal regulator clearly cannot regulate non-lawyers.

5.67 Third, the Law Society and the Bar Council also underline the possibility of anti-competitive effects due to the large size of firms of, for example, accountants, and the possibility of anti-competitive bundling.

Analysis of the Competition Authority

5.68 The objective of ensuring that legal practice is conducted to the highest ethical standards, free from all undue influence is a valid one. The question is whether a total ban on MDPs is necessary to ensure this.

5.69 In examining this issue, the Authority has had regard to the judgement of the European Court of Justice in the *Wouters* case.[88] The issue in question in that case was whether a ban on one particular type of MDP, that between lawyers and accountants, was justified. The Court held that the ban was proportionate in the particular circumstances because the accountants' profession in the Netherlands was not subject to the same requirements of professional conduct as was the Netherlands Bar. This imbalance entitled the Netherlands bar to consider that those of its members who entered a partnership with accountants might no longer be in a position to advise and represent their clients independently.

5.70 MDPs comprised of lawyers and other disciplines would make it possible to offer a wider range of services, particularly to business clients, who would be able to turn to one provider for a range of the different services necessary for the organisation, management and operation of their businesses. A total ban on MDPs is therefore liable to limit production, technical development and customer choice.

[88] Case C-309/99, J.C.J. Wouters and Ors v Algemene Raad van de Nederlandse Orde van Advocaten, Judgment of 19 February, 2002

5.71 Next, as pointed out by Advocate-General Leger in his Opinion in *Wouters*,[89]

> *"..clients would be able to turn to a single structure for a large part of the services required for the organisation, management and operation of their businesses. They would, as a result, obtain services which were better adapted to their needs since the structure would possess overall and in-depth knowledge of their policies (commercial policy, sales strategy, personnel management, etc.) and the difficulties they encounter. In addition, clients ought to be able to save both time and money. They would not themselves need to coordinate the services offered by the […] professional categories […] and could simply communicate to just one person all the information necessary for handling their business*."

5.72 The general analysis carried out by the ECJ in *Wouters* is of particular relevance to our analysis here. While pointing out the fact that "unreserved and unlimited" authorisation of MDPs might increase concentration in the generally un-concentrated market for legal services, the Court goes on to say that in so far as the preservation of competition could be guaranteed by less extreme measures than a prohibition on any form of MDP between lawyers and accountants, such a prohibition is restrictive. This argument must be all the stronger when the prohibition, as in Ireland, extends to MDPs between lawyers and any other profession.

5.73 The judgment in *Wouters* did not address all the difficulties that have to be considered when analysing whether a total ban on MDPs is justified. Sir David Clementi, in his recent report[90] on the regulation of legal services in England and Wales ("the Clementi Report"), identified the issue of regulatory reach as a fundamental one. He points out that even if a legal regulator were to be established, that regulator could have no jurisdiction over services provided outside the legal sector. He would therefore have to enter into agreements with other regulators wherever appropriate, and this might include deciding on a "lead regulator", who might be the regulator of the profession that was in the majority in a given MDP.

5.74 As the Clementi Report points out, the situation is more complicated when no one profession is in the majority in an MDP. One could still have a "lead" regulator, but the direct control exercised in that case might be only over a minority of the business. Regulation targeted at firms as a whole, rather than directly regulating all practising individuals within firms, could also provide a potential solution to regulatory problems. Firm-level regulation, where the firm, or one individual within the firm, is responsible for meeting all necessary regulatory requirements could have an additional benefit of reducing the overall regulatory burden.

5.75 Another problem identified by the Clementi Report is how legal professional privilege can be protected in circumstances where other members of the partnership are not bound by it, and what assurance can be given to clients as to when they are protected by it and when they are not. Clementi points out that ring-fencing the legal part of the practice by, for example placing the legal

[89] Case C-309/99, J.C.J. Wouters and Ors v Algemene Raad van de Nederlandse Orde van Advocaten, Opinion of Advocate-General Leger, delivered 10 July, 2001

[90] "Final Report of the Review of the Regulatory Framework for Legal Services in England and Wales", Sir David Clementi, December 2004.

services business into a separate entity, while possibly providing a solution to this problem, in reality will result in a legal practice that that has common ownership with a non-legal practice, rather than in a true MDP.

5.76 On the issue of some anti-competitive effects arising might arise from MDP's, this does not of itself justify a total ban. Competition law exists to counter such effects. In any case, anti-competitive bundling typically only occurs when a firm has a dominant position in a market.

5.77 The benefits that could result from MDPs would be considerable. On balance, while the Authority does not believe that a total ban on MDPs is justified, it recognises the very real problems that the concept poses for the legal profession. One possible solution might be to allow limited forms of MDPs with bodies whose ethos is close to that of the legal profession, as happens in the Netherlands.[91]

Questions

Q7a: What practical problems or issues, in addition to those identified above, could arise to hinder the establishment of Multi Disciplinary Partnerships?

Q7b: What practices or regulations would be necessary and/or sufficient for Multi-Disciplinary Partnerships to operate without affecting legal professional privilege?

Q7c: How might regulation of Multi-Disciplinary Partnerships be more effective if the system of regulation focused primarily on firms rather than on individual lawyers (and other professionals) within firms?

Non-lawyers owning a law firm

Nature of restraint

5.78 Non-lawyers cannot own or shareholders a law firm. This is a different issue from that considered in the above section on multi-disciplinary practices. The issue here is not whether lawyers should be permitted to offer services in combination with non-lawyers, but whether firms offering purely legal services should be allowed to be owned by non-lawyers.

[91] The Netherlands Bar, while prohibiting MDPs between its members and accountants, allows its members to form MDPs with notaries, tax consultants and patent agents

Effects

5.79 The restriction can limit economies of scale and serve as a barrier to expansion by potentially limiting the available sources of capital for a law firm. Currently entry or expansion by a law firm must be financed by the partners in the firm. Allowing non-lawyers to own all or part of a legal firm would permit new sources of access to capital, which could increase capacity and lead to a fall in prices.

5.80 The restriction also limits the introduction of innovative methods of supplying legal services to client, for example via limited liability companies. New owners could bring better business methods and new ideas as to how to offer services in a client-friendly fashion.

Rationale offered for restraint

5.81 The main justification offered for the restriction is that it is necessary to achieve the objective of client protection. Non-lawyers are not bound by the same duties of independence, confidentiality and the interests of the client as lawyers are. Owners who are not lawyers might, it is submitted, be able to put pressure on the lawyers within the firm to act without reference to these duties, to the detriment of clients.

5.82 It was submitted that outside owners might have a financial stake in the outcome of a particular legal issue, which would compromise the core value of independence and result in pressure being put on lawyers in a firm to act in a manner inimical to client's interest.

5.83 It was suggested that some non-lawyers might not be fit people to own a legal firm, and that by their very nature they could manipulate and potentially mis-appropriate client funds.

5.84 It was also suggested that it would be difficult to regulate such entities, and that the regulatory protections necessary for the proper practice of the legal profession would not be met.

Analysis of the Competition Authority

5.85 The objective of client protection is a valid one. However, the Authority does not view the restriction as proportionate to achieving this. Lawyers owe the same duties to clients regardless of who owns the firm that employs them. They should fulfil such duties in the same manner.

5.86 The Authority does not accept that the commercial incentives faced by lawyers are different from to those faced by non-lawyers. There is no reason to believe that non-lawyers would be more commercially motivated, or that they would put extra pressure on their employees to breach their duties to clients. At present there are no prohibitions on solicitors holds shares or having outside commercial

interests. This does not appear to have presented problems. Non-lawyer owners of legal practices would not face the sanction of disbarment that applies to lawyers, but equivalent other sanctions exist or could be put in place. For instance, if non-lawyers were able to own firms through a company structure, the Companies Acts provide sanctions to cover a range of offences in connection with the management of companies by directors and shadow directors. If these sanctions are not sufficient to address the specific problems that might arise in the case of legal companies owned by non-lawyers, it should be possible to address this by specific legislative amendments.

5.87 There may be other ways to address this problem without a complete ban on non-lawyer ownership. For instance, there could be a Head of Legal Practice who was required to be a lawyer, and/or a majority of the managers of the firm could be required to be lawyers.[92] All lawyers in the firm would be subject to their present Code of Conduct.

5.88 The suggestion that a non-lawyer owner could have an interest in the outcome of a legal issue was considered. The solution would appear to be specific proposals to deal with this rather than a complete ban. For instance, a legal practice with non-lawyer owners could be prevented from taking on a case where the owner has a commercial interest, or the law firm could be required to declare all interests.

5.89 Some people may not be fit to own a law firm, but this should not ban all non-lawyers from being owners of legal practices. Reasoned and transparent criteria setting out who is fit to run a firm could be set out by the proposed Legal Services Commission.

5.90 Regulation of a law firm owned by non-lawyers should not be more difficult than regulation of a firm owned purely by lawyers. The actual services offered by the firm are the same in each case, and the proposed Legal Services Commission would be the appropriate body to regulate this. As discussed in the previous section on multi-disciplinary practices, regulation could focus specifically on regulation of the firm itself and the service it offers rather than of the individuals within it. The owner of the firm could be subject to sanction through the Companies Acts.

5.91 Relaxing the restriction could permit greater access to capital and allow for increased owner and manager competence in efficiently running a business. These efficiencies should be passed on to buyers. Concerns about conflicts can be resolved by more proportionate controls than a complete prohibition on non-legal ownership. The Authority urges respondents to give further thought to specific resolutions of any of these issues.

[92] The Clementi report addresses similar issues, and some suggestions are taken from it.

Questions

Q8a: What practical problems, if any, might arise if barristers and/or solicitors were permitted to form limited liability companies?

Q8b: What practical problems, if any, might arise if non-lawyers were able to own law firms, as a partial or full owner, and either in a partnership or a limited liability company? Would there be an impact on the quality or cost of legal services?

Q8c: If non-lawyers were allowed to have an ownership stake in law firms, what controls, if any, would be required in addition to existing competition law?

Q8d: Should regulation be different for lawyer owned and non-lawyer owned firms? If yes, why?

Q8e: Would the proposed Legal Services Commission together with the Companies Acts be sufficient to ensure appropriate regulation of firms?

Chapter 6: Restrictions on Holding Dual Titles

6.1 Lawyers in Ireland are either solicitors or barristers. While it is possible to move from one profession to the other, a person who voluntarily chooses to undergo further training so that he is qualified as both a barrister and a solicitor cannot use the titles of solicitor and barrister simultaneously. This chapter describes and analyses the restriction and finds that it is unjustified, is adversely affecting competition between the professions and is to the detriment of buyers of legal services, and makes a proposal for reform.

Nature of Restraint

6.2 Lawyers are prevented from using the titles of both solicitor and barrister simultaneously. A solicitor wishing to become a barrister is required to first have his name removed from the Roll of Solicitors.[93] A barrister wishing to become a solicitor must first procure his disbarment[94] (i.e., cessation of his membership of the Bar) or alternatively he will be disbarred.[95]

Effects

6.3 First, a prohibition on holding both titles restricts competition for clients between solicitors and barristers.

6.4 Second, while solicitors can conduct litigation on behalf of clients in the higher courts in the same manner as barristers, solicitors tend not to do so and instead engage barristers for this service. The prohibition on holding both titles may be a factor deterring solicitors from providing one-stop shop services, as it deters solicitors from advocating in court without the title barrister. This in turn reduces choice for clients.

6.5 Third, the restriction deters lawyers switching between the professions of solicitor and barrister in response to changes in demand or supply.

Rationale offered for Restraint

6.6 The Law Society has stated that its main objective in upholding a divided profession was to maintain the core values of the solicitors' profession. It has argued that conflicts of interest are more likely to arise if a solicitor has a dual

[93] Rule 24(b) (2) Education Rules of the Honourable Society of King's Inns (October 2004 edition). Solicitors who have been in practice for 3 years can be admitted to King's Inns and called to the Bar provided they cease to act as a solicitor and have their name removed from the Roll of Solicitors at least 3 months before being admitted to the Inns. Solicitors who have been in practice for less than 3 years must undertake King's Inns Education Course.

[94] Section 43 of the Solicitors Act, 1954 as substituted by section 51 of the Solicitors (Amendment) Act, 1994 provides that to avail of the abridged transfer provisions from the barristers to solicitors professions, a barrister of three years standing must first procure his disbarment.

[95] Rule 8.11 (a) of the Code of Conduct of the Bar of Ireland.

role and that the administration of justice would not be best served if litigation was not prepared by two separate lawyers with differing specialities.[96]

6.7 The Law Society also submitted that the separation of the legal professions allowed more effective monitoring and regulation of professional conduct by the Law Society and the Bar Council.

6.8 A third point made by the Law Society was that the current demarcation between solicitors and barristers reflected the natural distinction between their functions, and may be the most cost efficient structure; barristers predominantly advocate in court, while solicitors need to be available to clients in their practice.

6.9 Finally, the holding of dual titles would of necessity involve direct access to barristers. The Bar Council's objective in maintaining the general prohibition on direct access and the Authority's analysis of this objective, is examined in Chapter 7. Both the Law Society and the Bar Council, in the context of putting forward views on maintaining the distinction between the two professions, highlighted their concern that changes to the current structure might cause reduced access to barristers. These arguments are addressed in Chapters 5 and 7.

Analysis of the Competition Authority

6.10 The preservation of lawyers' core values, namely, the duty to act for clients with complete independence, to avoid all conflicts of interest and to observe strict professional secrecy, is a valid objective. The restriction on holding dual titles is, however, disproportionate.

6.11 Whether a lawyer holds the title of barrister, the title of solicitor, or both together, his core values and professional obligations will be those outlined above. The rules of conduct for both solicitors and barristers, while differently worded, impose similar obligations upon both professions. Lawyers are neither more nor less likely to be in breach of these obligations by virtue of the fact that they hold two titles simultaneously. The best method of ensuring that lawyers achieve the objective outlined above is the imposition and monitoring of strict ethical standards.

6.12 The question of which professional body should regulate a lawyer holding dual titles can be complex, but would be answered by the establishment of the Legal Services Commission proposed in Chapter 3. In the meantime, a person who holds both titles could be subject in the exercise of his functions to the control of both professional bodies, so that the stricter rule would apply for any particular function. Alternatively, an individual with dual titles could be regulated solely by the Law Society.

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[96] The Law Society's views were made in the context of seeking the Law Society's views on alternative structures, for instance fusion, rather than dual titles being held by lawyers. Arguments were put forward in this context addressing issues such as choice and concentration: these arguments are addressed in Chapter 6: Restrictions on Business Structures

6.13 If, as the Law Society submits, the current structure is the most efficient, there will be little incentive for persons to undergo additional training in order to acquire a dual title. Matters will remain as they are. However if a barrister is engaged, not due to efficiencies, but rather due to an uninformed client wanting someone with the title "barrister", permitting dual titles may permit greater choice for buyers. This could also reduce costs as one lawyer holding both titles can be engaged rather than two separate lawyers.

6.14 Permitting lawyers to hold dual titles may assist the establishment of highly specialised sole practitioners and legal practices that concentrate in certain areas of contentious litigation, for instance construction law.

Proposal 8: King's Inns should abolish Rule 24(b) (2) of its Education Rules, thereby removing the requirement for a solicitor to remove his name from the Roll of Solicitors before being admitted to study at King's Inns.

Proposal 9: The Bar should abolish rule 8.11(a) of its Code of Conduct, thereby allowing barristers to simultaneously hold the titles of barrister and solicitor.

Proposal 10: The Department of Justice, Equality and Law Reform should introduce legislation to amend section 51 of the Solicitors (Amendment) Act, 1994, so that barristers, who have not disbarred themselves, can still avail of the abridged transfer provisions, to the solicitors' profession.

Chapter 7: Direct Access and Restrictions on Barrister Practice

7.1 This chapter describes those rules of the Bar Council's Code of Conduct that have the potential to prevent, restrict or distort competition in the market for the provision of legal services generally, and of advocacy services in particular.[97] The Code of Conduct is a body of rules adopted by all the members of the Law Library at a general meeting. The Code is revised from time to time, and each revision must be similarly adopted. The current Code was adopted on the 15th of December 2003 and defines the word "barrister" as a person who is a subscribing member of the Law Library, engaged in full time practice at the Bar.

7.2 This chapter finds that restrictions on direct access and the full time practice requirement restrict competition and proposes their abolition or amendment. In relation to direct access by lay clients to a barrister's services, two alternative proposals are presented: either that the current Direct Professional Access Scheme be radically broadened, or that the rules prohibiting direct access be abolished. Submissions on these proposals are sought from interested parties.

7.3 It is proposed to abolish rule 2.6, which precludes a practising barrister from engaging in certain occupations, and rule 8.3, which precludes barristers in employment from membership of the Law Library.

Direct Access - Rule 4.1 and Rule 2.22

Nature of restraint

7.4 A barrister cannot act for a client unless a solicitor instructs him.[98] A barrister is also prevented from directly or indirectly administering or handling the funds or assets of any client.[99] Taken together, these rules prevent the general public from having direct access to the services of a barrister. The rules are subject to the limited exceptions provided for in the Bar Council's Direct Professional Access Scheme, which allows a number of approved organisations and institutions and their members to have direct professional access (DPA) to members of the Bar of Ireland in non-contentious matters only.

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97 Rules of the Bar Code of Conduct relating to business structure are analysed in Chapter 6.

98 Rule 4.1 provides as follows:
Subject to such exceptions as may be authorised by the Bar Council (including access through the Bar Council's Direct Professional Access Scheme as amended from time to time) a barrister may not act in a professional capacity except upon the instructions of a solicitor or, in appropriate cases, a Patent Agent or Trade Mark Agent.

99 Rule 2.22 provides as follows:
In the interest of maintaining an independent referral bar a barrister is prohibited from directly or indirectly administering or handling the funds or assets of any client and a barrister shall not give any financial advice or assistance to a client or his solicitor on the investment of such funds or assets.

Effects

7.5 This restriction prevents potential efficiencies being realised. Buyers of legal services cannot directly engage a barrister in contentious matters but must first engage a solicitor, regardless of whether this is necessary for the case or desired by the client. In non-contentious matters, many buyers are still required to engage a solicitor. There may be instances where direct access would result in lower overall costs for the client. The restriction on direct access also limits the number of providers of legal services that clients can initially access for litigation.

Rationale offered for restraint

7.6 The Bar Council argues that permitting direct access would change the concept of the independent referral Bar. The Bar Council believes that such an independent referral Bar has considerable advantages, both in terms of competition and the administration of justice. It says that if a barrister wishes to provide both the service of advocacy and deal directly with clients, he can become a solicitor and continue to act as an advocate in all courts.

7.7 The Bar Council also makes other arguments in support of the rule. The Council considers that widespread direct access to the services of a barrister would not contribute to the efficiency of the service. In particular, the Council points out that if clients were allowed to approach barristers directly in all cases, barristers would be obliged to handle clients' funds, which they do not do at present, and would incur considerable costs in setting up appropriate systems for the handling of such funds. It would also, in the Council's opinion, give rise to the need for greater regulation of barristers to cover the handling of clients' funds

7.8 The Bar Council also says that, while it is one thing to permit direct access for the purpose of advice, direct access for the purpose of representation in litigation is another matter entirely. The role of the solicitor and that of the barrister at the preparatory stage of litigation is quite different. The solicitor prepares the brief, interviews witnesses and takes statements, while the barrister concentrates on strategy and how the case is to be presented in court. The Council considers this to be a division of function that works well.

7.9 The Bar Council also points out that in minor matters, a client can already avail of a "one-stop shop". If the client's case is heard in the District Court, the solicitor will both advise him and represent him in court. This makes sense, according to the Council, because hearings in the District Court are usually short, and the preparation of the case is correspondingly short. The Council acknowledges that solicitors could also act as advocates in the higher courts, but maintains that in practice they do not do so, preferring to brief barristers, and this, in the Council's view, is because the division of functions is a more efficient system.

7.10 The Bar Council points to the efficiencies gained by solicitors in sub-contracting out the advocacy function. Time is saved for a solicitor who would otherwise have to wait in court to see whether a case was going be heard that day. The Council points out that if there were direct access, barristers would have additional

paperwork, but would still have to wait in court as before, thereby increasing inefficiency and costs, ultimately to the client's disadvantage.

7.11 The Bar Council also points to what it believes is the lack of public demand for direct access. There are roughly 7,000 solicitors in the State, ready to take direct instructions from the public. If the rule were abolished, an additional 1,300 barristers would be added to this number. In the Council's view, there is no great public demand to have this extra number.

Analysis of the Competition Authority

7.12 Even if the preservation of an independent referral Bar is regarded as a valid objective, the restriction resulting from the rule is disproportionate to the achievement of that objective.

7.13 Although the current organisational structure may well contribute to the objective by allowing a barrister to devote his attention to advocacy and the provision of legal advice, this could still operate in the absence of the rule, as no barrister would be compelled to provide direct access.

7.14 The current structure is already subject to exceptions under the Direct Professional Access Scheme described above without any evident damage to the objective. Indeed, the Bar Council itself says that the Scheme is working very well.

7.15 Not all barristers participate in the existing limited scheme and many barristers prefer not to do so. There is no evidence that this would change if the present scheme were broadened or the access rule abolished entirely. For this reason, the Bar Council's arguments as to the extra cost barristers would incur and the efficiencies that might be lost have less weight, as individual barristers would be free to choose to incur such costs and run such risks. It may well be the case that it would be necessary to have some extra regulation if barristers were to deal with clients' funds (which in many cases may not arise), but this is not an insurmountable obstacle.

7.16 The Council's assertion that there is no demand for such a service may be true, but as long as direct access is prohibited, barristers and potential clients will be unable to test the market. If it is proven that there is little demand, then little will change.

7.17 In the United Kingdom, where an independent referral Bar also exists, direct access has now been extended to the public at large (although there are still significant restrictions on the circumstances in which it can be exercised).

7.18 In summary, a total prohibition on direct access (apart from the existing Scheme) is not justified in the light of the objective it seeks to attain. This objective could be met by less restrictive means.

Proposal 11: The Bar should either:

Option A: Abolish completely Rules 4.1 and 4.22 so that unlimited Direct Access is permitted; or

Option B: Broaden the existing Direct Access Scheme, in a manner similar to the new UK scheme, to include the following features:

- Barristers will only be permitted to undertake direct access work if:
    - they have been in practice for three years following the completion of their period of "devilling" or pupillage:
    - they have complied with the training requirements imposed by the Bar Council; and they have notified the Bar Council that they intend to engage in public access work.
- A barrister must refuse instructions if he or she considers that it is in the interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client.
- A barrister would not be obliged to accept instructions from a direct access client.
- Barristers may not undertake work in certain sensitive areas or where there are likely to be profound ramifications for clients and others; i.e.:
    - Immigration or asylum work;
    - Family or criminal proceedings other than for advice where proceedings have not been commenced (but not to attend interviews conducted by prosecuting or investigating authorities) or some appeals; and
    - Where the instructions come from intermediaries and are in connection with any family or criminal proceedings.

Questions

Q9a: What practical problems, if any, might arise in relation to options A and/or B?

Q9b: Are there alternatives to Options A and B which might also increase direct access to barristers?

Q10: Would extra regulation be required if barristers handle client funds? Would this create an unnecessary burden on the Bar, and/or additional costs to clients?

Employed Barristers and Barristers in Part-time Practice - Rule 2.6

Nature of restraint

7.19 Rule 2.6 of the Bar's Code of Conduct prohibits practising barristers from having occupations inconsistent with full-time practice at the Bar and inconsistent with regular attendance in Court and at the Law Library.

Effects

7.20 This rule may prevent persons practising at the Bar part-time. This may prevent entry into the profession and reduce the overall supply of barristers in the market place, to the detriment of clients.

7.21 Rule 2.6 also removes from practice a pool of barristers who may have valuable expertise in other areas, such as persons working part-time in banking or industry, who could bring that expertise to part-time work at the Bar.

7.22 The combined effects of rule 2.6 and rule 8.3, which confines membership of the Law Library to practising barristers, is that barristers in employment are prevented from representing their employers in court. This can create an extra cost for their employers when engaged in litigation, as the employer must engage another barrister who is in full-time practice at the Bar to represent them.

Rationale offered for restraint

7.23 The objectives sought to be attained are set out in the rule itself: the restriction is imposed so that a barrister may "perform his functions with due independence and in a manner consistent with his duty to participate in the administration of justice."

7.24 The Bar Council has explained that, in practice, it exercises considerable tolerance in respect of persons engaging in occupations outside the Bar, particularly in the early years of practice. The Council considered that its tolerance in this regard had not been abused. It explained that the rule is interpreted broadly, and that there is some possibility that it would "look constructively at [the] rule with a view to liberalising its appearance."

7.25 Asked by the Authority whether there was, in theory, anything wrong with the concept of a barrister who only practised part-time, the Bar Council responded with two arguments:

a. That it might diminish the pool of full-time available barristers, as the bulk of those practising might decide to work part-time at something else. At present, the Bar Council said that many senior barristers of high repute

take on *pro bono* work[100] to the benefit of the community. If the pool of full-time barristers were reduced, there might not be a sufficient number of experienced barristers available to take on such work.

b. That it might result in a "two-tier" bar, with the bulk of barristers practising part-time, and an elite group of full-time, well-respected barristers. The Bar Council would be concerned about such a "two-tier" bar emerging. Subject to those cautions, however, the Council felt there was considerable room for flexibility.

7.26 In relation to the issue of barristers in employment representing their employers, the Bar Council argues that a barrister should not have any pecuniary interest in the outcome of a case, and should not act where he could potentially be a witness in a case. The Council further claims that an employed barrister may not be able to exercise the necessary level of detachment and independent judgment from his one and only client. The Council gives as an example the hypothetical situation of a barrister employed by a large company where a hostile takeover is occurring. The lawyer may be asked to disclose something in the prospectus knowing that if he does so the takeover will collapse, and he, as well as other executives, will suffer financially. The Council suggests that it would be difficult for that lawyer to exercise the necessary independent judgment.

Analysis of the Competition Authority

7.27 The objective that barristers should perform their functions with due independence and in a manner consistent with the administration of justice, is a valid one.

7.28 The present restriction is unnecessary for the attainment of the objective. This is clear from the fact that in practice the Bar Council tolerates members engaging in external employment in the early years without any evident detriment to the attainment of the objective. The Bar Council's fear of the emergence of a two-tier bar has not been realised either; rather, it appears that after some years of balancing practice at the Bar with other external occupations, the "young" barrister either ceases the external occupations in favour of full-time practice, or leaves the Bar.

7.29 In so far as the rule is aimed at prohibiting occupations, which prevent a barrister attending at the Law Library and in Court, Rules 2.7 – 2.12 set out eleven categories of occupation in which a barrister may engage while in practice.[101] It

[100] Work for which no fee is charged. See chapter 6.

[101] According to these rules, a barrister may:

- be a member of the Oireachtas or the European Parliament;
- teach law at a university or other third level establishment;
- edit a learned legal journal;
- engage in occasional journalism;
- be a member of a local authority or of a sub-committee of a local authority;
- hold non-executive directorships;
- be a member or act as chairman of any panel, tribunal or investigating body not involving the barrister in direct contact or negotiation with the public;
- be a Coroner;
- be an arbitrator;
- be a member or officer of a Free Legal Aid law centre;

appears to the Authority that some of these would preclude regular attendance at the Law Library or in Court. It is not clear why some occupations that would clearly prevent attendance at the Law Library are permitted, while others are not. It is clear that the rationale of regular attendance at the Law Library and Court is not sufficient to justify the prohibition.

7.30 In relation to the restriction on employed barristers representing their employer in court, it is true that an employed barrister may in certain circumstances, such as in the example given by the Bar Council, have much to lose. However, a blanket ban on a barrister appearing in court on behalf of his employer is not justified. If a barrister were to behave unethically in regard to a particular case, the unethical behaviour is much more likely to occur outside of court, in circumstances where he is preparing documentation for litigation. It must be borne in mind that the employed barrister is only precluded from appearing in court. He is free to advise his employer and otherwise assist in the preparation of the case.

7.31 If the rationale is to prevent conflicts of interest, the present system is incomplete; neither employed nor practising barristers are prevented from holding shares in private or public limited companies, so arguably both can be subject to commercial influences.

7.32 In contrast to employed barristers, employed solicitors can act for their employers in all respects, including representing them in Court, and there is no evidence that this has resulted in improper behaviour or lack of independence.

7.33 There is no justification for this prohibition applying to barristers employed by the State. Many State bodies have ongoing legal needs and should be permitted to use "in-house" employed barristers to represent them in court. The prohibition results in the State having to outsource, at considerable additional cost, barristers' services, when it could instead employ barristers to represent the State in court or before tribunals.

7.34 In conclusion: the objectives can be attained, or will not be jeopardised, in the absence of the rule. Therefore, the rule is not justified.

Proposal 12: The Bar should abolish rule 2.6 so that barristers are permitted to be in part time practice at the Bar or to be in employment.

- be a member of any public body, board or council, whether or not an emolument is payable in respect of such membership.

Membership of Law Library - Rule 8.3

Nature of restraint

7.35 Rule 8.3 confines membership of the Law Library to full-time practising barristers.[102]

7.36 The effect of the rule is to prevent barristers who practise part-time and barristers in employment from becoming members of the Law Library. It therefore contributes to the restrictive effects of rule 2.6, as discussed above, which prohibits practising barristers from engaging in occupations inconsistent with full-time practice at the Bar and with regular attendance at Court and at the Law Library.

Analysis of the Competition Authority

7.37 Rule 8.3 would become obsolete if rule 2. 6 were abolished. The analysis of rule 2.6 above applies also to rule 8.3 and is not repeated here.

7.38 This is the second report which finds these restraints to be anti-competitive. The Authority notes that the Report of the Fair Trade Commission in 1990 reviewed the requirement to be a member of the Law Library and proposed that the Rule be abolished. The Bar subsequently voted for its retention.

Proposal 13: The Bar should abolish rule 8.3 so that membership of the Law Library is not limited to barristers in full time practice.

[102] Rule 8.3 provides as follows:

In the interest of maintaining an independent Bar, membership of the Law Library is confined to full-time practising barristers subject to the exceptions provided under paragraphs 2.7 to 2.11 of this Code and to such exceptions as may from time to time be approved by the Bar Council.

Chapter 8: Restrictions on the Supply of Conveyancing Services

8.1 The buying or selling of a house is for most people one of the most significant transactions they will make in their lifetime. Conveyancing services are essential to such transactions. Under current restrictions no profession other than solicitors is allowed to provide conveyancing services. Furthermore potential suppliers of services, such as banks or other financial service providers, are precluded from supplying these services even if they employ solicitors.

8.2 Current restrictions are disproportionate and restrict competition to a greater degree than is necessary to protect consumers. Reform of existing restrictions would encourage greater competition in the conveyancing market. The Authority proposes legislative reform to allow the entry of licensed conveyancers[103] into the market and also to increase the range of suppliers of conveyancing such as financial institutions.

Nature of the Restraint

8.3 Only solicitors can provide conveyancing services to the public for payment.[104] Statutory provisions reserve this work to solicitors by prohibiting individuals who are not solicitors from providing conveyancing services and by preventing other bodies, such as financial institutions or estate agents, from employing solicitors to provide conveyancing services to the public.

Effects

8.4 Reserving conveyancing to solicitors restricts competition and reduces pressures on fees for conveyancing services. Preliminary empirical analysis carried out by Indecon suggests that conveyancing fees increase with market concentration; i.e., that fees are higher in regional markets where there are fewer suppliers of conveyancing services.[105]

8.5 The restriction on market entry is exacerbated by the prohibition on bodies other than solicitors' firms supplying conveyancing services, (i.e. not only are solicitors the only profession which can supply conveyancing services, solicitors' firms are the only firms allowed to supply conveyancing services). This further restricts the range of conveyancing options available to consumers. For example, in the

[103] Licensed conveyancers are non-solicitors trained to provide conveyancing services. The Indecon Report concluded that the absence of licensed conveyancers reduced competition in the market for conveyancing services. The Indecon Report further doubted "*whether standards would fall if the market was open to specialised licensed conveyancers, provided there were trained to a high and consistent standard.*" Paragraph 4.166

[104] Section 58 of the Solicitors Act, 1954 Act. Building Societies are permitted by the Building Societies Act, 1989 to provide conveyancing services but the provisions in the legislation, which required Ministerial Regulations to take effect, have not been implemented.

[105] Based on surveyed responses on the price of conveyancing for a €300,000 house Indecon suggest that a 100 point increase in the Herfindhal-Hirschman index would be associated with a €43.40 increase in conveyancing fees and that a 10% increase in concentration would lead to a 0.74% increase in conveyancing fees.

absence of current restrictions, banks could employ solicitors to offer mortgages and conveyancing services together (i.e., "one stop shop" services) which could lead to price reductions for house buyers.

8.6 The restriction has also reduced the incentives for solicitors to innovate in the delivery of conveyancing services. There has not been any substantial innovation in solicitor firms' delivery of conveyancing services in Ireland.[106] This is in contrast with the UK, where solicitors' firms have innovated to provide conveyancing services outside of traditional office hours and "on-line" to facilitate clients.

Rationale offered for restraint

8.7 Consumer protection is the objective behind the reservation of conveyancing services to solicitors. The Law Society has submitted that the solicitors' monopoly is required to protect consumers for three reasons. First, consumers are financially protected by virtue of the requirement on solicitors to carry indemnity insurance to cover instances of negligence.[107] In addition, solicitors' clients have access to the Law Society's compensation fund to cover instances of fraud. Second, solicitors must adhere to the Law Society's Professional Code of Conduct, which stresses independence, representing clients' interests, and avoiding conflicts of interest. Third, solicitors are trained to a high level, which is necessary due to the complexity of the Irish title system and conveyancing procedure. The Law Society submits that because conveyancing touches on many areas of law it would not be feasible to provide a separate course to train people solely in conveyancing.

Analysis of the Competition Authority

8.8 While consumer protection is a valid objective, the current restrictions are disproportionate. The objective of consumer protection does not require the supply of conveyancing to be limited to solicitors and solicitors' firms.

8.9 First, professional indemnity insurance can be either replicated or procured by entrants to the conveyancing market. Financial institutions have ample resources to cover instances of loss without recourse to professional indemnity insurance or the Law Society's compensation fund. In addition, if self-insurance is permitted, solvency requirements to ensure equivalent protection, insofar as these are not already imposed by IFSRA, can be put in place.

8.10 In England and Wales, the sourcing of professional indemnity insurance and the creation of a fund equivalent to the Law Society's compensation fund has been possible for licensed conveyancers who are not solicitors.

[106] While some software packages, such as the Computerised Objections and Requisitions on Title ("CORT") have emerged, and some changes in practise have occurred (for instance, three way closings, when in addition to the vendor and purchaser in a conveyancing transaction engaging solicitors, the lending bank also appointed a solicitor to represent its interest), conveyancing practice has not greatly changed in the past 20 years.

[107] This is particularly necessary for conveyancing, which attracts the majority of claims for professional negligence.

8.11 The Law Society maintains that adherence to the Law Society's Code of Conduct is necessary for consumer protection. Regardless of whether financial institutions provide conveyancing services through in-house solicitors or other employees, their services will be subject to regulatory oversight. IFSRA, whose objectives include consumer protection, already supervises financial institutions.[108] IFSRA's regulatory responsibilities could be broadened to include the supply of conveyancing services by financial institutions. In-house solicitors employed by financial institutions to provide these services would remain governed by the Law Society's Code of Conduct and complaint procedures, subject to the amendment of such provisions as are necessary to permit them to act for persons other than their employer.[109]

8.12 Irrespective of regulatory requirements, financial institutions have an incentive to ensure that their services are of high quality and of good repute. It is unlikely that financial institutions would provide conveyancing services unless they were satisfied that the service provided would meet high standards.

8.13 A more complex issue concerns conflicts of interest and the independence of the advisor, whether a solicitor or otherwise, in the provision of advice to house buyers. In certain respects the current rules guarding against conflicts of interest are absurd. For instance, if a financial institution purchases land (using its own in-house solicitor), and then subsequently develops the land by way of joint venture, the financial institution's in-house solicitor is prohibited from acting for the joint venture by the Law Society's Code of Conduct. This prohibition is not justified.

8.14 Mortgage intermediaries offering "all in one" packages to homebuyers, including conveyancing linked services via solicitors, are beginning to emerge. As these packages show, there are already links between solicitors and mortgage intermediaries. There is no evidence that house purchasers have suffered from conflicts of interest arising due to these links.

8.15 Regulation can deal with obvious conflicts and could, for instance, prohibit the in-house advisor acting for both vendor and purchaser or earning commission on products. Certain financial products[110] may merit the engagement of an "outside" solicitor rather than the bank's in-house advisor. IFSRA, or alternatively the Legal Services Commission whose establishment is proposed in Chapter 3, would be well placed to regulate the provision of conveyancing services in conjunction with financial products.

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[108] In the United Kingdom the Department for Constitutional Affairs concluded that, on balance, legislative provisions permitting financial institutions to provide conveyancing services should not be activated. Government Affairs "Competition and Regulation in the legal services market" A Report following the consultation "In the Public Interest?" July 2003, Paragraph 31. Reasons included high set-up costs falling to government and that the solicitor's monopoly on conveyancing no longer existing. The situation in Ireland is very different. First, conveyancing is still a function reserved to solicitors by statute. Second, unlike in the UK, it is not proposed to introduce new regulatory structures solely for the licensing of entrants to the conveyancing market.

[109] The Law Society's Code of Conduct restricts in-house solicitors from acting for persons other than their employer. Chapter 2 page 16 states that "In in-house situations, the solicitor has only one client, who is the employer".

[110] When financial institutions offer "Lifeloans" or endowment mortgages, it may be appropriate for an outside solicitor to be involved. This is because these products are typically considered as higher risk and uninformed buyers may benefit from obtaining second opinions.

8.16 Customers could benefit from obtaining their mortgage and conveyancing services from the same source. According to certain financial institutions, the statutory restrictions preventing these services being provided together gives rise to unnecessary costs for borrowers. Indecon found that 75% of the public was in favour of conveyancing services being provided by persons other than solicitors.[111] Entry of financial institutions would be likely to promote innovation in the provision of conveyancing services.

8.17 It is not necessary for service providers to undergo training in all areas of law in order to provide conveyancing services. Experience in other jurisdictions shows that, while some conveyancing demands a high level of general legal knowledge, much of it is standard work, which can be performed by someone with a narrower legal background. Requiring excessive training to perform a particular function adds to costs for buyers of conveyancing services. Licensed conveyancers in England and Wales have been trained to a high standard by private colleges who have provided courses in conveyancing and have trained persons to a standard commensurate with that of solicitors.

8.18 In Ireland a significant number of titles, especially in urban areas, are unregistered, rendering them more complex. The Law Reform Commission, in conjunction with the Department of Justice, Equality and Law Reform, has launched a review of changes required to introduce e-conveyancing, to repeal a large body of out-moded legislation and to effect registration of all land titles in the State. Legislation on these issues is planned for autumn 2005. Reform along these lines would make it even easier for non-solicitors to be trained to provide conveyancing services.

8.19 The experience of using licensed conveyancers in other jurisdictions[112] has not created significant problems.[113] In England and Wales, licensed conveyancers entered the conveyancing market in 1987. A 1986 study[114] showed that solicitors reduced their fees in anticipation of increased price competition from the new licensed conveyancers. The Department of Constitutional Affairs in the U.K. says that while licensed conveyancers have secured only 5% by value of the market for conveyancing the average cost of conveying a £65,000 house had fallen by a quarter between 1989 and 1998.[115] In New South Wales in Australia, deregulation measures, which included solicitors being permitted to advertise and

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[111] Paragraph 4.167 Indecon Report

[112] The Law Society says that in England and Wales, licensed conveyancers account for only 5% of the market. They further submit that in Scotland, the system of introducing licensed conveyancers was not successful. As Ireland is comparable in size to Scotland, the Law Society says that the introduction of licensed conveyancers would have little effect in Ireland. We do not accept that low take up in Scotland is evidence that the system would fail in Ireland. For instance, one reason the Scottish system failed was that to be admitted persons had to be law graduates. Whether there will be sufficient demand for licensed conveyancers is ultimately a test for the market and a matter for buyer demand to decide, rather than the representative body for solicitors.

[113] Licensed conveyancers are dependent on one type of work, namely conveyancing and hence their incentive to compete on prices is less. Studies in England and Wales have shown that after initial fee reductions, the fees charged by licensed conveyancers tend to fall into line with those charged by solicitors i.e., "an accommodation takes places between solicitors and licensed conveyancers". See Stephen, Love and Paterson "Deregulation of Conveyancing Markets in England and Wales" Fiscal Studies (1994) vol 15 no 4 pp 102 – 118

[114] Paterson, Farmer, Stephen and Love "Competition in the Market for Legal Services" (Journal of Law and Society) 1988, Vol 15 pp 361-73; See also Domberger, S and Sherr, A (1989) "*The Impact of Competition on Pricing and Quality of Legal Services*" International Review of Law & Economics Vol. 9 p. 55

[115] Department of Constitutional Affairs, "Competition and Regulation in the legal services market" A Report following the consultation "In the Public Interest?" July 2003, Annex A Paragraph 24.

the introduction of licensed conveyancers, resulted in a 17% average fee reduction.[116]

8.20 The entry of licensed conveyancers would encourage competition, even if it did not lead to specialist practices offering services directly to clients. In particular, if licensed conveyancers were hired by existing law firms it could benefit buyers, to the extent that cost savings from employing licensed conveyancers instead of fully-trained solicitors would lead to cost reductions.

8.21 An increased range of suppliers would result in increased consumer choice, lower fees and innovative practices. Some regulatory considerations would arise from an easing of entry restrictions. Permitting banks to provide conveyancing services could result in tying (for instance, the sale of mortgages on condition the buyer also purchases the bank's legal services) or cross subsidisation (using profits from the market for mortgages to sell legal services below cost). These concerns can be adequately addressed by regulation and by existing competition law.

8.22 Section 31(12) of the Building Societies Act, 1989 prohibits building societies providing below cost conveyancing services. No such restriction is imposed on solicitors. It is inconsistent to prohibit financial institutions acting in a similar manner. One category of supplier should not be protected by statute from practices that could result in lower prices for buyers of legal services.

8.23 Two characteristics, which positively distinguish financial institutions from other possible new entrants to the conveyancing market, are financial standing and regulatory oversight. This may not be the case for all potential providers.

Proposal 14: The Department of Justice, Equality and Law Reform should introduce legislation permitting financial institutions to provide conveyancing services to the public by way of employed solicitors or other qualified persons. Where such legislation already exists, namely Section 31 of the Building Societies Act, 1989, the Department of Justice, Equality and Law Reform should bring forward secondary legislation to effect its implementation (except section 31 (2)) so that Building Societies can provide conveyancing services.

Proposal 15: The Law Society should amend its Code of Conduct so that solicitors employed by financial institutions can provide conveyancing services for persons other than their employer.

Proposal 16: The Department of Justice, Equality and Law Reform should bring forward legislation to permit licensed conveyancers to provide conveyancing services.

Proposal 17: The Legal Services Commission should have responsibility for regulating the training, qualification and operation of licensed conveyancers to promote competition in the interests of buyers of conveyancing services.

[116] J Barker "Conveyancing Fees in a Competitive Market" (Justice Research Centre) 1996

Questions

Q11a: What practical problems could arise to hinder the expansion of the range of suppliers of conveyancing services?

Q11b: Should regulation of conveyancing be different for solicitors and non-solicitors? If yes, why?

Q11c: What other potential suppliers of conveyancing services exist? What regulatory issues would need to be addressed if the range of suppliers of conveyancing services was extended beyond that in Proposals 14 – 17?

Chapter 9: Restrictions on Advertising

9.1 This chapter examines restrictions on advertising by barristers and solicitors. While the restrictions have valid objectives, for instance, to ensure the accuracy of advertisements, in their current form they are disproportionate and have a negative impact on competition in the market for legal services. Relaxation, or in some instances removal, of advertising restrictions, as outlined in the proposals in this chapter, would increase competition in the market for legal services by encouraging efficiency and innovation in the supply of legal services and would increase consumer information and choice.

9.2 There is a considerable difference between the restrictions imposed on solicitors and those imposed on barristers. Solicitors are not prevented from advertising; the restrictions relate more to the manner and content of the advertisements. In the case of barristers, the only advertising that is permitted is the placing of their names and specialisations on the Bar Council's website and in the Law Directory. While in general the restrictions governing solicitors are acceptable, subject to certain refinements, the restrictions on advertising by barristers are disproportionate, limit competition in the interests of buyers, and require immediate reform.

Barrister Advertising

Nature of restraint

9.3 Advertising by barristers is strictly limited to placing their names and specialisations on the Bar Council's website and in the Law Directory.[117]

Effects

9.4 The restrictions reduce the information available to buyers of legal services and insulate already well-known barristers from competition from alternative barristers who may be less well known or experienced but of comparable ability. Consequently, advertising restrictions can result in fees for professional services being higher than would be the case in a market without restraints.

9.5 Advertising restrictions can further unbalance the playing field for newly qualified barristers who have few or no contacts in the solicitors' profession. Barristers who have such contacts have a ready-made source of business. The barrister who has

[117] Rule 6.1 provides as follows:
A barrister may advertise by placing prescribed information concerning himself on the website of the Bar Council and subject to such rules and regulations as may be promulgated from time to time by the Bar Council in respect of the content of such an entry. A barrister may advertise by such other means as the Bar Council may prescribe by way of regulations promulgated from time to time, which regulations shall be promulgated for the purposes of protecting the public interest and maintaining proper professional standards.

none needs to make these connections. He may have a good master[118] who will introduce him to solicitors; on the other hand, he may not, and he is prohibited from taking steps to remedy this imbalance by advertising the fact that he has commenced practice. The advertising restrictions can affect the ability of newly qualified barristers to become established and may contribute to the high attrition rates in this profession.

9.6 For the most part only solicitors are currently permitted to engage barristers. The adverse effects set out above would be exacerbated if greater direct access to barristers were to be permitted. Increased direct access for barristers' advocacy services, would result in less well-informed buyers than the current buyers, who are solicitors. Advertising restrictions would prevent potential clients, particularly non-solicitor clients, from obtaining the quality of information needed to choose the barrister best suited to their particular need. It is worth noting the European Commission's view in its Report on Competition in Professional Services:

> *"There is […] an increasing body of empirical evidence which highlights the potentially negative effects of some advertising restrictions. This research suggests that advertising restrictions may under certain circumstances increase the fees for professional services without having a positive effect on the quality of those services. The implication of these findings is that advertising restrictions as such do not, necessarily, provide an appropriate response to asymmetry of information in professional services. Conversely, truthful and objective advertising may actually help consumers to overcome the asymmetry and to make more informed purchasing decisions."*[119]

Rationale offered for restraint

9.7 The Bar Council says the rule's objectives are the protection of the public interest, the maintenance of proper professional standards and the prevention of interference with the administration of justice.

9.8 The Bar Council submits that advertising might degenerate into "touting" for business, or might result in misrepresentation. The Bar Council says that a barrister might, for example, advertise that he has had success in a particular case, when in fact the success had nothing to do with that barrister's expertise or ability. The Council also says that if more advertising is permitted, greater pressure will be put on barristers to become more outrageous in the claims they make with regard to their capabilities. It questions in what way a barrister could usefully advertise other than saying what his specialty is, and it points out that he can do that at present on the Bar Council's website.

9.9 The Bar Council does not believe that advertising would confer any significant advantage on the client. It points out that solicitors are the direct consumers of barristers' services and that they are knowledgeable in relation to those services. The Bar Council also says that advertising the name of a barrister, or the fact that

[118] A "master" is an experienced barrister to whom a newly qualified barrister is apprenticed for at least one year. This apprenticeship is known as "devilling" or pupillage".
[119] Report on Competition in Professional Services, para. 45

he had succeeded in a certain number of cases, does not give a lay person any real information, but may, on the contrary, provide misleading information.

Analysis of the Competition Authority

9.10 Protecting the public interest, maintaining proper professional standards and the proper administration of justice are not only valid, but eminently desirable objectives. The Authority agrees that misleading advertising should not be permitted, and that certain forms of advertising could contribute to bringing the administration of justice into disrepute.

9.11 The rule as presently expressed is disproportionate to the objectives it seeks to achieve, because those objectives could be attained by a less restrictive rule. If barristers were permitted to advertise in locations other than the Bar Council's website, for instance in journals or newspapers, the advertisements would be subject to the present legislation which prohibits false and misleading advertising. The Bar Council could also prohibit misleading advertising through its Code of Conduct. There is no reason to believe that because a barrister places an accurate advertisement in, say, a legal journal, that the administration of justice will be undermined.

9.12 Truthful and objective advertising gives clients useful information and helps them to choose among competing barristers. This can be important even when solicitors are the only purchasers of the services in question because not all solicitors will be fully informed on the expertise of particular barristers. Furthermore, advertising would assume even greater importance if wider direct access were to be allowed in the future.

9.13 Certain advertising guidelines may, of course, be appropriate. As the Bar Council says, it may not be possible to accurately advertise a barrister's ability by referring to success in Court. But it is certainly possible to advertise a barrister's expertise, as is evident from the fact that this is being done already on the Bar Council's website without any evident harm to the administration of justice. The scope of this type of advertising could be further widened by, for example, allowing a barrister to describe his expertise in greater detail by explaining how it was acquired. Fee advertising, whether on the Bar Council's website or in other media would also greatly benefit price competition by allowing potential clients to compare fees and choose barristers who charged less. Given the lack of transparency surrounding how barristers fees are set, this would give much more information to potential clients about the costs they are likely to face.

Proposal 18: The Department of Justice, Equality and Law Reform should introduce legislation to transfer the regulation of advertising by barristers to the proposed Legal Services Commission.

Proposal 19: As an interim measure the Bar should permit advertising by barristers by either:

Option A: The abolition of Rule 6.1. The sole regulation of advertising by barristers would then be the restrictions on misleading advertising contained in the European Communities (Misleading Advertising) Regulations, 1988.

Option B: The substitution of Rule 6.1. with an alternative rule permitting advertising so long as it does not:

- Give false or misleading advertising;
- Refer to the outcome of previous, or future, legal action;
- Bring the administration of justice into disrepute, or otherwise be considered in bad taste; or,
- Appear in inappropriate locations.

Question

Q12: What practical problems, with adverse consequences for competition and for buyers of legal services, could arise in liberalising advertising as proposed in Proposals 18 and 19?

Solicitor Advertising

Nature of restraint

9.14 Under current rules, solicitors may advertise their services, subject to various restrictions on both form and content.[120] Advertisements are only permitted to include:

a) Basic details, such as name, address and other contact details;

b) Qualifications and experience;

c) Factual description of legal services provided by the solicitor and areas of the law these services relate to; and,

d) Charges or fees.

[120] These restrictions are contained in the Solicitors (Advertising) Regulations, 2002, and the Solicitors (Amendment) Act 2002.

9.15 Solicitors are not able to advertise as specialists, or to claim specialist knowledge. Rather they can only factually state areas in which they have experience. This restriction is consistent with the Law Society's prohibition of comparative advertising, if it is accepted that claiming to be a specialist necessarily implies a claim of greater (comparative) ability relative to other solicitors. As noted below, the Law Society intends reviewing its current position concerning specialist advertising.

9.16 There are, in addition to the broad restrictions on comparative and speciality advertising, many particular and specific restrictions on the form and content of solicitors' advertisements. For example, there are rules governing location and format of advertising and also rules concerning references of fees.[121]

9.17 Unsolicited approaches to potential clients are prohibited if they occur at inappropriate locations, such as adjacent to a scene or situation affecting a potential client, or near a Garda station, prison or courthouse, or otherwise are likely to bring the profession into disrepute.

9.18 The Law Society has sole responsibility for investigating and determining whether advertising restrictions have been breached. Investigations arise either as a result of a complaint or on the Society's own initiative. Where a breach of the rules is considered serious it will be referred to the Disciplinary Tribunal.[122]

9.19 If solicitors are unsure of an advertisement's acceptability, they can obtain the Law Society's prior approval to publish an advertisement. The Law Society has the authority to publish guidelines on advertising but has not yet done so.

[121] Solicitors are not permitted to publish advertisements that:

- are likely to bring the profession into disrepute or are in bad taste,
- reflect unfavourably on other solicitors,
- are false or misleading in any respect,
- are published in an inappropriate location (including hospitals, funeral homes, cemeteries or other similar locations),
- refer to claims for damages for personal injuries or the provision of legal services in connection with such claims,
- encourages any person or group of persons to make personal injuries claims,
- are contrary to public policy,
- include words or phrases such as "no win, no fee", "free first consultation" and other phrases that suggest contentious legal work can be provided at reduced cost,
- include cartoons, dramatic or emotive words or pictures,
- make reference to a calamitous event or situation, or
- refer to the willingness to make hospital or home visits.
- are in, or on, any form of transport.

Any poster or billboard that contains any information other than contact details, etc is banned. This is because it would be automatically deemed to bring the profession into disrepute and be in bad taste, regardless of whether this is actually the case.

The size of advertisements is restricted to that considered appropriate by the Law Society to the medium or location. Words that relate to legal services provided or areas of the law, for example family or property law, are not permitted to be given prominence over other words in an advertisement, for example contact details.

Providing information on the law, in the form of published comments and oral presentations, can be considered advertising by the Law Society if the publication is given away below cost or the solicitor is paid.

[122] The Disciplinary Tribunal is a statutory body appointed by the President of the High Court. See Chapter 3 for further details

Effects

9.20 The current restrictions on advertising by solicitors restrict the information available to clients about solicitors' services and fees. This advantages existing firms by protecting them from competition.[123] This can increase any market power of incumbent firms, and lead to higher fees for solicitors' services.

9.21 Specifically, the Law Society's restrictions on "bad taste" advertising could result in less consumer choice and less competition in the market for legal services. For example, advertising restrictions could encourage the perception that all solicitors' services are premium priced services for which clients should expect to pay high fees. This would discourage consumers from shopping around and consequently would hinder the ability of lower-cost practices to compete effectively with other practices.

9.22 New firms can also be further disadvantaged, to the benefit of already known incumbent firms, by the limits placed on either the substance or form of advertising. Regarding the latter, restrictions on size, location, image, font and other form and content restrictions, can limit the effectiveness of advertisements and advertising campaigns.

Rationale offered for restraint

9.23 The Law Society identifies various objectives that are served by current advertising restrictions:

a) Reducing fraudulent and/or vexatious lawsuits;

b) Preventing offence from advertising that may be in bad taste; and,

c) Preventing solicitors from misleading uninformed and vulnerable clients.

9.24 The current restrictions seek to protect the public by preventing advertising in inappropriate locations and by preventing potentially intrusive and aggressive advertising in respect of personal injury claims. In the Society's view, such actions by solicitors could allow solicitors to take advantage of clients when they are vulnerable to persuasion, and ultimately could encourage solicitors to initiate vexatious claims that would neither benefit the client nor further the broader objective of the administration of justice.

9.25 The Law Society also argues that potential clients may be unable to evaluate claims made in comparative advertisements, particularly for customised legal services. The Law Society has also stated its concern that prospective clients

[123] As discussed in the section on barrister advertising, extensive empirical evidence exists in support of this contention. For comments on these studies see Indecon Report Chapter 2, Report on Competition on Professional Services, paragraph 45.

would not be able to assess any dubious or unsubstantiated claims made by solicitors.

9.26 The Law Society prohibits advertisements claiming specialist knowledge in an area of law or legal practice, in order to protect clients. The Law Society states that it has recently agreed to review this prohibition with a view to establishing whether there might now be a case for relaxing the ban on any advertising of specialist knowledge. This review will consider whether the public interest would be better served by a relaxation of current restrictions, balancing the potential benefits of more information about solicitors in the market place against the possible detriments of misleading information.

9.27 The Law Society considers that restricting cold-calling is beneficial as buyers of legal services are not able to assess the likely service quality, legal competence and integrity of solicitors calling. For example, unregulated cold-calling could allow unscrupulous solicitors to take advantage of clients in vulnerable situations and mislead them.

9.28 The Law Society also holds the view that, in the absence of *ex ante* restrictions (i.e., restrictions imposed before the advertisement is published), relying on *ex post* judgement of advertising (i.e. after the advertising has been distributed) risks significant damage being done before advertising is found to be harmful.

9.29 The Law Society highlights the ability of solicitors to advertise fees, and argued that this is evidence of sufficient freedom for solicitors to advertise. In addition, given that the majority of new clients are introduced to firms via personal networks and as a result of 'word-of-mouth' recommendations, for many solicitors any significant advertising is unnecessary.

9.30 While in general supporting the current range of restrictions, the Law Society does recognise the role of advertising as a dimension of competition and as a source of information for clients. The Society also accepts that restrictions on solicitors' freedom to advertise need to be justified on public interest grounds, and holds the view that the restrictions outlined above have a minimal affect on competition and are necessary to protect the public.

Analysis of the Competition Authority

9.31 The objectives of the current advertising restrictions, namely to reduce the number of fraudulent and vexatious legal claims, and to protect the public from being misled or offended, are valid. However, the current restrictions are disproportionate, i.e. they are more stringent than necessary to achieve their stated objectives and have negative side effects, particularly regarding competition.

9.32 To elaborate, while the objective of reducing vexatious legal claims is valid, restricting advertising is an inappropriate, and to a large extent unnecessary, method of doing so. To the extent that advertising restrictions reduce vexatious claims, this is achieved at the expense of reducing the public's knowledge of their

legal rights, which may result not only in reduced vexatious claims but also a reduction in valid and meritorious claims. Similarly, imposing blanket bans on references to reduced-cost, competitive fees, "no-win-no-fee" charges also reduces the public's awareness of the availability of affordable legal services. This can reduce legitimate legal action and hinder access to justice, particularly for those who are only able to afford exercising their legal rights when charged on a no-win-no-fee basis.

9.33 Vexatious and fraudulent claims can, and should, be reduced by other more focused means that do not inhibit the pursuit of valid claims. For example, plaintiffs who attempt to bring actions in court that have no basis should not be permitted to proceed and should have costs awarded against them.[124] New legislation also allows criminal sanctions to be imposed on people who give fraudulent instructions to their solicitor or make fraudulent affidavits to the court in personal injury actions.[125] This legislation should be more effective in reducing fraudulent claims than restrictions on advertising. Similarly, harsher sanctions could be placed on solicitors found to have knowingly supported vexatious claims.

9.34 Restrictions on false and misleading advertising are important, for example, to prevent unscrupulous solicitors from deceiving uninformed and vulnerable clients. In addition some restrictions on comparative advertising may also be necessary. For example, factually correct statements regarding outcomes of cases could be misleading as solicitors may receive favourable decisions for reasons other than exceptional ability. Consequently, advertising the outcome of these cases could mislead clients about the true ability of some solicitors.

9.35 In the absence of a comprehensive set of specific guidelines, broad restrictions on advertising specialities may also be warranted. For example, the existing requirement that solicitors must refer to actual experience and qualifications may ensure that accurate information is provided to prospective clients. Restrictions on contacting or advertising to clients when they are vulnerable, such as after an accident or bereavement, also appears desirable, given that people are not always able to make sufficiently reasoned decisions at these times.

9.36 Similarly, ensuring that advertisements do not cause unnecessary offence or bring the profession or the administration of justice into disrepute is another valid objective. However, it should be recognised that what is offensive and in bad taste to one person may be acceptable to another person.

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124 O. 19 r. 28 of the Rules of the Superior Courts, 1986. Chapter 13 discusses the issue of costs and the taxation of costs.

125 Civil Liability and Courts Act, 2004.

9.37 The various restrictions on advertising by solicitors currently in place are of disproportionate strength. It is not necessary to have wide-ranging, blanket bans in order to protect consumers or to promote the administration of justice. In particular advertisements with the following characteristics would not necessarily be harmful, misleading or offensive:

a) different sized fonts,

b) cartoons or other images,

c) references to calamitous events,

d) accurate statements regarding fees or any other aspect,

e) located on a form of transportation, or

f) large in size.

9.38 Whether advertisements displaying any or all of these characteristics are misleading or harmful depends upon the actual content and context of the advertisement. This can only accurately be judged on a case-by-case basis.

9.39 Determining whether an advertisement is offensive or harmful, and hence should be prohibited, depends upon the facts in a specific situation. It is not obvious that the Law Society is best placed to evaluate these effects on clients and the wider public. In its capacity as the body that represents the interests of solicitors, the Law Society is also in a conflicted position when having to determine what is in the public interest. This issue of who should enforce this regulation is discussed in greater detail in Chapter 4.

9.40 Despite the wide range of restrictions, solicitors are permitted to undertake a degree of basic advertising. This means that large-scale changes to advertising restrictions are not necessary, and in general only relatively minor amendments are needed to ensure more effective, proportionate regulation of advertising.

Proposal 20: The Department of Justice, Equality and Law Reform should introduce legislation to transfer the regulation of advertising by solicitors to the proposed Legal Services Commission.

Proposal 21: As an interim measure the Department of Justice, Equality and Law Reform should introduce amending legislation to remove restrictions on advertising content and forms that are not inherently misleading, harmful or offensive, either by:

Option A: Removing all specific legislation relating to solicitors' advertising in favour of reliance on the restrictions on misleading advertising contained in the European Communities (Misleading Advertising) Regulations, 1988; or

Option B: Amending current restrictions by limiting restrictions to:

- False or misleading advertising;
- References to the outcome of previous, or future, legal action;
- Advertising in bad taste or which brings the administration of justice into disrepute; or,
- Advertising in inappropriate locations.

Question

Q13: What practical problems, with adverse consequences for competition and for buyers of legal services, could arise in liberalising advertising as proposed in Proposals 20 and 21?

9.41 A clear implication of the above proposals is that, in a more permissive advertising environment, greater reliance would be placed on enforcement of existing legal provisions in order to control and discourage the bringing of fraudulent or vexatious claims. A commitment to a more permissive advertising regime would therefore necessarily imply a credible commitment to enforcement, and, if necessary, a strengthening of existing legal provisions.

Chapter 10: Restrictions on recognition of foreign legal qualifications

10.1 This chapter describes restraints on foreign qualified lawyers providing legal services in Ireland. Entry requirements for European Economic Area (EEA) nationals to the Irish market for legal services are governed by the European Communities (Lawyers' Establishment) Regulations 2003.[126] This chapter concentrates on entry requirements for foreign qualified lawyers from non-EEA countries.

10.2 Non-EEA lawyers are required to undergo extensive legal examinations before they can practise as either solicitors or barristers in Ireland. This is the case even for lawyers from common law countries with legal systems very similar to Ireland, regardless of their experience or the specialist legal services to be provided. The present system for the recognition of foreign-qualified lawyers from non-EEA countries is disproportionate, unduly restrictive and operates to the detriment of buyers of legal services.

Nature of Restraint

10.3 Lawyers qualified in non-EEA countries cannot practise in Ireland as solicitors unless they undertake the full professional training provided by the Law Society or, if their country has reciprocity arrangements with Ireland, they pass a transfer test.[127] Lawyers qualified in non-EEA countries cannot practise in Ireland as barristers unless their country has reciprocity arrangements with Ireland or they pass the examinations for the Barrister-at-Law degree.

10.4 In the case of solicitors, reciprocal arrangements with other countries can only be concluded with the agreement of the Minister for Justice, Equality and Law Reform, and after the Law Society has deemed the legal profession in that country to correspond to the solicitor's profession in Ireland.[128] Only four reciprocal agreements are in place; three with State Bar Associations in the United States of America: New York, Pennsylvania and California, and one with New Zealand.

10.5 In the case of barristers, a reciprocating country is a jurisdiction where the professions of solicitors and barristers are separate and which, in the opinion of King's Inns, affords corresponding advantages to members of the Bar of

[126] S.I. No. 732 of 2003. The Regulations have made it easier for lawyers qualified to one EEA Member State to practise on a permanent basis in another EEA member state. For instance, a lawyer, who is a national of an EEA Member State, and authorised to practice in an EEA Member State can apply to the Law Society or Bar Council for registration as respectively a solicitor or barrister (but not both). Once registered with the Law Society or Bar Council, the registered lawyer is, subject to certain restrictions, permitted to practice under his home title. After three years the applicant can be entered on either the Roll of Solicitors or be called to the Bar and can then practice under the title of solicitor or barrister.

[134] The transfer test for solicitors (known as the Qualified Lawyers Transfer Test or "QLTT") consists of examinations in Constitutional Law & Company Law or Constitutional Law & Criminal Law, Contract & Tort, Land Law & Conveyancing, Professional Conduct, Probate & Tax, Solicitors' Accounts and European Union Law.

[128] Section 44(6) of the Solicitors (Amendment) Act, 1994

Ireland.[129] Recognition of other countries is entirely at the discretion of the Benchers of King's Inns.[130] King's Inns Rules specify that, if the reciprocating country's legal system is not based on common law, the applicant may be required to pass examinations.[131] At present there are no reciprocal agreements in force with a country recognised by King's Inns.

Effects

10.6 These restrictions prevent competent practitioners from offering legal services in the State, and thereby limit entry and restrict competition. This effect is particularly strong in areas of international law, such as finance and banking, mergers & acquisitions and competition law. In addition, non-EEA based law firms are prevented from setting up Irish sub-offices to supply legal services in the Irish market.

Rationale offered for Restraint

10.7 The objective of these requirements is to ensure that foreign qualified lawyers are properly qualified so that buyers of legal services will be protected.

Analysis of the Competition Authority

10.8 The protection of buyers of legal services is a valid objective, given the potential for significant harm resultant from poor legal advice, and given the difficulties many consumers of legal services would face in accurately assessing the quality of the services they receive. Nevertheless, the current restrictions are disproportionate, and the objective of protecting consumers can be better achieved by less restrictive means.

10.9 Foreign lawyers who provide services to the public should be assessed to ensure that they have an adequate knowledge of the relevant law. The present system for the recognition of foreign lawyers is unduly restrictive in two respects. First, it fails to recognise that informed buyers such as large companies and the State may not need this level of protection. In other words, they may be capable of carrying out their own assessment of capability. Secondly, it does not allow a foreign qualified lawyer who wants to work in a niche area to do so. If foreign lawyers who practice in Ireland do not provide advice on Irish law, then they need not be qualified in Irish law.

10.10 Reciprocity arrangements are at best a blunt, and possibly a redundant, instrument for regulating entry of foreign trained lawyers to the Irish market. For example, if an Irish solicitors' firm employs a foreign lawyer, the firm's indemnity insurance, its own internal procedures and its awareness of its own reputation should serve to ensure that the foreign trained lawyer is competent and that buyers of legal services are protected.

[129] Rule 23(a) Education Rules of the Honourable Society of King's Inns (October 2004 edition)
[130] As discussed in Chapter 4, it is not best practice for the recognition of foreign barristers to be vested in King's Inns, which is so closely connected to the barristers' profession.
[131] Rule 23(d) Education Rules of the Honourable Society of King's Inns (October 2004 edition)

10.11 Buyers of legal services are already protected when they engage a barrister, as under the current system it is mainly solicitors, not the public, who engage barristers. Solicitors are unlikely to engage an unqualified barrister, foreign or otherwise. So long as direct access is in general prohibited, there is no justification for foreign lawyers being prevented from practicing as barristers in Ireland. If direct access is permitted in the future, in accordance with the proposal to that effect in this Report, one way of affording protection to clients could be by requiring the foreign lawyer to furnish an undertaking to the Bar Council or to the proposed Legal Services Commission, as appropriate, to abide by its rules of conduct, and to submit to its sanctions when appearing before the Irish courts.

10.12 From 2001 to 2003, only 25 lawyers, 2 from New Zealand and the rest from New York,[132] have availed of the transfer test. It is not possible to say whether the low numbers are because foreign lawyers do not wish to work in Ireland or because the transfer test deters entrants. The net result is that there is a low level of entry of non-EEA qualified lawyers into the Irish market for legal services.

10.13 In summary, the present arrangements governing the recognition of foreign lawyers are illogical and inconsistent. Lawyers from countries with common law jurisdictions similar to Ireland, such as Australia, New Zealand, Canada and the US, are subject to various degrees of greater stringency in entry requirements than lawyers from EEA countries, including those EEA countries that have significantly different legal systems to Ireland.

10.14 The present requirements prevent Ireland becoming a destination for overseas law firms to establish European offices. In the absence of the restrictions on foreign lawyers, overseas law firms could establish in Ireland and provide legal services to both Irish and European businesses.

Proposal 22: The Department of Justice, Equality and Law Reform, the Law Society and King's Inns should replace the current system of reciprocity with a system that recognises foreign-qualified lawyers on the basis of their suitability to practice. The proposed Legal Services Commission should be responsible for regulating the recognition of foreign qualified lawyers.

Proposal 23: As an interim measure, the Department of Justice, Equality and Law Reform should establish criteria for foreign lawyers, to be assessed on a case-by-case basis by the Law Society.

Proposal 24: The Kings Inns should amend its rules to permit foreign lawyers practice in Ireland as barristers without reciprocity or recognition requirements or further examinations, but being subject to the Irish Bar Council's Code of Conduct and disciplinary sanctions.

[132] The New York figures may be upwardly skewed given that many American state bar associations recognise the legal qualifications of lawyers qualified in other U.S. states. This means that a lawyer qualified in, say, Tennessee, who wishes to practise as a solicitor in Ireland, may have his qualification recognised by New York. He can then qualify for the Irish transfer test. For Pennsylvania, the lawyer must have five years post qualification experience to be able to avail of the transfer test. The Californian State Bar Association was only recognised in September 2003.

Questions

Q 14: What practical or implementation issues could arise from changes in the system of recognising foreign lawyers arising from Proposals 22-24?

Q 15: To what extent, if any, would Proposals 22-24 need to be amended, if greater direct access to barristers was permitted (as proposed in Proposal 11)?

Chapter 11: Senior Counsel

11.1 In Ireland, barristers who have practised for a certain number of years may be admitted to the Inner Bar and be entitled to use the designation "Senior Counsel". According to the Bar Council -

> *Senior Counsel (known as "silks") are the equivalent of Queens Counsel in England. They are appointed by the Government from the ranks of Junior Counsel. It is a mark of eminence to be appointed Senior Counsel and Senior Counsel are expected to be extensively experienced in the practice of law over many years and to be in a position to bring a high level of legal knowledge, skill and judgment to bear on any task in which they are professionally engaged.* [133]

11.2 Appointment to the Inner Bar is made by the Government. The selection process includes the Chief Justice, in consultation with the President of the High Court, other members of the judiciary and the Chairman of the Bar Council, who consider all applications and notify the Attorney General as to their view. The Attorney General in turn can consult with the judiciary and other senior members of the Bar.

11.3 The Code of Conduct of the Bar lays down basic rules governing admission to the Inner Bar and the role of senior counsel in proceedings. Rule 10 contains the following provisions:

> **10.1** *Admission to the Inner Bar is confined to practising barristers.*
>
> **10.2** *Only a barrister of professional eminence shall apply for admission to or be admitted to the Inner Bar. It shall be unprofessional conduct for a barrister to apply to the Government for admission to the Inner Bar unless that barrister has a bona fide intention to conduct his practice as a member of the Inner Bar and enjoys a status of professional eminence by virtue of his practice at the Bar.*
>
> **10.3** *A client is never required to retain the services of a Senior Counsel. It is for the instructing solicitor to decide whether it is necessary or desirable in the interests of his client to brief Senior Counsel and to decide the number of Counsel to be retained in a case."*

11.4 A senior counsel holds himself out as having a particular expertise. His work is almost exclusively confined to advocacy and advisory work, as, unlike junior counsel, he does not draft pleadings.[134] Once a barrister becomes a senior counsel, he can and does charge a higher fee than he did as a junior.

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[133] www.lawlibrary.ie

[134] Pleadings are the claim and response of plaintiff and defendant, together with any subsequent documents setting out the issues in a case.

11.5 The Authority concludes that the title of Senior Counsel as currently awarded may distort competition because it is not a reliable mark of quality. The Authority considers that either the procedure for awarding the title should be radically changed and a monitoring procedure put in place, or that the title should be abolished entirely. The Authority concludes that if the title is to be retained, it should be opened up to solicitors.

11.6 Finally, the chapter examines the practice whereby junior counsel fixes a fee at two-thirds of that charged by senior counsel in the same case, and concludes that this practice restricts price competition. It concludes with a proposal that if the title of Senior Counsel is to be retained, the Bar Council should direct its members to cease setting fees on the basis of the practice.

11.7 The title of senior counsel fails to provide information about specialisation in specific areas of law. To the extent that this would be useful information for buyers, the current system prevents the quality mark from achieving full benefits for buyers. This would be even more important if direct access were allowed.

Nature of restraint

11.8 The title of Senior Counsel is a government-sponsored quality mark for the legal profession, but it is confined to practising barristers. It is not a reliable mark of quality, because there are no transparent criteria for awarding the title. Neither is there any ongoing monitoring of quality, nor any procedure for withdrawing the mark in the event of a reduction in the level of quality.

Effects

11.9 The title of Senior Counsel may distort competition in a number of ways, all of which reduce consumer choice and limit competitive downward pressures on prices by constraining the supply of barrister legal services.

11.10 As currently awarded (i.e., without objective criteria or monitoring of quality) the title of Senior Counsel may distort the market for legal services by leading solicitors and their clients to believe without adequate justification that in engaging senior counsel, they are engaging a lawyer who excels in his field. It is the practice for barristers who become senior counsel to charge higher fees than they did as junior counsel. This creates the impression that their work is more valuable than that of a junior counsel, which may not always be the case. A quality mark that is not based on objective criteria will either distort competition or become meaningless as buyers cannot depend on it.

11.11 The title of Senior Counsel restricts competition between barristers, because junior and senior counsel do not compete on an equal footing. This would be less of a problem if the title were objectively awarded and properly monitored, but the current system distorts the market.

11.12 The effects outlined above are exacerbated by the current practice in awarding and in adjudicating on costs. At present the courts and the Taxing Master[135] award higher costs and tax costs at a higher rate for senior counsel's fees than for junior counsel. As pointed out by the Office of Fair Trading ("the OFT") in respect of a similar practice in the UK,

> *"this makes the services of a junior less valuable and those of a senior more valuable, all else being equal, and would depress the fee juniors could command and cause that commanded by seniors to rise. The assumption that the senior is necessarily a better barrister, created by the conferral of title, may thus be reinforced and quantified by the judge awarding costs. Where judges place reliance on title even though it may not be a useful guide to quality of service, there is clearly a danger that users of legal services are being systematically misinformed as to the value of services*."[136]

11.13 The title has also given rise to the practice whereby, when senior and junior counsel are briefed together in a case, the junior charges a fee that is two-thirds of the fee charged by the senior. Although there is no rule requiring this to be done,[137] a number of junior counsel say that the practice is rarely, if ever, deviated from. Evidence from the Taxing Masters and from various legal costs accountants indicates that in awarding costs, this practice is nearly always followed by the barristers, and always allowed by the Taxing Master. It is also followed by the Government in paying the fees of senior and junior counsel acting in Tribunals of Enquiry.

11.14 The practice operates as follows: senior counsel charges the fee that he considers appropriate for the work he has done in a particular case. Junior counsel, instead of also calculating a fee in a similar manner, charges a fee two-thirds that of the senior. This may distort price competition among junior counsel in the following ways:

a) Where the senior has conducted most of the case, the junior will receive an unwarrantedly high fee; or,

b) Where the junior has conducted most of the case and the senior in consequence marks a relatively low fee for himself, the junior will not be adequately recompensed.[138]

11.15 In one case a client may benefit, while in another he may suffer. The failure to charge a fee that is appropriate for the services junior counsel has actually rendered, and instead to make it dependent on the fee of senior counsel, is a form of price-fixing. The practice does not facilitate flexibility for clients in

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[135] The Taxing Master is a statutory officer whose function is to provide an independent and impartial assessment of legal costs incurred by an individual or company involved in litigation. There are currently two Taxing Masters in Ireland, both of whom are based in Dublin. The issue of taxation is discussed further in Chapter 12.

[136] The future of Queen's Counsel: Response from the Office of Fair Trading, October 2003

[137] There was at one time a rule which required this to be done, but it was abolished following the 1990 Report of the Fair Trade Commission on restrictive practices in the legal professions

[138] The possibility that in such cases the senior may charge a slightly higher fee than he normally would cannot be ruled out.

negotiating fees with their barristers. The lack of cost-based pricing is indicative of a lack of effective competition.

11.16 The title of Senior Counsel is not awarded to solicitors. In so far as it is considered to be a mark of quality in the provision of the service of advocacy, this is not surprising. Notwithstanding the right of audience of solicitors in all courts, only a tiny minority of solicitors exercises this right in the High and Supreme Courts. It may be that if solicitors were eligible for the title, more of them would engage in advocacy. But the title of Senior Counsel is perceived as a mark of quality for specialisations other than advocacy. To that extent, the title may distort the market against solicitors whose specialisation in a given discipline may be as great as that of a senior counsel. Given that solicitors, unlike barristers, sell directly to the public, a quality mark that included solicitors might be of greater value to buyers.

Rationale offered for restraint

11.17 The Bar Council believes that the title of Senior Counsel is an indication of a higher level of expertise and experience in advocacy and that where a senior counsel is not able to provide the level of service that clients expect, he will not be successful.

11.18 The title of Senior Counsel is a mark of quality. It provides information to buyers of legal services by indicating they will receive from senior counsel a higher level of advocacy skills than they would from junior counsel and thus distinguishes between the providers of advocacy services.

11.19 Senior counsel hold themselves out in a particular way to provide advocacy services, as they do not get involved in the preliminary paperwork, drafting pleadings, etc. The title is an indication that a barrister is at a different degree of specialisation and does not get involved in certain types of work. The Council has argued that advertising would not achieve the same result.

11.20 The Bar Council is not aware that the senior counsel system causes any problems for clients or their solicitors.

Analysis of the Competition Authority

11.21 A number of restrictive effects arise directly from the use of the title of Senior Counsel. Other effects arise from the fact that the title is awarded without the application of objective and transparent criteria, and without the possibility of its removal should the recipient's quality decrease.

11.22 Those effects arising directly from the use of the title should be balanced against the benefits that may arise from a properly awarded and monitored quality mark. If the restrictive effects outweigh the benefits in those circumstances, the continuing use of the title would be undesirable.

11.23 The benefits, which come primarily from the provision of information regarding quality, are greater in the case of uninformed buyers. The argument in favour of retaining the title is therefore weaker in a system where direct access to barristers is prohibited. Although not all solicitors will have the same level of information, they are, on balance, in a better position than lay clients to obtain it.

11.24 The title of Senior Counsel as currently awarded does not achieve the objectives identified by the Bar Council, for the following reasons:

a) The title cannot serve as a reliable indication of a higher level of expertise and experience, because of the lack of transparent, objective and public criteria;

b) Even if such criteria did exist, the title would not provide a mark of quality to potential clients on an ongoing basis, because of the lack of quality monitoring and of any procedure for withdrawing the title.

11.25 Chapter 7 proposes that the public should be allowed to have direct access to barristers. Should this occur, a transparently awarded and monitored quality mark could assist uninformed buyers of barristers' services to choose the best advocate for their needs, and in identifying the best specialists in a given field. As a promotional step on the professional ladder, it could also serve as an encouragement to junior barristers to aim for excellence, to the ultimate benefit of the public at large.

11.26 Such a title, if transparently awarded and monitored, would be more likely to provide an accurate indication of quality. In those circumstances, the convention whereby a litigant engages senior counsel if his opponent in litigation has engaged one would have much greater justification. In addition senior counsel themselves may then be justified in charging higher fees than junior counsel.

11.27 There appears to be no justification for confining the title to barristers, to the exclusion of solicitors. Solicitors are trained in advocacy during the professional training part of their education, and have a statutory right of audience in the courts. Indeed, if the title were opened up to solicitors, it might encourage solicitors to exercise their right of audience more frequently than they do at present.[139]

11.28 The practice whereby junior counsel marks a fee at two thirds that of senior counsel in the same case is unjustifiable.[140]

11.29 In conclusion, a transparently awarded and monitored title available to solicitors as well as to barristers, which could be removed for cause, would justify a number of the restrictive effects produced by the use of the title, although this justification would be weaker in the absence of direct access.

[139] In the United Kingdom solicitors may become Queen's Counsel.
[140] This is discussed further in the context of taxation of costs in Chapter 12.

Proposal 25: The Government should establish objective criteria for awarding the title of Senior Counsel, together with a procedure for monitoring and removing it.[141] Solicitors should be eligible for the title.

Proposal 26: The Bar Council should advise all junior counsel to mark a fee based on work done when acting in a case. This fee should not depend in any way on that marked by senior counsel.

A properly awarded and monitored title would benefit prospective clients by ensuring that charges for services more accurately reflect barristers' input than is the case at present. It would also go some way to enhancing information available to buyers, something of greater importance if direct access is allowed. Option B could benefit prospective clients by removing the perceived necessity to engage senior counsel with the resulting additional fees. It would, when taken together with the increased advertising which should result if the Authority's proposals in that regard are implemented, allow clients to choose the best barrister for the job. The cessation of the "two-thirds" practice would also result in more accurate pricing and would in addition encourage price competition among junior counsel.

Questions

Q16: Does a quality mark for purchasers of advocacy services serve any other useful purpose not identified above?

Q17: If the title of Senior Counsel is retained, should the Government be responsible for awarding the title? Should it be the proposed Legal Services Commission or some other organisation?

Q18: Would proposals 25 and 26 above be sufficient to ensure competition and consumer interests or would abolition of the title of Senior Counsel best serve competition and consumer interests?

[141] For full details, see the website of the English Bar Council at www.barcouncil.org.uk

Chapter 12: Legal Fees and the Taxation of Costs

12.1 This chapter identifies aspects of the regulation of legal fees which may adversely affect competition and result in higher prices for buyers of legal services. The Minister for Justice, Equality and Law Reform has established a Working Group to identify ways of reducing legal costs, especially the cost of civil litigation. The Authority has met with representatives from the Working Group, which is due to report in late 2005.

12.2 The chapter analyses how solicitors and barristers set fees. Proposals to increase transparency and permit clients more information about fee charges are set out. The chapter also considers the system of taxation of costs and proposes changes to the current approach of the Taxing Masters.[142]

12.3 The cost of civil litigation in Ireland is considered to be high.[143] Many within the legal profession have suggested that the principal reason for high costs is the cumbersome nature of Irish court procedure and inefficiencies in the courts system. Irish legal procedures generally require far more attendance in court by lawyers than would be the case in, say, England and Wales. It was suggested that simplifying procedure and allowing more aspects of litigation to be conducted without the parties having to be in court would lower costs. The issue of court procedure is outside the remit of this Report, but the Authority hopes that the Working Group and other relevant bodies will consider this issue further.

How legal fees are set

12.4 Solicitors are required to issue what are known as "Section 68" letters, which specify in advance the fees the client is likely to face.[144] The Law Society has issued three model section 68 letters and solicitors generally use versions of these.

12.5 Solicitors generally invoice clients at the end of a case.[145] In some cases invoices may be extremely detailed, but most are sparse, with most of the total amount falling under the heading of "professional fee". It is often difficult for clients to judge the quality of services received, and whether fees are appropriate.

12.6 Traditionally, solicitors charged fees for conveyancing and probate based on a percentage of the value of the property or the estate. Fees calculated on a percentage basis usually represent bad value for clients as they tend to rise automatically with any rise in property values. They can also provide a focal

[142] The "taxation of costs" is a process whereby the costs of conducting legal proceedings are reviewed and assessed by an independent person, called the Taxing Master.

[143] To date, little research has been done on legal costs in Ireland. The Working Group will be examining systems and levels of costs abroad.

[144] Cf. Section 68 of the Solicitors (Amendment) Act, 1994.

[145] There is considerable variation in how clients are billed. For instance, corporate clients or frequent users of legal services may have accounts with monthly bills, although specific legal tasks may be billed for separately, and generally elicit a Section 68 letter.

point for collusion between lawyers in setting fees.[146] In recent years, more solicitors have begun to offer fixed fees for conveyancing and probate work. This is a positive step for competition.

12.7 Once a fee has been charged, a client who considers it to be unreasonably high may complain to the Law Society. The Society can compel a solicitor to reduce his fees. Submissions indicate that some clients feel that the Law Society may support a solicitor's interests over theirs, and for this reason some clients are hesitant to complain. The client also has the option of asking for the fee to be "taxed", as described below, but the cost of the taxation process can deter clients.

12.8 As solicitors generally engage barristers on behalf of clients, barristers issue fee notes to solicitors rather than directly to clients. There is no legal requirement for barristers to indicate their fees in advance. If a barrister's fee is agreed in advance, in some instances a solicitor will agree the fee on behalf of the client, without the client being consulted. Consequently, clients sometimes have uncertainty about how much a barrister is likely to charge.

Analysis of the Competition Authority

12.9 Competition in the setting of legal fees is desirable. Apart from the economic harm caused, excessive fees limit citizens' constitutional right of access to the courts. Different lawyers will offer different levels of service, and fees reflect this. All clients, regardless of what service they are demanding, should be able to make informed decisions about which lawyer to choose and at what rates. This requires greater transparency in the setting of lawyers' fees.

12.10 Submissions indicate that many solicitors are reluctant to give out quotes over the phone. This may be reasonable in some situations, but it should be possible to quote a fee in advance for issues such as conveyancing or probate. Once a client has arrived at a solicitor's office, he has already incurred some costs, and once there may be reluctant to go to other solicitor's offices to compare prices. Refusing to give quotes over the phone increases buyers' search costs, and this limits competition.

12.11 Section 68 letters can provide a useful means of giving information to clients, but at present many letters do not provide sufficient information. In some instances solicitors will indicate a "fixed" fee to the client, but more often solicitors only provide an estimate of the charges, or the basis on which the charges are to be made. It may not always be possible at the outset of a matter to quantify precisely the volume of work that will be required. But solicitors, especially if they are experienced, will have a sense of the level of charges and could at least indicate these in advance. Issuing a standard letter, which gives no more than hourly rates or states that the cost will depend on the complexity, provides little useful information for the client.

[146] The issue of percentage fees and the negative effects they can have for clients is discussed in the Authority's previous reports on engineers and architects. See www.tca.ie/professions

12.12 For contentious matters, it may not always be possible for a barrister to provide an exact fixed figure in advance. However, he should be able to give some indication of an hourly rate and the amount of work the case might involve. A client should know what a barrister is likely to charge before a solicitor briefs that barrister on the client's behalf.

12.13 A client cannot access a barrister directly, so cannot bargain over fees. Solicitors act in the best interests of their clients, but when arranging fees with barristers, they may not face a strong incentive to obtain the lowest fee possible as they will not have to pay it. Indeed, a solicitor may be reluctant to bargain down the barrister's fee as it could make the solicitor's fee seem excessive.

Proposal 27: The Legal Services Commission should be responsible for directing the amount and type of information to be contained in Section 68 letters (i.e. letters setting out estimates of fees) issued by lawyers.

Proposal 28: The Law Society should review its precedent Section 68 letters and issue a practice direction to ensure that solicitors give clients more information regarding likely fees.

Proposal 29: The Department of Justice, Equality and Law Reform should introduce legislation requiring barristers to issue letters providing fee information similar to solicitors' Section 68 letters, both to clients and to solicitors, when first briefed.

The system of taxation of costs

12.14 In the Irish court system, "costs follow the event". This means that the unsuccessful party in a court case must usually pay the successful party's legal fees and costs. If the amount cannot be agreed between the parties, or if some unusual issue has arisen, the unsuccessful party can ask to have his legal costs assessed by the Taxing Master. The objective of requiring the losing party to pay the costs of litigation is to protect defendants against frivolous or unreasonable litigation. Despite this, the losing party must also be protected against being charged excessive costs by the winning party's lawyers. This is the reason for the taxation system.

12.15 The Taxing Master is directed by statute to assess fees by examining the nature and extent of the services supplied by solicitors and barristers, thus determining the value of work done.[147] Using this statutory power, the Taxing Master can reduce the level of fees charged by reference to the nature and value of the work done by lawyers. The Taxing Master can also assess other costs incurred, such as the fees charged by expert witnesses.

[147] Section 27 of the Courts and Court Officers Act, 1995.

12.16 All common–law countries, with the exception of the United States, have some form of this system.[148] In the United States both sides generally pay their own costs regardless of the outcome of the case. An advantage of this system is that it can facilitate litigation by ensuring that those with a genuine case do not fear having to pay the other party's costs as well as their own if they lose.

12.17 The Authority discussed the system of taxation with the Taxing Masters, a number of legal costs accountants, and with solicitors and barristers. These discussions indicated that, in practice, an important factor in assessing costs is precedent in similar cases. If a particular amount was allowed in one case, that will almost certainly be the amount allowed in any similar case. This provides lawyers with a good indication in advance of what level of fee will be allowed on taxation.

12.18 Discussions also indicated that the cost of experts' reports, frequently from engineers, doctors or other professionals, has risen greatly over the last twenty years. Indeed, there is some suggestion that this might be part of the cause of the increase in civil litigation costs. This issue is outside the remit of this Report.

12.19 In the course of these discussions it was highlighted that the position of the Taxing Master is reserved to solicitors. Solicitors may not necessarily have a background in legal costs. Legal cost accountants are usually engaged by solicitors to assess the legal costs on a file.

Analysis of the Competition Authority

12.20 The system of taxation has negative effects on competition. It operates as a form of specific price regulation for certain services. It can provide a focal point around which fees may be indirectly fixed, and so reduce fee competition. Unless the system of awarding costs is reformed, it is not obvious that these effects can be totally eliminated. Whether or not such reform is desirable, or even entirely possible given the legal system in Ireland, is outside the scope of this Report. Thus, this Report focuses on methods by which the existing system of taxation may be improved to reduce anti-competitive effects.

12.21 Analysis of data provided by legal costs accountants indicates that the size of the damages awarded in a particular case is much more important in the taxation of costs than the actual legal work done on a case.[149] Generally, it would be expected that uncontested cases would involve somewhat less work than contested cases and should attract lower fees. Similarly, the number of motions presented in a case can indicate how active a solicitor was on a case. However, neither of these two factors appear to influence the level of costs allowed when these costs are taxed. Instead, to a large extent the fees allowed can be calculated as a percentage of the amount awarded.

[148] New Zealand recently adopted a system whereby costs follow the judgement, but the successful party is only recompensed two thirds of its legal costs.

[149] This analysis was undertaken on a sample of 36 road accident and personal injury cases referred to taxation. The fees allowed under taxation were compared with three variables: whether the case was contested; the number of motions presented; and the size of the award. The results show that 90% of the variation in solicitors' instruction fees can be explained by adding nine percent of the amount awarded to a base amount of €7300. Similarly, 80% of the variation in barristers' brief fees can be explained by adding 1.8% of the amount awarded to a base amount of €930.

12.22 Appendix W of the Rules of the Superior Courts[150] sets fees for specific legal services. The setting of fees by regulation is harmful to competition. The Authority's analysis of a number of Bills of Costs revealed that fees set by Appendix W account for a very small fraction of the costs of a case. The fees set out in Appendix W have not been updated and are below those that would arise in the absence of regulation.

12.23 Chapter 11 of this Report discussed the practice whereby junior counsel fix their fee at two-thirds that of senior counsel acting in the same case. This practice is anti-competitive. Analysis of a number of bills of costs indicate that it is the Taxing Master's standard practice to allow junior counsel's fee at two-thirds that of senior counsel, thereby entrenching the anti-competitive effect of this practice.

Proposal 30: Taxing Masters should not consider the size of any award when assessing legal costs. Legal costs should be assessed on the basis of the work undertaken by individual lawyers.

Proposal 31: Taxing Masters should cease the general practice of allowing junior counsel's fees at two-thirds that of senior counsel. Instead fees should be set on the basis of the work undertaken by each of senior and junior counsel.

Proposal 32: The Department of Justice, Equality and Law Reform should introduce legislation to permit persons other than solicitors being appointed to the position of Taxing Master.

[150] These are the rules governing court procedure in the Superior Courts. S.I. No. 15/1986 as amended.

Chapter 13: Miscellaneous Restrictions on Competition

13.1 The previous chapters of this report cover those restrictions on competition which the Authority considers to be the most economically significant. Other restrictions which, while of less economic importance, have nevertheless a negative impact on competition, are considered here. They are:

- Kings Inns Entrance Examination;
- Law Society Preliminary and Entrance Examinations;
- Kings Inns and Law Society Irish Examinations;
- Undertakings required from previously employed barristers;
- Restrictions on one barrister taking over a case from another;
- Restrictions on the transferring of solicitors' files (solicitors' liens), and,
- Restrictions on who can initiate legal proceedings

Kings' Inns Entrance Examination

Nature of Restraint

13.2 As outlined in Chapter 4, graduates in law who have a degree from a university recognised by King's Inns are exempt from the requirement to obtain the Diploma in Law from King's Inns. These law graduates are still required to pass the King's Inns Entrance Examination before they can obtain a place on the Barrister-at-Law course, which is a prerequisite to qualifying as a barrister and being called to the Bar.

Effects

13.3 The requirement for law graduates to sit the Entrance Examination allows Kings Inns to limit entry of competent students into professional education. This limits the numbers of persons who can gain access to the Degree course and to the barristers' profession, and consequently limits entrance to the market for legal services.

13.4 The Entrance Examination requirement also increases the costs of training for barristers by requiring law graduates to sit the Entrance Examination in subjects in which they have already been examined as part of their law degree.

Rationale offered for restraint

13.5 King's Inns submits that it requires law graduates from recognised universities to pass the Entrance Examination so that it can make its own assessment of students' knowledge of law.

Analysis of the Competition Authority

13.6 The objective of re-assessing peoples' knowledge of law is not a valid one. The fact that a person holds a degree in law from a recognised university should be sufficient proof of the standard that person has achieved in his or her knowledge of the law. The function of Kings' Inns is to assess whether a person has the necessary knowledge and expertise to practise at the Bar. It does this through examinations at the end of its professional course.

13.7 As the objective is not valid, there is no need to consider the question of proportionality. Consequently, the requirement for law graduates to sit the Entrance Examination is unjustified.

Proposal 33: Pending the introduction of Proposal 3, King's Inns, as an interim measure, should abolish the requirement for graduates in law from recognised universities to sit the King's Inns Entrance Examination.

Law Society Preliminary and Entrance Examinations

Nature of Restraint

13.8 Statute permits the Law Society to exempt from the Preliminary Examination persons who have degrees, professional qualifications or "such other special qualifications as the Law Society deem appropriate".[152] All others must pass the Preliminary Examination before sitting the Entrance Examination to the Law School.[153]

13.9 Graduates who have law degrees must also pass the Entrance Examination, which consists of examination in eight legal subjects, in which they have already been examined as part of their law degree.

[152] Law Clerks with at least five years experience who hold a Diploma in Legal Studies or equivalent qualification can apply to the Education Committee for exemption from the Preliminary Examination. A Law Clerk with in excess of ten years experience may apply to the Committee for exemption, even if he does not hold a Diploma in Legal Studies. Foreign Graduates and holders of other qualifications can apply to the Education Committee for exemption on the basis of such qualifications.

[153] Section 49(1)(d) Solicitors (Amendment) Act, 1994. Regulation 5 The Solicitors Act, 1954 to 1994 (Apprenticeship and Education) Regulations, 2001 SI No 546 of 2001

Effects

13.10 A prospective student who has neither a degree nor a professional qualification, and is not exempted on some other ground by the Law Society, must pass both the Preliminary and the Entrance Examinations before being able to commence the training course. Unnecessary examinations can both deter and prevent prospective entrants to a market. Examinations limit the number of solicitors entering the market for legal services, and therefore act as a barrier to entry.

13.11 As in the case of Kings' Inns Entrance Examination requirement, the requirement for law graduates to sit the Law Society's Entrance Examination allows the Law Society to limit entry of competent students into professional education. This in turn limits entrance to the market for legal services.

13.12 Again, as in the case of Kings' Inns, the Entrance Examination requirement increases the costs of training for solicitors by requiring law graduates to sit an examination in subjects in which they have already been examined as part of their law degree.

Rationale offered for restraint

13.13 According to the Law Society's website, the objective of the Preliminary Examination is "to ensure that only candidates who exhibit the capacity to achieve degree level in their subsequent studies are allowed to proceed to become solicitors. The standard for the examination is set to approximate to that of a pass university degree in arts".[154]

13.14 The Law Society further says that the objective of the Entrance Examination is to ensure that all attendees on the professional courses are well equipped with legal knowledge in order to attend the courses, and that all students are treated equally.

Analysis of the Competition Authority

13.15 The objective of ensuring that persons embarking upon the Law Society training course are of sufficient ability has merit. However, it is not clear why an individual seeking to pay fees to undertake a course would not have a sufficiently strong private incentive to look after his own interests. If an individual is not adequately prepared for the course, the costs rest largely on that individual. Putting these points aside, the requirement that certain persons must pass a Preliminary Examination before being allowed to sit the Entrance Examination is disproportionate.[155] If they are able to pass the Entrance Examination, which is of law degree standard, that is ample proof that they have the necessary capacity to undertake the professional course.

[154] www.lawsociety.ie

[155] The failure rate in the Preliminary Examination for the past three years has ranged from approximately 44 percent to 55 percent.

13.16 The objective of requiring that all those seeking a place on the professional courses are equipped with legal knowledge is a valid one. Requiring all applicants, including the holders of law degrees, to sit the Entrance Examination, is disproportionate. The fact that a person holds a degree in law from a recognised university is sufficient proof of the standard that person has achieved in his or her knowledge of the law. The function of the Law Society in respect of such a person is to assess whether he or she has the necessary knowledge and expertise to practise as a solicitor. It does this by examinations during the professional course.

13.17 The Law Society has not consistently applied the requirement for law graduates to sit the Entrance Examination. In 1989, for example, the Law Society exempted law graduates from certain Irish universities from the Entrance Examination.[156] The exemption was revoked in 1995 subsequent to the *Bloomer*[157] case, in which law students from Queen's University Belfast sought an exemption from the Entrance Examination similar to law graduates from Irish universities. After a High Court decision[158] in favour of the Queen's law students, rather than extending the exemption to the Queen's students, the Law Society reinstated the requirement for all law graduates to pass the Entrance Examination.[159]

Proposal 34: The Department of Justice, Equality and Law Reform should introduce amending legislation to abolish the requirement for non-graduates to pass the Preliminary Examination before sitting the Law Society Entrance Examination.

Proposal 35: Pending the introduction of Proposal 2, the Law Society, as an interim measure should abolish the requirement for law graduates to pass the Entrance Examination.

[156] The MacGabhann Case [1995] 3 IR 14. The MacGabhann decision arose from an apprentice seeking judicial review of his Entrance Examination result by alleging that the Law Society operated a quota. His application was refused but subsequently the Law Society decided to grant an exemption from the Entrance Examination to all Irish university law graduates. See The Law Society of Ireland 1852- 2002 "Portrait of a Profession" E Hall & D Hogan (editors) Chapter: Legal Education by John F. Buckley Pages 181 – 182.

[157] The Bloomer Case [1995] 3IR 14

[158] Specifically the High Court found that the Law Society's failure to recognise Queen's University's law degree had no objective justification and amounted to discrimination on the grounds of nationality, which is prohibited by Article 6 of the EEC Treaty.

[159] "The Society had been considering this course already given the pressures created by the general exemption given in 1989." See The Law Society of Ireland "Portrait of a Profession" 1852- 2002, E Hall & D Hogan (editors) Chapter: Legal Education by John F. Buckley Page 183

Solicitor and Barrister Irish Competency

Nature of Restraint

13.18 Students cannot qualify as either solicitors or barristers unless they have passed an examination testing their knowledge of the Irish language.[160]

Effect

13.19 The Irish examinations constitute a possible barrier to entry for non-Irish speaking persons who have obtained their law degree in Ireland. Such persons have increased education costs, as they must take pre-examination Irish courses. Lawyers who have qualified in other jurisdictions do not have to take the examinations.

Rationale offered for restraint

13.20 Irish citizens have a constitutional right to be represented in Irish in legal proceedings. Irish is also a recognised language of the European Union. The objective of the Irish examination is to ensure that Irish solicitors and barristers can represent clients in Irish.

Analysis of the Competition Authority

13.21 While the objective is valid, a compulsory requirement to pass an Irish examination will not achieve that objective unless the examination is of a sufficiently high standard to ensure that those who pass it are competent to conduct litigation in Irish. The Authority understands that this is not the case, and that many of those who have passed the Law Society or Kings' Inns Irish examinations do not consider themselves competent to conduct cases in Irish and would not undertake to do so.

13.22 The objective would be better achieved by a system that encouraged, but did not compel, students to attain a level of competency in Irish sufficient for full legal practice. This competency could be tested by examination, and those holding the ensuing qualification could hold themselves out as practitioners willing and able to practise in Irish and English. This would require the lifting of the advertising restrictions discussed in Chapter 9.

13.23 The Law Society has indicated that it is not in favour of retaining the Irish examination requirement.

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160 Legal Practitioners Qualification Act, 1929, ss. 3 and 4.

Proposal 36: The Department of Justice, Equality and Law Reform should introduce amending legislation to repeal sections 3 and 4 of the Legal Practitioners Qualification Act, 1929.

Proposal 37: The Law Society and Kings Inns should publicise criteria for a voluntary system whereby solicitors and barristers who wish to represent clients in Irish, or have a particular interest in Irish, could be trained and examined to a high and consistent standard. Institutions other than the Law Society and Kings Inns should be permitted to provide such courses and examinations.

Previously employed barristers

Nature of Restraint

13.24 Rule 2.15 of the Bar Council's Code of Conduct prevents barristers who have previously been employed from accepting work from their former employer for a specified period.

Effects

13.25 The rule limits certain clients' choice of barrister in relation to specialised areas of law by preventing them from engaging the barrister of their choice. For example, a barrister previously employed by a bank would be prohibited, by virtue of having given such an undertaking, from being briefed in respect of legal work for that bank during the period of the undertaking, notwithstanding that he may, as a result of his employment with the bank, have an expert knowledge of banking law and practice. This operates to the detriment of the client, whose choice of barrister is thereby limited.

13.26 The rule may also dissuade entry into the profession by preventing newly qualified barristers from competing with other members of the Law Library in respect of work made available by a former employer of such a barrister.

Rationale offered for restraint

13.27 According to the Bar Council, the rule has the objective of creating a level playing field between all newly qualified barristers by preventing a previously employed barrister from having an advantage over his contemporaries arising from an assured source of work. The rule also attempts to address the concern of the Bar Council that barristers should not only be, but should be seen to be, free from outside influence.

13.28 Notwithstanding the above rationale, the Bar Council explains that it would be unlikely to enforce the rule in a case where a former employee was briefed in respect of a large company for which he had previously worked, if his representation of the company did not give rise to any conflict of interest. Such a situation is not what the rule seeks to address, and in so far as it is inadvertently

addressed by the rule, the Council has said it may reconsider the way in which the rule is drafted.

Analysis of the Competition Authority

13.29 The objective of ensuring equal opportunities for all entrants to the profession is a valid one, as is the preservation of freedom from external influences. The restriction does not meet these objectives. It is not clear how a former employer would be more likely to exert influence on a barrister than any other client would, but in any event undue influence can be addressed in a less restrictive way.

13.30 The rule does not of itself create a level playing field. It prevents rather than ensures equal opportunities by handicapping one category of entrants with an advantage while not handicapping others (e.g., entrants with connections in the solicitors' profession.) Newly qualified barristers who have parents or relatives who are practising solicitors are not prohibited from immediately being briefed by those relatives. Such newly-qualified barristers gain a much greater advantage over their contemporaries than do former employees, as they are likely to receive a steady stream of work through their solicitor-relative, while the former employee would only receive work if his former employer found himself involved in legal difficulties of one sort or another.

13.31 Since the restriction does not meet the objectives it is intended to address, and because these objectives can be met by less restrictive rules, retention of the rule is not justified. The abolition of the rule would increase the possibility of sustainable entry for formerly employed barristers. This would operate to the ultimate benefit of future purchasers of legal services, who would as a result have a wider choice of barristers, particularly in niche areas of law.

Proposal 38: The Bar should abolish Rule 2.15, and, if necessary, introduce a new rule requiring barristers to make a declaration of any interests that might give rise to a conflict or to undue influence.

Barristers taking over a case

Nature of Restraint

13.32 Rule 7.5 of the Bar Code of Conduct precludes a barrister from taking over a case from another barrister until that other barrister has been paid.

Effect

13.33 This rule has the potential to restrict competition by preventing clients from obtaining the barrister of their choice. For example, a solicitor may wish, for whatever reason, to change barristers in the course of the case. He cannot do so without first paying the first barrister, as the second barrister is prohibited from taking over unless the Bar Council exercises its discretion in favour of his doing

so. The second barrister, when asked to take the brief, will be unable to accept immediately. If the matter is urgent, for example, requiring the barrister to appear in court the following day, he will not know whether he should rearrange his business and perhaps hand over other briefs to a colleague.

Rationale offered for restraint

13.34 The objective of the rule is to ensure so far as possible that a barrister is paid for work he has done. The Bar Council explains that traditionally, a barrister has no contractual agreement in respect of his fees, and therefore cannot sue for them if they remain outstanding. As this rule could work an injustice to a client who might as a result be left unrepresented, the Bar Council amended it in the past year so as to allow the rule to be suspended in any particular case at the discretion of the Bar Council. The Bar Council says it would always exercise this discretion where there was a danger of a client otherwise going unrepresented.

Analysis of the Competition Authority

13.35 The objective of ensuring a barrister is paid for work done, while laudable, does not justify the restriction that is caused by the operation of this rule. Because there is no contractual arrangement in respect of a barrister's fees, a barrister will always run the risk of being unable to recoup them. The risk does not appear to be any greater in the circumstances the rule seeks to address than in any other circumstance. It is inappropriate that in these precise circumstances an attempt should be made to recoup the fees at the expense of the interests of the client.

13.36 The Bar Council says that in practice the client's interests will not suffer, because the Bar Council will always exercise its discretion where there is a danger that a client will otherwise be left unrepresented. This appears to be a self-defeating argument, as in every case there will be a client who, if only for a brief period, will be left unrepresented unless the Council exercises its discretion. This means that the Council must always exercise its discretion in favour of allowing the second barrister to take over, which begs the question as to the practical use of the rule. The objective of securing a barrister's fees does not justify the restrictive effects that the rule would produce if the Bar Council did not exercise its discretion in any particular case.

13.37 The failure to afford legal recognition to the existence of a contract between a barrister and a solicitor appears to be illogical. It can hardly be argued that, in the instances where direct access is currently allowed, no contract exists between a barrister and his client, and there does not appear to be any distinction between that relationship and the relationship between a barrister and a solicitor.

13.38 A similar restriction existed in the two professions previously examined by the Authority: architects and engineers. In both cases, the restriction has now been removed. The abolition of the rule as it relates to barristers would ensure that clients can obtain the barrister of their choice, and that no client is ever left unrepresented.

Proposal 39: The Bar should abolish Rule 7.5. If necessary, legislative measures should be introduced to establish the existence of contractual arrangements between barristers and solicitors, and in the case of direct access, between barristers and their clients.

Restricting Switching of Solicitors by Withholding Files (Liens)

Nature of Restraint

13.39 At present a solicitor can withhold the transfer of a client's file to another solicitor if payment is outstanding or disputed. This is referred to as a *lien* on the file and is based upon a common law right.

13.40 A lien can be set aside by order of a court if the first solicitor has delayed providing a bill for costs or if there are no costs outstanding. The Law Society can also choose to exercise its statutory power and set aside a lien as a result of an investigation into the solicitor in question on receipt of a complaint by the client.

Effect

13.41 The right of a solicitor to withhold files hinders clients' ability to switch from one solicitor to another. This is because there is little that a client, or the new solicitor, can do to compel the first solicitor to relinquish the file in a timely manner. In the event that the first solicitor refuses to relinquish a file, a client has two options to pursue to try and force a transfer of files. The client must either obtain a court order, which adds additional costs and can be time-consuming, or complain to the Law Society, which will investigate the matter. There is no guarantee that this investigation will be able to be completed expeditiously. The effect of liens can be to increase the costs of switching solicitors.

Rationale offered for restraint

13.42 The Law Society argues that the current right to restrict the transfer of files is needed to ensure that solicitors, in particular those providing legal services to unscrupulous clients, obtain their remuneration. The Society points to the fact that this right is based upon common law and also that the Law Society has the power to compel a solicitor to hand over a file after an investigation.

Analysis of the Competition Authority

13.43 Although the objective of ensuring that solicitors are paid for work done is understandable, it does not justify the restrictive effect that ensues. The same objective is capable of being achieved by less restrictive means. While it is proper that solicitors should be paid for work they have done, this can be achieved by enforcement of the contract they have with their client – through the courts, if necessary.

13.44 A similar, although not identical, restriction exists in the barristers' profession, and is analysed above, the Authority concluding that the rule requiring a barrister to ensure that the colleague from whom he takes over a file has been paid should be abolished. Again, a similar rule existed in the two professions the Authority has already examined: architects and engineers. In both cases, the restriction has now been removed.

13.45 One circumstance in which a lien might be permitted to continue is when a solicitor has not been released from a professional commitment, called an undertaking, that he has furnished to a third party on behalf of his now former client. It is reasonable for the first solicitor to require his release from this commitment before being required to handover the file.

Proposal 40: The Law Society should amend its professional Code of Conduct to require solicitors to waive their lien (the common law right of a solicitor to retain a client's file pending payment from the client) in instances where unpaid fees are the sole issue between the solicitor and his former client.

Question
Q19: Is this proposal sufficient to overcome the common law right of a solicitor to exercise the solicitor's lien?

Initiating Legal Proceedings

Nature of Restraint

13.46 Litigation in Ireland is usually conducted by solicitors and barristers. The rules of the Superior Courts provide that when an originating summons or petition is being issued at the Central Office, it must be signed either by the litigant, if he sues in person, or by the solicitor who acts for him. A similar rule exists in relation to the entering of an appearance when a person is defending an action; it must contain the name of the defendant's solicitor unless the defendant is defending in person. Barristers cannot sign or have their names placed on such documents.

13.47 In court, only the litigant himself, if he is acting in person, or his solicitor and his counsel, if he has legal representation, has a right of audience.

Effects

13.48 The restriction on initiation of proceedings frustrates the operation of direct access to barristers, and obliges litigants who wish to have legal representation to

incur two sets of fees instead of one. Chapter 8 of this report recommends direct access, but while this restriction remains, a litigant who has directly accessed a barrister will not be able to issue an originating summons, as he does not have a solicitor to sign it, and cannot sign it himself as he is not a litigant in person. The restriction also prevents competent third parties – e.g., insurance companies – from initiating proceedings, thus incurring additional expense.

13.49 The restriction on representation imposes expenses that might otherwise be avoided on litigants who do not wish to act in person. Such a litigant might wish to be represented by, for example, a trade union official, a member of his family or a "McKenzie Friend".

Rationale offered for restraint

13.50 It is not clear why barristers are precluded from signing initiating summons or having their names on appearances.

13.51 Restricting representation in Court to barristers and solicitors ensures as far as possible that a litigant who does not wish to argue on his own behalf will be represented by someone who has a wide knowledge of the law and of the rules of practice and procedure.

Analysis of the Competition Authority

13.52 There appears to be no justification for precluding barristers from signing initiating documents or having their names on appearances. It would be essential to the proper operation of a full system of direct access that they should be allowed to do so.

13.53 The objective in respect of representation in Court is a valid one. On balance, however, the total ban on representation by non-lawyers seems disproportionate. While the Authority recognises that it is not in the interests of the efficient administration of justice that cases should be argued by persons not having a knowledge of the law or of the rules of court practice and procedure (except in the case of litigants acting in person) it nevertheless considers that many non-lawyers might have an adequate grasp of particular branches of the law. It may therefore be possible to extend the right of audience to certain categories of third parties – for example, insurance companies, trade union officials, family members – in appropriate circumstances.

Proposal 41: The Rules Committee should amend Order 5, rule 11 and Order 12, and rule 1 of the Rules of the Superior Courts so as to permit barristers to sign the originating summons and to allow their names to be placed on appearances.

Questions

Q.20: Should the right of audience be extended to cover certain categories of third parties in appropriate circumstances?

Q.21: If so, what categories of person should be accorded such right of audience?

Appendix A: Regulatory Regimes In Other Common-Law Jurisdictions

A.1 This section describes the regulatory framework as it affects competition in other common-law jurisdictions. The jurisdictions explored are: England and Wales; Scotland; Northern Ireland; Canada; New Zealand and the following Australian territories: New South Wales; Queensland; Victoria; Western Australia; South Australia; Tasmania; Australian Capital Territory and Northern Territory.

England and Wales

A.2 England and Wales, like Ireland, have a legal profession with two separate branches: solicitors and barristers.

A.3 Solicitors[161] (a) Education: The Law Society[162] stipulates the standards for training courses for solicitors (Legal Practice Course and Common Professional Examination /Graduate Diploma in Law), which are provided by a wide range of third level institutions. Applications for full-time places on these courses are administered by the Central Applications Board. Legal Practice Courses are designed by individual universities and The College of Law. While all the courses have to meet the written standards stipulated by the Law Society, they are all unique. This means that there may be some variations in how the subjects are taught and assessed.

A.4 Solicitors (b) Representation and Regulation: According to its website, "the Law Society represents solicitors in dealings with the Government and other bodies in such areas as promoting law reform and discussing new legislation; it guides solicitors by informing them of developments in law or in practice management, and publishes books, journals and manuals to help them; it promotes the solicitors' profession and helps consumers of legal services find suitable solicitors." The profession is also regulated by the Law Society whose regulatory powers are underpinned by statute: the Solicitors Act 1974, the Courts and Legal Services Act 1990 and the Access to Justice Act 1999. The Law Society governs entrance to the profession by administering admission to the Roll. All solicitors are required to be inscribed upon the Roll, a register of all persons qualified as solicitors. The Consumer Complaints Service and the Compliance Directorate of the Law Society investigate complaints of professional misconduct. Serious cases are brought before the Solicitors' Disciplinary Tribunal.

A.5 Barristers[163] (a) Education: A number of third-level institutions provide the compulsory Bar Vocational Course. All students must be admitted to an Inn of

[161] Information in this section has been in part provided by the Law Society and in part taken from its website, www.lawsoc.org.uk

[162] The Law Society of England and Wales was established under Royal Charter in 1845 and was empowered to enforce national standards of conduct and education. About the same time the term attorney was dropped in favour of the title "solicitor". The powers of the Law Society are primarily derived from the Charter and supplemental Charters, and from the *Solicitors Act 1974*. Its powers and responsibilities have been expanded by the *Courts and Legal Services Act* and the *Access to Justice Act*.

[163] Information in this section has been taken from the website of the Bar Council, www.barcouncil.org.uk, and has been verified by the Bar Council.

Court before registration on the Bar Vocational Course. The Inns are principally non-academic societies providing collegiate and educational activities and support for barristers and student barristers. The Inns alone have the power to call a student to the Bar. Only those called are able to exercise rights of audience in the superior courts of England and Wales as barristers.

A.6 Barristers (b) Representation and Regulation: One of the objectives of the Bar Council[164] is to promote the Bar's interests with Government, the European Union, the Law Society, International Bars and other organisations with common interests. It is also the Bar Council that makes and implements policies affecting the Bar on education and rules of conduct. Its objectives are:

a) To maintain and enhance professional standards.

b) To maintain effective complaints and disciplinary procedures.

c) To develop an effective, fair and affordable system for recruiting, and of regulating entry to the profession.

d) To regulate education and training for the profession.

e) To combat discrimination and disadvantage at the Bar.

f) To develop and promote the work of the Bar.

Scotland

A.7 The Scottish legal profession is, like its English, Welsh and Irish counterparts, divided into advocates (analogues to English barristers) and solicitors. Some solicitors are also admitted as a Notary Public[165]. Admission as a solicitor is a prerequisite to becoming a Notary Public.

A.8 Solicitors (a) Education: Aspiring solicitors must follow the Vocational Course required by the Law Society for qualification as a solicitor, which is called the Diploma in Legal Practice. This course, which is of 26 weeks duration, can be taken at the universities of Aberdeen, Dundee, Edinburgh and the Glasgow Graduate School of Law, which is run jointly by the Universities of Strathclyde and Glasgow. Before the Diploma they also require either an LLB degree from a

[164] The General Council of the Bar of England and Wales was founded in 1894 to represent the interests of barristers.

[165] A notary is "a civil lawyer practising in non-contentious matters, but does not have the same relationship with his or her clients, as does a solicitor. The notary's responsibility is to the transaction itself, rather than to the client.(14) The notary is at once the holder of a public office and a member of a distinct branch of the legal profession.(15) Their office is of relatively slight importance, except in relation to foreign transactions and, in England, certain ecclesiastical matters.(16) The notary is an officer of the law whose public office and duty it is to draw, attest or certify under his or her official seal, for use anywhere in the world, deeds and other documents."(Noel Cox: *The Notary Public- the third arm of the legal profession* in (2000) 6 New Zealand Business Law Quarterly 321-335)

Scottish university or passes in Law Society exams with a two-year pre-diploma training in a solicitors firm.

A.9 Solicitors (b) Representation and Regulation: The Law Society has the statutory objectives of promoting "the interests of the Solicitors profession in Scotland and the interests of the public in relation to the profession."[166] The profession is regulated by statute (currently the Solicitors (Scotland) Act 1980). The Council of the Law Society of Scotland deals with the admission, professional regulation and discipline of solicitors. There is also an independent Scottish Solicitors Discipline Tribunal. Complaints regarding the Law Society's handling of a complaint may be made to the Scottish Legal Services Ombudsman, an independent lay appointee.

A.10 Advocates [167] (a) Education: An aspiring advocate (called an "Intrant") must pass or gain exemption from all the Faculty of Advocates'[168] examinations in Law; and (b) obtain, or gain exemption from, the Diploma in Legal Practice at a Scottish University. This Diploma is the same as that required for prospective solicitors and is provided by the institutions referred to above. Following qualification, an Intrant must train for 21 months in a solicitor's office and "devil to"[169] a barrister for 9 months. He or she must also pass an examination in Evidence, Practice and Procedure set by the Faculty of Advocates.

A.11 Advocates (b) Representation and Regulation: The Faculty of Advocates is both the representative and the regulatory body for advocates.

Northern Ireland

A.12 The structure of the legal profession in Northern Ireland is similar to that in the Republic in that it is composed of two branches: solicitors and barristers. However, it differs in one respect: vocational training of barristers and solicitors takes place together.

A.13 Solicitors (a) Education: The Law Society of Northern Ireland is responsible for the training of solicitors, but it has delegated part of that responsibility to the Institute of Professional Legal Studies at Queen's University, Belfast, which is now the sole provider of professional legal education. The Institute's governing body is the Council of Legal Education and its membership comprises representatives of the University, the Inn of Court, the Law Society and the Institute. Aspiring solicitors in Northern Ireland must successfully complete a one-year post-graduate course of vocational training at the Institute. The course leads to the award of a Certificate in Professional Legal Studies and is taken as part of the two to four year apprenticeship required by the Society. The remainder of the apprenticeship consists of practical experience in a solicitor's office

[166] www.lawscot.org.uk
[167] All information in this section is taken from the website of the Faculty of Advocates at www.advocates.org.uk, with additional information provided directly by the Faculty.
[168] The Faculty of Advocates comprises all lawyers who have been admitted to practice as Advocates before the Courts of Scotland. It is self-regulating, and is run by an elected Faculty Council headed by the Dean of the Faculty. It controls admission to the profession and has established a training and education programme for aspiring advocates.
[169] That is to say, train with an experienced barrister

A.14 Solicitors (b) Representation and Regulation: The Law Society is the sole representative body for solicitors in Northern Ireland.[170] Under the 1976 Solicitors (Northern Ireland) Order, the Law Society also acts as the regulatory authority governing the education, accounts, discipline and professional conduct of solicitors in order to maintain the independence, ethical standards, professional competence and quality of services offered to the public.[171]

A.15 Barristers (a) Education: The Honourable Society of the Inn of Court of Northern Ireland is responsible for the training of barristers but it has delegated part of that responsibility to the Institute of Professional Legal Studies at Queen's University, Belfast. Aspiring barristers in Northern Ireland must successfully complete a one-year post-graduate course of vocational training at the Institute. The course, which is the same as that followed by aspiring solicitors, leads to the award of a Certificate in Professional Legal Studies.

A.16 Barristers (b) Representation and Regulation: The Bar Council is the regulatory and representational body for the profession. It is responsible for the maintenance of the standards, honour and independence of the Bar and, through its Professional Conduct Committee, receives and investigates complaints against members of the Bar in their professional capacity. The Benchers of the Honourable Society of the Inn of Court of Northern Ireland (all of whom are lawyers) have the exclusive power of disbarring a barrister or suspending a barrister from practice.

Canada

A.17 The legal profession in Canada is a unified profession. In considering the educational, representational and regulatory regime in Canada, we exclude the province of Quebec, which exceptionally has a civil law system

A.18 Education: There are twenty approved law schools in Canada. Upon graduation, the student wishing to be admitted to the Canadian Bar must complete the Bar admission course administered by the Law Society of the province in which the student wishes to practice. The length of the course varies from nine to eighteen months across the provinces, and includes a legal apprenticeship.

A.19 Representation and Regulation: The Canadian Bar Association (CBA) was formed in 1896 and incorporated by a Special Act of Parliament on April 15, 1921. It is the representative body for the legal profession in Canada. Approximately two-thirds of all practising lawyers in Canada belong to the CBA. [172] Each province and territory has its own Law Society, which is the governing and regulatory body for the legal profession in that area. Nationally, all the law societies belong to the Federation of Law Societies of Canada. The law societies admit persons to practice as lawyers. They also set professional standards.[173]

[170] Information obtained from the Information Office of the Law Society of Northern Ireland
[171] www.lawsoc-ni.org
[172] www.cba.org
[173] www,jurist.law.utoronto.ca

Australia

A.20 General: The legal profession in Australia consists of both barristers and solicitors. In some states, the profession is fused, in others, it is not. Interestingly, in those states where the profession is formally fused, an independent Bar has nevertheless emerged in relatively recent times (in one case, the Northern Territory, as recently as 1974). The legal profession as a whole is represented nationally by the Law Council of Australia, but there are also local representational bodies in the different states. Barristers in Australia have their own professional representational bodies, both nationally and regionally. They may also – and in some cases, must – belong to the Law Society of their particular region.

A.21 Regulation is carried out locally, under state and territory laws. In most jurisdictions, there is a system of co-regulation that actively involves both the Government and the profession in the regulation of lawyers. However, in Western Australia and South Australia, the profession now has a limited role and the regulation of lawyers is principally conducted by statutory bodies. We consider below the situation in the various territories.

New South Wales

A.22 In New South Wales, the legal profession is comprised of two branches: solicitors and barristers. A law graduate wishing to practise is first admitted as a Legal Practitioner in the Supreme Court of New South Wales and, once admitted, may elect to practise as either a barrister (obtaining a practising certificate through the New South Wales Bar Association), or as a solicitor (obtaining a practising certificate through the Law Society of New South Wales).

A.23 Solicitors (a) Education: Prospective solicitors must undertake a practical legal training program. The Law Society of New South Wales runs its own programme, and similar programmes are run by six universities. A student may choose any one of the seven options.

A.24 Solicitors (b) Representation and Regulation: The Law Society of New South Wales is the professional association for the solicitors' branch of the legal profession, representing more than 17,000 lawyers in New South Wales.[174] Solicitors are regulated by the Council of the Law Society and the Legal Services Commissioner under powers prescribed by the Legal Profession Act 1987. The Office of the Legal Services Commissioner, an independent statutory body, oversees and participates in a co-regulatory disciplinary system with the Law Society of New South Wales and the Department of Fair Trading (licensed conveyancers' professional body). The Office's main role is to ensure the co-regulatory regime achieves a high standard of ethical legal services in New South Wales.

A.25 The Law Society, and its rules of professional conduct and practice, is also regulated by the Legal Profession Advisory Council (LPAC). LPAC is a statutory

[174] www.lawsociety.com.au

body that is responsible for overseeing the regulatory functions of the Law Society and reports on any of the Law Society's rules that may have anti-competitive effects which are not in the public interest. LPAC consists of 11 members: five lay members, two barristers, three solicitors and a chairman (currently a non-lawyer).

A.26 Barristers (a) Education: A person wishing to practise as a barrister in NSW must have a current barrister's practising certificate issued by the New South Wales Bar Association. The person must be a law graduate or have completed the NSW Legal Practitioners Admission Board's examinations and apply for admission as a legal practitioner by the Supreme Court of NSW. In order to be eligible for admission to practice, it is necessary to complete an accredited program of practical legal training, and pass the Bar exams organised by the Bar Council (the governing body of the NSW Bar Association). At this point, the candidate may apply for an initial practising certificate. An initial practising certificate contains conditions relating to appearance rights in the initial period of practice and outlines additional requirements that the barrister must satisfy in order to receive an unconditional practising certificate. The barrister must complete the 12-month Reading Programme organised by the Bar Council. This programme includes a five week Bar Practice Course. During the 12-month period the reader remains under the supervision of at least one experienced barrister who is called a tutor. Depending on the reader's progress, the conditions on the practising certificate may commence to be lifted after completing the civil and criminal reading requirements.

A.27 Barristers (b) Representation and Regulation: Barristers are represented by the New South Wales Bar Association. Barristers are regulated under the Legal Profession Act 1987. As with solicitors, the Office of the Legal Services Commissioner oversees and participates in a co-regulatory disciplinary system with the the New South Wales Bar Association . The Commissioner also receives and monitors the investigation of any complaints about the conduct of barristers.[175]

A.28 The Bar Association, and its rules of professional conduct and practice, are regulated by the Legal Profession Advisory Council (LPAC) in the same manner as for the Law Society.

Queensland

A.29 In Queensland, as of 1 July 2004, all practitioners are admitted by the Supreme Court as legal practitioners and their names are entered on the Roll of Legal Practitioners. Those admitted may then elect to apply for a practising certificate to practise as a solicitor (from the Queensland Law Society) or as a barrister (from the Bar Association of Queensland). In short, the system may be described as one of joint admission but separate practising certificates. The joint administering authority is the new Legal Practitioners Admissions Board.

A.30 Solicitors (a) Education: Following completion of an approved law degree, a candidate must complete either an approved practical legal training course

[175] www.lawlink.nsw.gov.au

(available from a number of educational establishments), or Articles of Clerkship with a principal of a law firm

A.31 Solicitors (b) Representation and Regulation: The Queensland Law Society is the representative and regulatory body for solicitors within the state. Its regulatory role was conferred on it by statute in 1927. An independent Legal Services Commissioner receives complaints about both barristers and solicitors.

A.32 Barristers (a) Education: A law graduate intending to practise as a barrister in Queensland must enrol as a student-at-law with the Barristers' Board, a statutory, non-Governmental regulatory body composed of barristers. The student must submit ten written reports on specified Court proceedings to the Board. Newly admitted barristers, as a matter of practice, join the Bar Association of Queensland, and must then complete the Bar Practice Course at the Queensland University of Technology in Brisbane. [176]

A.33 Barristers (b) Representation and Regulation: Barristers are represented and regulated by the Bar Association of Queensland. [177]

Victoria[178]

A.34 The enactment of the Legal Profession Practice Act 1891 (Vic) legally fused the barristers' and solicitors' branches of the legal profession in Victoria, and this distinction is maintained in the current Act, the Legal Practice Act 1996 (Vic). In practice, however, the branches remain quite separate, for a person admitted as a "barrister and solicitor" of the Supreme Court of Victoria must make an election whether they wish to be inscribed on the Roll of Counsel or on the Roll of Solicitors.

A.35 Education: A law graduate must either complete a period of twelve months as an articled clerk or complete a course of practical training, which is provided by two third-level institutions. Those who then opt to be inscribed on the Roll of Counsel must undertake a further nine-month "reading" period. The first three months of this period consist of a course of instruction provided by the Victorian Bar, known as the "readers" course. Once this three-month period is completed the lawyer may sign the Bar Roll. Thereafter the barrister is entitled to accept briefs and to present cases on behalf of clients. [179]

A.36 Representation and Regulation: Representation and the direct regulation of solicitors are provided by the Law Institute of Victoria. In the case of barristers, the same services are provided by the Victorian Bar, which is a registered professional association.[180] Both of these bodies are funded and regulated by the Legal Practice Board (LPB).[181] The LPB is an independent body headed by a

[176] www.bond.edu.au
[177] www.qldbar.asn.au
[178] Information in this section has been obtained from the website of the Law Institute of Victoria, www.liv.asn.au, unless otherwise indicated. It has been verified with the Law institute
[179] www.vicbar.com.au
[180] www.vicbar.com.au
[181] www.lpb.vic.gov.au

Chairman (a judge or retired judge) along with three elected practitioner members and three lay members. The LPB's responsibilities also include: maintaining the register of all legal practitioners in the state; registering interstate and foreign practitioners; and administering the Legal Practitioners' Fidelity Fund.

A.37 Following a recent review of the regulation of the legal profession and in accordance with the Legal Profession Act 2004, the Legal Practices Board is to be replaced with the Legal Services Board (LSB). The LSB, which includes the new post of Legal Services Commissioner, will be responsible for overseeing the regulation of the legal profession.

Western Australia

A.38 Western Australia has a fused legal profession, although a separate, independent Bar emerged in 1961, in the following manner: the leading Queen's Counsel, the then Francis Burt QC (now Sir Francis Burt following his appointment as Chief Justice and later Governor of Western Australia) decided to practice solely as a barrister, and with the concurrence of the then Chief Justice, Sir Albert Wolff, announced to the Full Court of the Supreme Court that henceforth he would practice solely as a barrister. Each member of the independent Bar is required to give the same undertaking to the Full Court of the Supreme Court that was first given by Sir Francis Burt.

A.39 A lawyer who wishes to practise in Western Australia must hold a practice certificate. Practice certificates are issued for a 12-month period commencing on 1 July each year. There is no special practice certificate issued to practitioners who practise as barristers at the independent Bar. There is freedom of movement to and from the independent Bar. Practitioners seeking to move to the Bar present themselves to the Full Court of the Supreme Court to announce their intention of moving. [182]

A.40 Education: Law graduates must complete a period of twelve months as an articled clerk before gaining admission to practise.

A.41 Representation and Regulation: The Law Society of Western Australia is the representational body for both solicitors and barristers. A representational body for barristers alone, the Western Australian Bar Association, was formed in 1963. There are now 165 members of the Independent Bar, all of whom belong to the Western Australian Bar Association, although membership is not compulsory for those wishing to practise as barristers.[183] Since, by definition under the Legal Practice Act 2003, members of the independent Bar are "practitioners", they may, therefore, also be members of the Law Society. Most but not all of the members of the Association are also members of the Law Society. The Legal Practice Board is the statutory regulatory body for both barristers and solicitors.

182 www.austlii.edu.au
183 www.wabar.asn.au

South Australia

A.42 The practice of law in South Australia is regulated by the Legal Practitioners Act 1981 (SA) ("the Act") Under the Act, every practitioner is admitted and enrolled as a barrister and solicitor of the Supreme Court of South Australia. Until 1993, section 6 of the Act allowed the Supreme Court, upon the application of the Law Society, to divide legal practitioners into two classes, barristers and solicitors. In 1993, section 6 was repealed and a new section was inserted affirming that the legal profession in South Australia was now fused, but at the same time does not prohibit the development of a separate bar on a voluntary basis.

A.43 Education: Graduates wishing to be admitted to practise as lawyers must complete a required period of practical legal training, which is available at a number of third level institutions or from the Law Society of South Australia.[184]

A.44 Representation and Regulation: The Law Society of South Australia represents all practising lawyers, whether they are lawyers in private practice, barristers at the independent Bar or lawyers working in employment. The Law Society has certain statutory powers, mainly in relation to the financial administration of legal practices.[185] The regulatory role is fulfilled by: the Law Society, which oversees its own code of conduct and fulfils certain statutory functions in relation to the financial management of lawyers' practices; the Legal Practitioners Conduct Board of the Department of Justice, which investigates complaints of unprofessional or unsatisfactory conduct or of overcharging against legal practitioners; the Legal Practitioners' Disciplinary Tribunal of the Department of Justice, established to enquire into the conduct of the legal practitioner or former legal practitioner against whom a charge has been laid by the Attorney General, the Legal Practitioners Conduct Board, the Law Society or a person claiming to be aggrieved by reason of alleged unprofessional conduct.

Tasmania

A.45 In Tasmania, a practitioner is admitted to the Supreme Court as both a barrister and solicitor. Admission is governed by the Legal Profession Act 1993 (Tas). There has been a small, separate Bar in Tasmania for many years, operating under the same rules of practice.

A.46 Education: A law graduate must either complete a six months Legal Practice Course or complete two years articles of clerkship.

A.47 Representation and Regulation: The Law Society of Tasmania and the Tasmanian Bar Association are the representative bodies for the profession. The Law Society is the regulatory body for the legal profession. Its main service to the public is the provision of prudential supervision and services to investigate and prosecute complaints against lawyers. In addition, the Legal Profession Act 1993 established the office of Legal Ombudsman to monitor the investigation of

184 Information taken from "*A Guide to Careers in Law*" sponsored by The Law Foundation of South Australia, Inc.

185 www.lssa.asn.au

complaints by the Society against legal practitioners for unprofessional conduct or professional misconduct.[186]Legislation currently before the Parliament will establish a statutory board with responsibilities for regulating and disciplining the legal profession in Tasmania.

Australian Capital Territory

A.48 The legal profession in the Australian Capital Territory is a fused profession. Lawyers are admitted to the profession as legal practitioners, but may then choose to practise as a barrister or solicitor, or as both.[187]

A.49 Education: In order to qualify for admission, a graduate who holds a recognised law degree must complete a Legal Workshop (run by the Faculty of Law at the Australian National University) or a course of a similar nature recognised in another Australian jurisdiction as satisfying the practical professional training admission requirement.

A.50 Representation and Regulation: The Law Society of the Australian Capital Territory is the representative and regulatory body for legal practitioners who hold practising certificates. Its regulatory role is carried out in accordance with the Legal Practitioners Act and the Society's Professional Conduct Rules, and is exercised in consultation with, or with the approval of the Attorney General.

A.51 Legal practitioners practising solely as barristers in the Australian Capital Territory are not currently required to hold practising certificates. This is expected to change within the next two years. The Law Society has no regulatory jurisdiction over barristers. The Australian Capital Territory Bar Association is a voluntary association for legal practitioners who have elected to practice solely as independent barristers. That Association maintains conduct rules and has a regulatory role over its members.

A.52 Finally, the Supreme Court has inherent jurisdiction over certain matters relating to all legal practitioners, including conduct and discipline.

Northern Territory

A.53 In theory, the profession in the Northern Territory is fused. In practice, an independent Bar has emerged. Once an applicant has been admitted to practice in the Northern Territory he or she is entitled to practise as a solicitor, a barrister, or both. Section 22 of the Legal Practitioners Act 1974 (NT) requires, however, that in order to practise, the person must hold an unrestricted practising certificate or, in the case of a person wishing to practise as a barrister, a restricted practising certificate class 2, which allows the holder to practise as a barrister only and whilst under pupillage, to practise for a period of no less than 12 months and no more than 2 years with a local counsel who holds an unrestricted practising certificate.

186 www.taslawsociety.asn.au
187 www.lawsocact.asn.au

A.54 Education: The law graduate wishing to practise must complete a period of twelve months as a clerk under articles before gaining admission.

A.55 Representation and Regulation: The Law Society Northern Territory is the representative association for the legal profession. The Northern Territory Bar Association represents the interests of barristers at the independent Bar.[188] The profession is regulated by the Law Society, the Legal Practitioners' Complaints Committee and the Supreme Court. Barristers also have their own professional Code of Conduct, which is enforced by the Northern Territory Bar Association.

New Zealand

A.56 In New Zealand all practitioners are admitted to the High Court of New Zealand as barristers and solicitors. Once admitted, New Zealand lawyers have flexibility in their modes of practice. Most practitioners, including those who practise only as solicitors, hold certificates as 'barristers and solicitors', but it is also possible to obtain a practising certificate solely as a barrister. This allows for the existence of an independent bar as a separate group within the profession. This bar comprises practitioners who practise as 'barristers sole'. Barristers sole are not permitted to practise in partnerships but may employ other barristers sole. Lawyers may set up as barristers sole without any need for post-admission training or experience.

A.57 Education: After graduation, the law graduate must complete a practical course administered by the Institute of Professional Legal Studies or the College of Law New Zealand before being admitted to the roll of Barristers and Solicitors of the High Court of New Zealand.

A.58 Representation and Regulation: The New Zealand Law Society was established by statute in 1869. The current legislation is the Law Practitioners Act 1982 ("the Act"). The Act also makes provision for the existence of district law societies. The district law societies and the New Zealand Law Society operate in a federal structure, with their functions overlapping to some extent. Both undertake regulatory and representative functions. In general terms, in the regulatory area, the New Zealand Law Society is empowered to make the rules under which lawyers practise, while a primary function of district law societies is to enforce those rules. Complaints about lawyers are handled by the district law societies.[189]

A.59 Under the Law Practitioners Act 1982, all practising lawyers must be members of the district law society in the area in which they have their principal place of business, and of the New Zealand Law Society (NZLS). A Bill (the Lawyers and Conveyancers Bill) is currently before Parliament. It would, if enacted in its current form, change the regulatory and representational regime. All practising lawyers would continue to be compulsorily regulated (by the New Zealand Law Society), but there would be voluntary membership for representative purposes.

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188 www.lawsocnt.asn.au ; www.ntba.asn.au

189 www.nz-lawsoc.org.nz

Appendix B: The criminal legal aid system

B.1 Competition for clients in the criminal system works differently from the civil system.

B.2 Prosecutions of crimes require the engagement of two legal teams, one for the State, and the other for the accused. The Office of the Director of Public Prosecution (the DPP), whose function is to enforce criminal law, usually represents the State. A solicitor employed in the DPP's office, will prepare the case for trial. Usually the DPP's office will engage a barrister to advocate the case in court against the accused on behalf of the State.

B.3 The person accused of a crime has a constitutional right to legal representation.[190] As this right cannot be effectively exercised by an accused without having the means to pay a lawyer, free legal aid will be granted to the accused where the court is satisfied that he has insufficient means and the charge is serious. This is called the Criminal Legal Aid Scheme.

B.4 If the case is one that is to be heard by a judge and jury (i.e., trial on indictment in the Circuit court or higher), the legal aid certificate, granted by the District Judge, by way of means test of the accused, will cover the costs of the accused's solicitor and barrister. If the case is a minor matter to be heard before a judge alone (i.e., summary trial in the District Court) the legal aid certificate will only cover the accused's solicitor's fees in the District Court or on appeal.[191]

B.5 The accused person may know of a particular solicitor that they wish to use. Alternatively, the District Judge may assign a solicitor to the accused's case from the legal aid panel. If the accused expresses a desire to be represented by a particular solicitor on the panel, the District Judge will assign that solicitor if he is available. The solicitor will then engage a barrister to represent the accused if the case is to be tried in the Higher Courts.

B.6 The majority of lawyers specialising in criminal work do not do much civil law. There are some exceptions – most small solicitors firms do some criminal law, and new barristers will usually do any form of advocacy – but once a lawyer specialises in criminal law, he does not tend to compete for civil law work. Civil law and criminal law can thus be seen as distinct, though related, markets.

B.7 As most accused will qualify for legal aid, there is no price competition amongst solicitors in criminal law matters. Solicitors specialising in criminal law tend to concentrate on achieving a high volume of criminal law work. Barristers compete by developing a reputation amongst solicitors' firms or clients for defence work, and/or by seeking prosecution work from the DPP's office.

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[190] The State (Healy) –v- O' Donoghue [1976] IR 325; The Criminal Justice (Legal Aid) Act, 1962, is the legislation covering the operation of the Criminal Legal Aid Scheme.

[191] If the charge is murder or the case is particularly difficult, a legal aid certificate will cover the fees of a barrister at the District Court stage.

B.8 The fees paid for criminal law are changed from time to time by the DPP in a manner supposed to reflect market conditions. The fees had not changed for some time before 1999, when, following representations from the Bar Council, the fees were increased by around 75%. Since then, the DPP can, and usually does, give yearly increases at the same rate as any increase in civil service pay.

B.9 Fixed fees generally do not facilitate competition. But it is recognised that the administration of justice and the rights of an accused person to be represented are such that the legal aid scheme is fully warranted. It is important the fees paid by the State reflect market conditions and give the taxpayer the best possible value for money.[192]

[192] A report by the Criminal Legal Aid Review Committee, February 2002 ("the Buchanan Report") examined this issue and concluded: "that while it may be possible to operate contract systems which provide an acceptable level of service, we have found no evidence to indicate that this can be achieved at a lesser cost than that which prevailed for assigned counsel and/or public defender systems. The evidence for the US indicates that cost savings are achieved in certain situations where competitive bidding operates but this has a direct adverse effect on the quality of representation provided. We consider, therefore, that the US experience in providing criminal legal aid services by way of contract does not make a sound case for the implementation of such a system in Ireland". The Buchanan report also found that the relative cost of the legal aid scheme in Ireland was less than in England and Wales.

Appendix C: Glossary of terms

Associate Solicitors: Solicitors employed in a solicitors firm for a salary, who are not partners.

Asymmetric Information: Where parties to a transaction have different levels of information. In the context of professions typically it is the supplier of the service who has greater information than the consumer.

Attorney General: The chief law officer of the State.

Bar Council: A body composed of barristers elected from among the practising Bar. It regulates the barrister's profession and also represents the interests of barristers.

Bar: A collective term used to describe all barristers in private practice who are members of the Law Library.

Chambers: A group of barristers who share overheads and expenses.

Chief State Solicitor: An officer of State whose functions are to act as solicitor to Ireland, the Attorney General, the Director of Public Prosecutions and Government Departments and Offices.

Circuit: A barrister is said to practise "on circuit" when the bulk of his practice and court appearances are outside Dublin.

Civil Law: All branches of the law that do not deal with the prosecution of criminal offences.

Competitive Market: A perfectly competitive market is one in which suppliers are price takers; no supplier has the market power to increase prices above the competitive level.

Consumer Protection: An objective of various regulations, i.e. to protect consumers from the harm that they may suffer from unregulated market transactions.

Consumer Welfare: The benefit to a consumer from consumption of goods and services.

Contentious Matters: Proceedings addressed by way of legal proceedings before a court, arbitrator or tribunal.

Conveyancing: A legal service by which the ownership of property is transferred from seller to a buyer.

Criminal Law: The branch of the law dealing with the prosecution and punishment of offences.

Devil: An apprentice barrister.

Direct Professional Access Scheme: A scheme established by the Bar Council which allows certain bodies to have direct access to barristers' services solely for the purpose of legal advice.

Director of Public Prosecutions: The officer charged with the prosecution of offences within the State.

Economies of Scale: When per unit costs of production of a good or service decrease as production increases.

Economies of Scope: When it is more efficient to produce two or more different goods or services together than to produce them separately.

Efficiency: The minimum utilisation of inputs (resources) to produce a given amount of outputs (goods and/or services). Alternatively, maximising output for a given set of inputs.

Employed Barrister: A barrister who is not a member of the Law Library, but who is employed as a lawyer for a salary, whether by the State (as, for example, in the case of barristers in the Office of the Attorney General) or by a private employer (such as, for example, a bank) (See also "non-practising barrister").

Employed Solicitor: Employed, or "in house" solicitors. Employed solicitors only provide legal services to their employer.

Entrant: New or recent supplier in a market.

Entry restrictions: Restrictions (including regulations) that preclude easy entry into a market, the effect of which can be to shield incumbents form competition.

Honourable Society of Kings Inns: The institution whose governing body (known as "Benchers") controls entry into the barristers' profession by its monopoly provision of barristers' education and the awarding of the degree of "barrister-at-law".

Incumbent: An already established supplier in a market.

Independent referral Bar: Barristers who are not accessed directly by clients, but who are instructed by solicitors on clients' behalf.

Inner Bar: A collective term used to describe all practising barristers who have obtained the title of Senior Counsel. (See "practising barrister" and "Senior Counsel").

Junior Counsel: The title given to any practising barrister who has not been awarded the title of Senior Counsel. (See "practising barrister" and "Senior Counsel").

Law Library: The institution to which all practising barristers belong. It is located within the Four Courts and in two other premises nearby. (See "practising barristers").

Law Reform Commission: A statutory body whose function is to review and propose reforms to Irish law.

Law Society: A body composed of solicitors elected from among the profession. It regulates the solicitors' profession and also represents the interests of solicitors.

Lien: A common law right of a solicitor to retain his client's file pending the discharge of his invoice.

Litigation: Legal proceedings before a court to determine and enforce legal rights.

Market Failure: Where the market fails to produce a competitive outcome, (can arise for various reasons e.g. monopoly of supply, information asymmetry etc.).

Market Power: Ability of a supplier to increase prices above that which would apply in a competitive market.

Master: The barrister to whom a "Devil" is apprenticed (see "Devil").

Monopoly Provider: Sole supplier to a market.

Non-practicing Barrister: A barrister who is not engaged in private practice as a member of the Law Library. (See also "employed barrister").

Outer Bar: A collective term used to describe junior counsel – that is, all practising barristers other than Senior Counsel. (See "Junior Counsel" and "practising barrister" and "Senior Counsel").

Partners: Persons who share ownership, profit and the responsibility for debts in a business. The Partnership Act, 1890 govern their rights and obligations to each other and third parties.

Pleadings: The documents exchanged between the parties to litigation, by means of which each side sets out its case.

Practicing Barrister: A barrister who is engaged in private practice. Such a barrister is self-employed and is a member of the Law Library. (See "Law Library").

Practicing Certificate: A certificate awarded to qualified solicitors, the holding of which entitles them to engage in private practice.

Practising Solicitor: A solicitor in private practice who offers their services to the public for a fee.

Pro bono: When referring to work undertaken by lawyers, the term means work undertaken without a fee, in the public interest.

Probate: A legal service whereby the validity of the will of a deceased person is proved and his estate enabled to be distributed.

Proportional Regulation: Proportional regulations achieve their objective with the minimum possible negative impact on competition and consumer interests.

Registered Title: When ownership (otherwise called title) to property is registered in the Land Registry, which is a State organization, it is conclusive proof of title. All particulars concerning the ownership (for instance who is the owner of the land and if the property is subject to a mortgage) are entered on registers called folios maintained in the Land Registry. Maps of the property are also kept.

Rent Seeking: Behaviour seeking to create and/or protect market power.

Right of Audience: A right to address the judge in court, either on one's own behalf or on behalf of a third party.

Section 68 Letter: A letter setting out estimates of fees, which a solicitor is required by statute to provide to a client in advance of work done.

Segmented Markets: Markets which can subdivided into specialised or niche segments e.g. advocacy, conveyancing, contract law, criminal law etc.

Senior Counsel: A title awarded to a practising barrister on the basis that he has achieved a degree of excellence in his field.

Specialisation: Concentrating on the production of one good or service, with the desired result of increased efficiency and lower consumer prices.

Supply Side Substitutability: Where a firm is able to adjust its production processes with a high degree of flexibility to produce different goods.

Taking Silk: A term of antique origin used to denote the act of becoming a Senior Counsel. It derives from the silk court gown traditionally worn by Senior Counsel (See "Senior Counsel").

Taxation of Costs: A system of adjudication whereby an unsuccessful litigant against whom costs have been awarded may challenge the level of costs, including lawyers' fees.

Taxing Master: The title given to the person whose function it is to adjudicate on costs under the taxation of costs system. (See "taxation of costs").

Transaction Costs: The costs associated with buying and selling a good such as the cost of finding information or matching buyers and sellers.

Unregistered Title: Ownership or title of the property is not registered in the Land Registry. Hence ownership is not evidenced by a folio but by unregistered deeds, which must be investigated to establish the owner's title. (See "Registered Land").

Vexatious Litigation: Litigation undertaken without valid reason.

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